

Public Policy Position**Amicus Curiae in *Van Buren Township v Visteon Corp* (MSC Case No. 156018)**

The Government Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 655 members. The Government Law Section is not the State Bar of Michigan and the position expressed herein is that of the Government Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Government Law Section has a public policy decision-making body with 21 members. On August 16, 2018, the Section adopted its position after an electronic discussion and vote. 13 members voted in favor of the Section's position on the amicus curiae in *Van Buren Township v Visteon Corp* (MSC Case No. 156018), 0 members voted against this position, 5 members abstained, 3 members did not vote.

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STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Michigan Court of Appeals
STEPHENS, P.J., and SAAD and METER, JJ.

VAN BUREN CHARTER
TOWNSHIP,

Plaintiff-Appellant,

v

VISTEON CORPORATION,

Defendant-Appellee,

Supreme Court No. 156018

Court of Appeals No. 331789

Wayne County Circuit Court
No. 15-008778-CK

AMICI CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION
AND THE GOVERNMENT LAW SECTION OF THE STATE BAR OF MICHIGAN
IN SUPPORT OF APPELLANT VAN BUREN CHARTER TOWNSHIP

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Dated: August 29, 2018

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STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly determined that a declaratory judgment was not ripe under MCR 2.605?

Plaintiff-Appellant answered: NO

Defendant-Appellee answered: YES

Amici Curiae answers: NO

The Circuit Court would answer: YES

The Court of Appeals would answer: YES

STATEMENT OF FACTS

Amici Curiae concur with facts set forth in Appellant Van Buren Charter Township's Application for Leave to Appeal and Supplemental Brief and incorporate them by reference herein.

STATEMENT OF INTEREST OF AMICI CURIAE AND INTRODUCTION

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. Through its Legal Defense Fund, the Michigan Townships Association has participated on an amicus curiae basis in numerous state and federal cases presenting issues of statewide significance to Michigan townships. Filing of this amicus curiae brief was authorized by the Michigan Townships Association.

The Government Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 692 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commission, and special authorities. Although the section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to government law. The Government Law Section provides education, information and analyses about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs, and publications. The Government Law Section is committed to promoting the fair and just administration of government law. In

furtherance of this purpose, the Government Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The section has filed numerous amicus curiae briefs in state and federal courts.

The Government Law Section Council, the decision-making body of the Section, is currently comprised of twenty-one members. Filing of this amicus curiae brief was authorized on August 16, 2018 by the Council. The position expressed in this amicus curiae brief is that of the Government Law Section only and is not the position of the State Bar of Michigan.

Amici curiae, Michigan Townships Association and Government Law Section of the State Bar of Michigan submit this brief in support of the Appellant Van Buren Charter Township's application for leave to appeal and in response to this Honorable Court's May 11, 2018 Order in consideration of the application for leave to appeal¹. In this May 11, 2018 Order, the parties were required to submit supplemental briefs to address "whether the Court of Appeals: (1) properly determined that a declaratory judgment was not ripe under MCR 2.605; and (2) properly interpreted the contract to determine that 'defendant is not obligated to perform [under the contract] until . . . a shortfall has occurred, and . . . property taxes paid by the defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village.' *Van Buren Charter Township v Visteon Corp*, 319 Mich App 538, 548; 904 NW2d 192 (2017)."

Amici curiae contend that the question in this case regarding application of the doctrine of ripeness to declaratory judgments under MCR 2.605 is of major statewide significance to the orderly administration of Michigan municipalities and jurisprudence in this State. In particular,

¹ Appeal is being sought with regard to the Michigan Court of Appeals published opinion in *Van Buren Charter Township v Visteon Corporation*, 319 Mich App 539; 904 NW2d 192 (2017).

the Court of Appeals erroneous application of the ripeness doctrine will severely hamper a municipality's ability to effectively seek declaratory relief over disputed contract terms.

Declaratory judgments came into being in Michigan within the last 100 years and have "been heralded as one of the most significant procedural reforms of the century."² Declaratory judgments are remedial and are to be liberally administered to provide access to the courts.³ As will be discussed herein, the purposes for declaratory judgments are broad and provide for flexibility in hearing various issues. One of the main purposes of a declaratory judgment is to allow parties to receive a binding court decision to guide their actions before actual injury occurs or matters ripen into a breach.⁴ Ripeness in this context clearly does not require actual harm or loss as this would be in opposition to a purpose of declaratory judgments. The courts can adjudicate a future relation as long as there is a present interest in the determination and such determination serves a useful purpose.⁵ These limitations keep the courts from addressing issues that are hypothetical and therefore not ripe. The "actual controversy" requirement for a court to consider a declaratory judgment as set forth in MCR 2.605 necessarily incorporates ripeness and must be understood in context with the purposes for declaratory judgments.

With regard to contract disputes declaratory judgments are extremely effective because the parties can achieve a binding decision regarding the meaning of disputed contract terms before the dispute ripens into an actual breach of contract and before actual injury or loss occurs. Municipalities frequently request declaratory rulings to resolve disputes between the parties over the meaning of contract terms well in advance of specified situations in order to stabilize

² *Lansing Sch. Ed. Ass'n v Lansing Bd. of Ed.* (On Remand), 293 Mich App 506, 515; 810 NW2d 95 (2011).

³ *Nims v Grand Trunk Western R. Co.*, 326 Mich 371, 375; 40 NW2d 188 (1949).

⁴ *Lansing Sch. Ed. Ass'n*, supra, 515.

⁵ *Merkel v Long*, 368 Mich 1, 13; 117 NW2d 130 (1962).

uncertainties and to properly plan and budget. Municipalities enter into many long term complex contracts to provide public infrastructure, public services, and economic development among other things.⁶ It is essential for there to be a clear understanding of the terms of these agreements and, when controversies arise, to have recourse to the court system for declaratory judgments settling the parties' rights and obligations. All too often current disputes arise regarding contract provisions that apply to actions years down the road, but even under these circumstances, the parties still need current interpretation and resolution to guide their actions moving forward. For example, when there is a current contract dispute between municipalities over the ability of one party to terminate sewer service in five years, there is a current need to know what the contract requires as a new sewer system would take millions of dollars and numerous years to complete. The dispute is in the present and it should not matter that any number of contingencies could occur in the future (i.e., new board or commission could change position in 4 years). Ultimately, declaratory relief provides the municipalities' preventive binding adjudication that works to stabilize the situation and guide the Plaintiff's vital actions moving forward. Unfortunately, the erroneously restrictive determination regarding the availability of declaratory relief by the Court of Appeals in this case would lead to the inextricable conclusion that the issue is unripe and thereby deny the parties access to the courthouse.

With regard to the specific situation in this case, Van Buren Charter Township (Township) and Visteon Corporation are parties to an active settlement agreement.⁷ The

⁶ For example: 50 year contracts for the conditional transfer of property between municipalities, joint fire department agreements; water and sewer franchise agreements between municipalities; garbage and recycling contracts; long term funding commitments for economic development; road construction agreements; urban cooperation agreements between municipalities; bond financing agreements; and many other complex agreements for the public benefit.

⁷ Appellant's Appx. 38a-47a. (Settlement Agreement) A settlement agreement is construed as a contract. *MacInnes v MacInnes*, 260 Mich App 280, 283; 677 NW 2d 889 (2004).

Settlement Agreement stems from the Township, through its local development finance authority, issuing \$28,000,000 in 30 year municipal bonds to help construct Visteon's world headquarters within the finance authority district. The plan was to pay off the bonds using future property tax revenue captured within the local development finance authority district. Subsequently, in 2009, Visteon filed for bankruptcy and in exchange for concessions on the taxable value of their headquarters, the Settlement Agreement was reached. Visteon agreed in the Settlement Agreement to cover the expected shortfall in property tax revenue needed to pay off the bonds. With the help of a financial advisement company the Township determined that a shortfall would occur not later than 2018. When the Township went to invoke this provision of the Settlement Agreement in 2013, Visteon subsequently claimed it had no duty to negotiate or pay anything. This relevant provision from the Settlement Agreement provided as follows:

“Visteon acknowledges that the township assisted Visteon in the construction of the village through the issuance by the township of certain bonds supported by the full faith and credit of the township, the proceeds of which were used to help construct the village. To the extent that the property tax payments made by Visteon to the township, including payments made by Visteon to the township pursuant to Section 2.2, are inadequate to permit the township to meet its payment obligations with respect to that portion of the bonds that were used to help fund the village, Visteon hereby agrees to negotiate with the township in good faith to determine the amount of the shortfall with respect to those bonds and make a non-tax payment, payment in-lieu-of tax, (PILOT) to the township to assist the township in making timely payments on the bonds.”⁸

The Township in its suit for declaratory relief asked for a declaration that the Settlement Agreement requires Visteon to negotiate the shortfall before the shortfall in property tax revenue occurs and to pay the shortfall amount prior to its occurrence to allow for timely bond payments. Rather than hearing the Township's requested declaratory relief to stabilize the situation and direct future rights and obligations under the contractual provision, the circuit court ruled the

⁸ Settlement Agreement at 3.

case not ripe. As indicated in the Township's Supplemental Brief on page two, the Circuit Court in holding declaratory relief not ripe for adjudication, indicated that:

“[T]his case epitomizes why the ripeness doctrine exists, mainly to prevent courts from becoming prematurely embroiled in complex disputes involving hypothetical and contingent facts when, especially when the project [shortfall] is estimated [to occur] three years from now.

So for the reasons in Visteon's motion and supplemental pleadings, th [eCourt] is granting the motion and dismissing the complaint without prejudice.”⁹

The Circuit Court ruling dismissing the complaint as unripe was affirmed in the published decision of the Court of Appeals. The Court of Appeals also found the complaint not ripe because the contract was not ambiguous. As will be discussed in more detail herein these actions were erroneous in failing to comport with a proper understanding of the background and purposes for declaratory judgments. In this case, the controversy was an actual present dispute between the parties regarding when negotiations on the shortfall must occur and when payment must occur under the Settlement Agreement. The declaratory relief was needed to guide the actions of the Township moving forward and before an actual default on the bonds. Rights can be declared with regard to a dispute over non-ambiguous contract provisions just the same as ambiguous ones. Often upon consideration of disputed contract language courts will rule the language unambiguous in declaring the rights of the parties. This distinction by the Court of Appeals with regard to ripeness was meaningless. Further, future contingencies regarding the shortfall do not render the current dispute between parties as hypothetical and therefore not ripe. The disputed issues are quite real and capable of binding adjudication. As will be explained further the Township's declaratory complaint should not have been dismissed as not ripe.

⁹ Motion hearing transcript 5:9-17(Feb 11, 2016). (Appellant's Appx. 218a.)

ARGUMENT¹⁰

THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT A DECLARATORY JUDGMENT WAS NOT RIPE UNDER MCR 2.605.

A. Standard of Review

The authority for a court to enter a declaratory judgment is governed by MCR 2.605 which provides in relevant part that:

“(A) Power to Enter Declaratory Judgment.

(1) **In a case of actual controversy** within its jurisdiction, a Michigan court of record **may declare the rights and other legal relations of an interested party** seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment. ***”
(Emphasis added)

Whether a plaintiff has sufficiently alleged an actual controversy sufficient to invoke jurisdiction to provide declaratory relief is a question of law and is therefore reviewed de novo. *Kircher v City of Ypsilanti*, 269 Mich App 224, 226-227; 712 NW2d 738 (2005). Further, the interpretation of a court rule is a question of law that is subject to de novo review. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002). Finally, ripeness questions are also reviewed de novo. *Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008).

B. Background and Purpose of Declaratory Relief

To properly consider how the doctrine of ripeness applies to MCR 2.605 and the existence of an actual controversy, it is necessary to review the background and purpose of declaratory relief. Declaratory relief is not a common law remedy. The authority of Michigan

¹⁰ See also above introductory comments contained in the Statement of Interest of Amici Curiae and Introduction.

courts to grant declaratory relief was first provided for by the Legislature pursuant to 1919 PA 150.¹¹ Soon after enactment, this legislation was challenged and struck down as unconstitutional in *Anway v Grand Rapids Ry Co.*, 211 Mich 592; 179 NW 350 (1920). In *Anway*, the court struck down 1919 PA 150 because:

“In short, it requires that the time of the court shall be taken, not in the determination of actual controversies where rights have been invaded and wrongs have been done, but in the giving of advice to all who may seek it.”¹²

The court in *Anway* found that 1919 PA 150 exceeded the proper exercise of constitutionally authorized judicial authority by failing to limit declaratory relief to circumstances where actual controversies exist. In this regard, the court in *Anway* indicated that:

“This court and the court from which this case came by appeal draw their power from the Constitution. The power given to both under the Constitution was judicial power. It is beyond the power of the Legislature to take from either that judicial power, and it is equally beyond the authority of the Legislature to confer upon either power not judicial, or to require the performance of functions not judicial in character. This act confers power not judicial and requires performance of acts nonjudicial in character. For these reasons it is void in its entirety.”¹³

Almost ten years following the *Anway* decision the Michigan Legislature tried again, pursuant to 1929 PA 36¹⁴, to provide the courts with the authority to grant declaratory relief. This time around the legislation contained the limitation that an actual controversy must exist to grant declaratory relief. Even with the additional language requiring an actual controversy, 1929 PA 36 was still challenged as unconstitutional in the case of *Washington–Detroit Theatre Co. v Moore*, 249 Mich 673; 229 NW 618 (1930). In *Washington–Detroit Theatre Co.* the court acknowledged that *Anway* was a pioneer case in the country in its exhaustive discussion regarding the constitutionality of declaratory relief and that 1929 PA 36 eliminated the

¹¹ See Attachment A, 1919 PA 150.

¹² *Anway*, 211 Mich at 606.

¹³ *Id.*, at 622.

¹⁴ See Attachment B, 1929 PA 36.

possibility of being construed unconstitutional under *Anway* with its inclusion of an actual controversies limitation.¹⁵

In *Washington-Detroit Theatre Co.*, the court generally addressed the justiciability of declaratory relief, and noted that:

“The courts of Scotland have been rendering declaratory judgments for over 300 years. In England, they have been in vogue since 1852. They are part of the judicial system in Canada. About contemporaneous with, or since the *Anway* case, 17 or more American states have adopted identical or similar laws.”¹⁶

Notwithstanding, the actual controversies language, the defendant in *Washington-Detroit Theatre Co.* still claimed that 1929 PA 36 was unconstitutional as an improper exercise of judicial power in providing for proceedings before rights had been violated or wrongs committed or threatened. The defendant cited federal law for the proposition that a declaratory judgment was not a case or controversy over which the federal judiciary had constitutional authority to act providing that:

“But still the proceeding is not a case for controversy within the meaning of Article 3 of the constitution. The fact that the plaintiff’s desires are thwarted by its own doubts, or by the fears of others, does not confer cause of action. No defendant has wronged the plaintiff or has threatened to do so. Resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution, and for more than half a century thereafter. *Willing v Chicago Auditorium Ass’n*, 277 US 274; 48 S. Ct. 507, 509; 72 L. Ed. 880.”¹⁷¹⁸

In light of this constitutional argument, the court in *Washington-Detroit Theatre Co.*, made a critical distinction with regard to the plenary authority granted to states versus the constitutional authority of the federal judiciary indicating that:

¹⁵ *Washington–Detroit Theatre Co.*, 249 Mich at 676.

¹⁶ *Id.*, at 676-677.

¹⁷ *Id.*, at 680.

¹⁸ It should be noted that *Willing* was decided before the United States Supreme Court upheld the federal Declaratory Judgment Act as constitutional. *MedImmune, Inc, v Genentech, Inc.*, 549 US 118; 127 SCT 764, 770-771; 166 L Ed 604 (2007).

“This historical argument, however much it may subscribe a government of granted powers, is not applicable to a sovereign state who inherent powers enable it to attempt solution of any social problem arising from current conditions, and which may adventure into experiment for the public welfare.

While the legislature obtains legislative power and the courts receive judicial power by grant in the state Constitution, the whole of such power reposing in the sovereignty is granted to those bodies except as it may be restricted in the same instrument. There is no constitutional restriction on the power of the Legislature to recognize the complexity of modern affairs, and to provide for the settlement of controversies between citizens without the necessity of one committing an illegal act or wrong doing or threatening to wrong the other. There is no constitutional expression of limitation upon the power of the court to decide such disputes. In the *Anway* Case, Mr. Justice Sharpe collected the definitions of judicial power and they need not be repeated here. When an actual controversy exists between parties, it is submitted in formal proceedings to a court, a decision of the court is binding upon the parties and their privies and is res adjudicate of the issue in any other proceeding in court in which it may be involved, what else can the decision be but the exercise of judicial power?”¹⁹

This case is remarkable for recognizing the plenary powers of the state Legislature to assign to the judiciary the ability to provide for declaratory relief to settle controversies without first the necessity of a wrong or threatened wrong. Later cases also recognized this distinction that the United States Constitution is a grant of power to Congress while the Michigan Constitution is a limitation on the plenary authority of the Legislature.²⁰ To this extent there is no limitation in the Michigan Constitution restricting the plenary authority of the Legislature to provide the judiciary with declaratory relief powers.

In the case at bar, the Township in its suit for declaratory relief asked for a declaration that the Settlement Agreement requires Visteon to negotiate the shortfall before the shortfall in property tax revenue occurred and to pay the shortfall amount prior to its occurrence to allow for

¹⁹ *Washington-Detroit Theatre Co.*, 249 Mich at 680-681 (Emphasis added).

²⁰ See: *Romano v Auditor General*, 323 Mich 533, 536-537; 35 NW2d 701 (1949); *In re Request for Advisory Opinion Enrolled Senate Bill 558 (being 1976 PA 240)*, 400 Mich 175, 400 Mich 311, 317-318; 254 NW2d 544 (1977); *Attorney General ex rel. O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW2d 550 (1936).

timely bond payments. The Township does not need to wait until injury or threatened breach. A declaratory judgment regarding the correct interpretation of the contractual provision in dispute would be binding on the parties and res judicata with regard to these issues in any other proceedings or causes of action. This type of dispute settlement is not beyond the authority granted the judiciary in issuing a declaratory judgment. This authority becomes even more apparent through further analysis of the purposes of declaratory relief.

An expansive perspective on the useful purposes of declaratory judgments was expounded in *Merkel* and wherein among other things it was recognized that such judgments may determine rights based upon contingent future happenings. The court in *Merkel*, quoted favorably from *Sigal v. Wise*, 114 Conn 297, 158 A 891 that:

“The remedy by means of declaratory judgments is highly remedial, and the statute and rules should be accorded a liberal construction to carry out the purposes underlying such judgments. One great purpose is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds, and so avoid the expense, bitterness of feeling, and disturbance of the orderly pursuits of life which are so often the incidents of lawsuits. Fully to carry out the purposes intended to be served by such judgments, it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening.”²¹

In *Merkel*, the court went on to cite *Borchard, Declaratory Judgments*, 2d ed, pp.422-424 as containing the following apt statement:

“The Declaratory Judgments Act necessarily deals with present rights, but it is a present right to have a judicial assurance that advantages will be enjoyed or liabilities escaped in the future. Courts continually declare rights which have not become fixed under an existing state of facts, but are prospective only; they may not, however, be so remote and speculative as to be hypothetical and abstract.

It is nearer the truth to say that the courts will not determine future rights in anticipation of an event that may never happen, although even that generalization is probably a little broad. * * *

²¹ *Merkel*, 368 Mich at 13.

The general survey in this chapter will have indicated that the courts no longer hesitate, even in England, to declare legal relations to become active in the future, provided there is a tangible present interest in their determination and a useful purpose is thereby served."²²

The broad availability of declaratory relief as incorporated from *Sigal* and *Borchard* finds further support in Michigan where it has been stated that:

"The declaratory judgment statute is 'remedial, and is to be liberally construed and liberally administered' with a view of making the courts more serviceable to the people."²³

The declaratory judgment rule is intended to provide "a broad flexible remedy with a view to making the courts more accessible to the people."²⁴ Clearly the lower courts in the case at bar did not properly administer MCR 2.605 in a liberal flexible manner when they dismissed the Township's complaint for declaratory relief as unripe. The Township's access to the courtroom was improperly withheld. Declaratory relief is specifically designed to provide the type of relief requested by the Township through interpretation of presently disputed contract rights and obligations before actual harm occurs even where such rights may not have become presently fixed and would be prospective.²⁵ It is untenable to argue that it would not be useful to the Township to know when Visteon must negotiate the shortfall and when the shortfall must be paid.

In "THE NEXT STEP BEYOND EQUITY- THE DECLARATORY ACTION", 13 U. of Chi. L. Rev. 145, 175 (1946), the above cited Edwin Borchard further addressed the broad purpose of declaratory relief with regard to security, indicating that:

²² *Merkel*, 368 Mich at 13,14.

²³ *Nims*, 326 Mich at 375 (Citations omitted and emphasis added).

²⁴ *Shavers*, 402 Mich at 554 (Citations omitted).

²⁵ The Township does claim through use of a financial advisement company that the shortfall is a certainty.

“We come now to the manifold situations in which the plaintiff needs and seeks a confirmation or recognition of his rights, as a safeguard against future impairment. This stabilization of legal relations is designed to afford security and, by relieving the uncertainty aroused by conflicting adverse claims, to clarify the legal position, enable business relations to proceed without friction and with assurance, and preserve the social equilibrium. ...

...It also becomes frequently necessary to safeguard an existing right, even though its exercise may have to be postponed until further facts have become established, or notwithstanding the fact that a condition precedent has not been literally fulfilled. There may often be sound reasons, moreover, to prefer at the moment a declaration over a more drastic action-action which may indeed become unnecessary if it is possible to preserve a claimed right against impairment or loss by present assertion and judicial confirmation.”

The Township’s complaint for declaratory relief in this case was to protect its security in case of shortfall and to that extent the above purposes expressed by Borchard are apropos in support of a finding that the lower court should not have dismissed the complaint as not ripe.

An early case that addressed the multiple purposes of declaratory relief was *Flint v Consumers Power Co.*, 290 Mich 305; 287 NW 475 (1939). In *Flint*, this Court stated the following purposes for exercising declaratory relief:

1. “[R]ights to be determined by declaratory judgment or decree may be and perhaps usually are rights not in praesenti, but rights which are to come into full fruition or which will be fully vested at some future time.”²⁶
2. “If uncertainties and controversies arise between interested parties as to what their respective rights will be when such rights accrue or become vested, and to avoid needless hazards or possible losses, it is necessary to presently have decision of such uncertain or controverted rights, then there is actual need of and justification for declaratory adjudication.”²⁷
3. “If the parties will not be subjected to loss nor their rights impaired by instituting proceedings after the alleged rights accrue rather than resorting to declaratory proceedings prior to the actual accrual of such rights, there is no justification for asking a declaratory judgment or decree.”²⁸

²⁶ *Flint*, 290 Mich at 309.

²⁷ *Id.*, at 309-310 (Emphasis added).

²⁸ *Id.*, at 310.

4. “At least one of the tests of right to resort to a declaratory proceedings is the necessity for present declaratory judgment as a guide to plaintiff’s future conduct in order to preserve its legal rights.”²⁹
5. “The court will not decide as to future rights but will wait until the event has happened, unless special considerations otherwise require.”³⁰
6. “A declaratory judgment may be resorted to only when circumstances render it ‘useful and necessary’; where it will ‘serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.”³¹

It is clear from the above list that declaratory relief is not a rigid singular application but instead a flexible form of relief available under multiple circumstances, including for prospective contractual obligations. Further there is no limitation that it only be applicable to ambiguous contracts.

Continuing with the review of the purposes for declaratory judgments, it has been more recently stated that:

“Declaratory judgment has been heralded as one of the most significant procedural reforms of the century. Its purpose is to enable parties, in appropriate circumstances of actual controversy, to obtain an adjudication of their rights before actual injury occurs, to settle matters before they ripen into violations of law or a breach of contractual duty, to avoid a multiplicity of actions by affording a remedy for declaring in one expedient action the rights and obligation of all litigants, or to avoid the strictures associated with obtaining coercive relief, when coercive relief is neither desired nor necessary to resolve the matter. [Skiera v. Nat’l Indemnity Co., 165 Mich App 184, 189, 418 NW 2d 424 (1987), quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed.), Rule 2.605, p. 422.]

See also *Detroit v Michigan*, 262 Mich App 542, 550–551, 686 NW 2d 514 (2004) (“[D]eclaratory relief is designed to give litigants access to courts to preliminarily determine their rights.... [T]he ‘court is not precluded from reaching issues before actual injuries or losses have occurred.’ ”), quoting *Shavers v Attorney General*, 402 Mich 554, 588–589, 267 NW 2d 72 (1978).”³²

²⁹ *Id.*, at 310 (Citation omitted and emphasis added).

³⁰ *Id.*, at 310 (Citation omitted and emphasis added).

³¹ *Id.*, at 310 (Citation omitted and emphasis added).

³² *Lansing Sch Ed Ass’n* 293 Mich App at 515-516 (Emphasis added).

As demonstrated from all of the above addressing the purposes of declaratory judgment it is evident that: declaratory judgments were instituted as a new form of relief in Michigan to allow for greater access to the courts; it was in the State's legislative authority to design a new remedy for the courts to help settle controversies in recognition of the complexity of modern affairs; the remedy is intended to be administered in a broad and flexible manner with liberal construction; the remedy differs from others in not requiring actual injuries, losses or threatened harms to have first occurred; the remedy can be used to determine rights that will arise upon the happening of future events; the controversy in question must involve a present interest in the declaration that will serve a useful purpose; it can provide a recognition of rights to safeguard against future impairment; it can be used to stabilize legal relations such as those contained in contracts by relieving uncertainties and clarifying legal positions ahead of time; to settle controversies before they ripen in breach of contract; and a decision of the court is binding upon the parties and is *res judicata*.

In the case at bar, the Circuit Court and Court of Appeals view of declaratory relief was in direct hostility to this flexible understanding of the above expressed purposes. They failed to recognize that declaratory relief in this matter would have had a practical end in quieting or stabilizing the uncertain contractual relation between the parties as to present and future obligations regarding the shortfall security provision in the contract. The purposes for declaratory judgment are naturally subsumed into any interpretation of what constitutes an actual controversy under MCR 2.605. It is untenable how the Township's complaint for declaratory relief was dismissed as hypothetical and therefore unripe in light of these purposes. The courts improperly determined that simply because the situation might not come to fruition in the next three years or because it involves complex contingencies it is as a matter of law not ripe for

declaratory relief. As in this case, a contractual dispute of great magnitude is often considered well ahead of time so that the parties can shape their future conduct within the contractual requirements. The Township needed court guidance in how to proceed with regard to its shortfall security once the issue was contested by Visteon. Whether the contract is ultimately determined to be unambiguous is immaterial to this needed settlement of the dispute. As will be addressed next, ripeness as it relates to a declaratory judgment must be within the context of the above purposes and cannot operate to render these broad and flexible purposes nugatory.

C. Application of the Ripeness Doctrine Must Not Render the Purposes for Declaratory Judgment Nugatory.

From the above it is evident that declaratory judgments are a very special remedy in the law and intended to provide through liberal administration greater access to the courthouse to have actual controversies with regard to present and future rights resolved. Since its inception, declaratory judgments have provided for relief not previously found in the law and by nature addresses circumstances that under other causes of action might not be ripe. Strict application of some ripeness concepts is contrary to the purposes for declaratory relief. Ripeness must be applied in light of these purposes.

In the recent Court of Appeals case of *In re Reliability Plans of Electric Utilities for 2017-2012*³³, the court stated that:

“The ripeness doctrine requires that an actual injury be sustained by the plaintiff. *Van Buren Charter Twp. v Visteon Corp.*, 319 Mich.App. 538, 554, 904 N.W.2d 192 (2017).”³⁴

³³ *In re Reliability Plans of Electric Utilities for 2017-2012*, 2018 WL 3397823, Docket Nos. 340600, 340607 (2018). Published citation not yet available.

³⁴ *In re Reliability Plans of Electric Utilities for 2017-2012*, at *4.

This statement of the ripeness doctrine requiring actual injury is clearly contrary to the flexible purposes served by declaratory judgments (i.e., recognition of contract rights and obligations to stabilize a disputed situation and avoid future injury, etc.).

Other statements of the ripeness doctrine also present some issues in application to the purposes of declaratory judgments. It has been stated that:

“The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”³⁵

Obviously, the purposes for declaratory judgment would not entertain a purely hypothetical³⁶ claim but it should not be similarly said that the courts cannot consider contingent future events. This statement of ripeness is too narrow and not in harmony with the stated purposes of declaratory judgments. One such declaratory purpose served is to stabilize current legal relations by relieving uncertainties and clarifying legal positions ahead of time. This purpose is necessary to guide the parties’ actions moving forward. Most contracts contain provisions, such as in this case, where future happenings trigger certain rights and obligations. Parties to such contracts most often find it useful to plan ahead for these future contingencies and alter their current positions (i.e., budgeting, planning and taking actions). When disputes arise, these circumstances involving a present interest support declaratory relief, even though based upon contingent future events.

The best way to approach ripeness with regard to declaratory judgments is to simply treat it as included in the consideration of the actual controversy requirement in MCR 2.605. An

³⁵ *Huntington Woods v Detroit*, 279 Mich App 603, 615–616; 761 NW2d 127 (2008) (quotation marks and citation omitted).

³⁶ Meaning a claim that is just “conjecture”, “not real” or just “imagined as an example”. See Merriam-Webster online Dictionary, (August 2018), <https://www.merriam-webster.com/dictionary/hypothetical>.

appropriately broad test in this regard was stated in *City of Detroit v State*, 262 Mich. App. 542, 550-551; 686 N.W. 2d 514 (2004):

““The existence of an ‘actual controversy’ is a condition precedent to invocation of declaratory relief” and this requirement “prevents a court from deciding hypothetical issues.” *Shavers v Attorney General*, 402 Mich. 554, 588–589, 267 N.W.2d 72 (1978). But declaratory relief is designed to give litigants access to courts to preliminarily determine their rights. *Id.* at 588, 267 N.W.2d 72; MCR 2.605(A)(1). An actual controversy may exist where declaratory relief is needed to guide a plaintiff’s future conduct, and the “court is not precluded from reaching issues before actual injuries or losses have occurred.” *Shavers, supra* at 589, 267 N.W.2d 72.”

The actual controversy test from *City of Detroit*, citing *Shavers*, requires that the declaratory relief is needed to guide a plaintiff’s future conduct. This test incorporates ripeness because a court would not be deciding a hypothetical matter when considering relief that is needed to guide the plaintiff’s future conduct. This test is flexible enough to incorporate the multitude of purposes for a declaratory judgment.

In this case an actual controversy is self-evident in that there is a contractual provision in present dispute between the parties and declaratory relief is needed to guide the Township’s future conduct. The contract is not hypothetical. The dispute is not hypothetical. The security found in the shortfall language certainly is not hypothetical. There are millions of dollars at risk. The Township’s claim is a present claim that a shortfall will exist in the Township’s ability to make the bond payments and that Visteon must engage in negotiations with the Township pursuant to the contract terms. Even if there are future contingencies concerning the very real and troubling shortfall, the Township is entitled to have a court issue binding declaratory relief with regard to the provision in question to guide its future actions. This need does not change just because the court determines that the contract is unambiguous.³⁷ The Township must know

³⁷ Such interpretation of the contract by the Court of Appeals was actually an improper decision on the merits instead of a proper application of ripeness as expressed herein.

whether Visteon must start negotiations on the shortfall now and what the Township can count on receiving to avoid potential default on the subject bond payments. The Township should not have to wait until default occurs to pursue a declaration of the rights and obligations under the shortfall contract provision. A declaration by the court would have served the purposes of stabilizing the legal relations between the parties; safeguarding against future impairment; settling issues before they ripen into damages; and being generally useful to the Township moving forward.

It is of statewide importance to municipalities that a declaratory judgment may be necessary even when there are future contractual contingencies. For example, a township has a twenty year sewer flow contract with a neighboring city whereby the township has a right to certain capacity of the city's system to provide sewer services to its residents. The contract between the parties also provides for additional township flow if current capacity is reached and requires that the city will negotiate with the township on a new rate. With ten years remaining the township is almost at capacity and their expert determines that with current growth additional capacity will be needed in three years. The city disputes the contract interpretation and contends that the contract does not require them to negotiate until capacity is reached and even then they do not have to provide additional flow if a price is not agreed to by them. Although there may be no present breach or actual injury, a declaratory ruling is precisely what is needed by the township to determine that the city must presently negotiate excess capacity and whether the provision of additional flow is required. Although future contingencies are involved (i.e., continued growth), the declaratory relief would be needed to guide the actions of the township moving forward with regard to assuring additional available capacity when the time comes and the cost of such capacity. If the city is correct in its interpretation then the township may need to


construct its own system or partner with a different community. These sewer activities require budgeting of large amounts of money and planning years in advance of when capacity is reached. What is clear is that the township should not have to just wait until such later date and then claim a breach and actual loss. Similar to the case at bar, it would be too late at the date of default to properly handle the matter.

D. Conclusion

As discussed herein, the purposes for declaratory judgments are intended to provide a broad and flexible remedy that must be liberally administered to allow greater access to the courts. Actual controversies, including ripeness, must take into consideration the intended purposes of declaratory judgments. In this case, the lower courts took too narrow an approach to the purposes served by declaratory judgment and improperly barred the Township's complaint on the basis of ripeness. A declaratory judgment is like preventive medicine, intended to avoid an actual injury.

For the reasons set forth above, and in the Township's Briefs, Amici Curiae urge this Honorable Court to grant leave and reverse the opinion of the Court of Appeals.

BAUCKHAM, SPARKS, THALL,
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Dated: August 29, 2018

ATTACHMENT A

and of the federal act herein mentioned, and said report shall contain an explicit statement of the expenditures of all moneys, both federal and State, for the purposes mentioned in this act.

SEC. 11. All acts and parts of acts contravening the provisions of this act are hereby repealed.

Approved May 2, 1919.

[No. 150.]

AN ACT to authorize courts of record to make binding declaration of rights.

The People of the State of Michigan enact:

Declaration
and determi-
nation.

SECTION 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

How
obtained.

SEC. 2. Declarations of rights and determinations of questions of construction, as herein provided for, may be obtained by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or equity side of the court as the nature of the case may require, and where a declaration of rights is the only relief asked, the case may be noticed for early hearing as in the case of a motion.

Application
for further
relief.

SEC. 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order.

When issues
submitted
to jury.

SEC. 4. When a declaration of rights, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such inter-

rogatories and answers shall constitute a part of the record of the case.

SEC. 5. Unless the parties shall agree by stipulation as to the allowance thereof, costs in proceedings authorized by this act shall be allowed in accordance with such special rules as the supreme court may make, and in the absence of such rules the practice followed in ordinary cases at law or in equity shall be followed wherever applicable, and when not applicable, the costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party. Costs.

SEC. 6. This act is declared to be remedial, and is to be liberally construed and liberally administered with a view of making the courts more serviceable to the people.

Approved May 2, 1919.

[No. 151.]

AN ACT to provide for the fixing of salaries of clerks and deputy clerks in all justices' courts heretofore created by local or special acts of this State who receive salaries in lieu of fees.

The People of the State of Michigan enact:

SECTION 1. All clerks and deputy clerks in all justices' courts heretofore created by local or special acts of this State who receive salaries in lieu of fees shall receive the salaries provided for in said acts, and such additional salary as is provided for in the following sections. Additional salary.

SEC. 2. In those cases where the county pays the salary, the board of supervisors of the several counties of this State, in which said clerks and deputy clerks exercise their powers of office, may by a majority vote of all members elect, give such additional salary to said clerks and deputy clerks as they may deem just. Where county pays.

SEC. 3. In those cases where the city pays the salary, the common council or other legislative body of the city in which said clerks and deputy clerks exercise their powers of office, may, by a majority vote of all members elect, give such additional salary to said clerks and deputy clerks as they may deem just. Where city pays.

Approved May 2, 1919.

ATTACHMENT B

Levy and
assessment.

equal to the difference between the total of such taxes hereinbefore imposed plus all other credits allowed by the federal act for taxes paid the state governments, and eighty per centum of the tax which may be imposed by said federal revenue act. Such taxes are hereby imposed upon the transfers in estates of every person who, at the time of death, was a resident of this state. The purpose of this section is to obtain the benefit of the credit allowed under the provisions of title three, section three hundred one, sub-section B of the United States revenue act of nineteen hundred twenty-six, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose. Such additional tax shall be levied and assessed upon transfers and against the interests of beneficiaries liable for inheritance taxes, who would be liable to pay the federal tax as assessed before deducting the eighty per centum provided in said federal act. It shall be the duty of executors and administrators of estates subject to the payment of a federal estate tax, to file duplicates of the United States tax returns with the probate court. The provisions of this section shall apply only to the estates of decedents dying at or after the effective date of this amendment. This section shall not be affected by any subsequent repeal or changes in the federal revenue act of nineteen hundred twenty-six after the effective date hereof, nor any amendments thereto, and if the United States should alter, change or discontinue the imposition of the estate, legacy or succession taxes, the tax herein provided shall continue to be levied, imposed and collected upon estates of decedents resident of this state as hereinbefore provided.

This act is ordered to take immediate effect.
Approved April 8, 1929.

[No. 36.]

AN ACT to authorize courts of record to make binding declarations of rights.

The People of the State of Michigan enact:

May make
binding dec-
larations
of rights.

SECTION 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may, in cases of actual controversy, make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination at the instance of anyone interested in the controversy, of the con-

struction of any statute, municipal ordinance or other governmental regulation, or any deed, will or other instrument in writing, and a declaration of the rights of the parties interested, but the foregoing enumeration does not exclude other cases of actual controversy.

SEC. 2. Declarations of rights and determinations of questions of construction, as herein provided for, may be obtained ^{How obtained.} by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or equity side of the court as the nature of the case may require, and where a declaration of rights is the only relief asked, the case may be noticed for early hearing as in the case of a motion.

SEC. 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by motion to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order. ^{Application for further relief.}

SEC. 4. When a declaration of rights, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case. ^{How issue submitted to jury.}

SEC. 5. Unless the parties shall agree by stipulation as to the allowance thereof, costs in proceedings authorized by this act shall be allowed in accordance with such special rules as the supreme court may make, and in the absence of such rules the practice followed in ordinary cases at law or in equity shall be followed wherever applicable, and when not applicable, the costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party. ^{Costs, how allowed.}

SEC. 6. Declarations of rights made under this act shall have the effect of final judgments.

SEC. 7. This act is declared to be remedial, and is to be ^{Declared remedial.} liberally construed and liberally administered with a view of making the courts more serviceable to the people.

Approved April 8, 1929.

STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Michigan Court of Appeals
STEPHENS, P.J., and SAAD and METER, JJ.

VAN BUREN CHARTER
TOWNSHIP,

Supreme Court No. 156018

Plaintiff-Appellant,

Court of Appeals No. 331789

v

Wayne County Circuit Court
No. 15-008778-CK

VISTEON CORPORATION,

Defendant-Appellee,

MOTION OF THE MICHIGAN TOWNSHIPS ASSOCIATION
AND THE GOVERNMENT LAW SECTION OF THE STATE
BAR OF MICHIGAN TO EXTEND TIME TO FILE AN AMICI CURIAE BRIEF

NOW COME the Michigan Townships Association and the Government Law Section of the State Bar of Michigan, by and through their attorneys, Bauckham, Sparks, Thall, Seeber & Kaufman, P.C., and respectfully request that this Honorable Court grant this Motion to extend the time to file an amici curiae brief in support of the Appellant for the following reasons:

1. The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in a large number of state and federal cases presenting issues of statewide significance to Michigan townships. The attached amicus curiae brief in this matter is authorized by the MTA.

2. The Government Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 692 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commission, and special authorities. Although the section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to government law. The Government Law Section provides education, information and analyses about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs, and publications. The Government Law Section is committed to promoting the fair and just administration of government law. In furtherance of this purpose, the Government Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The section has filed numerous amicus curiae briefs in state and federal courts.

The Government Law Section Council, the decision-making body of the Section, is currently comprised of twenty-one members. Filing of this amicus curiae brief was authorized on August 16, 2018 by the Council. The position expressed in this amicus curiae brief is that of the Government Law Section only and is not the position of the State Bar of Michigan.

3. That the MTA and the Government Law Section were not previously involved in this case and did not become immediately aware of this Honorable Court's May 11, 2018 Order to schedule oral argument on the application and requiring the parties to submit supplemental briefs. The MTA and the Government Law Section subsequently became aware of this case and said Order. Following respective meetings, the MTA and the Government Law Section authorized the preparation of the attached brief representing issues of statewide importance to

government corporations. The undersigned received authorization for this brief from the Government Law Section on August 16, 2018.

4. This Honorable Court's May 11, 2018 Order requiring the parties to address "whether the Court of Appeals properly determined that a declaratory judgment was not ripe under MCR 2.605" presents issues of major importance to government corporations in Michigan. Particularly, local governments frequently request declaratory rulings to resolve disputes between the parties over the meaning of contract terms well in advance of specified situations in order to stabilize uncertainties and to properly plan and budget. Local governments enter into many long term complex contracts to provide public infrastructure, public services, and economic development among other things.¹ It is essential for there to be a clear understanding of the terms of these agreements and, when controversies arise, to have recourse to the court system for declaratory judgments settling the parties' rights and obligations. All too often current disputes arise regarding contract provisions that apply to actions years down the road, but even under these circumstances, the parties still need current interpretation and resolution to guide their actions moving forward. The above issue directed by the court will directly impact these circumstances and the MTA and the Government Law Section have a strong interest in assuring a proper interpretation of the appropriate uses of declaratory judgments. The Court of Appeals erroneous application of the ripeness doctrine will severely hamper a local government's ability to effectively seek declaratory relief over disputed contract terms. The attached amici curiae brief will provide edification and assistance to this Honorable Court's consideration of this extremely

¹ For example: 50 year contracts for the conditional transfer of property between municipalities, joint fire department agreements; water and sewer franchise agreements between municipalities; garbage and recycling contracts; long term funding commitments for economic development; road construction agreements; urban cooperation agreements between municipalities; bond financing agreements; and many other complex agreements for the public benefit.

important declaratory judgment issue.

5. Extension of the time to file the amici curiae brief and acceptance of the amici curiae brief will not be prejudicial to any party or delay the case as the brief is attached hereto.

6. That leave to file amici curiae briefs is to be freely granted, as courts generally welcome such assistance in resolving the issues before them. See E.G. *State of Michigan v Hermiz*, 462 Mich 71, 75, n10: 611 NW2d 783 (2000).

WHEREFORE, the Michigan Townships Association and Government Law Section of the State Bar of Michigan respectfully request that their Motion to Extend Time to File an Amici Curiae Brief be granted and that their amici curiae brief presented herewith be accepted.

Respectfully submitted,

By: 

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Dated: August 29, 2018