

STATE OF MICHIGAN
COURT OF APPEALS

AMERICAN EAGLE FIREWORKS, INC.,

Plaintiff-Appellant,

v

CITY OF LANSING,

Defendant-Appellee.

UNPUBLISHED

October 29, 2002

No. 231631

Ingham Circuit Court

LC No. 99-090267-AW

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

PER CURIAM.

Plaintiff, American Eagle Fireworks, Inc., appeals as of right the grant of summary disposition in favor of defendant, City of Lansing. We affirm.

I

The circumstances of this case are interwoven with another case that was recently acted on by this Court.¹ *American Eagle Fireworks, Inc, v Lansing Fire Marshal, et al*, unpublished memorandum opinion of the Court of Appeals, issued March 1, 2002 (Docket No. 228474) (hereinafter *American Eagle I*). Both cases revolve around a dispute that arose in the summer of 1999 concerning plaintiff's attempts to obtain permits to sell wholesale fireworks. We review the procedural history of *American Eagle I* solely to provide context for the current case on appeal.

A. *American Eagle I*

On May 25, 2000, plaintiff filed with the Lansing City Clerk an application for a permit to sell wholesale fireworks. In a letter sent to the city clerk on June 1, 2000, the Lansing Fire Marshall indicated that the application could not be approved because of inadequate storage at the two locations identified in plaintiff's application.²

¹ A protracted history of disputes between plaintiff and defendant regarding the sale of fireworks has more than once resulted in an appeal to this Court. See, e.g., *Stajos v Lansing*, 221 Mich App 223; 561 NW2d 116 (1997).

² The letter also indicated that in order to receive a site-specific permit, plaintiff would need to
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Thereafter, plaintiff filed in the circuit court a complaint seeking writs of mandamus and superintending control. “The circuit court dismissed the complaint, finding that defendants had no clear legal duty to issue the permit.” *American Eagle Fireworks I*, *supra* at 1. On appeal to this Court, plaintiff asserted that MCL 750.243b allows a municipality to maintain reasonable control of fireworks, and that pursuant to Lansing Ordinance 1615.04, the city’s fireworks ordinance, plaintiff was only required to satisfy three conditions to obtain a permit. Because plaintiff had allegedly satisfied the ordinance conditions, plaintiff argued that issuance of a permit was mandatory. Plaintiff argued that section 243b(2) did not operate to grant defendant discretion in the permit process if such discretion was not unambiguously retained in the fireworks ordinance. In support of this assertion, plaintiff argued that language in the statute indicating that a municipality “may grant a permit” actually should be read to mean “shall grant a permit.” This Court disagreed:

Mandamus is an extraordinary remedy that may 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, 410; 355 NW2d 75 (1984). Issuance of a writ of mandamus is proper where (1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment. *Vorva v Plymouth-Canton Community School Dist*, 230 Mich App 651, 655; 584 NW2d 743 (1998). The plaintiff must be without other adequate legal or equitable remedy. *Tuscola Abstract Co, Inc v Tuscola Co Register of Deeds*, 206 Mich App 508, 510; 522 NW2d 686 (1994).

MCL 750.243b(2) gives local authorities the discretion to grant permits to allow resident wholesale dealers to possess fireworks otherwise prohibited by MCL 750.243a. Specifically, that statute indicates that the “council or commissioner of a city . . . may grant a permit” MCL 760.243b(2). *Contrary to plaintiff’s argument, the use of the word “may” indicates a discretionary act, not a mandatory act. People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994); *Port Huron v Amoco Oil Co*, 229 Mich App 616, 631; 583 NW2d 215 (1998). City of Lansing adopted an ordinance allowing such permits to be issued. City ordinance 1615.04 establishes three requirements for a permit application to be considered complete. While plaintiff argues that satisfaction of these conditions requires defendants to issue the permit, *neither the statute nor the ordinance states that a permit must be issued when a complete application is filed.* [*American Eagle Fireworks*, *supra* at 1-2 (emphasis added).]

B. The Case at Bar

On or about June 10, 1999, plaintiff submitted two additional applications for permits to sell wholesale fireworks. These applications were rejected. Thereafter, plaintiff filed in the circuit court a five-count complaint. Defendant brought a motion for summary disposition under MCR 2.116(C)(8) and (10), which the trial court granted in all respects. We review plaintiff’s

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apply for two permits, one for each identified location.

challenge to the trial court's decision de novo. *Spiiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

II

Plaintiff first argues that the trial court abused its discretion when it held that Plaintiff was not entitled to a writ of mandamus requiring defendant to issue it a permit to sell certain fireworks. In a variation of their argument in *American Eagle I*, plaintiff once again asserts that the “may grant a permit” language of section 243b(2)³ should be read to mean “shall grant a permit.” This time, however, plaintiff argues that this mandatory reading of the statute means that defendant has no discretion in granting a permit to sell wholesale fireworks. Plaintiff maintains that once the statutory storage requirements of MCL 750.243d are met, issuance of a permit by defendant is mandatory, and thus a ministerial act. We disagree.

Traditionally, the issuance of a writ of mandamus is proper when the plaintiff has a clear legal right to the discharge of a duty the defendant has a clear legal duty to perform, and no other adequate remedy is available. *Toan v McGinn*, 271 Mich 28, 33; 260 NW 108 (1935); *People v Wayne County Judge*, 1 Mich 359 (1850); *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001). Michigan has identified two circumstances in which a clear legal duty to act exists such that mandamus will lie to compel performance when the duty cannot be enforced by any other means: (1) when the act sought to be compelled is clearly ministerial, involving no exercise of discretion or judgment, *Lickfeldt, supra* at 302; and (2) when the defendant is charged with the duty to perform an act which requires the exercise of discretion, *Teasel, supra* at 410. In the latter situation, mandamus will not lie to compel the exercise of discretion in a particular manner. *Teasel, supra* at 410.

MCL 750.243b clearly and unambiguously places discretion in the hands of Lansing officials regarding the issuance of permits to sell wholesale fireworks. As the Court in *American Eagle I* correctly concluded, “Contrary to plaintiff’s argument, the use of the word ‘may’ indicates a discretionary act, not a mandatory act.” *American Eagle I, supra* at 1. In support of its assertion that “may” signals a mandatory act, plaintiff relies on *Moore v Parole Bd*, 379 Mich 624; 154 NW2d 437 (1967). However, the reasoning from *Moore* cited by plaintiff was only able to garner the support of two justices of our highest Court. Further, “[t]he mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements.” *Detroit v Qualls*, 434 Mich 340, 362; 454

³ Section 243b(2) reads:

The council or commission of a city or village or the township board of a township, upon application in writing, may grant a permit, on forms provided by the director of the department of state police, to a resident wholesale dealer or jobber to have in his possession within the political jurisdiction, fireworks otherwise prohibited by section 243a, for sale only to holders of permits as provided in this section. A permit granted under this subsection is not transferable, nor shall a permit be issued to a person under the age of 18 years.

NW2d 374 (1990), quoting 56 Am Jur 2d, Municipal Corporations, § 374, p 408. Therefore, plaintiff is not entitled to mandamus relief.

III

We also find meritless plaintiff’s argument that it was denied substantive due process by the lack of adequate standards to guide the permit process. The first problem with plaintiff’s argument is that it incorrectly mingles the concepts of substantive due process and delegation of legislative authority. In support of its argument, plaintiff cites *Osius v St Clair Shores*, 344 Mich 693; 75 NW2d 25 (1956). The issue in *Osius* was whether a zoning ordinance contained adequate standards to guide a zoning board in making decisions regarding applications for building permits. *Id.* at 696-697. However, *Osius* was not decided on substantive due process grounds. Rather, the holding in *Osius* was based on the Court’s conclusion that the complete lack of adequate standards in the ordinance in issue constituted an improper delegation of legislative power to a nonlegislative body. *Id.* at 697-701.⁴

“The test to determine whether legislation enacted pursuant to the police power comports with [substantive] due process is whether the legislation bears a reasonable relation to a permissible legislative objective.” *Shavers v Kelly*, 402 Mich 554, 612; 267 NW2d 72 (1978). Accord *Goldblatt v Hempstead*, 369 US 590, 594-595; 82 S Ct 987; 8 L Ed 2d 130 (1962) (“To justify the state in . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.” [quoting *Lawton v Steele*, 152 US 133, 137; 14 S Ct 499; 38 L Ed 385 (1894)]).

Second, plaintiff has not identified the life, liberty, or property interest at stake. US Const, Am XIV; Const 1963, art I, § 17. Clearly, section 243b does not burden a fundamental personal right, nor can plaintiff legitimately claim to have an entitlement interest, regardless of its expectation, in a permit that has yet to be awarded. See *Board of Regents v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). Just as clearly, the regulation of the sale of fireworks is within the realm of the state’s police power. Plaintiff does not argue, nor do we believe a credible argument can be made, that section 243b does not bear a rationale relation to a permissible legislative objective. Thus, we conclude that the statute does not violate substantive due process.

To the extent that plaintiff is arguing that the statute fails under the theory of improper delegation, we conclude that the argument is without merit. Under the Michigan Constitution, Michigan cities are guaranteed the “power to adopt resolutions and ordinances relating to

⁴ We are aware that *Milford v People’s Hospital Authority*, 380 Mich 49, 59; 155 NW2d 835 (1968), stated that *Osius* was decided on substantive due process grounds. This characterization of *Osius* is dicta that we both disagree with, and are not bound to follow. We note that not only does *Osius* never specify that the ordinance in issue violated substantive due process, but the concept is never even raised as an argument or an alternative ground for the decision. See LeDuc, Michigan Administrative Law, § 5:08, p 16 (“Milford is the Rosetta Stone of confusion between the two due process concepts and of the further confusion of those two concepts with the concepts of separation of powers and delegation.”).

municipal concerns” Const 1963, art 6, § 22. The Home Rule Cities Act, MCL 117.1 *et seq.*, grants broad authority to defendant to enact ordinances for the health and safety of its residents. Further, pursuant to MCL 91.1, defendant possesses both the general “authority to enact all ordinances . . . deem[ed] necessary for the safety . . . of the city, and the general welfare of the inhabitants thereof . . . [.]” and the specific authority to “regulate the keeping, selling and using of . . . fireworks . . . and the exhibition of fireworks” The authority bestowed by MCL 750.243b(2) to permit the sale of fireworks otherwise prohibited by MCL 750.243a rests squarely within this comprehensive constitutional and statutory framework, and properly invests defendant with the authority to regulate uniquely municipal concerns, including the sale of fireworks.

Additionally, this is not a situation where a legislative body has delegated its responsibilities to an administrative body without providing adequate standards to guide the administrative body. *Osius, supra*. The Lansing City Council is a constitutionally and statutorily constituted legislative body. Const 1963, art 6, § 22; MCL 117.3(a) (providing that a city charter must provide for the election “of a body vested with legislative power”). The statutory scheme recognizes that the health and safety of the public will be best served by granting to local political bodies the authority to regulate this permit process. See *Qualls, supra* at 363. The fact that the Legislature has seen fit to proscribe how fireworks must be stored, MCL 750.243d, does not in any way limit defendant’s ability to regulate according to its own criteria, as long as the storage requirements of MCL 750.243d are respected. *Qualls, supra* at 363, n 42 (observing “that it is well established in Michigan that portions of a field not covered by state law are open to local regulation, and that where the nature of the regulated subject matter calls for regulations adopted to local conditions, supplementary local regulation will be upheld”).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Brian K. Zahra

/s/ Donald S. Owens