

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CITY OF GIBRALTAR, CITY OF  
WOODHAVEN, and CHARTER TOWNSHIP OF  
BROWNSTOWN,

UNPUBLISHED  
October 9, 2012

Plaintiffs-Appellees,

v

No. 304247  
Wayne Circuit Court  
LC No. 10-014908-AW

CITY OF FLAT ROCK,

Defendant-Appellant,

and

SOUTH HURON VALLEY UTILITY  
AUTHORITY,

Defendant-Appellee.

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Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

In 2008, a sewage transport pipe collapsed, causing a giant sinkhole. The South Huron Valley Utility Authority (SHVUA), the agency that owns the pipe, determined that the entire pipeline needed immediate repair, but the agency’s constituent communities could not agree on a payment method. When the city of Flat Rock lost its solo effort to allocate the costs to the plaintiff communities alone, it refused to approve construction contracts and bond sales that required unanimous support. Plaintiffs successfully sought a writ of mandamus to force Flat Rock to approve the outstanding measures and the SHVUA to proceed with the repairs. Because Flat Rock admittedly had no qualms with the construction contract or bond sale, and therefore had no ground to withhold its approval, we affirm the entry of the writ of mandamus.

**I. BACKGROUND**

The SHVUA is composed of seven communities that united to purchase and operate a sewage treatment facility. Sewage travels to the facility along two “arms”—the SHV Arm Interceptor (servicing Flat Rock, Huron Township, Van Buren Township and South Rockwood), and the Trenton Arm Interceptor (TAI) (servicing the three plaintiff communities). The SHVUA

is financially responsible for capital outlays and the constituent communities are financially responsible for their shares of “operation and maintenance” (O & M) costs according to their usage of the particular facility to be repaired, and the costs of sewage treatment.

When a 300-foot portion of the TAI collapsed in 2008 and caused a sinkhole, plaintiffs footed the bill for the emergency repairs. The constituent communities unanimously agreed to telescopically investigate the length of the TAI and discovered that the entire 8,900-foot pipeline was in poor condition and dire need of repair or replacement. The SHVUA members agreed that the TAI needed to be repaired and accepted bids for the repair contracts.

Disagreement arose over financing. Flat Rock believed the project should be funded only by the three plaintiff communities as an O & M cost. The other six communities considered the repair a capital expenditure that had to be funded by the whole. In an effort to settle the disagreement, the SHVUA sought an independent opinion regarding the nature of the repairs. An accounting consultant opined that the TAI repair was a capital expenditure because it would increase the capacity and efficiency of a SHVUA infrastructure asset and would extend the pipeline’s useful life. Despite this evaluation, Flat Rock would not agree to bear any financial responsibility for repairing the TAI. The SHVUA wanted to apply for a low-interest loan through the state, but knew that Flat Rock’s agreement would be required for the following bond sale and construction contract process. For the sole purpose of applying for the loans, the SHVUA members unanimously agreed that the costs would be allocated only to plaintiffs.

The SHVUA was unable to quickly secure loan funds from the state. The agency tabled the repair plans until December 2009, when it became clear that the project could be delayed no longer. The SHVUA then approached the state with a compromise. In 2004, the SHVUA had been sued by the Department of Environmental Quality (DEQ), now known as the Department of Natural Resources and Environment (DNRE), because its sewage storage basins were too small. After a heavy rain, the treatment facility would be deluged and raw sewage would flow into Lake Erie. The SHVUA entered a consent judgment and an “Administrative Consent Order” (ACO) to expand the sewage storage basins at great expense. That expansion project had not yet begun when the TAI began to fail. The SHVUA proposed to enlarge the TAI during its repair in order to serve as a “horizontal” storm water storage basin, thereby killing two birds with one stone and paying for only one major project instead of two. The DNRE and all seven SHVUA members agreed to this plan and entered a “Second Amended ACO,” requiring the SHVUA to commence construction by April 2011.

After the entry of the Second Amended ACO, and despite that it would then directly benefit from the TAI expansion project, Flat Rock continued to refuse to agree to any construction contract or bond sale under which TAI repair costs would be allocated system-wide. Plaintiffs sought a writ of mandamus against Flat Rock and the SHVUA, arguing that Flat Rock exercised its voting discretion in “such an arbitrary, capricious, unreasonable and whimsical manner so as to cause a reviewing court to conclude it has exercised no discretion at all.” Plaintiffs further accused Flat Rock of acting in an egregiously arbitrary manner by refusing to accept its part of the obligations under the Second Amended ACO to undertake the repairs or that the project was indeed a capital improvement. Plaintiffs sought to compel Flat Rock to approve the bond sale to pay for the TAI capital improvement and to approve a construction contract as required by the Second Amended ACO.

Flat Rock fought the entry of the mandamus order, claiming that the SHVUA was bound to follow the only unanimous vote reached on the TAI project funding issue: that plaintiffs would be responsible for the entire bill. Flat Rock also contended that it correctly interpreted the various governing documents as requiring the plaintiff communities alone to fund the TAI repair. During the pendency of the mandamus action, the SHVUA passed a resolution to allocate the cost of the TAI project system-wide over Flat Rock's lone objection. After that vote, Flat Rock continued to refuse to approve the multi-million dollar construction contract, a vote that had to be unanimous. As a result, the project stalled.

The circuit court ultimately ruled in plaintiffs' favor. In its opinion placed on the record, the court noted that O & M costs had historically been apportioned to the user communities. The court also agreed with Flat Rock that the same repair process was scheduled to be done to the entire 8,900-foot TAI as was done at the smaller emergency repair site. The court disagreed with Flat Rock's opinion regarding cost allocation, however, because the small repair was quite different from and more localized than the 8,900-foot repair. Moreover, the court noted that the constituent communities had given the SHVUA the authority to determine whether a particular repair is a capital expenditure or an O & M cost. The court accorded "weight" to the SHVUA's classification of the project as a capital expense in accordance with the independent consultant's opinion. The court relied upon the Second Amended ACO, entered by a unanimous vote, as evidence that plaintiffs had a clear legal right to the repairs and defendants had a clear legal duty to conduct those repairs. The court then concluded that it was unreasonable for Flat Rock to attempt to reclassify the capital expenditure as an O & M cost and arbitrarily refuse to work toward completion of the project mandated by the Second Amended ACO. The court determined that Flat Rock was not acting out of reason, but out of bias and passion when it unilaterally decided, contrary to the amended ACO language, that the TAI project was a localized issue affecting only the plaintiff communities.

The court subsequently entered an order of mandamus, requiring the SHVUA and Flat Rock to take all steps necessary to enter into a construction contract and begin the bond sale process, including ordering Flat Rock's SHVUA representative to vote in favor of these initiatives. The court compelled Flat Rock city officials to take all actions necessary to promote the project. In the event that Flat Rock's officials did not comply, the court directed that its order could be used in place of Flat Rock's vote or signature. The court allocated the project costs according to the method selected by a majority of the SHVUA members and ordered Flat Rock to pay 16.83%.

## II. STANDARD OF REVIEW

We review a trial court's entry of a writ of mandamus for an abuse of discretion. *In re MCI*, 460 Mich 396, 443; 596 NW2d 164 (1999). A trial court abuses its discretion when its ruling falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We review a trial court's underlying conclusions that a defendant had a clear legal duty to perform and that the plaintiff had a clear legal right to the performance de novo as questions of law. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006).

### III. ANALYSIS

“Mandamus is a writ issued by a court of superior jurisdiction to compel a public body or public officer to perform a clear legal duty.” *Lee v Macomb Co Bd of Comm’rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999), rev’d in part on other grounds 464 Mich 726 (2001). It is “an extraordinary remedy” that “will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner.” *Teasel v Dep’t of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984). The plaintiff bears the burden of proving its entitlement to a writ of mandamus. *Carter*, 271 Mich App at 439. To make that showing, the plaintiff must establish four elements:

#### 1. Clear Legal Right

Plaintiffs must show that they have “a clear legal right to performance of the specific duty sought to be compelled.” *Vorva v Plymouth-Canton Community Sch Dist*, 230 Mich App 651, 655; 584 NW2d 743 (1998). No one challenges that plaintiffs have a clear legal right to have the TAI project completed. The SHVUA members unanimously voted that the repairs are necessary and in favor of adopting the Second Amended ACO requiring the completion of the repairs. Through these votes requiring the completion of the repairs, the communities most affected by the deteriorating pipeline became entitled to have the repairs made. They therefore have a clear legal right see the project performed. The specific acts sought to be compelled on Flat Rock’s part are the approval of the bond sale and a construction contract for the TAI project. Both actions must occur or plaintiffs will be denied their clear legal right to have the TAI project completed. Accordingly, plaintiffs have a clear legal right to the approval of the bond sale and construction contract as well.

#### 2. Clear Legal Duty

Plaintiffs must show that “the defendant has the clear legal duty to perform” the specific act sought to be compelled. *Id.* The SHVUA concedes that it has a clear legal duty to complete the TAI project based on the Second Amended ACO. The real issue is whether Flat Rock has a clear legal duty to approve the bond sale and construction contract necessary for the project. Flat Rock bears those duties because the TAI project is a capital improvement to an SHVUA facility that must be financed system-wide. Thus, Flat Rock has no ground to object and was required, in the rational exercise of its discretion, to approve the construction contract and bond sale.

The SHVUA Articles of Incorporation provide that all seven communities must unanimously agree to issue bonds or to approve a construction contract over \$500,000. All other matters, including the cost allocation method for a project, require only a majority vote. Paragraph 2 of the SHVUA Bylaws provides the following payment provisions:

(b) The Commission shall be responsible for the operation, maintenance and repair of the Authority Sewerage and Sewage System.

(i) The Authority Sewerage and Sewage System shall consist of (a) the Sewage Treatment Plant, and its appurtenances; and, (b) the transmission facilities and its [sic] appurtenances . . . .

(ii) The constituent communities shall be primarily responsible for the repairs and maintenance of the local facilities . . . .

(iii) For the purposes of these By Laws AUTHORITY FACILITIES shall be defined as those facilities which are designed for and used by more than one community and/or is not located entirely in one community.

LOCAL FACILITIES are defined as those facilities which are designed for and used by one community and located entirely within that community.

(c) Any capital improvements to the system, including expansion of the plant shall be the primary responsibility of the Authority. The cost thereof and the method of payment shall be determined by the Authority, but to the extent possible shall be paid out of the revenues of the system.

The parties are also bound by a 1998 agreement regarding O & M cost allocation:

B. The Operation and Maintenance (O & M) charges for the [SHV] Wastewater System shall be revised to separately accumulate the O & M costs for the two Pump Stations and major interceptor segments . . . or as may otherwise be approved by the [SHVUA]. The O & M costs for each sub-account are to be assessed to those communities whose flow is tributary to the Pump Stations and major interceptor segments . . . . The actual O & M charges to be assessed to each community will be based on the relative percentage of flow contributed by each community as determined from the sewage flow billing meters.

The TAI is an “authority facility” as contemplated by the Bylaws. It is “designed for and used by more than one community” and “is not located entirely in one community.” Accordingly the SHVUA is responsible for its repair. The TAI repairs are capital improvements, not O & M costs, and are “the primary responsibility of the SHVUA.” The SHVUA documents do not define capital and O & M measures. Webster’s New Universal Unabridged Dictionary (Deluxe 2d ed), p 269, defines a “capital expenditure” as “money spent for expanding and improving a business: it does not include operating expenses.” “Operation” costs are those necessary toward “the act, method, or process of operating,” “the condition of being in action or at work,” or “a process or action that is part of a series in some work.” *Id.* at 1253. “Maintenance” costs are those necessary “to keep or keep up” and “to keep in a certain condition or position, especially of efficiency, good repair, etc., to preserve.” *Id.* at 1087. As an independent consultant advised the SHVUA, capital expenses go toward one’s assets to increase their useful life or their capacity/efficiency, while O & M expenses are everyday occurrences. The TAI project is a capital expense under either formulation. This was not a simple repair to “keep up” the infrastructure. The entire TAI had so deteriorated that it could collapse and cause severe, widespread damage. Moreover, once the Second Amended ACO was entered by a unanimous vote, the TAI project was revamped so the pipe repair would expand and improve the whole SHVUA system, benefitting all constituent communities. Accordingly, the costs to be expended will improve the SHVUA’s business. As a capital improvement of an SHVUA facility, the project was SHVUA’s responsibility to undertake and the SHVUA had the authority

to “determine[.]” “the method of payment.” The SHVUA used its authority and decided to allocate the cost to all seven communities based on their percentages of flow into the system.

Flat Rock’s contention that the SHVUA was required to allocate costs based on each community’s flow into the TAI is unavailing. Only the O & M agreement separates the two arm interceptors and allows for the allocation of costs based on use of the individual arms as separate entities. The TAI repair is not an O & M cost and the agreement is inapplicable. The TAI repairs will benefit all SHVUA communities as clarified by the Second Amended ACO. Further, a majority of six communities voted in approval of the specific system-wide cost allocation. That vote was sufficient to select the cost allocation method for this capital improvement to an Authority Facility.<sup>1</sup>

Once the cost allocation decision was made, Flat Rock was bound to abide by it. In this regard, the current appeal is identical to this Court’s prior unpublished opinion mandating Flat Rock’s acquiescence with the sewage storage basin project:<sup>2</sup>

In short, when the SHVUA entered into the ACO and consent judgment, it was acting consistent with its powers, which include “all powers necessary to carry out the purposes of its incorporation and those incident thereto.” MCL 124.284(1). As one of SHVUA’s principle creators and part of its governing body, Flat Rock was bound by SHVUA’s actions . . . . [*Dep’t of Environmental Quality v SHVUA*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket Nos. 265964, 268039), slip op at 4.<sup>3</sup>]

Bound by the SHVUA vote regarding the cost allocation, Flat Rock could only refuse to approve the construction contract and bond sale, which require unanimity, if it had concerns with those items. See *id.* at 3 (criticizing Flat Rock’s “‘back door’ challenge to the cost allocation” for the earlier equalization basin project by “waiting until the whole process was complete and then attempting to overturn it”). Flat Rock admittedly has no concern with the construction contract or bond sale, only with the predicate financing arrangement over which it had already lost its

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<sup>1</sup> The dissent implies that the SHVUA and its constituent members conceded that a system-wide cost-allocation plan was not mandatory for this capital improvement because it considered other cost-allocation methods calculated by consultants and staff. The SHVUA’s actions more likely evidence its willingness to consider options to ensure the completion of the necessary capital project despite Flat Rock’s stonewalling tactics.

<sup>2</sup> Flat Rock similarly withheld its approval of measures in relation to the financing of the sewage storage tanks leading up to the 2004 lawsuit between the DEQ and the SHVUA. At that time, Flat Rock refused to approve any collateral matters because it believed Van Buren Township’s apportioned costs were too low.

<sup>3</sup> The dissent challenges our reliance on this case as an unpublished opinion with “no precedential value.” The dissent fails to recognize that our prior unpublished opinion involved the same parties and same line of transactions as the current appeal. While it cannot bind outsiders, MCR 7.215(C)(1), this Court’s prior opinion binds the current parties.

battle. Flat Rock therefore has a clear legal duty to approve the construction contract and bond sale.

However, Flat Rock argues that the SHVUA's unanimous vote on April 15, 2009, providing that plaintiffs alone would bear the cost burden of the TAI project, was a binding agreement that should have been followed by the SHVUA and the circuit court. There are many problems with this argument. First, Flat Rock suggests that the 2009 vote trumps the February 2011 vote because it was unanimous. Yet a unanimous decision is not required to allocate the project costs. Second, Flat Rock knew that the other six SHVUA communities voted to allocate the costs to plaintiffs only because they needed Flat Rock's support to start the loan application process. It was unreasonable for Flat Rock to expect that the cost allocation issue would not be revisited at a later time. Third, at an August 19, 2009 SHVUA meeting, the board tabled the TAI project for one year to await the availability of loan funds and unanimously agreed to "consider the financial concerns" of the project again. Flat Rock agreed to allow the SHVUA to reconsider the issue and cannot now claim that the April 15, 2009 board vote created a contract or estopped the SHVUA from changing its mind.

### 3. Ministerial Task

To establish their entitlement to mandamus, plaintiffs must also show that the act sought to be compelled "is ministerial, involving no exercise of discretion or judgment." *Vorva*, 230 Mich App at 655. "An act is ministerial in nature if it is 'prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment.'" *Carter*, 271 Mich App at 439, quoting *Beadling v Governor*, 106 Mich App 530, 533; 308 NW2d 269 (1981).

There is a narrow exception to this rule allowing mandamus in relation to a discretionary action when the public body's "action is so capricious and arbitrary as to evidence a total failure to exercise discretion." *Bischoff v Wayne Co*, 320 Mich 376, 385; 31 NW2d 798 (1948). Stated another way:

Mandamus is a proper remedy if, in the attempted performance of discretionary acts, the official abuses the discretion so as to amount to a failure to do the act as the law requires, or if by a mistaken view of the law there has been no actual exercise of good faith of the judgment or discretion vested in the officer, or if an official acts so arbitrarily and capriciously that the court is justified in holding that no discretion was exercised at all, or if the action taken is fraudulent or so palpably unreasonable and arbitrary as to reveal an abuse of discretion as a matter of law. In other words, mandamus will issue against a public official where the petitioner has demonstrated a gross abuse of discretion.

If an official or political body, in making its decision, is prompted solely by bias and political reasons, such a decision is an abuse of discretion. [52 Am Jur 2d, Mandamus, § 50, pp 378-379.]

The SHVUA argues that Flat Rock's act of approving the construction contract and bond sale is ministerial in nature because, as it lost the battle on cost allocation and admittedly has no

objection to the remaining issues, it was bound to vote in the affirmative. The selection of a vote is the epitome of discretion and judgment and we can find no legal support for this theory.

Flat Rock's actions, however, fall within the exception to the ministerial task rule. Flat Rock openly admits that it has no qualms with the construction contract or bond sale and has only withheld its approval because it objects to the cost allocation method. There is nothing left to object to in relation to the cost allocation. The SHVUA acted within its authority and the decision was passed by a majority vote. Flat Rock's continued refusal to act on the construction contract and bond sale places the entire SHVUA in danger of causing a major environmental disaster which would result in penalties being imposed against the authority as a whole. Flat Rock's actions are based completely on bias and are arbitrary, capricious, and unreasonable. As such, the trial court properly deemed Flat Rock as not exercising its discretion at all.

#### 4. Alternative Remedy

Finally, plaintiffs must show that they have "no other adequate legal remedy." *Toan v McGinn*, 271 Mich 28, 33; 260 NW 108 (1935). Flat Rock argues that plaintiffs could have proceeded with the project and then sued it for damages, or sought declaratory relief regarding the SHVUA's power to choose the cost allocation method. The declaratory judgment described by Flat Rock would not have resolved the issues in this case. Even if a court declared that the SHVUA had the power to allocate costs, Flat Rock could withhold its approval of the construction contract and bond sale. It is theoretically possible that the SHVUA could have proceeded with the construction project, allocating costs only to plaintiffs, and then plaintiffs could have filed suit against the SHVUA and the four communities along the SHV arm interceptor for their share of the costs. This remedy would have been extremely complicated to implement. Plaintiffs' citizens would have to front the cost of the entire project. The proceeds from plaintiffs' lawsuit would then have to be divided and returned to the taxpayers. It is possible that plaintiffs would not be able to collect the necessary funds in the first place. While the remedy exists, it is not truly "adequate" as required by law.

As plaintiffs established all necessary elements of its mandamus petition, the court properly compelled Flat Rock and the SHVUA into action.

Affirmed.

/s/ Donald S. Owens  
/s/ Elizabeth L. Gleicher