STATE OF MICHIGAN
IN THE COURT OF APPEALS
ON APPEAL FROM OAKLAND COUNTY CIRCUIT COURT

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,

Defendants – Appellees.

COA No. 324717

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

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DEFENDANT-APPELLEE CITY OF ROCHESTER HILLS'

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether the Circuit Court correctly ruled that Plaintiff-Appellant DDHI lacks standing to challenge the validity of the City's Oil and Gas Lease with Jordan or Pipeline Easement granted to Sunoco where DDHI failed to demonstrate it has a substantial interest that will be detrimentally affected in a manner different from the citizens at large?

The Circuit Court held	"Yes."
Plaintiff-Appellant would say	"No."
Defendant-Appellee City says	"Yes."

II. Whether the Circuit Court correctly ruled that Plaintiff-Appellant DDHI failed to present a case of actual controversy, which is prerequisite to declaratory judgment under MCR 2.605(A), where DDHI cannot demonstrate an actual injury or loss, and where DDHI has not shown that a declaratory judgment is necessary to guide its future conduct in order to preserve its legal rights?

The Circuit Court held	"Yes."
Plaintiff-Appellant would say	"No."
Defendant-Appellee City says	"Yes."

III. Whether the Circuit Court correctly ruled that City Charter Section 11.8 did not require voter approval before the City could enter into the Oil and Gas Lease with Jordan or grant the Pipeline Easement to Sunoco because nothing in Charter Section 11.8 requires the City to obtain voter approval before leasing subsurface oil and gas rights where 1) The

City's surface estate (i.e., the park) and the City's ownership, possession, use and control of the parks remain wholly intact and unaffected by the Oil and Gas Lease; 2) Express conditions exist in the Lease designed to ensure the intent of Charter Section 11.8 will be upheld to restrict use of City-owned parks and opens spaces to park and open space purposes and to require voter approval before the City may transfer or convert public parks and open spaces to non-recreational uses; 3) DDHI's unreasonable and over-expansive interpretation misconstrues Charter Section 11.8; 4) The Michigan Supreme Court has previously determined that an oil and gas lease did not violate a park use restriction; and 5) The Sunoco Pipeline Easement, permitting a minor modification and realignment of a preexisting 60-year old pipeline by means of underground boring with no disturbance to the park or cemetery grounds or features, is neither a new use nor does it require voter approval under the City Charter?

The Circuit Court held	"Yes."
Plaintiff-Appellant would say	"No."
Defendant-Appellee City says	"Yes."

IV. Whether the Circuit Court correctly ruled that the City's Oil and Gas Lease with Jordan and granting of the Pipeline Easement to Sunoco did not violate the Home Rule Cities Act's prohibition, at MCL 117.5(1)(e), against selling a park or cemetery without voter approval where 1) The lease with Jordan and the pipeline easement with Sunoco are not sales; 2) The Oil and Gas Lease and Pipeline Easement cover only subsurface oil and gas rights and expressly does not allow Jordan or Sunoco to enter onto, use, or occupy the surface of the parks or cemetery or to interfere with their use; and 3) The Oil and Gas

Lease and Pipeline Easement do not transfer ownership, use or control and do not convert the City parks or cemetery to another use?

The Circuit Court held	"Yes."
Plaintiff-Appellant would say	"No."
Defendant-Appellee City says	"Yes."

COUNTER-STATEMENT OF FACTS

With one exception noted below,[1] Plaintiff-Appellant Don't Drill the Hills, Inc. ("DDHI") has accurately set forth the procedural history, and DDHI's Statement of Facts is, for the most part, accurate. But, it also is cluttered with immaterial facts and is incomplete. Therefore, this counter-statement sets forth material facts derived from the City's Amended Brief Supporting Motion for Summary Disposition, DDHI's Amended Complaint, and the public record.

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

The Lease has a five-year primary term with an option to renew. The City received $150 per leased acre as a cash bonus, and will receive royalties of 1/6 of the net Jordan realizes from any oil production. This is the same royalty the State gets under its standard oil and gas lease. (See Michigan Oil and Gas Lease, attached to City's Amended Brief Supporting Motion for

[1] DDHI states in the Procedural History section of its Brief that it asserted it should be given the opportunity to amend its complaint. However, the Circuit Court record will reflect that neither before nor after the entry of summary disposition did DDHI file a motion seeking leave to further amend its complaint.

Summary Disposition as Ex. 1. and attached hereto as Ex. 1.) Under its Oil and Gas Lease, Jordan "shall have no right of entry and shall conduct no operations on the surface of the leased premises," and "shall not erect, construct, store or maintain any wells, drill rig, storage tanks, pumps, pipes, or other in-ground or above-ground structures, facilities or equipment on the leased premises..."[2] (See Amended Complaint Ex A. – Exhibit A to Oil and Gas Lease). Jordan, through its operations, also "shall not disrupt, interfere with, restrict, drain, damage, destroy or remove any natural or man-made condition, feature or improvement located on the leased premises; nor shall [Jordan's] operations hinder, interfere with, restrict or otherwise adversely affect the current or future use and development of the leased premises for parks, open space and public recreation without further official approval of the City Council and compliance, as necessary, with applicable ordinance or charter requirements." (*Id*.) The Lease also prohibits hydraulic fracturing ("fracking"). (*Id.)* At the time of the Amended Complaint, Jordan had not begun any oil extraction operations in Rochester Hills (Amended Complaint para 15), and this continues to be true to date.

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

DDHI was not formed until April 24, 2014, in Port Huron, fifteen months after the City signed the Oil and Gas Lease. (See Articles of Incorporation, attached to City's Amended Brief

[2] Because the Lease prohibits oil exploration or development activities from taking place on the surface of the City parks or cemetery, in order to extract subsurface oil and gas Jordan will need to horizontally drill below the surface from an off-site well possibly located outside the City limits. The technique of horizontal drilling to reach and extract oil and gas situated beneath land in nondevelopment regions was recently discussed by the Court of Appeals in *Schmude Oil v Dept of Environmental Quality*, 306 Mich App 35 (2014).

Supporting Motion for Summary Disposition as Ex. 2 and attached hereto as Ex. 2.). DDHI filed suit against the City and Jordan on May 15, 2014 claiming that the Oil and Gas Lease violates City Charter Sec 11.8 and the Home Rule Cities Act, MCL 117.5(1)(e), and requesting declaratory relief.

In its Amended Complaint, DDHI added Sunoco Pipeline, L.P. ("Sunoco") as a co-defendant and claims that the Pipeline Easement (See Amended Complaint, Ex. B) the City granted to Sunoco in connection with the minor realignment of Sunoco's underground pipeline extending beneath the City's Bloomer Park likewise violated the same City Charter and Home Rule Cities Act provisions. (See Amended Complaint paras 22-24 and Counts I-III).

In 2012, Sunoco approached the City about upgrading an existing underground pipeline traversing beneath Bloomer Park. The Sunoco pipeline under Bloomer Park is actually a segment of an international pipeline that has been in place for decades and is used to transport liquefied petroleum gas products from Pennsylvania, through Ohio and Michigan (including through Rochester Hills), to Sarnia, Ontario. The pipeline under Bloomer Park was originally installed in 1951 pursuant to a Permit to Construct and Maintain a Pipeline issued by the State of Michigan to Sunoco in 1950. (Copy attached to DDHI's Brief on Appeal as Ex. F). At that time, Bloomer Park was a state park. In 1993, the State conveyed the park to the City. (See Deed and 1993 PA 123 attached to City's Reply Brief Supporting Its Motion for Summary Disposition, and attached hereto as Ex. 3).

In September 2013, the City and Sunoco entered into a Right of Entry Agreement (Copy attached to DDHI's Brief on Appeal as Ex. G). That Agreement acknowledged that Sunoco already had the right to construct, maintain and replace a pipeline through Bloomer Park under the 1950 permit, and further provided that after Sunoco finished installing the replacement

pipeline, the City would execute an easement agreement that would reflect the as-built location of the replacement pipeline. It would have the same 25' width as that permitted under the 1950 permit. Sunoco used a horizontal boring technique which allowed insertion of the replacement pipeline into a horizontal tunnel below the surface without need to deploy heavy construction equipment to excavate the park to replace the pipe. The boring of the tunnel and insertion of the pipe was done from pits located well outside of the park. The work was completed within days, and the replacement pipeline was operational in October 2013. All this occurred without any construction or excavation activity on the park grounds.

In accordance with the Right of Entry Agreement, the City, on April 8, 2014, executed the Pipeline Right-of-Way Easement with a legal description reflecting the as-built location of the replacement pipeline. (Copy attached to DDHI's Brief on Appeal as Ex. H). The description provides for a 25' easement that follows the same course as the 1950 permit at the southerly property line of the park, but veers slightly to the south as it approaches the northeast property line. The simple reason for the minor realignment was the boring equipment used to create the underground horizontal tunnel cannot make a sharp turn and required a gradual curve.

ARGUMENT

I. INTRODUCTION AND ARGUMENT SUMMARY.

The Circuit Court correctly ruled that Plaintiff-Appellant DDHI lacks standing to challenge the validity of the City's Oil and Gas Lease with Jordan or the Pipeline Easement the City granted to Sunoco because DDHI failed to demonstrate it has a substantial interest that will be detrimentally affected in a manner different from the general public. Also, DDHI failed to present a case of actual controversy, as required for declaratory relief under MCR 2.605(A), because DDHI cannot demonstrate an actual injury or loss. Nor has DDHI shown that

declaratory relief is necessary to guide its future conduct in order to preserve its legal rights. Rather, DDHI improperly attempted to use a complaint for declaratory relief as a means to nullify past conduct and contracts of other parties.

On the merits, the pertinent City Charter provision, Sec 11.8, applies only to "City – owned Parks and open spaces" and requires that they not be sold or leased or transferred or converted to another use unless approved by the voters. So, by the Charter's plain terms, it applies only to city-owned parks and open spaces, and does not apply to any other property interests. And, because subsurface oil rights are not "park" or an "open space" as those terms are commonly used, City Charter sec. 11.8 is not implicated.

Similarly, the Home Rule Cities Act, at MCL 117.5(1)(e), prohibits only the "sale" of "a park or cemetery or part of a park or cemetery." But, where no part of a park or cemetery has been sold, the Home Rule Cities Act does not apply.

Key to DDHI's claim that the City's Oil and Gas Lease with Jordan and Pipeline Easement with Sunoco violate the City Charter and the Home Rule Cities Act is DDHI's contention that the terms "park" and "open space" include not just the grounds dedicated to public recreation and conservation, but also everything above and below the surface, from heaven above to the center of the earth below.

All parties agree the city charter is not ambiguous and that the terms "park" and "open space" are not defined. The parties further agree that applicable rules of construction require the court to construe the charter by applying the plain and ordinary meaning to the terms used. The Circuit Court and the City have done that and have cited supporting case law explaining that a "park" is the area or ground used for the purpose of public recreation and conservation. But, DDHI wants the Court to read much more into the charter in order to unreasonably stretch and

expand the terms park and open space beyond their plain and ordinary meaning to essentially equate those terms to the real estate law concept of fee simple title interest and to define "park" and "open space" to include not only the actual park grounds and amenities, but everything above or below the park area to the center of the earth, including subsurface oil and gas rights.

But, unlike the City and the Circuit Court, DDHI fails to cite legal authority supporting its notion that a "park" or "open space" include more than the ground area devoted to public recreation and conservation and extends below the ground all the way to the center of the earth. Moreover, when Bloomer Park, where the Sunoco pipeline is located, was conveyed to the City by the State, the State reserved the subsurface oil and gas rights. But, certainly that doesn't mean that Bloomer is not a park or that it is any less of a park than other city parks. And, it just cannot reasonably be argued that the substrata extending thousands of feet below the park surface is open or useable for public recreation or that it is open space.

Meanwhile, a term that is specifically defined in the charter is "converted to another use," which means "changing the use of a park or open space, or a significant part thereof, from a recreation or conservation use to another use not directly related or incidental to public recreation or conservation." Clearly, there has been no conversion of use. Indeed, the express written conditions contained in the City's Oil and Gas Lease with Jordan ensure the intent of the 2011 amendment to the City Charter will be upheld to restrict the use of City-owned parks and open spaces to park and open space purposes and to require voter approval before the City may transfer or convert public parks and open spaces to non-recreational uses.

Regarding the Sunoco Pipeline Easement, the pipeline has been underneath Bloomer Park for more than sixty years. It is part of a federally-regulated, international pipeline that was installed in 1951 pursuant to a state permit issued in 1950 when the State still owned the

property. City Charter Sec. 11.8, in the last sentence of provision .2, expressly states, "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 that particular property." DDHI ignores this grandfather clause which immunizes the Sunoco pipeline from the application of City charter sec. 11.8.

Moreover, but for the replacement pipeline easement granted by the City in connection with Sunoco's recent upgrade and replacement of its aging pipeline, Sunoco would have the legal right under its 1950 state permit to open excavate and tear up Bloomer Park. The City's grant of the pipeline easement averted the park's devastation and enabled Sunoco to utilize a far more environmentally friendly and less invasive directional drilling technique which resulted in replacing the pipeline in Bloomer Park without Sunoco even entering onto the park, digging a single hole, or damaging a single tree or blade of grass! The only physical difference after Sunoco was done is that the directional drilling technique made it necessary to slightly realign a portion of the underground pipeline without any disturbance or effect on the park or its features and amenities.

There has not been a sale or transfer of any City park or open space, nor has there been any conversion of use. The nature of the Oil and Gas Lease and the conditions included in that lease ensure there will be no adverse effect on the use or recreational or conservation attributes of the city parks or open spaces. There will be no entry onto the parks or cemetery. There will be no surface wells drilled. There will be no fracking. There will be no alteration of any natural features at any park or open space. In other words, there will be zero impact on trees, grass, wetlands, watercourses or park facilities. There will be absolutely no interference with the continuing, unimpeded access to and use of the parks for public park and open space purposes.

Consequently, the City Charter is not implicated nor has the city charter or home rule cities act been violated. The Circuit Court properly granted summary disposition dismissing the case.

II. STANDARD OF REVIEW.

The Court of Appeals reviews *de novo* a Circuit Court's decision regarding a motion for summary disposition, whether brought under MCR 2.116(C)(5) or MCR 2.116(C)(8). See *Herbolsheimer v SMS Holding Co,* 239 Mich App 236, 240 (2000) and *Spiek v Dep't of Transportation*, 456 Mich 331, 337 (1998). Furthermore, the interpretation of statutes and city charters are questions of law that the appellate courts review *de novo*. *Adams Outdoor Advertising, Inc v City of Holland,* 463 Mich 675, 689 (2001); *In re Storm*, 204 Mich App 323, 325 (1994), overruled in part on other grounds *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 342 n 2 (1996). Because this appeal is from the Circuit Court's entry of summary disposition, and involves statutory and city charter interpretation, the Court's standard of review on appeal is *de novo*.

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

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

III. THE CIRCUIT COURT CORRECTLY RULED THAT DDHI LACKS STANDING TO CHALLENGE THE VALIDITY OF THE CITY'S OIL AND GAS LEASE WITH JORDAN OR PIPELINE EASEMENT GRANTED TO SUNOCO.

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

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

A. Private Citizens Do Not Have Standing to Represent the Public Interest.

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

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

governmental unit does not alone provide an adequate basis for standing" and standing does not exist merely because "decisions of a governmental unit are…unwise." *Dishaw v Somerville Assoc*, unpublished opinion of the Court of Appeals, issued June 3, 2003 (Docket No 242048) (Copy attached as Exhibit 4).

B. Neither DDHI, Nor Its Individual Members, Have an Interest That Will be Affected Differently From the General Public.

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

In Amended Complaint paragraph 18, DDHI alleges:

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

But, none of DDHI's purported members have suffered any injury, and if they had, the injury would not be special or peculiar to them. They are not affected differently than the general public. Borrowing and quoting from page 9 of Co-Defendant Jordan's Brief In Support of Its Motion for Summary Disposition filed in the Circuit Court:

> [A]ny members who may have suffered injury as "voters" share an injury common to all citizens of Rochester Hills. The other category of members, those whose property rights may be violated in some indefinite manner at some undefined point in the future, can allege nothing more than an amorphous and hypothetical future harm.

> Indeed, it is uncertain when, if, and to what extent Jordan will exercise its rights under the lease. DDH can only speculate what the impact of Jordan's activities, if any, will be, and any impact it may have on private property rights, if any. Additionally, the lease with the City of Rochester Hills is only a small fraction of property that Jordan has leased in the City—private leases account for a vast majority, 85%, of the leased property. (See Video: Jan. 27, 2014 City Council Meeting, Statement of Mayor Barnett, available at http://roch.legistar.com/.) A declaratory judgment that the lease with the city is void will not, as a practical matter, change any potential impact on other citizens' property rights.

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

C. <u>This Is Not a "Voter's Rights" Case.</u>

DDHI represents that it has 103 members, of whom 86 actually live in Rochester Hills.[3] Attempting to overcome its lack of standing due to absence of any special injury, interest or right that will be affected in a matter different from citizens at large, DDHI labels this as a "voter's rights" case with a relaxed standing requirement. But, unlike the voter's rights cases cited by

[3] Contrasted with Rochester Hills' total population of 70,995 according to the 2010 U.S. Census. (http://factfinder2.census.gov).

DDHI, (1) The present case is for declaratory judgment, not mandamus[4], (2) DDHI waited seventeen months after the alleged election-triggering event happened[5] to file suit, and (3) This case has nothing whatsoever to do with voter equality or access to a ballot.

Even if DDHI had applied for mandamus, a mandamus plaintiff must prove a clear legal right to the performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform the action. *Helmkamp v Livonia City Council,* 160 Mich App 442, 445 (1987). DDHI proves neither.

The *Salzer v East Lansing,* 263 Mich 626 (1933), case DDHI relies on actually supports the Circuit Court's decision that DDHI lacks standing. There, a taxpayer filed suit to restrain a city from purchasing property pursuant to a purchase agreement on the grounds that under the old Fourth-Class Cities Act[6], the city could not purchase the property without first making an appropriation for it, and it was too late to do so for the current year.[7] The court held the plaintiff had standing as a taxpayer because he sought to prevent an unlawful expenditure of taxpayer funds. In *Saltzer,* the plaintiff taxpayer was not enforcing voters rights, and the holding is consistent with case law cited herein that a private citizen generally does not have standing to vindicate a public wrong where he or she is not affected differently than citizens at large. For taxpayer suits, statute and case law lower the bar for standing if the taxpayer demonstrates he or she will suffer loss or damage as a taxpayer through increased taxation or illegal expenditures.

[4] DDHI acknowledges in its Brief that the cases it cites all sought mandamus whereas DDHI does not. But, DDHI asks the Court to disregard that critical distinction, despite having filed a declaratory relief action which is subject to entirely different and more stringent standing and ripeness requirements.

[5] i.e., the City Council's December 3, 2012 approval of the Jordan Oil and Gas Lease.

[6] Effective January 1, 1980, all fourth class cities became home rule cities. MCL 81.1c.

[7] DDH frames this as a voter's rights case due to a provision in the old Fourth Class Cities Act that would require a vote of the electorate in order to amend the annual appropriation bill mid-year. But, that was an immaterial fact, not an issue in dispute, in the case. There was no effort by that city to amend the annual appropriation bill mid-year or to forego an election, nor did the plaintiff seek to compel an election. Rather, the suit was to stop the property purchase from happening *before* it happened.

MCL 600.2041(3); *Mendez v Detroit*, 337 Mich 476, 482 (1953). But, DDHI is not out to save taxes or prevent an unlawful expenditure. Instead, DDHI wants to void an oil and gas lease and pipeline easement that may actually generate revenue for the City and lessen the burden on taxpayers!

D. Michigan's Environmental Law is Designed to Protect Citizens From Potential Adverse Impacts Relating to Oil and Gas Exploration and Development.

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

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

IV. THE CIRCUIT COURT CORRECTLY RULED THAT DDHI FAILED TO PRESENT A CASE OF ACTUAL CONTROVERSY, WHICH IS PREREQUISITE TO DECLARATORY JUDGMENT UNDER MCR 2.605(A).

DDHI seeks declaratory judgment under MCR 2.605 (Amended Complaint paras 32, 35, and 36) but does not satisfy the requirements of MCR 2.605, which states:

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

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

A. <u>There Is No Actual Injury or Loss, Nor is There any Future Conduct of Plaintiff DDHI to be Guided.</u>

DDHI claims an actual controversy exists as to whether the City had the authority under the City Charter and Home Rules Cities Act to enter the Lease or grant the Pipeline Easement. (Amended Complaint paras 27-28) But, DDHI has not suffered any injury or loss, and there is no future conduct on Plaintiff DDHI's part to be guided. Nor is DDHI a party to the lease or easement. Nor does DDHI have any rights or obligations under the lease or easement for which it needs guidance. In contrast, the Defendants-Appellees are the parties to the Lease and the Pipeline Easement, and they each have cognizable legal rights to preserve, but they do not request a declaratory judgment.

DDHI asks this Court to overturn the City's interpretation of the city charter and determine the lease between the City and Jordan and the pipeline easement between the City and Sunoco are void. But, because DDHI is not a party, obligor or beneficiary under the lease or easement, DDHI fails to establish "an adverse interest necessitating the sharpening of the issues raised." *UAW v Central Michigan Univ*, 295 Mich App 486, 495 (2012). Rather, DDHI wrongly uses the judicial process and requests declaratory relief to advance its political agenda and interfere with valid lease and easement agreements between the City and Jordan and the City and Sunoco. Instead of seeking guidance for its future conduct, DDHI inappropriately uses a complaint for declaratory relief as a means to nullify past conduct and contracts entered into by other parties, namely the City, Jordan, and Sunoco. As the Circuit Court suggested in its Opinion and Order, the courtroom is not the place for resolution of such political issues.

B. The Absence of an Actual Controversy Deprives the Court of Subject Matter Jurisdiction.

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

Consequently, DDHI failed to present a case of "actual controversy" which is a prerequisite for declaratory relief under MCR 2.605, and the Circuit Court properly granted summary disposition dismissing the case under MCR 2.116(C)(5) and MCR 2.116(C)(8).

C. DDHI Failed to Assert a Legal Private Cause of Action to Enforce the City Charter or Home Rule Cities Act.

Although not directly addressed in the Circuit Court's Opinion and Order, but nevertheless related to DDHI's lack of standing and failure to present a case of actual controversy, and providing an additional basis for summary disposition, the City argued in its summary disposition motion and brief that DDHI attempts to assert a cause of action that does not legally exist. Where remedies provided by statute for violation of a right have no counterpart in the common law – as is the case here -- the statutory remedies are exclusive. *Driver v Hanley (After Remand),* 226 Mich App 558, 566 (1997). Neither the City Charter nor the Home Rule Cities Act, MCL 117.1 *et seq,* authorize a private cause of action for non-profit corporations or their members to enforce the City Charter and the Home Rule Cities Act. DDHI concedes this point on page 16 of its Brief, but notwithstanding argues for the Court to create or infer an exception to the general rule that the remedy provided by statute or charter to enforce the right or duty created by statute or charter is exclusive. Yet, DDHI does not cite any provision of the City Charter or Home Rule Cities Act from which an intent to confer standing on private individuals to enforce same can be reasonably inferred. *Lansing Schools, supra,* at 372.

The only exceptions Michigan courts have made to this general rule that the remedy set forth in the statute or charter for enforcement of the statute or charter is exclusive have been in the area of civil rights discrimination claims. *Mack v Detroit,* 243 Mich App 132, 140 (2000), rev'd on other grounds 467 Mich 186 (2002). But, DDHI does not claim any civil rights discrimination, nor can it.

DDHI argues perjoratively in its brief that to hold only the city council or administration have the authority to enforce Charter Sec 11.8 "would put the fox in charge of guarding the hen

house." But, if that were the case, the same can be said about every other section of the city charter. DDHI's attempt to infer a private cause of action from this is untenable.

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

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

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

Also, Michigan courts have long declined to recognize a private cause of action charging that the giving of an oil lease by a city was *ultra vires.* Only the State may raise that question. See *Central Land, supra,* at 109; *Quinn v Pere Marquette Ry,* 256 Mich 143, 155 (1931). These authorities logically extend to bar a private cause of action that a city's granting of a pipeline easement was *ultra vires*. DDHI cites no contrary sustaining authorizing a private cause of action to declare an oil and gas lease or pipeline easement *ultra vires,* and DDHI's unsupported argument constitutes abandonment of the issue. See *Walters v Nadell,* 481 377, 388 (2008); *Houghton v Keller,* 256 Mich App 336, 339-340 (2003); *People v Jones,* 201 Mich App 449, 456-457 (1993).

Because DDHI failed to allege a legal private cause of action, DDHI failed to state a claim on which relief can be granted. The Circuit Court properly granted summary disposition to the City pursuant to MCR 2.116(C)(8) dismissing the case.

V. THE CIRCUIT COURT CORRECTLY RULED THAT CITY CHARTER SEC. 11.8 DID NOT REQUIRE VOTER APPROVAL BEFORE THE CITY COULD ENTER INTO THE OIL AND GAS LEASE WITH JORDAN OR GRANT THE PIPELINE EASEMENT TO SUNOCO.

DDHI incorrectly claims the City's entry into the Oil and Gas Lease with Jordan, leasing the subsurface oil and gas rights at two City parks,8 and the granting of a Pipeline Easement to Sunoco, without voter approval, violate City Charter Sec.11.8.

A. Rules of Construction Apply to the City Charter.

City Charter Section 11.8 states:

Section 11.8 - Parks and Open Spaces

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

.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.

DDHI asked the Court, in paragraph 32 of its Amended Complaint, to declare whether:

- The City's lease, without voter approval, of its subsurface oil and gas mineral rights, which were part of the City's fee ownership of the Parks, violates City Charter Sec 11.8;
- The Lease violates Charter Sec 11.8's provision that City-owned parks "shall be used only for park and open space purposes;"
- The Lease violates Charter Sec 11.8's provision that City-owned parkland shall not be sold without voter approval;

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

- The Lease converts the subsurface portions of the Parks to uses not directly related to public recreation or conservation in violation of Charter Sec 11.8;
- The new Pipeline Easement Agreement across and under Bloomer Park violates Charter sec. 11.8 for basically the same reasons.

DDHI's allegations misconstrue an unambiguous City Charter provision.[9] When construing home rule city charters, the prevailing rules regarding statutory construction apply. *Detroit v Walker,* 445 Mich 682, 691 (1994). When charter language is unambiguous and specific, it is controlling. *Detroit Fire Fighters Ass'n v Detroit,* 127 Mich App 673, 677 (1983). Courts are required to construe city charter language by its commonly accepted meaning. *Walker, supra,* at 691.

B. Subsurface and Surface Estates are Distinguishable.

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

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

The Oil and Gas Lease is a "non-development" lease, meaning that it does not confer any surface use or drilling rights to Jordan. Conditions included in the Lease (Refer to Ex A of the Lease) provide: (1) Jordan, shall not utilize hydraulic fracturing (i.e., no "fracking"); (2) Jordan

[9] DDHI concurs on pages 11 and 30 of its Brief that City Charter Sec 11.8 is unambiguous.

cannot enter onto the parks and may not conduct operations (including erection or construction of drills, wells, rigs, pipes, pumps, tanks, or other in-ground or above-ground structures, facilities or equipment) on the land without further approval of the City Council and compliance with applicable ordinance and charter requirements; (3) Jordan's operations shall not disrupt, interfere with, restrict, drain, damage, destroy or remove any natural or man-made condition feature or improvement located on the parks; and (4) Jordan's operations shall not hinder, interfere with, restrict or otherwise adversely affect the current or future use and development of the land for parks, open space and public recreation without further approval of the City Council and compliance with applicable ordinance and charter requirements.[10]

These lease conditions ensure the intent of the 2011 amendment to the city charter to restrict use of City-owned parks and open spaces to park and open space purposes and to require voter approval before the City may transfer or convert public parks and open space to non-recreational uses will be upheld. The City's parks continue to be used only for park and open space purposes. No City parks or open space have been sold, leased, transferred, exchanged or converted to another use. The two City parks remain fully open, accessible and usable as parks and open space without restriction – the same as before the lease. Consequently, the Oil and Gas Lease neither violates the charter, nor does it require voter approval.

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[10] DDHI inaccurately argues that despite these protective conditions, the City Council may unilaterally sweep them aside without regard for City Charter Sec. 11.8. DDHI ignores that paragraph 3 of Exhibit A to the Oil and Gas Lease expressly states:

> "Lessee [Jordan] shall have no right of entry and shall conduct no operations on the surface of the leased premises without further official approval of the City Council and compliance, as necessary, with applicable ordinance or charter requirements. Stated another way, Lessee shall not erect, construct, store or maintain any wells, drill rig, storage tanks, pumps, pipes, or other in-ground or above ground structures, facilities or equipment on the leased premises; Lessee, through its operations, shall not disrupt, interfere with, restrict, drain, damage, destroy or remove any natural or man-made condition, feature or improvement located on the leased premises; nor shall Lessee's operations hinder, interfere with, restrict or otherwise adversely affect the current or future use and development of the leased premises for parks, open space and public recreation without further official approval of the City Council *and compliance, as necessary, with applicable ordinance or charter requirements."* [Emphasis added]

D. The Oil and Gas Laying Below the Surface is Not "Park" or "Open Space" for Purposes of City Charter Sec 11.8 or MCL 117.5(1)(e).

Subpart .1 of Charter Sec. 11.8 defines "Converted to another use" to mean "changing the *use* of a park or open space, or significant part thereof, from a recreation or conservation use to another use not directly related or incidental to public recreation or conservation." But, the lease does not change any use of the parks. They remain fully open, available and useable for public recreation and conservation without restriction, the same as before. Only the subsurface oil and gas located thousands of feet below the surface is affected. The oil and gas deposit, if it exists at all, is inaccessible to and unusable by citizens and park users. It is not part of the park nor is it a park amenity or feature.

"Park" is not defined in the charter, so rules of construction require that words be interpreted according to their ordinary usage. *People v Terry*, 124 Mich App 656 (1983). In *Drake v City of Benton Harbor*, unpublished per curiam decision of the Court of Appeals, issued January 21, 2010 (Docket No. 287502) (Copy attached As Ex 5), the Court adopted the definition of "Park" in the *American Heritage Dictionary* (4th ed) as "an area of land set aside for public use as a piece of land with few or no buildings within or adjoining a town, maintained for recreational and ornamental purposes." Similarly, our Supreme Court, in *Dodge v North End Improvement Ass'n,* 189 Mich 16, 27-28 (1915), recited several definitions of the words "park" and "public park," none of which referred to subsurface oil, gas and mineral rights.

DDHI agrees City Charter Sec 11.8 is unambiguous, but then proceeds to read more into the charter beyond its plain meaning. DDHI equates "park" and "open space" with the real estate law concept of fee simple title, contending that park includes, and Charter Sec 11.8 therefore applies to, the land and everything above or below it ("from heaven to hell"). But, the "park" is the area set aside for public use for recreation and conservation purposes. It is not all

the air space above[11] or the subterrain below which is not accessible or available for a park or recreational use or purpose. And, there is nothing "open" about the subsurface, so it is not "open space."

In 1993, when the State conveyed Bloomer Park (where the Sunoco pipeline is located) to the City, the State reserved the oil and mineral rights.[12] Did that diminish or change the nature of Bloomer as a park because the State severed the mineral rights from the surface estate? The answer is, of course not! The status and use of Bloomer Park and the two other City parks as parks remains completely undisturbed and is not converted to another use by the leasing of subsurface oil and gas rights or a pipeline easement.

Much like the Supreme Court found in *Central Land Co v Grand Rapids*, 302 Mich 105 (1942) (More on this in Subsection H, *infra*), the City took great care in its dealings with Jordan over the oil and gas lease and with Sunoco regarding the pipeline easement to make sure Jordan's oil exploration and Sunoco's pipeline upgrade and minor realignment would not impair the parks or their use for parks and open space purposes.[13]

Oil and gas located thousands of feet below the park surface has never been used for a "recreation or conservation use" nor can one have ever contemplated that it could be so used. Sec 11.8 protects the surface estate of the parks and open spaces from being used for purposes other than recreation or conservation. DDHI's contrary interpretation is illogical and absurd, but

[11]Under DDH's expansive interpretation, even a jet flying in airspace over the park would violate the City Charter if not approved by the electorate.

[12] The deed from MDNR and 1993 PA 123 are attached hereto as Exhibit 3.

[13]DDHI champions the City's parks and open space, but if DDHI has its way, Sunoco would have been forced to open- excavate Bloomer Park to replace its pipeline under Sunoco's previous pipeline permit rather than utilize the far less invasive and environmentally friendly directional drilling technique the pipeline easement granted by the City made possible.

laws are construed to prevent absurd or illogical results. *Franges v General Motors*, 404 Mich 590, 612 (1979).

E. Subsurface Oil Exploration is Not a "Use" of the Park.

The exploration for oil located thousands of feet below the surface through horizontal drilling technique from an off-site well which may be located up to two miles away does not change the character of the parks or their use. Actually, the exploration for oil does not even need to occur directly beneath the City park or open space in order to generate royalties. Oil simply needs to be found within the state-approved drilling unit[14] which includes the City parks covered by the Oil and Gas Lease. In view of these circumstances and the terms of the Oil and Gas Lease, Jordan's subsurface oil exploration does not "use"[15] the parks at all; it most certainly does not convert the use of the parks to a non-recreation or non-conservation purpose.

Moreover, case law does not support DDHI's theory that any restriction on the use of the surface of the land for park purposes necessarily applies to subsurface oil, gas and minerals. For example, in *Certain-Teed Products Corp v Paris Twp*, 351 Mich 434 (1958), the plaintiff sought to mine gypsum laying beneath the surface of the plaintiff's property zoned for agricultural use. The plaintiff proposed to utilize an underground shaft from an adjoining property zoned for industrial use. Under the local zoning ordinance, mining operations were permitted on industrial, but not agricultural, zoned property. Our Supreme Court held:

> To the extent that plaintiff can effectively mine its gypsum without any interference of any kind with normal surface uses and living, we hold that any zoning prohibition would plainly be unconstitutional as not founded upon any public need. *Id* at 462.

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

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

Thus, while City Charter Sec 11.8 may limit the use of City parks and open spaces to recreational and conservation purposes, it does not mean the City is precluded from allowing underground oil and gas exploration and development that does not disturb or interfere with the surface. The soil, minerals, oil and gas laying thousands of feet below the surface may be owned by the City (or by the State with respect to Bloomer Park), but these oil and mineral rights are not "park" (or cemetery) to which City Charter Sec 11.8 or MCL 117.5(1)(e) apply.

F. <u>The Designation of the Two City Parks as Parks Has Not Changed.</u>

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

Lastly, subpart .3 of Charter Sec. 11.8 requires that all land acquired by the City with proceeds from the 2005 Green Space Millage proposal shall remain permanently preserved. This subpart does not apply because the two City parks covered by the Oil and Gas Lease were not acquired with Green Space Millage. The City parks remain as parks, and the Oil and Gas Lease has not changed that. Hence, under the unambiguous provisions of City Charter Sec. 11.8, the City's entry into the Oil and Gas Lease with Jordan neither violates the charter nor did it require voter approval.[16]

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

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

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

G. DDHI Misconstrues the City Charter.

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

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

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

DDHI's strained interpretation of the City Charter is not consistent with our Supreme Court's decision in *Central Land Co v Grand Rapids,* 302 Mich 105 (1942), which concerned land deeded to a city with a restriction that it be used solely for street and park purposes. DDHI desperately argues that because *Central Land* was not a voters rights case, it is inapplicable. DDHI misses the point.

In *Central Land,* the city built a street on part of the property and maintained the rest as a park. Later, after the City entered an oil and gas lease allowing oil drilling wells at the park, the original grantor sued claiming the oil and gas lease violated the deed restriction. The Supreme Court disagreed, ruling the oil drilling operations on the park property were minimally objectionable and did not interfere with the park, noting that:

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

The Supreme Court further reasoned:

> Neither the park property as a whole nor any substantial portion thereof is being used in any way or for any purpose which in any substantial degree interferes with the uses for which the property was conveyed to the city. *Id*, at 113.

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

Moreover, *Central Land* is not an anomaly. As the Circuit Court noted in its Opinion and Order, courts in other states have similarly held that laws and conditions restricting public parks to park and recreational purposes do not prohibit the leasing out of oil and gas rights for drilling and extraction of oil from park lands where such activity does not substantially interfere with or materially impair the surface use of the parks for recreational purposes. See, for example, *Taylor v Continental Southern Corp,* 280 P2d 514, 518-519; 131 Cal App 2d 267 (1955); *People Ex Rel State Lands v City of Long Beach,* 200 Cal App 2d 609 (1962); *City of Shreveport v Kahn,* 193 So 461; 194 La 55 (1940); *Keaton v Oklahoma City,* 102 P2d 938; 187 Okla 593 (1940); *Howe v City of Lowell,* 51 NE 536; 171 Mass 575 (1898).

I. The Sunoco Pipeline Easement was a Lawful Existing Use That Does Not Violate the City Charter.

The Sunoco pipeline through Bloomer Park is not a new use. The pipeline has been in place since 1951. It was recently reinforced and partially replaced as part of Sunoco's pipeline upgrade and maintenance program resulting in a minor realignment, done through underground boring and tunneling, in such a way that the park surface was not disturbed. The easement reflects the as-built realignment. Neither a tree nor a blade of grass was disturbed. The features and use of the park remains as before. All that occurred is that a segment of the old pipeline was replaced and realigned such that it was appropriate to have a new easement to supplement the 1950 permit.

DDHI purports to construe City Charter Sec 11.8 line-by-line, but glosses over subsection .2, which unequivocally authorizes the Sunoco pipeline easement in stating, "The existing use of a park or opens space on the effective date of this section shall be considered to be a lawful use for the particular property." Sunoco had a pipeline beneath the park for over 60 years – long before the 2001 City Charter amendment. The pipeline lawfully existed long before Sunoco's

recent pipeline upgrade and minor realignment, done without any disruption to or entry onto the park. The minor realignment or replacement of part of that pipeline did not create a new use or require the easement to be submitted to the voters under Charter Sec 11.8.

Consequently, Count I of DDHI's Amended Complaint claiming violation of the City Charter and Count III claiming the oil and gas lease and pipeline easement are ultra vires actions because they allegedly violate the City Charter fail to state claims on which relief can be granted. The Circuit Court properly granted summary disposition dismissing those claims under MCR 2.116(C)(8).

VI. THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY'S OIL AND GAS LEASE WITH JORDAN AND GRANTING OF THE PIPELINE EASEMENT TO SUNOCO DID NOT VIOLATE THE HOME RULE CITIES ACT'S PROHIBITION, AT MCL 117.5(1)(e), AGAINST SELLING A PARK OR CEMETERY WITHOUT VOTER APPROVAL.

A. The City's Oil and Gas Lease With Jordan and the Pipeline Easement Granted to Sunoco are Not Sales for Purposes of MCL 117.5(1)(e).

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

Based on dictionary definition, not case law, DDHI argues a "lease" is really a sale if it is an agreement by mutual assent to transfer real estate interests (oil rights and a pipeline easement) for money. But, DDHI's specious argument would apply to *any* lease, even one for office space or a residential apartment, where the parties mutually agree to transfer a real estate interest (right of possession) for money (rent). DDHI's specious argument blurs long-established legal distinctions among sales, leases and easements.

Jordan has leased from the City the right to extract and sell any subsurface oil Jordan may find. Jordan is obliged to pay the City royalties on any oil Jordan sells. If no oil is found, Jordan goes away. When the lease expires, Jordan goes away. But, the parks and cemetery do not go away and throughout the term of the lease and afterward will remain City parks and cemeteries fully available, without restriction, for parks and cemetery purposes. The same can be said about Sunoco's pipeline easement at Bloomer Park.

B. The State Legislature Did Not Include Leases or Easements In MCL 117.5(1)(e).

The Michigan Legislature easily could have, but did not, include leases on the list of acts in MCL 117.5(1)(e). The expression of one thing in a statute – "sell" – means the exclusion of other similar things—such as "to lease." *See Alan v Wayne*, 388 Mich 210, 253 (1970). Nothing in the statute or its legislative history suggests that "sale" and "lease" are interchangeable.

C. A Sale of a Park or Cemetery is Distinguishable From the Lease of Subsurface Oil and Gas Rights.

A "sale" of land ordinarily conveys the surface together with the subsurface oil and gas interests. *Stevens Mineral Co v Michigan*, 164 Mich App 692, 696 (1987). Owners of mineral interests and those who have a mineral lease also have different access rights. A mineral lease merely conveys the rights to explore, mine, and produce the minerals beneath the surface, usually pursuant to a royalty-sharing arrangement between the extracting party and the owner of

the mineral interest. *Thomas v Wilcox Trust*, 185 Mich App 733 (1990). But, a mineral *owner* has the right to enter onto the land and use the surface in a reasonable fashion to extract the minerals. *Erickson v Michigan Land & Iron Co*, 50 Mich 604 (1883). Under its Oil and Gas Lease, Jordan cannot enter onto the parks or cemetery, which is consistent with a *lease*, not a sale.

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

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Circuit Court properly granted summary disposition under MCR 2.116(C)(5) and (8) on the grounds that DDHI lacks legal capacity to sue (i.e., lacks standing) and fails to state a claim on which relief can be granted. As a matter of law, the City's Oil and Gas Lease with Jordan and Pipeline Easement with Sunoco did not violate the City Charter or the Home Rule Cities Act; DDHI lacked standing; DDHI has not presented a case of "actual controversy" under MCR 2.605; and there is no legal private cause of action to enforce

the City Charter or Home Rule Cities Act. Consequently, the City respectfully requests this Court to affirm the Circuit Court's Opinion and Order Re: Motion for Summary Disposition.

Respectfully submitted,

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Dated: April 16, 2015

CERTIFICATE OF SERVICE

On April 16, 2015, I electronically filed the foregoing Defendant-Appellee City of Rochester Hills' Brief on Appeal with the Court via TrueFiling file and serve which will send notification to all interested parties.

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