STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 14-181-CC

Hon. Donald E. Shelton

Irvin A. Mermelstein (P52053)
Attorney for Plaintiffs
2099 Ascot St.
Ann Arbor, MI 48103
(734) 717-0383

M. Michael Koroi (P44470)
Co-Counsel for Plaintiffs
150 N. Main St.
Plymouth, MI 48170
(734) 459-4040

Woods Oviatt Gilman, LLC
By: Donald W. O'Brien, Jr.
(temporary admission under MCR 8.126)
Co-Counsel for Plaintiffs
2 State St.
700 Crossroads Bldg.
Rochester, NY 14614
(528) 982-2802
_____/

OFFICE OF THE CITY ATTORNEY
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170

DEFENDANT CITY OF ANN ARBOR'S RESPONSE AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO DISQUALIFY COUNSEL

RESPONSE

Defendant City of Ann Arbor ("City"), by its undersigned attorneys, responds in opposition to Plaintiffs' Motion to Disqualify Counsel.

Because Plaintiffs' Motion was not properly noticed to be heard by this Court on August

27, 2014, the hearing on Plaintiffs' Motion should be delayed until it is properly noticed.

For the reasons argued in the City's Brief, below, Plaintiffs' Motion to Disqualify Counsel should be denied.

BRIEF

INTRODUCTION - PROCEDURE

Plaintiffs' Motion to Disqualify Counsel is not properly before this Court for hearing on August 27, 2014, because counsel for Plaintiffs did not file or serve a notice of hearing for this motion for August 27, 2014. A copy of Plaintiffs' Proof of Service for this motion accurately lists only the motion as being served on August 20, 2014. A copy is attached as Exhibit 1. If served by delivery, MCR 2.119(C)(1)(b) requires the notice of hearing for a motion to be served at least 7 days before the time set for the hearing.

The City files its response and brief in opposition to Plaintiffs' Motion to Disqualify Counsel, but objects to Plaintiffs' repeated disregard for the requirements of the court rules and suggests this motion should be deferred for hearing until it is properly noticed.[1]

INTRODUCTION - ARGUMENT

The Motion of Plaintiffs to disqualify Chief Assistant City Attorney Abigail Elias and all other attorneys in the Office of City Attorneys from representing their client, the City of Ann Arbor, in this case should be denied because it is without basis or merit. It also is premature, as the City's Motion for Summary Disposition is pending for decision before this Court.

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[1] In *Maldonado v Ford Motor Co*, 476 Mich 372, 375; 719 NW2d 809 (2006), the Michigan Supreme Court affirmed "the authority of trial courts to . . . prevent abuses so as to ensure the orderly operation of justice."

BACKGROUND

Plaintiffs' Motion needs to be considered in a broader context.

This Motion to Disqualify is another in a series of attacks on the City Attorney's office, Abigail Elias and Stephen K. Postema in particular, by counsel for Plaintiffs.[2] In August of 2012 Mr. Mermelstein notified two members of the Ann Arbor City Council regarding the possibility of legal exposure for inverse condemnation due to the footing drain disconnect ("FDD") program that is at issue in this case.[3] Mr. Mermelstein did not proceed with any lawsuit on behalf of any clients at that time. Instead, in February of 2013 he filed a Request for Investigation against Abigail Elias with the Michigan Attorney Grievance Commission. His complaint against Ms. Elias included a complaint focused on the FDD program and his disagreement with her legal analysis, in a misguided attempt to have the Attorney Grievance Commission rule on the merits of the present claims regarding the City's FDD program. While his Request for Investigation against Ms. Elias was pending, Mr. Mermelstein requested that Stephen Postema fire Ms. Elias, which Mr. Postema did not do. Mr. Mermelstein then filed a Request for Investigation against Stephen Postema with the Michigan Attorney Grievance Commission in March of 2013. On November 20, 2013, the Attorney Grievance Commission, not surprisingly, closed both of Mr. Mermelstein's Requests for Investigation without action. Copies of the dismissal letters are attached as Exhibit 2. Both letters comment that the Attorney Grievance Commission does not "review legal conclusions made by attorneys during the course of their business."

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[2] Specifically, by attorney Irvin A. Mermelstein.

[3] A copy of Mr. Mermelstein's August 4, 2012, email is attached as Exhibit 3. Mr. Mermelstein's email was copied to Plaintiff Raab.

ARGUMENT

I. PLAINTIFFS' MOTION LACKS GROUNDS AND AUTHORITY FOR DISQUALIFICATION

Plaintiffs' motion is premised on a theory that Abigail Elias, one of the City's attorneys in this case, is a likely and necessary witness in this case. However, the topics identified as topics about which Ms. Elias would be called to testify (Plaintiffs' Brief p. 3 and Plaintiffs' Exh. 2), are legal issues which would not be appropriate for deposition or testimony; they can be argued in briefs to this Court at an appropriate time. Plaintiffs even acknowledge that the issues have been addressed by the City in its brief in support of its motion for summary disposition (Plaintiffs' Brief p. 3).

Further, some of the topics identified by Plaintiffs are neither relevant to this case nor likely to lead to the discovery of relevant evidence in the case. Plaintiffs argue their complaint consists of claims for takings without compensation and/or inverse condemnation based on events at Plaintiffs' houses in 2002 and 2003, i.e., the disconnection of their footing drains from the City's sanitary sewer system and connection of those drains to the City's storm sewer system, including the installation of sump pumps required for those drains to operate.[4]

The DOM (Developer Offset Mitigation) program referenced by Plaintiffs was begun subsequent to the disconnections on Plaintiffs' properties and is otherwise neither at issue in or relevant to Plaintiffs' takings/inverse condemnation claims. The DOM requirements incorporated into development agreements are equally irrelevant.

Plaintiffs' references to "CAC" and to "Basecamp" are references to a citizen advisory committee and a website used by them for communication in connection with the City's Sanitary Sewer Wet Weather Evaluation project, which was begun in late 2013. The irrelevance of

matters in 2013 and 2014 that do not pertain to the properties of the Plaintiffs and are ten to twelve years after the events at issue in this case is without dispute.

Although Plaintiffs identify other topics (Plaintiffs' Brief p. 8 *et seq.*), Plaintiffs identify no relevant, non-privileged testimony that is necessary for Ms. Elias to be called as a witness to provide. Plaintiffs' motion to disqualify Ms. Elias and her colleagues must be viewed purely as harassment and as part of the ongoing campaign of attacks by Mr. Mermelstein against Ms. Elias and Mr. Postema.

II. TESTIMONY OF CHIEF ASSISTANT CITY ATTORNEY ELIAS IS NOT REQUIRED AND DOES NOT REQUIRE DISQUALIFICATION UNDER MRPC 3.7

Plaintiffs' theory is that the testimony of Ms. Elias is required to explain the legal validity of the FDD program at the time it was instituted. However, the legal validity of the FDD program is, by definition, an issue of law for which no testimony is required. Furthermore, to the extent Ms. Elias may have information about the origins of the FDD program, it would consist of advice provided by her and other attorneys in the City Attorney's office to their client, and possibly the research on which that advice was provided, all of which is protected as privileged attorney-client communications and by the attorney work product doctrine.

Simply put, Plaintiffs have not established that Ms. Elias will or must be called as a witness - or that their pending notice of deposition would survive a motion to quash. Therefore, Plaintiffs' have not met their burden of showing why disqualification of the City Attorney's office from representing the City in this case is required and Plaintiffs' motion is without basis.

Although Plaintiffs assert that Ms. Elias's testimony "is highly material and noncumulative" (Plaintiffs' Brief p. 5), they do not identify a single topic that is relevant, non-

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[4] Sump pumps are required as a matter of plumbing mechanics and hydrologic flow, and that requirement is codified in the Michigan Plumbing Code. See Section 1112.1.

privileged and fits that description. Although Plaintiffs say Ms. Elias is "in a unique position" to provide information about the FDD program (Plaintiffs' Brief p. 6), they do not identify that she is the only person with that knowledge or that she has any knowledge about the FDDs done by the Plaintiffs that are at issue in this case.[5] In fact, Plaintiffs assert that they want her to testify about a process "that involved many City officials and employees." (Plaintiffs' Brief p. 8) A process that involves "many" people does not require the attorney involved in the process to be a witness about the process.[6] Nor do they explain the relevance of the testimony, given their insistence that the only issue before the Court is whether the City or a third party occupies their properties, and the amount of the compensation due if a finding is made that there is such an occupation.

With respect to their takings/inverse condemnation claims, neither Plaintiffs nor the City has argued that the ins and outs of how the FDD Ordinance was adopted are essential or even relevant to their case.[7] Furthermore, as set forth in their Brief, Plaintiffs already have from other sources, including public records of the City, the information about which they now claim Ms. Elias must testify (Plaintiffs' Brief p. 9). The information they want expanded upon, aside from being irrelevant, clearly consists of privileged attorney-client communication and possibly information protected by the attorney work product doctrine, none of which could be disclosed by Ms. Elias. Plaintiffs' Brief further highlights that counsel for Plaintiffs want to focus on legal,

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[5] Although Ms. Elias has obtained information regarding Plaintiffs and their properties in preparing the defense of this lawsuit, that information is clearly protected by the attorney work product doctrine.

[6] Also, as already argued above, the relevance of the process for adoption of the FDD ordinance is not relevant to Plaintiffs' takings/inverse condemnation claims.

[7] That the FDD program has benefited property owners, including Plaintiffs, may be relevant to Plaintiffs' claims for equitable relief, but the arguments as to benefit are based on evidence of how the FDD program has worked on not on why or how the FDD Ordinance was adopted in the first place.

as opposed to factual, issues. (*Id* at p. 11; raising questions as to whether the City Attorney's legal analysis in 2000-2001 had included consideration of issues presented in *Loretto v Teleprompter CATV Corp*, 458 US 419; 102 SCt 3164; 73 LEd2d 868 (1982)).

Contrary to the actual record, Plaintiffs also make the absurd argument that an email from Ms. Elias to Dave Askins, as reported in The Chronicle,[8] says (1) the opposite of what it actually says, and (2) is contrary to what the FDD Ordinance says when in fact it is based on the FDD Ordinance. As already argued in the City's Reply Brief in Support of its Motion for Summary Disposition and will be included if needed in its Amended Reply Brief, when a banister, toilet, water heater, furnace, window or kitchen counter is installed in a home by someone other than the homeowner, the homeowner generally doesn't own it before it is purchased, arrives and/or is properly installed. A sump pump and footing drain line is no different. That the Plaintiffs did not own their sump pumps or related parts while they were manufactured and assembled in the factory or in transit did not make them any less the owners of those sump pumps and lines once installed. The statements in The Chronicle are not inconsistent with that position, and that position is consistent with and based on the FDD Ordinance. Further, this is a legal issue as to which testimony is not required. The decision is based on the FDD Ordinance.

Another absurd argument of Plaintiffs is that documents provided to and statements made to the Sanitary Sewer Wet Weather Evaluation ("SSWWE") study CAC by Ms. Elias in late 2013 and early 2014 were to obtain concurrence by the CAC with positions contrary to those of Plaintiffs in this case, and that Ms. Elias must be deposed regarding those communications. Why those communications were made has no relevance to this lawsuit or Plaintiffs' claims in this lawsuit. However, given that the CAC has no role in or interest in this lawsuit (which had not

[8] Plaintiffs' Exh 8.

been filed), Plaintiffs' theory that Ms. Elias was trying to persuade the CAC regarding the City's position in this lawsuit does not make sense. The events at issue in this case occurred in 2002 and 2003. The SSWWE study was not undertaken until 2013. Plaintiffs do not and cannot connect as relevant any activities involving the SSWWE study or the CAC that is part of that project. Plaintiffs' argument that some cases cited in Ms. Elias's November 25, 2013, memorandum are not on point is a legal argument which can be briefed; it is not an argument about which Ms. Elias needs to be deposed.

In addition, Plaintiffs' mischaracterization of the SSWWE study (Plaintiffs' Brief p. 14) is a gross misrepresentation of facts to the Court.[9]

Even if Ms. Elias could be deposed on limited issues, such limited testimony does not result in her being disqualified as counsel for her client prior to trial. MRPC 3.7(b) explicitly provides:

> "(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."

MRPC 3.7(b) was relied on and followed in *Dalrymple v Nat'l Bank and Trust Co.*, 615 F Supp 979, 989-990 (WD Mich 1985) (trial counsel not disqualified prior to trial when another member of his firm was a likely witness). See, also State Bar of Michigan Informal Ethics Opinions RI-281 (MRPC 3.7 "only disqualifies the lawyer as trial advocate - presenting evidence or argument in open court - and does not reach other aspects of the representation such as preparing the case for trial") and RI-299 (MRPC 3.7 "pertains only to acting as 'advocate at a trial,' and does not require withdrawal of the attorney from participation in pre-trial activities;"

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[9] The cover memorandum to the Ann Arbor City Council and City Council Resolution R-13-035 (2/4/13) approving a contract with Orchard, Hiltz & McCliment, Inc., for the Sanitary Sewer System Flow Monitoring and Wet Weather Evaluation Project (copies attached as Exhibit 4) provide an accurate description of the purpose and scope of the SSWWE study or project.

MRPC 3.7(b) expressly provides that an attorney may act as trial advocate, even though another attorney in the same law firm may be called as a necessary witness).

Plaintiffs go on to assert, but without basis, that Ms. Elias's testimony is or would create a genuine conflict of interest between her (and her colleagues) and her client, the City. Simply saying that the testimony is likely to conflict with the interests of the City does not make it so. This is not a case such as that addressed in RI-26 (on which Plaintiffs' rely; Plaintiffs' Brief p. 7), a situation where an attorney may have affirmed the mental competency of a testator without having ever met the testator. Even if Ms. Elias's legal theories were to be rejected by this Court, legal theories are properly presented by briefs to the Court and not by testimony of Ms. Elias as a witness. Nor does having a viable legal theory rejected by a court create a conflict of interest between the attorney and her client in the case. Plaintiffs' theory is, apparently, that a "competent" attorney would have decided in 2001 that *Loretto* precluded the FDD Ordinance.[10]

The Michigan Supreme Court has cautioned that it would be a "dangerous doctrine" to rule that an order can be obtained disqualifying a lawyer, "If any arguable question can be raised regarding the propriety of [that] lawyer continuing to appear in a case." *Smith v Arc-Mation, Inc*, 402 Mich 115, 118; 261 N.W.2d 713 (1978) (interpreting predecessor of MRPC 3.7); *Kubiak v Hurr*, 143 Mich App 465, 471, 472; 372 NW2d 341 (1985) (decided under predecessor rules to

[10] If so, then possibly hundreds of city attorneys across the country who have advised cities, counties and townships regarding adoption of similar ordinances have been equally incompetent. (See, e.g., the several ordinances listed in footnotes 17 and 18 of the City's Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, previously filed and decided by this Court.) Given the absence of any authority striking down any of those ordinances on *Loretto* or state inverse condemnation grounds, and certainly finding none that pre-dated adoption of the City's FDD Ordinance, Plaintiffs have no basis for this argument; perhaps they simply hope to use this Motion to Disqualify as a means to get this Court to rule on their *Loretto* theory in advance of that issue being properly before the Court for decision on the City's motion for summary disposition.

MRPC 3.7, 1.7 and 1.9; the rules were "not drafted to permit a lawyer to call opposing counsel as a witness and to thereby disqualify him as counsel;" grounds for a motion to disqualify must be significant enough to prevent the motion from being a tactical device).

Plaintiffs have not presented even minimal grounds for disqualification of Ms. Elias or her colleagues at the City Attorney's office. Their Motion to Disqualify Counsel should be denied.

III. THE CITY ATTORNEY'S OFFICE DOES NOT HAVE A CONFLICT THAT REQUIRES DISQUALIFICATION

Plaintiffs' reiterate their statements as to topics on which Ms. Elias must be called as a witness, and reiterate their baseless conclusion that Ms. Elias likely would be a witness adverse to the City. As argued above, there is no basis either for her to be called as a witness or for the conclusion that her testimony would be adverse to the City. Neither her disqualification nor the disqualification of her colleagues in her office is required under MRPC 1.7(b), 3.7(a) or 1.10.

IV. THE CITY WOULD BE PREJUDICED BY THE DISQUALIFICATION OF THE CITY ATTORNEY'S OFFICE AS COUNSEL IN THIS CASE

Plaintiffs have the burden of establishing specifically how and as to what issues in the case the likelihood of prejudice will result if Ms. Elias and her colleagues are not disqualified as counsel for the City in this case. See *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004); *Kubiak*, 143 Mich App 471. They have not asserted with any specificity any likely prejudice.

In contrast, as argued by Plaintiffs, Ms. Elias has been involved with the FDD program since its inception 13 years ago. Her familiarity with and knowledge of the issues in this case from those years cannot be replicated easily or quickly. Requiring the City to retain outside counsel would severely prejudice the City. Ms. Elias and Mr. Postema are experienced attorneys who litigate regularly in this Court on behalf of the City. The time and cost for outside counsel to

be retained and then to get up to speed on the issues in the case would be significant and would be counter to any fair and efficient administration of justice.

CONCLUSION

Although counsel for the City believe counsel for Plaintiffs brought this motion more for vindictive as opposed to tactical reasons, this Court need not speculate or decide whether Plaintiffs brought their motion for tactical or other improper reasons because their motion does not even come close to raising sufficient grounds for disqualification of the City Attorney's office as counsel for the City in this case.

Therefore, for the reasons argued above, this Court should deny Plaintiffs' motion to disqualify the City Attorney's office from representing the City in this case. This court also should award the City its costs and attorney fees for having to defend against this motion, which so clearly is without basis.

Dated: August 22, 2014

Respectfully submitted,

By: _____

Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant City
OFFICE OF THE CITY ATTORNEY

INDEX OF EXHIBITS

Exhibit 1: Plaintiffs' Proof of Service for Plaintiffs' Motion to Disqualify Counsel

Exhibit 2: Attorney Grievance Commission dismissal letters

Exhibit 3: August 4, 2012 email from Mr. Mermelstein to members of Ann Arbor City Council

Exhibit 4: Ann Arbor City Council Resolution R-13-035 (2/4/13) approving a contract with Orchard, Hiltz & McCliment, Inc. for the Sanitary Sewer System Flow Monitoring and Wet Weather Evaluation Project.

Exhibit 1: Plaintiffs' Proof of Service for Plaintiffs' Motion to Disqualify Counsel

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Irvin A. Mermelstein (P52053)
Attorney for Plaintiffs
2099 Ascot St.
Ann Arbor, MI 48103
(734) 717-0383
nrglaw@gmail.com

M. Michael Koroi (P44470)
Co-Counsel for Plaintiffs
150 N. Main St.
Plymouth, MI 48170
(734) 459-4040

Woods Oviatt Gilman, LLC
By: Donald W. O'Brien, Jr.
(temporary admission under MCR 8.126)
Co-Counsel for Plaintiff
2 State St.
700 Crossroads Bldg.
Rochester, NY 14614
(528) 982-2802

OFFICE OF THE CITY ATTORNEY
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170

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Ann Arbor, MI 48103
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Co-Counsel for Plaintiffs
150 N. Main St.
Plymouth, MI 48170
(734) 459-4040

Woods Oviatt Gilman, LLC
By: Donald W. O'Brien, Jr.
(Pro Hac Vice Application pending)
Co-Counsel for Plaintiff
2 State St.
700 Crossroads Bldg.
Rochester, NY 14614
(528) 982-2802

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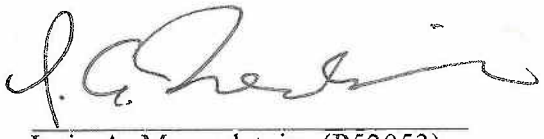
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170

PROOF OF SERVICE

I hereby certify that I personally delivered to the above-named Attorneys for Defendant, at the Office of the City Attorney at the above address, a true and correct copy of the Plaintiffs' Motion to Disqualify Counsel Pursuant to MRPC 1.7(b), MRPC 3.7(a) AND MRPC 1.10 the above-entitled action on this 20th day of August, 2014.



Irvin A. Mermelstein (P52053)

Exhibit 2: Attorney Grievance Commission dismissal letters

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2099 Ascot St.
Ann Arbor, MI 48103
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700 Crossroads Bldg.
Rochester, NY 14614
(528) 982-2802

OFFICE OF THE CITY ATTORNEY
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170

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STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

BUHL BUILDING
535 GRISWOLD, SUITE 1700
DETROIT, MICHIGAN 48226
TELEPHONE (313) 961-6585
WWW.AGCMI.COM

November 20, 2013

PERSONAL AND CONFIDENTIAL

Irvin A. Memelstein
2099 Ascot Rd.
Ann Arbor, MI 48103

RE: Irvin A. Memelstein as to Abigail Elias
AGC File No. 0351-13

Dear Mr. Memelstein:

Your complaint was filed with the Attorney Grievance Commission on February 12, 2013, alleging improper conduct on the part of Abigail Elias.

The undersigned investigated this matter by carefully reviewing all statements and documentation submitted by the parties. The results of the investigation, along with a recommendation, were submitted to the Commissioners for their review and decision.

The Attorney Grievance Commission determined that the evidence reviewed did not warrant further action by the Commission. Therefore, pursuant to MCR 9.114(A)(2), the Commission directed that this Request for Investigation be closed for the reason that the Attorney Grievance Commission does not issue legal opinions on prospective violations of the rules of professional conduct or review legal conclusions made by attorneys during the course of their business.

If I can be of further assistance to you, please do not hesitate to call.

Very truly yours,

Frances A. Rosinski
Senior Associate Counsel

FAR/mmp
cc: Abigail Elias

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STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

BUHL BUILDING
535 GRISWOLD, SUITE 1700
DETROIT, MICHIGAN 48226
TELEPHONE (313) 961-6585
WWW.AGCMI.COM

November 20, 2013

PERSONAL AND CONFIDENTIAL

Irvin A. Memelstein
2099 Ascot Rd.
Ann Arbor, MI 48103

RE: Irvin A. Memelstein as to Stephen K. Postema
AGC File No. 0563-13

Dear Mr. Memelstein:

Your complaint was filed with the Attorney Grievance Commission on March 18, 2013, alleging improper conduct on the part of Stephen K. Postema.

The undersigned investigated this matter by carefully reviewing all statements and documentation submitted by the parties. The results of the investigation, along with a recommendation, were submitted to the Commissioners for their review and decision.

The Attorney Grievance Commission determined that the evidence reviewed did not warrant further action by the Commission. Therefore, pursuant to MCR 9.114(A)(2), the Commission directed that this Request for Investigation be closed for the reason that the Attorney Grievance Commission does not issue legal opinions on prospective violations of the rules of professional conduct or review legal conclusions made by attorneys during the course of their business.

If I can be of further assistance to you, please do not hesitate to call.

Very truly yours,

Frances A. Rosinski
Senior Associate Counsel

FAR/mmp
cc: Stephen K. Postema

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Exhibit 3: August 4, 2012 email from Mr. Mermelstein to members of Ann Arbor City Council

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Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170

_____/

Exhibit 3: August 4, 2012 email from Mr. Mermelstein to members of Ann Arbor City Council

Postema, Stephen

From:	Irvin Mermelstein [nrglaw@gmail.com]
Sent:	Saturday, August 04, 2012 12:42 AM
To:	Teall, Margie; Higgins, Marcia
Cc:	Ellen Fisher; Brad Moore LT; judithhanway@sbcglobal.net; Eric Macks; stevejhorler@gmail.com; isthatyourbag@me.com; Raabmj@aol.com
Subject:	FDD Program: Form 1 Analysis and Inverse Condemnation Summary
Attachments:	FDD Form 1 Analysis rev 1.docx

Dear Council Members Higgins and Teall,

I am an attorney providing pro bono counsel and representation to homeowners in Lansdowne and nearby neighborhoods concerning the implementation of the FDD Program. In addition to the above cc's, this email will receive distribution to many other residents here.

City Exposure to Large Inverse Condemnation Claims by Owners

The City is facing a very significant problem concerning compensation claims by owners against it. There is a narrow doctrine--"inverse condemnation by physical occupation"--under a line of US Supreme Court cases going back to 1871 in *Pumpelly v Green Bay Co.* The lead case is *Loretto v Teleprompter,* decided in 1982. The case is still absolutely good law.

The Supreme Court decided in *Loretto* that a *per se* taking occurs when a municipality requires owners to accept permanent installation of equipment, following the "enforced acquiescence" of the owner. ("Enforced acquiescence" in *Loretto* took the form of a New York statutory requirement for owners of rental property to admit contractors for the city's cable franchisee to install cable wiring.) The Court stated that the permanent installation of wiring was a taking, without regard (and I emphasize this) to the civic purpose for the taking. This case is directly on point and should control the outcome of claims here.

Further, under *Loretto*, compensation is due to the owner unless the interference with the owner's free and exclusive use of his property as a result of the permanent installation is "trivial". The installations here are not trivial; they are major intrusions into people's homes and personal lives. This is made especially true when the physical installation is coupled with the requirement of the Ordinance to operate and maintain FDD installations at the owner's sole expense without limit as to time, ability to pay, ability to perform, physical disability, etc.

In my opinion, the physical installation and this onerous and continuing obligation to operate and maintain an FDD installation are both parts of the City's permanent presence in the homes of FDD program "participants" and subject to compensation as a package.

City Financial Impact

What is the impact of these United States Supreme Court cases on the City? The City will be subject to thousands of meritorious compensation claims, one for every FDD installation it has done and one for every installation it does from this point forward. The operation and maintenance requirement of the Ordinance makes matters worse for the City because it introduces tmakes property owners into 24/7 servants of the city for the benefit of others. These will be substantial claims.

Looking at the facts here, which fit very neatly with those in *Loretto,* the case on liability should be relatively straightforward. I expect the arguments will be over compensation, with a lot of money at issue and the City in a very weak position to defend.

Owners who have had no installation yet are likely entitled to injunctive relief, which would be appropriate.

As a very rough estimate, total liabilities for the city thus far (based on 2,000 houses with completed installations, a conservative 3% flooding rate, and a median house price of $205,000) would be about $51 million. Even if the 3% flooding rate is cut in half, that is a still a lot of money. In the test areas such as Lansdowne, the flooding rate may be higher than the assumed 3% and bump up the claims figure further.

In my opinion, this program has accomplished very little if anything, while doing a lot of damage to the City's financial picture going forward. These claims are not theoretical, and will represent a burden to the City in the form of claims resulting from the expenditure of money that, in retrospect, probably should have been spent on other options for dealing with the City's storm water and sewage problems.

How will the City pay for these claims? How big of a millage will be required to pay tens of millions of dollars to homeowners with FDD installations in their basements, whether flooded or not? From an Ann Arbor resident's perspective, this is not looking like the cost-efficient program it was advertised to be; doing another 18,000 homes could get very expensive.

This is no longer strictly a test area problem. Homeowners throughout the city need to be concerned now that the FDD Program will end up in a mass of meritorious claims for which the City's residents will have to bear the cost.

FDD Program Form 1 Analysis

I am also forwarding to you an analysis of the FDD Program Form 1, which I prepared. A previous draft (with immaterial differences) was provided to Craig Hupy, Anne Warrow, and Abigail Elias in preparation for a meeting with all three on July 25 at City Hall. This was a meeting to which my client, Judith Hanway, and I were invited by FDDP staff for the sole purpose of discussing Form 1 concerns. In fact, the City wished to discuss everything except the Form 1 and dismissed as ridiculous the idea that homeowners in the FDDP might have claims of any kind against the City. This is notwithstanding the fact that Judy and I raised eminent domain as a possible theory for recovery. In any event, the meeting was contentious and nonproductive, with the City proposing no follow-up at all. Mr. Hupy left in the middle.

The conclusion of the Form 1 analysis is that not a single claim was released by an owner who signed this document and that homeowners have not taken on any hold harmless obligations to the City or anyone else. The request for a hold harmless agreement was not even authorized by the Ordinance, which only authorized the City to obtain releases. This was also dismissed by the City representatives at the July 25 meeting.

The Form 1 document is completely useless to create an obligation or contract of any kind on the part of the homeowner and the manner in which signatures were obtained from owners was, at least in my opinion, very questionable. Most owners don't know whether they have signed it (the City does not leave a copy with the homeowner) or what it was that they signed. Its use should be discontinued, immediately.

Questions about Council Action

Finally, neighbors are concerned about a rumor that there will be a resolution concerning flooding in the Lawton School area put on the table by you, as co-sponsors, at the next City Council meeting. My apologies if the rumor has no basis. If such action at the Council is planned, however, I and many of my neighbors in this neighborhood, Churchill Downs, Chaucer Court and others would like to review the resolution and give you feedback before the Council meeting.

Personally, I would be quite concerned about any action by the Council that is not preceded by a thorough new review of the legal and engineering underpinnings of the FDD Program or that might inadvertently, but adversely affect the legal rights of my family and my neighbors vis a vis the City. As neighbors organize in this area, we would like to be sure that we can participate in any action by the Council on the FDD Program.

I would appreciate an opportunity to meet with each of you very soon concerning the FDD Program and to hear your views concerning the matters that are very much on neighbors' minds.

Thank you for your attention. I can be reached at 734 717 0383 and I look forward to hearing from you.

Sincerely,

Irvin A. Mermelstein

Law Office ▪ Irvin A. Mermelstein ▪ 2099 Ascot Street ▪ Ann Arbor MI 48103 ▪ 734.717.0383

Exhibit 4: Ann Arbor City Council Resolution R-13-035 (2/4/13) approving a contract with Orchard, Hiltz & McCliment, Inc. for the Sanitary Sewer System Flow Monitoring and Wet Weather Evaluation Project.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 14-181-CC

Hon. Donald E. Shelton

Irvin A. Mermelstein (P52053)
Attorney for Plaintiffs
2099 Ascot St.
Ann Arbor, MI 48103
(734) 717-0383
nrglaw@gmail.com

M. Michael Koroi (P44470)
Co-Counsel for Plaintiffs
150 N. Main St.
Plymouth, MI 48170
(734) 459-4040

Woods Oviatt Gilman, LLC
By: Donald W. O'Brien, Jr.
(temporary admission under MCR 8.126)
Co-Counsel for Plaintiff
2 State St.
700 Crossroads Bldg.
Rochester, NY 14614
(528) 982-2802

OFFICE OF THE CITY ATTORNEY
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170

_____/

Exhibit 4: Ann Arbor City Council Resolution R-13-035 (2/4/13) approving a contract with Orchard, Hiltz & McCliment, Inc. for the Sanitary Sewer System Flow Monitoring and Wet Weather Evaluation Project.

City of Ann Arbor

301 E. Huron St.
Ann Arbor, MI 48104
http://a2gov.legistar.com/Calendar.aspx

Text File

File Number: 12-1662

Agenda # DS-1
Introduced: 2/4/2013
Version: 1
Current Status: Passed
Matter Type: Resolution

Resolution to Approve a Professional Services Agreement with Orchard, Hiltz & McCliment, Inc. ($968,348.00) for the Sanitary Sewer System Flow Monitoring and Wet Weather Evaluation Project

Attached for your review and approval is a resolution to authorize a Professional Services Agreement with Orchard, Hiltz & McCliment, Inc. (OHM) for professional engineering and public engagement services for the Sanitary Sewer System Flow Monitoring and Wet Weather Evaluation Project.

As the Footing Drain Disconnect (FDD) Program has been in place for over 10 years, it is appropriate to evaluate and document the effectiveness of the program on reducing the impacts of wet weather events on the City's sanitary sewer system. This review will allow the city to assess the sanitary basement backup risk that remains in original priority areas, and to identify other areas in the City that may require mitigation of their sanitary basement backup risk. In addition, as advances in technology and wet weather control methodologies have likely occurred over the past decade, it is also appropriate to review, evaluate and recommend the complete range of methods moving forward to further reduce these wet weather impacts.

Within the City of Ann Arbor, there are groups of homes that have experienced multiple basement flooding occurrences. Many of these have been the result of backup of wastewater from the sanitary sewers through basement floor drains. While the sanitary sewer system normally moves all of the wastewater to the Ann Arbor Wastewater Treatment Plant (WWTP), when it rains some of this rain enters the sanitary sewer system and has occasionally exceeded the capacity of the system to move flows to the WWTP, resulting in basement backups. The City of Ann Arbor has taken a variety of approaches in the past to correct these problems with varied success.

A special task force comprised of homeowners, city staff, and experts in related disciplines was established in 1999 to define the scope of sanitary sewer overflow (SSO) or sewage backup problems due to wet weather conditions, and to identify possible effective solutions to minimize future sewage backup events. To focus the efforts of this SSO Prevention Advisory Task Force, five neighborhoods with high rates of basement flooding were selected for evaluation. The neighborhoods selected included about 5% of the area of the City of Ann Arbor and accounted for about 50% of

the basement flooding problems that had been reported to the City of Ann Arbor. The analysis efforts and final recommendations for these priority areas were documented in the Sanitary Sewer Overflow Prevention Study (June 2001).

Alternative solutions were reviewed by the Task Force using a variety of selection criteria including quality of life, cost, and construction impacts. The 2001 Sanitary Sewer Overflow (SSO) Prevention Study determined a comprehensive city-wide footing drain disconnection (FDD) program to be the best solution for the residents of Ann Arbor to meet these multiple objectives.

Since the inception of the FDD Program in October 2001, approximately 2,538 footing drains have been disconnected, including nearly 98% of the homes in the Bromley and Orchard Hills priority areas, and nearly 80% in the Dartmoor priority area. In addition, approximately 60% of the FDDs have been completed in the Morehead priority area and approximately 55% have been completed in the Glen Leven priority area.

The Project Management Services Unit issued a Request for Proposal (RFP #819) in November 2012 for a professional engineering firm to perform the following scope of work for this project:

- Perform flow monitoring on the sanitary sewer in the 5 priority areas from the 2001 study
- Update, calibrate, and validate the existing sanitary sewer model
- Evaluate the effectiveness of the current FDD Program
- Provide recommendations for reducing or eliminating wet weather flow impacts
- Perform extensive public engagement throughout the entire project, including a citizen Advisory Committee, a Technical Oversight Committee, focus groups, and the public at large.

In response to our request, we received five (5) proposals. A review team composed of City staff evaluated the proposals, interviewed three firms, and selected OHM for their proposed work plan, public engagement plan, staff qualifications and past involvement with similar projects.

OHM received updated Human Rights approval on September 21, 2012 and Living Wage approval on April 23, 2012.

Sufficient funds for the design engineering services for this project are available within the approved Sewer capital budget. This resolution will also establish a contingency amount of $192,000.00 (broken up into various components as described in Exhibit B of the attached Professional Services Agreement) in the event that additional flow monitoring needs to be performed due to dry weather conditions during the monitoring period. In addition, $85,000.00 is to be included in the project budget for the estimated staff time on the project allowing these costs to be captured as capitalized expenses.

Prepared by: Nicholas Hutchinson, P.E., Interim Project Management Manager
Reviewed by: Craig Hupy, Public Services Administrator
Approved by: Steven D. Powers, City Administrator

City of Ann Arbor

301 E. Huron St.
Ann Arbor, MI 48104
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Calendar.aspx

Council Action

Resolution: R-13-035

File Number: 12-1662 **Enactment Number: R-13-035**

Resolution to Approve a Professional Services Agreement with Orchard, Hiltz & McCliment, Inc. ($968,348.00) for the Sanitary Sewer System Flow Monitoring and Wet Weather Evaluation Project

Whereas, The existing Footing Drain Disconnection Program has been in place for over 10 years, and it is an appropriate time to evaluate and document the effectiveness of the program;

Whereas, Advances in technology and wet weather control methodologies have likely occurred over the past decade, it is also appropriate to review, evaluate and recommend a complete range of methods moving forward to further reduce wet weather impacts;

Whereas, Orchard, Hiltz & McCliment, Inc. of Livonia, Michigan has submitted to the City a proposal for the necessary services, setting forth the services to be performed by said firm and the payments to be made by the City therefore, all of which are agreeable to the City;

Whereas, Orchard, Hiltz & McCliment, Inc. received updated Human Rights approval on September 21, 2012 and Living Wage approval on April 23, 2012; and

Whereas, The required funds for the Professional Engineering Services are available within the approved Sewer capital budget;

RESOLVED, That a Professional Services Agreement with Orchard, Hiltz & McCliment, Inc. in the amount of $968,348.00 be approved for Professional Engineering Services for the Sanitary Sewer System Flow Monitoring and Wet Weather Evaluation Project;

RESOLVED, That a contingency amount of $192,000.00 be established within the project budget and that the City Administrator be authorized to approve additional Amendments to the Professional Services Agreement with Orchard, Hiltz & McCliment, Inc., not to exceed $192,000.00 in order to satisfactorily complete this project;

RESOLVED, That $85,000.00 be established within the project budget for the estimated staff time on the project;

RESOLVED, That the Mayor and City Clerk be authorized and directed to execute said agreement after approval as to form by the City Attorney and approval as to substance by the City Administrator; and

RESOLVED, That the City Administrator be authorized to take the necessary administrative actions to implement this resolution.

At a meeting of the City Council on 02/04/2013, a motion was made by Margie Teall, seconded by Marcia Higgins, that this Resolution R-13-035 be Approved. The motion passed.

STATE OF MICHIGAN
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Irvin A. Mermelstein (P52053)
Attorney for Plaintiffs
2099 Ascot St.
Ann Arbor, MI 48103
(734) 717-0383

M. Michael Koroi (P44470)
Co-Counsel for Plaintiffs
150 N. Main St.
Plymouth, MI 48170
(734) 459-4040

Woods Oviatt Gilman, LLC
By: Donald W. O'Brien, Jr.
(temporary admission under MCR 8.126)
Co-Counsel for Plaintiffs
2 State St.
700 Crossroads Bldg.
Rochester, NY 14614
(528) 982-2802
_____/

OFFICE OF THE CITY ATTORNEY
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170

PROOF OF SERVICE

I hereby certify that I mailed, first class postage prepaid, a true and correct copy of Defendant City of Ann Arbor's Response and Brief in Opposition to Plaintiffs' Motion to Disqualify Counsel and this Proof of Service to the above-named counsel for Plaintiff, this August 22, 2014. A courtesy copy was also sent to Plaintiffs' counsel via their email address of record.

Alex Keszler, Legal Assistant