STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs-Appellees,

v

CITY OF FLAT ROCK,

Defendant-Appellant,

and

SOUTH HURON VALLEY UTILITY AUTHORITY,

Defendant-Appellee.

UNPUBLISHED
October 9, 2012

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

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

BOONSTRA, J. (*dissenting*).

Today the majority votes to affirm the trial court's order of mandamus requiring defendant City of Flat Rock ("Flat Rock") to cast its vote in favor of a construction contract and bond sale. I respectfully dissent, as I agree with the majority that "[t]he selection of a vote is the epitome of discretion and judgment," but disagree that Flat Rock's vote was arbitrary and capricious. I additionally disagree with the majority's conclusions that plaintiffs have a "clear legal right" to an affirmative vote by Flat Rock, that Flat Rock has a "clear legal duty" to vote affirmatively, and that no alternative remedy exists.

"The issuance of a writ of mandamus is an extraordinary remedy." *Citizens Protecting Michigan's Constitution v SOS*, 280 Mich App 273, 284; 761 NW2d 210 (2008). "The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487,

493; 688 NW2d 538 (2004). I conclude that plaintiffs have not satisfied this burden.[1] To show that it is entitled to the extraordinary mandamus remedy, a plaintiff must demonstrate (1) that it has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Tuggle v Dep't of State Police*, 269 Mich App 657, 668; 712 NW2d 750 (2005).

I. PLAINTIFFS HAVE NOT SHOWN A CLEAR LEGAL RIGHT TO AN AFFIRMATIVE VOTE BY FLAT ROCK

I initially disagree with the majority's characterization (and the conclusion it draws therefrom) that "[n]o one challenges that plaintiffs have a clear legal right to have the TAI project completed."[2] In my view, it would be more correct to state that no one challenges that the completion of the TAI project repairs is not only desirable, but indeed is required by a September 27, 2010 Second Amended Administrative Consent Order (ACO). However, the Second Amended ACO was entered into by the Michigan Department of Natural Resources and Environment (DNRE) and the South Huron Valley Utility Authority (SHVUA).[3] It creates no

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[1] I note the following statements by the trial court at oral argument:

> THE COURT: . . . let's say . . . Flat Rock is compelled to attend and perform, why isn't that the flip side of what you suggested to the Authority? A, you pay and then you come after us later. How about if you participate, and then if you're wrong, the Authority pays you later. What's wrong with that?
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> * * *
>
> THE COURT: The, I would point out that, in the event that the Court is – and I always says this, and I don't know how many other Courts – and I don't think the Court's wrong, but if I am, Flat Rock is not remedy-less because, for the reasons that I've already stated on the record.

In my view, the trial court placed the onus on the wrong party. In a mandamus action, it is *plaintiff's* burden to demonstrate entitlement to the extraordinary remedy of mandamus by showing that each of the four elements are satisfied. *Citizens for Protection of Marriage*, 263 Mich App at 493. It is not the *defendant's* burden to bring suit to attempt to undo the effects of an improvidently issued mandamus order. Particularly where the remedy is so extraordinary, and the burden on plaintiff so great, there simply is no equivalent "flip side."

[2] The TAI project began as a repair of a 300 foot length of the Trenton Arm Interceptor. In March 2008, it was determined, however, that "the entire 8,900 foot length of the Trenton Arm Interceptor should be repaired to restore the structural integrity of the sewer, and to prevent further deterioration and potentially catastrophic collapses." The term "TAI project" thus refers to this more extensive repair project.

[3] On January 16, 2004, the Michigan Department of Environmental Quality entered into an Administrative Consent Order with SHVUA (of which plaintiffs, Flat Rock, and other

legal rights or duties on the part of anyone other than DNRE and SHVUA, and specifically creates rights in none of individual SHVUA members (including plaintiffs and Flat Rock), other than as member communities of SHVUA.[4]

Moreover, the Second Amended ACO creates a *duty* (not a *right*) to repair, and it imposes that *duty* on SHVUA. The Second Amended ACO states, for example:

> **On or before December 1, 2011**, the SHVUA shall complete construction of the Trenton Arm Interceptor re-lining project and submit written certification to DNRE confirming that the project was completed in accordance with the approved plans and specifications. The SHVUA shall notify DNRE, in writing, of compliance with the requirement **by December 15, 2011**. (Emphasis in original).

In my view, the mis-focus of the majority's characterization (as establishing a right to the repair, as opposed to a duty to repair and to follow the necessary processes by which to satisfy that duty) serves only to establish a predicate for the majority's resulting conclusion. But I also do not believe that the majority's conclusion follows from its own characterization. Specifically, the majority states:

> 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.

To the contrary, I believe that the TAI project could be completed in myriad ways that do not require Flat Rock to approve the particular bond sale and construction contract at issue.

Since, as discussed below, the SHVUA Articles of Incorporation require that certain bond sales and construction contracts receive unanimous approval to be effective, the members of SHVUA are obliged to reach unanimity on any bond sales and construction contracts that they propose as the mechanism by which SHVUA is to satisfy its obligations under the Second Amended ACO. However, the unanimity requirement cannot properly be read to impose a duty of all SHVUA members, or any individual SHVUA member, to vote affirmatively on any particular bond sale or construction contract. Such a reading would render the unanimity requirement a nullity and, therefore, is not permissible. *Klapp v United Ins Group Agency, Inc,*

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communities are members) concerning certain alleged violations of law relating to SHVUA's handling of wastewater from its member communities. In 2008, the original ACO was amended to extend the timeline for SHVUA to submit a required performance certification. The ACO was further amended in 2010 relative to the TAI project.

[4] The majority suggests that the trial court concluded that Flat Rock's position that it should not be allocated any of the costs of the TAI project was somehow "contrary to the amended ACO language[.]" However, I find in the record no such conclusion by the trial court, nor do I find any language in the Second Amended ACO that arguably was violated by Flat Rock (nor does the majority point to any such language).

468 Mich 459, 467, 468; 663 NW2d 447 (2003) (construction of a contract that renders any part surplusage or nugatory should be avoided). Rather, the unanimity requirement obligates the SHVUA members to negotiate terms that are unanimously agreeable to all SHVUA members; if unable to do so, they risk placing SHVUA in breach of its obligations and risk subjecting SHVUA (and potentially its members) to any resulting consequences.

The particular bond sale and construction contract at issue, as reflected in the trial court's Order of Mandamus, incorporate cost allocations that Flat Rock, in an exercise of its discretion, has rejected.[5] SHVUA's self-imposed requisite unanimity thus has not been achieved with respect to that particular bond sale and construction contract. This does not mean, however, that SHVUA members could not continue to negotiate and agree on alternative terms that are unanimously acceptable to SHVUA members. In fact, the record reflects that SHVUA members unanimously agreed, in April and June 2009, to an allocation of the TAI project costs only to plaintiffs.

Once unanimity is achieved, if it can be (or perhaps already has been), then the completion of the TAI repairs can proceed, and SHVUA can fulfill its duties. Until then, SHVUA and its members risk the consequences of their inability to achieve the requisite unanimity. However, by seeking mandamus relief to compel one SHVUA member to vote in accordance with the wishes of other SHVUA members, plaintiffs ask the courts to save SHVUA (and its members) from the consequences of their own self-imposed requirement of unanimity. In my view, that is not the proper role of the courts. I therefore disagree with the majority's

[5] More specifically, the trial court's May 12, 2011 Order of Mandamus requires, *inter alia*, that Flat Rock execute a Financing Contract (among SHVUA and its members) providing for the issuance of bonds to fund the TAI project repairs (and further requiring that the construction contractors provide those bonds), and that it also execute a Resolution approving the Financing Contract and authorizing the publication of notice (to its taxpayers and electors) of the "tax-supported contract" and bond issuance. While the draft Financing Contract and Resolution (and accompanying form of notice) appended to the Order of Mandamus did not initially set forth a particular cost allocation, the Order of Mandamus itself orders, in reference thereto, a cost allocation that includes a 16.83% cost allocation to Flat Rock. As the majority notes, "[t]he 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%." That the particular cost allocation ordered by the trial court may have been chosen "according to the method selected by a majority of the SHVUA members" is of no moment in light of the unanimity requirement. Moreover, the Municipal Sewage and Water Supply Systems Act (under which SHVUA was formed) mandates that any contract between SHVUA and its constituent municipalities for the financing or improvement of a sewage disposal system "*shall* provide for the allocation and payment of the share of the total cost to be borne by each contracting municipality." MCL 124.287(1) (emphasis added). Consequently, the cost allocation cannot be severed from the financing contract. Calling it a "predicate financing arrangement" does nothing to change this fact. Since the SHVUA Articles of Incorporation require unanimous approval of the financing contract, so too must it require unanimous approval of the accompanying cost allocation.

decision to impose a particular resolution of an internal political disagreement within SHVUA, one that essentially re-writes SHVUA's Articles of Incorporation, mandates that a particular SHVUA member must exercise its discretion to vote in a particular way, and thereby nullifies the very unanimity requirement that SHVUA and its members have chosen to impose on themselves.[6]

Because the Second Amended ACO creates no legal rights for plaintiffs, and because there is no clear legal right, in any event, to require Flat Rock to vote affirmatively on the particular construction contract and bond sale at issue, I would find that the first element of mandamus relief is not satisfied.

II. PLAINTIFFS HAVE NOT SHOWN THAT FLAT ROCK HAS A CLEAR LEGAL DUTY TO CAST AN AFFIRMATIVE VOTE

Plaintiffs must also demonstrate that Flat Rock has a clear legal duty to vote in favor of the particular construction contract and bond sale at issue. *Tuggle*, 269 Mich App at 668. In that regard, the majority characterizes the issue as follows: "The real issue is whether Flat Rock has a clear legal duty to approve the bond sale and construction contract *necessary for the project*." (Emphasis added). Of course, this characterization presumes that the particular construction contract and bond sale that are currently at issue are "necessary for the project," and that other options are unavailable. I must reject that presumption, and the characterization that flows from it.

The majority bases its presumption on a SHVUA consultant's classification of the project, for accounting purposes, as a "capital outlay,"[7] and on a SHVUA Bylaw provision that addresses SHVUA's obligation to pay for "capital improvements." In addition to noting the difference in terminology, I find several problems with the majority's rationale.

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[6] The majority postulates that the TAI repair project will to a limited extent benefit all SHVUA member communities. Even if true, however, and although that fact might call into question the wisdom of Flat Rock's position (that it should bear no costs of the project), it would not alter the impropriety of extraordinary mandamus relief, or properly sanction the substitution of the courts' discretionary preferences (including the particular cost allocation imposed) for the discretion granted to Flat Rock by SHVUA's Articles.

[7] On August 18, 2008, after consulting with SHVUA's engineering consultant (who advised that the TAI project repairs likely would "extend the useful life of the sewage collection system"), the accounting firm of Plante & Moran, PLLC provided SHVUA with an opinion letter that, pursuant to "generally accepted accounting principles," the TAI project costs qualified as "capital outlay expenditures." The significance of this cost categorization, according to Plante & Moran, is that, using "accrual accounting," SHVUA would then be able to depreciate the costs over future years. On August 20, 2008, the SHVUA board voted (with Flat Rock dissenting and another SHVUA member absent), to "accept the Plante & Moran definition of Capital Improvement."

First, I am unable to accept the majority's presumption that a majority of the SHVUA board can, by retaining an accounting consultant to opine on the "capital outlay" status of a project, properly bind all SHVUA members to the resulting opinion. To me, this smacks of a procedural mechanism designed to create a *fait accompli*, but one that in fact turns the process upside down. Wisely or not, SHVUA chose to impose a unanimity requirement in its Articles of Incorporation; yet the process now sanctioned by the majority allows a non-unanimous majority of the SHVUA board to secure a description of a project to subvert SHVUA's own unanimity requirement.[8] I cannot read the language of SHVUAs own Articles of Incorporation to sanction such a result.

Second, the record reflects a course of conduct that undermines plaintiffs' position that "capital improvements" must be financed system-wide. To the contrary, there is a history of financing major SHVUA "capital improvement" projects in a variety of ways other than the system-wide approach that plaintiffs would have this Court impose as a condition of classifying the TAI project as a "capital improvement."

Third, regardless of the opinion of the SHVUA-retained consultant (which in any event addressed accounting and depreciation issues, rather than an interpretation of SHVUA's Bylaws), I do not read the SHVUA Bylaws and Articles of Incorporation to create a clear legal duty to vote affirmatively on the particular construction contract and bond sale at issue. Even assuming, therefore, that the TAI project is a "capital improvement," that description does not obligate Flat Rock to vote in favor of any particular contract or bond issuance (or incorporated cost allocation). The majority relies on the following provision of the SHVUA Bylaws as giving SHVUA the authority to determine the applicable cost allocation:

> (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.

In my view, this Bylaw provision does not address the issue of "cost allocation." Rather, it serves to place responsibilities on SHVUA for making capital improvements, and it further requires SHVUA to determine the "cost" of the capital improvements, and the "method" by which SHVUA will make the resulting payment (e.g., by bond sale, or otherwise). It does not, however, address how SHVUA (and its members) will internally decide the relative contributions of its members toward the payments that SHVUA will be obliged to make.

Moreover the Bylaw provision does not, as the majority concludes, mandate any particular cost allocation. If it did, and if a particular cost allocation were mandated by the classification of a project as a "capital improvement," then the SHVUA board would have had no reason, at its April 15, 2009 board meeting, to review various "options for funding the Trenton Arm Capital Costs." Those "Trenton Arm Capital Cost Allocation Scenarios," as presented to

[8] Under SHVUA's Articles of Incorporation, a SHVUA member's exercise of its discretion in a manner that is different from that of other members is not an indication of "stonewalling tactics," as the majority contends, but rather of a lack of unanimity.

the SHVUA board by its environmental consultant, included (1) allocating the costs only to Brownstown, Gibraltar and Woodhaven; (2) allocating the costs to all system users; and (3) allocating the costs to all system users, excluding Flat Rock. If a "capital improvement," by its very nature, required a system-wide cost allocation (as the majority contends), then there would have been no reason to consider alternative cost allocation options.

The SHVUA Board's consideration of those options followed a period of many months (after it had been determined that the TAI project repairs were needed) in which SHVUA and its member communities discussed various aspects of the project, including cost allocation. Although the project was always referred to as a "capital improvement," there also always was a recognition that an agreement on the cost allocation would need to be reached and approved unanimously. The very fact of those discussions reflects a further recognition that a "capital improvement" was not necessarily subject to a particular cost allocation (e.g., system-wide), but rather that a variety of options existed for the allocation of costs relative to a project, even though the project was considered to be a "capital improvement."

These discussions culminated in the decisions that are reflected in the April 15, 2009 SHVUA board minutes. Following the board's review of the various "options for funding the Trenton Arm Capital Costs," the SHVUA board took the following actions:

> Motion Brownstown, second Huron to spread the cost allocation for the Trenton Arm as a capital improvement to all communities. Roll call vote: Yeas: Brownstown, Huron, Gibraltar, Van Buren and Woodhaven. Nays: Flat Rock. Absent: Romulus and S. Rockwood. Motion carried.
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> Brownstown made the motion to get it on the record but *knowing that all communities have to approve the cost allocations* and in order to move the project forward to take advantage of the stimulus funds being offered, a motion was made allocating the costs to Brownstown, Gibraltar and Woodhaven (user communities).
>
> Motion Brownstown, second Woodhaven to move forward with the Trenton Arm Project Plan with the costs being allocated to Brownstown, Gibraltar and Woodhaven. Motion carried unanimously. [Emphasis added.][9]

[9] In February 2009, Flat Rock moved to submit the TAI project for receipt of "stimulus" funding. That motion passed unanimously. The April 15, 2009 board minutes reflect that the possible receipt of such stimulus funding may have been a consideration in connection with the subsequent motion (which also passed unanimously) to allocate the costs of the TAI project solely to the user communities (Brownstown, Gibraltar, and Woodhaven). However, there is nothing in the record to support the majority's contention that the April 15, 2009 vote to allocate costs only to plaintiffs was "[f]or the sole purpose of applying for the loans." Moreover, there is nothing in the record to support any contention that, regardless of any member's purpose or motivation, the vote was in any way contingent on the *receipt* of stimulus funding, or that the vote would somehow be voided if stimulus funding was not actually or timely received. Further,

The SHVUA board thus recognized that a cost allocation would be not effective unless it had unanimous approval. Faced with that reality, the board unanimously approved a cost allocation that allocated the costs of the TAI project to plaintiffs only.[10]

As the majority acknowledges, the basis for the Board's recognition of a unanimity requirement with respect to the cost allocation is Article IX of the SHVUA Articles of Incorporation.[11] Article IX provides in pertinent part:

> For the passage of any resolution or ordinance providing for services to non-constituent municipalities, the issuance of bonds, or the amendment of these Articles, or the approval of any contract for construction or repair which exceeds Five Hundred Thousand ($500,000) Dollars, there shall be required a favorable vote of all seven Commissioners.

I find of no consequence the majority's observation that in August 2009, after placing the TAI project "on hold … for at least a year," the SHVUA board voted to authorize its advisors to "consider the financial concerns, assess and make recommendations for televising the Trenton Arm again." I do not view that vote as in any way reversing the prior unanimously agreed-upon cost allocation or, as the majority reads it, as an agreement "to allow the SHVUA to reconsider the issue." To the contrary, it not only does not revisit the cost allocation per se, but appears only to authorize SHVUA's advisors to "consider the financial concerns … for televising the Trenton Arm again." A resolution passed by the board of a public body should be interpreted like any contract to determine the intent of the parties. See *Village of Breedsville v Columbia Twp*, 312 Mich 47, 56-57; 19 NW2d 482 (1945). Contractual terms must be construed in context. *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 516; 773 NW2d 758 (2009). By divesting the "financial concerns" language from its context ("televising the Trenton Arm again") and not referencing the latter, the majority presents this vote as if it were for a reconsideration of the prior unanimous cost allocation vote. I do not find that to be a fair or appropriate reading of the August 2009 vote.

[10] At the April 15, 2009 meeting, the SHVUA board considered a report of its environmental consultant that discussed various aspects of the TAI project, including cost allocation. That report stated in part:

> MDEQ is well aware of the provisions in the SHV Articles of Incorporation which require unanimous agreement among all member communities to authorize a bond sale and award of a construction contract in excess of $500,000. MDEQ's guidance requires that the Authority explain how the proposed project will be implemented assuming a loan is awarded, and the state has indicated that the Project Plan will need to specify how the costs will be allocated so that the project can go forward with the unanimous support of the member communities. It is assumed, therefore, that the Project Plan will show that the cost is being charged to the 3 user communities (Woodhaven, Gibraltar and Brownstown Township) as shown in Attachment 2 since the alternative approach of allocating the cost system-wide is not unanimously supported.

[11] In the event of a conflict between SHVUA's Articles of Incorporation and its Bylaws, the Bylaws confirm that the Articles of Incorporation "shall prevail."

Because the cost of the TAI project exceeds this threshold, and because the cost allocation is necessarily tied to the construction contract and bond issue (as the Order of Mandamus reflects, and as is mandated by MCL 124.287(1)), Article IX requires that the construction contract and bond issuance for that project (including the corresponding cost allocation) receive unanimous approval of all SHVUA board members. This "check and balance" provision allows each SHVUA member to weigh its individual interest, as well as the general interest of SHVUA, and in an exercise of discretion, to exercise a veto where it believes it to be appropriate.

Pursuant to Article IX, Flat Rock exercised its discretion to veto a proposed system-wide cost allocation. The SHVUA Board then proceeded to unanimously approve an allocation of all TAI project costs to plaintiffs. Consistent with that unanimous April 15, 2009 vote, SHVUA proceeded with a Project Plan that "assumes that the project cost will be distributed uniformly to residential customers in the three use communities (Gibraltar, Woodhaven and Brownstown Township)." It further "anticipated that the cost of the project will be allocated to the three user communities (Brownstown Township, Gibraltar and Woodhaven) based on the relative flow quantities being conveyed in the Trenton Arm from each community." Plaintiffs, the three user communities, all passed "A Resolution Adopting the Final Project Plan." At its June 19, 2009 meeting, the SHVUA board further unanimously approved that final project plan (including its cost allocation to plaintiffs only) as follows:

> Motion Flat Rock, second S. Rockwood to approve the resolution adopting a final project plan for wastewater system improvement and designating an authorized project representative [Project-Trenton Arm] Motion carried unanimously.

Thus, for a second time, and without any arguable preconditions or limiting motivations, the SHVUA board members unanimously approved an allocation of the TAI project costs to plaintiffs only.[12]

Thereafter, following the November 2009 election, with certain SHVUA members apparently having new representation on the SHVUA board, the cost allocation issue apparently re-arose. At the March 29, 2010 meeting, the board discussed "the allocation of future collection system projects," including three possible cost allocation approaches (user only; system-wide; and a hybrid). In May 2010, the SHVUA board approved – in a non-unanimous vote – a conceptual memorandum of understanding that would have reversed the cost allocation for the TAI project from the user only approach (which was unanimously approved in April and June 2009) to a system-wide approach. This proposed re-allocation was never unanimously approved.

On September 27, 2010, SHVUA and the DNRE entered into the Second Amended ACO, which the SHVUA board approved unanimously. The Second Amended ACO provided for the completion of the TAI project, but significantly did not address cost allocation. To the contrary, the Second Amended ACO itself, and the SHVUA board in approving it, recognized that the approval of the Second Amended ACO (even if unanimous) did not constitute unanimous

[12] The SHVUA board later received legal advice to the effect that the TAI project could be financed by the issuance of bonds with only the user communities (plaintiffs) participating in the repayment.

approval of any construction contracts or financing arrangements (or any cost allocation that they might incorporate). Instead, the Second Amended ACO specifically set a deadline for SHVUA to document that it had achieved the requisite unanimity:

> . . . **on or before November 22, 2010**, the SHVUA shall submit documentation . . . demonstrating that the Authority has the legal ability to enter into construction contracts and financing arrangements for the projects described below, including a certification that unanimous agreement of the member communities has been obtained consistent with the provisions of Article IX of the SHVUA Articles of Incorporation. [Emphasis in original.]

At its September 15, 2010 meeting, the SHVUA board unanimously approved the Second Amended ACO after considering a report of its environmental consultant, who similarly noted that a unanimous adoption of the Second Amended ACO would not constitute unanimous adoption of any cost allocation:

> The Articles of Incorporation do not require unanimous agreement of the member communities to enter into the ACO Amendment, so a simple majority is sufficient to authorize the Chairman to execute the final document upon receipt of it from MDNRE. However, unanimous agreement of all communities will of course be needed to proceed with the two construction projects, so it would be beneficial to have unanimous agreement regarding the ACO Amendment if this can be achieved.

Of course, at its April 15, 2009 and June 19, 2009 meetings, the SHVUA board already had unanimously approved a cost allocation to plaintiffs only. At no time did the SHVUA board unanimously adopt any other cost allocation. Instead, after failing to convince Flat Rock to allow them to retract their prior cost allocation approval, plaintiffs filed this action, asking the trial court to issue a writ of mandamus compelling Flat Rock to change its vote (and thereby to order a system-wide cost allocation). While that request was pending, a majority of the SHVUA Board passed a motion, with a non-unanimous vote, on February 16, 2011, that purported to reverse the April 15, 2009 and June 19, 2009 unanimous cost allocation votes, and that instead would allocate the costs system-wide to all SHVUA member communities, based on a three-year weighted average.[13]

[13] For the reasons noted, I disagree with the majority's contention that "[o]nce the [non-unanimous February 16, 2011] cost allocation decision was made, Flat Rock was bound to abide by it[,]" notwithstanding the prior unanimous April 15, 2009 and June 19, 2009 decisions to allocate costs only to plaintiffs (which decisions the majority apparently finds not to be binding on plaintiffs). I further disagree with the conclusions and characterizations that the majority draws from that contention, i.e., that because Flat Rock supposedly was bound by that non-unanimous vote, it "could only refuse to approve the contraction contract and bond sale, which require unanimity, if it had concerns with those items. . . . Flat Rock admittedly has no concern with the construction contract and bond sale, only with the predicate financing arrangement over which it had already lost its battle. Flat Rock therefore has a clear legal duty to approve the construction contract and bond sale[.]" I similarly disagree with the majority's contentions that

Under these circumstances, I simply cannot agree that there exists any "clear legal duty" for Flat Rock to vote "affirmatively" for a cost allocation that a majority of SHVUA members favor (notwithstanding their prior unanimous votes to allocate the TAI project costs to plaintiffs only). Article IX does not create any "clear legal duty" for Flat Rock to vote affirmatively on a system-wide cost allocation. To the contrary, Article IX grants Flat Rock discretion in its vote, and merely provides that construction contracts and bonds cannot be approved until the constituent members of SHVUA have achieved unanimity. Failure to achieve unanimity may have consequences for SHVUA and its constituent members. However, SHVUA's self-imposed unanimity requirement cannot be used as a sword by which certain members may divest other members of the very discretion that Article IX affords to each member. To construe Article IX in such a circular fashion would render a nullity the very unanimity requirement that Article IX creates, and would re-write that unanimity requirement into a mere majority vote requirement.

While I certainly am cognizant that further delays in the completion of the TAI project may increase the risk of adverse environmental effects, and may risk the imposition of penalties against SHVUA, those risks should compel SHVUA and its member communities to move forward in unanimity (as the Articles require) to address those concerns. They do not, however, in my view, allow us to impose a result that I believe is contrary to law.[14]

"[b]ecause 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", and that "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." I believe, to the contrary, that Flat Rock was not only *not* bound by the non-unanimous February 16, 2011 allocation vote (and cannot be compelled by mandamus to approve it), but that it has definitively objected to the construction contract and bond sale that, as the Order of Mandamus reflects, and as MCL 124.287(1) requires, are inextricably tied to the cost allocation that Flat Rock has consistently opposed. It is simply inaccurate to suggest that Flat Rock has no objection to a bond sale, when it has consistently objected to the cost allocation that is imposed by the financing contract that provides for the bond sale. It is also inaccurate to suggest that it is legally permissible to sever the consideration of the financing contract from the cost allocation, MCL 124.287(1) or, correspondingly, that Flat Rock cannot object to (and instead must vote in favor of) a financing contract where it only objects to the cost allocation that the financing contract imposes.

[14] I am unpersuaded by the majority's citation to the 2004 litigation in *Dep't of Environmental Quality v SHVUA*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket Nos. 265964, 268039). Not only is that decision of no precedential value, MCR7.215(C)(1), but I find it distinguishable and not dispositive in any way of the issues in this case. Contrary to the suggestion of the majority, the 2004 litigation was not between "the same parties" as the instant case. While the majority ambiguously suggests that it involved "the same line of transactions," I find otherwise. Obviously, for example, the TAI project was not at issue in the 2004 litigation. The issues and circumstances also were different, including Flat Rock's steadfast and active opposition to the payment of any costs of the TAI project in the current circumstance. Among other important differences is the fact that, in the 2004 litigation, this Court found, for example, that "there was evidence of unanimity with regard to several critical

III. PLAINTIFFS HAVE NOT SATISFIED THE MINISTERIAL TASK REQUIREMENT

The issuance of a writ of mandamus is only proper where "the act is ministerial, involving no exercise of discretion or judgment." *Carter*, 271 Mich App at 438. The majority recognizes that the action taken by Flat Rock here in casting its vote is "the epitome of discretion and judgment." However, the majority then applies what it acknowledges to be a "narrow exception to this rule" that allows a court to issue a writ of mandamus in matters "involving discretion on the part of a public agency" when "its action is so arbitrary and capricious as to evidence a total failure to exercise discretion." *Bischoff*, 320 Mich at 385.

"The judiciary will not control the discretion of administrative bodies acting within the limits vested in them by law, unless the action is so capricious and arbitrary as to evidence a total failure to exercise discretion." *Brownstown Twp v Wayne County*, 68 Mich App 244, 251-252; 242 NW2d 538 (citations and footnote omitted). Absent this extraordinary circumstance, this Court should not interfere with the administrative decisions of a municipality, because to do so implicates separation of powers concerns. *Id.* at 251; US Const Arts I, II, II, § 1; Const 1963, art 3, § 2.

The words "arbitrary" and "capricious" have accepted meanings within our jurisprudence:

> Arbitrary is: "(W)ithout adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance . . . decisive but unreasoned"
>
> Capricious is: "(A) to change suddenly; freakish; whimsical; humorsome". [*Bundo v City of Walled Lake*, 393 Mich 679, 703, n 17; 238 NW2d 154 (1976), quoting *US v Carmack*, 329 US 230, 243; 67 S Ct 252, 258; 91 L Ed 209 (1946).]

The majority concludes that Flat Rock's actions were arbitrary and capricious because Flat Rock supposedly "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." However, as noted, the cost allocation is – by mandate of state statute – a necessary component of the financing contract, and the Order of Mandamus thus imposes a particular cost allocation in directing Flat Rock to approve the construction contract and bond sale. The fact that the majority of SHVUA members voted to allocate costs for the project system-wide does not mean that Flat Rock is obliged to raise no objection to the particular cost allocation imposed in connection with a particular construction contract or bond sale.

As Flat Rock's counsel stated at oral argument, historically the costs of major projects (regardless of whether a project was labeled a "capital improvement") was allocated based on

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provisions, including the approval of the construction project and the cost allocation. Approval of the actual construction contract is not at issue herein." There is nothing akin to any of that here, other than the April 15, 2009 and June 19, 2009 unanimous votes to allocate the TAI project costs solely to plaintiffs.

usage of facilities to be constructed (either purchased capacity or average usage over a period of time), rather than overall use of the system. These projects included significant expansions, constructions, and improvements to plants and facilities, as well as a previous repair of the TAI. As stated above, the Second Amended ACO does not require Flat Rock or any constituent community to agree to any particular cost allocation, but only that the parties negotiate and reach unanimous agreement on construction contracts and financing agreements for the project according to the SHVUA Articles of Incorporation. Thus, I cannot find that Flat Rock's actions were undertaken "without determining principle" or that Flat Rock's position was "whimsical" or subject to sudden change. Flat Rock has maintained the consistent position, from the time that the need for repairs to the TAI was determined, that it should not bear the cost to repair a portion of the system that it does not use. Whether valid or not, I do not find that position to be arbitrary or capricious.

At oral argument, counsel for plaintiffs noted that the requirement of unanimous approval for construction contracts over $500,000 or for the sale of bonds gave Flat Rock "significant power over the other communities to force a more favorable allocation" of costs. This "veto" power is an unusual feature of the SHVUA Articles, but it appears to be a deliberate one; this feature keeps smaller communities, such as Flat Rock, from being saddled with costs it cannot bear as a result of a majority vote of SHVUA members. I find nowhere in the SHVUA Articles a prohibition on SHVUA member communities basing their approval or disapproval of a construction contract or bond issuance on a disagreement with an associated cost allocation. Thus, I disagree with the majority's contention that Flat Rock's refusal to approve a construction contract or bond sale is arbitrary and capricious because it "only withheld its approval because it objects to the cost allocation method." To the contrary, the cost allocation is necessarily part and parcel of the financing contract. MCL 124.287(1).

By way of example, the majority's view would allow a majority of SHVUA members to determine any number of characteristics of a bond sale or construction contract by prior motion, winnowing the avenues for objection from dissenting members down to zero, and then claim that refusal to approve the actual contract or sale was arbitrary and capricious. Such a view would essentially gut the unanimity requirement of the Articles. I cannot support such a view. It is not for this Court to determine whether the SHVUA Articles are well thought-out or whether there may be a better way for SHVUA to govern itself. SHVUA having given each member such veto power, this Court should not be called upon to break a stalemate within SHVUA whenever a member community decides to exercise that power.

Further, as Flat Rock points out, the trial court did not find Flat Rock's position to be based on bias or passion, but rather found it based on a reasoned argument and the past course of conduct by SHVUA. Although the trial court disagreed with Flat Rock's position, it noted that Flat Rock's arguments were "reasonable" and "logical." Yet it found Flat Rock to have abused its discretion by "opting out" of the project costs. I would not substitute the discretion of this Court (or that of the trial court) for the discretion granted to Flat Rock by SHVUA's own Articles. *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984).

IV. PLAINTIFFS HAVE NOT SHOWN THE UNAVAILABILITY OF AN ADEQUATE ALTERNATIVE REMEDY

I also am not satisfied that plaintiffs possess no alternative remedy for the resolution of this issue. The majority states that "[i]t 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" but concludes that this remedy "would have been extremely complicated to implement" and that "[i]t is possible that plaintiffs would not be able to collect the necessary funds in the first place." But the fact that a remedy may be complicated to implement does not suffice to satisfy the fourth prong of the test for issuance of a writ of mandamus: "an individual seeking mandamus *must not have another adequate remedy available*." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 225; 608 NW2d 833 (1999) (emphasis added).

Here, I disagree that a money damages remedy and/or declaratory relief may not be an adequate remedy. The project need not be initially funded by all SHVUA members in order to proceed. SHVUA and/or the funding communities could subsequently seek to compel Flat Rock to pay a share of those costs through an action for money damages and/or declaratory relief. In my mind, this remedy "might achieve the same result" as a writ of mandamus, rendering the extraordinary remedy inappropriate. See *Citizens Protecting Michigan's Constitution v SOS*, 280 Mich App 273, 284; 761 NW2d 210 (2008). The fact that the apportioning of the proceeds of a lawsuit against Flat Rock may present some accounting difficulties is, I believe, insufficient to justify the use of the mandamus remedy over other, less extraordinary and more appropriate, remedies. And the majority's speculation that plaintiffs might not be able to raise the necessary funds alone is purely that – speculation.

V. CONCLUSION

For all of these reasons, I would find that the trial court abused its discretion in granting plaintiffs' request for a writ of mandamus, and would reverse. I therefore respectfully dissent from the majority's affirmance of the trial court's grant of mandamus relief under the circumstances presented.

/s/ Mark T. Boonstra