STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and MARY RAAB,

Plaintiffs,

Hon. Donald E. Shelton
Case No. 181-14 CC

vs.

THE CITY OF ANN ARBOR,

Defendant.

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO DISQUALIFY COUNSEL PURSUANT TO MRPC 1.7(b), 1.10 AND 3.7(a)

PROCEDURAL BACKGROUND

This action was served upon the City of Ann Arbor on March 7, 2014. The City removed the case to federal court on March 17, 2014, where it also filed a Motion to Dismiss on March 24. The Plaintiffs Motion for Remand was granted by the Federal Court and an Order of Remand was entered on May 29, 2014. On June 9, 2014, the City moved for summary disposition under MCR 2.116(c)(7) and (c)(8), a motion it noticed for hearing on July 30, 2014. Plaintiffs filed their brief in opposition on July 23, 2014. The City re-praecipied and re-noticed such hearing for August 13, 2014. On August 8, 2014, plaintiffs received a Reply Brief to the plaintiffs' July 23 timely-filed brief. On August 11, the City (asserting an objection to the date of service of Plaintiffs' Amended Brief in Opposition to the City's Motion for Summary Disposition) once again re-praeciped its Motion and re-noticed the hearing to September 18, 2014. The new praecipe, dated August 11, 2014 (attached as Exhibit 1), also indicates a change in the assigned judge.

FACTUAL BACKGROUND OF PLAINTIFFS' MOTION

Abigail Elias is Ann Arbor Chief Assistant City Attorney. Together with City Attorney Stephen K. Postema, she is counsel for Defendant City of Ann Arbor ("the City") in the instant case. On February 4, 2014, before this case was filed, plaintiffs' counsel advised Ms. Elias by email (Exhibit 2) that she would be a likely and necessary witness and deponent adverse to the City on material issues mentioned therein. In sending the email, plaintiffs' counsel reviewed public written commentary made by Ms. Elias before filing of this action, between November 2013 and January 2014, specifically with respect to the plaintiffs' then-threatened case, as Ms. Elias understood it, as well as press coverage of public presentations on essential legal and factual issues regarding issues now manifest in the present litigation. All the issues summarized

in the email (Exhibit 2) are material and contested. In its Brief in Support of its Motion for Summary Disposition, the City has itself raised several of the issues described in the February 4 email.

The email text is as follows:

> As a courtesy to you and in fairnes [sic] to your clients, I am advising that your non-privileged testimony and evidence will likely be required in connection with litigation over the FDDP, which is now in preparation for filing. The case will include a claim for inverse condemnation. You are a necessary witness on both liability and relief, which probably comes as no surprise.
>
> Your evidence is relevant to many matters, as you would expect, including but not limited to admissions against the interest of your clients in non-privileged non-confidential documents, and your conduct and statements (including matters relating to malice) about the creation, implementation and administration of the FDDP; the completion of FDDs; the administration and implementation of the DOM and of FDD sale and other arrangements with other entities; the negotiation of FDD clauses in City Development Agreements; and your participation and communications with the CAC and in connection with Basecamp.
>
> I am including for your information only this link to RI-281 (1996), which provides some specific guidance under Rules 3.7 and 1.7(b) concerning a sequence of actions after an attorney determines he or she is a likely, necessary witness adverse to her clients [sic] interest. If RI-281 is relevant guidance, it expresses a concern about clients finding out about a non-waivable conflict until the last moment when a judge decides the issue, which could be a particularly difficult transition problem for your clients.
>
> I assume you will notify Mr. Postema and take the steps you deem necessary.

Plaintiffs' counsel had emailed City Attorney Stephen K. Postema (Exhibit 3) the same day about the potential for a conflicts problem due to necessary testimony from Ms. Elias. That email provided additional details about the matters that would be covered in Ms. Elias's likely testimony, including information explaining the reference to "Basecamp" in the email to Ms. Elias. The email to Mr. Postema was forwarded with the email to Ms. Elias.

On March 7, 2014, together with their complaint and Motion for Preliminary Injunction, plaintiffs served a Notice of Taking of Deposition of Abigail Elias (Exhibit 4) with a return date

of April 10, 2014, which was delayed initially pending remand to this Court. Plaintiffs' counsel have heard no word from either lawyer in response to the two emails or service of the Notice of Deposition. Plaintiffs now intend to commence discovery, including noticing of additional deposition witnesses and rescheduling of Ms. Elias's deposition date.

SUMMARY OF THE GROUNDS FOR PLAINTIFFS' MOTION

Plaintiffs make this motion under MRPC 1.7(b) and 3.7(a) for the disqualification of Abigail Elias as counsel for the City, for both trial and pre-trial matters. MRPC 3.7(a) provides as follows:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

MRPC 1.7(b) provides as follows:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited ...by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Plaintiffs' have two general grounds for their Motion. First, a conflict exists under MRPC 3.7(a) and 1.7(b) as to Ms. Elias in the form of a conflict "between the likely testimony [of the lawyer] and the interests of the client" (RI-281 (1996), a copy of which is attached as Exhibit 5.

Second, as discussed below, examination of Ms. Elias and her likely testimony will include evidence of her own actions as a key City employee (including as City Attorney)

working actively and regularly on the FDD program in differing extra-judicial roles since 2000 to the present. Such likely testimony will relate to Ms. Elias's own actions and statements, including public admissions against the interests of her client and other non-privileged communications. These will "come under scrutiny" (RI-26 (1989), attached as Exhibit 6), including as to their probity. Her likely testimony will be adverse to the City concerning, *inter alia*, the matters discussed in Point I, below. The Official Comment to MRPC 1.7 states that "[i]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice," thus disqualifying him or her.

RI 281, *supra* (at Exhibit 5), provides detailed guidance about a "lawyer's duty" to a client in litigation upon (i) learning that opposing counsel intends to call him or her as a witness to a contested issue and (ii) concluding that the lawyer "may be a witness if the matter actually comes to trial." Id. Under those circumstances, a lawyer should evaluate her representation of the client in light of MRPC 3.7 and 1.7. RI 281, supra. "For purposes of [MRPC 3.7], the lawyer must decide whether the prospect of testifying is 'likely' and 'necessary.'" *Id.*

The question of likelihood of Ms. Elias's testimony was resolved by the advance emails about the potential conflict problem from plaintiffs' counsel and prompt service of a deposition notice for Ms. Elias's testimony. Ms. Elias is a necessary witness because her "testimony is highly material and noncumulative" and the subject matter of her likely testimony is highly relevant to the instant action. *EEOC v Bardon, Inc.* 2010 U.S. Dist. Lexis 3980 (D.C. Md. 2010) (representation improper where lawyer who would be called to testify in wrongful termination case witnessed the termination and participated in internal investigation of firing).

She is also "in a unique position to testify" about her own actions and how they have affected or related directly to the FDD program. *Id.* "While other individuals may be able to testify to fragmentary portions" of Ms. Elias's actions and communications, she "is the only individual who can provide testimony encompassing the totality of [her] role" in the creation, legislation and public defense of the FDD Program "and the reasons for actions [s]he took." *Id.*

A merely possible conflict does not require disqualification, but a genuine conflict under Rule 1.7(b) "in effect forecloses alternatives that would otherwise be available to the client," resulting in prejudice or harm to the client's interests. MRPC 1.7, Official Comments. "The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." *Id.* A significant problem on these facts, relating to the issue of "material interference," is that, like the lawyer in *Bardon, supra*, Ms. Elias's testimony and evidence will be about her own actions and statements that likely to conflict with the interests of her clients in defending against plaintiffs' action.

RI-26 (1989) is another example of this problem. The opinion[1] involved a lawyer who had written a will, but failed to meet the testator. The lawyer later represented the proponent of the will in a contest in which the physical and mental capacity of the testator was at issue, as well as undue influence. The opponent of the will then subpoenaed the lawyer to testify as to such issues and his testimony was highly material and adverse to his client on the question, at least, of testator capacity. The lawyer, in other words, was a part of the facts and law of the case, a witness to facts adverse to his clients' interests, and also the advocate for the will's validity. On

[1] State Bar of Michigan ethics opinions are advisory and non-binding in nature.

those facts, RI-26 opined that the representation "was no longer appropriate under MRPC 3.7." The opinion further states as follows concerning MRPC 1.7:

> ... MRPC 1.7(b) prohibits a lawyer from undertaking or continuing representation of a client whose representation would be materially limited by the lawyer's own interest, or in which the lawyer could not reasonably believe the representation would not be adversely affected. **A lawyer serving as advocate and witness in a matter in which the lawyer's own actions come under scrutiny would be such a prohibited representation.**

Determining whether or not a conflict exists as a result of the prospect of combining the roles of advocate and witness is primarily the responsibility of the lawyer (Official Comment to MRPC 3.7). The Official Comment to MRPC 1.7, however, states that "[w]here the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question."

Plaintiffs are mindful that determining whether or not a conflict exists as a result of the prospect of combining the roles of advocate and witness is primarily the responsibility of the lawyer (Official Comment to MRPC 3.7) and plaintiffs have taken reasonable steps to encourage Ms. Elias and Mr. to do so, including notifying both lawyers for the City of the problem pre-filing and promptly serving the City with a deposition notice for Ms. Elias 34 days later..

ARGUMENT

POINT I: MS. ELIAS IS A NECESSARY WITNESS CONCERNING MATERIAL AND CONTESTED ISSUES

Plaintiffs are entitled to obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action, including from Ms. Elias. MCR 2.302. Basic relevancy, not ultimate admissibility, is the essential standard for discovery purposes and, as discussed below, plaintiffs are clearly not embarked on a fishing expedition in seeking evidence

and testimony from Ms. Elias. At a minimum, the Plaintiffs will seek her evidence and testimony on at least three contested material issues:

A. Legal Authority for the FDD Ordinance

Ms. Elias is a necessary witness whose likely evidence and testimony will be used as evidence to undercut the City's arguments and evidence (as laid out in its pending Motion for Summary Disposition) that authority for enactment of the FDD Ordinance existed at the time the Ordinance was enacted. As discussed below, plaintiffs have probative public record evidence to the contrary, about which Ms. Elias alone can provide certain relevant testimony about the events leading up to enactment of the Ordinance. This was a process, on information and belief, that involved many City officials and employees Ms. Elias also represents or has represented.

In the City's Motion for Summary Disposition, the City has raised contested issues concerning sources of authority or justification for the FDD Ordinance. One such source placed into evidence is the "recommendations" for adoption of the current FDD program in the official Report ("SSO Report") of the Sanitary Sewer Overflow Task Force ("SSO Task Force"). These recommendations purported to be a solution to overcapacity problems in the City's sanitary sewer system experienced by the City from 1998 through 2000, which do not appear to be in dispute. As a matter public record, the SSO Task Force included five citizen members, but was overwhelmingly populated with City and County Officials (such as the then-Washtenaw County Drain Commissioner, the City Director of Public Services and the City's Acting Director of Water Utilities), City and county staff, consultants (including CDM Michigan, Inc. ("CDMI"), a participant from the Huron Valley Watershed Council, as well as non-member participants.

The SSO Task Force, however, did not limit itself to conclusions about sewage system problems. Rather, as the SSO Task Force Report itself demonstrates, the Task Force also studied

(and specifically questioned in 2001) the legality of FDD construction, including whether the City had **"power," "authority,"** or a **"legal framework"** to perform "work on private property" in the form of FDD construction.

At Page L2 of the SSO Report (cited pages are excerpted at Exhibit 7), the Task Force asked these material questions about barriers to the FDD program:

- *Legal Authority* - Can and will the City of Ann Arbor have the legal framework to accomplish the work required on private property?
- *Funding* - Is there a funding mechanism available for work performed on private property?

The City Council was also involved in the apparent internal discussion at City Hall about work on private property. Pages I.1 and .2 discuss a meeting with the City Council:

> A presentation was made to the Ann Arbor City Council on April 9, 2001 to outline the different alternatives, the preliminary costs and implementation issues with them. The following were comments that came out of this session.
>
> - ***Can the City Work on Private Property*** - The option of footing drain disconnection was seen as a viable solution only if access to **private property** could be arranged. The Council was interested in how other communities had handled this issue.
> - *How Would the Work be Paid For* - For **work on private property**, the issue of what was appropriate for individual homeowners and the City to pay was discussed.

[Emphasis added]. On page L3 (which was part of the Task Force's Final Recommendations), its apparent conclusion on legality (consistent with the other text discussed below) was that the City lacked necessary "power," "authority" and "legal structure" for FDD construction. The Report's Final Recommendations, therefore, included the following caveat:

> A first step is to develop a legal framework that would allow access and work on private property. To be effective, the City of Ann Arbor would need to have the power to accomplish the disconnection work on private property.

The SSO Report (at Paragraph L.4.3, pg. L5) indicates that the solution was to be an ordinance:

> City [sic] is currently developing an ordinance, contractor pre-qualifications and contract specifications needed to begin the FDD program. After approval of an ordinance providing authority to proceed, the city can begin with Priority 1-A homes late this summer or early fall.

Moving forward with the FDD Program, therefore, was clearly conditioned on solving the problem of an absence of "power" to have non-emergency "access" for "work on private property." The burden was on the City to "develop an ordinance," the "City" most likely referring to at least the City Attorney's Office. Ms. Elias was City Attorney at this time and (upon information and belief) a primary contributor and/or principal draftsperson of the FDD Ordinance referred to by the SSO Report. Plaintiffs have first-person admissible evidence of conversations at City Hall among City officials and by City Officials with non-City personnel about doubts concerning the legality of the FDD program.

This directive from the City Council at the briefing discussed above is relevant because it suggests that the work was being done under pressure:

> *Quick Action is Needed* - The Council was aware that there are significant problems of basement flooding and they recognized that the solutions need to be implemented quickly.

SSO Report at Paragraph I1 (at Exhibit 7). Further, Appendix Q to the SSO Report includes two flow charts. Both indicate that the creation of a "legal framework" and authority for the FDD program was the first task in "implementation" of the program and that the responsibility for fixing the legal problem was the City's. Based on a documented record of involvement of the City Attorney's Office with FDD matters since 2000, Plaintiffs can reasonably infer that this was largely or completely the responsibility of then-City Attorney Abigail Elias. There is no indication that the Task Force received legal assistance other than from the City Attorney's Office since early 2000 and the Task Force did not have its own counsel.

The Final SSO Report was presented to the City on July 9, 2001, as recorded in the Minutes of the Ann Arbor City Council Meeting that day. At that point (42 days before the passage of the FDD Ordinance), the only word from any City body about the legality of FDD construction was that there was no "power" or "legal framework" for FDD's as recommended by the SSO Task Force. The Report, in this respect, implies a consensus of a Task Force involving government officials, staff and City contractors as to the existence of a legal barrier and a need to address the problem before implementation. It is arguably an admission. It is fair to infer from the portions of the SSO Report cited herein that as of July 9, 2014, the City was not very far along in resolving whatever the legal barrier was. In any event, there is no evidence that the City implemented the action recommended as a "first step" and developed "a legal framework" for FDD construction. If there was any legal opinion or other document supporting the proposed Ordinance generated by the City, it has never been made public. The Plaintiffs intend to examine Ms. Elias regarding the extent to which the City followed through on the recommendations of the City's own Task Force and, if so, what the City did.

These are natural questions about what the legal issues were that made up the legal problem to be addressed and how (within the limits of privilege) the specific legal issues were addressed in the drafting of the Ordinance, which is in evidence. Because the FDD Ordinance was enacted long after the United States Supreme Court decided *Loretto v Teleprompter CATV Corp.*, 458 U.S. 419; 102 S. Ct. 3164; 73 L.Ed.2d 868 (1982), Plaintiffs will examine Ms. Elias, the only witness who can provide certain relevant testimony as to whether the *Loretto* decision was part of the legal problem; whether it was considered applicable; how it was reflected in the drafting of the Ordinance; and the extent of disagreement about the efficacy of the FDD Ordinance to resolve the private property problem. These are but a few of many relevant

questions for Ms. Elias about the transformation of FDD construction on private property from illegal in July 2001 to legal the next month.

Plaintiffs posit that a competent municipal attorney in 2001 examining the legality of permanent physical work on private property would have been aware of the *Loretto* case. Given that the Ordinance was nevertheless enacted, plaintiffs will examine several possibilities by means of Ms. Elias's testimony, including that the case was misinterpreted, or ignored or that an unsuccessful attempt was made to circumvent *Loretto* in the Ordinance. There is some evidence of the latter on the face of the FDD Ordinance. Ms. Elias's likely testimony will be relevant and non-cumulative as to specific issues of both liability and compensation, including the malice Plaintiffs have attested to.

This would require Ms. Elias, however, to be a witness adverse to her client, when her actions over a period of many years are being called into question as bearing on the City's liability and damages and while continuing to advocate in a case that could be undermined or seriously complicated by her testimony. It is also possible that Ms. Elias's testimony could result in increased legal exposure of her client, other clients (including individuals) based on her evidence, for example, about who was on notice of the FFD legal problem in July 2001 and how it was resolved before the FDD Ordinance was voted on. In other words, whether the City passed the FDD Ordinance with knowledge of constitutional or legal defects is material to the plaintiffs' case (including on malice) and Ms. Elias is a likely and necessary witness concerning that question.

B. Ownership Of Equipment Components Of FDD Construction

Ms. Elias has argued for the City in its Motion for Summary Disposition that a "critical" issue for the City's argument (whatever its merits) to distinguish *Loretto*, supra, from FDD

construction is whether the plaintiffs were "owners" of certain equipment components of the FDD construction they allege at their homes. In their Response and Brief to the City's Motion for Summary Disposition, plaintiffs have already placed in evidence an unprivileged email exchange between Ms. Elias, on behalf of the City, and the Editor of the Ann Arbor Chronicle, David Askins, in which Ms. Elias responded on behalf of the City to a question from Mr. Askins concerning when ownership of the equipment at issue passed to the plaintiffs. This response was subsequently published in an article on January 19, 2014, about a public presentation by Ms. Elias on January 9, 2010 relating to certain issues now contested in this action. The published version of the exchange appears at page 12 of the copy of Mr. Askins January 19, 2014 article attached hereto as Exhibit 8.

Ms. Elias's response to the *Chronicle*, however, included written admissions on January 10, 2014, against the City's interest. The Plaintiffs, in fact, have already cited these admissions in their Brief in Response to the City's Motion for Summary Disposition to support a good-faith argument that title to the equipment at issue, under Ms. Elias's reasoning in her admissions, never became the property of any Plaintiff. That is in direct conflict with the City's arguments in brief signed by Ms. Elias.

Further, certain language of Ms. Elias's admissions about the FDD Ordinance, as witness, is different in material ways from the corresponding language of the FDD Ordinance, of which (upon information and belief) Ms. Elias was the likely principal draftsperson in 2001, as well as City Attorney. At least one other difference between a non-privileged statement by Ms. Elias and the actual language of the Ordinance has also been identified, as to which Ms. Elias would also be a witness.

Based on the discussion thus far, while Ms. Elias advocates in court for the constitutionality of the FDD Ordinance and FDD construction, she will also be a likely witness against the City concerning the SSO Report's legal caveat, the "critical" (in the City's view) and now contested issue of transfer of ownership of equipment and about differences between the FDD Ordinance on its face and as implemented, according to Ms. Elias's own words in writing. The conflict seems patent.

C. Activities of Ms. Elias with respect to the City of Ann Arbor Sanitary Wet Weather Evaluation

The e-mailed admission on January 10, 2014, from Ms. Elias, discussed immediately above, was made as part of Ms. Elias's participation in an extensive and costly political defense of the FDD program by the City, referred to in the City's pending Motion, known as the Sanitary Sewer Wet Weather Evaluation ("SSWWE") study. The SSWWE project includes as a major component a volunteer Citizens Advisory Committee ("CAC") that has been meeting for over a year. A long segment of the January 29, 2014, Ann Arbor Chronicle article (Exhibit 8 at pp. 10-14) was in fact devoted to coverage of a public presentation by Ms. Elias to the CAC (who have no legal expertise), as part of the SSWWE project. Its apparent purpose was to advocate to, and obtain CAC agreement (in connection with the filing of this lawsuit) with legal positions contrary to that of the Plaintiffs about specific legal and factual issues that Ms. Elias apparently anticipated would be raised by the instant action, if filed.

An extreme example of this kind of documentary evidence and pre-litigation public statement from Ms. Elias of the City's case is a six-page memo on November 25, 2013 from Ms. Elias to the CAC (Exhibit 9) It discusses issues and authorities relating to the takings issue raised by both parties so far, including authorities cited in the City's Brief in support of its Motion for Summary

Disposition. These include, for example, discussions of the following cases in a manner that is inconsistent and at odds with the City's arguments in its Motion for Summary Disposition:

1. *Magnuson v City of Hickory Hills*, 933 F2d 562 (7th Cir. 1991);
2. *Board of Cty. Commissioners of Johnson County v Grant*, 264 Kan 58 (1998); and
3. *Loretto, supra*, at some length.

Plaintiffs intend to inquire about the purposes for such presentations and why, in the process of attempting to convince volunteer non-lawyers of the correctness of the City's position and to signify that agreement for unclear legal or political purposes, it was necessary for Ms. Elias to state that the City would indemnify the CAC members, "even if the CAC were negligent in making its recommendations." Plaintiffs will seek testimony about these facts and the differences between case discussions pre-filing and post-filing, including acknowledgments that some cases cited in the City's Brief supporting its Motion for Summary Disposition are not on point.

POINT II: THE CITY CANNOT WAIVE THE CONFLICTS IN THIS CASE

The question arises under MRPC 1.7(b) whether the City can waive the conflicts discussed here. Plaintiffs have cited ethical guidance above that conflicts are non-waivable when they arise from the direct involvement of a lawyer in the facts of a case and as to which he or she would be a likely witness adverse to his clients. The risk of prejudice to the client is very great when a lawyer is as much or more a part of the story of a case as a part of the advocacy for the case.

The Comments to MRPC 1.7 provide a reasonable standard for determining consentability in such circumstances:

> [A]s indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a

> client, **when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.**

[Emphasis added.] On these facts, a disinterested lawyer would conclude that the City should not continue the representation in this action and that the representation is in fact obviously prejudicial to the client and contrary to the client's interests. Ms. Elias's likely testimony will show that the legality of FDD construction at more than 1,800 homes, found wanting by the SSO Task Force in July 2001, rests entirely on her handling the following month (as City Attorney and a probable draftsperson of the FDD Ordinance) of a pre-enactment legal problem evident from public documents. Her handling is subject to question for its efficacy and probity and the relationship between her office's (or her) work product and black letter governing law since at least 1982 in the *Loretto* case.

Ms. Elias's testimony should, in fact, be a cause for concern for the City and constituents thereof who are also her clients. Her likely testimony could result in the addition of defendants to this action. A disinterested lawyer would conclude that the City might very well need to attack her testimony on legal issues and her handling of them and try to rebut it by impeaching its own lawyer. It is inevitable that in testifying about her drafting of the FDD Ordinance and other matters, Ms. Elias's own actions will be under scrutiny at trial, which could affect the tenor of her testimony. She would be testifying about her own work in 2000 and 2001 on the Ordinance at the center of this action. This raises the question whether Ms. Elias's conflict does not include a personal and professional stake (outside of her role as counsel) in the outcome of the contested issue whether *Loretto*, *supra*, is governing in this case.

A disinterested lawyer would reach the same conclusion based on Ms. Elias's likely testimony about written admissions by her and other non-privileged and published statements

about the City's legal positions on specific issues and cases, which positions have shifted between documents and are inconsistent with the City's arguments in its Motion for Summary Judgment. To defend the "critical" ownership argument in its brief, for example, the City would again need to attack its own lawyer as witness, likely by cross-examination, as she is considered a plaintiffs' witness. That is a recipe for confusion of all participants, and greatly increased cost and duration of litigation, due to a profound mixing of the roles of advocate and witness.

The representation is prejudicial to the City as the result of adversity of interests under MRPC 1.7(b) and 3.7(a) and it is improper for Ms. Elias either to request a waiver of these personal conflicts or to continue the representation on the basis of such a waiver. *Id.* A disqualification of Ms. Elias requires the disqualification of the City Attorney's Office under MRPC 1.10.

POINT III; DISQUALIFICATION WILL AVOID PREJUDICE TO BOTH PARTIES AND HARM TO THE FAIR AND EFFICIENT ADMINISTRATION OF JUSTICE

There is very little prejudice that the City will suffer as the result of the disqualification of Ms. Elias. If the representation is improper, then the City's interests (and the interests of its residents) are protected and promoted by substitution of counsel. It is important to note that there has been no progress on the merits of the case, in any event, because of delays imposed upon, but not caused by, the Plaintiffs. No discovery has commenced and the City has re-praecipied the hearing on its Motion for Summary Disposition until September 18, which provides a hiatus for arrangements to be made for substitute counsel. Substitute counsel can also examine whether, for example, options available to the City have been foregone as an outcome of the conflicts at issue here.

Both parties, on the other hand would be prejudiced in some of the same ways. The City will suffer the prejudice of having to impeach their own attorney's likely testimony on essential

issues, and then look to Ms. Elias as an advocate for its damaged positions. The Plaintiffs will be prejudiced by examination of opposing counsel, to whom the jury has been looking as a learned advocate presenting evidence, and not as a source of likely testimony. The jury would be confused, as result, between Ms. Elias's positions as advocate and adverse witnesses. There is a high likelihood that her name will be invoked by other witnesses and that the jury will look to Ms. Elias for answers when she examines witnesses as well as when she testifies herself. When a jury is confused and misled in this fashion, all parties are with severe prejudice.

When an attorney's actions are under scrutiny as an adverse witness to her own actions, there is a particular risk to all participants, including the tribunal and jury, of confusion about the lawyer's role at any given time. The potential that the interests of all parties and the tribunal in the fair and efficient administration of justice will be severely prejudiced outweighs any limited prejudice to the City without cognizable damage to the City's interest in representation by the counsel of its choice.

CONCLUSION

For the reasons stated, this Court should disqualify Ms. Elias from both pre-trial and trial phases of this action. Ms. Elias's conflict under MRPC 1.7(b) results in the disqualification of the City Attorney, Mr. Postema, and other attorneys in the Office of the City Attorney under MRPC 1.10.

Dated: August 20, 2014

Irvin A. Mermelstein
P52053