

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

KENNETH J. SPEICHER, an Individual

Supreme Court No. 148617

Plaintiff-Appellee,

Court of Appeals No. 306684

V

Lower Court No. 11-600857-CZ

COLUMBIA TOWNSHIP BOARD OF
TRUSTEES and COLUMBIA TOWNSHIP
PLANNING COMMISSION,

Defendants-Appellants. /

148617
DEAF'S SIDE

**SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF THE QUESTION PRESENTED

Must a plaintiff obtain injunctive relief – not merely declaratory relief – in order to recover court costs and actual attorney fees under MCL 15.271(4)?

Defendants-Appellants Columbia Township Board of Trustees and Columbia Township Planning Commission answer “yes.”

Plaintiff-Appellee Kenneth J. Speicher presumably answers “no.”

The Michigan Court of Appeals presumably answers “yes.” See *Speicher v Columbia Township Board of Trustees and Columbia Township Planning Commission* (On Reconsideration), No. 306684 (Mich App 12/19/13).

The trial court presumably answers “yes.”

STATEMENT OF FACTS

- A. The governing structure of Columbia Township, which includes both a Township Board of Trustees and a Township Planning Commission, established regular meetings for the Board and Commission.**

The Board and the Commission are two different public bodies in Columbia Township. Speicher has named both of them as parties herein. The Board and the Commission are comprised of separate individuals. The Township Board consists of Dale Bradford, Mary Burgett, Danielle Nuismer, George Harrington, and Rosemary Hurley. The Planning Commission is made up of Jack Bowen, Thomas Fry, Leroy Abernathy, Bob Seamon, and Rosemary Hurley. In addition, each of these bodies has its own meeting times and dates as well as different business to conduct within the Township.

At its regular meeting of March 16, 2010, the Board voted unanimously on resolution No. 2010-08. (Exhibit A¹, Complaint, ¶5). That resolution fixed the regular meetings of the Board and of the Commission for the year 2010-2011. (*Id.*). Those included Commission meetings scheduled for January 17, 2011; February 14, 2011; and March 14, 2011. (Exhibit A, Complaint, ¶6).

¹ Alphabetical exhibit references refer to exhibits filed with Defendants-Appellants' Application for Leave to Appeal. Numerical exhibit references refer to exhibits filed with this Supplemental Brief.

B. The video of the Commission meeting of October 18, 2010 shows the events surrounding the Commission's decision to change Commission Meetings from a monthly to a quarterly basis.

On October 18, 2010, the Commission at its regular meeting recommended to the Board that, beginning in January of 2011, the Planning Commission meet on a quarterly basis. (Exhibit A, Complaint, ¶18). The affidavits of Bowen, Abernathy, Fry, and Hurley establish that the decision by the Planning Commission to change from monthly to quarterly meetings was made by the Planning Commission at its October 18, 2010 meeting. A review of the video of that meeting confirms that.²

Jack Bowen attended the Planning Commission meeting on October 18, 2010. (Bowen aff, ¶2). He also reviewed the video of that meeting. (Bowen aff, ¶3). The video showed that, during the course of the meeting, Bowen made a motion that the Planning Commission change from monthly meetings to quarterly meetings. (Bowen

² The video of the October 18, 2010 Planning Commission meeting was attached as Exhibit B to the brief in support of summary disposition along with the affidavits of Planning Commission Members Bowen, Fry, Abernathy, and Hurley. [Exhibits C, D, E, and F, respectively]. The video reveals that the public was allowed extraordinary leeway to address the Commission on a wide range of issues even if not germane to the business being conducted by the Commission. This was clearly evidenced at the point in the video at which the Commission began to discuss revision of its scheduled meetings. Commissioner Jack Bowen moved that the meetings be changed from a monthly to a quarterly basis and that the Commission members be paid the same amount per meeting. The video shows nearly 20 minutes of discussion by members of the public on issues unrelated to the motion which had not yet even been seconded. It was not until the collateral topics were raised and acted upon by the Board that Commissioners Hurley, Abernathy, Fry and Bowen took up the change from monthly to quarterly meetings and the issue of the amount of pay per meeting.

aff, ¶4).³ There was also a discussion as to whether the same pay per meeting would be in effect and, in his motion, Bowen proposed that the same pay apply for each meeting. (Bowen aff, ¶4). Bowen recalled that, while his motion was still on the table and prior to the Planning Commission approval of the motion, there was much discussion by the Planning Commission on a variety of topics unrelated to the motion. (Bowen aff, ¶5).

Bowen prepared the minutes of the October 18, 2010 meeting. Those reflected the motion that was made, to wit: that the meetings of the Planning Commission be moved from monthly to quarterly and that the Planning Commission recommend that the same pay apply per meeting. (Bowen aff, ¶6). Bowen confirmed that the Planning Commission never again during the meeting addressed the frequency of the Planning Commission meetings but just voted on the topic. (Bowen aff, ¶7). Bowen was also of the understanding that the Township Board did not vote on the frequency of the meetings because the issue was not presented to the Board and inasmuch as the Planning Commission had decided that its meetings were to be held on a quarterly basis. (Bowen aff, ¶8).

³ Consistently, the minutes of the October 18, 2010 Planning Commission recite as follows:

Motion by Bowen. Sec. by Abernathy to recommend to the Board that the Planning Commission have quarterly meetings starting January 17, 2011, with same pay scale per meeting that is now in place . . .

Planning Commission member Thomas Fry proffered a similar affidavit. There, Fry affirmed that the Planning Commission voted to have quarterly meetings. (Fry aff, ¶6). The Township Board did not vote on the frequency of the meetings issue because the question was not presented to the Board, the Planning Commission having considered it and decided on quarterly meetings. (Fry aff, ¶7).

C. The Township Clerk consulted with the Township Attorney and acted upon his advice.

The day after the October 18, 2010 meeting, Township Clerk Mary Burgett contacted Township Attorney Brian Knotek. Burgett advised Knotek that the Commission had voted to hold four meetings a year. She inquired whether the Township Board was required to approve the change or whether it was left to the Commission to simply change the schedule from a monthly to a quarterly basis. Attorney Knotek advised that four meetings per year were appropriate under MCL 125.382. Ms. Burgett also verified with Attorney Knotek that, as long as the Commission stayed within the amounts approved by the Board, the pay per meeting was appropriate. (Burgett aff, ¶3) [Exhibit G]. Based upon the advice that Mary Burgett received from Attorney Knotek, the pay recommendation, as moved by the Planning Commission, was not submitted to the Township Board for consideration. (Burgett aff, ¶4). Beyond that, Mary Burgett averred that, because the Planning Commission meeting dates would be changed for the quarterly basis starting in 2011, she contacted the *South Haven Tribune* to publish the new meeting schedule for the

Planning Commission meetings. (*Id.*). She had contact with the *South Haven Tribune* by way of an e-mail. In order to provide further notice to the public of the meetings scheduled for the Planning Commission, Clerk Burgett posted a revised schedule on the window adjacent to the entrance door of the Township Hall. She "whited out" the dates for meetings in February and March of 2011. (Burgett aff, ¶6).⁴

Speicher did not appear for the Commission's January 17, 2011 meeting. No meetings of the Columbia Township Planning Commission were held on February 14, 2011 or on March 14, 2011. Speicher insists that he wanted to raise numerous issues with the Planning Commission at those meetings. (Speicher aff, ¶14). He claims to have appeared for the meetings. (Speicher aff, ¶15). No member of the Planning Commission or the Zoning Court of Appeals or the Zoning Administrator showed up on either February 14, 2011 or March 14, 2011. (Speicher aff, ¶16). Speicher had a list of approximately 150 concerns and comments about the Township's new proposed zoning ordinance. (Pltf's supplemental aff, ¶3).⁵

⁴ Defendants cannot affirmatively state when Mary Burgett posted the newly revised schedule of Commission meeting dates after whiting out the February 14, 2011 and March 14, 2011 dates. However, there is no question that Mary Burgett did post the notice in a visible place in the window adjacent to the entrance door of the Township Hall. She also had the new schedule of meeting dates published in the *South Haven Tribune*.

⁵ For example, Speicher claimed that his property in Columbia Township had been adversely affected by the actions of the Dutch Mill Tavern, a business in close proximity to his property. In particular, Speicher charged that the Dutch Mill Tavern closed off one of its access points to the Tavern parking lot and that resulted in an extraordinary

D. The circuit court denied Speicher's request for various forms of relief based upon an alleged violation of the Open Meetings Act.

Speicher commenced this action with the filing of a complaint on April 11, 2011.⁶

Speicher based his request for various forms of relief upon his contention that the decision of the Planning Commission to hold its meetings on a quarterly, instead of a monthly, basis was made at a meeting that was not open to the public. Speicher also insisted that an Open Meetings Act violation occurred when notice of the change of the scheduled meeting dates of the Planning Commission was not timely posted. To the contrary, defendants urged that no Open Meetings Act violation occurred relative to the decision to change the schedule of the Planning Commission meetings from a monthly to a quarterly basis.

Arguing that the Township Board never acted on the recommendation of the Township Commission and that no notice was published after the October 18, 2010

increase in traffic on the fire lane which was his only means of ingress and egress to the property. (Exhibit A, Complaint, ¶26).

⁶ This instant action is but one of many that Speicher has filed related to the Open Meetings Act. See *Speicher v Township of Columbia, et al* (MCOA 298016; Lower Court No 09-58193-CZ-B); *Speicher v Columbia Township Board of Trustees* (MSC No. 148999; MCOA 313158; Lower Court No. 11-60562-CZ); *Speicher v Columbia Township* (MSC No. 148617; MCOA No. 306684; Lower Court No. 11-600857-CZ); *Speicher v Columbia Twp. Board of Election Comm'r* (MSC No. 146583; MCOA No. 307368; Lower Court No. 10-60345-CZ); *Speicher v Columbia Twp. Board of Election Comm'r, et al.* (MCOA No. 312209; Lower Court No. 12-61702-CZ); *Speicher v Columbia Township* (Lower Court No. 13-63-481-CZ). These claims are largely based on technical violations, and seek declaratory judgment followed by requests for "actual" attorney fees.

meeting notifying the public of a change in schedule for the Commission's regular meetings, Speicher moved for summary disposition pursuant to MCR 2.116(C)(10). Speicher's position was based on the unsupported supposition that the Open Meetings Act was violated when at some unspecified date and time, a secret meeting was held at which it was decided that the Planning Commission meetings would be held on a quarterly instead of a monthly basis.

Defendants filed a brief in opposition to Speicher's motion for summary disposition along with a cross motion for summary disposition pursuant to MCR 2.116(I)(2). There, defendants took the position that, at all times, the Board had no involvement in the action giving rise to Speicher's complaint and that, even if the notice of a change of meeting dates was not posted within three days after the decision made by the Planning Commission, efforts to alert the public to the change in the meeting schedule rendered Speicher's complaint a "technical violation" for which no relief was afforded under the Open Meetings Act. In submitting that the uncontroverted evidence demonstrated that the decision to change the meeting schedule of the Planning Commission was made by the Planning Commission itself, at the October 18, 2010 meeting, defendants relied upon the video of that meeting as well as affidavits from Planning Commission members. Defendants also described as "clear and uncontradicted" evidence that the notice of a change in the schedule of Planning Commission meetings was, in fact, posted on the window at the Township Hall as well

as published in the *South Haven Tribune*, and that this occurred well in advance of February, 2011 and March, 2011. In sum, defendants argued that, if any, only a technical violation of the Open Meetings Act had occurred.

Defendants later filed a supplemental brief in opposition to Speicher's motion for summary disposition. The supplemental filing was predicated upon new deposition testimony. Specifically, defendants contended that the testimony of Mr. Speicher and Dixie Kovachs, as well as the documentary evidence received from them, conclusively established that they had every opportunity to address their concerns before the Board of Trustees, the Planning Commission, and the Township Zoning Board of Appeals so that none of the purposes underlying the Open Meetings Act had been implicated in this lawsuit.

Speicher replied to and opposed defendants' cross motion for summary disposition. The circuit court entertained oral arguments on August 29, 2011. During the course of those, the circuit court observed that the dispute had nothing to do with making decisions at open meetings, but rather related only to the issue of when public bodies were going to meet. (Exhibit C, Tr 8/29/11, p 9). Accordingly, the circuit court directed Speicher to advise the court as to how this affected Speicher inasmuch as the court had been "very liberal" with Speicher's position and that Speicher's contentions were getting more and more technical as exemplified by this case where no meeting was held and Speicher was not denied access to a meeting. (*Id.*).

In denying Speicher's motion for summary relief, the circuit court stated that it did not find the situation violated the Open Meetings Act. Rather, the circuit court opined that the whole matter was "technical" in nature and that the Township acted in good faith to post the necessary notices. The fact that the Township officials may have decided that they had to have fewer meetings was not actionable at least on the facts presented to the circuit court. Therefore, the circuit court denied Speicher's motion. (Exhibit C, Tr 8/29/11, p 20).

On September 9, 2011, the circuit court signed an order setting forth its rulings. It entered an amended order denying plaintiff's motion for summary disposition and granting defendants summary disposition and dismissing plaintiff's complaint on September 23, 2011. Thereafter, Speicher timely filed a motion for reconsideration.

In an opinion and order regarding plaintiffs' motion for reconsideration of the Court's amended order denying plaintiff's motion for summary disposition and granting defendants summary disposition and dismissing plaintiff's complaint entered on September 23, 2011, the circuit court rejected Speicher's request for a rehearing. In denying Speicher's motion, the circuit court reasoned as follows:

Plaintiff's complaint concerns the elimination of two planning commission meetings that may not have been done in strict compliance with the Open Meetings Act. Plaintiff complains that he wished to address the planning commission regarding whether the zoning administrator had the power to enforce the zoning ordinances. While the amendments to the planning commission meeting schedule may have been in violation of the Open Meetings

Act, the Court is not inclined to overturn its earlier finding that the violations, if any, were technical in nature, and did not impair the rights of the public in having their governmental bodies make decisions in an open meeting. This is not a case where the planning commission met and took action in violation of the Open Meetings Act. The planning commission did not hold a meeting on a date they had previously scheduled but then eliminated. Plaintiff may have been inconvenienced in going to the Township Hall for a meeting that was not held, but the Court is of the opinion that the conduct of the defendants is not actionable under the Open Meetings Act. Plaintiff had the option of bringing his concerns to the planning commission at its next regularly scheduled meeting.

The Court is not convinced that it committed a palpable error justifying reversal of its earlier decision

- E. **The Michigan Court of Appeals issued an unpublished opinion, and then on reconsideration, a second opinion, which was published, and an order vacating one portion of its earlier order and remanding the case.**

The Michigan Court of appeals issued two opinions in this case. Its first opinion, issued on January 22, 2013 held that Mr. Speicher was entitled to summary disposition in his favor and declaratory relief on the basis that the Columbia Township Board of Trustees and Columbia Township Planning Commission "did not post notice of this change [a change from holding monthly to quarterly meetings] on or before October 21, 2011, i.e., within 3 days of the October 18, 2011, meeting at which the Commission changed its regular meeting schedule." (Exhibit F, Opinion, p 1, January 22, 2013). But the Court specifically rejected Mr. Speicher's assertion that the schedule was changed at a meeting that was not open to the public.

The Court of Appeals also expressly approved the trial court's denial of Mr. Speicher's request for injunctive relief noting that the failure to timely post the new meeting schedule was a "technical violation of the Open Meetings Act," there was no evidence that the violation was done willfully, and no evidence that the public was harmed in any way by the technical violation. (*Id.* at p 2). The Court also specifically noted that Mr. Speicher's claim of injury was not based on the failure to timely post the meeting change, but from the change in the meeting schedule, and in any event, Mr. Speicher "did not suffer the injury he claim[ed] to have suffered, as it is undisputed that plaintiff had the same opportunity as every other citizen to address the Commission at the meetings it did hold, and plaintiff presented the issues he was concerned about to the Commission at the December 2010, January 2011, and the April 2011 meetings." (*Id.*). As a result, the Court of Appeals correctly concluded that "no injunctive relief was warranted."

Mr. Speicher sought reconsideration arguing that regardless of whether he requested or obtained injunctive relief, he was entitled to costs and attorney fees under the Act. He relied on a series of published decisions from the Court of Appeals, which held that costs and attorney fees are required to be awarded in any Open-Meetings-Act suit in which the plaintiff obtains relief for a violation of the Act, regardless of whether injunctive relief is awarded and regardless of whether proof of an injury is presented.

On reconsideration, the Court of Appeals issued an order vacating that "portion of this Court's opinion issued January 22, 2013 as to attorney fees". (Exhibit G, Order, December 19, 2013). The Court also issued a subsequent opinion explaining that it disagreed that Mr. Speicher was entitled to attorney fees under the facts of the case but that it was compelled to follow prior published opinion under MCR 7.215(J)(2). The Court called for the convening of a special panel to consider the issue. But the Court of Appeals has not convened a special panel. (Exhibit H, Order, 1/14/14).

F. Upon the Board of Trustees' and the Commission's application for leave to appeal, this Court has directed the parties to submit supplemental briefing to assist the Court in determining whether to grant the application.

The Board and the Commission filed a timely application for leave to appeal with this Court. On June 11, 2014, the Court issued an order directing the clerk to schedule oral argument on whether to grant the application or take other action. (Exhibit 1, Order 6/11/14). That order also called for the parties to submit supplemental briefs "addressing whether MCL 15.271(4) authorizes an award of attorney fees and costs to a plaintiff who obtains declaratory relief regarding claimed violations of the Open Meetings Act (MCL 15.261 *et seq.*), or whether the plaintiff must obtain injunctive relief as a necessary condition of recovering attorney fees and costs under MCL 15.271(4)." This Supplemental Brief is submitted in accordance with the Court's order.

STANDARD OF REVIEW

When interpreting a statute, a court's primary objective is to ascertain and to effectuate the intent of the legislature. To do so, a court begins with the language of the statute itself, *Lash v Traverse City*, 479 Mich 180; 735 NW2d 628 (2007). *Renny v Dept of Transportation*, 478 Mich 490; 734 NW2d 518 (2007), the Court taught noted that courts approach the task of statutory interpretation by seeking to give effect to the legislature's intent as expressed in the statutory language. Thus, the primary goal of statutory interpretation is to give effect to the intent of the legislature, *Brahm v Mayor of Detroit*, 478 Mich 589; 734 NW2d 514 (2007). This means that the paramount concern in statutory construction matters is identifying and effectuating the legislature's intent, *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006). The language of the statute is the best source for ascertaining its intent, *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012). Stated otherwise, when the statute is clear and unambiguous, judicial construction or interpretation is unwarranted, *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

ARGUMENT

A Plaintiff Must Obtain Injunctive Relief – Not Merely Declaratory Relief – In Order To Recover Attorney Fees And Costs Under MCL 15.271(4).

The important issue presented in this appeal is whether costs and attorney fees can be imposed under MCL 15.271(4) of the Open Meetings Act where a plaintiff is unsuccessful in obtaining injunctive relief and obtains declaratory relief only. MCL 15.271(4) limits a plaintiff's ability to recover "court costs and actual attorney fees" to situations in which a plaintiff commences an action for, and succeeds in obtaining, "injunctive relief":

- (1) If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act.
- (2) An action for injunctive relief against a local public body shall be commenced in the circuit court, and venue is proper in any county in which the public body serves. An action for an injunction against a state public body shall be commenced in the circuit court and venue is proper in any county in which the public body has its principal office, or in Ingham county. If a person commences an action for injunctive relief, that person shall not be required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order.
- (3) An action for mandamus against a public body under this act shall be commenced in the court of appeals.
- (4) If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the

person shall recover court costs and actual attorney fees for the action.

While the Court of Appeals in this case properly read the statutory language to disallow recovery of attorney fees when declaratory relief is obtained, *Speicher v Columbia Township Board of Trustees and Columbia Township Planning Commission (On Reconsideration)*, No 306684 (December 19, 2013) (Exhibit G), it was reluctantly compelled pursuant to MCR 7.215(J)(1) to follow prior erroneous decisions allowing recovery of attorney fees and court costs where any relief is granted. *Craig v Detroit Pub Schs Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005); *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78; 669 NW2d 862 (2003); *Morrison v City of East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000); *Manning v East Tawas*, 234 Mich App 244; 609 NW2d 574 (2000); and *Schmiedicke v Clare Sch Bd*, 228 Mich App 259; 577 NW2d 706 (1998). Such decisions ignore the distinction between injunctive and declaratory relief, are contrary to the plain and express language of the statute, and contravene the very purpose of the Open Meetings Act.

The correct rule, and the one the Court should adopt here, requires a plaintiff to succeed in obtaining injunctive relief before he or she may recover actual attorney fees and costs under MCL 15.271(4). This is not a novel interpretation of the statute. Several other intermediate appellate panels in addition to *Speicher* have also reached this conclusion. See *Leemreis v Sherman Twp*, 273 Mich App 691; 731 NW2d 787 (2007); *Felice*

v Cheboygan County Zoning Commission, 103 Mich App 742; 304 NW2d 1 (1981); *Saline Area Schools v Mullins*, 2007 WL 1263974, (No 272558, Mich Ct App May 1, 2007) (unpublished) (Exhibit I). Such is the only interpretation that properly acknowledges the legal distinction between injunctive and declaratory relief, follows the plain and express language of the statute, and comports with the Open Meetings Act's structure and purpose.

A. Declaratory relief is not the legal equivalent of injunctive relief; to the contrary, declaratory relief is a separate and distinct remedy which involves a lesser showing than injunctive relief, and can be issued when injunctions are inappropriate.

Prior decisions of the Court of Appeals have incorrectly treated declaratory relief as tantamount to injunctive relief for purposes of awarding attorney fees and costs under the Open Meetings Act. *Manning v East Tawas*, 234 Mich App at 253-54 ("declaratory relief under the OMA...is sufficient to entitle plaintiffs to an award of costs and attorney fees."); *Schmiedicke*, 228 Mich App at 267 ("[t]he legal remedy of declaratory relief is adequate" to award attorney fees under the statute); *Nicholas*, 239 Mich App at 535 ("[h]ere, the trial court declared that defendants violated the OMA. This constitutes declaratory relief, thus entitling plaintiffs to actual attorney fees and costs despite the fact that the trial court found it unnecessary to grant an injunction given defendants' decision to amend the notice provision after plaintiffs filed the present suit."). But injunctive and declaratory relief – only the former of which serves

as a basis for an award of attorney fees and costs under MCL 15.271(4) – are separate and distinct legal remedies and must be treated as such.

The legal dictionary definitions of “declaratory relief” and “injunctive relief” provide a proper starting point for our analysis. *People v Gregg*, 206 Mich App 208, 211-212; 520 NW2d 690 (1994) (noting that where a statute does not expressly define its terms, a court may consult dictionary definitions). “Declaratory relief” is defined as “[a] unilateral request to a court to determine the legal status or ownership of a thing.” Black’s Law Dictionary, p 1404 (Ninth Ed 2009). In a similar vein, a “declaratory judgment” is defined as “[a] binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.” (*Id.* at p 918 (Ninth Ed 2009)). In contrast, an injunction is a “court order commanding or preventing an action.” (*Id.* at p 855). “To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.” (*Id.*). These definitions make clear that the two remedies are separate and distinct.

Indeed, civil procedure separates injunctive relief and declaratory relief as two distinct forms of equitable relief. James Moore, 12 *Moore’s Federal Practice* § 57.07 (2000). Importantly, Michigan law does not even consider declaratory relief to be a claim, but rather a remedy that is equitable in nature. *Mettler Walloon, LLC v Melrose Tp*, 281 Mich App 184, 221; 761 NW2d 293 (2008) (noting the equitable nature of declaratory relief

and expressly rejecting that declaratory relief as an independent "claim"). Thus, it is wholly improper to view declaratory relief as the equivalent of injunctive relief under MCL 15.271, where that statutory provision provides for the recovery of costs and actual attorney fees when plaintiff succeeds in "[a]n *action* for injunctive relief..." MCL 15.271(2) (emphasis added). This is particularly true where declaratory judgments and injunctions are governed by separate court rules. See MCR 2.605 (governing "Delcaratory Judgments"); and MCR 3.310 (governing "injunctions").

Although they may lead to a similar result, declaratory relief involves a lesser showing than injunctive relief, and has long been referred to as "milder" than an injunction. *Rodriguez v Hayes*, 591 F3d 1105, 1119-1120 (9th Cir 2010), citing *Steffel v Thompson*, 415 US 452, 466-67; 94 S Ct 1209; 39 LEd2d 505 (1974). As the United States Supreme Court has said, "different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other." *Steffel, supra* at 469. Under Michigan law, a grant of declaratory relief is within the trial court's discretion and is not barred by the existence of another remedy. *Detroit Auto Inter-Insurance Exchange v Sanford*, 141 Mich App 820, 826; 369 NW2d 239 (1985). So long as an actual controversy exists and the court has subject matter over the underlying controversy, declaratory relief may issue. (*Id.*, citing GCR 1963, 521.1 and *Boyd v Nelson Credit Centers, Inc*, 132 Mich App 774, 778-79; 348 NW2d 25 (1984)). An injunction, on the other hand, "represents an extraordinary and drastic art of judicial power that

should be employed sparingly and only with full conviction of its urgent necessity.”

Senior Accountants, Analysts & Appraisers Ass’n v City of Detroit, 218 Mich App 263, 269; 553 NW2d 679 (1996). For this reason, the injunction has long been referred to as the “strong arm of equity.” *Reed v Burton*, 344 Mich 126, 132; 73 NW2d 333 (1955). A party seeking an injunction must traditionally satisfy three core elements: “(1) justice requires that the court grant the injunction; (2) a real and imminent danger of irreparable injury arises if an injunction is not issued; and (3) there exists no adequate remedy at law.”

Senior Accountants, supra, at 269, citing *Peninsula Sanitation, Inc v Manistique*, 208 Mich App 34, 43; 526 NW2d 607 (1994). In the context of the Open Meetings Act, the Court of Appeals has correctly reasoned that “[m]erely because a violation of the OMA has occurred does not automatically mean that an injunction must issue restraining the public body from using the violative procedure in the future.” *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 533-534; 609 NW2d 574, 579 (2000) citing *Esperance v Chesterfield Twp*, 89 Mich App 456, 44; 280 NW2d 559 (1979) and *Wilkins v Gagliardi*, 219 Mich App 260, 276; 556 NW2d 171 (1996). In other words, where there is no reason to believe that a public body will deliberately fail to comply with the Open Meetings Act in the future, injunctive relief is unwarranted. *Schmiedicke v Clare School Bd*, 228 Mich App 259, 267; 577 NW2d 706 (1998).

It is for this precise reason that declaratory relief can be issued when injunctions are inappropriate. See *Steffel*, 415 U.S. at 466-67 (declaratory judgment is less intrusive

remedy than injunction, requiring a lesser showing; declaratory judgment provides relief when legal or equitable remedies are too intrusive or otherwise inappropriate). Recognizing this, courts around the country have sometimes granted declaratory relief and at the same time denied injunctive relief. In *Ulstein Maritime, Ltd v United States*, 833 F2d 1052 (1st Cir 1987), for example, the district court declared a Small Business Administration (SBA) certification to be invalid in a bid protest case, and the government challenged the decision arguing that invalidating the certificate was equivalent to an injunction. The *Ulstein* Court disagreed, noting that the declaration did "not prevent the SBA from taking any actions which it can legally take". (*Id.* at 1056). In so doing, the *Ulstein* Court distinguished declaratory relief from injunctive relief as follows:

Injunctions and declaratory judgments are different remedies. An injunction is a coercive order by a court directing a party to do or refrain from doing something, and applies to future actions. A declaratory judgment states the existing legal rights in a controversy, but does not, in itself, coerce any party or enjoin any future action. Courts have on occasion refused to grant declaratory relief in cases where the effect would be identical to a legally impermissible injunction . . . But a declaratory judgment is a milder remedy which is frequently available in situations where an injunction is unavailable or inappropriate.

833 F.2d at 1055 (citations omitted). See also *Fantasy Book Shop, Inc v City of Boston*, 652 F2d 1115, 1126 (1st Cir 1981) (elements of injunction are different from declaratory relief); *Valley Construction Co v Marsh*, 714 F2d 26, 28 (5th Cir 1983) (allowing the possibility declaratory relief after finding injunctive relief unavailable); *Cincinnati Elec*

Corp v Kleppe, 509 F2d 1080, 1088-89 (6th Cir 1975) (issuing a declaratory judgment but denying injunctive relief in a bid protest case); *Doe v Stephens*, 851 F2d 1457, 1467 (DC Cir 1988) (upon concluding that the plaintiff was entitled to declaratory relief, the court stated "we believe it unnecessary to award [plaintiff] additional injunctive relief.") In light of these principles, this Court properly treats declaratory relief and injunctive relief as distinct remedies.

It is anticipated that Speicher will point to *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981), and its progeny, to support his argument that declaratory relief is enough under MCL 15.271(4) to allow the imposition of court costs and actual attorney fees. However, such an argument overlooks that the *Ridenour* Court allowed recovery of attorney fees only because plaintiff received the equivalent of an injunction and the trial court stated it *would* have issued an injunction but for the promise of defendant to comply in the future. (*Id.* at 806). This judicial gloss nevertheless awarded attorney fees and costs beyond those statutorily authorized. See *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490; 672 NW2d 849 (2003) (noting that the statutory language must be enforced as written, free of any "contrary judicial gloss.").⁷ The Court of Appeals aptly noted this problem in *Speicher*:

⁷ In *Ridenour*, the court was not legislatively empowered to award actual attorney fees and costs. But presumably, if the parties agreed to a settlement that provided for the defendant's promise to abide by the court's declaration and attorney fees, the court could enter a consent judgment along those lines.

From this comprehensive review, it is clear that the existing case law has morphed from the initial *Ridenour* opinion in 1981, in which attorney fees were warranted only because plaintiff received the equivalent of an injunction (and where the trial court stated it would have issued an injunction but for the promise of defendant to comply in the future) to current day opinions, where attorney fees are awarded on a mere showing of a violation of the OMA (and no showing of obtaining the equivalent of injunctive relief is needed). We conclude that the evolution of this particular aspect of the law is unfortunate, as it appears the rationale for the *Ridenour* decision, and the decision itself (to allow for recovery of attorney fees if the relief granted is the equivalent of injunctive relief), has been diluted or ignored in subsequent cases.

Speicher, at p 5. In other words, whatever its propriety in the unique circumstances, the judicial gloss in *Ridenour* has since morphed into an absolute rule requiring costs and attorney fees for any violation even if no injunctive relief is awarded and even if no suit for injunctive relief was ever brought. Once decisions interpreting and applying a statute come unmoored from the statutory language, they can drift farther and farther away from those moorings. Such is the case here.

In sum, the current rule ignores the critical distinction between declaratory and injunctive relief—only the latter of which is addressed in the statute. Furthermore, as discussed *infra*, the current rule contravenes the plain and express language of the statute.

- B. The plain language of MCL 15.271(4) limits recovery of attorney fees and costs to a plaintiff who obtains “injunctive relief”; tellingly, the statute does not include the separate remedy of “declaratory relief” even though the Legislature has done so in other statutes.**

Under our constitutional system of government, this Court is obligated to enforce legislative dictates as written. *WPW Acquisition Co v City of Troy*, 466 Mich 117, 124-125; 643 NW2d 564, 568 (2002). Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures. See Richard Posner, *Law and Literature: A Misunderstood Relation*, 240, 252-53 (1988) (the judiciary must search for the intent of the legislature in statutory interpretation); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich L Rev 20, 22 (1988) (describing as “archaeological” statutory interpretation that seeks to fulfill the intent of the drafting legislature and discussing various methods of interpretation which attempt to respect the legislature’s primacy). Separation of powers principles require the judiciary to respect legislative policy choices. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 405; 605 NW2d 300 (2000). This deference to legislative policy-making stems from the Court’s understanding of its constitutional role and its recognition that the legislature is better-situated to assess the trade-offs associated with a particular policy choice than is the judiciary. *Devillers v Auto Club Ins Ass’n*, 473 Mich 562; 702 NW2d 539 (2005).

Longstanding precepts of statutory interpretation require the court to give effect to the language when it is unambiguous. *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005). In interpreting statutory language, courts must determine and give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164

(1999). The first step in ascertaining legislative intent is to look at the words of the statute itself. *House Speaker v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993). In *Lesner v Liquid Disposal, Inc*, 466 Mich 95; 643 NW2d 553 (2002), this Court emphasized its obligation to enforce the statutory text as written by stating:

We may not read anything into the unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.... In other words, the role of the judiciary is not to engage in legislation.

(*Id.*, citing *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) and *Tyler v Livonia Public Schools*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999)).

The plain language of MCL 15.271(4) provides for an award of attorney fees and court costs upon "obtaining relief" in a "civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act". MCL 15.271(4). The provision starts with "if," a word that renders application of the final clause, "the person shall recover court costs and actual attorney fees for the action," dependent on a showing that each of the three requirements included have been satisfied. Stated another way, the word "if" makes clear that what follows is a condition, and as the Michigan Legislature did in MCL 15.271(4), the text "unearth[s] hidden conditions" by making them explicit; drafters are encouraged to achieve this clarity by placing "conditions where they can be read most easily, preferably using the word *if*." Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules*, p 5 (2007). Thus, court costs and attorney fees are available as relief "if":

- “a public body is not complying with this act”
- and “a person commences a civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act”
- “and succeeds in obtaining relief in the action”....

MCL 15.271(4). Only when all three of these preconditions have been satisfied does the provision provide for recovery of “court costs and actual attorney fees.” (*Id.*).

The conspicuous absence of “declaratory relief” in MCL 15.271(4) suggests that the Legislature intended to limit the statute’s scope to “injunctive relief” only and exclude all other types of relief. Indeed, the Legislature knew how to say “declaratory relief” in 1977 when the Open Meetings Act took effect, as evidenced by the numerous statutes in force at that time employing use of the word “declaratory ruling” or “declaratory relief” and distinguishing between declaratory and injunctive relief. See, e.g., MCL 24.207(i) (in the Administrative Procedures Act of 1969, exempting from the definition of “rule” a “declaratory ruling”); MCL 600.6419 (in the Revised Judicature Act of 1961, describing the power of the court of claims to hear and demand any claims for “equitable, or declaratory relief” against the state); MCL 445.911(1) (in the Michigan Consumer Protection Act of 1976, authorizing a person to bring an action to “[o]btain a declaratory judgment that a method, act, or practice is unlawful” and/or “[e]njoin in accordance with the principles of equity a person who is engaging or about to engage in a method, act, or practice which is unlawful” under the Act). Accordingly, the phrase

“injunctive relief” as used in MCL 15.271(4) should not be read to include declaratory relief when the Legislature could have easily included “declaratory relief” in the statutory text had it desired to do so. See, e.g., *Rodriguez v Hayes*, 591 F3d 1105, 1119-1120 (9th Cir 2010) (holding that the statutory phrase “enjoin or restrain” in 8 USC § 1252(f) “should not be read to include declaratory relief when Congress could easily have included ‘declaratory relief’ explicitly had it chosen to do so.”).

“Our legal vocabulary contains distinct words for distinctive judicial actions. Keeping them separate makes it easy to address one, both, or neither, in a statute...” *Hor v Gonzalez*, 400 F3d 482, 484 (7th Cir 2005). Here, the Legislature expressly limited a plaintiff’s recovery of actual attorney fees and costs in the Open Meetings Act context to situations in which “injunctive relief” is sought and obtained. While the Legislature could have easily included “declaratory relief” in the statutory text, it did not do so. Accordingly, the courts must give due deference to the Legislature’s choice of words. This is precisely what the *Speicher* panel indicated it would have done had it not been bound by prior precedent, including *Ridenour*:

But what is clear is that we would overrule this Court’s prior interpretations of MCL 15.271(4) that allow for the recovery of attorney fees when injunctive relief is not obtained, equivalent or otherwise, on the basis that this now common interpretation of MCL 15.271(4) is contrary to the plain and express language of the statute.

(Exhibit G, *Speicher* Opinion, p 5). Further, to be clear, *Ridenour* took liberties with the plain language of the Open Meetings Act, which provides for an award of attorney fees

and court costs upon the “obtaining relief” in a “civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act”.

MCL 15.271(4). *Ridenour* read this language to allow recovery despite the determination not to provide injunctive relief, a judicial gloss on the statute. If the Legislature has clearly expressed its intent in the language of a statute, the statute must be enforced as written free of any contrary judicial gloss. *Dep’t of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010); *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). Doing so here, this Court properly rejects any attempt to obtain attorney fees where declaratory, but not injunctive, relief is awarded in an Open Meetings Act claim brought pursuant to MCL 15.271(4).

C. Limiting an award of costs and actual attorney fees under MCL 15.271(4) to situations in which a plaintiff maintains a successful action for injunctive relief is likewise consistent with the statute’s structure and purpose.

The purpose of the Open Meetings Act is “to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern.” *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002). The relief to be afforded for violations of the Open Meetings Act was specified by the Michigan Legislature in a series of provisions including MCL 15.271-273. These provisions govern when an enforcement action can be brought, by whom, and in what venue. MCL 15.271. The Legislature also provided for carefully calibrated relief,

including allowing for civil and criminal penalties against public officials who intentionally violate the act. MCL 15.272-273

In *Leemreis v Sherman Twp*, 273 Mich App 691; 731 NW2d 787 (2007), the Court of Appeals explained that the Open Meetings Act provides “for three distinct types of relief.” 273 Mich App at 700. Under MCL 15.270(2) a person can “seek invalidation of the decision and there is not provision for costs or attorney fees.” 273 Mich App at 700. Under MCL 15.271(1) a person may commence a civil action for injunctive relief and obtains “relief in the action” recover costs and attorney fees. MCL 15.271(4). And finally, MCL 15.273 allows for an action against a public official for an intentional violation of the Act, and provides for relief by way of ‘actual and exemplary damages of not more than \$500 total ‘plus court costs and actual attorney fees to a person or group of persons bringing the action.” MCL 15.273(1). The *Leemreis* Court observed that “none of these sections refers to either of the other sections.” As a result, by reading the statute as a whole, the Court concluded that “these sections, and the distinct kinds of relief that they provide stand alone.” 273 Mich App at 793.

Because the structure of the statute requires a person to succeed in obtaining injunctive relief before he or she may recover costs and attorney fees pursuant to MCL 15.271(4), past precedents have rejected litigants’ attempts to obtain costs and fees under that statutory provision where no injunction was issued. In *Felice v Cheboygan County Zoning Commission*, 103 Mich App 742; 304 NW2d 1 (1981), for example, the

court declined to award costs and attorney fees despite “an admitted violation of the act by the defendants” because MCL 15.271(4) was not satisfied. The *Felice* court required a party seeking such relief to show more than that, after an action was brought under the Open Meetings Act, the defendant acted in a manner consistent with the plaintiff’s prayer for relief. The *Felice* court explained that the provision included the phrase “relief in the action” which reflected the Legislature’s intent “to restrict the circumstances under which a plaintiff would be entitled to costs and actual attorney fees.” (*Id.* at 746).

Michigan courts have also recognized that a past violation of the Open Meetings Act, by itself, is not sufficient “to constitute a real and imminent danger of irreparable injury” to support an injunction. *Wilkins v Gagliardi*, 219 Mich App 260, 275-276; 556 NW2d 171 (1996). Thus, in *Wilkins*, the Court of Appeals acknowledged that injunctive relief was not available merely because a technical violation of the Open Meetings Act took place:

Again, because the board acknowledged that the public is permitted to videotape meetings and because no evidence suggests that defendants or other members of the public were prevented from recording future meetings, defendants did not establish a “real or imminent danger of irreparable injury.

(*Id.* at 276). See also *Saline Area Schools v Mullins*, 2007 WL 1263974 at 1 (No 272558, Mich Ct App May 1, 2007) (unpublished) (declining to award costs and attorney fees because the trial court did not enter an order or judgment compelling compliance with the Open

Meetings Act or enjoining noncompliance or invalidating any decision by the government entity).

Applying the language of the statute in accordance with its structure and purpose, as in *Felice* and *Mullins*, a litigant who does not commence an action for, and succeed in obtaining, injunctive relief should not be able to recover costs and attorney fees under MCL 15.271(4). But applying the conflicting authority, the court is obligated to award costs and actual attorney fees. In this way, the judiciary is able to circumvent or ignore the three separate types of relief set forth in the Open Meetings Act and the conditions imposed upon each. A proper reading of the statute requires a reversal.

RELIEF

WHEREFORE, Defendants-Appellants Columbia Township Board of Trustees and Columbia Township Planning Commission respectfully request the Court peremptorily reverse the Court of Appeals for the reasons articulated by the Court in its call for a special panel, or failing that, grant this application for leave to appeal and rule that costs and attorney fees are not statutorily authorized here, and enter any and all other relief this Court deems proper in law and equity.

Respectfully submitted,

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Dated: July 23, 2014

STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE COURT OF APPEALS)

KENNETH J. SPEICHER, an Individual

Supreme Court No. 148617

Plaintiff-Appellee,

Court of Appeals No. 306684

V

Lower Court No. 11-600857-CZ

COLUMBIA TOWNSHIP BOARD OF
TRUSTEES and COLUMBIA TOWNSHIP
PLANNING COMMISSION,

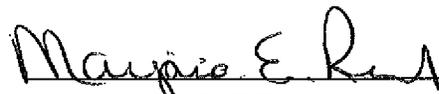
Defendants-Appellants.

PROOF OF SERVICE

MARJORIE E. RENAUD, being first duly sworn deposes and says that she is an employee with the firm of Plunkett Cooney, and that on the 23rd day of July, 2014, she caused to be served a copy of the Supplemental Brief in Support of Application for Leave to Appeal and Proof of Service, upon the following:

Robert W. Smith, Esq. 707 Comerica Building 151 S. Rose Street Kalamazoo, MI 49007-4792
--

by enclosing same in a pre-addressed, pre-stamped envelope and depositing same in the United States mail.


MARJORIE E. RENAUD