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

DON'T DRILL THE HILLS, INC,
Plaintiff,

v.

Case No. 14-140827-CH
Hon. James M. Alexander

CITY OF ROCHESTER HILLS, ET AL,
Defendants.
_____/

OPINION AND ORDER RE: MOTION FOR SUMMARY DISPOSITION

This matter is before the Court on motions for summary disposition filed by each Defendant. Plaintiff is a non-profit corporation organization that opposes oil and gas drilling and leasing in or by Defendant City of Rochester Hills. Plaintiff was formed on April 24, 2014 in Port Huron.

Defendant Jordan Development Company is a Traverse City-based oil and gas exploration company that operates over 450 oil and gas wells in Michigan. In January 2013, Rochester Hills and Jordan entered into a subsurface oil and gas lease. The lease with the city accounts for 15% of the subsurface acreage that Jordan has leased in Rochester Hills – and includes two city parks and a cemetery. The other 85% is comprised of private-property leases.

Under its lease with the City, Jordan may not enter, operate, or otherwise erect structures such as tanks on the surface. Jordan also may not affect the use of the surface estate for parks and public recreation, and it has not yet started any extraction or other operations. And if Jordan does drill, it may only do so on private land. Jordan seeks the subsurface oil and gas rights to

ground underneath the parks and cemetery solely because any oil or gas found thereunder may flow toward their offsite well location.

Defendant Sunoco Pipeline is the owner of an underground pipeline that traverses Rochester Hills-owned Bloomer Park. In 1950, Sunoco's predecessor obtained the original permit from the State of Michigan – which previously owned the park. In 2013, the City and Sunoco entered into a Right of Entry Agreement so that Sunoco could replace the pipeline.

The Agreement contemplated that Sunoco would use a horizontal-boring construction method that would allow the pipeline to be inserted into a horizontal tunnel located beneath the surface. This method eliminated the need for heavy construction equipment digging a trench from the surface. The pipeline was put into use in October 2013.

On April 8, 2014, the City executed a Pipeline Right-of-Way Agreement that included a legal description of the actual location of Sunoco's replacement pipe. This was necessary and contemplated under the Right of Entry Agreement because the horizontal-boring method could not make the same sharp turn that the original pipe took. As a result, the new pipe had to make a more gradual curve.

Plaintiff's Amended Complaint alleges that the City of Rochester Hills executed the agreements with Jordan and Sunoco without voter approval – as required by City Charter Section 11.8 and MCL 117.5(1)(e). As a result, Plaintiff seeks a declaratory ruling that the Jordan and Sunoco agreements are void because the City illegally executed the same.

Each Defendant now moves for summary disposition of Plaintiff's Complaint under MCR 2.116(C)(5) and (C)(8). A (C)(5) motion challenges whether a plaintiff lacks the legal capacity to sue. McHone v Sosnowski, 239 Mich App 674, 676; 609 NW2d 844 (2000). And a (C)(8) motion tests the legal sufficiency of the complaint. Maiden v Rozwood, 461 Mich 109,

120; 597 NW2d 817 (1999). In Response to these motions, Plaintiff seeks summary disposition under MCR 2.116(I)(1) and (I)(2).

All Defendants first argue that Plaintiff lacks standing to challenge the validity of the Agreements. Our Supreme Court has held that a litigant has standing when (1) the litigant meets MCR 2.605 requirements for declaratory judgment, or (2) if the court, in its discretion, determines that "the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Lansing Sch Educ Ass'n* v Lansing Bd of Educ, 487 Mich 349, 372; 792 NW2d 686 (2010).

MCR 2.605(A)(1) provides: "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."

Plaintiff argues that it has standing to enforce its members' right to vote. Plaintiff claims that this is a voters' rights case, and it represents persons that are "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."

To support this argument, Plaintiff attaches the Affidavit of its Vice President, Pablo Fraccarolli, who claims that Plaintiff's members include: 87 Rochester Hills residents; 52 of which have been "denied their right to vote"; 43 are concerned about their property values; 33 live near proposed well-head sites or within a proposed drilling unit; 6 have family buried in or own a plot in Stoney Creek Cemetery; and 59 are concerned about health risks.

Initially, the Court notes that Plaintiff's characterization of this case as a voters' rights case misses the mark. Plaintiff filed this case as a declaratory action – and not one seeking mandamus. Further, all cases cited by Plaintiff in support of its claim that this is a voters' rights

case are readily distinguishable. Each of the cited cases involves elections, the right to vote for government officials or ballot initiatives, or a challenge to government expenditures.[1] In this case, however, Plaintiff isn't arguing that its members weren't allowed to participate in an election or the City is illegally expending taxpayer funds.

Instead, Plaintiff is arguing that the City entered into agreements with Sunoco and Jordan Development without voter approval. As a result, Plaintiff claims that its members' standing hinges on whether they had the right to vote on approval of the cited agreements.

A. Right to vote.

Plaintiff claims that the right to vote comes from City Charter Section 11.8 and MCL 117.5(1)(e). The cited section of the City Charter provides:

> **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] Helmkamp v Livonia City Council, 160 Mich App 442; 408 NW2d 470 (1987) involved Livonia citizens' right to participate in a special election to elect a new mayor after their mayor resigned. Salzer v East Lansing, 263 Mich 626; 249 NW 16 (1933) isn't a voters' rights case. Rather, it considered taxpayer standing to challenge a city land purchase that was contrary to law. The illegal purchase damaged the taxpayer through misappropriation of tax funds. In Protect MI Constitution v Secretary of State, 297 Mich App 553; 824 NW2d 299 (2012), a ballot-action committee challenged the Secretary of State's inclusion of a constitutional amendment proposal on the upcoming general election ballot. The Court of Appeals held that the petition failed to comply with the prerequisites of Const 1963, art 4, § 25.

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.

Under the Home City Rule Act, MCL 117.5(1)(e), "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."

The Michigan Supreme Court has held that, when analyzing the meaning of a statute:

> [A] Court must interpret the language of a statute in a manner that is consistent with the legislative intent. In determining the legislative intent, the actual language of the statute must first be examined. As far as possible, effect should be given to every phrase, clause, and word in the statute. When considering the correct interpretation, a statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words within a statute, a court must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. When a statute explicitly defines a term, the statutory definition controls. Mich Educ Ass'n v Sec'y of State, 488 Mich 18, 26-27; 793 NW2d 568 (2010) (internal citations omitted).

Initially, the Court rejects Plaintiff's reliance on MCL 117.5. This section only limits a city's ability to "sell" a park, cemetery, or any part of a park or cemetery." The City's Agreements with both Jordan and Sunoco do not purport to "sell" any part of a park or cemetery to these entities. Jordan's Agreement is a non-development oil and gas lease. Sunoco's Agreement simply provides for an easement that has existed in similar form since 1950.

1. Sunoco

With respect to Sunoco's Easement, the Court finds that the City Charter also fails to support Plaintiff's claim. Section 11.8, subsection 2 of the City Charter provides that "[t]he 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." Because Sunoco's pipeline easement has existed since 1950, the Court finds that Sunoco's replacement (and slight realignment) of the existing pipeline easement does not require voter approval.

Contrary to Plaintiff's allegations that the City essentially forgot its residents, the City and Sunoco took great care to not disturb the park by using the horizontal drilling method.

Because neither the City Charter nor the Home City Rule Act provide Plaintiff's members with the right to vote for approval of the slight shift in Sunoco's decades-old pipeline easement, and Plaintiff bases its standing on said right, the Court finds that Plaintiff does not have standing to challenge Sunoco's easement.

For the foregoing reasons, Sunoco's Motion for Summary Disposition is GRANTED. Plaintiff's claims against Sunoco and relating to its easement are DISMISSED in their entirety.

2. Jordan Development

With respect to the Jordan's oil and gas lease and as stated, the Court rejects Plaintiff's reliance on MCL 117.5 because the same only prohibits the sale of a park or open space. Had the legislature intended to prohibit the **leasing** of any such space, it could have easily provided, but it did not.

The Court also finds that Plaintiff's reliance on the City Charter with respect to the cemetery portion of the lease is misplaced. The cited provision of the City Charter only applies to "parks and open spaces." As a result, the Court finds that the City Charter does not provide Plaintiff's members with the right to vote on a subsurface oil-and-gas lease with respect to any cemetery.

This leaves the two city parks (Tienken Park and Nowicki Park) and only the effect of the City Charter. As stated, said Charter provides that "City-owned parks . . . shall be used only for park and open space purposes" and they "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." Under the Charter, "'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]

Plaintiff argues that the City has leased or converted the parks to another use through the subsurface oil-and-gas lease with Jordan. The City and Jordan respond that no part of the park was included in the lease. Instead, Defendants argue, only the subsurface oil and gas rights were leased to Jordan. And our appellate courts recognize that the land surface is severable from the subsurface oil and gas interests. See Stevens Mineral Co v Michigan, 164 Mich App 692, 696; 418 NW2d 130 (1987).

The Merriam-Webster Dictionary defines "park" as "a piece of public land in or near a city that is kept free of houses and other buildings and can be used for pleasure and exercise" or "a large area of public land kept in its natural state to protect plants and animals."

Inherent in these definitions is that a park consists of only reasonably visible portions of the land. In other words, only the surface of the land may constitute a park.[3]

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[2] The term "open space" as used in the Charter appears not to apply to the subsurface oil-and-gas lease because there is nothing "open" about the subsurface below the park.

[3] Ironically, Plaintiff claims that city-owned Bloomer Park is a park. Yet when the State of Michigan gifted the park to the city, the State retained "all mineral, coal, oil, and gas" rights. As a result, Plaintiff's own argument relative to Sunoco's easement in Bloomer Park supports the notion that a park exists separate from its subsurface oil and gas rights. Otherwise, Bloomer Park could not be a park, and Plaintiff could have no objection to Sunoco's pipeline.

Indeed, when residents visit each of these parks, they do not do so to tunnel hundreds or thousands of feet below the surface of the parks. Instead, they do so to enjoy recreation activities or relaxation or simply to sit and enjoy the natural setting.

Jordan's lease prohibits its entry onto the parks or construction of any equipment on park land. The lease is specifically tailored to prevent any disruption or interference with park features or the use of the park as a park. These lease restrictions ensure compliance with the City Charter. Further, any subsurface drilling would occur away from public lands, and Jordan only sought the subsurface oil and gas rights to protect itself in the event that any oil or gas flowed from directly beneath the parks to its offsite well.

The Mich Educ Ass'n Court reasoned that "a statute must be read as a whole" in order to "to discern and give effect to the intent of the Legislature." Mich Educ Ass'n, supra at 26-27.

In this case, when read in whole, the Court finds that the intent of the City Charter is to ensure that City-owned parks and open spaces are preserved unless otherwise approved by the voters. The Jordan subsurface oil-and-gas lease does not disrupt, interfere, or otherwise affect the public's ability to use these parks as intended.

This finding is consistent with our Supreme Court's reasoning in Central Land Co v Grand Rapids, 302 Mich 105; 4 NW2d 485 (1942). Although Central Land considered a use restriction in a deed (rather than a use restriction in a city charter) that limited the land to park-use only, the Court reasoned that operation of oil wells did not "substantial[ly] . . . interfere[] with the uses for which the property was conveyed to the city." Central Land, 302 Mich at 113.[4]

[4] The Central Land Court reasoned:

> 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. No storage tanks are maintained on the property, but instead they are somewhat distantly located on other property. The pipelines leading from the wells to the storage tanks are for the most part, if not wholly, laid underground in the park area, excepting where such

Other jurisdictions have similarly reasoned. In a case also involving a subsurface oil-and-gas lease below a public park, the California Court of Appeals noted:

> a conveyance for park use not only carries all oil and minerals, but also the right to develop same in any manner **not inconsistent with use of the surface of the land for park purposes**. See cases collected in 144 American Law Reports at 507. The attorney general of this state had ruled that: "A county may enter into an operating agreement with the owner or possessor of land adjoining a county park for the development and production of oil by whipstocking or slant drilling from adjoining land into the subsurface of the county park provided that such drilling and operations incident thereto do not interfere with the **surface use** of the park by the public." (19 Ops. Cal. Atty. Gen. 157, 158.) This was done in the light of section 7051, Public Resources Code, providing for oil leases of county lands with this exception: "No land used, owned, dedicated, or acquired by purchase, condemnation, gift or otherwise, as a public park, highway, street, walk, or public playground shall be so leased;" **It was held that this prohibited surface leasing, not slant drilling**. A similar ruling was made in 21 Ops. Cal. Atty. Gen. 26. Taylor v Continental Southern Corp, 280 P2d 514, 518-519; 131 Cal App 2d 267 (Cal App 2d Dist 1955) (emphasis added).

The Court agrees with such reasoning. And for all of the foregoing reasons, Jordan's subsurface oil-and-gas lease does not amount to a sale, lease, transfer or conversion of the park to another use. As a result, Plaintiff's members did not have the right to vote on approval of said lease, and therefore, the Court rejects Plaintiff's claim that its members have standing based on a denial of a right to vote.

B. Actual Controversy.

The City and Jordan also argue that Plaintiff has failed to present a case of "actual controversy." To establish MCR 2.605 standing, a plaintiff must establish the existence of an "actual controversy."

> pipes extend along or across the highway passing through the park. Only a small, and not particularly unsightly or objectionable, structure is maintained at the location of each well. These buildings are not of a different character than an ordinary tool house or comfort station, such as are commonly maintained in park areas. Id. at 110-111.

These actions are similar to those ensured under Jordan's lease with the City. Jordan is not permitted to enter onto the park property, nor erect any structures thereon. Further, if Jordan chose to drill, it must obtain approval from the City and the State of Michigan.

> 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 reaching 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 an adverse interest necessitating the sharpening of the issues raised. *Int'l Un*ion UAW v Cent Mich Univ Trs, 295 Mich App 486, 495; 815 NW2d 132 (2012) (internal quotations and citations omitted).

MCR 2.605(A)(1) provides: "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 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 Pub Instruction, 272 Mich App 1, 8; 724 NW2d 478 (2006); quoting *Nat'l* Wildlife Federation v Cleveland Cliffs Iron Co, 471 Mich 608, 615; 684 NW2d 800 (2004). Further, it is "inappropriate[] [to] involve the judiciary in 'deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government.'" *Michigan Ed Ass'n*, 272 Mich App at 8; quoting *Nat'l Wildlife*, 471 Mich at 615.

This is the case here. None of Plaintiff's members is a party, obligor or beneficiary of the lease. As a result, they cannot point to any future conduct necessary for guidance. Rather, Plaintiff's members are citizens that are unhappy with their elected officials' decisions to approve the lease and easement. The courtroom, however, is not the proper forum for resolution of such issues; the voting booth is.

For the foregoing reasons, the Court finds that Plaintiff has failed to establish the existence of an actual controversy necessary for the Court to establish MCR 2.605 standing.

Conclusion

For all of the above reasons, the Court finds that: (1) Plaintiff's members did not have a right to vote for approval of the Sunoco easement or the Jordan lease, and therefore, do not have standing based on a denial of such right; (2) Plaintiff's members have failed to establish MCR 2.605 standing; and (3) neither Sunoco's easement nor Jordan's lease violates the City Charter or the Home City Rules Act.

As a result, Defendants Sunoco, Jordan Development, and Rochester Hills' motions for summary disposition are GRANTED under (C)(5) and (C)(8), and Plaintiff's Complaint is DISMISSED in its entirety.

For the same reasons, Plaintiff motion for summary disposition under MCR 2.116(I)(1) and (I)(2) is DENIED.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

November 4, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge