STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiff - Appellant,

v.

CITY OF ROCHESTER HILLS,
a Michigan municipal corporation;
JORDAN DEVELOPMENT COMPANY, LLC,
a Michigan limited liability company; and
SUNOCO PIPELINE, L.P., a Texas limited partnership,

Defendant - Appellees.

COA No. 324717

Oakland County Circuit Court
Case No. 14-140827-CH

Hon. James M. Alexander

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STATEMENT OF JURISDICTION

This action was decided via summary disposition in the Oakland County Circuit Court before the Honorable James M. Alexander. The Opinion and Order granting Defendants' motions for summary disposition and dismissing Plaintiff's Complaint in its entirety was entered on November 4, 2014 **(Exhibit A)**. On its face it is a final judgment as defined by MCR 7.202(6)(i). Appellants timely claimed this appeal from the Opinion and Order on November 20, 2014, within 21 days. Accordingly, this Court has jurisdiction over COA No. 324717 under MCR 7.203(A)(1).

STATEMENT OF QUESTIONS PRESENTED

1. Whether DDH, advocating on behalf of its members, including Rochester Hills registered voters and members who were instrumental in the development and passage of the voter initiated referendum to add Charter Section 11.8, has standing to enforce its provisions that City-owned parks can only be used for park purposes and shall not be sold, leased, transferred, exchanged or converted to another use without voter approval?

Lower Court said:	No
Plaintiff / Appellants say:	Yes

2. Whether the lower court erred in holding that the disputes regarding whether Rochester Hills electors (including DDH members) have the right to enforce Charter Section 11.8 and MCL 117.5(1)(e), and whether their voter approval provisions apply to the Jordan and Sunoco Agreement do not constitute actual controversies appropriate for resolution by Declaratory Judgment?

Lower Court said:	No
Plaintiff / Appellants say:	Yes

3. Whether the JORDAN Agreement, which severed and transferred oil and gas mineral rights from CITY-owned parks to JORDAN and allowed JORDAN to remove and sell such minerals required voter approval under Charter § 11.8?

Lower Court said:	No
Plaintiff / Appellants say:	Yes

4. Whether the SUNOCO Agreement, which moved the location of SUNOCO's prior easement and added new provisions and restrictions allowing surface uses and limited the CITY's uses of portions of Bloomer Park required voter approval under Charter § 11.8?

Lower Court said: No

Plaintiff / Appellants say: Yes

5. Whether the JORDAN Agreement, which severed and transferred oil and gas mineral rights from a CITY-owned cemetery to JORDAN and allowed JORDAN to remove and sell such minerals required voter approval under MCL 117.5(1)(e)?

Lower Court said: No

Plaintiff / Appellants say: Yes

I. INTRODUCTION / OVERVIEW

The heart of this matter involves discerning the intent of the Rochester Hills voters when they passed a voter initiated referendum to adopt Charter §11.8 that applies to all "CITY-owned property" designated as park in the CITY's Parks and Recreation Master Plan. The referendum required that such property be used only for park purposes, and not be sold, leased, transferred, exchanged or converted to another use without voter approval. It is hard to imagine a more comprehensive expression of the voters' intent to transfer the power to control transactions relating to park property from the CITY council to the voters. Yet the lower court, in contravention to statutory construction principles, ignored the clear intent of the voters and construed the referendum language to block rather than effectuate the intent of the voters.

Also at issue is whether the provisions in the Home Rule Cities Act at MCL 117.5(1)(e) (providing that a CITY does not have the power to "sell a park or cemetery, or any part of a park or cemetery[1]" without voter approval) prevent the CITY council from severing and selling the oil and gas minerals from a CITY-owned cemetery without voter approval.

Michigan law and common sense dictate that Rochester Hills' voters have standing to seek declaratory relief to determine whether or not the CITY council has the authority to sever and sell oil and gas minerals from beneath CITY-owned parks and the cemetery without voter approval. Likewise, seeking a court determination regarding whether such actions by a city

---

[1] CITY-owned parks are covered by both Charter § 11.8 and MCL 117.5(1)(e). The range of transactions prohibited without voter approval by Charter § 11.8 is broader than those covered by MCL 117.5(1)(e) so that this brief focuses primarily on Charter § 11.8 when discussing parks. However, CITY-owned cemeteries are not covered by Charter § 11.8 and are only governed by MCL 117.5(1)(e), so discussions regarding the cemetery focus exclusively on the statutory requirements requiring voter approval.

council without voter approval are *ultra vires* and void constitutes an actual controversy appropriate for resolution by declaratory judgment.

The issue of standing and issue of whether declaratory relief is an appropriate remedy are distinct from how a court may rule on the actual disputes the court is asked to resolve. The lower court erred by holding that Don't Drill the Hills, Inc.("DDH") (and DDH members) had no standing and that no actual controversy existed for declaratory judgment purposes via MCR 2.605.

Although DDH vehemently opposes oil and gas exploration and drilling in and around the CITY of Rochester Hills, this case is not about the relative merits and dangers posed by oil and gas drilling and production in and around the CITY. This is a voters' rights case about the denial of city voters' right to vote on the CITY's agreements with JORDAN and SUNOCO.

DDH asserts that the CITY proceeded illegally by adopting, without voter approval, agreements with JORDAN (the "JORDAN Lease" or "JORDAN Agreement") and SUNOCO. The JORDAN Agreement severs the oil and gas mineral rights from Tienken Park, Nowicki Park (the "Parks") and the VanHoosen Jones Stoney Creek Cemetery (the "Cemetery"), transfers these real estate interests to JORDAN, and allows JORDAN to extract and sell the oil and gas taken from the property until the minerals are depleted. The JORDAN Agreement also allows JORDAN to make revisions to the Agreement, including changes which allow JORDAN to use the surface of the parks upon the mere approval of the CITY Council without voter approval.

In regards to the new SUNOCO pipeline and easement through CITY-owned Bloomer Park, DDH does not dispute SUNOCO's right to maintain and repair the pipeline within and pursuant to the terms of SUNOCO's original 1950 Permit. DDH asserts only that the new easement over portions of Bloomer Park that were never previously subject to an easement, which contains

new restrictions on the CITY's use of portions of the park, and which grants SUNOCO new rights to control and put surface structures within the new easement, violated Charter § 11.8 by not being subjected to voter approval.

II. PROCEDURAL HISTORY

Defendants all requested summary disposition dismissal of DDH's Complaint based on MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(5) (lack of standing). DDH requested that summary disposition judgment as a matter of law be entered in its favor pursuant to MCR 2.116(I)(1) and (2) declaring that voter approval of the JORDAN Lease and SUNOCO agreements were required and that the agreements are *ultra vires* and void.

DDH also asserted that if the absence of a mandamus claim from its Complaint was the basis for denial based on lack of standing or dismissal for failure to state a claim, then DDH should be given an opportunity to amend its complaint per MCR 2.116(I)(5).

The lower court granted Defendants' motions and dismissed DDH's Complaint in its entirety. DDH appealed.

III. STATEMENT OF FACTS

A. SUMMARY OF FACTS

DDH is a Rochester Hills based non-profit corporation formed to oppose and/or minimize the adverse effect for Oil and Gas exploration and drilling in the Rochester Hills area and to prevent the use of CITY-owned parks and cemeteries from being used for oil and gas drilling, exploration, production, pipelines, and otherwise being used to support oil and gas exploration and production in the CITY. As of September 22, 2014, DDH had 103 members, of which 87 live in Rochester Hills including all of its officers and directors who are registered voters of Rochester Hills, Michigan. 61members of DDH have specifically authorized DDH to make

claims and advocate on their behalf in this lawsuit *See*, Affidavit of Pablo Fraccarolli, attached as **Exhibit B.**

In 2011, a Rochester Hills citizen organization known as Saving Parks and City Environment ("SPACE") initiated a referendum to amend the CITY Charter to prohibit the sale, leasing of, or change in the use of CITY-owned parks without voter approval (CITY's Answer to First Amended Complaint, ¶ 6). At the November 8, 2011 election, the voters of Rochester Hills approved the SPACE voter initiated referendum amending the CITY Charter to add § 11.8, Parks and Open Spaces, as follows:

> "**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.
>
> .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.
>
> *(Amd. 11-8-2011)*"

[The adoption of the Charter Amendment § 11.8 by referendum is acknowledged in all Defendants' Answers and/or Briefs.]

One of the reasons for the formation of SPACE and the referendum to add Charter § 11.8 was the controversy over the CITY Council's plans to build a water reservoir tower in Tienken Park. The referendum took away the power of the CITY Council to exercise its discretion regarding whether or not the CITY-owned parks could be sold, leased or converted to other uses and transferred that power to the voters. Although the prohibition of oil and gas leasing of parks is not expressly referenced in the charter amendment, SPACE members (some of whom now are DDH members) assert that the prohibition of oil and gas leasing of parks is consistent with the intent of the Charter amendment. See, affidavit of Erin Howlett, **Exhibit C,** Plaintiff's First Amended Complaint Paragraphs 6-8; Hearing Transcript p. 42 **(Exhibit K)**.

The CITY is the owner of the parks known as Nowicki Park, Tienken Park and Bloomer Park which are all expressly designated in and are a part of the CITY's Parks and Recreation Master Plan 2011 – 2015. [*See*, paragraph 5 of CITY's Answer to First Amended Complaint.]

Prior to approval of the JORDAN Agreement, the CITY's fee ownership of Nowicki Park, Tienken Park, and the Cemetery included ownership of all oil, gas, and mineral rights located within and under the boundaries of the two parks and cemetery. [*See*, paragraph 20 of CITY's Answer to First Amended Complaint.]

Under the terms of the JORDAN Lease, the oil and gas mineral rights for the CITY'S property are severed from the CITY's property and JORDAN may explore for, extract, and sell to others any oil and gas located beneath the property subject to its agreement with the CITY provided it pays a royalty to the CITY of 1/6 of the net amount realized by JORDAN. [*See,* JORDAN Lease, and paragraph 21 of CITY's Answer to First Amended Complaint.]

On December 3, 2012 the Rochester Hills CITY Council voted 5 – 2 to adopt a resolution (attached as **Exhibit D)** approving the proposed Oil and Gas Lease with JORDAN Management Company, LLC[2] and also providing:

> "BE IT FURTHER RESOLVED, that any proposed changes in the future language must be brought back to the City Council for review and approval."
>
> [*See*, paragraph 12 of City's Answer to First Amended Complaint and page 3 of JORDAN Brief.]

On January 15, 2013 the Rochester Hills Mayor signed the Oil and Gas Lease with JORDAN Development Company, LLC (not JORDAN Management Company, LLC) attached as **Exhibit E** (the "JORDAN Lease" or "JORDAN Agreement") even though it had not been approved by Rochester Hills' voters. [*See*, paragraph 14 of CITY's Answer to First Amended Complaint.]

At a January 27, 2014 CITY Council meeting, Mayor Barnett admitted that JORDAN intended to continue with its drilling / exploration in adjacent Auburn Hills over the next four to six months and, if successful, JORDAN would pursue additional leases in the CITY within a year's time. [*See*, ¶ 12 of CITY's Answer to Complaint for Declaratory Relief.]

In 1950, The CITY's predecessor in interest, the State of Michigan, granted a "Permit to Construct and Maintain Pipeline" (attached as **Exhibit F**) to Susoushenna Pipeline Company and its successors and assigns across a twenty-five foot (25') wide portion of what was then known as Bloomer State Park and is now owned by the CITY and called Bloomer Park (Defendant SUNOCO's Motion for Summary Disposition, p 2).

[2] Although the resolution authorized a lease with Jordan Management Company, LLC, the actual lease was with Jordan Development Company, LLC.

In September 2013 the CITY and SUNOCO entered into the Right of Entry Agreement, attached as **Exhibit G,** without voter approval.

Under the terms of the 2013 Right of Entry Agreement, SUNOCO was granted the right to enter and use portions of Bloomer Park outside of the 1950 originally permitted area and for consideration paid to the CITY, the CITY agreed to execute a new easement to SUNOCO to encompass the as-built location of the new pipeline constructed by SUNOCO (Defendant SUNOCO's Brief in Support of Motion for Summary Disposition, p 3).

In April 2014, the CITY approved the Pipeline Right-of-Way Easement attached as **Exhibit H,** whose terms include that the CITY "does hereby GRANT, BARGAIN, SELL AND CONVEY unto SUNOCO… a permanent, non-exclusive twenty-five foot (25') wide right-of-way and easement… emphasis in original]" in exchange for money paid to the CITY. [*See*, paragraph 23 of CITY's Answer to First Amended Complaint.] Although portions of the new pipeline and Pipeline Easement appear congruent with the 25' wide area referenced in the 1950 Permit, the new easement veers to the southeast across portions of Bloomer Park that were not covered by the prior Permit and exits the Park at a location approximately fifty (50') feet[3] southeast of the area referenced in the original Permit. [*See*, paragraph 24 of CITY's Answer to First Amended Complaint.]

The new SUNOCO Agreements give SUNOCO property rights to have and maintain a new pipeline in a part of the Park that previously was not subject to an agreement or easement and allows SUNOCO to abandon their old pipeline in the Park (See **Exhibits G** and **H**) and subjects

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[3] Estimated from the scale on the engineering drawing attached to the Right-of-Way Plan and Pipeline Right-of-Way Easement.

new portions of Bloomer Park to risks of leaks, contamination, and surface and subsurface disturbances.

Unlike the JORDAN Lease, the new SUNOCO Agreements have no prohibitions against SUNOCO using the surface areas of the Park and gives SUNOCO the right prevent the CITY from using portions of the Park for any buildings, structures or other things that might, in SUNOCO's sole discretion, interfere with SUNOCO's use of the property.

As of the date of DDH's First Amended Complaint JORDAN had not begun any drilling in the CITY. [*See*, CITY's Answer to First Amended Complaint paragraph 15.]

B. ERRONEOUS STATEMENTS IN OPINION AND ORDER

The Opinion and Order also contains several erroneous factual statements and mis-statements of DDH's arguments. Erroneous statements include:

- That "JORDAN seeks the subsurface oil and gas rights to ground underneath the parks and cemetery *solely because any oil and gas found thereunder may flow toward their offsite well location* [emphasis added]." Opinion and Order pp.1-2. In reality Jordon would access the oil and gas via directional and/or slant drilling under the parkland. *See*, **Exhibit I** previously attached to DDH's Consolidated Brief as **Exhibit I**.
- That "JORDAN only sought the subsurface oil and gas rights to protect itself in the event that any oil or gas flowed from directly beneath the parks to its offsite well." Opinion and Order p. 8. Again, JORDAN would directly access the oil and gas via directional and/or slant drilling under the Parks and Cemetery.

- That "Plaintiff isn't arguing that its members weren't allowed to participate in an election…." Opinion and Order p. 4. However, this is exactly what Plaintiff argued, that its members couldn't participate in an election on the issues because the CITY executed the agreements without holding an election.
- That SUNOCO's Agreement "simply provides for an easement that has existed in similar form since 1950." Opinion and Order p.5. In reality the new SUNOCO Agreement moved the easement 50 feet, allowed SUNOCO to build surface structures in the park, and restricted the activities the CITY could perform in the park without SUNOCO's permission. *See*, SUNOCO Easement, **Exhibit H.**

IV. ARGUMENT

A. STANDARD OF REVIEWAND BURDEN OF PROOF

(1) Appellate Standard of Review

Whether a party has standing is a question of law that is reviewed de novo. *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280, 291; 737 NW2d 447 (2007). Likewise, issues of statutory construction and grants of summary disposition and declaratory judgment are also reviewed de novo. *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 83; 746 NW2d 847 (2008). *Ross v Auto Club Group*, 481 Mich 1, 6; 748 NW2d 552 (2008); *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005) *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644; 517 NW2d 864 (1994).

De novo review is without deference to the lower court's decision. "Review de novo is a form of review primarily reserved for questions of, the determination of which is not hindered by

the appellate court's distance and separation from the testimony and evidence produced at trial." *People v Babcock,* 469 Mich 247, 268; 666 N.W.2d 231 (2003).

(2) <u>Burden of Proof</u>

i. <u>MCR 2.116(C)(5)</u>

Defendants sought dismissal of Plaintiff's First Amended Complaint based on MCR 2.116(C)(5) claiming that Plaintiff DDH lacks the legal capacity to sue by arguing that DDH does not have standing to pursue the claims pled. In deciding such a motion, the court must consider any affidavits, pleadings, depositions, admissions and documentary evidence filed or submitted. MCR 2.116(C)(5).

As detailed in this Brief below, DDH as an organization does have standing to assert the claims pled on behalf of its members because its members have standing to enforce their right to vote under Charter § 11.8 and MCL 117.5(1)(e).

ii. <u>MCR 2.116(C)(8)</u>

A motion to dismiss under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Admiral Insurance Co v Columbia Casualty Ins. Co,* 194 Mich App 300, 312 (1992); MCR 2.116(G)(5). In reviewing a motion for summary disposition under MCR 2.116(C)(8), the court looks to the pleadings, accepts as true all factual allegations and their reasonable inferences, and may grant the motion only where no factual development could possibly justify a right of recovery. *Sierocki* v *Hieber*, 168 Mich App 429, 432-433; 425 *NW 2d 477* (1988); *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395-396; 516 NW2d 498 (1994).

Under the facts pled, and as shown below, Plaintiff's First Amended Complaint states valid claims asking the Court to resolve by Declaratory Judgment whether Rochester Hills

voters' (including DDH members') have a right to vote on the JORDAN and SUNOCO Agreements, whether the Agreements were adopted in violation of Charter § 11.8 and/or MCL 117.5(1)(e), and the Agreements are void as *ultra vires* agreements.

iii. MCR 2.116(I)(1) and (2)

MCR 2.116(I)(1) and (2) state:

> **"(I) Disposition by Court; Immediate Trial.**
> (1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.
> (2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

Thus, MCR 2.116(I)(2) expressly authorizes a court to render summary disposition in favor of the party opposing the motion [here DDH]if it appears that such party is entitled to judgment. In deciding whether to grant summary disposition in favor of the opposing party the court may consider all materials referenced in MCR 2.116(G)(5) [the pleadings, affidavits, admission and documentary evidence offered in support of or in opposition of the motion]. A separate motion is not necessary for summary disposition in favor of the party opposing an opponent's motion. See, *Michelson v Voison,* 254 Mich App 691, 697-698; 658 NW2d 188 (2003) (denying defendant motion for summary disposition and awarding summary disposition judgment to plaintiff under MCR 2.116(I)(2).

At bar, all parties seek to have this Court construe Charter § 11.8 and MCL 117.5(1)(e) to determine whether or not voter approval was required for the CITY to enter into the JORDAN and SUNOCO agreements. Construction of unambiguous language in charters, statutes and agreements are matters of law for this Court to decide. *See,* Section IV. D. (3), *infra*. Re

GENERAL RULES OF CONSTRUCTION FOR CHARTER AND STATUTORY PROVISIONS. Accordingly, DDH is asking this Court to definitively decide the issue of whether Charter § 11.8 and/or MCL 117.5(1)(e) do or do not require voter approval of the JORDAN and SUNOCO Agreements and whether they are or are not void.

B. ROCHESTER HILLS VOTERS HAVE STANDING TO ENFORCE THEIR RIGHT TO VOTE PURSUANT TO CHARTER § 11.8 AND MCL 117.5(1)(e).

(1) DDH has Standing to Advocate the Interests of its Members.

The rule for standing of an organization such as DDH to litigate on behalf of its members is stated in *Lansing Schools Education Assoc v Lansing Board of Education,* 487 Mich 349, 373, note 21; 792 NW2d 686 (2010) (herein, "*Lansing Schools*") :

> "It is not disputed that, under Michigan law, an organization has standing to advocate for the interests of its members if the members themselves have sufficient interest [citation omitted]."

Here, DDH is litigating on behalf of its members who are electors in Rochester Hills who are seeking to establish and enforce their right to vote under Charter § 11.8 and/or MCL 117.5(1)(e) by seeking court rulings on whether or not voters have a right to vote on the CITY's entering the JORDAN and SUNOCO Agreements and whether the Agreements are valid. *See, also, Trout Unltd v City of White Cloud,* 195 Mich App 343, 348; 489 NW2d 188 (1992) (non-profit corporations have standing to advocate interests of its members, if its members have a sufficient stake or a sufficiently adverse and real interest in the matter being litigated.)

(2) Standing in General

The concept of standing is set forth in *In re Foster, 226 Mich App, 348, 358; 573 NW2d 324 (1997)* as follows:

> "In order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. *Solomon v Lewis,* 184 Mich. App. 819, 822; 459 N.W.2d 505 (1990).

> In *Bowie v Arder* 441 Mich. 23, 42-43; 490 N.W.2d 568 (1992), the Supreme Court, quoting 59 Am Jur 2d, Parties, § 30, p 414, noted that one cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. **[***14]** This interest is generally spoken of as 'standing.'"

The electors in Rochester Hills (including DDH members) added Charter § 11.8 by voter referendum to establish their right to control decisions made regarding CITY owned Property being used for park purposes. This gives them "standing", the legally protected right to invoke the jurisdiction of the courts to maintain an action to clarify and enforce such rights.

The purpose of standing has also been described as an assessment of whether a litigant's interest in an issue is sufficient to ensure sincere and vigorous advocacy. *Lansing Schools Education Assoc v Lansing Board of Education,* 487 Mich 349, 355; 792 NW2d 686 (2010) (herein "*Lansing Schools*"); *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). DDH's interest in protecting its members interest in their right to vote on matters covered in Charter § 11.8 and MCL 117.5(1)(e) is clear and has been demonstrated by their sincere and vigorous advocacy. In fact, DDH is expressly suited and organized to sincerely and vigorously advocate for persons concerned about the transfer of some of the CITY's interests in the real property used as Parks and Cemetery to private companies for oil and gas exploration and extraction, or pipeline purposes without voter approval. The facts pled and pleadings asserted by DDH clearly "indicate an adverse interest necessitating the sharpening of the issues raised", *Lansing Schools at 355,* therefore, this Court should issue declaratory rulings on the merits of the facts and laws at issue rather than ducking the issues by ruling that DDH had no standing to raise the issues.

Defendants and the lower court all asserted that DDH has no standing because it and its members cannot show any injury or harm different from that of the public at large. Such conclusion is erroneous. Charter § 11.8 and MCL 117.(1)(e) both establish "electors" as the identified class less than the public at large who have a right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large and therefore have standing.

The lower court and Defendants also all ignored the new standing doctrine established in *Lansing Schools* in 2010, overturning the prior standing doctrine adopted in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001) and overturning the *Lee* doctrine as it was applied and extended in numerous cases between 2001 and 2010.

The L*ansing Schools* court held:

> "…We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, *whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment*. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large ***or*** *if the statutory scheme implies that the Legislature intended to confer standing on the litigant* [emphasis added]." *Lansing Schools*, at 372.

The lower court erred and performed only an incomplete analysis of the factors which may establish standing. In the Opinion and Order, the lower court stated:

> "Our Supreme Court has held that a litigant has standing when (1) the litigant meets MCR 2.605 requirements for declaratory judgment, or (2) if the court, in its discretion, determines that 'the

> litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." Citing *Lansing Schools,* at 372.

However, the lower court completely ignored the parts of the standing doctrine adopted in *Lansing Schools* which provided that a litigant may also have standing "… *if the statutory scheme implies that the legislature intended to confer standing on the litigant* [emphasis added]*."* *Id.* at 372.

Thus, even if DDH and its member electors did not have a special injury or right [which we assert they do], or a substantial interest affected in a manner different from the public at large, they would still have standing if they met the requirements for declaratory judgment in MCR 2.605, or if the statutory scheme [here Charter § 11.8] implies that the legislature [here the voters passing the referendum] intended to confer standing on the litigant. DDH asserts that the plain language expressly and/or impliedly gives standing to the voters to challenge actions of taking by the CITY in violation of the voter approval mandates of Charter § 11.8.

Lansing Schools further stated that a litigant may have standing even if an implied private cause of action is in doubt, and that "a party may seek remedies other than monetary damages, such as declaratory relief under MCR 2.605(A)(1) against a governmental unit without having to demonstrate that a statute has an implied private right of action." *Id.* at 373, n. 22.

The trial court also erred in its standing analysis by intertwining the Court's perceived merits of DDH's substantive claims into its standing analysis. As the *Lansing Schools* court stated:

> "…Under the proper approach to standing, the issues of whether plaintiffs have sufficiently pleaded the cause of action and are entitled to the requested remedies are independent of the standing inquiry." *Id.* at 377, Fn 25.

In effect, the Court created a Catch-22 situation in which the court reasoned DDH does not have standing because the charter and statute do not give them a right to vote, and that DDH members had no right to vote because they had no standing.

To hold that only the CITY Council or Administration has the authority to enforce Charter § 11.8 would put the fox in charge of guarding the hen house. This result was clearly not intended by the citizens initiating the referendum and would eviscerate the clear intent mandating that the electors at an election, not the CITY Council or administration have the authority to make decisions regarding parks and cemeteries pursuant to Charter § 11.8 and MCL 117.5(1)(e).

(3) Charter § 11.8 Implies a Cause of Action for Voters to Protect Their Fundamental Civil Right to Vote.

Defendants all argued below that DDH's Complaint must be dismissed because Charter § 11.8 provided no private cause of action (and that DDH therefore had no standing). While Defendants are correct that the general rule is that when a statute or charter creates a new right or imposes a new duty, the remedy provided by the statute or charter to enforce the right, or for nonperformance of the duty, is exclusive. *See*, *Pompey v General Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971). However, there are exceptions. As held in *Mack v City of Detroit, 243 Mich App 132, 138; 620 NW2d 670 (2000)*:

> Where the common law provides no right to relief, but the right to relief is created by statute, a plaintiff has no private cause of action to enforce the right unless (1) the statute expressly creates a private cause of action, or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. [*Lane*, 231 Mich. App. at 695-696, citing *Long v Chelsea Community Hosp*, 219 Mich. App. 578, 583; 557 NW2d 157 (1996).]

Whether a particular statute or charter creates a private cause of action is a question of legislative intent. *Id; see, also*, *Boscaglia v Michigan Bell Telephone Co*, 420 Mich. 308, 317; 362 NW2d 642 (1984). In the case of a voter initiated referendum, it is the voters' intent that controls and the provisions should be liberally construed to effectuate the voters' purposes and facilitate rather than hamper the rights at issue. *Welch, supra, at 461*.

DDH asserts that voters' right to enforce their right to vote under Charter § 11.8 is inferred because the Charter provides no other adequate means of protecting their right to vote as provided in 11.8. To interpret § 11.8 to hold that voters have no right to enforce their right to vote not only hampers rather than effectuates and facilitates the core purpose and intent of 11.8, it renders the provision meaningless in violation of the law established in *Mack* and *Welch, supra.*

Michigan Courts have also been especially prone to imply private causes of action when the rights to be enforced are "civil rights". *Mack, supra at 141*. In Michigan, the right to vote is a fundamental civil right. As Michigan's Supreme Court has stated, "The 'right to vote' is not expressly enumerated in either our state or federal constitution. Rather, it has been held that the right to vote is an implicit 'fundamental political right' that is 'preservative of all rights. [citations omitted]'" *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71 479 Mich 1, 16; 740 NW2d 444, (2007).*

As defined in Black's Law Dictionary, 7th Ed., a "civil right" is:

> "The individual right of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include especially the right to vote…."

(4) Standing in Voters' Rights Cases.

Michigan courts have long recognized that in voter / election cases, voters suing to preserve or enforce their right to vote do not have to establish any special injury or harm other than an impact on their right to vote. The following are representative cases affirming voters' standing in right to vote cases:

In *Helmkamp v Livonia City Council*, 160 Mich App 442, 444-445; 408 NW2d 470 (1987) individual electors filed a suit for a declaratory judgment and an order of mandamus compelling the city to hold a special election. The Court of Appeals upheld the trial court's ruling that plaintiffs had standing to bring the action stating:

> "We agree that the lower court's reliance on *Amberg* was proper. *Amberg* is consistent with the following accepted statement of law:
>
> > 'It is generally held, in the absence of a statute to the contrary, that a private person as relator may enforce by mandamus a public right or duty relating to elections **without showing a special interest distinct from the interest of the public**. [*26 Am Jur 2d, Elections, § 367*, p 180, see also *52 Am Jur 2d, Mandamus, § 390*, pp 712-713.]'
>
> Consequently, defendants' assertions and citations to the contrary, **plaintiffs were not required to show a substantial injury distinct from that suffered by the public in general**. The trial court's ruling on the standing issue was not erroneous." [emphasis added] .

In *Salzer v East Lansing*, 263 Mich 626, 629, 631-632; 249 NW16 (1933) the court not only upheld an individual tax payer's standing to challenge the city council's authorization to execute a contract without following a law requiring voter approval of such expenditures it also held that the contract was *ultra vires* and void because it had not been approved by the voters.

In *Protect MI Constitution v Secretary of State*, 297 Mich App 553, 566-567, (overturned on other grounds) 492 Mich 860; 824 NW2d 299 (2012), the court again clarified the special nature of election cases in a case in which, among other things, the defendant challenged whether plaintiff, a ballot question committee had standing to seek mandamus[4] to prevent the placement of a proposal to amend Michigan's Constitution on the ballot. Specifically the court addressed standing as follows:

> "We reject CFMMJ's challenge to PMC's standing to bring this action**. Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases.** *Deleeuw v State Bd of Canvassers, 263 Mich App 497, 505-506; 688 NW2d 847 (2004).* [***17] See also *Helmkamp v Livonia City Council, 160 Mich App 442, 445; 408 NW2d 470 (1987)* ('[I]n the absence of a statute to the contrary, … a private person … may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public.' [Quotation marks omitted.]) **The general interest of ordinary citizens to enforce the law in election cases is sufficient to confer standing to seek mandamus relief.** See *Citizens Protecting Michigan's Constitution, 280 Mich App at 282* (permitting a ballot question committee to challenge a petition)." [Emphasis added.]

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[4] This and several other cases cited herein reference voters' standing to seek mandamus. Plaintiff herein is not currently seeking mandamus, because they are first seeking a declaratory ruling from this court that Charter § 11.8 applies to the agreements. The absence of a mandamus claim should not affect the court's ruling on the issue of standing and, if the current absence of a mandamus claim was the basis for denial based on lack of standing or dismissal for failure to state a claim per MCR 2.116(C)(8), then Plaintiff should be given an opportunity to amend its complaint per MCR 2.116(I)(5) as it requested in its pleadings before the lower court.

In the unpublished case[5] *Fleming v Macomb County Clerk,* 2008 Mich App Lexis 1325, attached as **Exhibit J,** the court addressed whether the individual plaintiff voters had standing to seek declaratory and injunctive relief regarding the county clerk's mailing unsolicited absentee voter ballots to all county voters over the age of 60. The county clerk argued that the individual voters did not have standing because they suffered no injury. In ruling that plaintiffs had standing, the court stated:

> "Defendant contends that even if the mass mailing violated state law or the constitution, plaintiffs are not entitled to relief because they failed to show any injury or harm. **However, plaintiffs are not required to show a substantial injury distinct from that suffered by the public in general in order to establish standing in an election case.** *Helmkamp v Livonia City Council, 160 Mich.App. 442, 445; 408 NW2d 470 (1987).* '[T]he right to vote is an implicit fundamental political right that is preservative of all rights.' In re *Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich 1, 16; 740 NW2d 444 (2007) (internal quotations omitted)....*Defendant's actions undermined the constitutional right of the public to participate in fair, evenhanded elections and, therefore, constituted an injury. Consequently, plaintiffs had standing to bring a cause of action to remedy this injury. See *Helmkamp, supra."*

* * *

Additionally, Charter § 11.8 and MCL 117.5(1)(e) imply that the legislature [and the voters by referendum] intended to confer standing on the electors by giving them the right to vote on the matters involved. Although Charter § 11.8 and MCL 117.5(1)(e) did not explicitly grant voters the right to sue if the CITY Council failed to abide by or enforce CITY voters' right to

[5] Although this case is not precedentially binding under the Rule of *Stare Decisis*, its reasoning is persuasive and the cases cited therein are recorded and precedentially binding.

vote, such right is clearly implied. And, nobody is in a better position to protect the electors rights that the electors themselves and organizations such as DDH who are advocating for their elector members.

That an implied right of citizen standing to enforce § 11.8 was intended by the voters who petitioned to put the Charter proposal on the ballot is also clear from the fact that the impetus for the referendum was past decisions by the CITY Council and Administration regarding uses they proposed and/or permitted in Parks. The clear intent of the referendum was that the electorate, not the CITY Council and Administration, would have direct control over the sale, leasing, transferring or converting of uses in Parks. See, affidavit of Erin H. Howlett attached as **Exhibit C**.

This case is similar in some respects to the early civil rights cases following adoption of the Voting Rights Act of 1965. In *Allen v State Board of Education*, 339 US 544, 556 (1969), the Supreme Court upheld an implied right of action by individual voters claiming their states had not complied with the Act. Although the Act did not explicitly grant voters the right to sue to enforce the Act's requirements and although the Court might have held that only the US Department of Justice could sue to require compliance, the Court held that the Act's goals "could be severely hampered… if each citizen had to depend solely on litigation instituted at the discretion of the Attorney General." *Id.* Thus, the Court upheld an implied private cause of action for a voter to seek enforcement of the Act.

(5) Error to Deny Standing and Declaratory Relief Because Mandamus not Pled.

The lower court erroneously stated "that Plaintiff's characterization of this case as a voters' rights case misses the mark [because] Plaintiff filed the case as a declaratory action - and

not one seeking mandamus." Opinion and Order, p3. And, Defendants all assert that DDH has no standing because mandamus was not pled.

The CITY's and JORDAN's lower court reply briefs argue that unlike the voters' rights and election cases cited by DDH, the present case is for declaratory relief, not mandamus and argues that declaratory relief actions are subject to entirely different and more stringent standing and requirements (CITY's reply brief p 1).

DDH cites authority for its standing irrespective of whether it sought declaratory relief or mandamus and asserts that the rational for courts upholding electors standing to litigate matters involving whether or not an election must be held (*Helmkamp*), what should or should be on a ballot (*Protect MI Constitution*), who is entitled to be mailed absentee ballots (*Fleming*), whether actions requiring voter approval are void without such approval (*Salzer*), and whether only the attorney general canforce states to comply with the civil rights act (*Allen*). In all those cases individuals (or an organization advocating for the individual) were held to have standing because the general interests of ordinary citizens to enforce matters involving their right to vote was sufficient to confer standing in such matter.

The lower court and Defendants also implicitly asserted that Declaratory relief is not permitted because DDH could have sought mandamus as opposed to Declaratory Relief. However, MCR 2.605(A)(1) expressly states that a court "… 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[*emphasis added*]*." Likewise, the provisions at MCR 2.605(C) provide "the existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case." Thus, the fact that DDH chose to not plead an alternate claim for mandamus does not prejudice DDH's right to seek Declaratory action.

A case expressly holding that Declaratory Judgment was appropriate notwithstanding that the plaintiff could have brought mandamus proceedings is *Lord v Genesee Circuit Judge,* 51 Mich App 10, 17; 214 NW2d 321 (1972) ("plaintiff is entitled to seek declaratory relief in spite of the availability of relief by way of *quo warranto* and *mandamus*. The circuit court had jurisdiction to grant the declaratory relief prayed for.")

However, if this Court upholds the dismissal of DDH's complaint pursuant to MCR 2.116(C)(8) for failure to add a claim for mandamus, then DDH requests this Court to remand to the lower court to allow DDH to file an amended complaint pursuant to MCR 2.116(I)(5)[6].

C. WHETHER THE JORDAN AND SUNOCO AGREEMENTS REQUIRE VOTER APPROVAL IS AN ACTUAL CONTROVERSY APPROPRIATE FOR DECLARATORY JUDGMENT.

MCR 2.605, Declaratory Judgments provides in pertinent part:

> "(A) Power to enter declaratory judgment
>
> (1) 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.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.
>
> …
>
> (C) Other adequate remedy. The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case."

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[6] DDH requested that the lower court allow such amendment in the event the court ruled the DDH failed to state a claim. The lower court's Opinion and Order dismissed the Complaint stating that it was a final order resolving the last pending clam and closed the case. DDH now appeals.

The actual controversy requirement requires that a party demonstrate an interest in the outcome that will ensure sincere and vigorous advocacy and that plaintiffs demonstrate an adverse interest necessitating a sharpening of the issues raised. *Associated Builders & Contractors v Michigan Dept of Consumer & Industry Services,* 472 Mich 117, 125-126; 693 NW2d 374 (2005). In *International Union v Central Michigan University Trustees,* 295 Mich App 486, 495; 815 NW2d 132 (2012) the court summarized current laws applicable to declaratory judgments as follows:

> "MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness. An 'actual controversy' under MCR 2.605(A)(1) exists **when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights**. The requirement prevents a court from deciding hypothetical issues. However, by granting declaratory relief in order to guide or direct future conduct, courts are not precluded from breaching issues before actual injuries or losses have occurred. **The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate and 'adverse interest necessitating the sharpening of the issues raised.**'" [Citations omitted and emphasis added.]

The lower court erroneously dismissed DDH's request for declaratory relief by holding that DDH "cannot point to any future conduct necessary for guidance…[and]failed to establish the existence of an actual controversy for the Court to establish MCR 2.605 standing." Opinion and Order, p10.

The lower court erred because declaratory rulings are necessary to not only determine whether the current JORDAN and SUNOCO Agreements required voter approval, but to determine whether voters have a right to vote on anticipated future oil and gas leases and other developments affecting parks and cemeteries. Resolution of the voter approval issue and

whether the Lease is valid is also necessary now, before Jordon actually begins to drill and begins to extract any oil and gas pursuant to the Lease. *See*, CITY's Answer to First Amended Complaint, Paragraph 15 admitting that JORDAN has not yet begun drilling in the CITY. Although the Agreements at issue involve only three CITY Parks and one Cemetery, the CITY's Parks and Recreation Master Plan 2011 -2015 contains 15 additional parks which may be subject to oil and gas exploration and drilling on or affecting CITY properties used as parks.

The issue of JORDAN and/or other oil and gas exploration companies attempting to lease additional CITY-owned parks or cemeteries is real. At the January 27, 2014 CITY Council meeting, the Rochester Hills mayor stated that JORDAN intended to continue with its drilling / exploration and pursue additional leases in and around the CITY within a year's time if its drilling / exploration efforts in adjacent communities were successful. *See,* CITY's Answer to Complaint for Declaratory Relief, paragraph 12. *See, also* the September 21, 2012, letter from Mayor Barnett addressed to "Dear Residents and Property Owners" [attached as **Exhibit I**] which discusses JORDAN's oil and gas development future plans for the CITY.

Declaratory Rulings to establish the rights of the voters and whether the CITY can enter additional oil and gas agreements for properties in the CITY used as parks and open space without voter approval needs to be resolved now to avoid future battles and litigation each time a new oil and gas lease covering CITY parks or open space and/or every time the CITY is approached by JORDAN to revise the Lease or seek an exemption from the restrictions in the Lease.

DDH's request for Declaratory Relief also seeks advance guidance on whether voter approval is required to amend the Lease to allow surface uses. The provisions in paragraph 3 of the exhibit A addendum to the Lease contain restrictions and prohibitions on JORDAN's

operations on the surface of the Parks, and the restriction that JORDAN's operations do not disturb or interfere with, restrict or otherwise affect the current or future use or development of the parks. However the restrictions listed are not absolute, as implied by Defendants. The language in paragraph 3 states expressly that the restrictions are not absolute, but may be set aside by "approval of the City Council…." Likewise, the CITY Council resolution authorizing signing the Lease in the first place states *that any proposed changes in the Lease be brought back to the Council [not the voters] for review and approval*. See, **Exhibit D**. Thus the restrictions in the Lease are all subject to being swept aside by mere approval of the council.

The lower court's and Defendants' assertions that no actual controversy exists are ludicrous. The dispute regarding whether or not the CITY has the right to sell the oil and gas minerals from CITY-owned parks and cemeteries without voter approval has been the subject of controversy at numerous CITY Council meetings, public forums in the community, subject to numerous newspaper and television stories on the controversy, and will certainly be the subject of future disputes and/or litigation unless the issues raised in this suit are resolved now. DDH has demonstrated vigorous advocacy adverse to the CITY's, JORDAN's and SUNOCO's positions and is well suited to sharpen the issues at bar regarding whether or not Charter § 11.8 and MCL 117.5(1)(e) require voter approval of the Agreements at issue. Accordingly the matter is ripe for Declaratory Relief.

D. CONSTRUCTION AND APPLICATION OF CHARTER § 11.8 AND MCL 117.5(1)(e).

(1) The Nature of Oil and Gas Leases and Easements.

The nature of oil and gas mineral rights and basic principles of real estate law are central to the dispute at bar. In Michigan, minerals and oil and gas in place constitute real estate. *Winter v State Highway Comm'r*, 376 Mich 11; 135 NW2d 364 (1965); *Mark v Bradford*, 315

Mich 50; 23 NW2d 201 (1946). A fee owner's interest in land extends indefinitely downward and upward, and the landowner alone is entitled to prospect for, sever, and remove substances found beneath the surface. Also, the fee owner of the surface owns all oil, gas and minerals in place beneath the land. See, *Manufacturer's Nat'l Bank v Dept of Natural Resources*, 420 Mich 128; 362 NW2d (1984), *Wronski v Sun Oil Co.,* 89 Mich App 11, 21, 279 NW2d 564 (1979).

Under an oil and gas so called "lease", the surface owner's oil and gas mineral rights are severed from the fee ownership of the landowner. *VanSlooten v Larson,* 410 Mich 21; 299 NW2d 704 (1980); *Rorke v Savoy Energy,* 260 Mich App 251; 677 NW2d 45 (2003); *Eadus v Hunter*, 268 Mich 233; 256 NW 323 (1934) (Minerals including oil and gas, are considered part of the realty until severed); *Michigan Consol Gas Co v Muzeck, 4 Mich App 502; 145 NW2d 266, aff'd 379 Mich 649; 154 NW2d 448 (1967)* (Upon execution of an oil and gas lease, the exclusive right to explore for and reduce mineral interests to possession immediately becomes vested in the lessee.)

Thus, an oil and gas lease such as the JORDAN Lease, although called a "lease," actually **severs, sells, and transfers a portion of the CITY's real property to JORDAN**. So, the JORDAN Lease is significantly more than a mere temporary lease as Defendants attempt to characterize it. Prior to execution of the JORDAN Agreement, the City-owned real property being used as the Parks and Cemetery included the CITY's ownership of the oil and gas and other mineral rights. The Lease severed and transferred these real property interests to JORDAN.

Likewise, an easement is an interest in real estate. *Myers v. Spencer,* 318 Mich 155, 164; 27 NW2d 675 (1947) (An easement is an interest in land**.** An easement may not be "created, granted, assigned, surrendered or declared, unless by act or operation of law**,** or by

a deed or conveyance in writing."). The CITY's new agreements with SUNOCO severed real property interests from the CITY's fee interest in Bloomer Park and transferred them to SUNOCO. By executing the new SUNOCO Agreements, the CITY transferred new real property interests in Bloomer Park to SUNOCO beyond the area covered by the 1950 easement which burdened Bloomer Park.

(2) General Rules of Construction for Charter and Statutory Provisions.

The general rules of construction for statutes are used to construe provisions of city charters. *Woods v Board of Trustee*, 108 Mich App 38, 310 NW2d 39 (1981). *See, also, Ballman v Borges,* 226 Mich App 166, 167; 572 NW2d 47 (1997).

In construing voter initiated referendums (such as Charter § 11.8), the words of an initiated law must be given their ordinary and customary meaning as would have been understood by the voters, and should be liberally construed to effectuate their purposes and facilitate rather than hamper the exercise of reserved rights by the people. *Welch Foods, Inc. v Attorney General,* 213 Mich App 459, 461; 540 NW2d 693 (1995) in which the court held:

> "Initiative provisions are liberally construed to effectuate their purposes and facilitate rather than hamper the exercise of reserved rights by the people. The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters…. If the statutory language is ambiguous, or reasonable minds may differ in its interpretation, a reasonable construction must be given in light of the purpose of the statute [citations omitted]."

See, also, *Kuhn v Department of Treasury,* 384 Mich 378; 183 NW2d 796 (1971) (statutory initiative and referendum provisions should be liberally construed to effectuate their purposes, to facilitate rather than hamper the exercise by the people of these reserved rights.)

Other rules of statutory construction include that the court must avoid a construction which would render any part of a statute surplusage or nugatory and "must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams,* 268 Mich App 416, 425; 707 NW2d 624 (2005). Clear and unambiguous statutory provisions must be enforced as written, *Metropolitan Council 23 v Oakland County,* 409 Mich 299; 294 NW2d 578 (1980). Courts are not to tamper with clear and unequivocal meaning of words used in a statute and there can be no departure from its plain meaning on grounds of its unwisdom or of public policy. *Noy v Saginaw,* 271 Mich 595; 261 NW 88 (1935).

(3) Construction of Intent of Charter § 11.8.

At bar, the clear intent of the Rochester Hills voter referendum initiated by SPACE members (including members of DDH) was to strip the CITY Council and Mayor of the power to control CITY-owned parks. This is evidenced by the context in which the referendum arose, following voters being upset with decisions made by CITY officials in attempting to develop a water tower reservoir in a CITY-owned park. And, as evidenced by the broad comprehensive language proposed in the referendum mandating that CITY-owned parks be used only for park purposes, and not be sold, leased, transferred, exchanged or converted to another use without voter approval. The overwhelming response of the Rochester Hills voters (including DDH members) when given the opportunity to take direct control of parks was to pass the Charter § 11.8 referendum.

The referendum language as a whole makes it clear that it was an attempt to give Rochester Hills voters air tight control of their parks (and open spaces). The comprehensive language in the referendum expressly applies to "all present and future City-owned **property**

designated as park or open space…[emphasis added]; contains an unequivocal mandate that "City-owned parks and open spaces shall only be used for park and open space purposes"; gives voters control over every conceivable type of transaction relating to CITY-owned park **property** by prohibiting any type of sale, lease transfer, exchange of park property without voter approval; and prohibits converting parks or significant parts thereof from recreation or conservation uses to uses not directly or incidental to public recreation or conservation. Importantly, the only exemption to the voters' intended control of the parks relates to existing uses on the effective date of the referendum were grandfathered in and would be considered lawful uses for the particular **property**.

In drafting the referendum language, SPACE members and voters (including DDH members) clearly meant that the proposed Charter amendment would apply to the "**property**" owned by the CITY and used for park purposes as opposed to referring to the mere **use** as a park. This is evidenced by the language in § 11.8.2 that the proposed provisions would apply to the "**City-owned property**" designated as a park. The referendum provisions control the property and what it may be used for as opposed to just controlling park uses.

The statutory construction advocated by the CITY and Defendants hampers and frustrates the purpose behind the referendum and the exercise of the rights reserved by the voters by in Charter § 11.8 contrary to the rules of construction for voter referendums in *Welch, supra.*

The language and intent of the voter initiated charter referendum are clear and unambiguous, so they must be applied as written, irrespective of whether the court agrees with their wisdom. *Noy v Saginaw,* 271 Mich 595; 261 NW 88 (1935).

The lower court and Defendants misconstrued the Charter's intent by selectively taking portions out of context and/or by ignoring the conjunctions "and" and "or". Instead, they

construed it as if it only contained one general limitation on changes of uses of the Parks. The following is a line-by-line construction of Charter § 11.8 based on the plain meaning of the language used:

The opening sentence of § 11.8 contains numerous categories of actions, each of which would require voter approval. First, the opening clause states: "City-owned parks and open spaces **shall** be used **only for** park and open space purposes…." (Emphasis added.) The second clause states: "… **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." The first clause contains a clear unequivocal mandate that parks "shall" be used "only" for park and open space purposes. The term "shall" denotes that the duty imposed is mandatory and excludes any idea of administrative discretion. *Southfield Twp v Drainage Board for Twelve Towns Relief Drains,* 357 Mich 59, 79; 97 NW2d 821 (1959); *Sharp v Huron Valley Bd of Ed,* 112 Mich App 18, 20; 314 NW2d 785 (1981) (the term "shall" connotes a mandatory duty imposed by law.) Neither the severing of the mineral interests and the extraction and sale of the oil and gas from a park, nor the placement of a hydrocarbon pipeline in easement in areas not previously subject to an easement are "for park and open space purposes" and are prohibited under the charter language.

"Park purposes" is not defined, but the plain meaning is that parks must be used for the typical things that parks historically have been, such as recreation, hosting public events, public gardens, preservation of natural resources, etc. There may be some ambiguity regarding what recreation and conservation park purposes are, but by no stretch of the imagination can oil and gas exploration and extraction, nor underground hydrocarbon pipelines be considered park purposes. In fact, the Defendants don't even attempt to argue that the uses permitted under the JORDAN and SUNOCO Agreements are for park purposes. Instead, they merely argue that they

don't interfere with park purposes.[7] Thus, the entry of the JORDAN and SUNOCO Agreements without voter approval violates the Charter irrespective of whether the agreements constitutes a sale, lease or transfer of the Parks because oil and gas exploration, extraction, and pipelines are not park purposes.

The second clause in § 11.8 prohibits five different types of transactions involving park property unless approved by the voters and states that CITY-owned parks **"shall not** be sold, leased, transferred, exchanged, **or** converted to another use" without voter approval (Emphasis added). The language "shall not" clearly and unambiguously prohibits all five of the named type of transactions unless approved by voters. The language is mandatory, and allows no exercise of administrative discretion by the Council. *See, West Bloomfield Hospital, Metropolitan Council 23, and Noy, supra*. Under this clause the JORDAN Lease, as a "lease", is expressly prohibited unless approved by voters.

The JORDAN Agreement also violated the prohibitions regarding sales and transfers of interests in the Parks. The terms of the JORDAN Lease, among other things, transfer the CITY's real estate interest in its mineral rights and oil and gas to JORDAN, and allow JORDAN to extract and sell the oil and gas beneath the Parks and Cemetery. See JORDAN Lease, ¶ 3. Additionally, JORDAN is free to assign its interest to anyone it chooses, without any further approval by the CITY. See JORDAN Lease, ¶ 13. The so-called "lease" actually creates a new real property interest which was severed from the CITY's fee ownership interest in the Parks and Cemetery and sells these real estate interests to JORDAN.

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[7] DDH sets aside for now its arguments about what adverse effects may result from the drilling and extraction may have.

Although the CITY and JORDAN argue that the CITY did not "sell" anything to JORDAN, the opposite is true. The term "Sale' is defined in *Black's Law Dictionary* as:

> "1. The transfer of property or title for a price.
>
> 2. The agreement by which such a transfer takes place.
>
> The four elements are (1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised".

To paraphrase the old adage "if it looks, walks, acts and quacks like a duck, it is a duck." Under the JORDAN and SUNOCO agreements: the parties are competent to contract, the agreements were made by mutual assent, transferable real estate interests (mineral rights and an easement) were transferred, and the CITY was paid money for transferring real estate interests in the Parks and Cemetery to JORDAN, and/or SUNOCO. The JORDAN and SUNOCO agreements meet all of the elements of a sale. Just as a duck is a duck regardless of what you may call it, the JORDAN and SUNOCO agreements are **"**sales**"** of portions of the CITY'S Parks and Cemetery real estate to JORDAN and SUNOCO regardless of the titles of the agreements.

The CITY, in attempting to justify its refusal to abide by the clear prohibitions in the Charter, does not assert that the JORDAN Lease is not a "lease". And, it admits that the JORDAN Lease severs and transfers the CITY-owned oil and gas mineral rights from the parks to JORDAN and allows JORDAN to sell the formerly CITY-owned underground oil and gas to others. Instead, the CITY merely argues that it was able to negotiate some relatively favorable terms in the Lease regarding the impacts which might otherwise occur if a lease with less favorable terms had been approved by the Council. In doing so the Council completely ignored the plain intent of **§** 11.8 that it is up to the voters, not the Council, to decide whether the terms of an agreement to sell, lease or transfer a CITY-owned park land are acceptable.

In addition to prohibiting a sale, lease or transfer of CITY parkland, Charter § 11.8 also prohibits converting significant parts of CITY-owned parks to other uses without voter approval. Charter § 11.8.1 defines "converted to another use" as follows:

> " '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."

Until the CITY Council approved the JORDAN Lease, the CITY-owned parkland could not be and was not used for purposes of oil and gas exploration or extraction. Likewise, prior to the SUNOCO agreements, SUNOCO had no right to use any portion of Bloomer Park outside the area designated in their 1950 Permit. Defendants do not and cannot argue that such oil and gas exploration and extraction, or the pipeline is "directly related or incidental to public recreation or conservation". In fact the extraction and selling of the oil and gas and minerals from the CITY-owned parks serves no recreational purpose and is arguably the opposite of "conservation" of such natural resources because the oil and gas would be used up rather than conserved.

Reasonable parties may differ regarding the merits of preserving the CITY's underground oil and gas reserves as opposed to extracting and using them ASAP, and whether to allow portions of the Bloomer Park pipeline to be relocated. However, it is undisputed that oil and gas exploration, extraction, and pipelines are not directly related to or incidental to public recreation or conservation. Therefore the plain language of the Charter prohibits the oil and gas exploration and production from the Parks without voter approval.

Further, under Charter § 11.8, the conversion to another use requiring voter approval does not have to affect the entire park, only a "significant part thereof." Allowing oil and gas exploration and the sale of the CITY's minerals from park land and the relocation of new

pipelines is significant and involves significant policy decisions regarding permitted uses of parklands and can only be made if approved by the voters.

(4) MCL 117.5(1)(e) Applies to the Cemetery and Parks.

Under MCL 117.5(1)(e), a home rule city such as Rochester Hills does not have the power to "sell a park, cemetery, or any part of a park or cemetery, except where the park is not required under an official master plan of the city … unless approved by the majority of electors voting on the question at a general or special election." It is undisputed that the Parks at issue are included and required under the CITY's Parks & Recreation Master Plan 2011 – 2015. [See, Paragraph 5 of CITY's Answer to 1st Amended Complaint]. And, they cannot be removed from the Master Plan without voter approval per Charter § 11.8.2. It is undisputed that the Parks and Cemetery are owned by the CITY.[8]

The relevant issue for this Court in construing MCL 117.5(1)(e) is whether the JORDAN Agreement constitutes a "**sale**" of "**any part**" of a Park or Cemetery". Using the same rationale as detailed above in this Brief DDH asserts that the JORDAN Agreement effectively severs and sells parts of the CITY's fee property rights to JORDAN and falls within the scope of the statute's prohibition against selling any part of a park or cemetery without voter approval.

Of critical importance in construing MCL 117.5(1)(e) is the use of the word **"any"** in the phrase "any part of a park or cemetery." The term "any" is defined to mean: "one or some indiscriminately of whatever kind", (Webster's New World Dictionary). Thus, Defendants proposed construction that the statute is not applicable to the JORDAN Agreement because the surface of the cemetery is not sold to JORDAN is not a proper construction because it ignores the

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[8] The balance of this section will primarily focus on application of MCL 117.5(1)(e) to the Cemetery because Cemeteries are only covered by the statute and are not covered under Charter § 11.8.

term "any" in modifying "any part of a park or cemetery". *See*, *People v Williams, supra.* (court must avoid a construction which would render any part of a statute surplusage or nugatory and "must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.") The Cemetery is real estate and the Oil and gas mineral rights are interests in real estate. *Winter v Bradford, supra*. JORDAN and the CITY have admitted that the JORDAN Agreement severs the oil and gas mineral rights from the Cemetery. Thus, some part of the real property owned by the CITY and used as a Cemetery was transferred to JORDAN for consideration paid to the CITY. Such a transfer is effectively a sale of a part of the CITY's real property and is within the scope of the prohibition to sell "any part" of a Cemetery without voter approval.

It should also be noted that the CITY's argument that the JORDAN Agreement only affects an area thousands of feet below the surface is not true. In reality, the Lease also gives JORDAN unfettered rights to use "shallow formations" of any part of the Cemetery for promoting the development of hydrocarbon production from "any formations **between the surface of the earth and a depth of 2,500 feet.**" [Emphasis added.] *See*, paragraph 9 of the JORDAN Agreement. These provisions are especially troubling to DDH members who have family members and friends buried in the cemetery.

Whether or not the CITY should enter into an agreement with JORDAN, which severs and sells the CITY's mineral interests to JORDAN, and which allows JORDAN access to shallow formations immediately below the surface of Cemetery [and Parks] is a decision reserved to the voters, not the CITY Council under MCL 117.5(1)(e). For the reasons stated herein, the JORDAN and the SUNOCO Agreements constitute the sales of parts of CITY-owned real estate from parcels used as the Parks and Cemetery and are governed by MCL117.5(1)(e).

E. ENFORCEMENT OF CHARTER § 11.8 AND/OR MCL 117.5(1)(E) MANDATES THAT JORDAN AND SUNOCO AGREEMENTS ARE *ULTRA VIRES* AND VOID BECAUSE NOT APPROVED BY VOTERS.

If the JORDAN and SUNOCO Agreements were illegally adopted without voter approval, they are *ultra vires* and void. *Salzer v City of East Lansing,* 263 Mich 626; 249 NW2d 16 (1933). Unlike individuals and private corporations, municipal corporations have only limited power to enter into agreements. *Homeowners' Loan Corp v Detroit,* 292 Mich 511, 515; 290 NW 888 (1940).

Home rule cities such as Rochester Hills derive their authority from the Home Rule City Act, MCL 117.1 *et seq.* and from the Charters they adopt. The "doctrine of *ultra vires*" precludes a city from engaging in a course of conduct that it is not specifically authorized to do. *Parker v West Bloomfield, 60 Mich App 583;* 231 NW2d 424 (1975). A municipality is protected against the unauthorized actions of its employees and agents and those dealing with public officials must take notice of their powers and if the official's act is beyond the limits of his or her authority, the municipality is not bound. *Kaplan v Huntington Woods,* 357 Mich 612; 99 NW2d 514 (1959).

The remedy courts impose on *ultra vires* contracts is to declare them void and unenforceable. *See, Salzer, supra*. In *Salzer*, the city council authorized the mayor to execute a contract for the purchase of land with money to be charged to the contingent fund but failed to make an appropriation for the expenditure as expressly required under applicable laws then in effect. The court held the action of the council was *ultra vires* and that the agreement was void. *See also*, *Trump Manufacturing Co v Village of Buchanan,* 116 Mich 113; 74 NW 466 (1898). (Court declared that a contract approved by village council was *ultra vires* and unenforceable because the village council did not have authority to enter into contract under a village charter provision that prohibited the entry of contracts payable in future years. See also *Michigan*

Municipal Liability & Property Pool v Muskegon County Road Commissioners, 235 Mich App 183; 597 NW2d 187 (1999) (court held that indemnity agreement entered into by county road commissioners was not authorized by law and was therefore *ultra vires* and unenforceable.

The JORDAN and SUNOCO Agreements are *ultra vires* and void because the Rochester Hills CITY Council had no authority to approve them , and the mayor had no authority to sign them the without approval from Rochester Hills' voters.

F. STATE LAW DOES NOT PREEMPT CITY'S VOTERS' RIGHT TO DECIDE WHETHER TO APPROVE OIL AND GAS LEASING OF CITY-OWNED PARKLAND AND CEMETERY

Defendant JORDAN's assertions that the State's oil and gas statutory scheme preempt Charter § 11.8 are misplaced and ludicrous because Charter § 11.8 has nothing to do with the regulation of oil and gas drilling and exploration. All § 11.8 establishes is whether it is the CITY Council or the voters who have the authority to sell, lease, transfer, exchange or convert CITY-owned parks to other uses.

The CITY's authority to enter into or not enter into contracts or agreements (such as the JORDAN Lease) is contained within powers granted to cities under Michigan's Home Rule Act, MCL 117.1 *et. seq.* To argue that a city does not have the authority to choose to enter or not to enter into an oil and gas lease with a private company such as JORDAN because oil and gas exploration and drilling are regulated by the state is not supported by any of the authorities referenced by Defendant.

While the State Supervisor of Wells office has extensive powers over the technical aspects of drilling, completion and operation of wells, the legislature did not vest it with control over the entire oil and gas industry and did not preempt all local regulation of the oil and gas industry. *See, Addison Twp v Gout,* 435 Mich 809, 815; 460 NW2d 215 (1990). ("Because there is no express intent to preempt local regulation, except as to zoning of wells, we must determine

if the Legislature has by implication preempted all local regulation of the oil and gas industry. We hold that no such intent is evidenced in the legislative scheme." *Id.*

G. *CENTRAL LAND CO V CITY OF GRAND RAPIDS* IS NOT APPLICABLE AND NOT CONTROLLING

The CITY's reliance on *Central Land Co v City of Grand Rapids*, 302 Mich 105; 4 NW2d 485 (1942) is misplaced. First, *Central Land* is not a voter's rights case involving voters standing and right to control future used and transactions pertaining to City owned parks. Instead, *Central Land* involved whether the Court would enforce a condition subsequent which, if enforced, would cause the land to revert back to the grantor after the City had made significant improvements to the property and application of longstanding Michigan law that conditions subsequent be strictly construed to avoid forfeiture. *Id* 112 – 113.

The condition subsequent at issue in *Central Land* was that the land deeded to the city would revert back to grantor unless it was "used solely for park, highway, street, or boulevard purposes…." In construing the intent of the restriction under the peculiar circumstances at hand, the Court majority discerned that the real intent of the agreement was to prevent the property from being developed as commercial or industrial sites which would compete with grantor's adjacent property being developed. *Id* at 109 – 110. Other factors considered by the Court in determining that the condition subsequent did not work a forfeiture included that the city had expended upwards of $400,000 in the construction of roadways which provided a material advantage to the other lands held by grantor/plaintiff, and that in light of the improvements made to the property it would be impossible for the parties to be placed *in statu quo*. *Id,* at 111 – 112. The language in and intent of the condition subsequent in *Central Land* was significantly different than the intent and language of Charter **§** 11.8.

It is also worth noting that *Central Land* was affirmed by a mere 4-3 split, with the dissent citing numerous cases which they believed supported enforcement of the conditions subsequent and forfeiture even with all of the mitigating factors cited by the majority. *Central Land* is not controlling under the facts and laws at bar.

Likewise, the California law referenced by the lower court in its Opinion and Order p.9 , in *Taylor v Continental Southern Corp, 280 P2d 514, 518-519; 131 Cal App 2d 267 (Cal App Dist 1955)* is not applicable or controlling in Michigan. The Taylor case, like Central Land, was a case involving the effect of a contingent right of reverter and who owned the oil and gas at issue and not who has the authority make decision regarding uses of park land. Although the Taylor court noted:

> "[A]conveyance for park use not only caries all oil and minerals, but also the right to develop same in any manner not inconsistent with the use of the surface of the land for the park purposes"

The dispute at hand is **who** has the right to develop parkland not who owns the oil and gas under it. In Rochester Hills, the voters have the right to decide whether and how to exercise rights regarding park land.

V. RELIEF REQUESTED

For all the foregoing reasons, DDH respectfully requests that this Court vacate and reverse the November 4, 2014, Opinion and Order Re: Motion for Summary Disposition and Rule as follows:

A. Rule that voters in Rochester Hills and DDH have standing to enforce Charter Section 11.8.

B. Rule that voters in Rochester Hills and DDH have standing to enforce MCL 117.5(1)(e) in relation to the sale of city owned parks and cemeteries in Rochester Hills.

C. Rule that the disputes relating to the validity of the Jordan and Sunoco Agreement constitute actual controversies appropriate for resolution by Declaratory Judgment.

D. Grant Declaratory Judgment in favor of DDH, holding that Charter Section 11.8, required voter approval of the Jordan and Sunoco Agreements as they relate to the Parks;

E. Grant Declaratory Judgment in favor of DDH, holding that Charter MCL 117.5(1)(e), required voter approval of the Jordan and Sunoco Agreements as they relate to the Parks;

F. Grant Declaratory Judgment in favor of DDH, holding that MCL 117.5(1)(e), required voter approval of the Jordan Agreement as relates to the Cemetery;

G. Grant Declaratory Relief that the Jordan Agreement and/or the Sunoco Agreement are *ultra vires* and void, and

H. In the alternative, remand to the circuit court for further proceedings consistent with this Court's opinion.

DDH respectively requests that it be awarded its taxable costs in this appeal.

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