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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from Michigan Court of Appeals

Judges Kathleen A. Feeney, Mark J. Cavanaugh, And Colleen A. O'Brien

PETER J. LUCIDO, Macomb County Prosecutor,

Plaintiff-Appellee,

v.

MARK A. HACKEL, Macomb County Executive, and COUNTY OF MACOMB,

Defendants-Appellants.

MSC Docket No. 167415

Court of Appeals No. 370065

PLAINTIFF PETER J. LUCIDO'S ANSWER

TO APPLICATION FOR LEAVE TO APPEAL

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Dated: September 5, 2024

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STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Commission is authorized under the County Charter to appropriate funds for outside legal counsel when Corporation Counsel is conflicted from representing the elected County Prosecutor.

   Defendants answer: No.

   Plaintiff answer: Yes.

   The Court of Appeals answered: Yes.

2. Whether County Charter § 6.6.5 precludes the Commission from appropriating $42,500 for outside legal counsel where no state statute prohibits the appropriation.

   Defendants answer: Yes.

   Plaintiff answer: No.

   The Court of Appeals Answer No.

3. Whether Plaintiff's action was timely filed within 60 days after the County Executive refused to sign contracts for outside counsel.

   Defendants answer: No.

   Plaintiff answer: Yes.

   The Court of Appeals answered: Yes.

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I. INTRODUCTION AND SUMMARY OF REASONS TO DENY LEAVE

Defendant's application for leave should be denied because Defendants have failed to demonstrate that this case "has significant public interest" or "involves legal principles of major significance to the state's jurisprudence." MCR 7.305(B)(2), (3).

This conflict originated from a single line-item appropriation of $42,500.00. The Macomb County Commission appropriated these funds to pay for independent legal representation to advise the Macomb County Prosecutor regarding pre-suit and non-litigation matters. The appropriation of these funds by the Commission was a result of conflicts of interest conceded to by Macomb County Corporation Counsel, John Schapka. As explained in his July 18, 2022, memorandum to the Chief Deputy Macomb Prosecutor, Corporation Counsel unequivocally believed there was a:

> "…conflict of interest, and I cannot foresee any circumstance which would ameliorate that conflict any time soon. As a consequence, even absent the Charter's impact on the representational issue, I would be precluded from undertaking Mr. Lucido's representation." (App'x 235a).

Although conflicted from representing the Prosecutor, Corporation Counsel notified the Prosecutor that he would not request outside counsel for the Prosecutor. Given Corporation Counsel's admitted ethical constraints, the Commission's appropriation of these funds was both necessary and lawful. While the conflict of interest was clear, the Executive, as well as Corporation Counsel himself (Id.), nonetheless opposed the appropriation of those funds. After the Commission overrode Defendant Hackel's veto of the appropriation, the Defendant Executive impounded the funds (Slip Op. at p. 7). Recognizing the purpose of the funds was appropriate, the court held that the Defendant Executive should not have impounded those funds because there was no "economic efficiency" for doing so (Id. at p. 12-13).

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The Court of Appeals decision resolving these disputes is not a matter of public interest nor of statewide jurisprudence that this Court should accept on Leave. Macomb County Corporation Counsel's underlying internal ethical conflicts, as well as the conflicts between the Plaintiff and Defendant Executive, are exclusively related to *this* County's affairs. Moreover, there are no novel legal issues to resolve here either. The law is clear in Michigan that a subunit of government is authorized to appropriate taxpayer funds by ordinance provided there is no conflict with the State's constitution or statutes. This was the *unanimous* conclusion of the Court of Appeals in this case.

Defendants' first legal dispute is with the Court of Appeals interpretation of *§ 6.6.5* of the Macomb County charter:

> "We conclude that, although § 6.6.5 indicates that an elected county official cannot expend funds on independent counsel, it has an exception if such expenditure is permitted by law. The County Commission appropriated the funds, then issued a resolution that specifically authorized their use for independent legal counsel, and defendants have not cited anything in the charter proscribing that authority or process." (Slip Op. at p. 12).

The Court of Appeals appropriately analyzed Charter *§ 6.6.5,* concluding that the appropriations ordinance was not in conflict with charter provision, § 6.6.5. The Court likewise held that MCL 49.73 does not prohibit the Commission from authorizing independent legal counsel. Additionally, the Court ruled that MCL 691.1408(3) is not directly related as it involves only legal action arising from conduct during employment with a governmental agency, but noted the statute offers another example of support that the Plaintiff may consult independent counsel. (Slip Op. at p. 11).

Defendants contend that the Court of Appeals erroneously concluded that "permitted by law" means "permitted by ordinance." There is no such conclusion within the Court of Appeals opinion.

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Instead, the Court of Appeals decision interpreted the County's charter and MCL 49.73 to determine whether the County's ordinance conflicted with either its charter or the statute, noting that:

> "Section 4.4 of the charter gives the Commission the power to appropriate funds as provided by the charter and law, as well as approve contracts of the County. Also, under § 4.4(j) of the charter, the Commission may "[e]xercise any power granted by law to charter or general law counties unless otherwise provided" in the charter." Slip at p. 10).

While not referenced in the opinion of the Court of Appeals, the law in Michigan is clear that:

> "A county charter may authorize the county to adopt resolutions and ordinances 'relating to its concerns,' subject to law. ***This means that the charter county need not have specific permission from the legislature to perform local functions and that such activities may be limited only by legislative enactment."*** *County Comm'Rs v. Oakland County Exec*., 98 Mich. App. 639, 645, 296 N.W.2d 621, 625, (1980) (Emphasis added).

The Court of Appeals also concluded that the County's charter under § 4.4(j) permits the Commission to appropriate funds as provided by the charter and law explaining the Commission may "[e]xercises any power granted by law to charter or general law counties unless otherwise provided" in the charter (Slip Op. at p. 10). Contrary to the Defendants' contention, the Court of Appeals agreed that the charter itself authorizes the commission to appropriate these funds and neither statute cited by the Parties limited or restricted that authority.

In reaching its decision in this case, the Court of Appeals was not asked nor did the Court of Appeals need to reach Defendants' current argument that an ordinance is not a law. Even if this issue had been presented to the Court of Appeals, the decision reached by the Court of Appeals would have been the same because an ordinance is simply a local law. In *Clam Lake Twp v LARA*, 500 Mich 362, 381; 902 NW2d 293 (2017), a unanimous Court (quoting from a lay dictionary and

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also citing Black's Law Dictionary) observed "[a]n ordinance is simply a law set forth by a governmental authority, specifically a municipal regulation." (quotations marks and internal citations omitted). Again, this is not a novel concept. More than 100 years ago, this Court held that "[a]n ordinance, validly enacted . . . is, within the jurisdiction of the municipality enacting it, as much entitled to respectful obedience, and is as much the law of the land for that locality, as a law enacted by the Legislature." *People v Hanrahan*, 75 Mich 611, 620; 42 NW 1124 (1889). In *People v Goldman*, 221 Mich 646, 649; 192 NW 546 (1923) this Court again held that violations ordinances were violations of the law.

More importantly, the Commission is *permitted by state law* to enact an ordinance appropriating funds for independent counsel. Pursuant to MCL 46.11(j) the Commission is permitted to "pass ordinances that related to county affairs and *do not contravene the general laws of the state…"* Id.(Emphasis added). UBAA, §141.436(1) provides that:

> "Unless another method for adopting a budget is provided by a charter provision in effect on April 1, 1980, the legislative body of each local unit shall pass a general appropriations act for all funds except trust or agency, internal service, enterprise, debt service or capital project funds for which the legislative body may pass a special appropriation act." MCL 141.436(1).

Consistent with the above statutory authority, Charter §4.4(c) harmoniously provides that the Commission has the authority to "[a]ppropriate funds." Charter §8.7 also provides that the Commission "shall adopt a balanced line-item operating budget and an appropriations ordinance" each fiscal year. In its published decision in *Macomb Cnty. Prosecutor v. Macomb Cnty. Exec.,* 341 Mich. App. 289, 308, 989 N.W.2d 864, 873, (2022), the Court of Appeals previously interpreted these sections of the County Charter stating "[w]e conclude that these provisions of the County Charter allow the Board to appropriate more funds for a line item than the amount reflected

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in the recommended budget itself." Clearly, by statute the Commission is authorized, therefore *permitted by law,* to appropriate funds through its appropriations ordinance.

Defendants' second issue, the timeliness of the Plaintiff's lawsuit, is factually driven and equally narrow. While Defendants argue the Prosecutor's lawsuit was untimely, the Court of Appeals correctly interpreted MCL 141.438(7)(b), pointing out that the statute does not state that the Prosecutor's claim accrues when the "first action" was taken by the Defendants, but instead states a claim is timely if filed within 60 days of an amendment to a general appropriations act *or an action relating to the enforcement of that general appropriations act.* In the instant case, the limitations period could not have started and did not start to run until January 25, 2024, when the Board of Commissioners approved the five specific outside counsel engagement contracts and Defendant Executive refused to sign them. Until then, Plaintiff was not yet harmed because he could not have utilized or enforced the $42,500.00.00 appropriation since prior to that date there were no contracts that the Board of Commissioners had approved. Nothing within MCL 141.438(7)(b) authorizes the Executive to issue a statement declaring in advance that he intends to veto the proposed a general appropriations act as a means of expediting accrual of suit by the Prosecutor. Plaintiff's suit was filed on March 13, 2024, within 60 days from January 25, 2024, and thus was timely.

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COUNTER-STATEMENT OF THE CASE

On November 27, 2023, the Commission adopted the 2024 general appropriations act. (Ex. 4, Enrolled Ordinance 2023-04, App'x 61a.) As a result of Corporation Counsel's declaration that he was conflicted from representing the Plaintiff, the Commission included a $42,500.00 line-item for "contract services" within the Prosecutor's budget for the purpose of retaining outside counsel for "prelitigation services." (Id., App'x 66a.) On December 8, 2023, the Executive vetoed this line-item.

On December 14, 2023, the Commission voted to override the Executive's veto. (Ex. 6, Resolution No. 11699, App'x 73a.). On January 4, 2024, the Prosecutor's Office submitted five legal services contracts to the Executive's Office for review, with a request that they be transmitted to the Commission for approval. (See Ex. 7, 1/16/24 Biondo Email, App'x 74a.)

On January 25, 2024, the Commission adopted Resolution No. 24-11938, approving the five contracts. (Ex. 11, Resolution No. 24-11938, App'x 166a.) The Prosecutor requested the Executive to review and process the contracts in accordance with the County's contracting ordinance. The executive again refused to sign the contracts.

On March 13, 2024, the Prosecutor filed an original action in the Court of Appeals under the UBAA challenging the Executive's refusal to enforce the appropriation, seeking declaratory, injunctive, and mandamus relief compelling the Executive to disburse the appropriated funds. (Plft's MSD Br, at xvi.). The Executive argued that the Prosecutor's claim was time-barred or, alternatively, outside of the Court of Appeals' limited jurisdiction. In addition, the Executive argued that no law permitted the use of independent outside counsel by the Prosecutor for general legal advice. (Exec Resp Br, pp 20-25.).

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The Commission also filed an amicus brief. The Commission argued that its appropriation was lawful because § 6.6.5 of the Charter gave it the general authority to approve and fund independent legal counsel for Countywide Elected Officials. (Comm'n Amicus Br, p. 15-19.).

In a published decision, the Court of Appeals granted the relief requested by the Prosecutor, in part, directing the Executive to disburse the $42,500.00 appropriation. The Court of Appeals stated:

> "We conclude that, although § 6.6.5 indicates that an elected county official cannot expend funds on independent counsel, it has an exception if such an expenditure is permitted by law. The Commission appropriated the funds, then issued a resolution that specifically authorized their use for independent legal counsel, and defendants have not cited anything in the charter proscribing that authority or process." Slip op at 10.

Regarding two statutes raised by the parties, MCL 49.73, 141.438(7), the Court of Appeals stated:

> "This statute applies when an officer is named "as a defendant." Here, however, plaintiff wishes to retain counsel for general legal advice, and not necessarily in cases where he is named as a defendant, and MCL 49.73 does not mandate the use of independent legal counsel for general legal advice. Nevertheless, the statute's directive regarding the provision of legal counsel under specific circumstances does not mean that the Commission is prohibited from authorizing independent legal counsel under other circumstances. Likewise, MCL 691.1408(3) of the Governmental Immunity Act, MCL 691.1401, et seq., does not directly apply here as it involves legal action arising from conduct during employment with a governmental agency, but it offers another example to support the conclusion that plaintiff may consult independent counsel… Id. Id. at 11.
> Likewise, MCL 691.1408(3) of the Governmental Immunity Act, MCL 691.1401, et seq., does not directly apply here as it involves legal action arising from conduct during employment with a governmental agency, but it offers another example to support the conclusion that plaintiff may consult independent counsel." Id.

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The Court also interpreted and rejected the Executive's argument that the Prosecutor's claims were untimely under MCL 141.438(7), stating:

> "The Legislature did not use the term "first action" in MCL 141.438(7), but merely referred to the general "an action" in referring to the 60-day period for bringing suit. Even assuming for the sake of argument that the 60-day period begins when plaintiff "first" incurred the harm, plaintiff was not harmed on December 8, 2023, given that the Commission voted to override Hackel's veto six days later, on December 14, 2023. Further, defendants' 60-day calculation does not include the Commission's January 25, 2024 approval of the contracts, and Hackel's failure to sign those contracts. In light of those additional circumstances, we cannot agree with defendants that Hackel's January 29, 2024 refusal was the same harm as the December 8, 2023 harm. Under Frank, "[a]dditional damages resulting from the same harm do not reset the accrual date . . . ." Id. at 155. Hackel's later refusal was a new harm, where it occurred after the Commission's veto override." Id. at p. 7.

After reviewing the relevant sections of the charter, the Court granted the Prosecutor's request for mandamus relief, "directing [the Executive] to disburse the funds to [the Prosecutor] and directing that the parties work together to facilitate the appropriate contract." Id. at 15.

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ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Crawford v Dep't of Civil Service*, 466 Mich 250; 645 NW2d 6 (2002). This Court reviews a lower court's decision whether to grant a writ of mandamus for an abuse of discretion. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42; 921 NW2d 247 (2018). Questions of law are reviewed de novo. Id.

II. REASONS FOR DENYING DEFENDANTS' APPLICATION

A. The Unanimous Decision of the Court of Appeals was correct and the Defendants' application for leave to appeal fails to meet this Court's criteria for granting leave under MCR 7.305(B).

Defendants have not and cannot demonstrate that this case meets one of the established criteria for granting leave to appeal. See MCR 7.305(B). The focal issue underlying this case involves Corporation Counsel's conflict of interest precluding him from advising or representing Plaintiff. This is an inherently local issue specific to Macomb County.

The gravamen of the dispute is whether the Commission's appropriation of funds for outside counsel was permitted under charter § 6.6.5. Plaintiff asserted the charter permits the appropriation, while the Defendants assert the charter does not. The Court of Appeals held that neither the County's charter nor MCL 49.72 prohibit the Commission from appropriating taxpayer funds to provide for outside counsel, finding that the charter language supports Plaintiff's position.

As explained by the Court of Appeals in this case, the County's charter § 6.6.5 addresses the availability of legal counsel for countywide elected officials who "*may* seek advice and counsel from Corporation Counsel upon request." (cite needed). Under both the first and second sentences of § 6.6.5, Corporation Counsel is ordinarily available to offer general legal advice to the Plaintiff

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and other countywide elected officials. Corporation Counsel, however, disqualified himself from advising the Prosecutor.

The Charter at § 7.5.3(b) also states that Corporation Counsel *may* "[a]ppoint special counsel upon approval of the Commission."[1] Corporation Counsel however refused to request authority for special counsel after acknowledging his conflict. (App'x, p. 236-238) As noted by the Court of Appeals, Corporation Counsel has retained outside counsel for the Plaintiff with approval of the Commission in the past. (Slip Op at p. 10).

Under the Defendants' narrow interpretation of the Charter raised in its application, the County's elected prosecutor would be *precluded by law* from accepting representation by special counsel even though such counsel was otherwise authorized under § 7.5.3(b) because Defendants contend the Plaintiff is not permitted by a state statute to do so. The result under Defendants' argument would preclude the Prosecutor from being advised or represented by *any* attorney, other than Corporation Counsel, on prelitigation matters even when Corporation Counsel is otherwise precluded due to ethical conflicts of interest. Defendants' interpretation of § 6.6.5 creates an impermissible conflict of interest for Corporation Counsel under at least MCPC 1.7(a) and (b). See also, *Barkley v. City of Detroit,* 204 Mich. App. 194, 200, 514 N.W.2d 242, 245, (1994).(In its published decision in *Barkley*, the Court of Appeals held that given conflicts of interest between city employed police officers and Corporation Counsel, an impermissible and unwaivable conflict of interest existed.)(Id.). Despite the ethical constraints imposed upon Corporation Counsel and his office, Defendants nonetheless opposed the appropriation for independent counsel.

[1] Relying upon the same legal arguments raised by Defendants in this Application for Leave, Corporation Counsel also declined to appoint outside independent legal counsel for the Plaintiff. (App'x 234a).

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Unlike the Defendants' interpretation of § 6.6.5, the Court of Appeals' interpretation of § 6.6.5 is consistent with general principles of statutory interpretation and avoids the absurd or unjust result sought by the Defendant, wherein the Plaintiff is unable to seek advice from independent, unconflicted counsel to avoid legal problems. *Franges v. General Motors Corporation; Betker v. General Motors Corporation; Schalk v. Michigan Sewer Construction Company*, 404 Mich. 590, 612, 274 N.W.2d 392, 399, (1979)("Another frequently applied rule of statutory construction is that statutes should be construed to prevent absurdity, hardship, injustice or prejudice to the public interest."). In reaching its decision, the Court of Appeals held that the appropriation of the funds was not in conflict nor prohibited by the County's charter or MCL 49.73.

The Defendants, however, incorrectly contend that the Commission is not permitted to appropriate these funds through an ordinance unless the state legislature authorizes the expenditure by statute. The authority of counties to adopt resolutions and ordinances is derived from the Michigan Constitution:

- "Subject to law, ***a county charter may authorize the county*** through its regularly constituted authority to adopt resolutions ***and ordinances relating to its concerns.***" MI CONST Art. 7, § 2(Emphasis added).
- "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution." MI CONST Art. 7, § 34.

"The Michigan Constitution is the preeminent law of our land[.]" Mays v Snyder, 323 Mich App 1, 33; 916 NW2d 227 (2018), aff'd 506 Mich 157 (2020). This Court has acknowledged that Michigan "is a home rule state," in which "local governments are vested with general constitutional authority to act on all matters of local concern not forbidden by state law." *County of Wayne v. Hathcock*, 471 Mich. 445, 460, 684 N.W.2d 765, 775, (2004).

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The Legislature and the courts have also recognized that the Michigan constitution establishes a system of home rule, implementing the Charter County Act, enacted in 1966, MCL 45.501 et seq. As this Court has stated, county charters may expressly provide for "the authority to perform at the county level any function or service not prohibited by law, which shall include, by way of enumeration and not limitation: Police protection, fire protection, planning, zoning, education, health, welfare, recreation, water, sewer, waste disposal, transportation, abatement of air and water pollution, civil defense, and any other function or service necessary or beneficial to the public health, safety, and general welfare of the county." *Hathcock.* 471 Mich at 460-461. "A county charter may authorize the county to adopt resolutions and ordinances 'relating to its concerns,' subject to law. This means that the charter county need not have specific permission from the legislature to perform local functions and that such activities may be limited only by legislative enactment." *County Comm'Rs v. Oakland County Exec.,* 98 Mich. App. 639, 645, 296 N.W.2d 621, 625, (1980).

Within the hierarchy of Michigan law, county charters establish the fundamental law within the county, like a constitution; it prevails over any contradictory local ordinance or resolution. See *Bivens v Grand Rapids,* 443 Mich 391, 400-401 (1993). Local governments may generally regulate matters of local concern when this power is conferred by the state. *DeRuiter v Twp of Byron*, 505 Mich 130, 140; 949 NW2d 91 (2020). MCL 45.514(1) further provides that county charter adopted under this act shall provide for "[t]he election of a legislative body to be known as the county board of commissioners, . . . and for their authority, duties, [and] responsibilities . . ." *Hackel v. Macomb Cnty. Bd. of Comm'rs*, 2023 Mich. App. LEXIS 7182, *7, (2023)(Unpublished). As the legislative body of the county, MCL 46.11(j) authorizes a county board of commissioners to pass ordinances that relate to county affairs and "do not contravene the general laws of this

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state or interfere with local affairs of a township, city or village within the limits of the county…" County commissions, as the local legislative body, are authorized under Michigan law to appropriate funds and to enact ordinances. The Commissions appropriation ordinance was a valid local law under Michigan's statutory hierarchy.

Our courts recognize there is a hierarchy of law in Michigan and laws created by subunits of government are presumed to be valid unless preempted by state statutes. *City of Grand Rapids v. Brookstone Capital,* LLC, 334 Mich. App. 452, 470, 965 N.W.2d 232, 243, (2020). Ordinances are simply a subset of laws within a hierarchy of state laws; the two are not co-extensive, but the former is included in the latter. According to *Black's Law Dictionary* 1208 (9th ed. 2009), "[a]n ordinance is commonly defined as an 'authoritative law or decree,' especially 'a municipal regulation.'" In *USA Cash # 1, Inc v Saginaw*, 285 Mich App 262, 267; 776 NW2d 346 (2009), the court articulated the hierarchy of state and local laws as well as the concepts of preemption:

> "A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field. (Internal citation omitted) 'For purposes of preemption, a direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits.' It is well established, however, that a local ordinance that regulates in an area where a state statute also regulates, with mere differences in detail, is not rendered invalid due to conflict. Walsh v City of River Rouge, 385 Mich 623, 635-636; 189 NW2d 318 (1971). "As a general rule, additional regulation to that of a State law does not constitute a conflict therewith." Id. at 636. **Where no direct conflict exists, both laws stand.** Id."

These cases and statutes y stand for the principle that in the absence of a conflicting statute or conflicting provision within its charter, the Macomb County Commission is a legislative body authorized to pass local laws related to County affairs. Ordinances are "local laws" that are valid provided they do not contain provisions that conflict with a higher law of this state. *Wayne County*

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v. Wayne County Ret. Comm'n, 267 Mich. App. 230, 250, 704 N.W.2d 117, 128, (2005)("Because the statute does not contain provisions directly conflicting with the local law as provided in the charter and the retirement ordinance, the doctrine of preemption is inapplicable."). Consistent with this statutory scheme, this Court stated in *Walsh v. River Rouge*, 385 Mich. 623, 636, 189 N.W.2d 318, 324, (1971), that state statutes represent the *general law*[2] of the state while ordinances[3] represent *local law.*[4] Absent a conflict between the general law and the local law, *both laws stand*. Whether a state statute preempts a local ordinance is a question of statutory interpretation." *Deruite*r *v. Twp. of Byron*, 505 Mich. 130, 139, 949 N.W.2d 91, 96, (2020). This brings us to the thrust of the Court of Appeal's decision challenged by the Defendants.

In this case, the Court of Appeals implicitly recognized and applied well recognized and related principles of statutory construction and preemption, ultimately concluding that the Commission had authority under the County's charter to appropriate taxpayer funds through an ordinance (a local law). Additionally, the Court of Appeals analyzed the statutes raised by the

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[2] Citing Black's Law Dictionary (5th ed), p. 616, the Court of Appeals defined "general law" as:

> A law that affects the community at large. A general law as contradistinguished from one that is special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. A law, framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law. A law that relates to a subject or a general nature, or that affects all people of [sic] state, or all of a particular class, while one relating to] particular persons or things of a class is a "special law." *O'Hara v. Wayne County Clerk*, 238 Mich. App. 611, 619-620, 607 N.W.2d 380, 384-385, 1999 Mich. App. LEXIS 312, *12-13.

[3] According to Black's Law Dictionary, 12th ed., an Ordinance is defined as "A rule established by authority; a permanent rule of action; a law or statute."

[4] Defining "Local law" Black's Law Dictionary(5th Ed.), p. 846, states "A local law in one which operates over a particular locality instead of over the whole territory of a state…On whose operation is confined within territorial limits, other than those of the whole state or properly constituted class or locality therein."

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Parties, concluding that the ordinance did not conflict with either the general law of this state or the County's own charter.

Defendants, however, insist that that the Court of Appeals misunderstood the phrase "permitted by law." Defendants now contend that "permitted by law" must refer to specific state legislation *authorizing* rather than preempting the appropriation of these funds. Previous published decisions by the Court of Appeals interpreting the similar phrase, "authorized by law" are contrary to Defendants' position:

> "We agree that, in plain English, authorized by law means allowed, permitted, or empowered by law. Black's Law Dictionary (5th ed). Therefore, it seems clear that an agency's decision that "is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious," is a decision that is not authorized by law." *Northwestern Nat'l Cas. Co. v. Commissioner of Ins*., 231 Mich. App. 483, 488, 586 N.W.2d 563, 566, (1998).

Under Michigan's constitution and the relevant enabling statutes, the Macomb County Commissions' appropriation of these funds though an ordinance is *permitted by law*. The unanimous Court of Appeals' decision is consistent with more than a century old public policy that local governments, closest to the people, must have broad authority to manage local concerns; the decision does not create the existential crisis of jurisprudence argued by the Defendants.

McQuillin's *Law of Municipal Corporations*, one of the most frequently cited national treatises on local government law, expressed it this way: "[L]ocal self-government has come to be regarded as the most important feature in our system. The American people have always acted upon the deep-seated conviction that local matters can be better regulated by the people of the locality than by the state or central authority…" McQuillin, *The law of Municipal Corporations* (3rd ed, § 1:40).

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The substance of the Defendants' arguments is in opposite to the concept of home rule and preemption. To invalidate this ordinance, Defendants must demonstrate that it conflicted with the Charter or a statute. However, under Defendants' strained analysis of the Charter the *absence* of a state statute addressing this local issue precludes the Commission from enacting this ordinance. This is the inverse of home rule and contrary to the drafter's purpose when the people of Macomb County adopted their home rule charter.

B. The Court of Appeals published decision in this Case is unrelated to the unpublished decision in *Hackel v Macomb County Board of Commissioners* (Docket No. 166363) and leave should be denied.

Defendants also insist that the decision of the Court of Appeals in this case raises apples to apples legal issues with the unpublished decision in *Hackel v Macomb County Board of Commissioners* currently before this Court. Defendants' analysis is again incorrect.

The Court of Appeals decision in *this case* focused upon the specific charter language in § 6.6.5, which addresses availability of legal counsel on behalf of countywide election officials. Slip at p.19. By contrast, the underlying dispute in the unpublished decision in *Hackel* arose when the County Commission passed an ordinance requiring the County Executive to give the Commission access to the County's financial information. *Hackel v. Macomb Cnty. Bd. of Comm'rs*, 2023 Mich. App. LEXIS 7182, *1, (2023)(Unpublished). Unlike this case, the Court of Appeals in *Hackel* analyzed the provisions of § 3.5(a) of the Charter, as well as relevant sections of the UBAA to determine whether the ordinance passed by defendant is "consistent with the powers conferred by the state in its constitution and statutes, and if it falls within the scope of authority delegated by the electorate in the [] charter." Id. at 14.

In reaching its decision in *Hackel*, the court held that § 3.5(a) states that County Executive "has the authority, duty, and responsibility to . . . [s]upervise, coordinate, direct, and control all

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County departments except for departments headed by Countywide Elected Officials other than the Executive, facilities, operations, and services except as otherwise provided by this Charter or law[.]" Id. at 15-16.

Also noteworthy, the Court in *Hackel* acknowledged that the Commission has the ultimate legal authority to "appropriate funds" and "adopt a balanced line-item operating budget and an appropriations ordinance each fiscal year." Id. at p. 21, (citing *Macomb Cnty. Prosecutor v. Macomb Cnty. Exec.,* 341 Mich. App. 289, 306, 989 N.W.2d 864, 872, (2022) ("We conclude that these provisions of the County Charter allow the Board to appropriate more funds for a line item than the amount reflected in the recommended budget itself.").

The differentiation however is that the *Hackel* Court concluded that the Commissions' ordinance granting the Commission access to financial information *conflicted* with the language of County's Charter; "…the challenged ordinance 'provide[s] for greater' rights to defendant 'than those expressed in the charter,' [internal citation omitted], and falls outside 'the scope of authority delegated' to defendant by the Charter, the ordinance is invalid and unenforceable…" Id. at p. 32. Although the *Hackel* Court did not reference preemption in its opinion, its ruling clearly invoked the principles of preemption.

Unlike the decision in *Hackel*, the Court of Appeals in this case concluded that there was no such conflict nor any restriction within the County's charter § 6.6.5 precluding the Commission from appropriating taxpayer funds. Likewise, the Court in this case correctly held that MCL 49.73 does not prohibit the Commission from authorizing independent legal counsel. Defendants' contention that the Court of Appeals decision in this case misinterpreted the phrase "permitted by law" misconstrues the Court's ruling as well as this state's statutory hierarchy, preemption, and the purpose of home rule.

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C. The unanimous decision of the Court of Appeals that the Plaintiff's Lawsuit was timely was correct and does not raise issues of significant jurisprudence or public interest.

Defendants next contend that this Court should grant leave to review the Court of Appeals ruling that Plaintiff's lawsuit was timely filed. Once again, the Defendants cannot demonstrate that this issue presents a significant legal issue with broad implications beyond the facts of this case. The applicable limitations period is found in MCL 141.438(7) which states as follows:

> (7) Except as otherwise provided in subsection (8) and notwithstanding any provision of law to the contrary, any suit brought under subsection (6) or section 16(9) shall only be brought in the Michigan Court of Appeals within 60 days after 1 of the following:
>
> (a) The adoption of a general appropriations act.
>
> (b) An amendment to general appropriations act or ***an action*** relating to the enforcement of that general appropriations act, if the amendment or action constitutes a basis for the suit. (Emphasis added).

There is no dispute that on November 27, 2023, the Board of Commissioners appropriated $42,500.00.00 for outside legal services for the Prosecuting Attorney in its annual appropriation ordinance. Defendant Executive vetoed this line item. On December 14, 2023, the Board overrode this veto. On January 25, 2024, the Board approved five specific contracts for outside legal services for the Prosecuting Attorney; on this date, the Board adopted Resolution 2024-11938. Prior to January 25, 2024, Plaintiff could not have utilized the appropriation because there were no specific contracts in place with the providers. Enrolled Ordinance 2107-03 Section 2.2, and Charter Section 3.17 require all county contracts be signed by the Defendant Executive. However, the Defendant Executive refused to sign the contracts, and as a result, Plaintiff could not use those outside legal services until the contracts were signed. Thus, Plaintiff could not have sued to enforce the general appropriations until after January 25, 2024. As explained by the Court of

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Appeals, Plaintiff's claim accrued when the Defendant Executive impounded the appropriated funds:

> "Hackel's refusal to sign the contracts operated as his admission that he would impound funds even after the Commission overrode his veto. Plaintiff therefore reasonably waited to file suit until after Hackel's refusal to disburse funds in January that had been reinstated by the Commission's override of Hackel's December veto." (Slip Op. at p. 7).

Pursuant to MCL 141.438 (7) (b), Plaintiff's complaint is timely if it is brought in the Michigan Court of Appeals within 60 days of "*an action* relating to the enforcement of that general Appropriations Act" (Emphasis added). Note that use of the term "action" does not refer to a "civil action" as used in court rules, because that statute refers to a civil action as a "suit". The legislature's use of the term "an action" in this statute is different from "the first action" as argued by Defendants. For example, under the statute of limitations provisions in the revised Judicature Act of 1961 MCL 600.5801 et seq, the legislature uses the term "first accrues" to start the running of the limitations period in many instances. (i.e., Mich 600.5801 claiming title under deed; MCL 600.5805, injury to person or property; MCL 600.5807 breach of contract; MCL 600.5809 non-contractual money obligations). Use of this qualifier of "first accrues" is not present in MCL 141.438(7).

Statutory provisions should not be read in isolation. *Tomra of North America v Dep. Of Treasury*, 325 Mich App 289, 926 NW2d 259 (2018). Under the rules of statutory interpretation, the legislature is presumed to understand the meaning of the language it enacts into law. *Robinson v City of Detroit* 462 Mich 439, 459, 613 NW2d 317 (2000). Each word of a statute is presumed to be for a purpose and as far as possible effect must be given to every clause and sentence. Id. The court may not assume that the legislative inadvertently made use of one word or phrase instead of another. Id. Where the language of a statute is clear and unambiguous, the court must follow

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it. Id. In *Robinson*, the court considered the difference between the phrase "the proximate cause" and "a proximate cause." That court commented that the legislature used the term "a proximate cause" in at least 5 statutes and used the term "the proximate cause" in at least 13 statutes, thus the legislature has shown an awareness that these two phrases are different. Id at 361. In that case the court focused on the difference between use of the word "the" and the word "a". That court relied on the Random House College Dictionary, where "the" is defined as a definite article (used especially before a noun with a specifying or particularizing effect) and "a" or "an" which are indefinite articles which have an indefinite or generalized force. Id

Turning to the pertinent statute here, MCL 141.438 (7)(b), the legislature could have used the definite phrase such as in "the first action" or the definite phrase "first accrues" as it did in the revised Judicature Act, but it did not. Rather the legislature chose to use the indefinite phrase "an action" thereby negating the implication that the timeliness of starting a suit is dependent upon one specific "first" event. Under the reasoning of Robinson, the legislature's use of the indefinite article "an action" in MCL 141.438(7)(b) does not mean the first specific action taken by the party, to start the limitation period, but refers to any indefinite or generalized action taken by the party at any time that relates to enforcement of the general Appropriations Act. MCL 141.438(b) uses this same phrase "an action" when referring to Plaintiff's right to enforce the general Appropriations Act for his branch of county government. Defendant Executives' refusal to sign those contracts was "an action" relating to the enforcement of that general Appropriations Act that constitutes a basis for this suit.

Even under the revised Judicature Act definitions, a Statute of Limitations generally does not begin to run until the claim accrues. The claim accrues at the time the wrong upon which the claim is based was done. MCL 600.5827. Plaintiff's claims in this case could not accrue before

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January 25, 2024 because no contracts had been approved by the Board of Commissioners for Defendant to sign, thus there was no wrong that Defendant could have committed before that date. Contrary to Defendant's arguments, Defendant's Veto of this line item on December 8, 2023, was not a wrongful action that would start the limitations period because Defendant Executive has the authority to Veto, See Charter Section 3.9. This suit was filed on March 13, 2024, which is less than 60 days from January 25, 2024, and thus is timely.

III. CONCLUSION AND RELIEF REQUESTED

This Court should deny leave in this case. The underlying issues in this case do not raise issues of public interest nor of significant jurisprudence. Subunits of governments routinely appropriate funds through ordinances. Provided those ordinances to not conflict with the State's Constitution or statutes, those ordinances become the local law. The Court of Appeals appropriately ruled on all the issues in this case, none of which give rise to issues that are significant to other counties within Michigan. There is no basis to grant the Defendants' Application.

Respectfully submitted,
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Dated: September 5, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212(B). I certify that this document contains 6, 666 countable words. The document is set in Times New Roman, and the text is in 12-point type.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective email addresses as disclosed on the pleadings by the electronic filing system on September 5, 2024.

/s/ Breana N. Perrin
Breana Perrin
Legal Assistant to John M. Perrin