

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

TONY KEENE,

Plaintiff,

v.

CITY OF ANN ARBOR,

Defendant.

Case No. 11-182-cz

Hon. Melinda Morris

_____/

Tony Keene
In Pro Per
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DEFENDANT CITY OF ANN ARBOR'S RESPONSE TO PLAINTIFF'S "PETITION FOR PRELIMINARY INJUNCTION AGAINST CITY OF ANN ARBOR CHAPTER 71" AND BRIEF IN SUPPORT OF RESPONSE

Defendant City of Ann Arbor ("the City"), through the Office of the City Attorney, asks that this Court deny Plaintiff Tony Keene's "Petition for Preliminary Injunction against City of Ann Arbor Chapter 71" ("Plaintiff's Petition) and dismiss this case in its entirety for the reasons stated below.

INTRODUCTION

For reasons of lack of ripeness, separation of powers, and failure to state a claim, Plaintiff's request for a temporary restraining order to enjoin the Ann Arbor City Council from further considering a proposed ordinance to license medical marijuana businesses should be denied and his request for further injunction and "Court oversight" of the City's legislative process should be dismissed.

STATEMENT OF FACTS

For purposes of this response, the facts as alleged in Plaintiff's Petition may be taken as true. They are as follows:

Two proposed ordinances relating to medical marijuana – a zoning ordinance and a licensing ordinance – are pending before City Council. “The definition for ‘cultivation facility’ is different in the proposed zoning ordinance than as defined in the proposed licensing ordinance.” Plaintiff's Petition ¶ 1. “City Council has not outlined any detailed operational procedures of enforcement logistics, and therefore has no estimate on what the cost of any proposed licensing scenario would be.” Plaintiff's Petition ¶ 2.

ARGUMENT

A. LACK OF RIPENESS.

Plaintiff's request for a temporary restraining order should be denied and his Petition¹ requesting an injunction and “Court oversight” of the City's legislative process should be dismissed because Plaintiff's challenge is not ripe for adjudication. As Plaintiff concedes, the legislation he wishes to challenge is merely proposed. (Plaintiff's Petition ¶¶ 1-2.) The proposed legislation has not yet been enacted and may change prior to enactment or not be enacted at all.

The Michigan Supreme Court has held that “[g]enerally, 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.” *Hendee v Putnam Twp*, 486 Mich 556, 586 (2010) (citations and quotations omitted). The Court also held that “[t]he rationale of the ripeness doctrine in zoning actions rests upon the idea that

¹ Plaintiff has filed in pro per a “Petition for Preliminary Injunction against City of Ann Arbor Chapter 71,” but has filed no complaint. The City therefore treats this “petition” as Plaintiff's pleadings and a motion for preliminary injunction and responds accordingly.

courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.” *Id.* at 587.

Again, as Plaintiff acknowledges, the zoning legislation is merely a draft, and therefore the full extent of any eventual regulation has not been “finally fixed.” Furthermore, Plaintiff’s facial challenge to a non-existent City ordinance cannot be ripe “because such challenges attack the very *existence or enactment* of an ordinance.” *Paragon Properties Co v Novi*, 452 Mich 568, 577 (1996) (emphasis added). Here, the challenged “ordinance,” Chapter 71 or Ann Arbor City Code, does not exist because it has not been enacted. Plaintiff’s request for a temporary restraining order should therefore be denied and his petition dismissed because his claims are unripe.

B. SEPARATION OF POWERS.

Not only are Plaintiff’s claims unripe, but Plaintiff is also precluded from obtaining his requested relief by the constitutional doctrine of separation of powers. In *Wayne Co Sheriff v Wayne Co Bd of Comm’rs*, 148 Mich App 702, 704 (1983), the Court of Appeals invoked the separation of powers doctrine in declining to issue declaratory relief against county commissioners for their budget decision to eliminate a division of the sheriff’s office, stating as follows:

“Under established separation of powers doctrine, legislative power must be insulated from judicial interference. This Court has consistently held that in disputes such as the present one, the judiciary will not interfere with discretionary actions of a legislative body such as defendant Board of Commissioners.” *Id.*

In *Northwood Properties Co v Perkins*, 325 Mich 419, 423-424 (1949), the Michigan Supreme Court reversed the Circuit Court’s order directing the city, its mayor, and its city commissioners to change the zoning on the plaintiff’s property by amending the city’s zoning

ordinance so that plaintiff could get the building permit he sought. In no uncertain terms, the Supreme Court held the trial court erred by attempting to insert itself into the legislative process, stating as follows:

“While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another. The court erred in seeking to compel the defendant mayor and city commission members to amend the ordinance.” *Id.* (citations omitted).

Plaintiff seeks very similar relief in this case, asking this Court to halt “further readings of the proposed new ordinance” by City Council and to compel City Council to produce “Court supervised definitions” for inclusion in the ordinance as well as “a detailed licensing administrative and enforcement budget.” (Plaintiff’s Petition ¶¶ 1-2.) The doctrine of separation of powers, as applied in *Wayne Co Sheriff, supra*, and *Northwood Properties, supra*, squarely precludes Plaintiff from obtaining either an injunction prohibiting City Council from legislative deliberation or “Court oversight” of the City’s legislative process. Since Plaintiff has no valid grounds for his requested relief, his petition should be dismissed.

C. PRELIMINARY INJUNCTION STANDARD.

Plaintiff’s request for a temporary restraining order preliminary injunction also fails under the “four-factor analysis:”

Whether a preliminary injunction should issue is determined by a four-factor analysis: harm to the public interest if an injunction issues; whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. This inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant.” *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93. (Citation omitted)

As described above, Plaintiff cannot show that he is likely to prevail on the merits because his claims are both unripe and precluded by the doctrine of separation of powers. Plaintiff's request for a temporary restraining order also fails on the other three factors. Severe harm would befall the public interest if the City is prevented from exercising its legislative discretion, while Plaintiff has not articulated any particular harm, let alone irreparable harm, that would befall him if an injunction were not issued. Plaintiff therefore has failed to meet the threshold for a preliminary injunction.

D. SUMMARY DISPOSITION FOR FAILURE TO STATE A CLAIM.

Given that the only facts pled by Plaintiff do not entitle him to the preliminary injunctive relief he seeks, this case is also subject to dismissal for failure to state a claim under MCR 2.116(C)(8). Summary disposition against a party for failure to state a claim is appropriate when accepting as true all facts pled by the party no claim for relief could be granted. *Henry v Dow Chemical Co*, 473 Mich 63, 71 (2005). In *Henry, supra*, the Supreme Court found Plaintiffs had no likelihood of success on the merits of their request that the courts institute a medical monitoring program, which in turn made appropriate the dismissal of their equitable claim under MCR 2.116(C)(8). *Id*, at 96-97

As demonstrated above, Plaintiff cannot prevail on the merits of his request for the Court to enjoin further action by City Council on the proposed ordinances at issue for reasons of ripeness and separation of powers. The proposed ordinances and certain language Plaintiff objects to in them are the only facts he has pled to support his claim. Thus, as in *Henry, supra*, Plaintiff's petition must be dismissed for failure to state a claim.

CONCLUSION

For the reasons stated above, the City respectfully requests that Plaintiff's request for temporary restraining order and preliminary injunction be denied. The City further requests that Plaintiff's Petition requesting an injunction and "Court oversight" of the City's legislative process with respect to pending medical marihuana legislation be dismissed under MCR 2.116(C)8 and (I)(2).

Had Plaintiff's filing been submitted by an attorney, the attorney would clearly be subject to sanctions under MCR 2.114. With appropriate regard for Plaintiff's pro per status, the City requests that this Court inform Plaintiff of the applicability of MCR 2.114 to any party, whether attorney or in pro per, and that violation of this Court Rule carries the possibility of sanctions.

Dated: February 25, 2011

Respectfully submitted,

By: 

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PROOF OF SERVICE

I hereby certify that I mailed, first-class postage prepaid, a true and correct copy of the foregoing document to the above-named counsel for Plaintiff at the address listed above, this 25th day of February, 2011.


Jane Allen
Legal Assistant