STATE OF MICHIGAN

IN THE OAKLAND COUNTY CIRCUIT COURT
6TH CIRCUIT OF MICHIGAN

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

Plaintiff,

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,

Defendants.

Case No. 14-140827-CH

Hon. James M. Alexander

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PLAINTIFF'S CONSOLIDATED ANSWER TO
DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

Plaintiff, DON'T DRILL THE HILLS, INC. (hereinafter "DDH") by its attorneys, LOZEN, KOVAR & LOZEN, P.C., Answers Defendants' Motions for Summary Disposition as follows:

Defendants' Motions for Summary Disposition pursuant to MCR 2.116(C)(5) and MCR 2.116(C)(8) should all be denied and judgment entered in favor of Plaintiff should be entered pursuant to MCR 2.116(I)(1) and MCR 2.116(I)(2) for the reasons stated in Plaintiff's Consolidated Brief Regarding Summary Disposition of even date..

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Dated: September 24, 2014

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PLAINTIFF'S CONSOLIDATED BRIEF REGARDING SUMMARY DISPOSITION

Plaintiff, DON'T DRILL THE HILLS, INC. (hereinafter "DDH") by its attorneys, LOZEN, KOVAR & LOZEN, P.C., submits this Consolidated Brief in response to the summary disposition motions

filed by JORDAN DEVELOPMENT COMPANY, LLC ("JORDAN"), SUNOCO PIPELINE, L.P. ("SUNOCO"), and the CITY OF ROCHESTER HILLS ("CITY") as follows:

I. OVERVIEW

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 poised 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 approving, 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 is challenging whether the new pipeline and easement over portions of Bloomer Park that were never previously subject to an easement violated Charter Section 11.8 by not being subjected to voter approval.

This Court's decision on the scope and application of Charter Section 11.8 and MCL 117.5(1)(e) is necessary to guide DDH members, the CITY, and JORDAN regarding the ongoing and anticipated future actions and potential future litigation involving oil and gas development and activities in CITY-owned parks and cemeteries.

Defendants all request summary disposition dismissal of DDH's Complaint based on MCR 2.116(C)(8) and MCR 2.116(C)(5). DDH is requesting 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. All parties are arguing that the Charter, Statute and agreements are unambiguous and be interpreted in their favor so that resolution of the controversies regarding the application of the Charter and statutory provisions are ripe for review as matters of law.

II. STANDARDs OF REVIEW FOR SUMMARY DISPOSITION

A. MCR 2.116(C)(5)

Defendants seek 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 based, among other things, on the denial of their right to vote under Charter Section 11.8 and MCL 117.5(1)(e) *[See,* Consolidated Brief Section IV.E., *infra].*

B. MCR 2.116(C)(8)

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 for resolution by this Court regarding Rochester Hills voters' (and DDH members') right to vote, and whether the Jordan and Sunoco agreements were adopted in violation of Charter Section 11.8 and/or MCL 117.5(1)(e), and are void as ultra vires agreements.

C. 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 Section 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,* Consolidated Brief Section IV. B. *infra.* Re Rules of

Construction. Accordingly, DDH is asking this Court to definitively decide the issue of whether Charter Section 11.8 and/or MCL 117.5(1)(e) does or does not require voter approval of the Jordan and Sunoco Agreements and whether they are or are not void.

III. UNDISPUTED FACTS

DDH believes the following material facts are undisputed and serve as basis for granting summary disposition in its favor against the CITY:

1. DDH is a Rochester Hills based citizens' organization. As of September 22, 2014 it has 103 members, of which 87 live in Rochester Hills. All of its officers and directors live in and are registered voters of Rochester Hills, Michigan[1] and the current officers and directors of DDH are: Christopher Morris (President), Pablo Fraccarolli (Vice President), Denise Doyle (Treasurer), and Nancy Lewis (Secretary). *See*, Affidavit of Pablo Fraccarolli, attached as **Exhibit A**.

2. On November 8, 2011, Rochester Hills' voters passed a citizen initiated referendum to amend the City Charter to add Section 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.

[1] DDH's attorney in Port Huron, MI assisted in DDH's formation by filing the Articles of Incorporation and currently serves as its registered agent and registered office. However, he is not an officer, director or member of DDH.

> .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 Section 11.8 by referendum is acknowledged in all Defendants' Answers and/or Briefs.]

3. 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.]

4. Prior to approval of the Jordan Agreement, the CITY's fee ownership of the parks and cemetery at issue included ownership of all oil, gas, and mineral rights located within and under the boundaries of the parks and cemetery. [*See*, paragraph 20 of City's Answer to First Amended Complaint.]

5. 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.]

6. At the December 3, 2012 City Council meeting and previously, members of the public and 2 Council members voiced their opinion to the City Council that the proposed Jordan Lease required voter approval.

7. On December 3, 2012 the Rochester Hills City Council voted 5 – 2 to adopt a resolution (attached as **Exhibit B)** 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.]

8. 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 C** (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.]

9. 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*, paragraph 17 of City's Answer to First Amended Complaint.]

10. In 1951, The CITY's predecessor in interest, the State of Michigan, granted a "Permit to Construct and Maintain Pipeline" (attached as **Exhibit D**) 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.

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

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

12. 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 1951 Easement and for the consideration of $50,000, the CITY agreed to execute a new easement to SUNOCO to encompass the as-built location of the new pipeline constructed by SUNOCO.

13. In April 2014 the CITY approved the Pipeline Right-of-Way Easement attached as **Exhibit F,** 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]. [*See*, paragraph 23 of City's Answer to First Amended Complaint.]

14. Although portions of new pipeline and Pipeline Easement appear congruent with the 25' wide area referenced in the 1951 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.]

IV. ARGUMENT

A. Nature of Oil and Gas Leases and Easements

Regarding oil and gas mineral rights, 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). However, under an oil and gas "lease", the oil and gas mineral rights are severed from the fee

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

ownership of the landowner. *VanSlooten v Larson,* 410 Mich 21 (1980); *Roarke v Savoy Energy,* 260 Mich App 251 (2003).

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). 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. *See, 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, the Jordan Agreement is significantly more than a mere temporary lease as Defendants attempt to characterize it.

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 agreements with SUNOCO sever real property interests from the CITY's fee interest in Bloomer Park and transfers them to SUNOCO.

Prior to execution of the Jordan and Sunoco Agreements, the real property owned by the CITY being used as the Parks and Cemetery included the CITY's ownership of the oil and gas and other mineral rights and no Sunoco Easement outside of the area covered by the 1951 easement burdened Bloomer Park..

B. General Rules of Construction

The general rules of construction for statutes are applicable in construing provisions of a CITY Charter. *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). Additionally as to a voter referendum such as

Charter Section 11.8 "the words of an initiated law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc. v Attorney General,* 213 Mich App 459, 461; 540 NW2d 693 (1995).

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).

C. **Construction of Charter Section 11.8**

All at bar argue that the Charter and statute are clear and unambiguous, so they must be applied as written, irrespective of whether this Honorable Court agrees with the wisdom of the clear meaning of the language used.

Defendants attempt to misconstrue the Charter's intent by selectively taking portions out of context and/or by ignoring the conjunctions "and" and "or" and by attempting to construe it as if it only contained one general limitation on changes of surface uses of the Parks.

The following is a line-by-line construction of Charter Section 11.8 based on the plain meaning of the language used:

The opening sentence of Section 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."

Thus, 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. *West Bloomfield Hospital v Certificate Need Board,* 208 Mich 393, 399 (1985). *See, also, 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 and 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.[4] 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.

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

The second clause prohibits five different types of transactions involving parks 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, 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.

Although Defendants 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 that 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 to transfer title to some of its 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, they admit that the Jordan Lease severs and transfers the CITY-owned oil and gas mineral rights for the parks to JORDAN and allows JORDAN to sell the 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 Section 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 Section 11.8 also prohibits converting significant parts of city-owned parks to other uses without voter approval. Charter Section 11.8.1 defines "converted to another use" as follows:

> ".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."

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 their 1951 easement area. And, Defendants don't and can't argue that such oil and gas exploration and extraction or a 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 Section 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 involve significant policy decisions regarding permitted uses of parklands and can only be made if approved by the voters.

D. MCL 117.5(1)(e) requires voter approval of the Jordan Agreement as it pertains 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 issues are in 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 Section 11.8.2. It is undisputed that the Parks and Cemetery are owned by the CITY.[5]

The relevant issue for this Court is whether the Jordan Agreement constitutes a "sale" of "any part of a Park or Cemetery". Using the same rationale as detailed in Consolidated Brief section IV.C., *supra* , DDH asserts that the JORDAN Agreement effectively sells parts of the fee property rights held

[5] The balance of this section will primarily focus on application of MCL 117.5(1)(e) to the Cemetery because Cemeteries are not covered under Charter Section 11.8.

by the CITY to JORDAN and falls within the scope of MCL 117.5(1)(e) prohibition of 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 term "any" in modifying "any part of a park or cemetery". *See*, *People v Williams, supra.* 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 areas 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. For the reasons stated *infra*, 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. DDH has Standing to Enforce its Members' Right to Vote per Charter

The purpose of standing is to assess 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); *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). Defendants all assert that DDH has no standing because it and its members cannot show any injury or harm different from that of the public at large.[6] However, Defendants all ignore that this is a voters' rights case and the cases cited in their briefs are inapplicable to voter rights cases. Defendants also ignore the fact that 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 Parks and Cemetery for oil and gas exploration and extraction or pipeline purposes without voter approval.

For example, DDH is advocating on behalf of its current membership of 103 members including 87 of who live in the City and 61members who have specifically authorized DDH to make claims and advocate on their behalf in this lawsuit. The members who authorized DDH to advocate for them in this suit include 61 who want City Parks to be used only for recreation and conservation spaces; 52 registered voters who were denied their right to vote per the Charter; 6 who have family members buried in the Cemetery; 43 concerned about impacts on their property values; 33 living near proposed well head sites or within proposed drilling units; and 59 who are concerned about health risks. *See,* First[t] Amended Complaint, paragraph 18 and Affidavit of Pablo Fraccarolli attached as **Exhibit A.**

[6] DDH asserts that it and its members do meet this test because some have potential claims not shared by the public at large. However this Brief will primarily focus on the denial of the members right to vote.

1. 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, (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...."

2. Voters' Standing to Enforce Their Right to Vote

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.]'[Emphasis added.]
>
> Consequently, defendants' assertions and citations to the contrary, [citations omitted] **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; 824 NW2d 299; overturned on other grounds 492 Mich 860 (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[7] 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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[7] 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 Section 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).

In the unpublished case[8] *Fleming v Macomb County Clerk,* 2008 Mich App Lexis 1325, attached as **Exhibit G,** 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 N.W.2d 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 N.W.2d 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 Section 11.8 and MCL 117.5(1)(e) imply that the legislature [and the voters by referendum] intended to confer standing on the voters by giving them the right to vote on the matters involed. Although Charter Section 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 vote, such right is clearly implied.

That an implied right of citizen standing to enforce Section 11.8 was intended by the voters who petitioned to put the Charter proposal on the ballot is also clear from the fact that this impetus for the referendum was past decisions by the City Council regarding past decisions by the City Council

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[8] 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.

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 H**.

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.* Regarding the standing of an organization such as DDH to litigate on behalf of its members, the court upheld the principle that

> "...under Michigan law, an organization has standing to advocate for the interests of its members if the members themselves have sufficient interest." (citations omitted). *Id* at 373.

Here, because DDH's individual members' and directors' right to vote was blocked by the CITY, DDH has standing to pursue these claims on behalf of its members. *See, also, Trout Unltd v City of White Cloud,* 195 Mich App 343, 348 (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.)

The *Lansing Schools* case also directly addressed the issue of standing in actions involving declaratory judgments. The 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."

At bar, Plaintiff has legal causes of action, including protecting its members' rights to vote per Charter Section 11.8 and MCL 117.5(1)(e). Under this standard DDH also has standing because it meets the requirements of MCR 2.605 sufficient to establish standing to seek a declaratory judgment. The facts pled and asserted by DDH clearly "indicate an adverse interest necessitating the sharpening of the issues raised", *Id, s*o that this Court should issue declaratory rulings on the merits of the facts and laws at issue.

To hold that only the Council or Administration has the authority to enforce Charter Section 11.8 would put the fox in charge of guarding the hen house and 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 Section 11.8 and MCL 117.5(1)(e).

F. <u>Actual Controversies Exist</u>

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.
>
> ...
>
> (C) Other adequate remedy. The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case."

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). DDH has demonstrated vigorous advocacy adverse to the CITY's, JORDAN's and SUNOCO's position and is suited to sharpen the issues at bar. *See*, Consolidated Brief Section IV. E. Declaratory actions also allow parties to avoid multiple litigation by enabling litigants to seek a determination of questions formerly not amenable to judicial determination. *Id* at124.

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 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..

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.]

Plaintiff is seeking declaratory rulings to guide its conduct in not only this case, but in regard to anticipated future oil and gas exploration and drilling on or affecting CITY lands in Rochester Hills. Although the current oil and gas lease and the SUNOCO agreement cover 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 future leasing.

The issue of JORDAN and/or other oil and gas exploration companies attempting to lease additional CITY-owned parks or cemeteries is real. In fact, at the January 27, 2014 City Council meeting, the Rochester Hills mayor admitted that JORDAN intended to continue with its drilling / exploration and pursue additional leases in the CITY within a year's time if its drilling / exploration efforts in adjacent communities were successful. 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 future plans in four general areas in the City.

Having declaratory rulings by this court establishing the rights of the litigants under the Charter and Statute and the application to oil and gas leases covering city parks is essential to guide the litigant parties, including guiding Plaintiff DDH regarding the filing of future mandamus or other suits each time a new oil and gas lease covering city parks is presented to the CITY and/or every time the CITY is approached by JORDAN to revise the Lease or seek an exemption from the restrictions in paragraph 3 of the addendum or other changes in the terms of the Agreement.

The existing Jordan Lease expressly provides that JORDAN may expand its operations and use the surfaces of the Parks and Cemetery by merely obtaining the approval of the City Council. *See*, paragraph 3 of Addendum to the Lease, **Exhibit C**. Likewise the Council resolution authorizing signing the Lease states that any proposed changes in the Lease be brought back to the Council (not the voters) for review and approval. See, **Exhibit B**. These provisions are critical, because it is the restrictions in paragraph 3 of the Lease Addendum, such as the restrictions on JORDAN's operations on

the surface of the parks, the prohibition against constructing and storing any wells, drill rigs, storage tanks, pumps, pipes, or other in-ground or above-ground structures, facilities or equipment in 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 are not absolute restrictions, as implied by Defendants in their briefs, but are all subject to being swept aside by mere approval of the council.

G. *Ultra Vires* Agreements are Void

If the Jordan Lease was illegally adopted without voter approval, it is 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 drive 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.

H. State Law Does Not Preempt Voters' Rights to Decide Whether to Sever and Sell Oil and Gas Mineral Rights for CITY-owned Parkland and Cemetery

Defendant JORDAN's assertions that the State's oil and gas statutory scheme preempt Charter Section 11.8 are misplaced and ludicrous because Charter Section 11.8 has nothing to do with the regulation of oil and gas drilling and exploration. All Section 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 choose 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.*

I. *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 condition subsequents 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 Section 11.8.

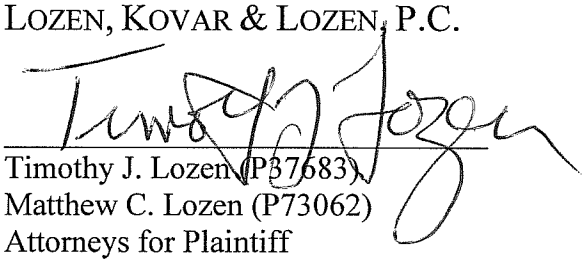
It is also worth noting that *Central Land* was affirmed by a mere 4-3 split, with the dissent citing numerous cases which they believed supported enforcement of the conditions subsequent and forfeiture even with all of the mitigating factors cited by the majority.

Central Land is not controlling under the facts and laws at bar.

V. CONCLUSION

For the reasons stated in Plaintiff's First Amended Complaint and this Consolidated Brief, Defendants' Motions for Summary Disposition should be denied and judgment should be entered in Plaintiff's favor declaring that Charter Section 11.8 and MCL 117.5(1)(e) are applicable to the Jordan and SUNOCO Agreements and declaring the agreements are void and ultra vires because they were adopted without voter approval.

LOZEN, KOVAR & LOZEN, P.C.



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