STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiff/Appellant,

v.

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

Defendants/Appellees.
_____/

COA No. 324717

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

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APPELLEE SUNOCO PIPELINE, L.P.'S BRIEF

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STATEMENT OF JURISDICTION

The statement of jurisdiction set forth in Appellant's Brief is correct. This Court has jurisdiction of an appeal as of right filed from a final judgment or order of the circuit court. MCR 7.203(A)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether Plaintiff has standing to seek a declaratory judgment regarding Sunoco Pipeline, LP's pipeline right of way easement.

The Circuit Court held "No".
Plaintiff contends the answer is "Yes".
Defendant Sunoco Pipeline, LLP contends the answer is "No".

II. Whether an actual controversy exists that would warrant declaratory judgment regarding minor modifications to Sunoco's existing pipeline right of way easement.

The Circuit Court held "No".
Plaintiff contends the answer is "Yes".
Defendant Sunoco Pipeline, LLP contends the answer is "No".

III. Whether Section 11.8 of the Rochester Hills City Charter required voter approval before the City Council could agree to slightly modify the legal description of Sunoco's 1950 pipeline right of way easement where the purpose of the modification was simply to reflect the actual location of a replacement pipeline that had been constructed using methods that avoided the need to disturb the surface of Bloomer Park.

The Circuit Court held "No".
Plaintiff contends the answer is "Yes".
Defendant Sunoco Pipeline, LLP contends the answer is "No".

IV. Whether slight modifications to an existing Sunoco pipeline right of way easement constituted the sale of a park requiring voter approval under MCL 117.5(1)(e)?

The Circuit Court held "No".
Plaintiff contends the answer is "Yes".
Defendant Sunoco Pipeline, LLP contends the answer is "No".

COUNTER-STATEMENT OF FACTS

This action challenges two separate and completely unrelated transactions. The first is a lease of underground oil and gas entered into between the Defendants the City of Rochester Hills ("City") and Jordan Development Company ("Jordan"). The second is a minor modification made by the City to the legal description of a pipeline right of way held by Defendant Sunoco Pipeline, L.P. ("Sunoco") that was first created by the State of Michigan in 1950. Because Sunoco has no interest in the Jordan lease, this brief addresses the issues raised by Plaintiff Don't Drill the Hills, Inc. ("DTTH") only as they relate to Sunoco's pipeline.

On November 9, 1950 the State issued a "Permit to Construct and Maintain a Pipeline" to Sunoco's predecessor in interest, allowing the latter to install, maintain and replace an underground pipeline in perpetuity through what was then a state park located in Avon Township, Michigan. *Exhibit A to Defendant Sunoco's Brief in Support of Summary Disposition.*[1] The pipeline easement has been a matter of public record since it was first recorded with the Oakland County Register of Deeds on January 5, 1951. *Id.*

Some 62 years later, in 2012, Sunoco began preliminary work on a project to replace the existing 8" underground pipeline with a new 8" pipeline for use in transporting liquefied petroleum gas products from Pennsylvania through Ohio and Michigan to Sarnia, Ontario. *Exhibit B, p. 3.* The stated purpose of the project was to replace existing pipeline sections with thicker wall pipe to improve safety and reliability of the system and to provide increased safeguards for local residents and business owners. *Id., p.1.*

In the time that has passed since the original pipeline was constructed, Avon Township became incorporated as the City of Rochester Hills and the State transferred ownership of the

[1] Unless otherwise indicated, references to exhibit letters in this brief are intended to refer to the corresponding exhibit attached to Defendant Sunoco's Brief in Support of Summary Disposition.

state park property to the City. Therefore, in order to proceed with its plans to replace the existing pipeline Sunoco entered into a Right of Entry Agreement with the City in September, 2013. *Exhibit C.* This agreement included an acknowledgment that Sunoco already had the right to replace the existing underground pipeline under the 1950 State Permit and provided that once Sunoco finished doing so the City would execute "an Easement Agreement or similar document that will reflect the 'as-built' location of the pipeline to be installed pursuant to this Agreement that will be of equal width as the Permit now in place and contain terms and conditions similar to the existing Permit." *Id.*

The agreement also required that Sunoco use a horizontal directional drill boring methodology to install the new pipe. *Id., ¶ 4.* This method was intended to preserve the natural beauty of the park because it allows sections of pipe to be inserted into a tunnel that is drilled horizontally below ground between boring pits located outside of the park boundaries. Hence, there would be no need to deploy heavy construction equipment into the park to dig a long narrow trench and backfill it after the pipe was installed. Use of the "open trench" methodology was planned for other sections of the project. *Exhibit B.* The Right of Entry Agreement further provided that Sunoco "shall not interfere with normal operations of the Premises or impair access to the Premises." *Exhibit C, ¶ 7.* Thus, Sunoco was not permitted to interfere with the surface use of the property for normal recreational purposes or impede access to Bloomer Park.

The replacement pipeline was put into commercial use in October, 2013 and currently carries approximately 26,400 BPD (barrels per day) of ethane, a liquefied petroleum gas product which is ultimately transported to Sarnia, Ontario. The Right of Entry Agreement was recorded with the Oakland County Register of Deeds on December 16, 2013. *Exhibit C, p. 1.*

Following completion of the replacement pipeline and pursuant to the terms of the Right of Entry Agreement, the City subsequently executed a "Pipeline Right-of-Way Easement" with a legal description that reflected the "as built" location of the replacement pipeline. *Exhibit D.* The description provides for a 25 foot easement that is congruent with and follows the same path as the 1950 right of way at the southerly property line but diverges slightly as it approaches the northeast property line. *Exhibit D, p. 6.* The reason is simply because the drilling equipment used to bore the below-grade horizontal tunnel where the pipe is inserted cannot make a sharp turn as it drills from one boring pit to the next one. Hence, a change in direction between boring pits, which may be a mile apart, must be accomplished through a gradual curve. The "Pipeline Right of Way Easement" containing the "as built" legal description was dated April 8, 2014 and recorded on April 29, 2014. *Id., p. 1.*

Plaintiff Don't Drill the Hills, Inc. is a Michigan non-profit corporation with its registered office located in Port Huron, Michigan. *Exhibit E.* It is organized on a non-stock directorship basis. *Id.* On May 15, 2014, Plaintiff filed a Complaint for Declaratory Relief naming the City and Jordan, but not Sunoco, as Defendants. This Complaint challenged the City's decision to lease oil and gas rights located under several city parks to Jordan. Sunoco was not involved in the lease transaction and has no interest whatsoever in the Jordan lease.

On June 25, 2014, some nine months after Sunoco had completed its replacement pipeline and put it into commercial use, Plaintiff filed a First Amended Complaint for Declaratory Relief which added Defendant Sunoco as a party. The First Amended Complaint sought a declaration that execution of the Pipeline Right-of-Way Easement by the City constituted a "sale" of a portion of Bloomer Park and that such action was unauthorized absent

voter approval under Section 11.8 of the City Charter and MCL 117.5(1)(e). *First Amended Complaint, ¶¶ 32(e), 36, 43.*

Instead of filing an Answer to the First Amended Complaint, each of the Defendants filed a motion for summary disposition under MCR 2.116(C)(5) and (C)(8). On November 14, 2014, Oakland County Circuit Court Judge James M. Alexander entered an Opinion and Order Re: Summary Disposition in which he granted each of the motions filed by the Defendants and denied Plaintiff's request that summary disposition be granted in its favor under MCR 2.116(I)(1) and (I)(2). With respect to Plaintiff's claims against Sunoco, the Court held that "Sunoco's Agreement simply provides for an easement that has existed in similar form since 1950" and that neither state law nor the City Charter required the agreement to be submitted for voter approval. *Opinion and Order, pp. 5, 6*. Specifically, the Court held that there was no "sale" of a park necessitating voter approval under MCL 117.5(1)(e) and the pipeline easement qualified as a lawful existing use for which voter approval was not required under the express terms of Charter Section 11.8.2. Accordingly, the Court dismissed the Amended Complaint against Sunoco and the other Defendants in its entirety.

Plaintiff thereafter filed the instant appeal.

STANDARD OF REVIEW

Appellate review of a decision to grant or deny summary disposition under MCR 2.116(C)(5), as well as whether a party has standing, is *de novo* based upon a consideration of the pleadings, affidavits, admissions and other documentary evidence submitted by the parties. *Franklin Historic Dist Study Comm v. Village of Franklin*, 241 Mich App 184, 187; 614 NW2d 703 (2000); *Kuhn v. Secretary of State*, 228 Mich App 319, 333; 579 NW2d 101 (1998). This Court also reviews *de novo* a trial court's decision to grant or deny summary disposition pursuant

to MCR 2.116(C)(8), reviewing the legal sufficiency of a plaintiff's complaint on the pleadings alone to determine whether the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Maiden v Rozwood,* 461 Mich 109, 118-120; 597 NW2d 817 (1999), quoting *Wade v. Dep't of Corrections,* 439 Mich 158, 163; 483 NW2d 26 (1992).

ARGUMENT

I. THE LOWER COURT CORRECTLY HELD THAT PLAINTIFF DDTH LACKS STANDING WITH RESPECT TO ITS DECLARATORY JUDGMENT CLAIM CHALLENGING SUNOCO'S PIPELINE RIGHT OF WAY EASEMENT.

In addressing Plaintiff's challenge to the Sunoco easement, the Circuit Court held that "[b]ecause 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 and Plaintiff bases its standing on that right, the Court finds that Plaintiff does not have standing to challenge Sunoco's easement." *Opinion and Order, p. 6.* Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation. *Allstate Ins Co v Hayes*, 442 Mich. 56, 68, 499 NW2d 743 (1993). One cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568, 577 (1992). To have standing, a plaintiff must demonstrate a legally protected interest that is in jeopardy of being adversely affected and must allege a sufficient personal stake in the outcome of the dispute to ensure that the controversy to be adjudicated will be presented in an adversarial setting that is capable of judicial

resolution. Generally, a plaintiff shows a personal stake in a lawsuit by demonstrating injury to the plaintiff or the plaintiff's property. *Taylor v Blue Cross/Blue Shield of Michigan*, 205 Mich App 644, 655-656; 517 NW2d 864, 870 (1994).

Simply because someone claims they will be harmed does not create standing to pursue a declaratory judgment. In *Fieger v Commissioner of Ins*, 174 Mich App 467 (1988), the plaintiff, an attorney, claimed to have standing to challenge the constitutionality of certain provisions of 1986 P.A. 178 because he suffered noneconomic injury to his right and ability to function effectively as an attorney, and that his ability to protect the constitutional rights of his clients had been hampered because the act that was the subject of the case was unconstitutional. The Court of Appeals held that such injury did not convey standing because a plaintiff must assert his own legal rights and cannot rest his claim to relief on the legal rights or interests of third parties. *See also, Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013).

It is also well settled that a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large. Rather, demonstration that a substantial interest of the litigant will be detrimentally affected in a manner different from the public at large must be shown. *Detroit Fire Fighters Ass'n v City of Detroit*, 449 Mich 629, 633, 537 NW2d 436, 437-438 (1995).

As Plaintiff concedes at page 16 of its brief on appeal, "the general rule is that when a statute or charter creates a new right or imposes a new duty, the remedy provided by the statute or charter to enforce the right, or for nonperformance of the duty, is exclusive." *Pompey v General Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971). Nevertheless, Plaintiff argues that this rule should not apply to the instant case because the general rule does not apply where the statute or charter expressly creates a private cause of action or where a private cause of action

can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. *Appellant's Brief, p. 16*. Plaintiff concedes the Charter does not expressly provide for a private cause of action but suggests the latter exception applies. However, that simply is not true. Plaintiff's argument ignores the fact that the Charter expressly provides a means for enforcement of its provisions. Section 12.4 of the Charter provides that a violation of the Charter is a misdemeanor and subject to a fine. Hence, enforcement of the Charter is expressly delegated to the public authorities responsible for law enforcement and not to private individuals or corporations. Therefore, Plaintiff's attempt to infer a private cause of action for a violation of the Charter has no merit.

Furthermore, Plaintiff has yet to demonstrate that it or its members have any substantial legal interest that will be detrimentally affected by a slight modification to the legal description contained in the pipeline easement that has been in place since 1950. Absent such a showing, Plaintiff has no standing to seek a declaratory judgment regarding Sunoco's easement. In essence, Plaintiff is attempting to challenge Sunoco's interest in real property but is itself a complete stranger to the title of the subject property. Plaintiff does not claim that it or any of its members holds a superior title to Sunoco's easement or any other legal or equitable title, right or interest whatsoever in the parcel of property that is subject to the easement. All agree that the fee title to the 25 foot wide strip of land described in the easement is owned by the City. Thus, Plaintiff is not seeking to vindicate any interest it or its members have in the parcel but rather is attempting to attack Sunoco's right of way easement by reliance upon the purported obligations of the City under the City Charter. Plaintiff may not rely on the legal interest held by a third party, in this case the City, in the parcel of land at issue as a basis for standing to challenge Sunoco's easement. Moreover, if Plaintiff were asserting a property interest in the subject parcel

inconsistent with Sunoco's easement, its proper remedy would be to commence an action to determine interests in real estate pursuant to MCL 600.2932 and MCR 3.411. The fact that it did not is tantamount to an admission that Plaintiff has no substantive interest in the parcel of real estate that is the subject of the easement at issue.

In *Killeen v Wayne County Civil Service Commission*, 108 Mich App 14, 19-20; 310 NW2d 257, 260 (1981), the Court found no standing where the plaintiff had failed to set forth in the complaint any allegations whereby his rights as a private person had been interfered with in a manner distinct from the public at large. The Court stated that absent such allegations, a private person has no standing to institute proceedings to redress grievances on behalf of the public at large. Quoting from *Home Telephone Co v Michigan Railroad Comm*, 174 Mich 219, 224, 140 NW 496 (1913), the Court stated that public grievances must be brought into court by public agents and not by private intervention.

> We think it is well settled in this State that grievances which afflict the community must be redressed by those to whom the law has intrusted the duty of interference. Such has been the rule of law in this State for many years. *Miller v. Grandy*, 13 Mich. 540. It was there held that private persons could not assume to themselves the right to institute proceedings in chancery to redress grievances on behalf of the public. They can only proceed where their individual grievances are distinct from those of the public at large, and such as give them a private right to redress.
>
> *Id.*

The Amended Complaint does not identify any special injury to DDTH and merely asserts that it has members and that some of them live in Rochester Hills. Such allegations are insufficient to establish standing to pursue a claim that seeks to adjudicate the extent of Sunoco's property interest in a parcel of land owned in fee by the City.

Finally, while Plaintiff has cited a series of cases involving voter's rights to support its standing argument, those cases have no bearing on the issue of standing to challenge Sunoco's

easement. As the Circuit Court correctly concluded, because the pipeline easement has been in existence since 1950 and Section 11.8.2 of the City Charter declares any existing use to continue to be lawful, no voter approval was necessary before the City could agree to the slight realignment of the easement. Because Plaintiff based its standing on that right, Plaintiff lacks standing to challenge Sunoco's easement. Plaintiff has not addressed the Court's discussion of the existing use provision of Section 11.8.2 nor has it identified any provision in the Charter that suggests that a slight realignment of an existing use would require voter approval. Under these circumstances, the Circuit Court was correct when it granted summary disposition in Sunoco's favor pursuant to MCR 2.116(C)(5) based on lack of standing.

II. THE CIRCUIT COURT CORRECTLY HELD THERE WAS NO CASE OF ACTUAL CONTROVERSY.

Where no case of actual controversy exists, the circuit court lacks subject matter jurisdiction to enter a declaratory judgment. *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). An actual controversy does not exist where the injuries sought to be prevented are merely hypothetical. There must be an actual injury or loss. *Recall Blanchard Committee v Secretary of State*, 146 Mich App 117; 380 NW2d 71 (1985). An actual controversy will be found to exist only where a declaratory judgment is necessary to guide a litigant's future conduct in order to preserve the litigant's legal rights. *Shavers, supra*; *Crawford Co v Secretary of State*, 160 Mich App 88; 408 NW2d 112 (1987).

The Circuit Court found that Plaintiff did not satisfy these requirements stating:

> … they cannot point to any future conduct necessary for guidance. Rather, Plaintiff's members are citizens that are unhappy with their elected official's decision 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.
>
> *Opinion and Order, p. 10.*

Plaintiff challenges the Circuit Court's determination but in doing so devotes its entire argument on the issue to a discussion of the Jordan oil and gas lease with only passing reference to the Sunoco easement. No doubt this is because the replacement of the Sunoco pipeline was completed and in commercial operation long before Plaintiff filed its Amended Complaint for Declaratory Judgment and Plaintiff has yet to identify any actual injury it or any member has sustained or is likely to sustain by virtue of a minor realignment of the 25 foot wide easement to match the physical path of the replacement underground pipeline. As the Circuit Court noted, it is inappropriate to involve the judiciary in deciding public policy, not in response to a real dispute in which a plaintiff has 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. *Id.* Nor has Plaintiff identified any other reason why a declaratory judgment would be necessary with respect to the already completed Sunoco pipeline project. Therefore, Plaintiff has offered no cogent argument to dispute the Circuit Court determination that no actual controversy exists with respect to the Plaintiff's declaratory judgment action directed at Sunoco's pipeline easement.

III. THE CIRCUIT COURT CORRECTLY HELD THAT VOTER APPROVAL OF THE MODIFICATION OF THE SUNOCO PIPELINE EASEMENT WAS NOT REQURED UNDER SECTION 11.8 OF THE CITY CHARTER.

A. A Pipeline Easement Right of Way Was an Existing Use Dating Back to 1950.

Plaintiff conceded below that since 1950 Sunoco or its predecessors in interest have had a pipeline easement allowing it to construct, maintain and replace an underground pipeline that crosses Bloomer Park. *Amended Complaint, ¶24.* Plaintiff further conceded that the legal description of the easement contained in the 2014 document is congruent with portions of the 1950 easement description. *Id.* Nevertheless, the crux of Plaintiff's Amended Complaint is that because it does not align perfectly with the legal description contained in the 1950 Permit, the execution of the 2014 document constituted a sale of part of Bloomer Park without voter approval in violation of Section 11.8.1 of the City Charter.

The Circuit Court rejected Plaintiff's argument noting that Section 11.8.2 of the Charter expressly states that an existing use of a park or open space on the effective date of the Charter provision at issue remains a lawful use. Therefore, because Sunoco's pipeline easement has existed since 1950 the Court held that the replacement and slight realignment of the existing pipeline easement did not require voter approval. *Opinion and Order, p. 6.*

The Circuit Court was correct and on appeal Plaintiff fails to even address the express language of Section 11.8.2 of the City Charter that creates an exception to the voter mandate for uses of a park that pre-date the effective date of Section 11.8. Plaintiff's Amended Complaint acknowledges that Section 11.8 of the Charter became effective on November 8, 2011. *Plaintiff's Amended Complaint, ¶ 7.* While Plaintiff argues that the language of Section 11.8.1 precludes the City from selling or converting city parks and open spaces to "another use not

directly or incidental to public recreation or conservation" unless approved by a majority vote of the electors, Plaintiff, both below and on appeal, simply ignores the exception adopted at the very same time. Specifically, Section 11.8.2 states, in pertinent part, 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". Thus, any non-recreational use made of Bloomer Park on November 8, 2011 remained a lawful use of the park thereafter without any requirement for voter approval.

In its brief on appeal, Plaintiff has not even addressed the Circuit Court's application of this provision in the case at bar or offered any reason why the Court's conclusion on this point should be reversed on appeal. Nevertheless, the lower court was correct. When reviewing the provisions of a home rule city charter, courts apply the same rules that apply to the construction of statutes. The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Courts apply unambiguous statutes as written. *Barrow v City of Detroit Election Comm'n*, 301 Mich App 403, 413–414 (2013). Here, given that Bloomer Park has been used for a pipeline since the 1950s, which predates not only the 2011 Charter amendment but also the City's inception and the date the City acquired the park from the State of Michigan, and the Charter provision expressly provided that any use of the park on November 8, 2011 remained lawful, the City was free to agree to allow a replacement pipeline to be constructed within the park boundaries without the need for prior voter approval. While the legal descriptions in the 1950 Permit and 2014 Pipeline Right-of-Way Easement are only in part identical, it is not the legal description of the easement but the <u>use</u> of the park for a non-recreational purpose that is addressed by the Charter and, therefore, germane to the issue. Because the park was being used for an underground pipeline, clearly a non-recreational or conservation purpose, before

November 8, 2011 no voter approval was required for the City to execute the 2014 pipeline easement. The 2014 document did not change the existing use of the park and certainly did not adversely affect the use of the park as a park in any material way from how it had been used before that document was signed.

It is not disputed that the existing easement already allowed a pipeline to be located within the boundaries of the park property and the purpose of the 2014 document was simply to align the description of the easement with the physical location of the replacement pipeline. The fact that the replacement was installed using modern techniques that permitted the pipeline to be placed within a tunnel without disturbing the surface was actually a significant benefit to the park. Simply aligning the legal description with the path of the horizontally bored underground tunnel that resulted from the technical limitations of the underground machinery used to preserve the surface area of the park itself can hardly be characterized as a sale of park property. The alternative was to bring heavy equipment into the park itself and dig a long trench across the entire park from the southern to the northeastern boundary lines then bury a replacement pipe within the confines of the easement as described in the 1950 Permit. The fact that the City did not insist on that course of action should be applauded by Plaintiff, not condemned, but in any event the Plaintiff's attempt to characterize the 2014 document arising out of the 2013 replacement of the pipeline as a sale of park property has no merit. Under Plaintiff's theory, the City would be precluded from relocating rights of way for water, sewer, gas, electric or telephone lines within the park without voter approval where doing so would open up additional areas to recreational use. This defies common sense.

Plaintiff does claim that the 2014 easement places new restriction on the City's right to place structures on the easement and allows Sunoco to exercise control and put new structures on

the surface. *Appellant's Brief, pp.3, 7.* However, Plaintiff has not explained how an agreement that precludes the City from erecting a building over a pipeline easement used to transport liquid petroleum products would constitute the sale of a park or would amount to a change to a non-recreational or conservation use of the park's surface so as to implicate Section 11.8. Furthermore, Sunoco's express rights under the 2014 easement are no greater than its common law rights under the 1950 easement to take actions to prevent interference with the easement. In this state the rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil. *Cantieny v Friebe*, 67 NW2d 102, 103-04 (Mich. 1954). Thus, the grantee of an easement has all rights to the reasonable and necessary use of the right-of-way within the purpose of the easement. *Panhandle E Pipe Line Co v Musselman, 257 Mich App 477, 668 NW2d 418, 422 (2003).* In the case of a pipeline easement this may include the right to limit interference with aerial surveillance of the pipeline route as part of routine maintenance. *Id*. Hence, while the 2014 easement spells out Sunoco's right to maintain the easement in greater detail, Sunoco had similar rights under the terms of the 1950 easement.

B. Plaintiff Incorrectly Assumes that the Definition of "Park" or "Open Space" Includes Property Interests Lying Below the Surface of a Parcel of Land.

By its terms, Section 11.8 of the City Charter applies only to "[c]ity-owned parks and open spaces" and not to all public lands or to all interests in real property held by the City of Rochester Hills. Nevertheless, Plaintiff simply assumes, without any citation of authority, that the term "park" includes not only the actual surface area of real property devoted to public recreation but also anything lying below the surface area of such land. Plaintiff's argument conflates the real property maxim "*cujus est solum, ejus est useque ad coelum et ad inferos*" (he who owns the soil owns to the heavens and to hell) with the definition of the term "parks and

open spaces" as used in the Charter. While it is well established that real property consists of something more than mere surface rights, *see eg. Grand Rapids Gravel Co. v. William J. Breen Gravel Co.*, 262 Mich 365, 373; 247 NW 902, 905 (1933), Plaintiff has cited no authority that a "park" includes more than just the surface area of a tract of land devoted to public recreation and extends below ground all the way to the center of the earth. Furthermore, it seems inherently absurd to construe the term "open spaces" as used in the City Charter to include the soil located many feet below the surface of undeveloped land. The mere fact that the City's legal interest in real property extends to the soil below a park or open space does not mean that everything below the surface is also a "park" or an "open space" as those terms are used in the City Charter at issue.

Unless otherwise defined in the Charter or statute itself, words are to be assigned their plain and ordinary meanings. *Wayne County Retirement System v Wayne County,* 301 Mich App 1, 27; 836 NW2d 279, 295 (2013). Where a law has been passed by the electorate using the initiative process, words are not to be construed based on the subjective intent of one of the people who gathered signatures to put an initiative on the ballot, as suggested by Plaintiff, but rather given their ordinary and customary meaning as they would have been understood by the voters. *Welch Foods v Attorney General,* 213 Mich App 459; 540 NW2d 693 (1995). Courts must presume that the meaning as plainly expressed in the statute is what was intended. *People v Williams,* 286 Mich App 416; 707 NW2d 624 (2005).

Here, there is no definition of "park" contained in the Charter so the word must be construed using its ordinary and customary meaning. The common understanding of a park or public park does not support Plaintiff's theory that a park extends beyond the surface of a parcel of land to include soil, minerals, gas or anything else lying well below the surface. Indeed, in

Dodge v North End Improvement Ass'n, 189 Mich 16; 155 NW 38 (1915), the Supreme Court recited several definitions of the words "park" or "public park" and none of them referenced the area below the surface:

> In Words and Phrases there are several definitions of the words 'park' and 'public park.' One of them reads:
>
> 'A park is variously defined to be a pleasure ground in or near a city, set apart for the recreation of the public; a piece of ground inclosed for the purposes of pleasure, exercise, amusement or ornament; a place for the resort of the public for recreation, air and light; a place open for every one. State ex rel. Attorney General v. Schweickardt, 109 Mo. 496, 19 S. W. 47, 51 (citing Perrin v. New York Cent. R. Co., 36 N. Y. 120; Price v. Inhabitants of City of Plainfield, 40 N. J. Law [11 Vroom] 613).'
>
> Another definition is:
>
> 'In its common and ordinary significance, a public park is an open or inclosed tract of land and adapted for, set apart, maintained at public expense, and devoted to the purposes of pleasure, recreation, ornament, light and air for the inhabitants of the town near or in which it is located.' 3 McQuillin, Mun. Corp. 2533, 2534, and cases cited in footnote.'
>
> ***
>
> 'A park may be devoted to any use which tends to promote popular enjoyment and recreation, although primarily involving the ideas of open air and space, occupation in part by monuments, statues, museums, galleries of art, free public libraries and other agencies contributing to the aesthetic enjoyment of the people, is not a perversion of the lands from park purposes. These are maintained for the use, convenience and recreation of persons resorting to and using public parks.' 3 Dillon, Mun. Corp. 1749, 1750.
>
> *Id. at* 27-28; 155 NW at 441 (1915)

These definitions clearly indicate that a "park" or "public park" is the ground used by the public for "recreation, air and light", not all of the soil or legal interests the City may have in the soil or minerals that lie below the park. Furthermore, case law does not support Plaintiff's theory that use restrictions applicable to the surface of a tract of land necessarily apply equally to what lies below the tract. In *Certain-Teed Products Corp v Paris Twp*, 351 Mich 434, 88 NW2d 705

(1958), the Plaintiff sought to mine gypsum lying below property zoned for agricultural use via an underground mine from abutting property zoned for industrial use. Under the zoning ordinance, mining operations were a permitted use on the industrial property but not on property zoned for agriculture. The Supreme Court rejected the lower court's decision to apply the *ad coelum* doctrine by analogy and held that "to the extent the 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. Thus, while Section 11.8 of the Charter may limit the use of city owned parks and open areas to recreational and conservation purposes, that does not mean that the City is precluded from permitting underground activities that do not interfere with recreational and conservation uses on the surface. The park consists of that portion of the "ground" or "tract" actually used by the public and maintained by the City for recreational purposes, not all real property interests held by the City that may fall within the parameters of a legal description that includes the park. This Court may not abandon "the canon of common sense" when construing the Charter provision at issue. *See Grand Rapids Employees Independent Union v. City of Grand Rapids*, 235 Mich App 398, 406; 597 NW2d 284 (1999). The soil, minerals, gas and other material lying many feet below the surface may be owned by the City as part of its fee interest in the real property but they are not a "park" or "open space" to which Section 11.8 of the Charter applies.

IV. THE EXECUTION OF A REPLACEMENT PIPELINE EASEMENT IS NOT THE SALE OF A PARK WITHIN THE MEANING OF MICHIGAN COMPILED LAW SECTION 117.5(1)(e).

Plaintiff's alternative theory below was that the execution of the 2014 Pipeline Right-of-Way Easement constituted a sale of a part of Bloomer Park without voter approval contrary to MCL 117.5(1)(e). On appeal, Plaintiff has apparently abandoned this argument by failing to include the issue in its Statement of Questions Presented at pages x-xi of its Brief on Appeal. The only issue Plaintiff identified with respect to MCL 117.5(1)(e) is "[w]hether the Jordan Agreement, which severed and transferred oil and gas mineral rights from a City owned cemetery to Jordan … required voter approval under MCL 117.5(1)(e)." *Plaintiff's Brief on Appeal, p. xi* (*emphasis added).* Because Plaintiff did not raise any issue with respect to the application of MCL 117.5(1)(e) to Bloomer Park or Sunoco's pipeline easement in the statement of questions presented, Plaintiff failed to properly preserve this issue for review. MCR 7.212(C)(5); *Grand Rapids Employees Independent Union, supra.* Furthermore, Plaintiff expressly refrained from briefing the issue by limiting its discussion to application of MCL 117.5(1)(e) to "cemeteries". *Plaintiff's Brief on Appeal, p. 35, fn. 8.* The mere statement of a position without argument or citation of authority in support thereof is insufficient to present the matter for the consideration of an appellate court. *Dolby v Dillman,* 283 Mich. 609, 613; 278 NW 694, 696 (1938).

Nevertheless, even if the issue had been preserved this Court should affirm the decision of the Circuit Court. The discussion of the definition of a "park" in Argument III B, *supra,* being limited to the surface area used for public recreation and not the subsurface soil has equal application when construing the words "park or part of a park" in MCL 117.5(1)(e). Furthermore, by definition, an easement is a non-exclusive right to use the property of another

for a particular purpose. It is wholly distinct from a right to occupy and possess the land as does the fee owner. *Michigan Dept of Natural Resources v Carmody-Lahti Real Estate, Inc.*, 472 Mich 359, 378-379; 699 NW2d 272, 284 (2005).

> "An easement is a right which one proprietor has to some profit, benefit or lawful use, out of, or over, the estate of another proprietor. * * * It does not displace the general possession by the owner of the land, but the person entitled to the easement has a qualified possession only, so far as may be needful for its enjoyment."
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> *Id.* at 379, fn. 39 quoting from *McClintic–Marshall Co v Ford Motor Co*, 254 Mich 305, 317; 236 NW 792 (1931).

Furthermore, an easement may be created in a number of ways that have nothing to do with a sale of the property that is the subject of the easement. An easement may be created by express grant or reservation within a written document or by operation of law. *Forge v Smith*, 458 Mich 198; 580 NW2d 876 (1998). If the legislature had intended to preclude a city from either creating a new easement or modifying an existing easement in, over or under a park it could have stated so plainly. It did not. Under the maxim of "*inclusio unis est exclusio alterius*", the statute clearly applies only to a sale of park property and cannot be construed to bar the City from granting easements or rights of ways for utilities or other purposes that do not interfere with the use of the park by the public. Nor can the prohibition on the sale of a park be construed to preclude a minor modification to an existing pipeline easement in connection with the replacement of the original pipeline.

In addition, the statute relied upon by Plaintiff does not contain a general prohibition on the sale of any park property. To the contrary, by its terms it only prohibits the sale of a park, or a part of the park, where the subject of the sale is a park "required under the official master plan of the city." *MCL 117.5(1)(e).* Normally, the owner of the surface rights also owns the

subsurface rights but it is clear that under Michigan law they may be divided and held by different owners. In fact, by the common law several sorts of estates or interests, joint or several, may exist in the same fee; one person may own the ground or soil, another, the structures on the land, another, the minerals beneath the surface, and still another, the trees and wood growing on the land. *Rathbun v State*, 284 Mich 521, 534; 280 NW 35, 40 (1938).

Hence, because each can be separately owned and conveyed, unless the official master deed addresses and requires the subsurface where the pipeline is actually located to be deemed part of the park, MCL 117.5(1)(e) cannot and should not be construed to preclude the City from modifying an existing easement to place a structure below the surface where the structure will have no material impact on the use of the park for park purposes. Plaintiff has not alleged that the City's master plan addresses subsurface rights or that the official master plan requires the subsurface area to be designated as a park. Absent same, the City was not encumbered by the limitations of MCL 117.5(1)(e) in how it deals with its legal interest in the property and was free to execute both the Right of Entry Agreement to allow replacement of an underground pipeline using a horizontal boring method and the Pipeline Right-of-Way Easement to align the legal description of the easement with the actual location of the pipeline without voter approval. *See Nash v City of Grand Rapids*, 170 Mich App 725; 428 NW2d 756 (1988) (Existing park not required under City's master plan could be sold without voter approval.)

V. THE COURT DID NOT ERR BY DENYING PLAINTIFF'S REQUEST FOR SUMMARY DISPOSTION UNDER MRC 2.116(I)(1) AND (2).

Plaintiff did not file a formal motion for summary disposition in the Court below but requested the court enter summary disposition in its favor pursuant to MCR 2.116(I)(1) and (2) which was properly denied by he Court. Subsection (I)(1) allows the Court to enter judgment if

"the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show there is no material issue of fact". Subsection (2) allows the court to enter summary disposition in favor of the party opposing the motion if it appears to the Court that that party and not the moving party is entitled to summary disposition. Neither rule has application to the case at bar.

First, there is no right to declaratory relief as a matter of law. It is an equitable action and relief is discretionary with the court. It is also well established that court's jurisdiction to issue a declaratory judgment should be exercised with great care, extreme caution, and only where there are special circumstances warranting it. *Washington-Detroit Theatre Co v Moore,* 249 Mich 673, 229 NW 618 (1930); *Rott v Standard Acc Ins Co,* 299 Mich 384 (1941*); Skiera v. National Indemnity Co,* 165 Mich App 184 (1987). MCR 2.605 indicates that a court "may" grant declaratory relief. It is not required to do so and under the deferential standard of review outlined in MCR 2.605, a reviewing court must affirm the trial court's decision even if a reasonable person might differ with the trial court in its decision to withhold relief. *PT Today, Inc v Commissioner of Office of Financial and Ins Services,* 270 Mich App 110 (2006). Given the nature of the relief sought, Plaintiff's position that it is entitled to declaratory judgment as a matter of law simply is without merit.

Second, Sunoco has yet to even file an answer to the Amended Complaint. Instead, it exercised its right to file a motion for summary disposition on procedural grounds to challenge Plaintiff's standing under MCR 2.116(C)(5) and the failure of the Amended Complaint to state a cause of action under MCR 2.116(C)(8). The motion was not based upon MCR 2.116(C)(10) (no material issue of fact). Therefore, the only issues briefed and argued before the lower court were whether Plaintiff has standing and whether the Amended Complaint stated a cause of

action. Even if the lower court had determined that Plaintiff did have standing and did state a cause of action, there would have been no legal basis to enter a declaratory judgment at that point in the proceedings vitiating Sunoco's easement based solely on Plaintiff's bare Amended Complaint. Instead, Defendant would have had the opportunity, pursuant to MCR 2.116(J), to file its answer raising such legal and equitable defenses as it may have to Plaintiff's request for declaratory judgment. Among those defenses would certainly be (1) that the action of the City was an administrative act not subject to a referendum and (2) relief should be denied based on the doctrine of laches in as much as the complaint herein was not filed until after Sunoco had already incurred substantial expense and completed the pipeline project.

With respect to the former, it is well establish that the administrative functions are not subject to voter referendum. *Rollingwood Homeowners Corp, Inc v City of Flint*, 386 Mich 258, 268, 191 NW2d 325 (1971); *Beach v. City of Saline*, 412 Mich 729, 731, 316 NW2d 724, 725 - 726 (1982). In *Beach*, the Court held that the decision to acquire real estate is inherently an administrative function and therefore not subject to voter referendum. Likewise, the decision to slightly modify an existing underground pipeline easement to conform the legal description of a 25 foot wide right of way to the path of a tunnel created by a horizontal boring drill rather than force Sunoco to dig an open trench through Bloomer Park to replace the pipeline is an inherently administrative act. Hence, voter approval of the modification was not required. The case would have then proceed to a decision on the merits, and even then the lower court would have discretion to withhold relief depending on the facts and circumstances.

Plaintiff has simply not provided any logical argument for its position that the Court was required to enter a declaratory judgment in Plaintiff's favor without giving Defendant an opportunity to file an answer where the only issues before the Court in the pending motion were

Plaintiff's standing and whether Plaintiff's complaint stated a cause of action. The lower Court properly denied the request.

Likewise, with respect to its claims against Sunoco, Plaintiff's suggestion that it should be allowed to recast its Complaint to seek relief by way of mandamus is without merit. Where an amendment would be futile it should be denied. *See P.T. Today, Inc., supra.* A writ of mandamus is issued by a court of superior jurisdiction to compel a public body or public official to perform a clear legal duty. *Kosib v Wayne County Bd of Auditors*, 320 Mich 322, 326; 31 NW2d 68 (1948); *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323; 597 NW2d 545 (1999), on other grounds, 464 Mich 726 (2001). Sunoco is neither a public body nor a public official. Accordingly, an action for mandamus is not an appropriate way for Plaintiff to challenge Sunoco's title to the easement in question.

CONCLUSION

The Circuit Court did not err when it granted summary disposition to Defendant Sunoco pursuant to MCR 2.116(C)(5)and (8). Plaintiff does not have standing to pursue its claim that voter approval was required under the City Charter or state law before the City could execute a pipeline easement document that made minor changes to the legal description of an existing Sunoco pipeline easement. In addition, even if standing did exist, Plaintiff has failed to state a cause of action by failing to set forth facts sufficient to establish that the 2014 easement document constituted a sale of part of Bloomer Park or a conversion of Bloomer Park to a new non-recreational use such that voter approval was required under the City Charter. Finally, Plaintiff failed to set forth facts sufficient to demonstrate that the 2014 easement document constituted a sale of a park required by the official master plan such that voter approval was required under state law.

RELIEF

Wherefore, Defendant Sunoco Pipeline, L.P. requests the Court affirm the Opinion and Order entered on November 4, 2014 granting summary disposition and dismissing Plaintiff's claims against Defendant Sunoco Pipeline, L.P. pursuant to MCR 2.116(C)(5) and (8).

DATED: April 16, 2015

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CERTIFICATE OF SERVICE

It is hereby certified that on April 16, 2015, Appellee Sunoco Pipeline, L.P.'s Brief was electronically filed with the Court using the Court's electronic filing system which will send notification of such filing to TIMOTHY J. LOZEN, MATTHEW C. LOZEN, MICHAEL A. COX, DANILA V. ARTAEV, JOHN D. STARAN and P. DANIEL CHRIST.

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