STATE OF MICHIGAN
IN THE SUPREME COURT

BONNIE L. HOFF,

Plaintiff-Appellee,

v

SANDRA SPOELSTRA, SUZANNE KENSINGTON AND CITY OF MARQUETTE,

Defendants-Appellants,

and

GERALD R. PETERSON, JERRY IRBY AND STU BRADLEY,

Defendants-Appellees.
_____/

Supreme Court Case No:

Court of Appeals Case No: 272898

Marquette County Circuit Court
No. 05-42405-CD

BRIEF OF AMICI CURIAE THE MICHIGAN MUNICIPAL LEAGUE, THE MICHIGAN TOWNSHIPS ASSOCIATION, AND THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN, IN SUPPORT OF DEFENDANTS-APPELLANTS APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Amici Curiae adopt the Statement of the Order Appealed from and the Relief Sought of the Defendants-Appellants Sandra Spoelstra, Suzanne Kensington, and the City of Marquette in their Application for Leave to Appeal.

STATEMENT OF BASIS OF JURISDICTION

Amici Curiae adopt the jurisdictional summary in the Defendants-Appellants Sandra Spoelstra, Suzanne Kensington, and the City of Marquette's Application for Leave to Appeal.

STATEMENT OF QUESTION PRESENTED

DOES A SUB-QUORUM MEETING OF MEMBERS OF A PUBLIC BODY ACTING INDIVIDUALLY WITHOUT DELEGATION OR AUTHORITY FROM THE PUBLIC BODY AS A WHOLE CONSTITUTE A VIOLATION OF THE OPEN MEETINGS ACT?

Defendants-Appellants Sandra Spoelstra, Suzzanne Kensington, and the City of Marquette answer:	No
Plaintiff/Appellee Bonnie Hoff answers:	Yes
The Court of Appeals answers:	Yes
The Marquette County Circuit Court answers:	Yes
Amici Curiae answer:	No

STATEMENT OF FACTS

Amici Curiae adopt the Statement of Facts of the Defendants-Appellants Sandra Spoelstra, Suzanne Kensington, and the City of Marquette in their Application for Leave to Appeal.

DESCRIPTION OF AMICI CURIAE

The Michigan Municipal League

The Michigan Municipal League is the principal association of cities and villages in the State of Michigan. It is a non-partisan, non-profit corporation whose central objective is to improve the quality of municipal government within the state by providing technical, educational, and administrative resources to the cities and villages that make up its membership, while increasing public awareness of the functions and needs of local governments in Michigan. The League has over 500 member municipalities, approximately 83% of which are also members of the Michigan Municipal League Legal Defense Fund. The Legal Defense Fund represents the League's member cities and villages in state and federal litigation that may affect the structure, operation, authority, or financial well-being of municipalities within the state.

The Michigan Townships Association

The Michigan Townships Association ("MTA") is a non-profit organization formed in 1953 to provide a unified voice for Michigan's township governments and to help township leaders govern more efficiently and improve the services they provide to residents. More than 99% of Michigan's 1,242 townships are MTA members. Through its website, seminars, publications, county chapters, written communication, telephone calls, monthly electronic newsletters and legislative faxes, MTA keeps members informed of current issues facing townships.

The Public Corporation Law Section of the State Bar of Michigan

The Public Corporation Law Section (the "Section") is an affiliate section of the State Bar of Michigan. It is composed of Michigan lawyers interested in issues related to municipalities and other public entities in the state. The Section provides educational programs for its members as well as the public at large. Any member of the State Bar of Michigan is eligible for membership in the Section.

INTRODUCTION

This case has profound implications for the constituencies of all three Amici Curiae. This decision will determine whether the scope of the Open Meetings Act (OMA) remains true to its original intent, or whether it will be expanded beyond the intent of the Legislature as demonstrated by the plain words of the statute and into a realm which could lead to absurd results.

All three Amici Curiae acknowledge and respect the importance of the OMA and the public's right to know how its business is being conducted. They realize that the public policy of this State has been clearly stated as being one of openness as set forth in the OMA. However, Amici also believe that it is extremely important that the rights of the public, as well as the obligations of those serving on public bodies, be consistent with the OMA as adopted by the Legislature – not as expanded by judicial interpretation.

Practical Consequences

The decision in this case will have a striking effect on governmental entities across the state. Notwithstanding the plain language of the OMA, if the Court of Appeals

decision stands, members of public bodies will now be unsure if it is a violation of the OMA to discuss business one-on-one with each other.

Day to day administration of governmental entities will also be impacted. Many communities, cities in particular, have an agenda review process in the days leading up to a council meeting. The agenda review session is an administrative function and takes place in a non-public setting. Often the mayor, vice-mayor and city manager will meet to discuss details of the agenda items. Under the Court of Appeals' analysis and conclusion such agenda review session could violate the OMA as the mayor and vice mayor are both present and talking about city business.

Furthermore, this decision severely impacts the daily operation of larger townships. In larger townships (and sometimes, not so large) it is very common for the township administration to consist of the elected supervisor, clerk and treasurer. These three officials work together at the township hall on an often daily, sometimes full time, basis. Under this decision, a discussion between any two of these elected officials regarding township business could be a violation of the OMA. The officials would literally have to avoid talking to one another to keep from violation the act – an absurd and impractical result.

Leave Should be Granted Because the Court's Decision Effectively Amends the OMA

This Court should grant leave to appeal in this case because the Court of Appeals, by its decision, has impermissibly amended at least four sections of the OMA. This can best be illustrated by using the same technique the Legislature uses to demonstrate amendments in proposed legislation. Language which has been effectively added to the

OMA by the Court of Appeals decision is underlined while language which has been effectively deleted is shown in strikethrough text:

1) The decision amended section 2(b) to read, in effect, as follows:

(b) "Meeting" means the convening of two or more members of a public body ~~at which a quorum is present~~ for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o.

2) The decision amended section 3(3) to read, in effect, as follows:

All deliberations of two or more members of a public body ~~constituting a quorum of its members~~ shall take place at a meeting open to the public except as provided in this section and sections 7 and 8. for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o.

3) The decision amended section 10(2) to read, in effect, as follows:

A decision made by a public body may be invalidated if two or more members of the public body have ~~has~~ not complied with the requirements of section 3(1), (2), and (3) in making the decision or if failure to give notice in accordance with section 5 has interfered with substantial compliance with section 3(1), (2), and (3) and the court finds that the noncompliance or failure has impaired the rights of the public under this act.

4) It amended section 2(a) to read, in effect, as follows:

(a) "Public body" means any two or more members of a state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, ~~that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function~~; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o.

If changes of the above magnitude are to be made to the OMA, they should be made by the people's representatives in the Legislature, not by judicial interpretation of the courts.

Leave Should be Granted Because this Case Involves a Subdivision of the State, Public Officers and is of Major Significance to the State's Jurisprudence

Leave to appeal should be granted because this case is against a subdivision of the state and officers of that subdivision. MCR 7.302(B)(2). In addition, this case involves legal principles of major significance to the state's jurisprudence, MCR 7.302(B)(3), because the Court of Appeals has ruled that sub-quorum meetings of members of a public body violate the provisions of the OMA. However, the plain language of the OMA does not support such an interpretation. This decision effects every public body in Michigan.

STANDARD OF REVIEW

This Court has received an appeal from an order granting summary disposition, which is reviewed *de novo*. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003); *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). This case involves matters of statutory construction, which are reviewed *de novo*. *Mayor of Lansing v Public Service Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004). If the Court finds the language of the statute is clear, no further analysis is necessary or allowed and the Court must apply the legislation as it is written. *Eggleston v Bio-Medical Applications*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Hesse v Ashland Oil*, 466 Mich 21, 30; 642 NW2d 330 (2002).

ARGUMENT

I. A SUB-QUORUM MEETING OF MEMBERS OF A PUBLIC BODY ACTING INDIVIDUALLY WITHOUT DELEGATION OR AUTHORITY FROM THE PUBLIC BODY AS A WHOLE DOES NOT CONSTITUTE A VIOLATION OF THE OPEN MEETINGS ACT.

A. The OMA Is Applicable to Meetings at Which a Quorum Is Present.

The Defendants-Appellants actions did not constitute a violation of the OMA. The Court of Appeals erred in finding that sub-quorum meetings in this case were a violation of the OMA.

The OMA was carefully drafted to prevent decisions by a quorum of a governing body from being made outside the public view. *See* MCL 15.263(2). The language of the OMA is consistent in its application to situations involving a quorum of a governing body.

The preamble to the OMA sets forth its intent as "An Act to require certain meetings of certain public bodies to be open to the public." 1976 PA 267. (emphasis added.) Thus, the OMA was not intended to apply to any and all meetings of a public body, only "certain" meetings. Those "certain" meetings are when a quorum is present.

The OMA defines a meeting as:

> the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o. MCL 15.262(b). (emphasis added.)

Nothing in the OMA as written prohibits individual members of a public body from meeting to discuss government business outside the public view so long as the number of members present does not constitute a quorum of the public body.

Similarly and consistently, the OMA prohibits members of a public body from "talking about" governmental business only when a quorum is present:

> (3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8. MCL 15.263(3). (emphasis added.)

The Legislature intended the OMA to apply to certain meetings – meetings at which a quorum of the public body is present.

The only way the OMA by its plain terms can apply to a meeting of less than a quorum of a public body is if the members present constitute a quorum of a committee or subcommittee that has been delegated authority by the public body. This is clearly evident in the definition of "public body":

> (a) "Public body" means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o. MCL 15.262(a). (emphasis added).

The above definition demonstrates the intent of the Legislature that the only time a group of less than a quorum of the public body is subject to the OMA is when it is a committee or subcommittee that has been delegated authority by the public body. The Court of Appeals, in holding that just two or three members of a public body absent delegated authority can fall within the OMA, effectively destroys the carefully crafted framework of the Legislature as to how and when the OMA is to be applied.

This case involves the City of Marquette and its seven-member city commission. Notwithstanding the plain language of the OMA, the Court of Appeals found that three sub-quorum meetings of city commission members constituted a violation of the OMA through a "constructive quorum" theory. The meetings in question consisted of two city commission members taking part in three separate meetings on a single day, with each of the three meetings involving a different third member of the city commission. The sixth and seventh members of the city commission were not present at any of the meetings. Furthermore, no quorum was present at any of the said meetings as four commissioners are needed to constitute a quorum of the City of Marquette City Commission.

In this case, the Marquette City Commission established no committee or subcommittee and delegated no authority to Spoelstra or Kensington or any other member of the city commission. Therefore, under the plain language of the OMA the meetings in question were not required to be public meetings.

B. The Facts of this Case Differ From *Booth Newspapers v University of Michigan* as There Was No Delegation of Authority and No Authority to Make Determinations.

The Court of Appeals erred in comparing the facts in this case to those of *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993). In *Booth*, the defendant had established and delegated its powers to a presidential selection committee. *Id.* at 215. The presidential selection committee, made up of the members of the Board of Regents, then appointed a chairperson and created three subcommittees. *Id.* at 215-16. The presidential selection committee delegated to one of its members the sole authority to act on its behalf in making the first cut to the list of

perspective candidates. *Id.* at 216. The purpose of establishing the committees and delegating power was so that the committees could carry out actions in private that would otherwise be required to take place in a public meeting under the OMA. *Id.* at 216-17. In the *Booth* case the sub-quorum meetings and "round-the-horn" decisions took place over several months and involved making five different series of cuts to the proposed candidates list for president of the university. *Id.* at 216-19.

These crucial distinctions separate the facts in the *Booth* case from the meetings of Spoelstra and Kensington. The Marquette City Commission delegated no authority to Spoelstra and Kensington, nor to any of the other three commissioners with whom Spoelstra and Kensington met.[1] Spoelstra and Kensington sought to comply with the OMA and the meetings in question took place on a single day. Furthermore, neither Spoelstra or Kensington nor any of the other commission members with whom they met had any authority to make determinations.

C. The Facts of this Case Differ from *Booth Newspapers v Wyoming City Council* as Spoelstra and Kensington Acted as Individuals Without Delegated Authority and Sought to Comply with the OMA.

The Court of Appeals also erred in comparing the facts of this case to those of *Booth Newspapers, Inc v Wyoming City Council,* 168 Mich App 459; 425 NW2d 695 (1988). In the *Wyoming* case, three city staff members and special counsel met with five members of the city council over a two-day period to discuss matters regarding the city's water system. *Id.* at 465. The court in *Wyoming* found that the mini-meetings were held

[1] The Board of Regents in the *Booth* case really delegated their authority to an individual regent, a committee and three subcommittees. Such delegation of authority causes the individual, committee and subcommittees to each be considered a public body under the OMA and fall under its public meeting requirements. *Booth, supra* at 226.

for the purpose of avoiding the OMA. *Id.* at 471. Furthermore, during the mini-meetings special counsel sought and received direction from the city council members on how he should proceed in negotiations with respect to a city contract. *Id.* at 465. The mini-meetings were much more than just a discussion between members of a public body – the city council was in essence conducting business and giving direction to its attorney at the meetings. Contrary to the facts in *Wyoming*, Spoelstra and Kensington acted on their own as individuals in meeting with other commission members and sought to comply with the requirements of the OMA. Furthermore, Spoelstra and Kensington had no delegated authority from the city commission and were without power to make decisions, conduct business or give direction.

D. The Facts of this Case Should Be Compared to *St. Aubin v Ishpeming City Council.*

The facts of this case more closely resemble those in *St. Aubin v Ishpeming City Council*, 197 Mich App 100; 494 NW2d 803 (1992). In *St. Aubin*, the mayor held individual discussions with all of the council members to determine whether the city manager should be retained. *Id.* at 102. The *St. Aubin* court found the mayor's canvas was not intended to avoid the OMA and in fact was not a violation of the OMA. *Id.* at 102-03. Just as in *St. Aubin*, Spoelstra and Kensington engaged in meetings with the intent to comply with the OMA. The decision in *St. Aubin* is also consistent with the intent of the OMA – that members of a public body may talk to one another in private about public business without violating the OMA.

E. The Court of Appeals Decision Impermissibly Amends the OMA in Several Ways.

The Court of Appeals decision effectively amends the OMA so that it now prohibits members of a public body from talking to one another and permits the invalidation of a decision made by a public body when any member of that public body is found to have violated the act. The OMA is absent of any language prohibiting members of a public body from talking to each other about public matters. The plain language of the act applies when a quorum of the public body is present for meetings and/or deliberations.

The Court of Appeals decision effectively removes the quorum requirement from Section 3 of the act resulting in a judicial amendment which effectively reads:

> (3) All deliberations of <u>any members of</u> a public body ~~constituting a quorum of its members~~ shall take place at a meeting open to the public except as provided in this section and sections 7 and 8. MCL 15.263(3). (emphasis added.)

It is difficult to reconcile the language of this section with the Court of Appeals decision without editing the language as shown. The Legislature could have easily written the language of this section so that it applied to discussions between less than a quorum of members of the public body if it had so intended. If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. *Sun Valley Foods v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). No further judicial construction is required or permitted. *Id.*

Next, the Court of Appeals erred in invalidating the action of the Marquette City Commission based on a determination that only two members of its seven-member commission violated the OMA. Section 10 of the act deals with decisions of a public body and provides statutory deference to legislative actions. This section starts out with the presumption that decisions of a public body shall be presumed to have been adopted in compliance with the requirements of the act. MCL 15.270(10). Next, this section provides that if a public body has not complied with the OMA in making a decision and a court finds that the noncompliance or failure has impaired the rights of the public then the decision may be invalidated. *Id.*

However, the Court of Appeals found that only Spoelstra and Kensington violated the OMA, no other members of the Marquette City Commission nor the city itself were found to have violated the act. Under the plain language of Section 10, before the court may conclude that a public body's decision is invalid, it must first find that the *public body* violated the act. Furthermore, the Court of Appeals failed to discuss the statutory presumption that the Defendants-Appellants' actions are presumed to have been adopted in compliance with the requirements of the OMA. It seems unjust that a finding that two members of a public body violated the OMA would be sufficient to overcome the statutory presumption that decisions of the public body as a whole have been adopted in compliance with the OMA. This decision effectively amends the OMA by adding to Section 10 the authority for a court to invalidate a decision of a public body if any two or more of its members are found to have violated the OMA.

Lastly, the Court of Appeals erred in interpreting the Legislature's intent in excepting chance meetings of public bodies. Section 3 of the OMA contains a chance meeting exception, which reads as follows:

> (10) This act does not apply to a meeting which is a social or chance gathering or conference not designed to avoid this act. MCL 15.263(10).

This exception exists so that a quorum of a public body meeting in a social, chance or conference setting, not designed to avoid the act, will not constitute a violation of the act. The term "meeting" is defined by the OMA as a meeting at which a quorum is present. MCL 15.262(b). Thus, this exception protects chance meetings of a quorum of a public body not designed to avoid the act. The Court of Appeals stretched the legislative intent of this exception by concluding that it evidenced a legislative intent that the OMA apply to any meeting that was intended to avoid the OMA, whether or not a quorum was involved. As indicated previously, under the plain language of the OMA, a quorum is necessary to trigger the provisions of the OMA regardless of the alleged intentions of those involved.

CONCLUSION AND RELIEF REQUESTED

This appeal involves issues of great significance to the jurisprudence of this State and to every governmental entity in Michigan. The Legislature carefully crafted a "bright line" statutory test to determine when meetings of a public body must be open to the public, e.g., when a quorum is present. The decision by the Court of Appeals has blurred this "bright line" statutory test and created situations in which meetings of less than a quorum of a public body constitute a violation of the OMA. This case presents this Court

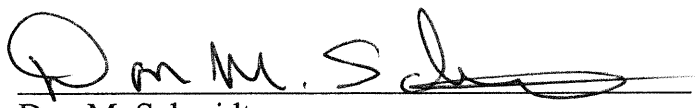
with an opportunity to correct the judicial interpretation by the Court of Appeals and restore the requirements of the OMA as plainly written.

For the reasons set forth above, Amici Curiae respectfully request that this Court grant Defendants-Appellants' Application for Leave to Appeal and reverse the decision of the Court of Appeals.

Dated: October 3, 2008

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: 

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