STATE OF MICHIGAN

COURT OF APPEALS

FRANK HOUSTON, EDNA FREIER, CHRISTY JENSON, LORETTA COLEMAN, JIM NASH, DAVID RICHARDS, and ERIC COLEMAN,

Plaintiffs-Appellees,

v

GOVERNOR,

Defendant,

and

OAKLAND COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellant.

FOR PUBLICATION
March 7, 2012
9:00 a.m.

No. 308724
Ingham Circuit Court
LC No. 12-000010-CZ

FRANK HOUSTON, EDNA FREIER, CHRISTY JENSON, LORETTA COLEMAN, JIM NASH, DAVID RICHARDS, and ERIC COLEMAN,

Plaintiffs-Appellees,

v

GOVERNOR,

Defendant-Appellant,

and

OAKLAND COUNTY BOARD OF COMMISSIONERS,

Defendant.

No. 308725
Ingham Circuit Court
LC No. 12-000010-CZ

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

M. J. KELLY, J.

This case involves plaintiffs' challenge to the constitutionality of 2011 PA 280 (Public Act 280). The circuit court determined that 2011 PA 280 was unconstitutionally enacted. For that reason, on February 21, 2012, it entered an order declaring the act to be unconstitutional and granting summary disposition in plaintiffs' favor. The Oakland County Board of Commissioners appealed that order by right in docket number 308724 and the Governor appealed the same order by right in docket number 308725. We conclude that Public Act 280 contained a provision that constitutes a local act. Because the Legislature enacted 2011 PA 280 without complying with the requirements of Const 1963, art 4, § 29, that provision is unconstitutional. Accordingly, we agree with the circuit court's conclusion that part of 2011 PA 280 is unconstitutional, but we do not agree that the whole act is unconstitutional. For that reason, we affirm in part, reverse in part, and remand this case to the circuit court.

I. FACTUAL BACKGROUND

After the 2010 decennial census, but before the enactment of 2011 PA 280, the apportionment commission for Oakland County adopted a reapportionment plan for the Oakland County Board of Commissioners. The apportionment commission adopted the plan consistent with the statutory scheme applicable to the apportionment of county boards of commissioners. See MCL 46.401 *et seq.* Thereafter, the Legislature enacted 2011 PA 280, which the Governor signed on December 19, 2011.

With Public Act 280, the Legislature amended key provisions of MCL 46.401, MCL 46.402, and MCL 46.403. The Legislature amended MCL 46.401 to reduce the maximum number of commissioners that a county may have from 35 to 21. See 2011 PA 280, § 1(1). It also amended MCL 46.401 to include a new subsection. The new section, MCL 46.401(2), provided for reapportionment in counties that were not in compliance with the newly reduced level of commissioners:

> If a county is not in compliance with [MCL 46.402] on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with [MCL 46.402]. For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1). [2011 PA 280, § 1(2).]

In addition, the Legislature amended MCL 46.403(1) to change the membership of the apportionment commission for certain counties: "In a county with a population of 1,000,000 or more that has adopted an optional unified form of county government under 1973 PA 139, MCL 45.551 to 45.573, with an elected county executive, the county apportionment commission shall be the county board of commissioners." See 2011 PA 280, § 3(1).

The practical effect of these amendments was to reduce the Oakland County Board of Commissioners—and only the Oakland County Board of commissioners—from 35 to 21 members and to require the Oakland County Board of Commissioners to adopt a reapportionment plan for the districts from which its members will be elected.

The circuit court examined Public Act 280 and determined that it was unconstitutional on three grounds: it determined that Public Act 280 was a local act and that the Legislature failed to enact it in compliance with Const 1963, art 4, § 29, that it amounted to an unfunded mandate enacted in violation of the Headlee Amendment, see Const 1963, art 9, § 29, and that it would not allow a proper opportunity for judicial review of the required new apportionment. As more fully explained below, we agree that Public Act 280 is unconstitutional in part because it is a local act that was enacted in contravention of Const 1963, art 4, § 29.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Similarly, this Court reviews de novo whether an act was enacted in violation of Michigan's constitution. See *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 317-318; 685 NW2d 221 (2004). This Court presumes that a statute is constitutional unless its unconstitutionality is clearly apparent. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

B. LOCAL ACTS

Since the adoption of Michigan's 1908 constitution, see Const 1908, art 5, § 30, there has been a provision limiting the Legislature's authority to enact local or special acts. With Const 1963, art 4, § 29, the people of this state provided that the Legislature "shall pass no local or special act in any case where a general act can be made applicable" and, when the Legislature elects to pass a local or special act, the act shall not take effect "until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected." The people adopted this limitation in order to prevent the Legislature's "'pernicious practice'" in passing local acts, which amounted to "'a direct and unwarranted interference in purely local affairs and an invasion of the principles of local self-government.'" *Advisory Opinion on Constitutionality of 1975 PA 301*, 400 Mich 270, 286-287; 254 NW2d 528 (1977), quoting *Attorney General ex rel Dingeman v Lacy*, 180 Mich 329, 337-338; 146 NW 871 (1914). This practice led to abuse because the "'representatives from unaffected districts were usually complaisant, and agreed to its enactment without the exercise of that intelligence and judgment which all legislation is entitled to receive . . . .'" *Id.*

In evaluating whether an act is a local or special act, courts will examine the substance of the act rather than its form. *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 349; 22 NW2d 433 (1946). Further, the fact that an act contains limitations—such as a population threshold—that appear to target a single municipality does not remove the act from general application if it is possible that another municipality or county might someday qualify for inclusion:

> The probability or improbability of other counties or cities reaching the statutory standard of population is not the test of a general law. In the above cases the acts were sustained as general upon the hypothesis that other municipalities would attain the provided population. By the same token, it must be assumed here that other counties will [meet the criteria.] Unless the act works under such conditions, it is a local, not a general, act. [*City of Dearborn v Wayne Co Bd of Supervisors*, 275 Mich 151, 157; 266 NW 304 (1936).]

"However, where the statute cannot apply to other units of government, that is fatal to its status as a general act." *Michigan v Wayne County Clerk*, 466 Mich 640, 643; 648 NW2d 202 (2002).

In holding 2011 PA 280 to constitute an unconstitutional local act, the circuit court emphasized that, on its effective date, Public Act 280 will only affect Oakland County—Oakland County alone will lose commissioners and be required to undertake a second apportionment within 30 days of the act's effective date. To the extent that Public Act 280 requires reapportionment within 30 days of its enactment, we agree with the circuit court's conclusion that it is a local act. In this regard, we conclude that our Supreme Court's decision in *Wayne County Clerk* is dispositive.

In *Wayne County Clerk*, the Legislature enacted a public act that would have required the city of Detroit to place a proposal on the August 6, 2002 election ballot to change an at-large system of electing its city council to a single-member district plan of organization. See *Wayne County Clerk*, 466 Mich at 641. The statute at issue in *Wayne County Clerk* did not mention Detroit by name. *Id.* at 642. Rather, it "purport[ed] to apply to any city with a population of more than 750,000 that has a nine-member at-large elected city council." *Id.* However, only Detroit met that population requirement. *Id*.

Our Supreme Court first recognized that population-based statutes "have been upheld against claims that they constitute local acts where it is possible that other municipalities or counties can qualify for inclusion if their populations change." *Id.* Nevertheless, the Court held that the statute at issue did not qualify as a general act because, even if another city reached the population threshold of 750,000 and had a nine-member at-large council, the statute would not apply because of the requirement that the proposition appear on the August 6, 2002 ballot. Because there would not be a census before that date, no other city could meet the population requirement. *Id.* at 643. Accordingly, our Supreme Court concluded that the statute did not validly direct placement of the proposition on the August 6, 2002 ballot because it was not passed by a two-thirds vote of the Legislature as required by Const 1963, art 4, § 29. In other words, the statute at issue in *Wayne County Clerk* was unconstitutional because it was an improperly adopted local act. *Id.* at 643-644.

As in *Wayne County Clerk*, it is manifest that Public Act 280 is—at least in part—directed at a single locality: Oakland County. Oakland County alone would be required to reduce the number of members on its county board of commissioners and to undertake a second reapportionment of its county board of commissioners within 30 days of the effective date of the act. Moreover, as in *Wayne County Clerk*, there is no realistically possible way in which any other locality could be affected by these requirements within that 30-day time frame.

Defendants attempt to refute this fact by imagining hypothetical scenarios in which other counties could enlarge the number of members on their county commissions and adopt new forms of county governance so as to become subject to Public Act 280's requirement to reduce the size of their county commissions and to undertake reapportionment. But their attempts do not alter the fact that the first sentence of 2011 PA 280, § 1(2) will invariably apply only to Oakland County. It is implicit in the holding in *Wayne County Clerk* that, where a statute can practically affect only one municipality within a specific time frame, *practically* impossible scenarios should not remove the statute from being considered an unconstitutional local act. Particularly, our Supreme Court considered it decisive that no other city could qualify under the statute "because there will be no new census before that date [August 6, 2002]." *Id*. at 643. Obviously, the statute at issue in *Wayne County Clerk* was passed before the August 6, 2002 election date that it implicated. And, at least in theory, one might imagine a scenario where Congress required a new census to have been conducted in the interval between the passage of the statute at issue and the August 6, 2002 election. After all, US Const, Art I, § 2, clause 3, does not preclude Congress from providing for a census to be conducted more frequently. But our Supreme Court did not adopt a test premised on such imaginings; rather, the Court recognized the practical reality that there would be no new census before August 6, 2002. We likewise decline defendants' invitation to consider strained and unrealistic hypothetical scenarios in order to uphold the constitutionality of what is manifestly a local act.

For similar reasons, we must respectfully disagree with our dissenting colleague. The dissent notes that 1966 PA 261 had a similar 30-day provision for reapportionment, but the key difference here is that the other criteria in 1966 PA 261—namely the statement that it applied to counties with a population under 75,000—clearly rendered that apportionment requirement applicable to multiple counties. In contrast, because it applies only to counties that are not in compliance with the act *on the very day* that the act becomes effective, Public Act 280's 30-day apportionment requirement will plainly apply to only one county: Oakland County. See 2011 PA 280, §1(2).[1] Indeed, under the act's terms, even if every other county suddenly and miraculously became non-compliant on the day after the act became effective, those counties—unlike Oakland County—would not have to reduce their commissioners and reapportion until the time set for "subsequent apportionments", which can only mean the next decennial census. *Id.* Accordingly, we must conclude that the 30-day reapportionment requirement was intended to target Oakland County alone—and that makes it a local act.

[1] This Court will not uphold an act as a general act where it is plain that the requirements are a "manifest subterfuge" designed to limit its application to only one locality. See *Avis Rent-A-Car*, 400 Mich at 345, 345 n 7 (noting that an act with a population requirement that does not provide for the inclusion of other localities as they reach the population requirement is a local act).

C. SEVERABILITY

Although we agree with the trial court's conclusion that 2011 PA 280 is unconstitutional to the extent that it targets Oakland County alone, we do not agree that the remaining portions of the act constitute an impermissible local act. Because we must uphold the constitutionality of the act to the greatest extent possible, we will not invalidate the entire act if the offending provisions can be severed from the act. See *Avis Rent-A-Car System, Inc v City of Romulus*, 400 Mich 337, 348-349; 254 NW2d 555 (1977). Because it is undisputed that it was not enacted in compliance with Const 1963, art 4, § 29, we hold that the first sentence of 2011 PA 280, § 1(2)[2] is unconstitutional and should be stricken from the act. In all other respects, Public Act 280 is a valid statute of general application.

IV. CONCLUSION

For the above reasons, we affirm the circuit court's grant of summary disposition as to the unconstitutionality of the first sentence of 2011 PA 280, § 1(2) as an improperly enacted local act. However, we do not agree that the remaining provisions of the act are invalid on the same basis; those provisions are sufficiently general to be passed without meeting the requirements of Const 1963, art 4, § 29. Moreover, given our resolution of this issue, we need not address the alternate bases proffered by the trial court for concluding that 2011 PA 280 is unconstitutional. The practical effect of our decision today is to permit Oakland County to retain its current level of commissioners and its current apportionment until after the next decennial census.[3] As such, the trial court's concerns about an unfunded mandate and the lack of judicial oversight of the reapportionment process are no longer a concern. Therefore, we conclude that the circuit court erred to the extent that it invalidated the entire act as unconstitutional. For these reasons, we affirm the trial court's order in part, reverse it in part, and remand for entry of an order invalidating the offending sentence, but otherwise upholding the constitutionality of the act.

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[2] This sentence reads: "If a county is not in compliance with Section 2 on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with section 2." 2011 PA 280, § 1(2).

[3] The remaining provision of 2011 PA 280, § 1(2) states: "For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1)." Thus, Oakland County will not have to comply with amended section 1, which incorporates amended section 2, until the next reapportionment.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because there were important issues of public concern, we order that no party may tax its costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Amy Ronayne Krause