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

DON'T DRILL THE HILLS, INC.,
a Michigan nonprofit corporation,

Plaintiff,

Case No. 2014-140827-CH

v

Hon. James M. Alexander

CITY OF ROCHESTER HILLS,
a Michigan municipal corporation, and
JORDAN DEVELOPMENT COMPANY, LLC,
a Michigan limited liability company,

Defendant.
_____/

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DEFENDANT CITY OF ROCHESTER HILLS' AMENDED BRIEF SUPPORTING MOTION FOR SUMMARY DISPOSITION

Defendant City of Rochester Hills ("City"), through its City Attorneys, Hafeli Staran & Christ, P.C., submits this amended brief supporting its motion for summary disposition, based on MCR 2.116(C)(5) and (8), in order to more specifically address Plaintiff's First

Amended Complaint and its new allegations relating to the Pipeline Easement granted by the City to Sunoco Pipeline L.P.

STATEMENT OF FACTS

The City restates, with permission, much of Co-Defendant Jordan Development Company, LLC's ("Jordan") Statement of Facts from its summary disposition motion.

In 2012, Jordan approached the City to negotiate a subsurface oil and gas lease for Nowicki Park, Tienken Park, and the Van Hoosen Jones Stony Creek Cemetery. (Amended Complaint para 9) After first receiving a legal opinion that the lease would not violate City Charter Sec 11.8, the City Council, on December 3, 2012, approved the Oil and Gas Lease with Jordan. (Amended Complaint para 12 and Ex A.) The City also had consulted the Michigan Department of Environmental Quality ("MDEQ") and an environmental consultant. (Video: Jan 27, 2014 City Council Meeting, Statement of Mayor Barnett, available at http://roch.legistar.com) The Mayor signed the Lease on January 15, 2013. (Amended Complaint para 9).

The lease has a 5-year primary term with an option to renew. The City received $150 per leased acre as a cash bonus, and will receive royalties of 1/6 of the net Jordan realizes from any oil production. This is the same royalty the State gets under its standard oil and gas lease. (Michigan Oil and Gas Lease, Ex. 1.) Under the lease, Jordan may not enter, operate, or otherwise have structures such as tanks on the surface. (Amended Complaint Ex A.). Jordan also shall not hinder, interfere with, or otherwise adversely affect the use of the surface estate for parks and public recreation. (*Id.*) To date, Jordan has not begun any oil extraction operations in Rochester Hills (Amended Complaint para 15).

Jordan has also negotiated over 400 private oil and gas subsurface leases with private property owners. (See Amended Complaint para 16; Jan 27, 2014 City Council Meeting, Mayor Barnett.) Jordan's lease with the City accounts for only 15% of the subsurface rights it has leased in the City. (Video: Jan 27, 2014 City Council Meeting, Statement of Mayor Barnett, available at http://roch.legistar.com).

Plaintiff Don't Drill the Hills ("DDH") was formed on April 24, 2014 in Port Huron, 15 months after the City signed the Oil and Gas Lease. (Art of Inc., Ex. 2.). DDH filed suit against the City and Jordan on May 15, 2014 claiming that the Oil and Gas Lease violates City Charter Sec 11.8 and the Home Rule Cities Act, MCL 117.5(1)(e).

In its Amended Complaint, DDH added Sunoco Pipeline, L.P. as a co-defendant and claims that the Pipeline Easement the City granted to Sunoco in connection with the minor realignment of Sunoco's pipeline through the City's Bloomer Park[1] likewise violates the same City Charter and Home Rule Cities Act provisions. DDH seeks a declaratory judgment declaring the oil and gas lease and pipeline easement unlawful.

ARGUMENT

The City moves for summary disposition under MCR 2.116(C)(5) and (8) on the grounds that DDH lacks legal capacity to sue (i.e., lacks standing) and fails to state a claim on which relief can be granted. As a matter of law, the City's Oil and Gas Lease with Jordan and Pipeline Easement with Sunoco do not violate the City Charter or the Home Rule Cities Act; DDH lacks standing; DDH has not presented a case of "actual controversy" under MCR

[1] The City accepts and adopts the Statement of Facts set forth in the Brief In Support of Defendant Sunoco Pipeline, LP's Amended Motion for Summary Disposition, explaining the background and events surrounding the subject pipeline easement.

2.605; and there is no legal private cause of action to enforce the City Charter or Home Rule Cities Act.

A motion for summary disposition under MCL 2.116(C)(8) tests the legal sufficiency of a complaint. *Wortelboer v Benzie,* 212 Mich App 208, 217 (1995). All well-plead factual allegations are considered true and construed in a light most favorable to the non-movant. *Wade v Dept of Corr,* 439 Mich 158 (1992). The motion should be granted where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id* at 163.

MCR 2.116(C)(5) is grounds for summary disposition where a plaintiff lacks the legal capacity to sue, such as where the plaintiff lacks standing. *Groves v Dept of Corr,* 295 Mich App 1 (2011). For a 2.116(C)(5) motion, the court must consider any affidavits, pleadings, depositions, admissions and documentary evidence filed or submitted. MCR 2.116(G)(5).

I. THE CITY'S ENTRY INTO THE OIL AND GAS LEASE AND THE PIPELINE EASEMENT ARE LAWFUL ACTIONS, DO NOT VIOLATE THE CITY CHARTER AND ARE NOT ULTRA VIRES.

DDH incorrectly claims the City's entry into the Oil and Gas Lease with Jordan, leasing the subsurface oil and gas rights at 2 City parks,[2] and the granting of a Pipeline Easement to Sunoco, without voter approval, violate City Charter Sec.11.8.

A. Rule of Construction Applicable to City Charter.

City Charter Section 11.8 states:

Section 11.8 - Parks and Open Spaces

City-owned parks and open spaces shall be used only for park and open space purposes and shall not be sold, leased, transferred, exchanged or converted to another use unless approved by a majority of votes cast by the electors at an election.

[2] Count I does not pertain to the cemetery. Charter Sec. 11.8 applies only to City-owned parks and open spaces.

.1 "Converted to another use" means changing the use of a park or open space, or significant part thereof, from a recreation or conservation use to another use not directly related or incidental to public recreation or conservation.

.2 This section shall apply to all present and future City-owned property designated as park or open space in the City's Parks and Recreation Master Plan. The designation of parks or open space shall not be removed or changed without voter approval. The existing use of a park or open space on the effective date of this section shall be considered to be a lawful use for the particular property.

.3 All land acquired by the City with proceeds from the 2005 Millage Proposal to Provide Funding to Permanently Preserve Green Spaces and Natural Features within the City of Rochester Hills shall remain permanently preserved.

DDH asks the Court, in paragraph 32 of its Amended Complaint, to declare whether:

- The City's lease, without voter approval, of its subsurface oil and gas mineral rights, which were part of the City's fee ownership of the Parks, violates City Charter Sec 11.8;
- The Lease violates Charter Sec 11.8's provision that City-owned parks "shall be used only for park and open space purposes;"
- The Lease violates Charter Sec 11.8's provision that City-owned parkland shall not be sold without voter approval;
- The Lease converts the subsurface portions of the Parks to uses not directly related to public recreation or conservation in violation of Charter Sec 11.8;
- The new Pipeline Easement Agreement across and under Bloomer Park violates Charter sec. 11.8 for basically the same reasons.

DDH's allegations misconstrue an unambiguous City Charter provision. When construing home rule city charters, the prevailing rules regarding statutory construction apply. *Detroit v Walker,* 445 Mich 682, 691 (1994). When charter language is unambiguous and specific, it is controlling. *Detroit Fire Fighters Ass'n v Detroit,* 127 Mich App 673, 677

(1983). Courts are required to construe city charter language by its commonly accepted meaning. *Walker, supra,* at 691.

B. Subsurface and Surface Estates Distinguished.

There is a difference between leasing the "park" and leasing the subsurface oil and gas rights. Oil and gas rights may be severed from ownership of the surface estate. *VanSlooten v Larsen,* 410 Mich 21 (1980); *Rorke v Savoy Energy,* 260 Mich App 251 (2003). Jordan's Lease only covers subsurface oil and gas rights. Nothing in Charter Sec 11.8 requires voter approval before leasing subsurface oil and gas rights where the City's surface estate (i.e., the park) remains wholly unaffected, and where the City's ownership, possession, use and control of the parks, including the right to develop, occupy, use and/or preserve the land for park and open space is unaffected by the Lease.

C. Conditions In the Oil and Gas Lease Ensure Consistency With City Charter.

The Oil and Gas Lease is a "non-development" lease, meaning that it does not confer any surface use or drilling rights to Jordan. Conditions included in the Lease (Refer to Ex A of the Lease) provide: (1) Jordan, shall not utilize hydraulic fracturing (i.e., no "fracking"); (2) Jordan cannot enter onto the parks and may not conduct operations (including erection or construction of drills, wells, rigs, pipes, pumps, tanks, or other in-ground or above-ground structures, facilities or equipment) on the land without further approval of the City Council and compliance with applicable ordinance and charter requirements; (3) Jordan's operations shall not disrupt, interfere with, restrict, drain, damage, destroy or remove any natural or man-made condition feature or improvement located on the parks; and (4) Jordan's operations shall not hinder, interfere with, restrict or otherwise adversely affect the current or future use and

development of the land for parks, open space and public recreation without further approval of the City Council and compliance with applicable ordinance and charter requirements.

These lease conditions ensure the intent of the 2011 amendment to the city charter to restrict use of City-owned parks and open spaces to park and open space purposes and to require voter approval before the City may transfer or convert public parks and open space to non-recreational uses will be upheld. The City's parks continue to be used only for park and open space purposes. No City parks or open space have been sold, leased, transferred, exchanged or converted to another use. They remain as parks and open space. Consequently, the Oil and Gas Lease neither violates the charter nor does it require voter approval.

Subpart .1 of Charter Sec. 11.8 unambiguously defines "Converted to another use" to mean "changing the *use* of a park or open space, or significant part thereof, from a recreation or conservation use to another use not directly related or incidental to public recreation or conservation." But, the lease does not change any use of the parks. They remain fully open, available and useable for public recreation and conservation without restriction, the same as before. Only the subsurface oil and gas located thousands of feet below the surface is affected. This oil and gas, if it exists at all, is inaccessible to and unusable by citizens and park users. It is not part of the parks nor is it a park amenity.[3] Oil and gas a mile below the park surface has never been used for a "recreation or conservation use" nor can one have ever contemplated that it could be so used. Sec 11.8 protects the surface estate of the parks and open spaces from being used for purposes other than recreation or conservation. Any contrary

[3] "Park" is not defined in the charter, so rules of construction require that words be interpreted according to their ordinary usage. *People v Terry*, 124 Mich App 656 (1983). In *Drake v City of Benton Harbor,* unpublished per curiam decision of the Court of Appeals, issued January 21, 2010 (Docket No. 287502) (Copy attached As Ex 3), the Court adopted the definition of "Park" in the American Heritage Dictionary (4th ed) as "an area of land set aside for public use as a piece of land with few or no buildings within or adjoining a town, maintained for recreational and ornamental purposes."

interpretation is illogical and absurd, and laws should be construed to prevent absurd or illogical results. *Franges v General Motors,* 404 Mich 590, 612 (1979).

The exploration for oil located thousands of feet below the surface through horizontal drilling technique from an off-site well which may be located up to two miles away does not change the character of the parks or their use. Actually, the exploration for oil does not even need to occur directly beneath the City park or open space in order to generate royalties. Oil simply needs to be found within the state-approved drilling unit[4] which includes the City Parks covered by the Oil and Gas Lease. In view of these circumstances and the terms of the Oil and Gas Lease, Jordan's subsurface oil exploration does not "use"[5] the parks at all; it most certainly does not convert the use of the parks to a non-recreation or non-conservation purpose.

Subpart .2 of Charter Sec. 11.8 unambiguously says the designation of parks or open space shall not be removed or changed without voter approval. The Oil and Gas Lease does not violate that because the city parks are still designated in the City's Parks and Recreation Plan.

Lastly, subpart .3 of Charter Sec. 11.8 requires that all land acquired by the City with proceeds from the 2005 Green Space Millage proposal shall remain permanently preserved. This subpart does not apply because the two City parks covered by the Oil and Gas Lease were not acquired with Green Space Millage. Nevertheless, the City parks remain as parks, and the Oil and Gas Lease has not changed that. Hence, under the unambiguous provisions of

[4] The normal drilling unit in Michigan is a 40 acre government-surveyed, quarter-quarter section of land.

[5] In regard to "use," our Supreme Court has said, "If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy, or cultivation, etc…." *Linton v Howard,* 163 Mich 556, 562 (1910).

City Charter Sec. 11.8 the City's entry into the Oil and Gas Lease with Jordan neither violates the charter nor did it require voter approval.[6]

D. Plaintiff DDH Misconstrues the City Charter.

By DDH's way of thinking, the City's elected officials have no discretion to determine appropriate park and open space purposes. The City's elected officials cannot, without voter approval, authorize an adjoining public road to be widened if it will touch park land, nor can the City even install a street light on the park land to illuminate that road. The City cannot route telecommunication or power lines or utility poles through the parks; the City would have to route around the park. The City could not place a sewer or water main, drain or pipeline at a park. The City could not allow a park to be used as a temporary staging area in connection with a public improvement project. The City could not allow police training, or a political demonstration or assembly, or an educational program, religious service, private wedding, dog show, carnival, festival, arts and crafts fair, or farmers market because none of these activities are directly related or incidental to public recreation or conservation. By DDH's way of thinking, even letting an ice cream truck in the park should require an election under the city charter since that is a commercial use of a park, regardless of negligible impact.

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[6] So, why not just submit the question to the voters anyway? The answer is that would be both irresponsible and *ultra vires* because the City has no lawful authority to submit advisory questions to the voters except where the charter requires it. In *SMFB v Killeen,* 153 Mich App 370 (1986), the Court of Appeals held that since neither the Home Rule Cities Act nor the city charter authorized submittal of advisory questions to the electorate, the city could not do so. In *Scovill v Ypsilanti,* 207 Mich 288 (1919), the Supreme Court held a city could not hold an advisory election on questions relating to municipal actions that the city's governing body was charged to decide.

In discussing limitations on initiative and referendum processes, our Supreme Court has cautioned:

"It is the fate of all ideas, good and bad, that someone will seek to extend them to an extreme beyond purpose and reason. It is the duty of the courts, in their area of responsibility, to guard against that tendency, and to confine this important reserved right of the people to its legitimate and proper scope lest, through misuse, it fall into disrepute." *West v Portage,* 392 Mich 458, 466 (1974).

Negligible impact is irrelevant under DDH's rigid interpretation which leaves no room for judgment or discretion.

These are all examples of minimal, sensible possible uses of a park that are not directly related or incidental to recreation or conservation, but would all violate Charter Sec. 11.8 under the interpretation DDH advocates. Ironically, all of those minor uses to some degree involve some degree of excavation, modification or physical occupation of the surface of the park property, which make them more impactful on the use of the parks and open space for public recreation and conservation than will Jordan's subsurface oil and gas exploration under its Oil and Gas Lease with the City!

E. The Supreme Court has Previously Determined an Oil and Gas Lease Did Not Violate a Park Use Restriction.

DDH's strained interpretation of the City Charter is not consistent with the Supreme Court decision in *Central Land Co v Grand Rapids,* 302 Mich 105 (1942), which concerned land deeded to a city with a restriction that it be used solely for street and park purposes. The city built a street on part of the property and maintained the rest as a park. Later, after the City entered an oil and gas lease allowing oil drilling wells at the park, the original grantor sued claiming the oil and gas lease violated the deed restriction. The Supreme Court disagreed, ruling the oil drilling operations on the park property were minimally objectionable and did not interfere with the park, noting that:

> Defendants have taken rather extraordinary care in so operating the oil wells on the park property that this activity does not materially impair the use of the land for the purposes for which it was conveyed to the City. *Id,* at 110.

The Supreme Court further reasoned:

> Neither the park property as a whole nor any substantial portion thereof is being used in any way or for any purpose which in any substantial degree

interferes with the uses for which the property was conveyed to the city. *Id,* at 113.

Central Park concerned interpretation and enforcement of a use restriction in a deed, whereas this case concerns interpretation and enforcement of a use restriction in a city charter. But, the reasoning the Supreme Court employed in *Central Park* should likewise support a determination that Charter Sec 11.8 has not been violated because the City's oil and gas lease with Jordan does not cause the parks to be used for any activity that materially or even minimally interferes with the use of the parks.

F. The Sunoco Pipeline Easement Does Not Constitute a New Use Nor Violate the City Charter.

The Sunoco pipeline through Bloomer Park is not a new use. The pipeline has been in place since the 1950's. It was recently reinforced and partially replaced as part of Sunoco's pipeline upgrade and maintenance program resulting in a minor realignment, done through underground boring and tunneling, in such a way that the park surface was not touched or disturbed. The easement reflects the as-built realignment. Not a tree or blade of grass has been altered. The features and use of the park remains as before. All that occurred is that a portion of the pipeline that has been in place since 1951 was replaced and realigned such that it was appropriate to have a new easement to substitute for the 1950 permit.

Moreover, for sake of argument, even if one were to consider the pipeline to be a "use" of the park, it is certainly not a new use. As stated earlier, subpart .2 of Charter Sec 11.8 says, "The existing use of a park or open space on the effective date of this section shall be considered a lawful use for that property." The pipeline existed in the park for decades before the 2011 City Charter amendment. The minor realignment or replacement of part of

that pipeline does not create a new use or require the easement to be submitted to the voters under Charter Sec 11.8.

Consequently, Plaintiff DDH's Count I alleging violation of the City Charter and Count III alleging the oil and gas lease and pipeline easement are ultra vires actions because they violate the City Charter fail to state claims on which relief can be granted, and the Court should enter summary disposition dismissing Counts I and III under MCR 2.116(C)(8).

II. THE CITY'S ENTRY INTO THE OIL AND GAS LEASE WITH JORDAN AND PIPELINE EASEMENT WITH SUNOCO DID NOT VIOLATE THE HOME RULE CITIES ACT'S PROHIBITION, AT MCL 117.5(1)(e), AGAINST SELLING A PARK OR CEMETERY WITHOUT VOTER APPROVAL.

In Count II of its Complaint, DDH claims the City's entry into the Oil and Gas Lease with Jordan and pipeline easement with Sunoco, without voter approval, violates the Home Rule Cities Act at MCL 117.5(1)(e). But, MCL 117.5(1)(e) states a city does not have the power to "*sell* a park, cemetery, or any part of a park or cemetery....unless approved by a majority of the electors voting on the question at a general or special election." [Emphasis added]. The Lease with Jordan and the pipeline easement with Sunoco are not sales. The City still owns the City parks and cemetery. The Oil and Gas Lease covers only subsurface oil and gas rights. It does not allow the lessee, Jordan, to enter onto, use, or occupy the surface of the parks or cemetery. It does not restrict or interfere with the City's use, development or conservation of the park land or cemetery. It does not transfer the City's ownership, use or control, and it does not convert any City park, open space or cemetery to another use.

Jordan has leased the City's rights to extract and sell any subsurface oil Jordan may find. Jordan is obliged to pay the City royalties on any oil Jordan sells. If no oil is found,

Jordan goes away. When the lease expires, Jordan goes away. But, the parks and cemetery do not go away and will remain City parks and cemeteries fully available, without restriction, for parks and cemetery purposes. The same can be said about Sunoco's pipeline easement beneath the surface of Bloomer Park.

Jordan explains in its well-drafted summary disposition brief that the State Legislature easily could have, but did not, include leases on the list of prohibited acts in MCL 117.5. The expression of one thing in a statute – "sell" – means the exclusion of other similar things—such as "to lease." *See Alan v Wayne*, 388 Mich 210, 253 (1970). Nothing in the statute or its legislative history suggests that "sale" and "lease" are interchangeable.

A "sale" of land ordinarily conveys the surface together with the subsurface oil and gas interests. *Stevens Mineral Co v Michigan*, 164 Mich App 692, 696 (1987). Owners of mineral interests and those who have a mineral lease also have different access rights. A mineral lease merely conveys the rights to explore, mine, and produce the minerals beneath the surface, usually pursuant to a royalty-sharing arrangement between the extracting party and the owner of the mineral interest. *Thomas v Wilcox Trust*, 185 Mich App 733 (1990). But, a mineral *owner* has the right to enter onto the land and use the surface in a reasonable fashion to extract the minerals. *Erickson v Michigan Land & Iron Co*, 50 Mich 604 (1883). Under its Oil and Gas Lease, Jordan cannot enter onto the parks or cemetery, which is consistent with a *lease,* not a sale.

For the foregoing reasons, the City's entry into an Oil and Gas Lease with Jordan and pipeline easement with Sunoco, as a matter of law, do not violate MCL 117.5(1)(e). DDH's Count II and Count III fail to state a claim on which relief can be granted, and the Court should enter summary disposition dismissing Count II and III under MCR 2.116(C)(8).

III. DDH LACKS STANDING.

The Supreme Court recognized standing is an "indispensable doctrine rooted in our constitution," and it is a fundamental prerequisite to the prosecution of a lawsuit. *Michigan Citizens for Water Conservation v Nestle Waters,* 479 Mich 280 (2007). "Standing ensures that a genuine case or controversy is before the court," *Id* at 294, and "requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *Dodak v State Admin Bd,* 441 Mich 547, 554 (1993).

For DDH, a nonprofit corporation, to have standing to advocate interests of its members, its members themselves must have a sufficient stake or sufficiently adverse and real interests in the matter being litigated. *Trout Unltd v City of White Cloud,* 195 Mich App 343, 348 (1992). But, DDH's purported members – allegedly private citizens – lack standing.

A private citizen has no standing to vindicate a public wrong or enforce a public right where he/she is not hurt in any manner differently than the citizenry at large. *Inglis v Public School Employees Retirement Bd,* 374 Mich 10 (1964); *Waterford School Dist v State Bd of Ed,* 98 Mich App 658, 662 (1980). Public officials represent the public interest and are accountable for the protection and representation of those interests. There are political consequences for public officials who do not properly represent their constituents.

Nobody elected DDH or its members to represent or vindicate the public interest. "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Comm'r of Ins,* 174 Mich App 467, 471 (1988). A citizen's dissatisfaction with "the conduct and discretionary decisions of a governmental unit does not alone provide and adequate basis for standing" and standing does

not exist merely because "decisions of a governmental unit are...unwise." *Dishaw v Somerville Assoc,* unpublished opinion of the Court of Appeals, issued June 3, 2003 (Docket No 242048) (Copy attached as Exhibit 4).

To have standing, DDH members must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different than from the citizenry at large." *Lansing Schools Educ Ass'n v Lansing Bd of Ed,* 487 Mich 349, 372 (2010).

In Amended Complaint paragraph 18, Plaintiff DDH alleges:

> Members of DDHI include: former active participants and organizers of SPACE who were instrumental in having Section 11.8 of the Charter adopted; members who are registered voters in the City of Rochester Hills who were denied their right to vote on the lease; members who use the Parks; members who live within the units in which drilling is proposed; members who live in close proximity to the Parks; members who live in close proximity to and/or have family members buried in the Cemetery; members who live in close proximity to the well drilling sites proposed by Jordan; members who would be directly impacted by the noise, smells, increased traffic, potential spills, and other adverse environmental impacts caused by the proposed oil and gas exploration and production under the Lease (and the leases from other property owners within the proposed pooled units); members who live adjacent to lands that have been leased to Jordan and/or West Bay, members who have an ownership interest in their neighborhood Common Areas; and members who own property whose value may be negatively impacted.

But, none of DDH's purported members have suffered any injury, and if they had, the injury would not be special or peculiar to them. They are not affected differently than the general public. Borrowing and quoting from Co-Defendant Jordan's brief:

> [A]ny members who may have suffered injury as "voters" share an injury common to all citizens of Rochester Hills. The other category of members, those whose property rights may be violated in some indefinite manner at some undefined point in the future, can allege nothing more than an amorphous and hypothetical future harm.
>
> Indeed, it is uncertain when, if, and to what extent Jordan will exercise its rights under the lease. DDH can only speculate what the impact of Jordan's activities, if any, will be, and any impact it may have on private property rights, if any. Additionally, the lease with the City of Rochester Hills is only a

> small fraction of property that Jordan has leased in the City—private leases account for a vast majority, 85%, of the leased property. (See Video: Jan. 27, 2014 City Council Meeting, Statement of Mayor Barnett, available at http://roch.legistar.com/.) A declaratory judgment that the lease with the city is void will not, as a practical matter, change any potential impact on other citizens' property rights.

DDH's allegations about members who live within the units in which drilling is proposed, and members who live in close proximity to the well drilling sites proposed by Jordan, and members who would be directly impacted by the noise, smell, increased traffic, potential spills, and other adverse environmental impacts caused by the proposed oil and gas exploration and production under the Lease are speculative and hypothetical. No well drilling site in the City has been proposed by Jordan. No drilling unit in the City has been established. Nor have any noise, smell or other alleged environmental impacts occurred, and it is wildly speculative that they ever will occur or will impact DDH's members. But, what is certain under the City's Oil and Gas Lease with Jordan is there will not be any oil wells drilled or adverse environmental impacts on the City parks and cemetery!

State law provides additional measures to protect citizens from adverse impacts. Under the Michigan Natural Resources and Environmental Protection Act, MCL 324.61501, and corresponding Michigan Administrative Code Rule 324.201, before an oil company may drill for oil, they must apply for a permit to the State Supervisor of Wells, and the permit must undergo extensive review by MDEQ. Mich Admin Code R 324.201(2)(d), 324.205. The applicant must submit an environmental impact assessment. Mich Admin Code R 324.201(2)(f). Concerned citizens may request an administrative hearing before the MDEQ Supervisor of Wells before a final decision is made. Mich Admin Code R 324.1205, 324.1206. At the conclusion of the administrative process, an aggrieved party may seek judicial relief from the circuit court under MCL 600.631.

Because DDH fails to identify any special injury or substantial interest it or its members have or that they will be detrimentally affected differently than the general public, DDH lacks standing, and summary disposition should be granted dismissing the case under MCR 2.116(C)(5).

IV. PLAINTIFF FAILS TO PRESENT A CASE OF "ACTUAL CONTROVERSY."

DDH seeks declaratory judgment under MCR 2.605 (Complaint para 18) but does not satisfy the requirements of MCR 2.605, which states:

> (A) Power to Enter Declaratory Judgment.
>
> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

The "actual controversy" requirement prevents courts from getting involved in hypothetical issues. *Citizens for Common Sense v Attorney General,* 243 Mich App 43, 55 (2000). For an actual controversy to exist "[t]here must be an actual injury or loss." *Fieger, supra,* at 470. "An 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Groves v Dept of Corr,* 295 Mich App 1, 10 (2011).

DDH claims an actual controversy exists as to whether the City had the authority under the City Charter and Home Rules Cities Act to enter the Lease and grant the pipeline easement. (Amended Complaint paras 27-28) But, there is no future conduct on Plaintiff DDH's part to be guided. Nor is DDH a party to the lease or easement. Nor does DDH have rights or obligations under the lease or easement for which they need guidance. In contrast, the co-defendants are the parties to the lease and the easement and have cognizable

legal rights to preserve, but they do not request a declaratory judgment. DDH asks this Court to overturn the City Council's and the Mayor's interpretation of the city charter and determine the lease between the City and Jordan and the pipeline easement between the City and Sunoco are void. But, because DDH is not a party, obligor or beneficiary under the lease or easement, DDH fails to establish "an adverse interest necessitating the sharpening of the issues raised." *UAW v Central Michigan Univ,* 295 Mich App 486, 495 (2012). Rather, DDH uses the judicial process to advance a political agenda and interfere with valid lease and easement agreements between the City and Jordan and the City and Sunoco.

In the absence of an actual controversy, the court lacks subject matter jurisdiction to enter a declaratory judgment. *Leemreis v Sherman Twp,* 273 Mich 691 (2007). The "actual controversy" requirement is essential to ensure that the judicial branch [refrains from] becoming intertwined in every matter of public debate." *Michigan Ed Ass'n v Superintendent of Public Instruct,* 272 Mich App 1, 8 (2006). Courts should not adjudicate matters of public policy which are not raised as a result of a "distinct and personal harm." *Id.*

Consequently, DDH fails to present a case of "actual controversy" which is a prerequisite for declaratory relief under MCR 2.605, and the Court should grant summary disposition to the City dismissing the case under MCR 2.116(C)(5) and (8).

V. DDH FAILS TO ALLEGE A LEGAL PRIVATE CAUSE OF ACTION TO ENFORCE THE CITY CHARTER OR HOME RULE CITIES ACT.

DDH attempts to assert a cause of action that does not legally exist. Where remedies provided by statute for violation of a right have no counterpart in the common law – as is the case here -- the statutory remedies are exclusive. *Driver v Hanley (After Remand),* 226 Mich App 558, 566 (1997). Neither the City Charter nor the Home Rule Cities Act, MCL 117.1 *et seq*, authorize a private cause of action for non-profit corporations or their members to

enforce the City Charter and the Home Rule Cities Act. DDH does not cite any provision of the City Charter or Home Rule Cities Act from which an intent to confer standing on private individuals to enforce same can be reasonably inferred. *Lansing Schools, supra,* at 372. The only exceptions courts have made to this general rule that the remedy set forth in the statute or charter for enforcement of the statute or charter is exclusive have been in the area of civil rights discrimination claims. *Mack v Detroit,* 243 Mich App 132, 140 (2000), rev'd on other grounds 467 Mich 186 (2002). But, DDH does not claim any civil rights discrimination.

Section 12.4 of the City Charter titled "Violation, punishment" provides that:

> All violations of this Charter or any ordinance shall be punishable, unless otherwise provided, by a fine not to exceed Five Hundred ($500.00) Dollars, or by imprisonment for a period not to exceed ninety (90) days, or both fine and imprisonment in the discretion of the court, except that if the authority of the court is extended to levy a higher fine or impose a greater sentence, the court, in its discretion, may do so to the extent it is lawfully permitted under statute or ordinance.

The Charter limits the remedy for charter violations to the $500 fine and misdemeanor. That and the governor's power, under MCL 168.327, to remove elected city officials for misconduct are the exclusive remedies.

Also, Michigan courts have declined to recognize a private cause of action charging that the giving of an oil lease by a city was *ultra vires.* Only the State may raise that question. See *Central Land, supra,* at 109; *Quinn v Pere Marquette Ry,* 256 Mich 143, 155 (1931).

Because DDH has failed to allege a legal private cause of action, DDH has failed to state a claim on which relief can be granted. Summary disposition should be granted to the City pursuant to MCR 2.116(C)(8) dismissing the case.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Plaintiff DDH has failed to state claims on which relief can be granted, and also lacks standing. Therefore, the City should be granted summary disposition under MCR 2.116(C)(5) and (8) dismissing DDH's Complaint and awarding the City costs and attorney fees.

HAFELI STARAN & CHRIST, P.C.

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Dated: September 9, 2014

PROOF OF SERVICE

On September 9, 2014, I electronically filed the foregoing Defendant City of Rochester Hills' Amended Brief Supporting Motion for Summary Disposition with the Court via wiznet/odyssey file and serve which will send notification to all interested parties.

HAFELI STARAN & CHRIST, P.C.

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INDEX OF EXHIBITS

1. Oil and Gas Lease – Michigan Department of Natural Resources
2. Articles of Incorporation
3. Drake v City of Benton Harbor, unpublished per curiam decision of the Court of Appeals, issued January 21, 2010 (Docket No. 287502)
4. Dishaw v Somerville Assoc, unpublished opinion of the Court of Appeals, issued June 3, 2003 (Docket No 242048)

EXHIBIT 1

OIL AND GAS LEASE NO.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES

By authority of Part 5, Section 502, 1994 Public Acts 451 as amended.

This Lease, made and entered into this of in the year ,

By and between the DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES for the STATE OF MICHIGAN, hereafter called "Lessor", whose address is P.O. Box 30452, Lansing, Michigan 48909-7952, and , whose address is , , , hereafter called "Lessee".

Witness, that the State of Michigan is the owner of all rights of any oil and gas lying within or under any of the land described below, and the Lessor has the authority to lease for the exploration, development, and production of any existing oil and gas therein.

The Lessor, for and in consideration of a cash bonus paid to it, and of the covenants and agreements herein contained on the part of the Lessee to be paid, kept and performed, does hereby lease, without warranty, expressed or implied, unto the Lessee for the sole and only purpose of drilling, boring, and operating for oil and gas, and acquiring possession of and selling the same, and for laying pipelines and building tanks, power stations, and structures thereon, necessary to produce, save and take care of such products. No operations shall be conducted by the Lessee on any of the following described land situated in the State of Michigan without obtaining all separate written permissions required by the Lessor or any other State or Federal Government Agencies:

County

Parcels

Description	Section	Acres	Equity

Stipulations

None

Containing <LEASEACRES> net acres, more or less

A. DEFINITIONS

For the purposes of this Lease, the following definitions apply:

1. "Actual drilling operations" shall mean and be defined as actual drilling and penetration of strata in a continuous manner either by rotary, cable or combination drilling equipment to reach the objective formation at the intended depth as specified by permit and shall include drilling, completing, reworking, recompleting and deepening.
2. "Commercially Producible Well" shall mean a well capable of production in paying quantities.
3. "Commensurate royalties" means that amount of money which would fairly compensate the Lessor for any royalties lost due to drainage of oil and/or gas from the leased premises.
4. "DEQ" shall mean the Department of Environmental Quality.
5. "Development Plan" shall mean a plan to minimize negative impacts to the surface and shall include, but not be limited to, a complete copy of the proposed drilling permit application pursuant to 1996 AACS R 324.201, a copy of the request to install a surface facility or flowline pursuant to 1996 AACS R 324.504(4), and any supplemental Project Development maps, plans and Environmental Impact Assessments (EIA) filed with the Supervisor of Wells. Additionally, identification of State-owned surface lands within the proposed unit will be required. Documents filed with the Supervisor of Wells may need to be supplemented to identify pipelines, drill sites, facility sites, roads, erosion control, and other measures which may be necessary to mitigate impacts.
6. "Development Unit" shall mean the larger of a) the Drilling Unit or b) the unit voluntarily pooled, for the drilling of a single well.
7. "Drilling Unit" shall mean an area prescribed by applicable spacing regulations for the granting of a permit by the Supervisor of Wells for the drilling of a well.
8. "Extension fee" means a surcharge payment by the Lessee for the privilege of extending the primary term of the Lease for one (1) or two (2) years.
9. "Gas" means a mixture of hydrocarbons and varying quantities of nonhydrocarbons in a gaseous state which may or may not be associated with oil, including those liquids resulting from condensation, including but not limited to natural gas and casinghead gas.
10. "Gross Proceeds" means the total monies and other consideration accruing to an oil and gas Lessee for the disposition of the oil, gas, or plant products produced. Gross proceeds includes, but is not limited to, payments to the Lessee for certain services such as compression, dehydration, measurement, and/or gathering which the Lessee is obligated to perform at no cost to the Lessor to place lease products in marketable condition. Where lease products are sold to an affiliated person or entity, gross proceeds are equivalent to the gross proceeds derived from, or paid under, comparable arm's-length contracts for purchases, sales, or other dispositions of like-quality lease products from the same field or area. In evaluating the comparability of arm's-length contracts for purposes of this Lease, the following factors shall be considered: price, time of execution, duration, market or markets served, terms, quality, volume, posted prices, prices received for arm's-length spot sales, other reliable public sources of price or market information, and such other factors as may be appropriate.
11. "Lease Date" shall mean the date the Lease was made and entered into as shown on Page 1 of this document.
12. "Lease Issue Date" shall mean the date that the Lease is acknowledged by the Lessor as set forth on Page 11 (signature page).
13. "Lease Products" means any leased minerals attributable to, originating from, or allocated to this Lease.
14. "Lessee" shall mean the person or entity who shall remain responsible for any and all covenants, express or implied, contained within the Lease regardless of any partial interest assignments.
15. "Marketable Condition" for gas means sufficiently free from impurities, except CO2, H2S and N2, and otherwise in a condition that it will be accepted by a purchaser under a sales contract typical for the field or area.
16. "Marketable Condition" for oil means sufficiently free from impurities and otherwise in a condition that it will be accepted by a purchaser under a sales contract typical for the field or area.

17. "Oil" means natural crude oil or petroleum and other hydrocarbons, regardless of gravity, which are produced at the well in liquid form by ordinary production methods and which are not the result of condensation of gas after it leaves the underground reservoir, including but not limited to oil, casinghead gasoline, drip gasoline and natural gasoline extracted from natural gas.

18. "Paying quantities" shall mean a dollar amount sufficient to pay the day to day well operating costs and for which a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well.

19. "Production Unit" is a Drilling Unit, or Development Unit, or Uniform Spacing Plan and, if agreed to by the Lessor, a Unitized Area, and consisting of one or more wells.

20. "Reasonably prudent operator" shall mean an operator that operates to maximize economic return to both Lessor and Lessee, taking into account market conditions, comparable production activities in the same field or area and all applicable regulatory conditions.

21. "Reclassification" shall mean the change of the classification in all, or a portion of, the lands contained within the Lease from nondevelopment or development (including a subsection of development which may contain restrictions) as deemed appropriate by the Lessor when the existing classification is substantially in error or there is a change in circumstances subsequent to the Lease Date.

22. "Reclassification fee" means a surcharge payment by the Lessee for the privilege of modifying all, or a portion of, the existing classification of lands contained within the Lease.

23. "Supervisor of Wells" shall mean the Director of the Department of Environmental Quality or his/her designated representative.

24. "Uniform Spacing Plan" (USP) shall mean a unit, as authorized by a Supervisor of Wells Order, such as (A) 14-9-94 for the Antrim formation, which will provide flexibility in the placement of wells as intended in Part 615 of 1994 PA 451, as amended.

25. "Unitization Agreement" is an agreement to consolidate acreage into a Unitized Area for the allocation of production on a basis as defined within the Agreement or Ratification as approved by the Lessor.

26. "Unitized Area" is the leased lands within the boundaries defined in the Unitization Agreement, or Ratification thereto, approved by the Lessor.

27. "Working Interest in the Lease" shall mean one or more individuals or entities who have obtained, with prior approval from the Lessor, an interest in the Lease to explore, develop, and produce the oil and/or gas under the leased premises.

28. "1994 PA 451, as amended" shall mean Act 451 of the Public Acts of 1994, as amended, and known as the Natural Resources and Environmental Protection Act.

B. TERM OF LEASE

1. Lease rights shall terminate and the Lessee shall be required to file a release with the Lessor as hereinafter provided whenever any rentals coming due under the Lease shall be and remain unpaid for a period of fifteen (15) calendar days after the rental becomes due.

2. Unless terminated pursuant to B(1), it is agreed that this Lease shall remain in force for a primary term of five (5) years from the Lease Date and as long thereafter as oil and/or gas are produced by the Lessee in paying quantities from any Development Unit, Drilling Unit or, at the option of the Lessor a Production Unit, but only as to the lands included in said unit.

3. The Lessor agrees that it may grant to the Lessee an extension of the primary term of this Lease for not more than two one-year extensions. Such extension to the sixth and seventh anniversaries of the Lease Date--as to any or all of the lands leased hereby--will be considered upon written application by the Lessee and payment of an extension fee, regardless of whether the Lessee is engaged in actual drilling operations on any Development Unit or Drilling Unit containing lands leased hereby. The application must be submitted not sooner than the fourth anniversary of the Lease Date. The amount of the extension fee shall be established by the Lessor and the extension fee must be paid prior to the fifth anniversary of the Lease Date for the first one-year extension and prior to the sixth anniversary of the Lease Date for the second one-year extension. The extension fee established for the sixth year shall remain the same for the seventh year, if executed. If, during the extended term, oil and/or gas is found in paying quantities, this Lease, insofar as it affects lands for which an extension was granted, shall continue with like effect as if oil and gas had been found within the primary term first set forth in paragraph B(2).

4. If the Lessee at the end of the fifth year of this Lease, or the first or second one-year extension granted under B(3), is engaged in actual drilling operations with respect to any well or wells on any Development Unit or Drilling Unit authorized which includes lands leased hereby, this Lease shall remain in force only on the lands included in such Development Unit or Drilling Unit so long as the actual drilling operations on said well(s) is diligently prosecuted to completion within one year from the start of drilling of said well. If oil and/or gas is found in paying quantities upon completion of such well(s), this Lease, only insofar as it affects land included within the said Development Unit or Drilling Unit, shall continue and be in force with like effect as if such well or wells had been completed within the primary term first set forth in paragraph B(2).

5. Notwithstanding anything to the contrary herein contained, actual drilling operations on or production from a Development Unit or units established under the provisions of J(7) shall maintain this Lease in force beyond the primary or extended term only as to land included in such unit or units. As to all other lands, this Lease shall expire under its own terms.

6. All applicable laws and rules are made a part and condition of this Lease. Violations of any of the applicable laws shall be considered a violation of the terms of this Lease and the Lessor, at its sole discretion, may invoke E(7), E(8), or E(9), or any combination thereof. No rules made after the approval of this Lease shall operate to affect the term of the Lease, rate of royalty, rental, or acreage, unless agreed to by both parties.

C. ECONOMIC TERMS

1. Rentals

The Lessee shall pay to the Lessor rental as follows:

a. The Lessee shall be required to make annual rental payments during each year of this Lease, it being understood that the primary lease term commences on the Lease Date.

b. Rental for each year of the primary term shall be paid at the rate of $2.00 per acre per year. Should the primary term of this Lease extend beyond the fifth year under provisions of Section B of this Lease, the rental shall be paid at the rate of $3.00 per acre for the sixth year, and $4.00 per acre for the seventh year.

c. A minimum rental of $5.00 per year per Lease shall be paid by the Lessee on any Lease where rental payment heretofore specified shall be less than that amount.

d. All rental, except for the first year of the Lease, shall be paid annually in advance of each anniversary of the Lease Date. Rental for the first year of the Lease shall be paid in conjunction with and at the same time as when Bonus payments are due.

e. The Lessor's receipt and deposit of a late rental payment shall not constitute a waiver of, or otherwise affect, the Lease termination that shall automatically occur whenever any rental payment is unpaid for a period of fifteen (15) calendar days or more after the anniversary of the Lease Date.

f. Each and every oil and/or gas well, producing in paying quantities, and paying royalties to the Lessor, shall abate the rental only on the leased premises situated within the established oil or gas Development Unit or Drilling Unit. At the Lessor's option, rent may be abated in accordance with specific terms contained within a Unitization Agreement which has been approved in writing by the Lessor. The abatement shall be effective on the rental due date following the rental period in which the abatement is granted.

2. Royalties

The Lessee shall pay to the Lessor royalties as follows:

a. The Lessee shall pay the Lessor a royalty equal to one-sixth (1/6) of the gross proceeds of sale of all oil and/or gas produced and saved in any combination from the leased premises as further set forth below.

b. It is agreed that the Lessee is required to place lease products in marketable condition at no cost to the Lessor. The value of gross proceeds shall be increased to the extent that the gross proceeds have been reduced because the purchaser, or any other person, is providing certain services the cost of which is the responsibility of the Lessee to place lease products in marketable condition.

c. At the sole option of the Lessor, and in lieu of royalty payments upon oil and/or gas produced and saved, the Lessee shall deliver to the credit of the Lessor free of cost the equal one-sixth (1/6) part of all oil and/or gas produced and saved under the terms of the Lease to facilities to which the wells may be connected.

d. If payments specified are not made on or before the twenty-fifth (25) day of the first month following oil production sale or the second month following gas and/or plant products sale, the Lessor may claim default under the provisions of Section E(1) herein. In addition to any remedies available to the Lessor

under the Lease, payments made after the due date shall include interest at the rate of one and a half percent (1.5%) per month, or at the maximum legal rate, whichever is less, on the amount of royalty unpaid. A full month's interest will be charged for late payments received during any portion of the month in which late payment is received.

e. Should oil be produced from any well, the gross proceeds of sale of lease products of such oil shall be free to the Lessor of any cost to whichever point is first encountered: 1) the point of sale to an independent nonaffiliated third party purchaser; or 2) to an affiliated purchaser, provided the sale is at prevailing market rates; or 3) the point of entry into an independent nonaffiliated third party owned pipeline system; or 4) the point of entry into an affiliate owned pipeline system, provided transportation rates are at prevailing market rates. Upon request by the Lessor, written justification of charges made by the Lessee must be submitted and agreed to in writing by the Lessor.

f. Should gas, including casinghead gas, be produced and saved from any well, the gross proceeds of sale of lease products of said gas shall be free to the Lessor of any cost to whichever point is first encountered: 1) the point of entry into a facility to remove CO2, H2S, N2 or obtain plant products, or 2) the point of entry into an independent nonaffiliated third party owned pipeline system; or 3) the point of entry into a pipeline system owned by a gas distribution company, or any subsidiary of such gas distribution company which is regulated by the Michigan Public Service Commission; or 4) the point of entry into an affiliated pipeline system, if the rates charged by such pipeline system have been approved by the Michigan Public Service Commission, or if the rates charged are reasonable, as compared to independent pipeline systems, based on such pipeline system's location, distance, cost of service and other pertinent factors. Upon request by the Lessor, written justification of charges made by the Lessee must be submitted and agreed to in writing by the Lessor.

g. The Lessee agrees that all royalties accruing to the Lessor herein shall be without deduction of any costs incurred by the Lessee except as agreed herein. The Lessor is not liable for any taxes incurred by the Lessee and no deduction may be taken for any tax in computing the royalty. Lessor's royalty is to be free and clear of all costs, claims, charges and expenses of any nature, including third party post production costs on or off the premises except as herein provided, and except for the reasonable costs of CO2, H2S and N2 removal, there shall be no deduction for the cost of gathering, separating, dehydrating, compressing or treating the gas to make it marketable. Unless otherwise specifically agreed in writing, there shall be no deduction for transportation costs prior to entry of gas into a pipeline system as set forth in C.2f (2) through (4).

3. Royalties for: Shut-in Wells and Wells Suspended from Operation

Within fifteen (15) calendar days after the anniversary of the Lease Date when a producing well is shut-in or suspended from operation for a period greater than 180 continuous calendar days, the Lessee shall pay to the Lessor, for each acre of the leased premises located within the established oil and/or gas Production Unit, a sum equal to the rental rate applicable under the terms of C(1b). For each year thereafter, any shut-in rate shall increase an additional $1.00 per acre per year. Such payment shall be deemed a royalty under all provisions of this Lease.

D. TERMS FOR: SHUT-IN WELLS AND WELLS SUSPENDED FROM OPERATION

1. If a commercially producible oil and/or gas well completed on the leased premises, or on acreage pooled or consolidated with all or a portion of the leased premises into a Development Unit for the drilling or operation of such well, but only to the extent that the leased premises are included in said Development Unit, is at any time shut-in, or operations are suspended due to action taken by the Supervisor of Wells, and no oil and/or gas therefrom is sold (or gas is used for the manufacture of gasoline or other products), subject to the conditions of this Lease, such shut-in well or well suspended from operation shall be deemed to be a well on the leased premises producing oil and/or gas in paying quantities, and this Lease shall continue in force provided that within thirty (30) calendar days from the date the Lessor's written request is mailed, the Lessee submits to the Lessor satisfactory documentation in support of the shut-in or suspended status.

2. If an oil and/or gas well has been shut-in, or operations have been suspended by the Supervisor of Wells, and shall remain shut-in or suspended for a period of thirty (30) calendar days due to conditions or circumstances beyond control of the Lessee, the Lessee shall notify the Lessor in writing within fifteen (15) calendar days thereof, and annually thereafter, stating the conditions or circumstances for the shut-in or suspended status and expected date of resumption of production. The Lessee must be able to demonstrate why the well is shut-in or suspended. In the event the Lessor shall determine, in its opinion, that such oil and/or gas can be marketed, the Lessor shall give notice to the Lessee in writing and the Lessee shall have thirty (30) calendar days from the date such notice is mailed in which to satisfy the Lessor. If the Lessee fails

to satisfy the Lessor and reach agreement with the Lessor, the Lessor may, at its sole discretion, invoke Section E(9) of this Lease as herein provided.

3. The Lessee shall at all times use reasonable diligence to produce and market oil and/or gas capable of being produced from such shut-in well.

E. DEFAULT OF LEASE

1. In the event the Lessor shall determine a default in the performance by the Lessee of any express or implied covenant of this Lease, the Lessor shall give notice, in writing, by personal service or certified United States mail, return receipt requested, to the Lessee's last known address, specifying the facts by which default is claimed. Except as to rental and offset well requirements as herein provided, the Lessee shall have thirty (30) calendar days from the date such notice is mailed in which to satisfy the obligation of the Lessee, if any, with respect to the Lessor's notice.
2. No tools, fixtures, machinery or other property of the Lessee shall be removed from said premises, if any royalties, damages, or other payments are due to the Lessor, and all sums due on royalties, damages, or other payments, shall be a lien on all implements, tools, movable machinery, and all other chattels used in operating said property, and also upon all of the unsold oil and/or gas obtained from the land herein leased, as security for the payment of said royalties, damages, or other payments.
3. The Lessee may remove all machinery and fixtures placed on the leased premises, including the right to remove casing from wells not productive of oil or gas in commercial amounts, provided, however, that said Lessee has complied with and fulfilled all other provisions of the Lease as herein provided.
4. Should the Lessee be prevented from complying with any express or implied covenant of this Lease, from conducting drilling operations thereon, or from producing oil and/or gas therefrom, after effort made in good faith, for any cause beyond the reasonable control of the Lessee, such as, but not limited to war, rebellion, riots, strikes, acts of God or an order or rule of governmental authority, then while so prevented, the Lessee's obligation to comply with such covenant shall be suspended upon proper and satisfactory proof presented to the Lessor in support of the Lessee's contention. The Lessee shall not be liable for damages for failure to comply therewith except in the event of lease operations suspended for wrongful acts or omissions of the Lessee. This Lease shall be extended as to such portion of the leased premises as, while, and so long as the Lessee is prevented, by any such cause, from drilling, reworking operations or producing oil and/or gas thereon or therefrom, provided, however, that nothing herein shall be construed to suspend the payment of rentals during the primary or extended term. The Lessee is expected to make application for all separate written permissions required by governmental agencies, including but not limited to easements, drilling permits, and surface use permits, within reasonable time prior to expiration of the Lease. Lessee's obligations under this Lease shall not be excused by failure to make timely applications for permits, annual frost law road restrictions, winter snow conditions or other conditions which are reasonably foreseeable.
5. As required by R299.8106 (3), before a lease will be executed for oil and/or gas exploration, development, and production, the Lessee shall file with the Lessor a lease performance bond, in an amount established by the Lessor, to cover costs incurred by the Lessor due to breach of any clause contained herein by the Lessee, including but not limited to the costs of any enforcement actions necessary on the part of the Lessor, costs of any necessary environmental remediation, clean-up or site restoration and conditioned that the Lessee, its heirs, executors, administrators, successors, and assigns, shall faithfully perform the covenants, conditions, and agreements specified in the Lease, and the laws and rules of the State of Michigan which apply.
6. The Lessee shall keep in full force and effect a sufficient lease performance bond to cover the acreage held under this Lease. If the amount of the lease performance bond in effect becomes depleted or partially depleted because of any claim or claims, the Lessee shall file a new or additional lease performance bond as required by the Lessor.
7. The Lessor may invoke part or all of the lease performance bond when it determines that part or all of the covenants, conditions or agreement specified in the Lease are not being fulfilled. Invoking the lease performance bond is not necessarily related to any action taken by the Lessor under part E(1).
8. In addition to invoking a part of or all of the lease performance bond noted under E(7), the Lessor, at the Lessor's sole option, may determine that the Lessee be placed on a "Hold Action" list until such time as any and/or all infractions by the Lessee have been resolved to the satisfaction of the Lessor. Placement on said list may result in barring the Lessee from any further leases, assignments, easements, extensions or other approvals required by the Lessor. However, placement on said list does not eliminate the Lessor's ability to forfeit any or all parts of said Lease under E(9).

9. If the Lessee fails to voluntarily satisfy the claim of default as herein provided relative to any condition or any express or implied covenants of this Lease, the Lessor may proceed, at its sole discretion, with forfeiture of all or part of said leased premises in accordance with the provisions of Act 81 of Public Acts of 1929, being Sections 554.281 and 554.282 of the Michigan Compiled Laws with invocation of all or part of the lease performance bond or with any combination thereof.

F. ASSIGNMENTS AND CONTRACTS

1. It is expressly understood and agreed that no assignments of working interests, of this Lease or any portion thereof, shall be valid except upon written approval of the same by the Lessor, and upon payment of a fee as established by the Lessor. Failure to notify, provide supporting documentation, and obtain Lessor's approval to assign any, or all, parts of said Lease, shall constitute default of this covenant and result in the Lessor's ability to invoke Paragraph E(7), E(8) and/or E(9).
2. Assignments of the entire 100% working interest to all formations in any portion of the premises herein leased shall be construed as a separate lease agreement and not a part of the original Lease. Development on the assigned acreage, after the assignment has been made, shall not affect the rate of rental or term of the Lease on the unassigned acreage; and, conversely, development on the unassigned acreage, after the assignment has been made, shall not effect the rate of rental or term of the Lease on the assigned acreage. Where the Lessee assigns any interest in this Lease which is less than the entire 100% working interest to all formations in any portion of the leased premises, the Lessee shall remain responsible for any and all covenants, express or implied, contained within this Lease.
3. If the estate of either party is assigned, the covenants hereof shall extend to their heirs, executors, administrators, successors, or assigns, but no change in the ownership of the land or the assignment of royalties shall be binding on the Lessee until after the Lessee has been furnished a written transfer or assignment or a copy thereof.
4. Subject to Paragraph F(1), each and every clause and covenant in this Lease shall extend to the heirs, executors, administrators, successors, and assigns of the parties hereto.

G. SURFACE DAMAGE PAYMENTS

1. The Lessee shall pay or agree upon payment to the surface owner, or any person holding under the owner, for all damages or losses (including any loss of the use of all or part of the surface), caused directly or indirectly by operations hereunder, whether to growing crops or buildings, to any person or property, or to other operations.
2. Before a drilling permit application is submitted to the Supervisor of Wells relating to land in which the State of Michigan owns mineral rights only, and as described in this Lease, proof shall be submitted to the Lessor, in writing, that notification to enter the land has been provided to the surface owner and that either voluntary agreement or stipulated settlement relative to surface use and damages has been reached between the Lessee, or the Lessee's authorized agent, and the surface owner or G(3) is invoked.
3. When a mutually satisfactory agreement relative to surface use and damages cannot be reached, either party can inform the Lessor, in writing, that a dispute exists and the Lessor will grant a negotiation period of thirty (30) calendar days in which no drilling or development operations may be conducted by the Lessee. This time period is to allow for the resolution of the dispute. If, at the end of this period, proof of the agreement is not submitted in writing to the Lessor, drilling and development operations will not be prohibited by the Lessor and resolution of the dispute rests solely with the Lessee and the surface owner independent of the Lessor. It is the sole responsibility of the Lessee to ensure that said thirty (30) day negotiation period is completed thirty (30) days prior to the expiration of the primary term or any extensions of this Lease.

H. RECORDS AND LOGS

1. The Lessee shall submit, upon request by the Lessor, an accurate log or record of each well in the format acceptable to the Supervisor of Wells and as provided for in the DEQ's Rules and Regulations under Part 615, 1994 PA 451, as amended.
2. The Lessee shall keep an accurate account of all operations under this Lease, including production, sales, prices, and dates of same; and shall report to the Lessor on the twenty-fifth (25th) day of each month, the quantity produced by each producing unit in the preceding calendar month, the quantities delivered to pipeline companies, and the quantities otherwise disposed of from the premises herein leased. The Lessee shall install and properly maintain, at its expense, adequate and correct meters for the measurement of gas

production and flows, and shall provide for verification of gas production and flows by an independent third party at the sole discretion and request of the Lessor.

3. The Lessor shall have the right to examine the books of the Lessee insofar as they relate to the production, sale, and valuation of any oil, gas or other products derived from the premises herein leased. The Lessee shall provide monthly information such as production volumes, sale prices, remittance amounts, deductions and other information pertinent to the calculation and payment of royalties due the Lessor in a format approved by the Lessor. The Lessee shall submit, upon request by the Lessor, copies of source documents, reports, contracts, schedules, and computations to support volumes, prices, costs, and other factors used to determine value and remittance.

4. The Lessor, or the Lessor's designated agent, shall have free access to the leased premises for the purpose of inspection and examination.

5. The Lessee shall, at the sole discretion of the Lessor, submit to an audit of all transactions, contractual relationships, volume, production, flows, sales, valuation, or such other records as Lessor may determine appropriate which are related to establishment of gross proceeds, deductions, the State of Michigan's decimal interest and corresponding correctness of the royalty payments or any other types of payments due to the Lessor. The audit may be performed by the Lessor, or contracted for by the Lessor, at the Lessor's discretion. The Lessee shall be responsible for the cost of the audit if, based upon the final audit report, any underpayment calculated before interest is in excess of five percent (5%) of the payment made for the audit period.

I. ENVIRONMENTAL TERMS

1. Any operations under this Lease shall be subject to all applicable Federal and State laws and rules now or hereafter in force. This Lease is not in itself an authorization to drill, and issuance of drilling permits for specific locations is subject to separate application and approval by the Supervisor of Wells pursuant to Part 615, 1994 PA 451, as amended. No operations shall take place on State-owned surface without separate written permission(s) required by the Lessor and/or any other State or Federal governmental agency.

   For lands under this Lease, the Lessee shall submit to the Lessor a complete copy of any application for permits to drill simultaneously with the submission of the application to the Supervisor of Wells. Each application shall identify the location of any State-owned surface lands contained within the proposed unit.

2. No operations shall take place in: a) a wetland (as defined in Part 303 of 1994 PA 451, as amended); b) habitat identified as critical to the survival of an endangered species and designated under provisions of Part 365 of 1994 PA 451, as amended; c) a site designated by the Secretary of State to be of historical or archaeological significance; unless a plan can be mutually agreed upon by the Lessor and the Lessee to substantially eliminate negative impacts.

3. Notwithstanding areas identified in Section I(2), in areas identified by the Lessor as having special wildlife, environmental, recreational significance, and/or State surface, the Lessee agrees to submit and negotiate a Development Plan with the Lessor which will minimize negative impacts and will minimize surface waste while remaining consistent with the spacing requirements established by the Supervisor of Wells.

   The Development Plan shall be submitted to the Lessor simultaneously with the Lessee's submission of the drilling permit application to the Supervisor of Wells. Upon completion of a producible exploratory well, the Development Plan, if not already provided to the Lessor, shall be submitted thirty (30) calendar days prior to any further drilling permit applications or formation of the Production Unit.

   The Lessor reserves the right to exclude certain sites from drilling and/or production activities in areas having special wildlife, environmental, or recreational significance, on State surface lands.

4. No well shall be drilled which is inconsistent with the Development Plan agreed to in I(3) or nearer than 1,320 feet to any lake or stream without the prior written consent of the Lessor. Great Lakes coastal shores shall be classified as nondevelopment within 1,500 feet of the shoreline unless a written exception is granted by the Lessor. To obtain the Lessor's consent, the Lessee will be required to demonstrate to the Lessor that the non-conforming well location will result in less environmental impact.

5. The Lessee shall route all pipelines from the well site to follow existing well roads or utility corridors and shall bury all pipelines below plow depth, unless the Lessor authorizes an exception in writing.

6. Restoration shall be completed within nine (9) months of surface disturbance within the premises for well site(s), pipeline(s), road(s), and other oil and gas development activities unless otherwise specifically approved in writing by the Lessor's authorized representative. Restoration shall be pursuant to requirements

identified within the Surface Use Permit, easement or other similar written permission for the development activity.

7. The Lessee, when surrendering this Lease, or portion thereof, or any well, shall leave the premises as required by applicable law and according to the terms and conditions of this Lease and terms of any prior written permissions from the Lessor, and in a safe and orderly condition. All debris and materials, such as timbers, boards, sheeting, tanks, pipe tubing, and any other equipment used in operating this Lease or a well, shall be removed from the leased lands when operations have ceased. Slush pits and burning pits shall be taken care of as required by applicable law and filled in. Upon failure of the Lessee to conform with these provisions, the Lessor shall have the right to enter on the property to repair damages and restore the property to a lawful, safe and sightly condition at the Lessee's cost or, at the Lessor's option, to invoke Paragraph E(7), E(8), or E(9). The Lessee may not escape any prior obligation of the Lease by surrendering this Lease, or any portion thereof.

J. LESSOR RIGHTS

1. The Lessor reserves the right to all minerals on, in and under the leased premises not herein expressly granted.
2. The Lessor reserves the right to use or lease the premises, or any part thereof, at any time, for any purpose but not to the detriment of the rights and privileges herein specifically granted.
3. The Lessor reserves the right to sell or otherwise dispose of the premises, or any part thereof, subject to the terms and conditions of this Lease.
4. The Lessor shall not be liable for any damages resulting from failure of its title, or control of restrictions established by the State department or Federal governmental agency having jurisdiction over the surface of the leased lands, as either relates to rights included herein; provided, however, that if the Lessor's title or control fails as to any or all of the rights covered by this Lease, the Lessor shall refund to the Lessee all bonus, rental or royalty payments made by the Lessee attributable to that part or portion of, or interest in, the title or control which has failed. In the event of title dispute wherein the Lessor's claim to title prevails, the Lessor shall receive interest at the prevailing prime rate on all money withheld by the Lessee pending settlement of the title dispute.
5. Should the Lessor be prevented from complying with any express or implied covenant of this Lease because of a force majeure (i.e., for any cause beyond the reasonable control of the Lessor such as, but not limited to, acts of God, legislation or rules of any governmental body, including budgeting constraints, any judgment of injunctive order entered by a court of competent jurisdiction, acts of the public enemy, riots, strikes, labor disputes, labor or material shortages, fire or flood) then such covenant shall be suspended to the extent made necessary by the aforesaid force majeure.
6. The Lessor reserves the right to require the Lessee to drill and operate wells to offset producible wells on adjoining production units when the Lessor believes drainage is occurring, regardless of whether such adjoining units are owned or leased by the Lessee. If, within one hundred twenty (120) calendar days from the date notification from the Lessor is mailed pursuant to E(1), the Lessee fails to: commence drilling such offset well(s), or agree to payment of and to commence payment of commensurate royalties on a monthly basis, or to submit reasonable proof to the Lessor that drainage is not occurring, the Lessor may require the Lessee to surrender a portion of the leased premises necessary to establish a Drilling Unit(s) for the drilling of offset wells. Offset wells shall be drilled to a depth not less than that of the producing formation of the adjoining well, and the drilling of such offset well or wells shall be prosecuted to completion in good faith. In the event the Lessee elects to make payment of commensurate royalties, the Lessee shall provide the Lessor with information in the Lessee's possession relevant to determination of said royalties.
7. For the purpose of oil and/or gas development and production under this Lease, the Lessor does hereby grant to the Lessee, the right to pool said premises, or any part thereof, with other land to comprise an oil and/or gas Drilling Unit. The Lessee shall record in the Register of Deeds office in the county in which said Drilling Unit is situated, an instrument identifying the unit so authorized, and a copy of the recorded instrument shall be filed with the Lessor within thirty (30) calendar days after recording. If such oil and/or gas well shall not be drilled on the leased premises but within the authorized Drilling Unit, it shall nevertheless be deemed to be upon the leased premises within the meaning of all of the covenants, expressed or implied, in this Lease, but only to the extent that the leased premises are included within the Drilling Unit. The Lessor shall participate in the royalty from such oil and/or gas Drilling Unit, at the rate provided in this Lease, only in the proportion that the number of acres owned by the Lessor within

the limitations of such Drilling Unit bears to the total number of acres included therein unless a substitute method is agreed to between the Lessee and the Lessor or established by the Supervisor of Wells.

8. Unitization Agreements including acres under this Lease must be approved in writing by the Lessor. Participation in royalties from a unitized area, or rent abatements, shall be in accordance with the Unitization Agreement.

9. The Lessor reserves the right, at its option, to renegotiate certain terms and conditions of the Lease as requested by the Lessor or Lessee.

K. LESSEE RIGHTS

1. The Lessee may surrender all or any part of the premises herein leased by giving notice in writing to the Lessor, provided however, that the Lessee may not escape any prior obligation of the Lease by filing a release. Upon surrender, the Lessee shall execute and deliver to the Register of Deeds, in the county wherein the land is situated, for recording, a proper and sufficient instrument of release of all of the Lessee's rights and interest under this Lease, insofar as they apply to the premises surrendered, and shall have said instrument delivered to the Lessor within fifteen (15) calendar days after recording with the Register of Deeds. Failure of the Lessee to conform with the provisions of this Lease may result in the Lessor invoking Paragraph E(7), E(8), and/or E(9).

L. RECLASSIFICATION OF LAND UNDER LEASE

1. The Lessee understands and agrees that the Lessor may at any time prior to the start of actual drilling operations, reclassify this Lease as "nondevelopment" as defined in 1981 AACS, R 299.8101. In the event of such reclassification, the Lessee agrees that its sole remedy, to the exclusion of any other at law or in equity, is to surrender this Lease or a portion thereof to the Lessor in exchange for a refund of all bonus and rental payments made by the Lessee attributable to the Lease or portion thereof surrendered. Where the land subject to this Lease is reclassified as "nondevelopment", the Lessee at its option may be entitled to a refund equal to the difference between the average per-acre bonus paid for State development leases and for State nondevelopment leases at the same sale in the same vicinity if said nondevelopment leases were sold for less than the development lease. Upon surrender, the Lessee shall execute and deliver to the Register of Deeds a proper and sufficient release of the Lessee's rights as set forth in Section K(1).

2. In the absence of alleged drainage and for nondevelopment lease tracts other than those formally dedicated by the Lessor as State parks, State recreation areas, or wilderness and natural areas, the Lessor may grant a change of classification from a nondevelopment lease, or tracts therein, to a development lease classification if the Lessor finds that the existing nondevelopment classification is in error or that there is a change in circumstances. In the event that a lease is reclassified as development, the Lessee shall pay compensation to the Lessor at least equal to the difference between the average per-acre bonus paid for State development leases and for State nondevelopment leases at the same sale in the same vicinity.

3. Notwithstanding the provisions of Section L, the Lessor shall not reclassify a lease as development if there will be impairment of any of the following: wetlands, endangered species habitat, historic, archaeological or cultural sites, areas of special wildlife, ecological or recreational significance.

M. NONDEVELOPMENT LEASE RESTRICTIONS

(This section pertains to nondevelopment leases only. A nondevelopment lease is identified by the prefix "N" in front of the Lease Number shown on page 1 of this document.)

1. All other provisions of this Lease notwithstanding, it is understood that no drilling or development work shall be conducted on the surface of the land described in this Lease without reclassification and/or the specific authorization of the Lessor. Reclassification or such authorization for this Lease or any portion of the lands contained herein, will be granted at the sole discretion of the Lessor.

2. Drilling, if authorized, shall be limited to the number of wells necessary to prevent drainage from said State minerals.

3. No operations shall be conducted until written instructions for the proper protection of any and all natural resource interests and/or surface values are issued by the Lessor.

The said Lessor, by its Manager of Minerals Management Section, has signed and affixed the seal of the State of Michigan by virtue of action taken by Lessor on , and the Lessee has signed and affixed its seal the day and year written below.

ACKNOWLEDGEMENT BY LESSOR

NATURAL RESOURCES DIRECTOR FOR
THE STATE OF MICHIGAN

By: _____

, Manager
Department of Natural Resources
Minerals Management Section

Acknowledged before me in Ingham County, Michigan, on _____, 20____, by , Manager, Minerals Management Section, of the Department of Natural Resources for the State of Michigan.

Prepared By:

_____, Notary Public
State of Michigan County of _____
My Commission Expires: _____
Acting in County of _____

ACKNOWLEDGEMENT BY LESSEE

LESSEE:

By: _____

Before me, the undersigned, a notary public in and for said county and State, on this _____ day of _____, 20____, personally appeared _____ to me personally known, who being duly sworn did say that they (or he/she) are authorized to sign on behalf of the Lessee named in the foregoing instrument and acknowledged to me that they (or he/she) executed the same as their (or his/her) free and voluntary act and deed.

_____, Notary Public
State of _____ County of _____
My Commission Expires: _____
Acting in County of _____

This Lease was approved by the Michigan State Administrative Board on:

EXHIBIT 2

MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

FILING ENDORSEMENT

This is to Certify that the ARTICLES OF INCORPORATION - NONPROFIT

for

DON'T DRILL THE HILLS, INC.

ID NUMBER: 71548R

received by facsimile transmission on April 23, 2014 is hereby endorsed.

Filed on April 24, 2014 by the Administrator.

This document is effective on the date filed, unless a subsequent effective date within 90 days after received date is stated in the document.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Department, in the City of Lansing, this 24th day of April, 2014.

Alan J. Schefke, Director
Corporations, Securities & Commercial Licensing Bureau

Sent by Facsimile Transmission

CSCL/CD-502 (Rev. 01/14)

MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
CORPORATIONS, SECURITIES & COMMERCIAL LICENSING BUREAU

Date Received

This document is effective on the date filed, unless a subsequent effective date within 90 days after received date is stated in the document.

Name
Timothy J. Lozen

Address
511 Fort Street, Suite 402

City | State | ZIP Code
Port Huron, MI 48060

EFFECTIVE DATE:

Document will be returned to the name and address you enter above. If left blank, document will be returned to the registered office.

ARTICLES OF INCORPORATION
For use by Domestic Nonprofit Corporations
(Please read information and instructions on the last page)

Pursuant to the provisions of Act 162, Public Acts of 1982, the undersigned corporation executes the following Articles:

ARTICLE I

The name of the corporation is:

Don't Drill the Hills, Inc.

ARTICLE II

The purpose or purposes for which the corporation is organized are:

Taking actions to oppose oil and gas drilling and leasing in and/or by the City of Rochester Hills and related actions.

ARTICLE III

1. The corporation is organized upon a Nonstock basis.
(Stock or Nonstock)

2. If organized on a stock basis, the total number of shares which the corporation has authority to issue is _____. If the shares are, or are to be, divided into classes, the designation of each class, the number of shares in each class, and the relative rights, preferences and limitations of the shares of each class are as follows:

ARTICLE III (cont.)

3. a. If organized on a nonstock basis, the description and value of its real property assets are: (If none, insert "none")

None

b. The description and value of its personal property assets are: (If none, insert "none")

None

c. The corporation is to be financed under the following general plan:

Contributions by supporters of the corporation

d. The corporation is organized on a Directorship (Membership or Directorship) basis.

ARTICLE IV

1. The name of the resident agent at the registered office is:

Timothy J. Lozen

2. The address of its registered office in Michigan is:

511 Fort Street, Suite 402 (Street Address) Port Huron (City), Michigan 48060 (ZIP Code)

3. The mailing address of the registered office in Michigan if different than above:

_____ (Street Address or PO Box) _____ (City), Michigan _____ (ZIP Code)

ARTICLE V

The name(s) and address(es) of the incorporator(s) is (are) as follows:

Name	Residence or Business Address
Timothy J. Lozen	511 Fort Street, Suite 402, Port Huron, MI 48060

04/23/2014 11:06AM (GMT-04:00)

Use space below for additional Articles or for continuation of previous Articles. Please identify any Article being continued or added. Attach additional pages if needed.

ARTICLE VI

No member of the board of directors of the corporation who is a volunteer director, as that term is defined in the Act, or a volunteer officer shall be personally liable to this corporation or its members for monetary damages for a breach of the director's or officer's fiduciary duty; provided, however, that this provision shall not eliminate or limit the liability of a director or officer for any of the following:
1. a breach of the director's or officer's duty of loyalty to the corporation;
2. acts or omissions not in good faith or that involve intentional misconduct or a kowing violation of law;
3. a violation of section 551(1) of the Act;
4. a transaction from which the director or officer derived an improper personal benefit
5. an act or omission occurring before the filing of these articles of incorporation; or
6. an act or omission that is grossly negligent.

If the Act is amended after the filing of these articles of incorporation to authorize the further elimination or limitation of the liability of directors or officers of nonprofit corporations, the liability of members of the board of directors or officers, in addition to that described in Article VI, shall be eliminated or limited to the fullest extent permitted by the Act as so amended. No amendment or repeal of Article VI shall apply to or have any effect on the liability or alleged liability of any member of the board of directors or officer of this corporation for or with respect to any acts or omissions occurring before the effective date of any such amendment or repeal.

ARTICLE VII

The corporation assumes the liability for all acts or omissions of a volunteer if all of the following conditions are met:
1. The volunteer was acting or reasonably believed he or she was acting within the scope of his or her authority.
2. The volunteer was acting in good faith.
3. The volunteer's conduct did not amount to gross negligence or willful and wanton misconduct.
4. The volunteer's conduct was not a tort arising out of the ownership, maintenance, or use of a motor vehicle for which tort liability may be imposed as provided in section 3135 of the Insurance Code of 1956, 1956 PA 218, MCL 500.135.

These Articles of Incorporation are signed by the incorporator on April _____, 2014.

I, (We), the incorporator(s) sign my (our) name(s) this 22nd day of April, 2014

Timothy J. Fozo

EXHIBIT 3

2010 WL 199587
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Carol DRAKE and Clellen Bury, Plaintiffs-Appellants,
v.
CITY OF BENTON HARBOR and Harbor Shores Community Redevelopment Corporation, Defendants-Appellees.

Docket No. 287502. | Jan. 21, 2010.

Berrien Circuit Court; LC No.2008-000247-CE.

Before: SERVITTO, P.J., and BANDSTRA and MARKEY, JJ.

Opinion

PER CURIAM.

*1 Plaintiffs appeal by right the trial court order granting summary disposition in defendants' favor. Because the unambiguous language in the property deed and consent judgment does not preclude the City of Benton Harbor from leasing a portion of Jean Klock Park to Harbor Shores Community Redevelopment Corp. for use of the same as a golf course open to the general public, and a golf course falls within the definition of a "park purpose" and/or "public purpose," we affirm.

In 1917, Mr. and Mrs. Klock gifted a 90-acre parcel of land with½ mile of Lake Michigan frontage, known as Jean Klock Park, to the City of Benton Harbor ("Benton Harbor"). The deed to Benton Harbor specified that the property was conveyed upon:

> the express condition, and with the express covenant that said lands and premises shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose; and at all times shall be open for the use and benefit of the public, subject only to such rules and regulations as the said City of Benton Harbor may make and adopt.

Until approximately 2003, Benton Harbor undisputedly used and maintained Jean Klock Park consistent with the deed, i.e. as public park and beach. In 2003, Benton Harbor announced its plan to sell part of the park to a private housing developer. Plaintiffs, along with a group of other Benton Harbor citizens, initiated a lawsuit against Benton Harbor challenging its right to convey the property under the assertion that such sale violated the covenants and restrictions in its deed. This prior lawsuit was settled between the parties and resulted in the entry of a consent judgment on January 27, 2004. The consent judgment allowed for the sale of a portion of the property to the developer and also permanently enjoined Benton Harbor:

> from using any portion of the property depicted as "Jean Klock Park"... for any purpose other than a bathing beach, park purposes, or other public purposes related to bathing beach or park use ...

In 2005 Benton Harbor announced its intention to lease approximately 22 acres of the (now) 74-acre park to defendant Harbor Shores Community Redevelopment Corporation ("Harbor Shores") for the development and use of the land as a public golf course. Benton Harbor apparently signed a lease with Harbor Shores for this purpose. Plaintiffs thereafter initiated the instant action, alleging a breach of the parties' settlement agreement and violation of deed restrictions, and seeking an injunction.

In lieu of answering plaintiffs' complaint, Benton Harbor moved for summary disposition pursuant to MCR 2.116(C)(8). Benton Harbor contended that the lease of a portion of the park for use as a public golf course serves a public purpose and is a "park use" as a matter of law and as required by the 1917 deed and the parties' 2004 consent judgment. Harbor Shores, a nonprofit corporation formed for the purpose of, among other things, fostering redevelopment and revitalization of blighted areas, also moved for summary disposition, essentially parroting the position held by Benton Harbor, but citing MCR 2.116(C)(10). The trial court granted defendants' motions for summary disposition and plaintiffs now appeal that decision.

*2 We review a trial court's award of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood,* 461 Mich. 109, 118, 597 N.W.2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the complaint alone. *Id.* at 119, 597 N.W.2d 817. In deciding a motion under this subrule, all factual allegations and reasonable inferences supporting a claim are accepted as true, and the court construes such allegations and inferences in favor of the nonmoving party. *McHone v. Sosnowski,* 239 Mich.App. 674, 676, 609 N.W.2d 844 (2000). A motion under subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Skinner v. Square D Co.,* 445 Mich. 153, 161, 516 N.W.2d 475 (1994). In reviewing such a motion, the trial court reviews the record evidence to determine whether a genuine issue of material fact exists to warrant a trial. *Harrison v. Olde Financial Corp.,* 225 Mich.App. 601, 605, 572 N.W.2d 679 (1997).

The interpretation of the language of a contract is an issue of law, which this Court reviews de novo. *Morley v. Automobile Club of Michigan,* 458 Mich. 459, 465, 581 N.W.2d 237 (1998). Deeds are contracts. *Negaunee Iron Co. v. Iron Cliffs Co.,* 134 Mich. 264, 279, 96 N.W. 468 (1903). An agreement to settle a lawsuit is also subject to the legal principles generally applied to contracts. *Walbridge Aldinger Co. v. Walcon Corp.,* 207 Mich.App. 566, 571, 525 N.W.2d 489 (1994).

On appeal, plaintiffs first argue that the Benton Harbor's lease of part of Jean Klock Park to Harbor Shores violates the restriction that the property be "forever used" by Benton Harbor. According to plaintiffs, Benton Harbor is the only entity that may use the property, and the lease of a portion of the property to Harbor Shores necessarily means that Benton Harbor is no longer using that portion of the property as required in the deed. We disagree.

As our Supreme Court explained in *Dep't of Natural Resources v. Carmody-Lahti Real Estate, Inc.,* 472 Mich. 359, 370, 699 N.W.2d 272 (2005):

> In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of the parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable. [*Id.,* quoting *Purlo Corp. v. 3925 Woodward Avenue, Inc.,* 341 Mich. 483, 487-488, 67 N.W.2d 684 (1954).]

*3 Where the terms of a contract are unambiguous, their construction is for the court to determine as a matter of law, and the plain meaning of the terms may not be impeached with extrinsic evidence. *Zurich Ins. Co. v. CCR and Co.,* 226 Mich.App. 599, 604, 576 N.W.2d 392 (1997). A contract is ambiguous when two provisions "irreconcilably conflict with each other," *Klapp v. United Ins. Group Agency, Inc.,* 468 Mich. 459, 467, 663 N.W.2d 447 (2003), or "when [a term] is equally susceptible to more than a single meaning," *Lansing Mayor v. Pub. Service Comm.,* 470 Mich. 154, 166, 680 N.W.2d 840 (2004).

When interpreting a restrictive covenant, the intent of the drafter controls, and where the language of a restriction is clear, the parties are confined to the language employed. *Moore v. Kimball,* 291 Mich. 455, 461, 289 N.W. 213 (1939). In addition, restrictions are generally construed against those attempting to enforce the restrictions, and all doubts are resolved in favor of the free use of the property. *Id.*

The deed states that the property is conveyed upon "the express condition, and with the express covenant that said lands and premises shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose ..." When read in context, it is clear that this phrase is a restriction on the use of the property-not a restriction on Benton Harbor's right to convey or otherwise assign its right to use the property. The phrase "used by said City of Benton Harbor" is followed by clear provisions as to what uses are allowed. In other words, as long as Benton Harbor owns the property, it must use it in the proscribed

manner. Had the deed intended to limit Benton Harbor to being the only entity to ever use the property, there would have been a period after "used by said City of Benton Harbor" and a list of allowable uses could have followed in a separate sentence. However, there is no period following "used by City of Benton Harbor." Instead there is a phrase which immediately follows the quoted language which modifies *how* Benton Harbor may use the property.

Further, the deed clearly contemplated that someone other than Benton Harbor may have some right, title, or interest (and thus, perhaps, use) in the property. For example, a condition of the conveyance is that "said grantees, their heirs, legal representatives or assigns shall not allow, suffer, or permit any intoxicating liquors or drinks ..." and that any violation of this condition may be enjoined "by said grantors by any court of competent jurisdiction without notice to the then owner of said premises, or any tenant thereof." The property was further conveyed:

> TO HAVE AND TO HOLD the said premises as above described, with the appurtenances unto the said party of the second part [Benton Harbor], *and to its assigns,* FOREVER ...

Clearly, while the deed was granted to Benton Harbor, it was contemplated that Benton Harbor may, at some time, assign some, if not all, of its interest in the property to another. Had this not been contemplated, there would be no need to include language referencing Benton Harbor's "assigns, heirs or legal representatives" of the "then owner or any tenant."

*4 We find no ambiguity in the deed language at issue and thus need not refer to extrinsic evidence in interpreting the deed restriction. *Zurich Ins. Co.,* 226 Mich.App. at 604, 576 N.W.2d 392. Here, the deed, when read as a whole, does not restrict the person or entity to use the property to Benton Harbor. As aptly noted by the trial court, "nothing in the deed or the consent judgment expressly prohibits the lease of part of the park to a private, nonprofit entity to carry out or implement a park purpose." Plaintiffs' assertion that the deed requires that the property be exclusively used by only Benton Harbor is without merit. Further, Benton Harbor is, in fact, using the property.

Because "use" as employed in the phrase "shall forever be used by said City of Benton Harbor" is not defined in the deed (or consent judgment), we may look to dictionaries to determine the plain, ordinary meaning of the word. *English v. Blue Cross Blue Shield of Michigan,* 263 Mich.App. 449, 472, 688 N.W.2d 523 (2004). Black's Law Dictionary (7th ed) defines "use" as "the application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." The American Heritage Dictionary (4th ed.) defines "use" as "to put into service or apply for a purpose; employ."

Here, Benton Harbor derives monetary and other gain from leasing the property to Harbor Shores. Because Benton Harbor benefits from the property while still retaining title ownership of the same, it could be argued that Benton Harbor is putting the property into service and thus the lease is a "use" of the property as defined above. In *Linton v. Howard,* 163 Mich. 556, 562, 128 N.W. 793, 795-796 (1910) our Supreme Court noted that "use", as it applies to real property, "does not mean the thing itself, but means that the user is to enjoy, hold, occupy, and have the fruit thereof. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy, or cultivation, etc., or the rent which can be obtained for the same." See also, *In re Moor's Estate,* 163 Mich. 353, 358, 128 N.W. 198 (1910). Rent obtained from real property having been unambiguously found by our courts to be a "use" of the real property, Benton Harbor's lease of the property for monetary gain is thus a use of the property.

According to plaintiffs, the deed also requires that property remain in public ownership, and the Harbor Shores lease allowing for it to operate a golf course on the property removes it from public ownership. Plaintiffs cites *City of Huntington Woods v. City of Detroit,* 279 Mich.App. 603, 606, 761 N.W.2d 127 (2008) as being directly on point as to this issue.

In *City of Huntington Woods,* the Rackhams purchased a parcel of property, the deed to which contained the following provision: "It is part of the consideration hereof that the land transferred by this deed shall be used only as a public park or golf course or for other similar purpose." The Rackhams constructed an 18-hole golf course, with a clubhouse, on the property. In 1924, the Rackhams deeded the property, containing the golf course and the clubhouse, to the defendant. That deed included the following condition:

> *5 FIRST: That the said premises shall be perpetually maintained by the said party of the second part exclusively as a public golf course for

> the use of the public under reasonable rules, regulations and charges to be established by second party.

Since 1924, the defendant continuously operated and maintained the property as a public golf course. Around 2006, however, the defendant solicited bids for the purchase of the golf course. Plaintiffs asserted that the use of the term "public", twice, within the deed restriction was indicative of the grantor's intent that the property must remain publicly owned, thereby precluding any conveyance to a private entity. A panel of this Court agreed, holding that:

> Given the unambiguous language used and the clearly stated intent of the grantors, we conclude that the Rackham deed contains an express covenant precluding the use of the subject property for any purpose other than a public golf course ... [A]dditional restrictions requir[e] the golf course to remain *public* necessitat[ing] a further limitation on the type of entities to which defendant might convey the property. As a result, we determine that defendant may only sell the subject property to another public entity and not to a private entity, despite the retention of any conditions or assurances that the property would remain a golf course open to the public. *Id.* at 626, 761 N.W.2d 127.

The restriction in *Huntington Woods* was that the property be used as a "public golf course" with "public" appearing before "golf course." Here, however, the restriction is that "said lands" be used for "bathing beach, park purposes, or other public purpose and at all times shall be open for the use and benefit of the public." The placement of the word "public" before golf course in *Huntington Woods* could be construed as an indication of ownership concerning the golf course. In this case, the placement of the word "public" before the word "purpose" in the deed place restrictions only on the use of the property.

The case before this Court also differs from *Huntington Woods* in that there is no proposed *sale* of the park to a private entity. Instead, this case involves the *lease* of a portion of the park to be used as a public golf course. While plaintiffs contend that a lease valid for up to 105 years (such as the one at issue) is effectively a conveyance, plaintiffs have directed us to no binding Michigan law to support this position. Moreover, a provision in the lease provides that Harbor Shores acknowledges that its permitted use of the leased premises shall not be deemed an ownership interest, which remained with the Benton Harbor. Further, the degree of control retained by Benton Harbor clearly indicates that the lease was not an effective conveyance.

The lease provides, among other things, that Harbor Shores cannot use the property for any purpose other than that specified in the lease absent the written consent of Benton Harbor; that an oversight panel created by Benton Harbor and comprised of Benton Harbor city commissioners and residents must approve Harbor Shores proposed golf fees, determine whether Harbor Shores is in compliance with the agreement, and has the right to inspect the golf course and audit and review Harbor Shores' records at any time. In the lease, Benton Harbor also retains the right to access the leased property for winter recreation (thus not even granting Harbor Shores exclusive use of the premises), requires that Berrien County residents be given discount rates, requires that the course be available for local high school competitions, and requires that at least 40% of the golf course employees be Benton Harbor residents. Benton Harbor having retained significant control over the property, the lease is not in effect a conveyance.

*6 Plaintiffs next contend that Benton Harbor's lease of a portion of Jean Klock Park to Harbor Shores violates the restriction that the property be used for "public" purposes or a "public park purpose" and be "open for the use and benefit of the public", as contemplated by the deed restrictions on the property (and the consent judgment). Again, we disagree.

> Plaintiffs encourage us to review evidence outside of the deed to ascertain whether a golf course was an intended use of the property or whether, as plaintiffs contends, the property was intended for use as a passive use natural park. As required, though, we look first to the specific language in the deed to determine the meaning of the conveyance; only if the language is ambiguous do we look to extrinsic evidence. *Zurich Ins. Co.*, 226 Mich.App. at 604, 576 N.W.2d 392.

The deed restricts use of the property to "bathing beach, park purposes, or other public purpose." The deed does not define "park purpose" or "public purpose." "Park" is defined in the American Heritage Dictionary (4th ed.) as, among other things, "an area of land set aside for public use as [ ] a piece of land with few or no buildings within or adjoining a town, maintained for recreational and ornamental purposes." "Recreation" is defined as "refreshment of one's mind or body after work through activity that amuses or stimulates; play." "Public purpose" is defined in Black's Law Dictionary (7th ed.) as "An action by or at the direction of a government for the benefit of the community as a whole." Golf is generally referred to as a recreational activity, and a public golf course has been found by courts of our state to fall under the definition of both a "park" and a "public purpose."

In *City of Detroit v. Oakland County,* 353 Mich. 609, 613, 92 N.W.2d 47 (1958), our Supreme Court was called upon to determine whether a golf course would be exempt from taxation under the following statute.

The following property shall be exempt from taxation:

* * *

'Third, Lands owned by any county, township, city, village or school district and buildings thereon, used for public purposes: * * *.

The Court, relying upon a Minnesota case, specifically held that, "the golf course in question comes within the definition of a public park. We agree with the factual determination of the trial chancellor that it is used continuously for public purposes." *Id*. at 617, 92 N.W.2d 47.

In *Golf Concepts v. City of Rochester Hills,* 217 Mich.App. 21, 23, 550 N.W.2d 803 (1996), this Court addressed taxation issues with respect to property that the City of Rochester owned, but had leased to a private, for-profit corporation that operated a golf course on the property. In resolving the taxation issue, this Court affirmed the Tax Tribunal's determination that the golf course, though supported by user fees rather than tax monies, was equally available to all members of the public without discrimination and was designed for the benefit of the citizens of Rochester Hills. This Court concluded that "the golf course is thus within the definition of a public park." *Id.* at 25-26, 550 N.W.2d 803.

*7 In the instant matter, Benton Harbor will lease a portion of the park to (non-profit) Harbor Shores for the operation of a golf course. Benton Harbor still owns the underlying property and retains significant control over the property, even sharing in its physical occupation during non-golf seasons. Benton Harbor also requires that the course be open to the public during reasonable hours, without discrimination of any kind, and receives the profits from the same for the benefit of the city. Based upon the cases cited and the specific facts in this case, the golf course falls within the meaning of both a public park and as serving a public purpose. Had the drafters of the deed intended that the park be used only in its passive, natural state, as claimed by plaintiffs, they could have placed such restrictions in the deed. They did not, and instead chose to employ broader language such as "park" and "public purpose." Because these terms have plain, ordinary meanings, we read and apply the deed as written. We do not find any ambiguity in the language employed in the deed, and thus need not review extrinsic evidence to determine the intent of the parties.

Affirmed.

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EXHIBIT 4

2003 WL 21278906
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Tina DISHAW, on behalf of the Taxpayers for the Forest Park School District, Plaintiff-Appellant,
v.
SOMERVILLE ASSOCIATES, a Wisconsin corporation; Gundlach Champion, a Michigan corporation; Carlson & Goulette, Inc., a Michigan corporation; and STS Consultants, a Wisconsin corporation, Defendants-Appellees.

No. 242048. | June 3, 2003.

Before: SMOLENSKI, P.J., and GRIFFIN and O'CONNELL, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff Tina Dishaw, on behalf of the taxpayers of the Forest Park School District, appeals from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of defendants Somerville Associates, Gundlach Champion, Carlson & Goulette, Inc., and STS Consultants, on the basis of Dishaw's lack of standing to pursue the claims alleged in the instant case. We affirm.

I

Plaintiff is a resident of Crystal Falls, Michigan, and a taxpayer of the Forest Park School District. Defendants are various contractors involved in the construction of a school addition, which was authorized by voter approval of a $7 million bond in 1997. This addition consisted of approximately 84,000 square feet at the existing high school and a new bus garage. The work also included remodeling of the existing building. The project was inspected by the school district and requisite governmental authorities and accepted by the district as a completed project in August 1998. The building has been used since that time.

In December 2001, plaintiff filed the instant complaint for injunctive relief and damages on behalf of the taxpayers of the Forest Park School District, alleging breach of contract and negligent design and construction of the school addition by defendants. The alleged defects consist for the most part of indoor air quality problems and standing ground water in the lower regions of the building, purportedly resulting in adverse health effects among children and teachers. Plaintiff contends that it will require substantial repair and modification to the facility to correct these problems; as a consequence, she and other taxpayers have incurred damages, including loss of use of the school building, the payment of personal property taxes for the project, and future property taxes to be incurred to repair the deficiencies.

Plaintiff also moved for certification of this matter as a class action. She sought to be declared a representative of a class of taxpayers suing in their individual right or, alternatively, suing in the place of the Forest Park School District which, as the owner of the building, neither brought an action against the architects, contractors or subcontractors, nor took any official board action on the concerns raised by plaintiff.

Defendants thereafter moved for summary disposition pursuant to MCR 2.116(C)(8), asserting that plaintiff, as an individual taxpayer or as a representative suing on behalf of the school district, lacked standing to bring her claim, and that the real party in interest to any claim for injunctive relief or actual damages was the Forest Park School District. Following a hearing on defendants' motions, the trial court took the matter under advisement and ultimately concluded that plaintiff lacked standing to pursue the present action either on behalf of the school district or as an individual taxpayer. The court found that other issues raised by the parties' motions, including class certification, were thus rendered moot. On May 30, 2002, the trial court entered an order dismissing all counts of the complaint on the basis of lack of standing. Plaintiff now appeals.

II

*2 This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 NW2d 817 (1999). A motion for

summary disposition alleging the real party in interest defense (standing) is properly brought under MCR 2.116(C)(8) or (10) based on the pleadings or other circumstances of the case. *Leite v. Dow Chemical Co,* 439 Mich. 920; 478 NW2d 892 (1992). A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and

> [a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v. Dep't of Corrections,* 439 Mich. 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). [*Maiden, supra* at 119-120.]

Whether a party has standing is a question of law subject to de novo review. *Lee v. Macomb Co Bd of Commr's,* 464 Mich. 726, 734; 629 NW2d 900 (2001).

III

On appeal, plaintiff contends that the trial court erred in granting defendants' motions for summary disposition on the basis of her lack of standing to bring the present claims. Specifically, plaintiff contends that she and others within her as yet uncertified class have standing to sue both on behalf of the school district, because the district has purportedly refused to pursue an action against defendants for their allegedly deficient and negligent performance, and as taxpayers in their own right. We disagree.

Legal actions must be prosecuted in the name of the real party in interest. MCL 600.2041; MCR 2.201(B). A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Blue Cross and Blue Shield of Michigan v Eaton Rapids Community Hosp,* 221 Mich.App 301, 311; 561 NW2d 488 (1997). In general terms, "standing" means that

> a party is normally required to have a sufficiently concrete interest in bringing a case that it can be expected to provide effective advocacy. *Allstate Ins Co v. Hayes,* 442 Mich. 56, 58; 499 NW2d 743 (1993). Said another way, standing has been described as a requirement that a party ordinarily must have a substantial personal interest at stake in a case or controversy, as opposed merely to having a generalized interest in the same manner as any citizen. *House Speaker v. Governor,* 443 Mich. 560, 572; 506 NW2d 190 (1993). Recently, we have described it even more succinctly by indicating that the concept of standing ordinarily requires that a party have "an interest distinct from that of the public." *Lee v. Macomb Co,* 464 Mich. 726; 629 NW2d 900 (2001). [*Michigan Coalition v. Civil Service Comm,* 465 Mich. 212, 217-219; 634 NW2d 692 (2001).]

*3 "Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large." *Waterford School Dist v. State Bd of Ed,* 98 Mich.App 658, 662; 296 NW2d 328 (1980). However, the common law bar is lifted pursuant to statutory authority under certain circumstances:

> In Michigan, the common-law bar on taxpayer suits has been relaxed by statute. The Revised Judicature Act permits litigation to prevent the illegal expenditure of state funds or to test the constitutionality of a related statute "in the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside." MCL 600.2041(3); MSA 27A.2041(3). The taxpayers must demonstrate that they will sustain substantial injury or suffer loss or damage as taxpayers, through increased taxation and the consequences thereof. *Menendez v. Detroit,* 337 Mich. 476, 482; 60 NW2d 319 (1953), *Jones v. Racing Comm'r,* 56 Mich.App 65, 68; 223 NW2d 367 (1974). A taxpayer lacks standing unless these requirements are met. [*Id.* at 662-663.]

See also *Menendez, supra; Grosse Ile Comm for Legal Taxation v Grosse Ile Twp,* 129 Mich.App 477; 342 NW2d 582 (1983); *Altman v. Lansing,* 115 Mich.App 495, 501; 321 NW2d 707 (1982); *Kaminskas v. Detroit,* 68 Mich.App 499, 501-502; 243 NW2d 25 (1976).

Recently, in *Lee v Macomb Co Bd of Commr's, supra,* our Supreme Court revisited the issue of standing in the context of an action brought by the plaintiffs, who were armed services veterans and families of veterans, against two counties and their boards of commissioners to compel the boards to levy a tax to establish a veterans' relief fund in accordance with the soldiers' relief fund act, M.C.L. § 35.21 *et seq.* It was uncontested that none of the plaintiffs actually sought relief under the act. The defendants thus asserted that the plaintiffs had suffered no injury and therefore were without standing to sue and, further, had failed to exhaust

their administrative remedies. Ultimately, on appeal, the Supreme Court determined that although the plaintiffs were potential beneficiaries of any monies that were collected and distributed through the soldiers' relief act, they did not have standing to bring the suits. In so holding, the court "flesh[ed] out the tests that a litigant must meet to establish standing," *id.* at 738, and adopted the stringent standing requirements of the federal courts set forth in *Lujan v. Defenders of Wildlife,* 504 U.S. 555; 112 S Ct 2130; 119 L.Ed.2d 351 (1992), which held:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered "an injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> *4 The party invoking ... jurisdiction bears the burden of establishing these elements. [*Lee, supra* at 739-740, quoting *Lujan, supra,* 504 U.S. at 560-561 (citations omitted).]

Applying this test, the *Lee* Court concluded that the plaintiffs therein lacked standing:

> In *Lujan* terms, they have not yet suffered any "injury in fact." See 504 U.S. 560. Specifically, they have shown no "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.' " *Id.* at 560. Both groups of plaintiffs have alleged and argued only that they "should receive" and "should have received, the benefit of the property tax levy required by M.C.L. § 35.21," and that the failure to levy and collect the tax set forth in the soldiers' relief fund act "has caused, and continues to cause, plaintiffs great harm and damage." Even if accepted as true, these allegations cannot satisfy the *Lujan* injury in fact requirement because it is not readily apparent how the collection of a tax pursuant to the act would have benefited plaintiffs in a concrete and particularized manner. MCL 35.23 provides that the soldiers' relief commission is to determine the amount and manner of any relief thereunder and that it may discontinue such relief in its discretion. Thus, the amount of relief, if any, that plaintiffs might have received under this act is solely within the discretion of the commission. "[G]reat harm and damage" is not concrete or particularized. Plaintiffs also fail to explain, with particularity, what is meant by "the benefit of the property tax levy required by M.C.L. § 35.21." At most, we can only speculate how the existence of a fund would have helped plaintiffs. Accordingly, plaintiffs lack standing to pursue the present actions. [*Id.* at 740-741.]

Here, plaintiff acknowledges that her claim falls outside the narrow scope of taxpayer suits that have been legislatively sanctioned. *Waterford Schools, supra.* Plaintiff does not allege that the school district has engaged in an illegal expenditure or misappropriation of public funds, and it is clear that plaintiff is not challenging the constitutionality of a statute relating to the expenditure of funds. MCL 600.2041(3); MCL 129.61; MCR 2.201(B)(4). Plaintiff's allegations thus do not fall within any of the statutory exceptions to the common law rule that a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large. *Waterford Schools, supra.*

Moreover, although plaintiff maintains that she is entitled to pursue the present action against defendants because the school district has purportedly refused to address the problems with the school addition and plaintiff's present and future taxes will be detrimentally impacted by costs related to the faulty construction, plaintiff has failed to demonstrate "an interest distinct from that of the public," *Lee, supra* at 739, as measured by the *Lujan* test. In particular, plaintiff has failed to adequately allege the invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not merely conjectural or hypothetical. *Lee, supra* at 739-740. Although plaintiff generally alleged that teachers and children (including her own) at the school may have suffered injury, counsel for plaintiff acknowledged during the course of oral argument on the summary disposition motions that plaintiff was not pursuing a personal injury claim based on adverse health effects caused by the negligent construction and design of the school building. Instead, plaintiff alleges "injury in fact" primarily in the form of tax expenditures that otherwise would not have been incurred but for the defective construction and design of the school building. However, such claims are merely speculative, and plaintiff has not shown some special grievance which sets her apart from the

citizens at large. As noted by this Court in *Altman, supra* at 504-505,

> *5 Plaintiffs also have failed to show with particularity how city funds were spent to the detriment of taxpayers. The requirement that increased taxation be shown with particularity provides governmental units with a necessary shield to protect against judicial scrutiny of all governmental expenditures. As this Court stated in *Killeen v Wayne County Civil Service Comm,* 108 Mich.App 14, 19; 310 NW2d 257 (1981):
>
> "The bald allegation that tax monies are being expended is too general and conclusory to serve as a springboard for the maintenance of a taxpayer's suit since such allegations would be equally applicable to practically every action taken by a unit of government and would throw open the doors to unlimited, unrestricted citizen's lawsuits."

With regard to plaintiff's assertion that she is entitled to pursue a cause of action *on behalf of* the school district, she cites no persuasive authority suggesting that under the present circumstances, as citizen taxpayer, she may file suit against the parties to a contract with the school district when the district itself, which possesses the discretionary authority to sue or not to sue, has not initiated such an action.

The law relating to a taxpayer's ability to bring an action on behalf of a governmental entity has been concisely summarized in 18 McQuillin, Municipal Corporations (3d ed, Revised 2003), § 52.17, pp 40-43:

> Taxpayers may sometimes sue on behalf of a municipal corporation, to enforce causes of action in its favor, when its officers refuse to do so, and may sometimes pursue pending litigation which the officers wrongfully abandon, sue to set aside default judgments, or prosecute appeals from judgments against the municipality.
>
> Taxpayers may bring suit to recover property belonging to the municipality, or for any money which has been paid out or released without authority of law, or to enforce a cause of action belonging to the municipality against a person having money or property belonging to the municipality or who is otherwise liable to suit, provided conditions required by the particular court or state are complied with.
>
> *The right of taxpayers to sue upon behalf of a city is generally subject to the following conditions and exceptions:* (1) The municipality itself must have a clear right and power to sue; (2) a taxpayer cannot sue third persons in behalf of the municipality unless the bringing of such action is a duty devolving upon the municipal authorities, *as to which they have no discretion* and which they have refused to perform; (3) either a demand must have been made that suit be brought by the public officers of the municipality, or it must be alleged and shown that such demand would be unavailing; and (4) the action does not lie where it would be grossly inequitable to enforce the claim, nor where the basis of the action is a claim of the taxpayer's rather than that of the municipality. However, the remedy of the taxpayer, in such cases, may not be necessarily confined to a direct action against those against whom the municipality has a cause of action. [Emphasis added.]

*6 Here, the school district clearly has the right and power to sue, by virtue of its statutory authority. See M.C.L. § 380.11a. However, plaintiff has not demonstrated that the school district has a nondiscretionary duty to sue the contractors it engaged to renovate the school, and that the school district has refused to perform this duty. On the contrary, the school district has no mandatory duty to bring suit in this case. As a legislatively-created body, the school district conducts business through votes at its school board meetings, M.C.L. § 380.1201(1), and, acting through the school board, is empowered to exercise its governmental discretion in determining the appropriate action, if any, to be taken concerning the allegations raised by plaintiff. MCL 380.11a. Plaintiff has provided no documentation indicating that the school board has taken any action on this matter to date.

Plaintiff in essence seeks to supplant the school district's authority by suing on its behalf in the absence of any authorization from the school board. There is no provision in Michigan law that would entitle her to proceed on this theory. The dissatisfaction of a taxpayer with the conduct or discretionary decisions of a governmental unit does not alone provide an adequate basis for standing. "[S]tanding to maintain a taxpayer's suit cannot be grounded on decisions of a governmental unit that are merely unwise." *Altman, supra* at 505, citing 18 McQuillin, Municipal Corporations (3d ed), § 52.24, p 49.

Plaintiff's reliance on *Ferndale School Dist v Royal Oak Twp School Dist No. 8,* 293 Mich. 1; 291 NW 199 (1940), as authority for permitting a taxpayer suit on behalf of the school district, is misplaced. In that case, the petitioner sought to intervene in an already pending action involving a portion of

land annexed by Ferndale from Royal Oak Township but not incorporated into the school district. Whatever considerations govern a citizen's intervention pursuant to court rule in a lawsuit in which a governmental entity is the defendant, they have no bearing on the question presented here: whether a citizen taxpayer may commence a suit against contractors with a governmental entity when the entity has not filed suit. Indeed, intervention to help a governmental entity defend against an injunctive action or a suit for damages raises significantly different policy concerns than bringing a suit that the government entity allegedly could have pursued but did not. Intervention to defend a suit does not pose a severe threat to government discretion.[1] In contrast, allowing a taxpayer to commence an independent action against third parties on behalf of a governmental entity, in the absence of any decision from the governmental entity to pursue such an action, impedes the entity's exercise of its discretion. A governmental entity may choose not to pursue a suit for many reasons, including an assessment that it is meritless, the belief that relief can be more readily obtained through other avenues, or a conclusion that litigation will harm the entity's interests.

*7 For these reasons, in the instant case we conclude that plaintiff cannot bring an action on behalf of the school board against defendants, who are parties to a contract with the school district. The trial court therefore did not err in granting summary disposition in favor of defendants on the basis of plaintiff's lack of standing to pursue the present claims.

With regard to plaintiff's motion for class action certification, this Court has held that "[a] plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class." *Zine v. Chrysler Corp,* 236 Mich.App 261, 287; 600 NW2d 384 (1999). Thus, the trial court properly held that because plaintiff lacked standing to bring suit, her motion for certification of a class action was rendered moot.

Affirmed.

Footnotes

1 As noted in 18 McQuillin, Municipal Corporations (3d ed, Revised 2003), § 52.10, pp 18-20, taxpayers may typically intervene in accordance with the court's discretion if the taxpayer has an interest in the suit or where the government has refused to defend itself or where there is some suggestion of fraud of collusion.

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