

STATE OF MICHIGAN
COURT OF APPEALS

NORTHERN AIR, INC., and KEM AVIATION,
L.L.C., a/k/a SPARTA AVIATION, INC., d/b/a
GRAND RAPIDS AIR CENTER and RAPID
AIR,

UNPUBLISHED
April 16, 2013

Plaintiffs-Counter Defendants-
Appellants,

v

JOSEPH A. TOMASELLI, GERALD R. FORD
INTERNATIONAL AIRPORT BOARD, and
KENT COUNTY DEPARTMENT OF
AERONAUTICS,

No. 310252
Kent Circuit Court
LC No. 12-002974-AW

Defendants-Counter Plaintiffs-
Appellees.

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's denial of their request for a writ of mandamus and the court's grant of declaratory judgment in favor of defendants. We affirm both the denial of the writ and the grant of declaratory judgment.

The two plaintiff companies are fixed base operators (FBOs) who provide ground services at the Grand Rapids Airport. A potential competitor to plaintiffs, Rothbury Executive Air (Executive Air), sought to construct a third fixed base operation at the airport. Executive Air applied to the defendant Airport Board for waivers, a variance, and a lease for airport property. The Board approved Executive Air's request for waivers and a variance at a special meeting in May 2011; the Board approved the Executive Air lease at a regular meeting in February 2012. Plaintiffs then filed this lawsuit against the Airport Board, alleging that the Board's votes on the Executive Air matters were procedurally improper. In their complaint, plaintiffs sought a mandamus to require the Board to tally the votes as denials of Executive Air's requests. Plaintiffs also sought a declaratory judgment that the votes cast in violation of the Board's Standing Rules were void. In response, defendants sought a declaratory judgment that the Board's votes on the Executive Air matters were valid and had full force and effect.

We first consider the trial court's decision on the writ of mandamus. Michigan case law establishes that a writ of mandamus is an extraordinary remedy. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 366-367; 820 NW2d 208 (2012). A plaintiff seeking a writ has the burden of establishing each of the four requisite mandamus factors. First, the plaintiff must demonstrate a clear legal right to the performance of the specific duty the plaintiff requests. *Id.* Second, the plaintiff must establish that the defendant has a clear legal duty to perform the requested act. *Id.* Third, the plaintiff must show that the requested act is ministerial; and fourth, the plaintiff must show that no other remedy exists that might achieve the same result. *Id.* We review de novo the first and second factors, as questions of law. *Id.* at 367. We review the trial court's ultimate decision on mandamus for abuse of discretion. *Id.*

We conclude that the trial court correctly denied the writ of mandamus on the ground that plaintiffs failed to fulfill their burden of establishing a clear legal right to enforcement of the Board's procedural rules. The right plaintiffs sought to enforce was based on the Board's Standing Rules. Specifically, plaintiffs argued the Board's Standing Rules created an enforceable right to nullify Chair Tomaselli's votes on the Executive Air matters. We disagree.

Procedural rules that lack the force of law do not create a clear legal right enforceable in a mandamus action. *Hanlin v Saugatuck Twp*, ___ Mich App ___; ___ NW2d ___; 2013 Westlaw 163729 (Docket No. 300415; January 15, 2013). In *Hanlin*, this Court determined that the plaintiffs had failed to establish a clear legal right to enforcement of the instructions in a state-issued manual for a Board of Canvassers:

“In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory.” *Danse Corp v Madison Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002). Plaintiffs have presented this Court with no argument or evidence to conclude that the Manual for Boards of County Canvassers has, in fact, been promulgated as an administrative rule under the Administrative Procedures Act. Plaintiffs may not rely on an agency's manual which has not been given the force of law to establish clear legal rights and duties for a mandamus claim. [*Id.*, slip op p 8.]

The *Hanlin* reasoning applies to the Standing Rules at issue in this case. Nothing in the Standing Rules indicates that the rules were adopted to be enforceable as administrative procedures, or that the rules are enforceable by persons other than Board members. To the contrary, the rules authorize the Board Chair and the Board members to decide procedural matters. Standing Rule § 2.1 states, “It shall be the duty of the Chair to preside at all meetings of the Board, to preserve order and to decide all questions of order subject to appeal to the Board.” Further, Standing Rule § 7.7 authorizes members to appeal decisions of the Chair. Standing Rule § 7.13 requires that “Robert's Rules of Order shall govern in all questions of procedure which are not provided for by the rules of this Board.” Accordingly, if there were a dispute about voting methods, the Board Chair would make an initial determination of the proper procedure, subject to review by the remaining Board members. Absent some indication that persons other than Board members have the right or privilege to require the Board to comply with its internal rules, plaintiffs cannot rely on the Standing Rules as the source of an enforceable legal right for

purposes of their mandamus action. Plaintiffs failed to establish the requisite first factor for a mandamus action, and the trial court properly denied the mandamus.

We next consider the trial court's declaratory judgment decision. Declaratory judgments are governed by MCR 2.605. A trial court may issue a declaratory judgment when there is an actual controversy before the court and when a binding adjudication of the parties' legal rights will guide a plaintiff's future conduct. MCR 2.605(a); *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). We review de novo the trial court's grant of declaratory judgment. *Toll Northville, Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008).

Defendants first argue that plaintiffs' challenge to the declaratory judgment is moot on appeal. We disagree. An issue is moot if a judicial decision on that issue would have no practical legal effect. See *People v Richmond*, 486 Mich 29, 37; 782 NW2d 187, clarified 486 Mich 1041; 783 NW2d 703 (2010). This Court will not decide a moot issue, unless "the issue is one of public significance that is likely to recur, yet evade judicial review." *Id.* (citation omitted).

In this case, our decision on the declaratory judgment will have a practical legal effect. Specifically, an affirmance of the declaratory judgment may preclude relitigation of certain issues as between these parties and may bar subsequent claims that could have been resolved in the declaratory judgment action. See generally *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006) (collateral estoppel); see also *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006) (res judicata). As a result, the issue is not moot on appeal.

Defendants next argue that the trial court correctly granted the declaratory judgment. We agree. The declaratory judgment issue required the trial court to apply the Board's Standing Rule § 7.3., which reads:

Section 7.3 – Majority Vote.

All questions that shall arise at meetings of the Board shall be determined by the votes of a majority of the members present so long as a quorum is present. The Chair may vote only to break or create a tie vote or to decide a question requiring a two-thirds (2/3) majority vote.

The issue in this case arose because the initial vote on the Executive Air measure at the May 2011 meeting—where all six Board members were present—was three members in favor and two members against. The Chair then voted in favor, making the tally four in favor, two against. Correspondingly, at the February 2012 meeting—where four Board members were present—the vote was two in favor, one against. When the Chair voted in favor of the measure, the tally was three in favor, one against.

The validity of the Board's voting decision turns on the meaning of the phrase in § 7.3: "a majority of the members present." Plaintiffs argue that the phrase means: a majority of all members present, *including the Chair*. According to plaintiffs, four votes were required to obtain a majority at the May 2011 meeting, because all six Board members were present at the meeting, including the Chair. Similarly, according to plaintiffs, three votes were required to

obtain a majority at the February 2012 meeting, because four members were present, including the Chair. Plaintiffs maintain that the Chair was not entitled to vote on the measures, because there was no tie, and the measure did not require a two-thirds vote. Plaintiffs conclude that the Chair's votes should not have been counted in the tally, and that the measures should have been rejected for failure to obtain a majority.

Defendants, in contrast, contend that the rule's phrase means: a majority of the members present *and eligible to vote*, which does not include the Chair except to create or break a tie. According to defendants, three votes were sufficient to obtain a majority at the May 2011 meeting, because there were five Board members present at the meeting who were eligible to vote on the Executive Air question. Similarly, defendants contend that two votes were sufficient to obtain a majority at the February 2012 meeting, because there were three Board members present who were eligible to vote. Defendants conclude that the Chair's votes on the Executive Air measures were superfluous, and that the measures were adopted with or without the Chair's vote.

The trial court's decision validating the Board's votes was correct, for two reasons. First, as we previously noted, the Standing Rules authorize the Chair to "decide all questions of order subject to appeal to the Board." The question of what constitutes a majority can be considered a question of order. See Robert, Evans, Honemann & Balch, *Robert's Rules of Order Newly Revised In Brief* (Cambridge, Mass: Da Capo Press, 2004) ch 11, pp 90-91 (e.g., a challenge to the procedure for authorizing an expenditure is a point of order). In this case, the Chair apparently determined that the Executive Air measures at the May 2011 and February 2012 were carried by a majority vote of the members present, including the Chair. No Board member raised a question of order concerning the votes, nor did any Board member seek an appeal from the Chair's decision concerning the votes, despite the availability of an appeal under Standing Rule § 7.7. Given that the Chair approved the voting tally, and that no Board Member challenged the tally, the trial court properly determined that the voting tally was valid.

Second, Standing Rule § 7.13 states that Robert's Rules of Order governs "all questions of procedure which are not provided for by the rules of this Board." The Board's Standing Rules do not expressly define the meaning of the term "majority vote." Absent a definition in the Standing Rules, the meaning of the term is governed by Robert's Rules.

Chapter 13 of Robert's Rules addresses the term as follows:

Majority Vote—the Basic Requirement

[T]he basic requirement for approval of an action or choice by a deliberative assembly, except where a rule provides otherwise, is a *majority vote*. The word *majority* means "more than half"; and when the term *majority vote* is used without qualification—as in the case of the basic requirement—it means *more than half of the votes cast by persons entitled to vote*, excluding blanks or abstentions, at a regular or properly called meeting. [Robert's Rules of Order Newly Revised (11th ed), ch 13, p 400. (last emphasis added).]

Similarly, the Board's Standing Rule § 7.3 is entitled "Majority Vote." According to Robert's Rules, a majority vote means "more than half of the votes cast by persons entitled to vote." For the votes at issue here, the Board's Standing Rule § 7.3 declared that the Chair was not entitled to vote because his vote was not needed to create or break a tie. Consequently, the number of persons entitled to cast votes at the May 2011 meeting was five; the number of persons entitled to cast votes at the February 2012 meeting was three. In turn, three of the five eligible voting members constituted a majority vote at the May 2011 meeting, and two of the three eligible voting members constituted a majority vote at the February 2012 meeting. The Executive Air measure received the requisite three approval votes at the May 2011 meeting, even without the Chair's vote. Similarly, the Executive Air measure received the requisite two approval votes at the February 2012 meeting. Accordingly, the trial court's declaratory judgment validating the vote was proper.

Plaintiffs argue that, at one or both meetings, the Board's counsel admitted that the majority tally must include the Chair. Defendants acknowledge that the Board's counsel indicated at the meetings that all members present must be counted to determine a majority. However, as defendants correctly point out, nothing in the Standing Rules or in Robert's Rules authorized the Board's counsel to interpret the rules or to decide questions of order. The Standing Rules require the Chair to decide questions of order, subject to appeal to the Board. Counsel's comments cannot control the interpretation of the Standing Rules for purposes of declaratory judgment.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro