

STATE OF MICHIGAN
COURT OF APPEALS

COALITION FOR A SAFER DETROIT,
Plaintiff-Appellant,

FOR PUBLICATION
February 9, 2012
9:00 a.m.

v

DETROIT CITY CLERK and DETROIT
ELECTION COMMISSION,

No. 300516
Wayne Circuit Court
LC No. 10-009328-AW

Defendants-Appellees.

Advance Sheets Version

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

SAAD, J.

Plaintiff appeals the trial court's order that denied its request for a writ of mandamus and granted defendants' motion for summary disposition. For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

On May 5, 2010, plaintiff filed signed initiative petitions with the Detroit City Clerk to place on the November 2, 2010, ballot a proposed amendment to § 38 of the 1997 Detroit City Code.¹ Section 38 addresses controlled substances and contains the following relevant provisions:

38-11-2. Possession, sale, etc., prohibited generally.

It shall be unlawful for any person to possess, sell, offer for sale, distribute, administer, dispense, prescribe or give away any controlled substance for which the unlawful possession, sale, offer for sale, distribution, administration, dispensation, prescription, or giving away is punishable by imprisonment for not more than one (1) year under any of the provisions contained within Part 74 of the Michigan Public Health Code, being MCL

¹ While Detroit recently enacted a new city code, effective January 1, 2012, we note that the initiative petition in this case involved an amendment of the 1997 Detroit City Code.

333.7401 through MCL 333.7461; MSA 14.15(7401) through 14.15(7461), provided, that this division shall not be construed to prohibit the possession, sale, offer for sale, distribution, administration, dispensation, or prescription of any controlled substance, or its derivative, in accordance with this division.

* * *

Sec. 38-11-7. Penalties.

(a) Any person who shall be convicted of violating any provision of this division shall be deemed guilty of a misdemeanor and shall be punished by a fine not to exceed five hundred dollars (\$500.00), or by imprisonment not to exceed ninety (90) days, or by both in the discretion of the court.

(b) Each day a violation continues shall be considered a separate offense and may be punished accordingly.

The proposed amendment set forth in the initiative would have added § 38-11-50 to the code, which would provide: “None of the provisions of this article shall apply to the use or possession of less than 1 ounce of marihuana, on private property, by a person who has attained the age of 21 years.”

The city clerk reported that the petitions contained sufficient valid signatures. When the signature requirement had been met and verified, 1997 Detroit City Charter permitted the city council to enact the ordinance proposed by the petition or, if it failed to do so, to submit the proposed code amendment to the voters. 1997 Detroit Charter, art 12, § 12-107. The city council did not vote on the proposed amendment, and the matter was forwarded to the Detroit City Election Commission. The election commission asked the Detroit Law Department to provide an opinion about whether the proposed amendment was a valid initiative under Michigan law.

An attorney with the law department drafted a legal memorandum in which she concluded that the initiative conflicted with a state law that prohibits the use and possession of marijuana and that a city may not enact an ordinance that conflicts with state law. As a result the initiative would have been advisory in nature and, under Michigan law, an advisory or “symbolic” initiative may not be placed on the ballot. On August 9, 2010, the election commission voted to not place the initiative on the ballot.

Plaintiff filed a complaint for mandamus requesting the circuit court to order defendants to place the proposed amendment on the ballot. The court denied the writ of mandamus and granted defendants’ motion for summary disposition under MCR 2.116(C)(8). The court ruled that the clerk had the discretion to determine whether the proposed amendment was contrary to state law. The court also agreed that the proposed amendment was contrary to state law and that the clerk therefore had no legal duty to place the initiative on the ballot.

II. ANALYSIS

A. BURDEN OF PROOF AND STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy that will only be issued if “(1) the party seeking the writ has a clear legal right to the performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result.” *Citizens Protecting Michigan’s Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008). The party seeking mandamus has the burden of establishing that the official in question has a clear legal duty to perform. *Burger King Corp v Detroit*, 33 Mich App 382, 384; 189 NW2d 797 (1971).

We review for an abuse of discretion a circuit court’s decision on a request for mandamus. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006). However, we review de novo the first two elements required for issuance of a writ of mandamus—that defendants have a clear legal duty to perform, and plaintiffs have a clear legal right to performance of the act requested—as questions of law. *Tuggle v Mich Dep’t of State Police*, 269 Mich App 657, 667; 712 NW2d 750 (2006). We also review de novo a trial court’s decision on a motion for summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). MCR 2.116(C)(8) tests whether a claimant has failed to state a cognizable claim. For purposes of a motion for summary disposition under MCR 2.116(C)(8), this Court accepts all well-pleaded factual allegations as true, and construes them in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

B. DISCUSSION

Plaintiff argues that because its petitions had the required number of qualified signatures, the statutory requirements governing initiative proposals were satisfied and, therefore, that the trial court erred by upholding defendants’ decision to not place the proposed amendment on the ballot. Plaintiff also does not agree that the proposed amendment is contrary to state law.

Article 3, § 3-104 of the 1997 Detroit Charter, provides that: “[e]xcept as otherwise provided by this Charter or ordinance, state law applies to . . . the conduct and canvass of city elections.” With regard to initiatives, the Home Rule Cities Act MCL 117.1 *et seq.*, provides:

Each city may provide in its charter for 1 or more of the following:

* * *

(g) The 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 act also sets forth the following with regard to the handling of local elections in MCL 117.25:

(1) An initiatory petition authorized by this act shall be addressed to and filed with the city clerk. The petition shall state what body, organization, or person is primarily interested in and responsible for the circulation of the petition

and the securing of the amendment. Each sheet of the petition shall be verified by the affidavit of the person who obtained the signatures to the petition. The petition shall be signed by at least 5% of the qualified and registered electors of the municipality. Each signer of the petition shall also write, immediately after his or her signature, the date of signing and his or her street address. A signature obtained more than 1 year before the filing of the petition with the city clerk shall not be counted. The petition is subject to the requirements of [MCL 117.25a].

(2) A person who willfully affixes another's signature, or subscribes and swears to a verification that is false in any material particular, is guilty of perjury. A person who takes the oath of another to the petition not knowing him or her to be the same person he or she represents himself or herself to be or knowing that the petition or any part of it is false or fraudulent in any material particular, or who falsely represents that the proposed amendment is proposed by persons other than the true sponsors, is guilty of a felony and is liable for the same punishment as provided for perjury.

(3) Upon receipt of the petition, the city clerk shall canvass it to ascertain if it is signed by the requisite number of registered electors. For the purpose of determining the validity of the petition, the city clerk may check any doubtful signatures against the registration records of the city. Within 45 days from the date of the filing of the petition, the city clerk shall certify the sufficiency or insufficiency of the petition. If the petition contains the requisite number of signatures of registered electors, the clerk shall submit the proposed amendment to the electors of the city at the next regular municipal or general state election held in the city which shall occur not less than 90 days following the filing of the petition.

Article 12 of the 1997 Detroit Charter governs initiatives and referendums in Detroit and provides, in relevant part:

12-104. Duties of the City Clerk.

The petitions shall be filed with the city clerk. The clerk shall, within ten (10) days, canvass the signatures thereon to determine their sufficiency and make a report of the result to the city council. Any signature on an initiative petition obtained more than six (6) months before the filing of the petition with the clerk shall not be counted.

* * *

12-107. Procedure.

Upon the report of the clerk that the initiative or referendum petitions are sufficient, and filed within the time limits provided by this Charter, the city may within thirty (30) days:

1. In the case of an initiative petition, enact the ordinance proposed by the petition; or

2. In the case of a referendum petition, repeal the ordinance to which the petition refers.

If the city fails to enact or repeal the measure, the measure shall be submitted to the voters.

12-108. Submission to Voters.

If a measure must be submitted to the voters, it shall be submitted:

1. In the case of initiative, at the next election in the city, or, in the discretion of the city council, at a special election; and

2. In the case of referendum, at the next election in the city occurring not sooner than seventy (70) days after the city council's determination not to repeal the measure, or, in the discretion of the city council, at a special election.

Except as otherwise required by law, the result of any initiative or referendum election shall be determined by . . . a majority of the voters voting on the question.

We agree with plaintiff that it was not within the scope of defendants' authority to assess the substance of the petition or to determine whether, if passed, it would conflict with state law. The duties of the city clerk are clearly stated in both MCL 117.25 and the Detroit City Charter. After the clerk canvasses the petitions to determine if they contain the requisite number of qualified signatures, MCL 117.25(3) provides that the clerk "shall submit the proposed amendment to the electors of the city at the next regular municipal or general state election held in the city which shall occur not less than 90 days following the filing of the petition."² The charter then requires the clerk to report to the city council with regard to his or her canvass of the signatures, and it gives the city council the opportunity to pass the ordinance as proposed or to submit the initiative to the voters in the next election. 1997 Detroit Charter, art 12, § 12-107. Despite the additional opportunity for the city council to simply adopt the proposed amendment, nothing in either the charter or the statute indicates that defendants have the discretion to review the substance or effect of the proposal itself.

On the basis of the clear language in the statute and charter, it was a ministerial act for defendants to place the initiative petition on the ballot once the clerk determined that the

² This Court has held that a clerk's authority extends to a determination of whether the petition facially complies with MCL 117.25(1) and (2). *Herp v Lansing City Clerk*, 164 Mich App 150, 159; 416 NW2d 367 (1987). However, unlike *Herp*, this case does not involve a challenge under either subsection or a challenge to the form of the petition.

petitions contained the required number of qualified signatures. Because the clerk certified the petitions as having the requisite number of qualified signatures, defendants had a clear legal duty to place the initiative on the ballot and plaintiff had a clear legal right to the performance of that duty. Further, no other legal remedy was available when defendants declined to place the proposed amendment on the ballot through an exercise of discretion that is not permitted by law. Accordingly, we hold that the trial court abused its discretion by failing to enter an order of mandamus because plaintiff satisfied the elements necessary for mandamus relief. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 284.

We further hold that the trial court erred when it addressed the question of whether the proposed ordinance conflicts with state law when it decided the summary disposition motion. A preelection determination of the validity of a ballot initiative substantially interferes with the legislative function, and our courts have repeatedly held that a substantive challenge to a proposed initiative is improper until *after* the law is enacted. *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 493; 688 NW2d 538 (2004); *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 270 n 5; 553 NW2d 679 (1996); *Hamilton v Secretary of State*, 212 Mich 31, 34; 179 NW 553 (1920). We recognize that in the very rare case in which there is a clear and unmistakable conflict between an initiative and state law, the Constitution, or the city charter itself, or when an “initiative petition does not meet the constitutional prerequisites for acceptance,” a court may find it necessary to intervene in the initiative process. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 276-277, 291; *Detroit v Detroit City Clerk*, 98 Mich App 136, 139; 296 NW2d 207 (1980). But because the judicial branch should rarely interfere with the legislative process, such cases should be, and are, rare and this is not such a case.

To support their position, defendants cite *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977), for the proposition that an ordinance conflicts with and is preempted by state law if it permits what state law forbids. We take no position on whether a court could come to this conclusion if this proposed ordinance was passed and then challenged. We also take no position on the wisdom of the petition or speculate about any actions that may or may not be taken if and when the proposed amendment is enacted. Simply stated, before it becomes law, any judgment on the merits of such a claim would be an academic discussion about a hypothetical set of facts. Our courts should not render hypothetical opinions about matters that may never become law.

Moreover, we note here that the question of a potential conflict between city and state law is complex, particularly when the language of the proposed ordinance does not appear to invalidate or interfere with the enforcement of state and federal laws prohibiting the use or possession of marijuana. The proposed amendment appears to only provide that the use or possession of less than one ounce of marijuana on private property by a person 21 or older will not also be punished *under the Detroit ordinances*. And though plaintiff's objective in supporting this initiative may well be to take yet another incremental step toward legalizing marijuana in Michigan, and though the intended effect of the ordinance may be to discourage arrests for the possession or use of small amounts of marijuana, this issue is not properly before us. We do note, however, that under MCL 764.15 it remains the case that local police officers may arrest a person for the commission of a state felony or misdemeanor and, under the Detroit City Charter, it is the *obligation* of the Detroit Police Department to “enforce laws of the state

and the nation” as well as “the ordinances of the city.” 1997 Detroit Charter, art 7, § 7-1101. Thus, the proposal, on its face, does not appear to change the fact that all persons under Michigan’s jurisdiction remain subject to the drug laws contained in the Public Health Code that criminalize the use and possession of marijuana. MCL 333.7403(2)(d) and MCL 333.7404(2)(d).³

Plaintiff established the requirements for a writ of mandamus, and the trial court abused its discretion by failing to grant the writ. It was outside defendants’ authority to consider the substance and effect of the initiative, and defendants had a clear legal duty to place the matter on the ballot once the clerk verified that the petition had the requisite number of qualified signatures. Plaintiff had a clear legal right to the placement of the initiative on the ballot, and plaintiff had no other remedy that would achieve the same result. Again, we emphasize that judicial preelection determinations regarding the legality of ballot proposals are disfavored as an undue interference with the legislative process—including the initiative process—the most direct form for citizens to pass laws. And when as here, the question of whether the ballot proposal conflicts with state law is a complex, close question of law, clearly the judiciary should let the legislative process proceed.

Accordingly, we reverse and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Elizabeth L. Gleicher

³ We also observe that defendants’ arguments with regard to an alleged conflict with state law appear to apply equally to the initiative permitting the use or possession of marijuana and paraphernalia by a person “under the direction, prescription, supervision, or guidance of a physician or other licensed medical professional.” Detroit City Code, §§ 38-11-9 and 38-11-32. Those amendments of the code were passed by initiative in 2004, despite the fact that Michigan’s medical marijuana act was not passed on a statewide basis until 2008.