STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MARK HACKEL, Macomb County Executive,

Plaintiff,

vs. Case No. 2012-0916-CZ

MACOMB COUNTY COMMISSION,

Defendant.

_____/

OPINION AND ORDER

The parties have filed cross-motions for summary disposition in this matter.

I. BACKGROUND

Plaintiff filed this complaint on February 29, 2012. Plaintiff alleges that defendant hasenacted an ordinance and several resolutions which purport to curtail his authority to enter intocontracts on behalf of the county. Specifically, plaintiff challenges the legality of MacombCounty Ordinance 2012-1, Resolution 12-1, Resolution 11-23, and two appropriations issued bythe Board of Commissioners ("the Board"). The ordinance and resolutions establish policies andprocedures concerning County contracts, and require submission to – and approval by – theBoard under certain circumstances. See generally Macomb County Ordinance 2012-1,

Resolution 12-1, and Resolution 11-23. Plaintiff alleges that defendant's actions run afoul of the Macomb County Home Rule Charter ("the County Charter" or "the Charter"); violate the separation of powers; violate the Uniform Budget and Accounting Act ("the UBAA"), MCL 141.421 *et seq.*;[1] and are void for vagueness.

This Court issued a preliminary injunction on March 26, 2012, enjoining defendant from enforcing Ordinance 2012-1, Resolution 12-1, or Resolution 11-23 during the pendency of these proceedings. The Court then conducted a hearing on the parties' cross-motions for summary disposition on April 27, 2012. At the conclusion of the hearing, the Court took this matter under advisement.

II. STANDARD OF REVIEW

Plaintiff moves for summary disposition under MCR 2.116(C)(9) and (C)(10). Summary disposition is warranted pursuant to MCR 2.116(C)(9) when "[t]he opposing party has failed to state a valid defense to a claim asserted against him or her." A summary disposition motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-plead allegations as true. *Id.* "If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition is proper." *Village of Dimondale v Grable,* 240 Mich App 553, 564; 618 NW2d 23 (2000).

1 Plaintiff's complaint contains fifteen separate numbered counts: Count I, Contracting Policy Declaratory Judgment: Charter Sections 4.4(d) and 4.4(j); Count II, Contracting Policy Declaratory Judgment: Separation of Powers; Count III, Contracting Policy Declaratory Judgment: Charter Section 8.10; County IV, Contracting Policy Declaratory Judgment: Charter Sections 7.4 and 8.6 and the UBAA; Count V, Contracting Policy Declaratory Judgment: Vagueness; Count VI, Ordinance 2012-1 Declaratory Judgment: Charter Sections 4.4(d) and 4.4(j); Count VII, Ordinance 2012-1 Declaratory Judgment: Separation of Powers; Count VIII, Ordinance 2012-1 Declaratory Judgment: Charter Section 8.10; Count IX, Ordinance 2012-1 Declaratory Judgment: Charter Sections 7.4 and 8.6 and the UBAA; Count X, Resolution 11-23 Declaratory Judgment; Count XI, Resolution 11-23 Declaratory Judgment: Vagueness; Count XII, Restricted Appropriations Declaratory Judgment; Count XIII, Contract Services Appropriation Declaratory Judgment; Count XIV, Preliminary and Permanent Injunction; and Count XV, Attorney Fees.

Summary disposition is warranted pursuant to MCR 2.116(C)(10) where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The court must review the pleadings, affidavits, depositions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004).

Defendant has filed a cross motion for summary disposition, and in addition to requesting summary disposition under MCR 2.116(C)(10), also cites MCR 2.116(C)(7) and (C)(8). Summary disposition is appropriate pursuant to MCR 2.116(C)(7) if "[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." In reviewing a motion under MCR 2.116(C)(7), the Court accepts all well-pled factual allegations as true and construes in them in the light most favorable to the nonmoving party. *Stablein v Schuster*, 183 Mich App 477, 480; 455 NW2d 315 (1990). "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr,* 242 Mich App 703, 706; 620 NW2d 319 (2000); *Guerra v Garratt,* 222 Mich App 285, 289; 564 NW2d 121 (1997). If, however, a genuine issue of material fact exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Guerra, supra* at 289.

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim on which relief can be granted. *Carter v Ann Arbor*

City Attorney, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

III. POSITIONS OF THE PARTIES

Plaintiff claims that the County Charter grants the Board of Commissioners limited authority to enter into legislative contracts. Under the Charter, he claims to have broad "incidental power" to contract and sole control over the administration of the County budget. He contends that the Board of Commissioners' authority with respect to procurement transactions is very limited, and he claims that Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 all exceed the scope of the Board's authority. Plaintiff further contends that his control over the County Finance Department also implies control over procurement transactions. Plaintiff denies that the Board of Commissioners has any authority to issue directives to a coequal branch of government. Plaintiff contends that the contracting policy established by the Board violates the separation of powers. He contends that the sole authority to spend appropriated funds rests with the Macomb County Executive ("the Executive") pursuant to the UBAA and general separation of powers principles. He avers that the UBAA is controlling even in the face of conflicting charter provisions. Plaintiff also contends that Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 are void for vagueness. Plaintiff avers that certain appropriations by the Board also infringe upon the Executive's authority to develop proposed legislation. Finally, plaintiff requests reimbursement for his attorney fees at County expense.

Defendant denies that the separation of powers doctrine applies to local governments in Michigan. Furthermore, even if the separation of powers doctrine were applicable, defendant contends that the power to enter into contracts is a function of the legislative branch. Defendant next argues that the plain language of the County Charter vests the power to approve contracts in the Board of Commissioners. Defendant avers that the power to approve contracts necessarily implies a corollary power to disapprove contracts. Defendant denies that the Executive can exercise an "incidental" power which has been expressly conferred on the Board. Defendant further denies that the Executive has the power to approve contracts based on his duty to sign contracts, his control of the finance department, or his duty to administer the County budget. Defendant contends that the Board's power to approve contracts is a necessary check on the Executive's power. Defendant also argues that the proceedings before the Charter Commission lend further support to its interpretation of the County Charter. Defendant next argues that the UBAA is not controlling, since the County Charter, along with the ordinance and resolutions at issue, contravene the UBAA's provision that a chief administrative officer has control of expenditures.

IV. ANALYSIS

A. Historical Development of the Macomb County Charter

Prior to addressing the substance of the parties' motions, the Court finds that, under the circumstances, a brief survey of the historical development of county government in Michigan is useful to correctly frame the issues in this case. As a general matter, it is important to note that "[l]ocal governments have no general or inherent powers. Their limited powers rather, are only those expressly conferred upon them by the Constitution of the State of Michigan, by acts of the

Legislature, or necessarily implied therefrom." *Crain v Gibson*, 73 Mich App 192, 200; 250 NW2d 792 (1977).

County boards of supervisors were first established by Michigan's territorial legislative council in 1827. *County Organization in Michigan*, prepared by the Citizens Research Council of Michigan (1989) at 2. Article 10, Section 6 of Michigan's Constitution of 1850 provided that "[a] board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law." Section 7 of Article 10 provided that "[c]ities shall have such representation in the board of supervisors of the counties in which they are situated, as the legislature may direct."

The composition and powers of the county board of supervisors remained largely unchanged under the Constitution of 1908. Article 8, Section 7 of the 1908 Constitution provided that "[a] board of supervisors, consisting of 1 from each organized township, shall be established in each county, with such powers as shall be prescribed by law. Cities shall have such representation in the board of supervisors of the counties in which they are situated as may be provided by law." Section 8 provided that "[t]he legislature may by general law confer upon the boards of supervisors of the several counties such powers of a local, legislative and administrative character, not inconsistent with the provisions of this constitution, as it may deem proper."

Similarly, Article 7, Section 7 of the Constitution of 1963 provides that "[a] board of supervisors shall be established in each organized county consisting of one member from each organized township and such representation from cities as provided by law." The Michigan Supreme Court subsequently determined that the requirement that county supervisors consist of

members from each organized township conflicted with the United States Constitution as interpreted by the United States Supreme Court in *Avery v Midland County*, 388 US 905; 87 S Ct 2106; 18 L Ed 2d 1345 (1967). See *In re Advisory Opinion re Constitutionality of PA 1966, No 261*, 380 Mich 736, 740-741; 158 NW2d 497 (1968). Accordingly, County commissioners are now apportioned pursuant to the provisions of MCL 46.401, *et seq*.

Article 7, Section 8 of the Constitution of 1963 concerns the powers of a general law county's board of supervisors: "[b]oards of supervisors shall have legislative, administrative and such other powers and duties as provided by law." It is worth noting that this provision does not confer "executive" authority on the board of supervisors, or otherwise provide for the appointment of an executive officer at the county level. See *Crain*, *supra* at 200 ("The limited powers that a County Board of Commissioners does have are legislative and administrative, but are not executive in the sense of the executive department in the tripartite division of state government."). The Court of Appeals has observed that "[n]either the Board collectively, nor the Chairman thereof, are chief executives of the county." *Id*.

In accordance with the Constitution of 1963, the legislature defined the powers of a county board of commissioners through MCL 46.11. This section contains a very detailed enumeration of powers, including several provisions which imply that the board of commissioners of a general law county has the power to enter into contracts:

> A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following:
> (a) Purchase or lease for a term not to exceed 20 years, real estate necessary for the site of a courthouse, jail, clerk's office, or other county building in that county.
> . . .
> (c) Authorize the sale or lease of real estate belonging to the county, and prescribe the manner in which a conveyance of the real estate is to be executed.
> (d) Erect the necessary buildings for jails, clerks' offices, and other county buildings, and prescribe the time and manner of erecting them.

> . . .
>
> (*l*) Represent the county and have the care and management of the property and business of the county if other provisions are not made.
>
> (m) Establish rules and regulations in reference to the management of the interest and business concerns of the county as the board considers necessary and proper in all matters not especially provided for in this act or under the laws of this state. The county board of commissioners shall not audit or allow a claim, including a bill or charge, against the county unless the claim has been filed with the county clerk of the county before the fourth day of a regular meeting of the board, or before the second day of an adjourned or other meeting, the claim is contracted by the board during the session of the board or the claim is for mileage and per diem of the members of the board. The county clerk shall keep a book of all claims in the order in which the claims are presented, giving the name of each claimant and the amount and date of presentation of each claim. The book, after the time prescribed for the presentation of claims, shall be delivered to the chairperson for the use of the board. At the October session, the board, by a vote of 2/3 of the members, may receive and allow accounts that have wholly accrued during the session.
>
> . . .
>
> (q) Acquire by exchange land needed for county purposes, including the purchase of land to be used in exchange for other land of approximate equal value owned by the federal government and needed for county purposes.
>
> . . .

MCL 46.11. The legislature further provided that

> The Board of Supervisors in each of the several counties may appoint a county purchasing agent and such other representatives, agents and employees for its county as may be deemed necessary by it, to carry out any of the powers granted by this act, or by any other law of the state: Provided, that the provisions of this section shall not apply in any county in which county purchasing agents and other county representatives, agents, and employees are now appointed or elected under the provisions of any general or local act.

MCL 46.13a.

Pursuant to the foregoing provisions – and arguably in excess of the authority provided therein, see *infra* – the Macomb County Board of Commissioners exercised oversight over all county contracts prior to the enactment of the Macomb County Charter. See, e.g., Defendant's Superseding Brief at 3 ("before the Charter, the Commission (or its designees) negotiated all

county contracts").

In addition to the foregoing provisions, the Constitution of 1963 contained a new provision enabling counties to adopt a charter form of government:

> Any county may frame, adopt, amend or repeal a county charter in a manner and with powers and limitations to be provided by general law, which shall among other things provide for the election of a charter commission. The law may permit the organization of county government in form different from that set forth in this constitution and shall limit the rate of ad valorem property taxation for county purposes, and restrict the powers of charter counties to borrow money and contract debts. Each charter county is hereby granted power to levy other taxes for county purposes subject to limitations and prohibitions set forth in this constitution or law. Subject to law, a county charter may authorize the county through its regularly constituted authority to adopt resolutions and ordinances relating to its concerns.
>
> The board of supervisors by a majority vote of its members may, and upon petition of five percent of the electors shall, place upon the ballot the question of electing a commission to frame a charter.
>
> No county charter shall be adopted, amended or repealed until approved by a majority of electors voting on the question.

Const 1963, art 7, § 2.

Despite the inclusion of this provision in the Constitution, the legislature took some time to enact a "general law" whereby a county charter could be adopted. The Charter County Act, MCL 45.501 *et seq*. (1966 PA 293) became effective on March 10, 1967. Pertinent to the case at bar, the Act provides that a county charter must contain certain mandatory provisions, including the following:

> In a county having a population of less than 1,500,000, for a salaried county executive, who shall be elected at large on a partisan basis, and for the county executive's authority, duties, and responsibilities. In a county having a population of 1,500,000, or more, a county charter adopted under this act shall provide for a form of executive government described and adopted under section 11a.

MCL 45.514(1)(a). In a county with population of 1,500,000 or more, the Act specifies mandatory minimum powers of the county executive. MCL 45.511a(8). However, the Act does

not specify what the executive's "authority, duties, and responsibilities" must consist of in a county having a population less than 1,500,000. See generally MCL 45.501 *et seq.*

Only two counties in Michigan have adopted the Charter County form of government: Wayne County and Macomb County.[2] Wayne County adopted a county charter on November 3, 1981, and has amended its charter on several occasions thereafter. See Wayne County Charter at 76. The Court takes judicial notice of the fact that Wayne County's population exceeds 1,500,000, and that the minimum mandatory functions of the executive as set forth in MCL 45.511a(8) apply.

The Macomb County Charter was approved by the voters and became effective on January 1, 2011. Because Macomb County's population is less than 1,500,000, the mandatory executive functions set forth in MCL 45.511a(8) are inapplicable. As such, the question of whether the Executive has the power to enter into contracts without the approval of the Board of Commissioners is a matter of first impression. In determining the proper spheres of the Board of Commissioners and the Executive, the Court must look both to the language of the Charter itself and to the general law of the State of Michigan.

B. Plain Language of the Macomb County Charter

1. General Rules of Statutory Interpretation

The general principles of statutory interpretation apply to the fundamental law (i.e., the charter) of a local government. See, e.g., *Brady v City of Detroit*, 353 Mich 243, 248; 91 NW2d 257 (1958) ("In construing provisions of the fundamental law of the city the general rules recognized in cases involving the interpretation of statutes are applicable."). As the *Brady* Court observed,

2 In addition, Oakland and Bay counties have adopted a "unified" form of county government. *County Organization in Michigan*, *supra* at 7, pursuant to provisions of PA 139 of 1973.

> The inquiry must be directed to ascertaining the intention of the people of Detroit in the adoption of their charter. Provisions pertaining to a given subject matter must be construed together, and if possible harmonized. It may not be assumed that the adoption of conflicting provisions was intended. One provision may not be construed in such manner as to render another of no effect if such result can be avoided. It is also true that under ordinary circumstances general provisions must yield to a specific mandate.

Id. at 248. The *Brady* Court further observed that

> Additional words of qualification needed to harmonize a general and a prior special provision in the same statute should be added to the general provision, rather than to the special one. Under these rules, where there is, in the same statute, a general prohibition of a thing and a special permissive recognition of the existence of the same thing under regulation, the particular specified intent on the part of the legislature overrules the general intent incompatible with the specific one.

Id. at 249, quoting 50 Am Jur at 371-372 (quotation marks omitted). Additionally, "[u]nder the statutory construction doctrine known as ejusdem generis, where a general term follows a series of specific terms, the general term is interpreted 'to include only things of the same kind, class, character, or nature as those specifically enumerated.'" *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004) (citation omitted).

2. Section 4.4(d)

Keeping the aforementioned principles of statutory construction in mind, the Court now turns to the language of the Charter itself. As noted above, the County Charter provides that "the Commission may . . . [a]pprove contracts of the County." Macomb County Charter, Section 4.4(d). "The normal meaning of 'approve' with relation to government action implies the power to disapprove. . . . [D]iscretion not necessarily implied but normally is." *Alco Universal Inc v City of Flint*, 386 Mich 359, 362; 192 NW2d 247 (1971).

Although the language of Section 4.4(d) is permissive rather than mandatory, and does

not expressly include a power to "disapprove" contracts, the most straightforward reading of this section suggests that the Board of Commissioners does in fact have the power to both approve and disapprove contracts. However, by enacting Ordinance 2012-1, Resolution 12-1, and Resolution 11-23, the Board of Commissioners went beyond this permissive authority to approve (or disapprove) contracts and has also sought to curtail the Executive's ability to independently enter into contracts on behalf of the County.

This begs the question as to whether the power to approve contracts under the County Charter is a function of the Board of Commissioners which the Board may delegate to the Executive, or whether the Executive independently has the power to enter into contracts on behalf of the County. Having carefully reviewed the pertinent provisions of the County Charter, the Court concludes that the Executive has the power to approve contracts independent of any delegation by the Board of Commissioners.

3. Section 3.5

First of all, Section 3.5 of the County Charter provides the Executive with "the authority, duty, and responsibility" to "[s]upervise, coordinate, direct, and control all 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." Macomb County Charter at Section 3.5(a). The Executive also has the duty to "exercise all incidental powers necessary or convenient for the discharge of the duties and functions specified in this Charter or lawfully delegated to the Executive." Macomb County Charter at Section 3.5(c).

While subsections (a) and (c) do not explicitly confer the power to enter into contracts on

the Executive, they do confer the authority to "supervise, coordinate, direct, and control" County departments, along with "incidental" power which is "necessary" or "convenient." The Executive's duty to "supervise" and "coordinate" County departments is plainly irrelevant to the issue at hand. However, the Executive's duty to "direct" and "control" County departments, does impliedly include the power to enter into contracts. Neither of these terms is defined in the Charter itself. "When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal." *McCormick v Carrier,* 487 Mich 180, 191–192; 795 NW2d 517 (2010) (quotation omitted).

"Direct" has been defined as "to manage the affairs of; guide; conduct; regulate; control." *Webster's New Universal Unabridged Dictionary Second Edition* (1972) (emphasis added). "Control" is defined as "to exercise authority over; direct; command." *Id*. There can be little question that entering into contracts when necessary for the operation of a County department would plainly fall within the purview of "managing the affairs of" that department. Further, the power to enter into contracts on behalf of a department plainly constitutes an exercise of authority over that department.

Turning to subsection (c), the terms "incidental," "necessary" and "convenient" are also undefined in the Charter. "Incidental" is defined as "secondary or minor, but usually associated; as, the *incidental* costs of education." *Id*. "Necessary" has been defined as "that cannot be dispensed with; essential; indispensible." *Id*. "Convenient" has been defined as "fit; suitable; appropriate" or "favorable to one's comfort; easy to do, use, or get to; causing little trouble, work, etc.; handy." *Id.*

The power to enter into contracts is clearly incidental – i.e., secondary but associated with – the principal functions of the Executive branch. See Discussion of Executive Powers/Functions, *infra*. Likewise, this power is necessary to the efficient exercise of executive power. Finally, even if the power to enter into contracts is not necessary to "the discharge of duties and functions specified in this Charter or lawfully designated to the Executive," this power is certainly "convenient" – in the sense of fit, suitable, appropriate, or even "handy" – for the discharge of the Executive's duties and functions.

4. Section 8.6.1

The County Charter also endows the Executive with the responsibility to "prepare and *administer* a comprehensive balanced budget in a manner which assures coordination among agencies." Macomb County Charter, Section 8.6.1 (emphasis added). "Administer" is defined as "to have charge of as chief agent in managing, as public affairs; conduct; direct." *Webster's New Universal Unabridged Dictionary Second Edition* (1972). For example, "[a] president *administers* the laws when he executes them, or carries them into effect." *Id*. Given this definition, the Executive would have little – if anything – to "administer" if he lacks the authority to enter into contracts effectuating the provisions of the budget.[3] Accordingly, the Executive's authority to "administer" the budget once again implies the authority to enter into contracts directing expenditures under the budget.

5. Section 8.10

Section 8.10 of the County Charter, captioned "Purchasing," directs the Board of Commissioners to "adopt comprehensive *policies and procedures governing the awarding of*

3 As the *Brady* Court observed, "[o]ne provision may not be construed in such manner as to render another of no effect if such result can be avoided." *Brady, supra* at 248. Furthermore, "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co.*, 466 Mich 142, 146; 644 NW2d 715 (2002).

contracts, including the procurement and handling of services, supplies, materials, and equipment." Macomb County Charter at Section 8.10 (emphasis added). This section then goes on to provide that "[t]he Executive *shall implement the policies* adopted by the Commission, including requirements for competitive bidding and the use of sealed bids for purchases and contracts specified by the ordinance." *Id.*

In analyzing this section, it is worth noting that "[w]ords excluded from a statute . . . must be presumed to have been excluded for a specific purpose." *Robinson v City of Lansing*, 486 Mich 1, 25; 782 NW2d 171 (2010). Furthermore, "[p]rovisions pertaining to a given subject matter must be construed together, and if possible harmonized." *Brady, supra* at 248.

Under Section 8.10, the authority to create procedures pertaining to purchasing contracts rests with the Commission. However, Section 8.10 does not authorize the Board of Commissioners to adopt ordinances or policies covering contracts *other* than purchasing contracts, nor does this section authorize the Board of Commissioners to become involved in the purchasing process beyond their establishment of "policies and procedures." The authority to implement these procedures pertaining to purchasing contracts rests exclusively with the Executive. Had the drafters of County Charter intended to place the authority for implementation with the Board, they would have indicated as much. As they did not, the implementation of the contracting policy – which implicitly entails the execution of contracts – rests with the Executive.

Based on the foregoing, it is clear that the Executive has an independent power to enter[4] into contracts pursuant to the plain language of the County Charter. The Executive is not required to seek approval from the Board prior to exercising this power. Because Ordinance 2012-1, Resolution 12-1, and Resolution 11-22 purport to curtail the Executive's power under the Charter, the ordinance and resolutions are invalid.

C. Separation of Powers

1. Strict Constitutional Separation of Powers Does Not Apply to Local Government

Although Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 are invalid for the aforementioned reasons alone, the Court shall also address the parties' other legal arguments. First, the Court turns to plaintiff's contention that the constitutional separation of powers doctrine confers the authority to enter into contracts on the executive branch. Article 3, § 2 of the Constitution of 1963 "incorporates the separation of powers doctrine into the Michigan Constitution." *Rental Property Owners Ass'n of Kent County v City of Grand Rapids*, 455 Mich 246, 266; 566 NW2d 514 (1997). However, "[b]oth the context and history of th[is] provision demonstrate that the provision applies only to state government." *Id*. at 267. Accordingly, "[t]he separation of powers doctrine stated in Const 1963, art 3, § 2 . . . does not apply to local governmental units." *Harbor Telegraph 2103, LLC v Oakland County Bd of Comm'rs*, 253 Mich App 40, 50-51; 654 NW2d 633 (2002).

4 Having reviewed the County Charter, it is clear that the Board's power to approve contracts under Section 4.4(d) does *not* conflict with the Executive's independent power to do so under Sections 3.5, 8.6.1, and 8.10. However, even if – *arguendo* – there were some conflict between the provisions of the Charter, the rules of statutory interpretation nevertheless favor the interpretation advanced by plaintiff. As noted above, "where there is . . . a general prohibition of a thing and a special permissive recognition of the existence of the same thing under regulation, the particular specified intent on the part of the legislature overrules the general intent incompatible with the specific one." *Brady, supra* at 249, quoting 50 Am Jur at 371-372 (quotation marks omitted). Even if the Board's power to approve contracts under Section 4.4(d) were construed so as to include a *general* prohibition of contract-making by the Executive, the fact remains that Sections 3.5, 8.6.1, and 8.10 nevertheless constitute *specific* grants of contract making authority to the Executive. Therefore, the rules of statutory construction would support a finding in favor of plaintiff even if the provisions of the County Charter were internally inconsistent.

Based on the foregoing authority, the separation of powers enshrined in the Michigan Constitution does not apply to county governments. Should there be any doubt, the inapplicability of the constitutional separation of powers is further elucidated by the fact that all general law counties in Michigan – which constitute the vast majority of Michigan counties – operate without any form of chief executive and are governed solely by their county commissions. See generally MCL 46.11. As such, the constitutional doctrine of separation of powers does not apply to Macomb County government.

2. While Not Expressly Binding, General Separation of Powers Principles Apply to Local Government

While the *constitutional* separation of powers is technically inapplicable to local government in Michigan, the fact remains that the electorate has chosen to enact a County Charter with a separate "executive branch." In other words, while the constitutional separation of powers is – strictly speaking – inapplicable to county government, the Charter's creation of two separate "branches" of county government suggests that this concept is not wholly irrelevant to the Court's analysis.

The Supreme Court has explained that "[w]hile not expressly binding on local government, . . . principles and policies [associated with the separation of powers] apply to local government." *Detroit City Council v Mayor of Detroit*, 449 Mich 670, 680 n 14; 537 NW2d 177 (1995). Furthermore, the Charter County Act itself reinforces the conclusion that separation of powers principles have some applicability to local governments. To wit, the Act expressly provides for the creation of both a "salaried county executive" and a separate and distinct "legislative body to be known as the county board of commissioners." See MCL 45.514(1)(a)

and (b).

Accepting that general separation of powers principles apply to local government, the Court must determine whether entering into contracts – particularly contracts to expend funds following an appropriation by the legislative branch – is a function of the executive branch. Whether the executive has such a function is unsettled in Michigan.[5] The Constitution of 1963 indicates that "[t]he executive power is vested in the governor." Const 1963, art 5, § 1. However, the Constitution does not define the "executive power."

Pertinent to the case at bar, the Supreme Court has cited with approval a Massachusetts opinion holding that "[t]he executive branch is the organ of government charged with the responsibility of, and is normally the only branch capable of, having detailed and contemporaneous knowledge regarding spending decisions. The constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment" with respect to spending decisions. *Detroit City Council, supra* at 680 n 14, quoting *In re Opinion of the Justices to the Senate*, 375 Mass 827, 836; 376 NE2d 1217 (1978). Control of such spending decisions impliedly encompasses the power to enter into contracts to effectuate such decisions. Cf. *id.*

A survey of other state court decisions establishes that the weight of authority indicates that entering into contracts is a function of the executive branch. *In re Opinion of Justices*, 129 NH 714, 719; 532 A2d 195 (1987) ("the legislature may not invade the province of the executive by requiring the approval of the fiscal committee for contracts entered into by the executive");

5 Defendant points out that the legislative branch has the power to enter into contracts under Michigan law. See *Taxpayers of Michigan Against Casinos v City of Detroit*, 471 Mich 306, 328; 685 NW2d 221 (2004) ("We have held that our Legislature has the general power to contract unless there is a constitutional limitation."). However, the Supreme Court "has established that the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998). Therefore, the fact that the legislative branch has the constitutional power to enter into contracts does not preclude the executive branch from entering into contracts when appropriate to his exercise of the "executive power." See Const 1963, art 5, § 1.

Alexander v State, 441 So 2d 1329, 1341 (Miss, 1983) ("[o]nce taxes have been levied and appropriation made, the legislative prerogative ends and executive responsibility begins"); *State ex rel McLeod v McInnes,* 278 SC 307, 314; 295 SE2d 633 (1982) ("administration of appropriations . . . is the function of the executive department"); *Anderson v Lamm,* 195 Colo 437, 447; 579 P2d 620 (1978) (the legislature must not infringe "upon the executive's power to administer appropriated funds"); *In re Opinion of the Justices to the Governor,* 369 Mass 990, 994; 341 NE2d 254 (1976) ("to entrust the executive power of expenditure to legislative officers is to violate art. 30 [of the Massachusetts Constitution] by authorizing the legislative department to exercise executive powers"); *State ex rel Meyer v State Board,* 185 Neb 490, 500; 176 NW2d 920, 926 (1970) (the legislature "cannot administer the appropriation once it has been made").

While not addressing contracting per se, the Michigan Attorney General has also issued opinions which support the conclusion that decisions pertaining to the expenditure of appropriated funds is a function of the executive branch. The Attorney General has opined that "while the Legislature may attach conditions to the disbursement of funds in an appropriations act, the Michigan Constitution prohibits the imposition of restrictions that would violate the autonomy of the other branches of the state government." OAG, 1989, No 6632 (December 20, 1989). For example, "the Legislature cannot become involved in the executive decision making process by requiring approval by a legislative committee of anticipated executive actions, including expenditure of appropriated funds." *Id*.; and see also, e.g., OAG, 1975, No 4896 (September 9, 1975) ("[t]he constitutional doctrine of separation of powers contained in Const 1963, art 3, § 2, prohibits the requirement of prior legislative approval before expenditure of appropriated funds").

Having carefully considered all of the foregoing authority, the Court is convinced that – under general separation of powers principles – the executive branch has the power to enter into contracts to spend appropriated funds. The executive branch's authority to enter into contracts in no way diminishes the legislative branch's "power of the purse." That is, the legislative branch has control over appropriations and can fund or defund other departments as it sees fit (subject to certain [6]limitations). However, the legislative branch cannot infringe on the prerogatives of its coequal branches. Based on the Supreme Court's decision in *Detroit City Council, supra*, the weight of authority from those courts in sister states which have considered the issue, and the nonbinding Attorney General opinions cited above, the Court finds that the executive branch has the power to oversee day-to-day expenditures once an appropriation has been made. Applying these principles to local government, the Court concludes that the County Executive has the power to enter into contracts implementing the expenditure of previously appropriated funds independent of any additional specific authorization to do so by the Board of Commissioners.

The Court's conclusion is further supported by several practical considerations. Forexample, if the executive branch lacks the power to direct the expenditure of appropriated funds,the executive would be required to seek approval before taking any action which would entail

6 See, e.g., *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 143; 719 NW2d 553 (2006), wherein the Supreme Court observed that:In order for the judicial branch to carry out its constitutional responsibilities as envisioned by Const 1963, art 3, § 2, the judiciary cannot be totally beholden to legislative determinations regarding its budgets. While the people of this state have the right to appropriations and taxing decisions being made by their elected representatives in the legislative branch, they also have the right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities.

spending money. This would significantly impair the executive's independent authority as a coequal branch of government, interfere with the executive's performance of his or her other functions, and subject the executive to the whims of the legislative [7]branch. Furthermore, the legislative branch could be bogged down by minutiae, constantly required to hold open meetings to determine whether a given expense should be paid out of appropriated [8]funds. For these reasons as well, general separation of powers principles supply a separate basis for the conclusion that the County Executive has the authority to enter into contracts to expend appropriated funds on behalf of the County.

D. The Uniform Budgeting and Accounting Act

1. General State Laws Apply to Charter Counties

The Court is also persuaded that this outcome is mandated by the Uniform Budgeting and Accounting Act. Like other units of local government, charter counties are bound by the restrictions imposed by general (i.e., statewide) law. *O'Hara v Wayne County Clerk*, 238 Mich App 611, 619-620; 607 NW2d 380 (1999). As such, "statutory provisions, by virtue of their enactment into general law, form a part of that charter whether or not repeated therein, fill in the gaps, and supersede any possibly conflicting provision actually contained within the charter." *Lucas v Bd of County Road Comm'rs of Wayne County*, 131 Mich App 642, 658-659; 348 NW2d 660 (1984). Pertinent to the case at bar, the Uniform Budgeting and Accounting Act contains

7 Similarly, it is worth noting that apart from certain limitations set forth in Administrative Order No. 1998-5, a circuit court is otherwise free to enter to contracts pertaining to court operations. Cf. *Ottawa County Controller v Ottawa Probate Judge*, 156 Mich App 594, 606-607; 401 NW2d 869 (1986). However, if defendant's interpretation of the County Charter were accepted, the Board of Commissioners alone would have the authority to approve all contracts pertaining to circuit court operations. The County Charter clearly cannot deprive the judiciary of its powers as a separate branch of government. While not dispositive, the shortcomings of defendant's interpretation of the County Charter when applied to the judiciary lend further support to the Court's conclusion that defendant's interpretation is erroneous.

8 The Court takes notice through the pleadings and arguments of Counsel that Macomb County Government was itself operated in essentially this manner prior to the enactment of the County Charter. The Board of Commissioners was intimately involved in the approval of every County contract. While by no mean determinative of the Court's decision in this matter, the Court notes that it would be somewhat anomalous if the new County Charter were construed so as to allow exactly the same inefficiencies to continue.

provisions which conflict with defendant's proposed interpretation of the County Charter.

2. The Board of Commissioners Cannot Retain Control of Funds Post-Appropriation

Under the UBAA, "appropriation" is defined as "an authorization granted by a legislative body to incur obligations and to expend public funds for a stated purpose." MCL 141.422a(3). The UBAA provides that "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). "The general appropriations act shall set forth the amounts appropriated by the legislative body to defray the expenditures and meet the liabilities of the local unit for the ensuing fiscal year, and shall set forth a statement of estimated revenues, by source, in each fund for the ensuing fiscal year." MCL 141.436(3).

As the attorney general has observed, "no provision of . . . [the UBAA] authorize[s] the county board of commissioners, in adopting a general (or non-mandated line-item) appropriation act, to require elected county officials or other administrative officers of budgetary centers, to seek permission of the chief administrative officer or fiscal officer of the county in expending designated 'line-items' within an approved budget." OAG, 1980, No 5816 (November 17, 1980). As such, a "requirement of seeking pre-expenditure permission would not only contravene the provisions of . . . [the UBAA], but would also violate the separation of powers doctrine embodied in Const 1963, art 3, Sec. 2." *Id.*

Under MCL 141.436, the Board of Commissioners is required to pass a general appropriations act. Once an appropriation has been made, the expenditure of the appropriated funds is "authorized." That is, the department which is the recipient of the appropriation is now

permitted "to incur obligations and to expend [the] funds. . . ." MCL 141.422a(3). There is nothing in the language of the UBAA which suggest that a county board of commissioners is free to renege on the appropriation, or to exercise continuing control over the appropriated funds.

Macomb County Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 purport to restrict the Executive's authority to expend appropriated funds by requiring him to seek approval of certain contracts. In other words, if these documents are given effect, the Board of Commissioners would effectively retain control over funds even after the funds have been appropriated. Since a retention of control over the funds post-appropriation is not allowed under the UBAA, the Court finds that Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 contravene the UBAA and are invalid.

3. The UBAA Authorizes the County Executive to Enter into Contracts

The UBAA also contains provisions directly concerning the functions of a county executive. The "chief administrative officer" of a county is "[t]he elected county executive or appointed county manager of a county; or if the county has not adopted an optional unified form of county government, the controller of the county . . . or if the county has not appointed a controller, an individual designated by the county board of commissioners of the county." MCL 141.422b(3)(f). "Unless otherwise provided by law, charter, resolution, or ordinance, the chief administrative officer shall have final responsibility for budget preparation, presentation of the budget to the legislative body, *and the control of expenditures under the budget and the general appropriations act*." MCL 141.434(1) (emphasis added).

Given the plain language of MCL 141.434(1), a county executive must be presumed to have the power to control expenditures absent specific provisions to the contrary. Pertinent to

the case at bar, the power to control expenditures also necessarily entails the power to enter into contracts directing such expenditures. The provisions of the Macomb County Charter are essentially consistent with the presumption contained in MCL 141.434(1). There is no provision in the Macomb County Charter which either explicitly or implicitly abrogates the Executive's authority to control expenditures once an appropriation has been made. Furthermore, there are various provisions of the County Charter which suggest that the Executive's authority is coterminous with the authority of a "chief administrative officer" under the UBAA. See *supra*.

Defendant makes much of the fact that Macomb County Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 all purport to place limits on the Executive's authority to enter into contracts. As noted above, a "resolution" or "ordinance" may create an exception to the presumption of MCL 141.434(1). However, it is axiomatic "[t]he charter of a [county] is its fundamental law, and all ordinances in conflict therewith are null and void, upon the principle that a statute which contravenes a constitution must fall." *Banish v City of Hamtramck*, 9 Mich app 381, 388; 157 NW2d 445 (1968). Therefore, in order for a resolution or ordinance to "otherwise provide[]" within the meaning of MCL 141.434(1), that resolution or ordinance must itself be a valid enactment which does not conflict with the county's charter. Cf. *id*.

Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 contravene the Executive's authority under the County Charter in several ways. To wit, the Ordinance and Resolutions contravene the Executive's authority to "administer a comprehensive balanced budget," Macomb County Charter, Section 8.6.1, to "implement the [contracting] policies adopted by the Commission," *id*. at Section 8.10, to "control all County departments," *id*. at Section 3.5(a), and to "exercise all incidental powers necessary or convenient for the discharge of the duties and

functions specified in this Charter or lawfully delegated to the Executive." *Id.* at Section 3.5(c). Since the ordinance and resolution are in conflict with these charter provisions, they are invalid and do not create an exception to the presumption enshrined in MCL 141.434(1). Because Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 conflict with the powers given to the Executive under the UBAA, they are invalid for this reason as well.

E. Vagueness

Having determined that Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 are invalid for all of the foregoing reasons, the Court declines to address plaintiff's argument that the ordinance and resolutions are also void for vagueness.

F. Section 3.5(g) of the County Charter

The question remains as to whether plaintiff is entitled to summary disposition of counts XII and XIII of his complaint. These counts are based on two separate appropriations by the Board of Commissioners. The first, on June 23, 2011, funded legislative consulting services but allowed "direction to be provided equally by the County Executive and the Board of Commissioners." The second, on December 15, 2011, appropriated money for "contract services" (i.e., lobbying) which were to be retained by the Board of Commissioners. Both of these appropriations allowed the Board to retain control of appropriated funds. However, these appropriations neither restrict nor direct the action of the Executive. Therefore, it is unlikely that either appropriation contravenes the UBAA or general separation of powers principles.

Nevertheless, these appropriations are invalid under the County Charter. Section 3.5(g) of the County Charter provides that the Executive shall have the "authority, duty, and responsibility" to "develop proposed legislation beneficial to County interests." While an

overlap of some powers is permissible between branches of government, any overlap must "not create encroachment or aggrandizement of one branch at the expense of the other. . . ." *Judicial Attorneys Ass'n, supra* at 296. Given the limited scope of the power granted to the Executive in Section 3.5(g), any sharing of this power by the Board of Commissioners would necessarily encroach on the Executive's prerogatives. By conferring this limited and specific power on the Executive, the Charter implicitly denies this power to the Board of Commissioners. Therefore, the Court is satisfied that the June 23, 2011 appropriation restriction and the December 15, 2011 appropriation are invalid.

G. Attorney Fees

The Court now turns to plaintiff's request for attorney fees. The Court of Appeals has found that a circuit court has "inherent power" to exercise its judicial function, and that "this authority includes undertaking litigation to secure necessary funding, employing outside counsel to do that, and recovering reasonable attorney fees spent on that litigation." *46th Circuit Trial Court v Crawford County*, 273 Mich App 342, 344; 729 NW2d 914 (2006); and see *46th Circuit Trial Court v Crawford County*, 275 Mich App 82, 89; 739 NW2d 361 (2007).

While the Court of Appeals' decisions apply narrowly to the judicial branch, the concerns underlying the Court's decisions are analogous to those presented in the case at bar. This Court finds the reasoning in the *46th Circuit Trial Court* decisions to be persuasive. As such, the Court is convinced that the County must bear the cost of the Executive's representation in this matter. Plaintiff's request for reasonable attorney fees is therefore properly granted.

H. Summary of the Court's Decision

In summary, the Court finds that several sections of the County Charter endow the

Executive with the power to enter into contracts independent of the Board of Commissioners. Specifically, subsections (a) and (c) of Section 3.5, Section 8.6.1, and Section 8.10 all compel this conclusion. Additionally, the Court finds that even though the constitutional separation of powers set forth in Article 3, § 2 of the Constitution of 1963 is inapplicable to local government, general separation of powers principles nevertheless apply to local governments when local governments organize as separate "branches." Applying these principles to the County Charter, the Court finds that the power to make expenditures following an appropriation is an executive function which is properly exercised by the County Executive. The Court also finds that under the UBAA, the Board of Commissioners is precluded from retaining control over the expenditure of funds once the funds have been appropriated. Additionally, the Court finds that the UBAA authorizes the Executive to control expenditures of appropriated funds.

Based on the foregoing, the Court holds that Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 are invalid in light of the County Charter, separation of powers principles, and the UBAA. The Court further holds that Board of Commissioners' June 23, 2011 restriction on the budget appropriation for legislative consulting services is invalid in light of the County Charter. Likewise, the Court holds that the Board of Commissioners' December 15, 2011 budget appropriation for contract services to be retained by the Board of Commissioners is invalid under the County Charter. Finally, the Court holds that the Executive's request for attorney fees is properly granted.

V. CONCLUSION

For the reasons set forth above, plaintiff's motion for summary disposition is GRANTED in part. Defendant's motion for summary disposition is DENIED. The Court finds that Macomb

County Ordinance 2012-1, Resolution 12-1, and Resolution 11-23 are INVALID for the reasons discussed, infra. Defendant is ENJOINED from enforcing Ordinance 2012-1, Resolution 12-1, and Resolution 11-23. The June 23, 2011 restriction on the budget appropriation and the December 15, 2011 budget appropriation are also INVALID for the reasons discussed in this *Opinion and Order*. Plaintiff's request for attorney fees is GRANTED. The Court holds this *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: May 14, 2012

JCF/sr

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