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March 20, 2012

VIA HAND DELIVERY

Clerk of the Court
Michigan Court of Appeals
Hall of Justice
925 W. Ottawa Street
Lansing, MI 48933

Re: Joseph Rivet, et. al. v The City of Bay City
Court of Appeals Docket No.: 307112
Lower Court Case No.: 11-3589-AA-JS

Dear Clerk:

Enclosed please find for filing with the Court in the above referenced matter the following:

1. The Michigan Municipal League's Motion for Leave to Participate as A*micus Curiae* with attached proposed *Amicus* brief (original and 5 copies);

2. Certificate of Service of the same; and

3. Check in the amount of $100.00 for the motion filing fee.

Please return one date-stamped copy of the motion to our office. Thank you for your assistance with regard to this matter. Should you have any questions or concerns, please do not hesitate to contact our office.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By: _____
Rhonda R.F. Dancer
Legal Administrative Assistant

RRFD/rrfd

Enclosures

cc: Brian K. Elder, Esq.
Neil P. Wackerly, Esq.

19,954,597.1\107546-00022

STATE OF MICHIGAN

IN THE COURT OF APPEALS

JOSEPH RIVET, in his personal capacity and on behalf of, THE CITIZENS OF AFFORDABLE BAY CITY,

Plaintiffs/Appellants,

v.

THE CITY OF BAY CITY, a Michigan Home Rule City,

Defendant/Appellee.

Docket No.: 307112

Circuit Court No.: 11-3589-AA-JS

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CERTIFICATE OF SERVICE

Rhonda R.F. Dancer hereby certifies that on March 20, 2012 she served a copy of The Michigan Municipal League's Motion for Leave to Participate as A*micus Curiae* with attached proposed *Amicus* brief upon counsel of record at their above listed addresses VIA FIRST CLASS MAIL.

Rhonda R.F. Dancer

19,954,602.1\107546-00022

STATE OF MICHIGAN

IN THE COURT OF APPEALS

JOSEPH RIVET, in his personal capacity and on behalf of, THE CITIZENS OF AFFORDABLE BAY CITY,

Plaintiffs/Appellants,

v.

THE CITY OF BAY CITY, a Michigan Home Rule City,

Defendant/Appellee.

Docket No.: 307112

Circuit Court No.: 11-3589-AA-JS

THE MICHIGAN MUNICIPAL LEAGUE'S MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

The Michigan Municipal League ("MML"), by its counsel, MILLER, CANFIELD, PADDOCK and STONE, P.L.C., pursuant to MCR 7.212(H), moves for permission to participate in the above-captioned matter as *amicus curiae*. In support of this motion, the MML states as follows:

1. The MML is a non-profit Michigan corporation whose purpose is the improvement of local government and administration through cooperative effort. Its membership is comprised of some 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The MML operates the Legal Defense Fund through a board of directors, which has authorized the MML's participation in this matter. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

2. This litigation involves matters of statewide significance for local governments. Specifically, this litigation addresses whether local governments' ability and authority to administer their municipally-owned and municipally-run water and sanitary sewer systems may be taken away by legislative initiative. More generally, however, this litigation challenges local governments' ability and authority to efficiently manage day-to-day operations without each such operation being the subject of a ballot initiative and election.

3. The MML's position in this matter is that, by permitting the filing of a ballot petition for initiative to change, challenge, or alter the administrative operations managed by Home Rule Cities on a day-to-day basis, such as the water and sewer utility systems at issue here, could bring local governments to a grinding halt and waste precious taxpayer dollars. Furthermore, granting Plaintiffs/Appellants' demand for relief would ignore well-established statutory and constitutional requirements for initiatives that must be observed to preserve the integrity and purity of elections at the local level.

4. Therefore, the MML has keen interest in the outcome of this matter, as it potentially impacts each local government in Michigan.

5. Pursuant to MCR 7.212(H)(1), a motion to participate as *amicus curiae* must be filed within 21 days after the Appellees' brief is filed. This motion is timely.

6. Further, the MML requests that the Court permit it to participate in oral argument.

7. The MML has attached a proposed brief for the Court's consideration, should it grant this motion.

WHEREFORE, the MML respectfully requests that the Court grant its motion to participate as *amicus curiae*, consider the attached proposed brief, and issue an order permitting the MML to participate at oral argument.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Michael J. Hodge (P25146)
Scott R. Eldridge (P66452)

By: _____
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Dated: March 20, 2012

19,934,679.1\107546-00022

STATE OF MICHIGAN

IN THE COURT OF APPEALS

JOSEPH RIVET, in his personal capacity and on behalf of, THE CITIZENS OF AFFORDABLE BAY CITY,

Plaintiffs/Appellants,

v.

THE CITY OF BAY CITY, a Michigan Home Rule City,

Defendant/Appellee.

Docket No.: 307112

Circuit Court No.: 11-3589-AA-JS

THE MICHIGAN MUNICIPAL LEAGUE'S BRIEF AS *AMICUS CURIAE*

ORAL ARGUMENT REQUESTED

Respectfully submitted by:

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
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Dated: March 20, 2012

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STATEMENT OF THE BASIS FOR JURISDICTION

The jurisdictional summary stated in Appellant's Brief appears complete and correct.

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE FORM OF THE PETITIONS FOR INITIATIVE AT ISSUE DID NOT SUBSTANTIALLY COMPLY WITH APPLICABLE LAW.

Circuit Court answered: Yes.

Appellants answer: No.

Appellee answers: Yes.

Michigan Municipal League answers: Yes.

II. WHETHER THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE PETITIONS FOR INITIATIVE AT ISSUE CONCERN MATTERS THAT ARE "ADMINISTRATIVE" IN NATURE RATHER THAN "LEGISLATIVE" IN NATURE AND, THUS, NOT THE PROPER SUBJECT OF AN INITIATIVE PETITION.

Circuit Court answered: Yes.

Appellants answer: No.

Appellee answers: Yes.

Michigan Municipal League answers: Yes.

STATEMENT OF INTEREST BY AMICUS CURIAE

The Michigan Municipal League ("MML") is a non-profit Michigan corporation created in 1899 whose purpose is the improvement of local government and administration through cooperative effort. Its membership is comprised of some 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The MML operates the Legal Defense Fund through a board of directors, which has authorized the MML's participation in this matter. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This litigation involves matters of statewide significance for local governments. Specifically, this litigation addresses whether local governments' ability and authority to administer their municipally-owned and municipally-run water and sanitary sewer systems may be taken away by legislative initiative. More generally, however, this litigation challenges local governments' ability and authority to efficiently manage day-to-day operations without each such operation being the subject of a ballot election.

The MML's position in this matter is that, by permitting the filing of a ballot petition for initiative to change, challenge, or alter the administrative operations managed by Home Rule Cities on a day-to-day basis, such as the water and sewer utility systems at issue here, could bring local governments to a grinding halt and waste precious taxpayer dollars. Furthermore, granting Plaintiffs/Appellants' demand for relief would ignore well-established statutory and constitutional requirements for initiatives that must be observed to preserve the integrity and purity of elections at the local level. In short, the MML has keen interest in the outcome of this matter, as it potentially impacts each local government in Michigan.

I. INTRODUCTION

This matter tests the integrity and purity of the local election process, and whether local governments and taxpayers should have to be burdened with an election to answer a purely administrative question – one that local governments are well-equipped and expressly authorized to answer. Plaintiffs/Appellants ("Petitioners") have proposed what appears to be a ballot question, by way of initiative petition, to force the City of Bay City ("Bay City") to sell its revenue-generating water and sewer utility systems to a non-existent "authority" for one dollar. The Petitions for Initiative at issue ("Petitions"), however, fail to comply with the most basic statutory and constitutional requirements for the filing of initiative petitions, which serve to preserve the integrity and purity of elections. What is more, the Petitions ask mere advisory questions about purely administrative functions of local government that Michigan Courts have routinely concluded are not the proper subject for initiatives or referendum. If deemed valid, the Petitions would give license to all members of the electorate to dictate how local governments administer some of their most mundane, day-to-day functions, thereby hampering efficient governance and costing taxpayers unnecessarily.

Because Petitioners' Petitions do not comply with well-established Michigan election laws, they are invalid. Accordingly, the Court should affirm the lower court judgment and deny Petitioners the relief they demand.

II. STATEMENT OF THE FACTS

Rather than occupy the Court's time with another recitation of the facts as presented by the parties, the MML, as *amicus curiae*, accepts the statement of facts presented by Bay City as correct, and adds the following, relevant facts related to Bay City's Charter.

Bay City's charter is not unlike many other Home Rule City charters in that it provides the City with broad, municipal powers:

> The city shall have all powers possible for city to have under the constitution and laws of this state, as fully and completely as though they are specifically enumerated in this charter.
>
> The powers of the city under this charter shall be construed liberally in favor of the city. The specific mention of particular powers in the charter shall not be construed as limiting the general power granted in this article.

City of Bay City Charter, §2.1. The City Charter also sets forth detailed provisions governing elections and, specifically, initiatives and referendums:

> Petitions for initiative or referendum, including the certificate of the circulator, shall be substantially in the form required by state law for initiation of constitutional amendments or legislation or referendum of legislation. The petition shall contain the full text of the proposed initiative and shall specifically identify any existing ordinance, resolution or other action of the commission which would be altered or abrogated if the proposal is adopted.

Id., §11.4.1. Before being circulated to the electorate, petitions for initiative under the City Charter are to be reviewed for "compliance with the law." *Id.*, §11.4.2.

In addition, the Bay City Charter includes provisions governing public utilities:

> To the fullest extent permitted by law, the city shall have the right to establish; acquire by purchase, gift, condemnation, lease or construction; own; extend; expand; maintain; operate or continue to operate, within or without its corporate limits, any public utility, including without limitation...water works plants and systems and sewage disposal systems, sewers and plants, and to sell and deliver heat, power, light, water and sewer services within or without its limits at rates and charges which are established by ordinance or otherwise.
>
> The city shall not...sell any public utility unless the proposition is approved by a majority of the electors voting in an election.

Id., §12.1.

Finally, the Bay City Charter mandates that the City Manager, who is the "chief administrative officer of the city," shall "[m]anage and supervise all city utilities." *Id.*, §5.2(g).

III. ARGUMENT

A. Standard of Review

Petitioners' request for relief is, in essence, a demand for a writ of mandamus. See

Ferency v Sec of State, 139 Mich App 677; 362 NW2d 743 (1984) (despite express request for declaratory relief, true nature of complaint was one for mandamus relief). Specifically, in both their brief in the Circuit Court and their brief on appeal to this Court, Petitioners demand that the Bay City Clerk approve the Petitions for Initiative ("Petitions") and *order* them placed on the ballot for the next election. *Id.* (where plaintiff sought injunctive order from court directing officials to perform statutorily mandated duties).

Mandamus is an "extraordinary remedy" and is discretionary with the court. *Herp v Lansing City Clerk*, 164 Mich App 150, 161, 416 NW2d 367 (1987). The burden of establishing that the defendant has a clear legal duty to act, that the plaintiff has a clear legal right to the discharge of that duty, and that the act is ministerial in nature is on the party seeking mandamus. See *White-Bey v Dep't of Correction*, 239 Mich App 221, 608 NW2d 833 (1999). Whether Appellants are entitled to the extraordinary remedy of mandamus is a question of law. *Michigan Civil Rights Initiative v Board of State Canvassers*, 268 Mich App 506, 708 NW2d 139 (2005). The Michigan Court of Appeals reviews a trial court's grant or denial of a writ of mandamus for an abuse of discretion. See, e.g., *White-Bey v Dept of Corrections*, 239 Mich App 221; 608 NW2d 833 (1999).

B. The Petitions Are Invalid As to Form

Although "substantial compliance" with the statutory and constitutional requirements governing the validity of ballot petitions is the general standard in Michigan, wholesale failure to comply with those requirements renders petitions invalid. *Herp*, *supra*. Here, neither Bay City nor the MML is asking for a hyper-technical reading of the requirements for ballot petitions. The Petitions here, however, do not substantially comply with the charter or statutory requirements because they *wholly exclude* mandated information and *wholly avoid* the statutory requirements. These deficiencies are fatal and render the Petitions invalid as a matter of law. See generally

McQuillin, Municipal Corporations, 3d ed revised, vol. 5, § 16.50, p 382 ("[The] principal of liberal construction is not intended to prohibit a legislative body from prescribing procedures relating to the proper exercise of the initiative and referendum."); see also *Citizens for Capital Punishment v Secretary of State*, 414 Mich 913, 915 (1982) ("the requirements of these [election] statutes serve to further the important state interest of insuring the purity of elections").

1. The Petitions Seek to Amend (Improperly) the Bay City Charter

Bay City's Charter vests in the City Manager, who is the "chief administrative officer of the city," the power and responsibility to "[m]anage and supervise all city utilities." *City of Bay City Charter*, §5.2(g). The Petitions seek to move all management and operational responsibility of the water and sewer utilities to another, non-existent entity, thereby altering or amending this section of the Bay City Charter.[1] Bay City is a Home Rule City. The Home Rules Cities Act governs charter amendments, including by way of initiatory petition. MCL 117.21(1). Petitioner here has not even attempted to meet the statutory requirements for amending the Bay City Charter, and the Petitions are, therefore, invalid.

Section 21 of the Home Rule Cities Act mandates that proposed charter amendments "shall be published in full with existing charter provisions that would be altered or abrogated by the proposed charter amendment or other question." MCL 117.21(2). Petitioners here have made zero attempt to satisfy this requirement because the Petitions do not publish in full the existing charter provisions to be amended or abrogated. Even if the Petitions were to be deemed to have satisfied MCL 117.21(2), however, they would have to be submitted to both the Attorney General and Governor's office for consideration *before* being submitted to the electorate. See MCL 117.21(2) and MCL 117.22.

[1] See also, *Petitioners/Appellants Br on Appeal*, p 19, admitting: "Quite obviously, this is no special or temporary action...[t]he City of Bay City will have its Charter amended..." See also *id.*, pp 21-22, conceding that the Petitions seek to amend or alter Art 12, Section 1 of the Charter.

Petitioners here ask that their proposed ballot language, despite acting to amend the Bay City Charter, be placed on the ballot without having to meet any one of these statutory requirements. The Home Rule Cities Act provisions governing amendments to city charters, however, cannot be ignored, as they ensure the integrity and efficiency of the election process. See generally *Citizens for Capital Punishment, supra* at 915; see also *Henry v City of Pontiac*, 363 Mich 302, 304-305; 109 NW2d 835 (1961) (Section 117.21 manifested legislative intent "to provide for orderly change of the charter" and "not to encourage or sanction confusion in city government"). Without having satisfied the statutory requirements for amending the Bay City Charter, the proposed ballot language cannot be placed on the ballot as Petitioners demand.

2. The Petitions Fail to Comply With the Express Charter Language

The people of the State of Michigan have "power to propose laws and to enact or reject laws, called the initiative." Const 1963, art 2, § 9. Initiatives at the local level exist only by grant of statute. See *Settles v Bradley*, 168 Mich App 797, 801-802; 427 NW2d 188 (1988). The Home Rule Cities Act provides that each city may provide in its charter "[t]he initiative and referendum on all matters within the scope of the powers of that city and the recall of city officials." MCL 117.4i(g). The Bay City Charter states in no uncertain terms that "[a] petition shall contain the full text of the proposed initiative and **shall** specifically identify any existing ordinance, resolution, or other action of the commission which would be altered or abrogated if the proposal is adopted." *City of Bay City Charter*, §11.4.1 (emphasis added).

"The prevailing rules regarding statutory construction extend to the construction of home rule charters." *Ewing v Detroit*, 237 Mich App 696, 702; 604 NW2d 787 (1999). Thus, unless the language of the charter is ambiguous, it must be interpreted in accordance with its plain meaning. *Wayne Co v Wayne Co Retirement Comm'n*, 267 Mich App 230; 704 NW2d, 117 (2005). Here, the plain, unambiguous language of Section 11.4.1 of the Bay City Charter

mandates that each petition identify any existing ordinance or other action of the commission that would be altered or abrogated if the proposal is adopted. See, e.g., *Wayne Co v State Treasurer*, 105 Mich App 249, 252 (1981) ("'shall'...connotes a mandatory duty or requirement"). Petitioners' failure to include this information leaves the Petitions fatally flawed.

a. The Petitions Do Not Refer to A Single Ordinance Implicated

The Petitions ask whether Bay City should sell to a non-existent entity its sewage and water utility systems. Any such sale would implicate dozens of ordinances governing Bay City's water utilities and dozens of ordinances governing Bay City's sewage utilities, including those governing the management of those systems, permits, service charges, metering, fees, and rates. For example, Chapter 106, Sec. 106-392 of Bay City's Code of Ordinances provides that "The superintendent shall be responsible for the operation of the waterworks and the water department. He shall be directly responsible to the city manager, as provided in article 5, section 5.2 of the charter." If the sale of the water utility that Petitioner is seeking were to occur, the above-cited ordinance would be altered or abrogated – that is, the City Superintendent would no longer be responsible for the operation of the waterworks and the water department and the City Manager would no longer be overseeing those operations.

Yet, the Petitions make zero reference to the ordinance. In fact, the Petitions make reference to not one single ordinance – of the dozens and dozens – that will be implicated. Nor do they refer generally to the fact that existing ordinances will be implicated. Absolute silence does not "substantially comply" with the Charter mandate that each initiative identify existing ordinances to be altered or abrogated, thereby depriving the electorate of information necessary to cast an informed vote. See *Michigan Campaign for New Drug Policies v Bd of State Canvassers*, Docket No. 243506 (Mich App, Sept. 6, 2002) (unpublished) (Exhibit 1) (Court of Appeals affirmed determination that a petition was invalid on its face because it purported to

replace Const. 1963, art 1, §24 without publishing the existing Const 1963, art 1, §24).[2]

b. The Petitions Do Not Refer to Other Commission Action That Would Be Implicated

In recent years, the City of Bay City issued limited tax, general obligation bonds related to its existing water and sewer utility systems, which still have outstanding principal balances. These are full faith and credit bonds; thus, although they do not directly pledge the revenues of the water and sewer utility systems to pay the bonds, the revenues of each utility system must be used to pay the debt service on the bonds. Like the general management and administration of the water and sewer utility systems, the bonds involve a host of other ordinances. In addition, the bonds are governed by bond agreements – not one of which is identified in the Petitions. For example, as noted in Bay City's Brief on Appeal, the governing bond agreements place strict limitations on the City's ability to sell its water system, which only the City may satisfy. See *Bay City's Br on Appeal*, p 3.

The Petition to sell the water utility system, however, does not seek or attempt to address these contractual obligations and requirements. What is worse, Petitioners' attempt to sell the system, if successful, operates as a breach of the existing bond agreements. That is, if adopted as presented, the Petitions would cause the City to breach the requirements for the sale of the utility systems noted above (and in the City's Brief), *and* to breach the City's commitment to the bondholders in that the City will no longer have control over the revenues that are a source of repayment for the outstanding bonds. To be sure, the Petitions provide no explanation for the electorate as to how or if the existing bonds will be repaid if the utility systems were to be sold to

[2] Petitioners appear confused about the difference between a "ballot question" and a "petition for initiative." Contrary to Petitioners' assertion (see *Petitioners/Appellants Br on Appeal*, p 22), petition language need not be limited to 100 words, as is required for the final ballot question language. Indeed, nothing in the Michigan Election Law limits *petition language* to a certain number of words.

a non-existent authority. See *Citizens Lobby of Port Huron, supra* (it is "inconceivable" to allow the electorate "to initiate ordinances affecting the fiscal affairs of the city without regard to the budget or to the overall fiscal program."). Petitioners should not be permitted to expose Bay City to a breach of contract or breach of trust claim with such imprecise and short-sighted initiative petitions.[3]

3. The Petitions Fail to Meet The Most Basic Statutory Requirements for Initiative Petitions

The Home Rule Cities Act is the starting point for determining the validity of initiatory petitions filed at the local level. MCL 117.25. Petitions filed under MCL 117.25 are "subject to the requirements of [MCL 117.25a]." MCL 117.25(1). Section 25a of the Home Rule Cities Act, in turn, provides that petitions under MCL 117.25 are "subject to section 488 of the Michigan election law, 1954 PA 116, MCL 168.488." MCL 117.25a. Section 488 of the Michigan Election Law states, in relevant part, that "Section[s] 482(1), (4), (5), and (6) apply to a petition to place a question on the ballot before the electorate of a political subdivision under a statute that refers to this section..." MCL 168.488(2).

MCL 168.482(4) mandates that a petition include the following statement beneath the petition heading: "We, the undersigned qualified and registered electors, residents in city [city]...in the county of [county], state of Michigan, respectively petition for (an amendment to constitution) (initiation of legislation) (referendum of legislation) (other appropriate

[3] Similarly, as noted in the City's Brief on Appeal, Bay City, not unlike many municipalities, is a party to collective bargaining agreements covering employees of the water and sewer utility systems. The Petitions say nothing about whether (generally) or how (specifically) the proposal will impact the existing CBAs, the employees covered by them, or the management of those employees. If the City is no longer managing or operating the utility systems, it will no longer need some or all of those employees to run the operations. The proposals in the Petitions would not only impact these employees, but they would likely impact the City's contractual obligations vis-à-vis the CBAs, including as to certain mandatory subjects of bargaining between the City and the representative union.

description)." MCL 168.482(4). The Petitions do not substantially comply with Section 482(4) in that they do not describe the purpose of the petition.

Under the statutory construction doctrine known as *ejusdem generis*, where a general term follows a series of specific terms, the general term is interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated. *Neal v Wilkes*, 470 Mich 661, 669-670; 685 NW2d 648 (2004) (citations and quotations omitted). Here, in Section 482(4), the general phrase "other appropriate description" follows a series of specific terms that describe actions to create, amend, or reject constitutional or legislative language. Following the doctrine of *ejusdem generis*, the phrase "other appropriate description" must also relate to action or actions designed to create, amend, or reject constitutional or legislative language. The description in the Petitions at issue do no such thing.

Furthermore, the Petitions do not comply with MCL 117.25, which requires that "[t]he petition **shall** state what body, organization, or person is primarily interested in and responsible for the circulation of the petition..." MCL 117.25(1) (emphasis added). The Petitions here make zero attempt at identifying the interested person or organization. As such, the Petitions are invalid. Indeed, this Court has held that the failure to state the name of the organization or persons responsible for circulation, as required by § 25 of the Home Rule Cities Act, is "not a mere technical noncompliance, but a wholesale exclusion of statutorily mandated disclosure information." *Herp, supra*, at 161; see also *Leininger v Secretary of State*, 316 Mich 644; 26 NW2d 348 (1947) (petition contained no title for the proposed measure and, thus, it was fatally defective on its face).

Nothing in the Bay City Charter permits a petition to be submitted to the City Clerk without *first* satisfying all of the statutory requirements governing initiative petitions, including MCL 117.25(1). To conclude otherwise – particularly with respect to MCL 117.25(1) – would

permit a petitioner to leave off essential disclosure information about who is primarily interested in circulating the petition, get a petition approved by the City Clerk, and *then* insert misleading names about the interested parties without the City Clerk's knowledge or approval before being circulated. Certainly, the Michigan Election Law, which seeks to preserve the integrity and purity of elections, does not support such an absurd result.

C. The Proposed Action Is Not Legislative, But Administrative, In Nature and Thus Not Appropriate for Initiative

Michigan law is clear: "city voters may vote by referendum or initiative on legislative matters but not on matters that are administrative in nature." *Citizens Lobby of Port Huron, Michigan, Inc v Port Huron City Clerk*, 132 Mich App 412; 347 NW2d 473 (1984) (citing *West v Portgage*, 392 Mich 458; 221 NW2d 303 (1974) and *Rollingwood Homeowners Corp, Inc v City of Flint*, 386 Mich 258; 191 NW2d 325 (1971)); see also *Beach v City of Saline*, 412 Mich 729; 316 Nw2d 724 (1982). The Circuit Court here concluded correctly that the decision and act of selling Bay City's water and sewer utility systems is administrative in nature and, thus, not subject to initiative. To conclude otherwise in this case would open up to voter initiative or referendum – at great expense to taxpayers – even the most mundane of administrative functions of government, thereby ensuring *inefficient* governance. See *McQuillin, Municipal Corporations*, 3d ed revised, vol. 5, §16.54, 406 ("The courts have…taken cognizance of the way in which the conduct of government would be seriously hampered were the initiative and referendum to be used to compel or bar 'administrative' acts by elected officials.").

The Michigan Supreme Court has held that "[a] city holds and manages its municipal utility in a proprietary and administrative capacity, as distinguished from its exercise of governmental or legislative powers." *Kalamazoo Municipal Utilities Assoc v City of Kalamazoo* 345 Mich 318, 334; 76 NW2d 1 (1956) (holding that the City of Kalamazoo's sale of its electric

utility to another entity was not subject to voter referendum). At issue in *City of Kalamazoo* – one of the earliest cases to address the "administrative" versus "legislative" dichotomy at issue in this case – was whether the City of Kalamazoo (a Home Rule City) could, by way of resolution as opposed to ordinance subject to referendum, sell to the Consumers Power Company the city's light utility, which generated revenue for the city. *Id.* at 321. The sale was to include a land transfer, along with certain infrastructure situated on and underneath the land. *Id.* at 323. Noting that the proposed sale to Consumers "repealed no ordinance," *id.* at 328, and referring to the city's ability (by way of Charter) to acquire any public utility as "business activities," *id.* at 333, the Supreme Court held that the sale was not subject to referendum because it was a proprietary, administrative act, *id.* at 334.

The utility systems at issue here are no different. Indeed, Chapter 106, Sections 106-1 to 106-5 of the Bay City Code of Ordinances explain that the City's water and sewer utility systems are "enterprise fund utilities" used to generate revenue to pay debt. Consequently, they are managed under the City's proprietary function, and the details of the City's management of those systems is "administrative" in nature. See *id.* Thus, like *City of Kalamazoo*, the administration of Bay City's business activities – vis-à-vis water and sewer utilities – is not subject to initiative or referendum.

Likewise, in *Beach*, *supra*, the Supreme Court affirmed that the City of Saline's decision to purchase and annex 160 acres of private land was an "administrative" act and, thus, not subject to referendum. 412 Mich 729. The City of Saline Charter, much like Bay City's, provided a broad statement providing for initiative and referendum "to the full extent permitted by law...to all matters within the scope of the power of the city..." See *Beach v City of Saline*, 101 Mich App 795, 799; 300 NW2d 698 (1980) aff'd by 412 Mich 729. Although the Saline Charter appeared "at first glance" to permit a referendum on the purchase of the property, the

Court of Appeals (affirmed by the Supreme Court) concluded that the purchase was indeed "administrative" in nature, despite not being "mundane." *Id.* at 801 (citing to *West* and *Rollingwood, supra*). The same is true here. Although not "mundane", the proposed sale and management of Bay City's utilities is "essentially administrative" in that it, like in *Beach*, would largely involve the transfer of City property.

Further, according to *this* Court, a contract that "is in the nature of a service contract," such as when a county board of commissioners authorizes the sale of a parcel of land to another entity for the development and operation of a solid waste landfill, is not legislative in nature and thus not subject to initiative or referendum. *Duggan v Clare Co Bd of Commissioners*, 203 Mich App 573, 576; 513 NW2d 192 (1994). In *Duggan*, the Clare County Board of Commissioners passed a resolution authorizing the sale of a parcel of land to Waste Management of Michigan to develop and operate a solid waste landfill. The petitioners in that case initiated a petition drive for a referendum on the resolution. After the board refused to place the matter on the ballot, the petitioners sought injunctive relief. The Court of Appeals affirmed summary disposition in favor of the board of commissioners, concluding that a local government's sale of land for the purpose of developing and providing a waste disposal service was not legislative in nature because it did not "prescribe a permanent rule for the conduct of government." *Id.* at 576. Specifically, this Court explained that neither the "sale-of-land" component of the deal nor the "service-contract" component of the deal (i.e., the development and operation of the waste disposal service) was legislative. Consequently, the board's action was not subject to referendum.

Although the sources of the proposal in this case and that in *Duggan* differ, the nature of the proposed actions are a lot alike. Like *Duggan*, there is a "service-contract" component to the proposed sale of Bay City's water and sewer utility systems. That is, the Petitioners are not pleased with the City's management of the two utility systems and they would like the City to

outsource the management component of the two services (despite the City's right to operate and own the utilities (see *City of Bay City Charter*, § 12.1)). Thus, like *Duggan*, the nature of the proposed sale of services here is not a legislative act prescribing a permanent rule for the conduct of government.

In addition, like *Duggan*, there is a "sale-of-land" component to the proposed sale of Bay City's water and sewer utility systems. As the Circuit Court noted, and Petitioner conceded, in the proceeding below, Petitioners' proposal would necessarily include the transfer of real property, including where the current water and sewer utility infrastructure is situated, which Michigan Courts have concluded is not subject to initiative or referendum. See, e.g., *Rollingwood*, *supra*; *West*, *supra*; *Beach*, *supra*. Thus, like *Duggan*, the nature of the proposed sale of land and infrastructure here does not prescribe a permanent rule for the conduct of government that is subject to initiative or referendum.

D. The Petitions Present "Advisory Questions" Not Proper for Initiative

The Petitions are not the proper subject of initiative or referendum for yet a different reason: they propose mere advisory questions. Michigan's constitution provides:

> The people reserve to themselves the power to propose laws and to enact and rejects laws, call the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution.

Const 1963, art 2, § 9. Here, the text of the proposed initiative is not really an initiative at all. Indeed, the Petitions do not seek to propose a law, to enact a law, or reject a law. See Const. 1963, art 2, § 9; see also *McQuillin*, *Municipal Corporations*, 3d ed revised, vol. 5, §16.51, p 383 ("Generally speaking, the initiative, in the case of municipal legislation, is initiation of municipal legislation and its enactment or rejection by the municipal electorate in the event the proposed measure is not enacted by their elected representatives.").

Rather, they propose nothing more than an advisory question about *how* Bay City should exercise its powers to administer its water and sewer utility systems. In Michigan, such "advisory questions" that are not truly legislative in character are not the proper subject of a ballot initiative, particularly where, as here, neither the City Charter nor a statute authorizes either the City or the electorate to petition to have advisory questions placed on ballots. See *Southeastern Michigan Fair Budget Coalition v Killeen*, 153 Mich App 370; 395 NW2d 325 (1986) (advisory questions were not the proper subject of an initiative petition where neither city charter nor statute expressly permitted advisory questions to be placed on ballot); see also OAG, 1985-1986, No 6411 (Dec. 19, 1986) (A county board of commissioners may not, without constitutional or statutory authority, schedule an election for the consideration of an advisory question by the electorate).[4] Because the Petitions present mere "advisory questions" about how the City should exercise its powers, they are invalid.

IV. CONCLUSION

Petitioners' plea to *let democracy work* by submitting their proposals to the electorate would ring much less hollow if the petitions complied with the most basic statutory and charter requirements for initiative petitions, and if they did not attempt (improperly) to undermine the City's powers to administer its utilities. Contrary to Petitioners' characterization, the Petitions are not designed to "reorganize government"; they are designed to outsource the administration of the City's proprietary and business activities and to sell municipally-owned property. As such, the proposed sale of Bay City's utilities is more akin to: the sale of the electrical utility in

[4] In addition, the Bay City Charter charges the City Clerk – not a petitioner – with the responsibility for preparing the form of the ballot question. See *City of Bay City Charter*, §11.4.7 ("The city clerk shall prepare and certify the form of the ballot..."). Petitioner's Petitions attempt to present a ballot questions, which is the Clerk's job, not an actual proposal to initiative or change municipal legislation.

the *City of Kalamazoo* case, *supra*; to the sale of land for the purpose of developing and operating a solid waste landfill in the *Duggan* case, *supra*; and to the purchase of real property in *Beach*, *supra* – all of which were held not to be proper subjects for initiative and referendum.

For these reasons and those stated above, the MML respectfully requests that the Court affirm the lower court judgment and deny Petitioners the relief they seek.

Respectfully submitted,

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Dated: March 20, 2012

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Court of Appeals, State of Michigan

ORDER

Michigan Campaign for New Drug Policies v Bd of State Canvassers

Docket No. 243506

LC No. 00-000000

Patrick M. Meter
Presiding Judge

Richard Allen Griffin

Donald S. Owens
Judges

The Court orders that the motions for immediate consideration are GRANTED.

The motion to intervene is GRANTED.

The Court orders that the complaint for mandamus is DENIED. Pursuant to *Consumers Power v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986), Const 1963, art 12, § 2 "does summon legislative aid in the area of the form of these petitions as well as in the areas of circulation and signing" because the constitution specifies that the "petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." MCL 168.477(1) authorizes the board to make a determination with regard to the "sufficiency or insufficiency of a petition under this chapter," including a determination of the "sufficiency" of the petition's compliance with MCL 168.482. There was no legal analysis necessary to conclude that the petition, on its face, purported to replace Const 1963, art 1, § 24, and did not publish the existing art 1, § 24, in violation of MCL 168.482(3). Although the proponents claim that it was never their intent to replace art 1, § 24, and that the numbering error can be remedied, they have not shown that they have a clear legal right to certification of a defective petition. Accordingly, mandamus is inappropriate.

Presiding Judge

STATE OF MICHIGAN
COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 06 2002
Date

Sandra Schultz Mengel
Chief Clerk