

STATE OF MICHIGAN
IN THE SUPREME COURT

CITY OF LANSING

Plaintiff-Appellant,

v

STATE OF MICHIGAN and
WOLVERINE PIPE LINE COMPANY,
a Delaware corporation,

Defendants-Appellees.

Supreme Court No. 134213
Court of Appeals No. 272927
Lower Court File No. 05-918-CZ

**Brief of Amicus Curiae The Michigan Municipal League
In Support of Plaintiff-Appellant City of Lansing's Application for Leave to Appeal**

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STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary in the application of the Plaintiff-Appellant City of Lansing is correct and is adopted by the amicus curiae.

STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in finding that 2005 PA 103 may be applied to render inoperative the City of Lansing's constitutional right to grant or withhold consent to Wolverine Pipe Line Company's proposal to run a liquid petroleum pipeline through City streets?

Plaintiff-Appellant says "Yes"

Defendants-Appellees say "No"

Amicus curiae says "Yes"

The Court of Appeals said "No"

STATEMENT OF FACTS

The amicus curiae Michigan Municipal League accepts the statement of facts asserted by the Plaintiff-Appellant City of Lansing as complete and correct.

DESCRIPTION OF THE AMICUS CURIAE

The Michigan Municipal League

The Michigan Municipal League is the principal association of cities and villages in the State of Michigan. It is a non-partisan, non-profit corporation whose central objective is to improve the quality of municipal government within the State by providing technical, educational, and administrative resources to the cities and villages that make up its membership, while increasing public awareness of the functions and needs of local governments in Michigan. The League has over 500 member municipalities, approximately 83% of which are also members of the Michigan Municipal League Legal Defense Fund. The Legal Defense Fund represents the League's member cities and villages in state and federal litigation that may affect the structure, operation, authority, or financial well-being of municipalities within the State.

STANDARD OF REVIEW

This case involves an appeal of an order granting summary disposition, which is reviewed *de novo*. *Maskery v Univ. of Michigan Bd. of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003); *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). More specifically, this case involves matters of statutory and constitutional construction, which are reviewed *de novo*. *Mayor of Lansing v Public Service Comm'n*, 470 Mich 154, 157; 680 NW2d 840 (2004) ("*Lansing v Wolverine I*").

ARGUMENT

I INTRODUCTION

This honorable Court's guidance to the Legislature and lower courts on the issues presented in the case at bar will serve to settle important matters of constitutional construction and legislative prerogative. This case meets several of the standards set forth in MCR 7.302(B), and therefore merits this Court's review. It involves a challenge to the longstanding principle of local control—a challenge embodied in an act of the Legislature, 2005 PA 103, MCL 247.183(2), which conflicts with and undermines the Consent Clause of Const 1963, art 7, § 29, a provision expressing the framers' intent that municipalities should retain control over the use of their public rights of way. As such, this case clearly involves a substantial question as to the validity of a legislative act, as described in MCR 7.302(B)(1). Moreover, this case meets the standard described in MCR 7.302(B)(2); the State of Michigan is a named co-defendant-appellee and the constitutional issue of a city's right to grant or withhold consent to the use of its rights of

way has significant public interest. Finally, as set forth in more detail in this brief, this case meets the standard described in MCR 7.302(B)(5); the Court of Appeals decision is clearly erroneous and will cause material injustice, as it approves an act of the Legislature which, on its face and in practice, diminishes local governments' ability to protect their communities from harmful outside interests.

The relationship between Const 1963, art 7, §§ 22 and 29 is not only a constitutional question of great import, but a novel one, as well. Amicus curiae is not aware of any instance in which Michigan appellate courts have addressed this question outside of the litigation at hand. Prior to the enactment of 2005 PA 103, this Court was presented with litigation of these matters between these parties, and it is the position of amicus curiae that this Court properly decided that case on statutory grounds. Since this Court's decision in *Lansing v Wolverine I*, Defendant-Appellee Wolverine Pipe Line Company ("Wolverine Pipe Line") was able to secure legislative relief in the form of 2005 PA 103. The Legislature's action now begs the constitutional question.

Amicus curiae submits that this case presents an opportunity for this Court to reinforce judicial recognition of the broad decision-making powers of cities by finding that the Legislature may not abrogate a city's unqualified constitutional right to grant or withhold consent to the use of its streets for utility purposes—in this case, the installation of a hazardous liquid petroleum pipeline by the Wolverine Pipe Line.

II THE COURT OF APPEALS DECISION ENABLES THE LEGISLATURE TO ABRIDGE A CRITICAL CONSTITUTIONAL RIGHT OF LOCAL UNITS OF GOVERNMENT—A RIGHT WHICH BY ITS TERMS IS NOT SUBJECT TO LEGISLATIVE ABRIDGEMENT.

- A. The Consent Clause of Const 1963, art 7, § 29 represents an expression of the priority given to local control, as it vests with a local unit of government sole control over whether a utility company such as Wolverine Pipe Line may install its infrastructure in the local unit's highways, streets, alleys or other public places.**

Local control is a core public policy concern embedded in this State's constitutional doctrine. In *People v Hurlbut*, 24 Mich 44 (1871), Justice Cooley declared:

The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless . . . imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

Id. at 74. As the State's system of government matured and moved beyond *Hurlbut* and Justice Cooley's fundamental declaration, local control remained a priority. The 1963 Constitution provides:

Each . . . city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

Const 1963, art 7, § 22. The general grant of authority in Const 1963, art 7, § 22 was intended to be broad but not absolute, with the only limitation being direct contravening intent by the Legislature. The 1963 Constitutional Convention recognized that "home

rule cities and villages are guaranteed full power over their own property and government, and these powers cannot be limited except by deliberate statement of intent by the legislature.” 1 Official Record, Constitutional Convention 1961, p. 1007.

Const 1963, art 7, § 22, however, is not the solitary expression of local control in the Michigan Constitution, nor does the deference to the Legislature in that section necessarily show up in other constitutional provisions relating to local government. For instance, Const 1963, art 7, § 29 provides:

No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village.

The above-quoted passage, the “Consent Clause” of Const 1963, art 7, § 29, contains no language of limitation. The requirement that a utility operator secure consent of the local unit of government before setting up its own infrastructure in public places is absolute; it is not “subject to” other constitutional limitations or acts of the Legislature. In contrast, the “Reasonable Control Clause” of Const 1963, art 7, § 29 provides:

Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

A local unit of government’s right to control its highways, streets, alleys and public places is therefore subject to two sources of limitation: 1) restrictions found elsewhere in the Constitution and 2) reasonableness. Had the framers of the Michigan

Constitution intended Const 1963, art 7, § 22, the Consent Clause and the Reasonable Control Clause each to have the same breadth and the same restrictions, they would have signaled their intent with the same language. Principles of constitutional construction dictate that the Constitution and its amendments are to be interpreted as they were understood by their ratifiers—the people of the State of Michigan. *See Goldstone v Bloomfield Twp. Public Library*, 268 Mich App 642; 708 NW2d 740 (2005). The Constitution, therefore, is to be interpreted according to the plain meaning of its words. *See id.*; *County Road Ass'n of Michigan v Governor*, 474 Mich 11; 705 NW2d 680 (2005); 2006 OAG. 7187 (February 16, 2006). As such, where a constitutional grant of authority may be abridged or affected either by another constitutional provision or by law, the Constitution will state so explicitly. *See, e.g.*, Const 1963, art 9, § 13 (public entities may borrow money and issue debt “subject to this constitution and law”); Const 1963, art 9, § 2 (charter counties may levy taxes “subject to limitations and prohibitions set forth in this constitution or law”). Where only the Constitution itself limits a grant of authority, such limitation is equally clear. *See, e.g.*, Const 1963, art 7, § 24 (“[s]ubject to this constitution” cities and villages may operate public service facilities).

Indeed it is clear that if the framers of the Michigan Constitution intended for the Consent Clause to be subject to legislative abridgement, they would have added language to that effect. Even more compelling, however, is the floor commentary from the 1907-

08 Constitutional Convention considering the Consent Clause,¹ which made clear the intent to

recognize the unquestioned right of every city and village to control its own streets and to determine under what regulations poles or wires or pipes or tracks should be put upon those streets. . . . *It can be plainly seen now that this is a prohibition upon the legislature and is not a matter of legislation. It would prevent the legislature by a general act from granting away to any utility the control which the city should have over its own streets. . . .* It recognizes the right of a city to the control of its own streets. The streets are the property of the city [or village] . . . and therefore *the right of the city or the village to the control of those streets should be unquestioned and should be protected in the Constitution.*

1 Official Record Constitutional Convention 1907-08, p. 1247 (emphasis added). The above-quoted floor commentary only serves to buttress what is already clear by the words of the of the Consent Clause: Although local control as a broad policy concept is not limitless, the particular manifestation of local control set forth in the Consent Cause is intended by its terms to be beyond substantive abridgment by the Legislature.

¹ The Consent Clause in the 1908 Constitution was codified at section 8, article 28, and contained the same operative language as the 1963 version

No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

Const 1908, art 8 § 28.

Amicus curiae submits to this Court that the Court of Appeals' interpretation of the relationship between Const 1963, art 7, §§ 22 and 29 *takes control out of the hands of the local unit of government, where such control was intended to reside under the Constitution*, and places it in the hands of the Legislature, or, more ominously, in the hands of outside private interests such as Wolverine Pipe Line.

B. The case at bar illustrates the very purpose of the Consent Clause, as it involves a powerful private interest seeking to move forward with a high-impact project, which the local legislative body has determined will negatively affect the local community.

As stated previously, amicus curiae recognizes that local control does not mean that municipalities enjoy boundless power in all cases, and that the Legislature may impose limits on such power. However, as a public policy matter, local control demands the greatest protection in instances in which state legislative judgment is insufficiently informed of local nuances and mores, or instances in which outside interests may be able to exercise influence at the state level in order to pursue a course of action that would be detrimental to the local community. *See Williams, The constitutional vulnerability of American local government*, 1986 Wisc L R 83, 138-49 (1986) (discussing the Justice Cooley's views on local government power as a protection against the influence of special interests at the state level). This case represents the very scenario against which the Consent Clause was intended protect local units of government. The Planning Board and City Council of the City of Lansing concluded that the Wolverine Pipe Line project was not in the City's interest. Among other things, the Planning Board found that the project

would increase the likelihood of automobile accidents in the area of the project; would pose a threat to drinking water in the Lansing area; would have a disparate impact on minority populations in the area; and did not conform to the City's Comprehensive Plan. City of Lansing City Council Resolution #0423, August 5, 2002. Ultimately, Wolverine Pipe Line and its shareholders had the resources to look to the Legislature to accomplish what they could not accomplish through the City. It is this set of circumstances—the well-funded, well-connected private utility seeking to circumvent approval of the local unit of government by lobbying the Legislature—that triggers the need for a consent requirement which is not subject to abridgement by the Legislature.

Moreover, the facts in this case are in many ways unexceptional; local units of government are frequently faced the challenge of holding the line against well funded, privately-owned utilities like Wolverine Pipe Line and other similar companies. The Consent Clause is a vital tool for local governments in such a position. In dicta contained in a footnote, the Court of Appeals noted that 2005 PA 103

applies only to a subset of utilities that seek to use a specific type of public property. Hence, this case does not involve an attempt to deprive all cities of all authority to grant or withhold consent to utilities to use the cities' highways, streets, alleys or other public places.

City of Lansing v State of Michigan and Wolverine Pipe Line Company, ___ Mich App ___, slip opinion 6 n4. Indeed the Court of Appeals' observation is accurate, however there is no analytical principle in its opinion that limits the Legislature's power to abrogate local control under Const 1963 art 7, § 22, even where local control is explicitly

provided in a separate constitutional right. If the Legislature may rely on the constitutional decree that municipal resolutions and ordinances are "subject to the constitution and law" as a means to erode fundamental protections afforded local governments elsewhere in the Constitution, then local governments' ability to protect their communities from unwanted, often harmful corporate intrusion rings hollow.

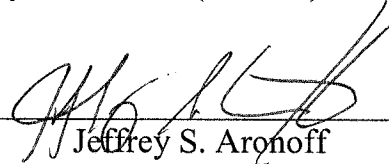
CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing arguments and authorities, the amicus curiae Michigan Municipal League respectfully requests that this Court grant Plaintiff-Appellant leave to appeal and reverse the Court of Appeals decision with instructions to the lower court to issue a permanent injunction upon Wolverine Pipe Line's use of city streets until the company obtains the consent of the City of Lansing pursuant to Const 1963, art 7 § 29.

Respectfully submitted,

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