

**STATE OF MICHIGAN
37TH JUDICIAL CIRCUIT COURT
CALHOUN COUNTY**

COMMITTEE FOR MARSHALL NOT –
THE MEGASITE, *et al*,

Plaintiffs,

vs.

CITY OF MARSHALL, MICHELLE EUBANKS

Respondents,

and

MARSHALL AREA ECONOMIC
DEVELOPMENT ALLIANCE (MAEDA), a
Michigan non-profit organization,

Intervenor.

Mark J. Blando (PHV granted)
Robert T. Dube Jr. (PHV granted)
Attorney for Plaintiffs
10 South Fifth St., Ste. 800
612-236-0160
mblando@ecklandblando.com
rdube@ecklandblando.com

Ellis Boal (P10913)
9330 Woods Rd.
Charlevoix, MI 49720-1698
231-547-2626
ellisboal@voyager.net

Floyd E. Gates, Jr. (P54234)
Christopher J. Zdarsky (P81809)
Attorneys for MAEDA
Bodman PLC
99 Monroe Ave., NW Ste 300
Grand Rapids, MI 49503
616-205-3319

Joseph W. Colainne (P47404)
Zachary C. Larsen (P72189)
Attorneys for Defendants
Clark Hill PLC
215 S. Washington Sq, Ste 200
Lansing, MI 48933
517-318-3029

Richard C. Lindsey, Jr. (P51342)
Brendan Beer (P65365).
Attorneys for MAEDA
Abbott, Thompson, et al
405 S. Jackson St., PO Box 450
Jackson, MI 49024
rlindsey@atbplclaw.com
bbeer@atbplclaw.com

**OPINION RE: MOTION FOR
SUMMARY DISPOSITION**

At a session of Court, in the
37th Judicial Circuit Court for the City of Battle Creek,
County of Calhoun, State of Michigan,
On the 9th day of August, 2023

PRESENT: HON. WILLIAM C. MARIETTI
Circuit Judge, sitting by assignment

The Respondents, City and Eubanks, as well as the Intervenor, MAEDA, have filed motions for summary disposition pursuant to MCR 2.116(C)(5) and (8). Petitioners have filed a response which includes a prayer for summary judgment pursuant to 2.116(I)(2). A (C)(8) motion is confined to a review of the pleadings. *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018). The court will grant relief when a party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001). Neither MAEDA nor the Respondents have filed a pleading as of yet.¹ Therefore, it would be premature for the court to grant (I)(2) relief for the Petitioners in the absence of a pleading to circumspect from the Respondents and Intervenor.² Initially, the court notes that many of the arguments in the briefing by the parties were addressed in the opinion of July 12, 2023; that opinion is incorporated herein.

The Petitioners have filed a complaint/petition that prays for a writ of *mandamus*, injunctive relief and a declaratory judgment. The *mandamus* petition requests the court to order the Marshall City Clerk, Ms. Eubanks, to certify the sufficiency of their petitions for a referendum on ordinance 2023-08 which rezones a large parcel to industrial use and provides an appropriation for building inspections and site plan review. The complaint also seeks injunctive relief from the operation of the ordinance and a declaratory judgment that the appropriation section of the ordinance is invalid.

The petition for *mandamus* allocates the burden to the Petitioners to establish a clear legal right to the performance of a duty, a clear legal duty for the Respondents to so perform, the duty involved is ministerial and no other remedy exists for achieving the same result. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 761NW2d 210 (2008). Regarding the existence of alternative remedies, Section 5.04 of the City of Marshall's Charter provides an opportunity for the Respondents to require the City Council to review a finding of insufficiency and for judicial scrutiny of the final determination. Thus, it is apparent that there is an alternative remedy to *mandamus* available to the Petitioners for obtaining a certificate of sufficiency. Petitioners have failed to sustain their burden to establish the nonexistence of a viable alternative to *mandamus*. For that reason, alone, the writ should be denied as a matter of law.

¹ For Respondents and Intervenor a pleading would be an answer in the context of this case. MCR 2.110(A)(5). A motion for summary disposition is not a pleading. *Id.*

² Petitioners' reference to *Galasso v Surveybrain.Com*, unpublished opinion *per curiam* of the Court of Appeals, issued 5/5/12 (Docket No. 303300) is not applicable here. In that case, the plaintiff brought a (C)(10) and (C)(9) motion. The defendant filed an answer and requested judgment under (I)(2). The court considered the (I)(2) motion the equivalent of a (C)(8) motion. In the course of adjudicating this motion, the court was able to review the plaintiff's complaint as well as an answer. In the instant case there is no answer or pleading to review.

The petitioners also have the burden to prove they have a clear legal right to have the petition certified sufficient and that there is a legal obligation for the City Council to do so. Section 5.01(b) of the Charter provides that a referendum is not available to challenge an ordinance that contains an appropriation of funds. Ordinance 2023-08 contains an appropriation provision. Therefore, by the terms of the Charter, the petition is facially insufficient because its subject is not amenable to a referendum. The Supreme Court has upheld a similar charter provision in *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc.*, 465 Mich 303; 633 NW2d 357 (2001). The decision of the City Clerk and Elections Commission to decline to certify as sufficient a petition for a referendum on an ordinance that rezoned a parcel and included an appropriation was affirmed because the Detroit Charter, as with the Marshall Charter, prohibited a referendum for an ordinance that includes an appropriation of funds. This trial court does not have the prerogative to depart from Supreme Court precedent; any decision to abandon the principle of *stare decisis* must emanate from the highest court.

Notwithstanding this decision by the Supreme Court, the petitioners contend that the clerk did not have the authority to conclude their petition was insufficient based upon Section 5.01(b). The petitioners rely on *Coalition for a Safer Detroit* which confines the Clerk's authority to determining whether a petition manifests the requisite number of valid signatures and is in proper form. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362; 820 NW2d 208 (2012). Neither the Clerk nor Detroit City Council were empowered to consider the substance or effect of the proposed ordinance. The Detroit City Charter and state statutes were analyzed to arrive at that holding. The Charter provides that, when presented with a petition, the clerk shall canvass the signatures. The statute under consideration in *Coalition for a Safer Detroit* provided that the Clerk shall canvass the petition to see if it is signed by the requisite number of electors. Given that language, the holding limiting the clerk to ascertaining the sufficiency of the signatures was compelled by the terms of the charter.

The Marshall Charter requires the clerk to complete a certification as to its sufficiency and, if insufficient, specify the particulars wherein it is defective. Marshall City Charter Sec. 5.04(a). The fact that this Section limits the opportunity to amend the petition to defects related to signatures implies that there are other particulars, that don't involve the validity of signatures, which may provide a basis for the Clerk to find a petition to be insufficient. The difference in the language of the respective Charters materially distinguishes this case from *Coalition*.

In addition, the Detroit City Clerk, although precluded by *Coalition for a Safer Detroit* from considering the substance and effect of an initiative petition, does have authority to reject a petition as facially defective. *Detroit Coalition for Compassionate Care v Detroit City Clerk*, unpublished opinion *per curiam* of the Court of Appeals, issued 10/22/02 (Docket No. 241648).³

Moreover, regardless of whether the clerk had the authority to certify insufficiency due to the appropriation section, the scenario presented in this case is remarkably similar to that which the Court of Appeals considered in *Citizens Lobby of Port Huron, Inc., v Port Huron City Clerk*, 132 Mich App 412; 347 NW2d 423 (1984). In that case, the Clerk and City Council, notwithstanding the sufficiency of the signatures and form of the petition, refused to certify it because it involved an administrative, as opposed to legislative, matter and, thus, was not appropriately referable to the

³ Though not binding, unpublished opinions may be considered persuasive when they involve similar facts. *Miclea v Cherokee Ins Co*, 333 Mich App 661; 963 NW2d 665 (2020).

electorate.⁴ The plaintiff filed suit with a prayer for a writ of *mandamus* to compel the defendants to certify the petition and either enact it or place it on the ballot. The Court of Appeals found that the Circuit Court's denial of a writ was justified because the city council did not violate the charter by refusing to place the initiative involving an administrative matter on the ballot. In the instant case, the Marshall City Council refused to adopt the proposed ordinance or place it on the ballot because it involved a repeal of an ordinance that contained an appropriation which is not properly referable to the electorate under Section 5.01(b) of the Charter. This is the same action that the Court of Appeals approved in *Citizens*. It is also significant that the Court in *Citizens* noted that, though the clerk did not have the authority to refuse to certify the petition, which was in proper form, the main issue was whether the petition was not referable because it was administrative in nature. Since it was not referable, the writ was properly denied.

The same principle applies herein. If the petition was facially not referable because it involved repeal of an appropriation, the writ must be denied. As with *MGM*, *Citizens Lobby* is a published opinion and binding precedent for this court.

Of course, if the Council did not have the authority to include an appropriation in the ordinance, *MGM* would be inapposite. With that in mind, the Petitioners collaterally attack the validity of the appropriation provision in ordinance 2023-08. Two reasons are tendered to sever and/or strike the appropriation from the ordinance. First, they reference Section 9.05 of the Charter which requires that the annual budget and appropriation of funds for the ensuing fiscal year be adopted in the same resolution. Thus, it is submitted that an ordinance cannot be the legislative vehicle for an appropriation; it must be enacted by resolution. However, ordinance 2023-08 does not involve the annual budget and, therefore, the limitation on the legislative process to a resolution does not apply. The Petitioners cite Section 9.06 of the Charter for the proposition that any new appropriation during the fiscal year must be authorized "in accordance with the budgetary process" which must be by resolution. Petitioner's brief p. 24. A careful reading of Section 9.06 does not support the statement that the appropriation must be done "in accordance with the budgetary process"; that limitation is neither expressed nor implied in Section 9.06. The specific language provides that any withdrawal of city funds or obligation incurred for the expenditure of funds must comply with the budget appropriation. In the same section, the Council retains the prerogative to move unencumbered funds from one account to another. This provision does not specify which form of legislation can be employed to accomplish such a transfer. In the absence of specification, Section 4.01(a) of the Charter provides that the Council shall legislate by ordinance *or* resolution. (*emphasis supplied*) The Charter clearly contemplates that appropriations may be accomplished by ordinance since it references this concept in Section 5.01's language precluding initiative and referendum power for "any ordinance relating to appropriation of money".⁵ The Council's election to proceed by ordinance for the appropriation in 2023-08 is, in indeed, authorized by the Charter.

⁴ The Citizens court relied on the opinion of Justice Levin that the right of referendum extends only to legislative acts, and, thus, does not encompass administrative matters. *West v Portage*, 392 Mich 458; 221 NW2d 303 (1974).

⁵ Petitioners contend that this language in Section 5.01 refers to appropriations authorized by Section 9.08. However, that provision relates to borrowing money, the issuance of bonds and pledges. It addresses the borrowing power of the City. Appropriations are not equivalent to borrowing power. They are two distinct and different activities. Section 5.01 makes no reference to borrowing powers.

The second reason offered to strike the appropriation section from 2023-08 involves the title/subject restrictions imposed by Section 4.02 of the Charter. By the terms of that Section, an ordinance must be confined to one subject that is clearly expressed in its title.⁶ With regard to the single subject restriction, the ordinance may contain an appropriation provision if it directly relates to, carries out, and implements the principle object of the law. *Livonia v Dept of Social Services*, 423 Mich 466; 165 NW2d 608 (1968). This principle has been applied to uphold the validity of a statute that imposed a tax and included an appropriation to fund its collection. *Kuhn v Dept of Treasury*, 384 Mich 378; 183 NW2d 796 (1971). It also served to sustain the inclusion of an appropriation for initiating management practices related to invasive species in a statute expressing a purpose of ensuring that scientific principles govern decisions pertaining to wildlife management. *Keep Mich Wolves Protected v State of Michigan*, unpublished opinion *per curiam* of the Court of Appeals, issued 11/22/16 (Docket No. 328604). In *MGM* the City of Detroit included an appropriation with a change in zoning in one ordinance. The Supreme Court held that this precluded a referendum on the ordinance based upon a provision in the Detroit City Charter that paralleled Section 5.01(b). *MGM, supra*.

If the zoning involved in Ordinance 2023-08 was for agricultural, conservancy or recreational purposes there might be a viable argument that there is no direct relationship to an appropriation for site review or building inspections. However, the stated purpose of the Ordinance is to "... promote the public health, safety and general welfare of the residents...by regulating the land use for safe and efficient use ... to meet the needs for ... industry, trade, service and efficient use of lands and to reduce hazards to life and property." Ordinance 2023-08 Sec. 1. The metamorphosis of the zone to an industrial and manufacturing complex in this case clearly contemplates development of the property with industrial/ manufacturing facilities. This would generate site plan reviews as well as building inspections to achieve the purposes of promoting safety, meeting the needs for industry, and reducing hazards to life and property. The appropriation directly relates to and implements the object and express purposes of the ordinance.

Petitioners also contend that the ordinance violates Section 4.08 because the title does not mention an appropriation. The purpose of the title object restriction is to provide the public with fair notice. *Pobutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). This requirement is not satisfied in the absence of a necessary connection between a section of the ordinance and its subject. *People v Cynar*, 252 Mich App 82; 651 NW2d 136 (2002). The title for 2023-08 provides that it will transform zoning from township to industrial and manufacturing complex. As noted, *supra*, industry and manufacturing necessarily involve physical facilities which will require site plans and building inspections. An appropriation to accomplish this is incidental to the general purpose of transitioning to industrial/manufacturing activities and not beyond the scope of the title. *Livonia, supra*.

Having determined that the ordinance is valid, the decision of the Supreme Court in *MGM, supra*, governs the disposition of this motion. As the court indicated in the decision denying injunctive relief, the Petitioners are litigating their claims in chancery. This court will not exercise its discretionary equitable powers to facilitate a scheme that violates the City Charter and flouts Supreme Court precedent. Accordingly, the (C)(8) motion is granted. In conformance with MCR

⁶ Article 4, Section 24 of the Michigan Constitution imposes a similar limitation on statutes.

2.116(I)(5), the Petitioners shall be given the opportunity to amend their pleadings.⁷ Respondents may prepare an order in conformance with this opinion.



9/14/23

Hon. William C. Marietti
Circuit Court Judge sitting by assignment

⁷ The Petitioners have already filed an amended pleading. Respondents have filed a motion to strike which has been held in abeyance pending the decision herein. The Respondents may notice for hearing the motion to strike. As a result of this dispositive decision pursuant to MCR 2.116(C)(8), the court does not address the (C)(5) motion presented by the Respondents nor the constitutional issues related to signatures raised by the Petitioners. *Booth Newspapers v Univ of Michigan Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993).