

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

In Re:

The Recall Petition of NOEL FLOHE, Elmwood Township Supervisor; the Recall Petition of CONNIE PRESTON, Elmwood Township Clerk; the Recall Petition of DEBORAH STREET, Elmwood Township Treasurer; the Recall Petition of JAMES O'ROURKE, Elmwood Township Trustee; the Recall Petition of JOHN STANEK, Elmwood Township Trustee; and the Recall Petition of JOHN GALLAGHER, Elmwood Township Trustee.

File No. 03-6320-AA
HON. PHILIP E. RODGERS, JR.

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DECISION ON APPEAL

The Intervener and others seek to recall certain elected officials who serve Elmwood Township in Leelanau County. The proposed recall petitions were first reviewed on May 27, 2003 by the Leelanau County Board of Election Commissioners ("Election Commission"). At this initial meeting, the Election Commission determined that the recall petitions did not clearly state each reason for the recall as required by Michigan Election Law, MCL 168.952. The petitions were redrafted, and on June 16, 2003, the Election Commission met to review the proposed language of newly submitted recall petitions¹ to determine "whether each reason for the recall stated in the petition is of sufficient clarity to enable the officer whose recall is sought and the electors to identify

¹The resubmitted petitions involved the same elected officials and the same recall proponents.

the course of conduct that is the basis for the recall." MCL 168.952(3). Upon motion, duly made and seconded, the Election Commission unanimously voted to accept the recall petitions as clear. This is an appeal from that decision of the Election Commission. The parties have filed briefs and have agreed to waive oral argument.

APPLICABLE STATUTORY LAW

Recalls of elected officials in Michigan are governed by MCL § 168.951, *et seq.* Subsection 952(1) sets forth the requirements for a recall petition. It reads, in relevant part, as follows:

A petition for the recall of an officer shall meet all of the following requirements:

* * *

(c) State clearly each reason for the recall. Each reason for the recall shall be based upon the officer's conduct during his or her current term of office. The reason for the recall may be typewritten. MCL 168.952(1)(c).

952(3) provides:

The board of county election commissioners, not less than 10 days or more than 20 days after submission to it of a petition for the recall of an officer, shall meet and shall determine whether each reason for the recall stated in the petition is of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall. Failure of the board of county election commissioners to comply with this subsection shall constitute a determination that each reason for the recall stated in the petition is of sufficient clarity to enable the officer whose recall is being sought and the electors to identify the course of conduct that is the basis for the recall.

To paraphrase subsection 952(3), the election commission must promptly determine "whether each reason for the recall stated in the petition is of sufficient clarity." If the election commission fails to make such a determination, each reason is deemed to be of sufficient clarity.

I.

WHETHER THE ELECTION COMMISSION FOLLOWED PROPER PROCEDURES WHEN IT DECIDED THAT THE RECALL PETITIONS ARE SUFFICIENTLY CLEAR

MCL § 168.952(1)(c) requires that a petition for the recall of an officer "[s]tate clearly *each* reason for the recall." MCL 168.952(3) requires the board of county election commissioners to promptly meet and determine "whether each reason for the recall stated in the petition is of sufficient clarity. . ."

The Appellants contend that the Election Commission did not follow proper procedures in that it did not consider ". . . each reason for the recall stated in the petition. . ." to determine its clarity. And, the Appellants contend that the Commission erroneously considered all of the petitions together, rather than individually for each official. The Appellants rely upon the fact that the statutory provision requires the Election Commission to determine whether "*each* reason for the recall stated in the petition is of sufficient clarity" and the fact that there is no evidence in the minutes of the June 16, 2003 meeting that the Commissioners discussed "*each* reason for the recall stated in the petition" separately and separately as to each official sought to be recalled. This is a matter of statutory interpretation for this Court.

"[T]he primary rule of statutory construction is to determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished." *Gross v General Motors Corp*, 448 Mich 147, 158-159; 528 NW2d 707 (1995). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted. *Mino v McCarthy*, 209 Mich App 302, 304; 530 NW2d 779 (1995). If judicial interpretation is necessary, the Legislature's intent must be gathered from the language used, and the language must be given its ordinary meaning. *Id* at 304-305. In determining legislative intent, statutory language is given the reasonable construction that best accomplishes the purpose of the statute. *Id* at 305.

There is conflicting case law related to this issue. On the one hand, in *Molitor, supra* at 349, the Court said: "In determining the validity of the petition, we review the statements as a whole. That is, if any one allegation contained in the petition is sufficiently clear, then the petition must be upheld," citing *Amberg v Welsh*, 325 Mich 285, 293-294; 38 NW2d 304 (1949). See also, *Eaton v Baker* 334 Mich 521; 55 NW2d 77 (1952). On the other hand, in *Bonkowski v Macomb Co Election*

Comm, 185 Mich App 288, 292; 460 NW2d 308 (1990), the Court held that an invalid reason negates the validity of a petition. A plain reading of the statute leads this Court to conclude that the Election Commission must consider each reason stated in the petition and determine whether each reason is of sufficient clarity. Any reason that is not of sufficient clarity should be stricken from the petition.

The minutes of the Election Commission's June 16, 2003 meeting are admittedly devoid of any indication of whether the Election Commission considered each reason separately. However, while the Appellants mislead the Court by ignoring the history of this recall effort, procedural deficiencies have been predetermined by the Legislature to have no meaningful consequence on appeal.

The Election Commission first met on May 27, 2003 to consider whether each reason stated in the recall petitions involving these same officials and these same recall proponents was of sufficient clarity. At that meeting, the Election Commission determined that the reasons stated for the recall were not of sufficient clarity. The meeting on June 16, 2003 was to consider the recall petitions as redrafted in light of the Election Commission's May 27, 2003 decision. Procedural defects in either of these meetings are controlled by state law. Both the Intervener and Election Commission direct the Court's attention to the second sentence of MCL 168.952(3) which states as follows:

Failure of the board of county election commissioners to comply with this subsection shall constitute a determination that each reason for the recall stated in the petition is of sufficient clarity to enable the officer whose recall is being sought and the electors to identify the course of conduct that is the basis for the recall.

They contend that any procedural deficiency in the proceedings, by default, results in a finding of clarity as a matter of law. The Court agrees with this plain language reading of the statute. While the Legislature has established a clarity proceeding, it also has decreed the result of a failure to follow proper procedure. In other words, whether the Election Commission followed proper procedure is irrelevant and immaterial. The sole issue on appeal is whether the recall petitions are of sufficient clarity to enable the officer whose recall is sought and the Elmwood electors to identify the course of conduct that is the basis for the recall.

II.

WHETHER THE RECALL PETITIONS ARE OF SUFFICIENT CLARITY

The standard of review for clarity of recall petitions has been described as both "lenient," *Meyers v Patchkowski*, 216 Mich App 513, 517; 549 NW2d 602 (1996) and "very lenient." *In re Wayne Co Election Comm*, 150 Mich App 427, 438; 388 NW2d 707 (1986). "Thus, recall review by the courts should be very, very limited." *Mastin v Oakland Co Elections Comm*, 128 Mich App 789, 793; 341 NW2d 797 (1983). A meticulous and detailed statement of the charges against an officeholder is not required. See *Molitor v Miller*, 102 Mich App 344, 348; 301 NW2d 532 (1980), quoting *Eaton v Baker*, 334 Mich 521, 525-526; 55 NW2d 77 (1952). It is sufficient if an officeholder is apprised of the course of conduct in office that is the basis of the recall drive, so that a defense can be mounted regarding that conduct. *Molitor*, n 9, *supra* at 350; 301 NW2d 532. "Where the clarity of the reasons stated in the petition is a close question, doubt should be resolved in favor of the individual formulating the petition." *Id* at 351.

In *Molitor*, *supra* at 346, the Court found that allegations of "nonfeasance of office" and "failure to conduct township business for the good and welfare of all residents" were of insufficient clarity. However, the Court found allegations of "conducting secret meetings in violation of the open meetings act" and "failure to follow procedures set forth in the township officers manual" to be sufficiently clear. The Court upheld the recall petitions overall.

In *Mastin*, *supra* at 792, the Court found the following language to be sufficiently clear:

1. Failure to faithfully represent the people of the 8th Senatorial District by voting on March 23, 1983, to report a tax increase bill (HB 4092) out of committee with a recommendation for passage.

2. Failure to faithfully represent the people of the 8th Senatorial District by voting 'yes' on March 24, 1983, to a bill increasing the State income tax (HB 4092).

In *Schmidt v Genesee Co Clerk*, 127 Mich App 694, 698; 339 NW2d 526 (1983), the Court found that, taken as a whole, the following language met the clarity standards required by the statute:

Ex-HIBITED SPEND AND TAX--TAX and SPEND mentality. At a time when governmental units are cutting back on budget expenditures and laying off people the above elected official presented the 1982 budget which was a increase of \$400,000.00 over the 1981 budget (December 7, 1981).-- INCREASED the budget again by another additional \$185,516.00 on August 2, 1982, which can only result in future higher taxes.--Voted, at a special, not regular meeting, to INCREASE operational taxes by one mill without a vote of the people.--INCREASED sewer and water rates above the recommendation of the County.--Voted to spend \$63,000.00

to RE ASSESS ALL TOWNSHIP PROPERTIES.--Acted to violate the provisions of the Charter Township Act requiring the budget to be presented for public inspection before adoption. -- Allowed Township Funds to be invested in UN AUTHORIZED ACCOUNT and not available for public inspection. -- Failed to follow campaign promise to give open, clean, honest, and efficient government, and at all times be available to serve and to administer the Township efficiently and remain within a budget.

Most recently, in *Dimas v Macomb County Election Commission*, 248 Mich App 624; 639 NW2d 850 (2002), the Court found the following language met the clarity standard:

. . .during a Warren City Council meeting on December 21, 1999, [council members George L. Dimas, Charles T. Busse, and Ann E. Klein] voted to raise Warren's potable water rates by 10.97% to its consumers.

In contrast to these cases, the Court in *Noel v Oakland Co Clerk*, 92 Mich App 181, 183; 284 NW2d 761 (1979) was presented with language determined to be insufficient: "Incompetence in administering his/her duties as an elected official and in a manner not conducive to the better interests of the residents of the City of South Lyon."

Each petition in the instant case contains an identical recitation of reasons for seeking the recall of a particular township official, to-wit:

Contempt of Court: Acted contrary to court orders in approving the Lincoln Meadows project, resulting in a finding of contempt of court (13th circuit Court, 12/02/2002). **Contempt for the law:** Violated the Open Meeting Act (PA 267.15.267.2) by voting on 11/12/02 to approve incomplete minutes of the special meeting of 9/27/02, thereby shielding important spending decisions from public scrutiny. On 2/10/03, illegally altered the minutes for the special meeting of 9/27/02. Has never approved closed session meeting minutes as required by law. **Contempt for the taxpayer:** Between 2001 and 2003, authorized over \$40,000 in tax dollars for legal fees to assist the developer of the Lincoln Meadows project, with whom Board member John Gallagher was found on 6/6/01 by the Circuit Court to have inappropriate business ties; on 5/12/03, voted to pay developer attorney Ed Ropy \$2,875 for an unauthorized 4-page draft of a tax abatement ordinance that is available for free through many governmental agencies. **Contempt for the township's future:** On 12/9/02, voted for a new zoning ordinance that will open 8300 acres of township agricultural land to residential development, which will result in increased taxes and diminished quality of life for its residents.

The petitions allege at least seven actions by the Township Board members: (1) violating the order of the Court related to Lincoln Meadows; (2) approving meeting minutes which kept certain Board decisions secret in violation of the Open Meetings Act; (3) altering other minutes; (4) failing to keep or approve minutes of closed session meetings in violation of the Open Meetings Act; (5)

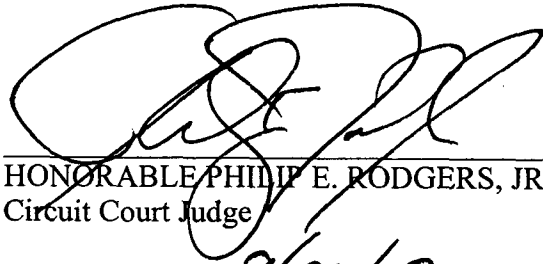
spending over \$40,000 over three years to defend the lawsuits over Lincoln Meadows; (6) paying an attorney \$2,875 for an ordinance that was not authorized by the Board and which was readily available for free from other sources; and (7) approving a new zoning ordinance.

Unlike the general language of two of the reason for the recall in *Molitor* and the general language of the reasons for the recall that was rejected by the *Noel* Court, the language at issue here refers to specific actions, in most cases by date. See *Dimas, supra*. Thus, the petitions are "of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall." MCL 168.952(3).

CONCLUSION

Regardless of whether the Election Commission followed proper procedures in determining that the recall petitions comply with the statute, the reasons for the recall stated in the recall petitions are of sufficient clarity. The decision of the Election Commission is affirmed.

This Decision resolves the last pending claim and closes this case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

9/24/03

State of Michigan



Thirteenth Judicial Circuit

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From: Hon. Philip E. Rodgers, Jr.
13th Circuit Court

Phone: 231/922-4701

Date: September 25, 2003

Subject: *In re: The Recall Petition of Noel Flohe, et al.*
Leelanau County Circuit Court File No. 03-6320-AA

Pages: Nine including cover page

State of Michigan



Thirteenth Judicial Circuit

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September 25, 2003

Transmitted via Facsimile

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Re: *In re: The Recall Petition of Noel Flohe, et al.*
Leelanau County Circuit Court File No. 03-6320-AA

Dear Counsel:

Attached is a copy of the Court's written Decision on Appeal in the above-referenced case. Since the Court has issued this written decision, the hearing that was scheduled for Monday, September 29, 2003 has been canceled.

Sincerely,

A handwritten signature in black ink, appearing to read "Barbara D. Budros".

Barbara D. Budros
Judicial Staff Attorney to
Hon. Philip E. Rodgers, Jr.

BDB:JAA
Attachment