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 FOR SANCTIONS PURSUANT TO MCR 2.114

PRELIMINARY STATEMENT

The Plaintiffs, Anita Yu, John Boyer and Mary Raab, request sanctions against the Defendant, City of Ann Arbor ("the City") and/or its counsel, pursuant to MCR 2.114. The Plaintiffs respectfully submit that the Defendant and/or its counsel have filed documents, to wit, papers in support of the City's motion for summary disposition, which are neither well-grounded in fact nor warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. Although the City has delayed for nearly six months the service of its answer through motion practice, an improvident removal to federal court and unilateral adjournments, the City's defenses to the Plaintiffs' challenge to the City's Footing Drain Disconnect Program (FDDP) have been clearly set forth in its motion for summary disposition. It is respectfully submitted that the City's defense based upon the statute of limitations and its defense that the Plaintiff's federal claims are unripe are frivolous. It is also the Plaintiff's contention that the City or its counsel has included in its brief gross mischaracterizations of the complaint that are misleading.

The instant motion is directed at arguments advanced by the City in support of its motion for summary disposition pursuant to MCR 2.116(C)(7) and, in particular, the City's document entitled "*Defendant City of Ann Arbor's Brief in Support Motion for Summary Disposition for Lack of Subject Matter Jurisdiction, Because the Actions Are Time-Barred, for Failure to State Claims Upon Which Relief Can Be Granted and/or for Lack of Standing.*" (hereinafter "City Brief") (a copy of the City Brief is attached hereto as **Exhibit "A"**).

POINT I

STANDARD ON A MOTION UNDER MCR 2.114

MCR 2.114(B) requires that every document of a party represented by an attorney be signed by at least one attorney of record. MCR 2.114(D) provides that, in signing the document, the signer certifies that:

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact, and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(4)

"The filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions pursuant to MCR 2.114(E)." *Guerrero v. Smith*, 280 Mich. App. 647, 648; 761 NW2d 723 (2008). If the Court finds that the rule has been violated, the sanction is mandatory. *In re Goehring*, 184 Mich. App. 360, 367, 457 NW2D 375 (1990). Pursuant to MCR 2.114(F), sanctions can be imposed for frivolous claims and defenses.

By virtue of both MCR 2.113(A) and MCR 2.114(A), the rules governing the imposition of sanctions apply to "motions, affidavits and other papers" as well as pleadings. *Bechtold v. Morris*, 443 Mich. 105, 108-09; 503 NW2D 654 (1993); *see also, Triplett v. Louise St. Amour*, 444 Mich. 170, 178; 507 NW2d 194 (1993); *Michigan Bank-Midwest v. Anderson*, 165 Mich. App. 630, 644; 419 NW2d 439 (1988). Thus, even though the City has not yet served an answer to the Plaintiffs' complaint, its motion papers and the arguments advanced therein are subject to the same standards that an answer would be.

POINT II

THE CITY'S BRIEF MISCHARACTERIZES THE COMPLAINT

A party makes claims that are not well grounded in fact in violation of MCR 2.114(D)(2) when it advances an argument that is contradicted by documentary evidence in that party's possession. *See, e.g., Christman v. Chicago Title*, 2014 Mich. App. LEXIS 1471 at *3 (Mich. App. 8/12/14). In this case, the City has advanced arguments that mischaracterize the Plaintiffs' complaint. These mischaracterizations are then attacked, rather than the actual claims which are easily discernible from the four corner of the complaint.

A. The Plaintiffs Did Not Permit or Invite the City's Agents.

The City's argument that a six-year statute of limitation should apply is based solely upon its unfounded assertion that the Plaintiffs somehow "permitted or invited" the invasion or occupation (City Brief, p. 14). The City's position in this regard is without merit. First, the well-pleaded allegations of the Plaintiffs' complaint allege exactly the opposite. In that regard, the complaint includes the following allegations:

- "The City and/or CDMI delivered a Homeowners Packet to Plaintiff, Anita Yu, during or about the first three months of 2003. *The Homeowners Packet threatened fines and other actions if Plaintiff, Anita Yu failed to give an enforced consent to the entry into her home and completion of an FDD.*" (¶ 30)

- "*As required by the Homeowners Packet*, Plaintiff, Anita Yu, selected Hutzel Plumbing, a Michigan corporation, for FDD work, one of the five "pre-qualified" plumbers to whom her choice was limited by the City..." (¶ 31)

- "Plaintiffs, John Boyer and Mary Raab, *under threat of compulsion*, completed the footing drain disconnect in 2002..." (¶ 37)

- "The *mandatory disconnection of the Plaintiffs' footing drains and the forced installation of sump pumps and related equipment* constituted a physical intrusion by the City, or others acting on its behalf or in its stead, resulting in a permanent physical occupation of the Plaintiffs' property and a significant interference with the Plaintiffs' use of their property." (¶ 43)

- "The Plaintiffs have suffered damage to their property, have been *forced to incur* costs and expenses as a direct result of the FDDP and will continue to incur such costs and expenses in the future." (¶ 45)

(A copy of the Plaintiffs' complaint is attached hereto as **Exhibit "B"**)[emphasis added]. The complaint contains other allegations which refute any contention that the Plaintiff's participation in the FDDP was voluntary. Since the Plaintiffs' allegations of fact must be accepted as true by the City, its statement that the physical invasion complained of was "permitted or invited" is not "well-grounded" and is sanctionable.

B. The Plaintiffs Do Not "Recognize" the Facts as Portrayed by the City.

The City asserts that "Plaintiffs recognize that they own the sump pumps they installed ant that the sump pumps and footing drain system operate as an integral part of their houses; in other words, that neither the City nor a third party owns anything located in their homes, occupies their properties, or has otherwise taken their properties." (City Brief, p. 2). The City cites as support for this assertion ¶¶ 30-33, 35 and 37 of the complaint, Exhibit 2, page 4, Figure 2 and Exhibit 2, page 11 at ¶ 16.

Even a cursory examination of the references which the City claims purportedly support this assertion reveals that the cited paragraphs from the complaint in no way represent an admission or concession that they own the sump pump and related facilities, equipment which they allege caused a physical invasion of their property when installed by the City and/or its agents. For example, ¶ 30 contains the following sentence: "[t]he Homeowners Packet threatened fines and other actions if Plaintiff Anita Yu failed to give an *enforced consent to the entry into her home* and completion of an FDD." [emphasis added]. Similarly, ¶ 37 alleges that: "Plaintiffs, John Boyer and Mary Raab, *under threat of compulsion*, completed the footing drain disconnect in 2002." [emphasis added]. And, in a breathtaking display of *chutzpah*, the City actually cites, as support for its assertion that the *Plaintiffs* "recognize" that they own the equipment, the City's own Homeowner Packet (Complaint, Exhibit 2), including a drawing the City prepared and, brazenly, the City's response to its own Frequently Asked Questions (FAQ's).

This level of mischaracterization goes beyond zealous advocacy; it is misleading and is unfair to both the Court and to the Plaintiffs, whose lawyers are forced to ferret out mischaracterizations and distortions of the record when they should be responding to a "fair presentation of the issues" by opposing counsel. *See, Rockey v. General Motors Corp.*, 1 Mich. App. 100, 105 (Mich. App. 1965).

C. The Plaintiffs Do Not "Concede" That the Ordinance Was Adopted to Address Public Health, Safety and Welfare.

The City claims in its Brief (City Brief, p. 4) that "Plaintiffs concede that Sec. 2:51:1 was adopted by the City to address the public health, safety and welfare issues of sanitary sewer backups in basements

and sanitary sewage overflows." The City cites as support for this claim ¶¶ 17-20 and 22 of the complaint. Again, this alleged "concession" is a mischaracterization of the allegations of the complaint and represents another attempt by the City to manufacture admissions by the Plaintiffs.

The paragraphs cited by the City provide scant support for its claim. For example, ¶ 17 alleges that the surcharges to the sanitary sewer system in August of 1998 and June of 2000 were "at least partly due to the cracked conditions of the sewers, which promoted and promotes infiltration of storm water into the sanitary sewer system." Similarly, ¶ 20 alleges that "[s]tarting in 2000 MDEQ demanded mitigation of sewer overflows from the City to prevent further SSO's but did not impose a particular solution, including a sewer system upgrade. Upon information and belief, the City was unwilling to upgrade the sewer system due to the anticipated capital expenditures which would be necessary to upgrade the underground infrastructure."

The City also ignores ¶ 42 of the complaint in which the Plaintiffs allege: "[u]pon information and belief, the Ordinance was not enacted in response to emergency conditions or some other imminent threat to public health, safety or welfare. Rather, the Ordinance was enacted by the City in order to facilitate a solution to long-standing and self-created conditions in the least expensive and/or most expedient way possible."

If the City wants to deny any of the Plaintiffs allegations it disagrees with when it finally answers the Plaintiffs' complaint based upon the facts and evidence it believes exist, then it is free to do so, so long as it complies with the applicable court rules. What it should not be permitted to do is distort the Plaintiffs' own allegations by mischaracterizing them so cavalierly. MCR 2.116 is designed to limit such sharp practice.

POINT III

THE PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED AND THE CITY'S ARGUMENT TO THE CONTRARY IS FRIVOLOUS

The City argues that the Plaintiffs' state law claims are time-barred because they failed to commence these claims within six-years pursuant to MCL 600.5813, which, according to the City, is the applicable statute of limitations (City Brief, Point III (B)(2)).

The City conceded that, when reviewing a motion for summary disposition under MCR 2.116 (C)(7), the trial court must accept the non-moving parties well-pleaded allegations as true and construe the allegations in the non-movant's favor to determine whether any factual development could provide a basis for recovery. *Hofman vs. Boonsiri*, 290 Mich. App. 34, 39; 801 NW2d 385 (2010). It also claims that "neither the facts nor the legal effect of those facts are in dispute in this case." (City Brief, Point I(B), p.5). Given this acknowledgement, if the complaint alleges inverse condemnation, then the City is bound to accept those allegations as true for the purposes of this motion.

In this light, the City cannot seriously argue that the Plaintiff's complaint fails to state a claim for inverse condemnation. Indeed, the final paragraph before the allegations relating to the specific causes of action, reads as follows:

> 48. Due to the City's enactment, implementation and enforcement of the Ordinance, the Plaintiffs' properties have been unreasonably burdened, economically impaired, physically occupied and/or invaded and otherwise damaged, *resulting in the de facto or inverse condemnation of the Plaintiffs' properties.*

(City's Brief, Exhibit "1," ¶ 48) [emphasis added]. Because the initial paragraph for each of the causes of action repeats and realleges all of the foregoing paragraphs, paragraph 48 is incorporated by reference into each cause of action. The fact that each of the causes of action in the Plaintiffs' complaint is premised upon inverse condemnation was recognized by the Hon. Avern Cohn, United States District Court Judge, when he granted the Plaintiffs' motion to remand the case from federal court to state court following oral argument on May 28, 2014. (a copy of the transcript from the oral argument of the Plaintiffs' motion to remand is attached to the accompanying affirmation of Donald W. O'Brien, Jr., Esq. as **Exhibit "C"**). To the extent that the City's motion rests upon the notion that the complaint somehow

does not sufficiently allege inverse condemnation, that notion is completely undermined by the well-pleaded allegations of the complaint.[1]

The City is left to argue that, even if the Plaintiffs' complaint states claims for inverse condemnation, their state law claims are time-barred because the applicable statute of limitations is still six years under MCL 600.5813. According to the City, because the Plaintiffs "permitted or invited" the occupation, the six year statute of limitations should apply, rather than the fifteen year period provided by MCL 600.5810(4). The City's position in this regard is frivolous as it is not "well grounded in fact and law."

A. The Facts.

See Point III(A) above.

B. The Law.

On this record, the City's attempt to distinguish *Difronzo* and argue in favor of a six-year statute of limitations is not well grounded in fact, nor is it warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. As such, the City's certification was unjustified and sanctions are appropriate.

In *Hart v. Detroit*, 416 Mich. 488 (1982), cited by the City, the Michigan Supreme Court was asked to determine whether certain claims for inverse condemnation were time-barred. The plaintiffs in *Hart* had all owned properties in the City of Detroit that were taken by the City of Detroit as part of an urban renewal project. The City of Detroit had undertaken *de facto* takings of the plaintiffs' properties and demolished the structures upon them and, thereafter, initiated tax foreclosure proceedings as a result of the plaintiffs' nonpayment of real property taxes. The inverse condemnation action was commenced **after** title was legally conveyed to the City of Detroit and more than three years after the right of equity

[1] In support of its motion for summary disposition under MCR 2.116(C)(7), the City submitted no affidavits or any other admissible evidence from anyone with personal knowledge of the relevant facts. The Plaintiffs' allegations could have been challenged by the City with admissible evidence but the City has failed to do so.

redemption had expired. The fact that the plaintiffs no longer possessed any ownership rights in the property at issue was critical to the holding in *Hart*.

The Court determined that the six year statute of limitations for "personal actions" under MCL 600.5813 applied to the plaintiffs' claims, seeking recovery for "a complete loss of his realty by the condemnor's actions." 416 Mich. at 502. In distinguishing the situation where a claimant retained ownership rights to the property in question, the Court in *Hart* pointed out that "[t]here is no dispute that the present plaintiffs no longer have any right to regain possession of the subject property..." *Id.* at 503. Distinguishing the case before it from a case in which the fifteen year statute of limitations for adverse possession might be more appropriate, the *Hart* court noted:

> However, plaintiffs here lost all title and interest to the properties upon the expiration of the period of redemption following the sale of the properties for nonpayment of taxes. *When the present legal action was commenced, plaintiffs had no ownership rights in the properties, legal or equitable.* Under such circumstances, there is no foundation to apply a 15-year limitation period that is predicated upon the plaintiff having continual ownership rights.

416 Mich. at 499 [emphasis added]. The *Hart* Court conjectured that it was possible that a scenario could exist where the application of the fifteen-year statute of limitations might be more appropriate.

The scenario envisioned by the *Hart* court arose six years later in *Difronzo v. Port Sinilac*, 166 Mich. App. 148 (1988). In *Difronzo*, the plaintiff waited fourteen years to bring suit alleging, among other claims, a claim for inverse condemnation resulting from the alleged encroachment upon his riparian rights to shorefront property on Lake Huron. *Difronzo* squarely presented the question of whether a fifteen-year statute of limitation applied to the plaintiff's claims.

Although the trial court agreed with the Village of Port Sanilac that the plaintiff had no possessory interest in the property in question, the Court of Appeals disagreed and held that there was a legitimate issue as to whether the plaintiff suffered a physical encroachment upon his frontage and interference with his riparian rights. In light of that conclusion, the Court of Appeals applied the fifteen-year statute of limitations:

Hart is readily distinguishable from the instant case because the plaintiff still retains ownership rights in the lakeshore property he claims has been de facto taken.

In fact, the *Hart* Court also stated:

> We do not foreclose the possibility that on the proper facts, where a plaintiff retains ownership rights in the property when suit is brought, the analogy to adverse possession may be applied.

This is such a case. The Supreme Court noted that the rationale for applying the adverse possession limitation period rested on the owner's present interest in the property. Without question plaintiff has a present interest in the lake frontage and riparian rights.

166 Mich. App. at 153-54.

The applicability of the fifteen-year statute of limitations is even more clear in the case at bar. While in *Difronzo*, there was an "issue" as to whether the plaintiff held ownership rights to the property encroached upon, the Plaintiffs in this case indisputably retain ownership rights in the subject properties and each complains of a physical occupation of that property.[2] There is simply no good faith basis for extending *Hart* to the Plaintiffs who have held title to their property since the 1970's. Their inverse condemnation claims are clearly subject to a fifteen-year statute of limitations.

Second, the City's attempt to distinguish the case at bar from *Difronzo* is unavailing and its reliance on *Benninghoff v. Tilton*, 2009 Mich. App. 2357 (Mich. Ct. App. 11/12/09) is unfounded. As noted above, the critical distinction that determines if an alleged inverse condemnation claim is governed by the fifteen-year statute of limitations is whether the claimant retains an ownership interest in the property at issue. In *Hart*, the plaintiffs no longer possessed any ownership interest in their respective properties while, in *Difronzo*, the plaintiff alleged that he still owned the affected frontage and still held riparian rights. In the case at bar, there is no dispute but that the Plaintiffs still hold title to the properties

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[2] The fact that the Plaintiffs possess a sufficient ownership interest to qualify for a fifteen-year statute of limitations does not mean that they have not suffered a taking in the form of a physical invasion of their properties. As the United States Supreme Court noted in *Loretto*: "[f]inally, even though the owner may retain the **bare legal right** to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." 458 U.S. at 435 [emphasis added].

on which the alleged physical occupation has occurred and where the offending sumps, sump pumps and related equipment remain. There is no authority (and the City cites none) for the proposition that a six-year statute of limitations applies under the circumstances present here.

The case cited by the City for the proposition that a six-year statute of limitations applied where the physical occupation is "permitted or invited" by the owner, *Benninghoff v. Tilton, supra*, does not support the City's position. In *Benninghoff*, even though the parties stipulated that the six-year statute of limitations governed their dispute over the extent of the public's prescriptive rights to use a roadway for recreational purposes, the Court found that the fifteen-year statute of limitations applied. The Court in *Benninghoff* engaged in a thorough analysis of the *Hart* and *Difronzo* cases and reaffirmed that the key difference in determining which statute of limitations applies is whether the claimant retains an ownership interest:

> Contrary to plaintiffs' contention on appeal, an inverse condemnation action seeks compensation for a completed invasion of a property interest—it does not itself result in a transfer of property rights. Indeed, as already noted, a property owner may seek compensation under an inverse condemnation action where the taking was temporary, and may even seek compensation for an invasion that did not result in the transfer of any property right at all, such as for regulations that excessively burden the property.

2009 Mich. App. LEXIS at *65 [citations omitted]. The only arguable reference to a possible "invitation" to the adverse possessor arose as part of a broader discussion by the Court as to the circumstances which give rise to a prescriptive easement by the public to private property. That discussion, in turn, involved Michigan's "highway-by-user" statute, MCL 221.20, and the scope of the prescriptive easement acquired thereunder. Nowhere (and particularly not at *19 as indicated in the City's Brief) does the Court in *Benninghoff* opine that a six-year statute of limitations applies where, as here, a claimant alleges that he was compelled by law to accept a physical invasion of his or her property.

Under the law of inverse condemnation as it has evolved, a taking can still be found even though the property owner has capitulated to the government in allowing the physical invasion at issue. As the United States Supreme Court has observed:

The element of required acquiescence is at the heart of the concept of occupation. As we said in *Loretto*:

> [Property] law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

FCC v. Fla. Power Corp., 480 U.S. 245, 252 (1987), *quoting, Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 436 (1978). Rather, so long as the property owner's compliance is coerced, a physical occupation always results in a taking:

> [t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land...Thus whether the government floods a landowner's property, or does no more than require the landowner to suffer the installation of a cable, the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

Yee v. City of Escondido, 503 U.S. 519, 527 (1992) [citations omitted]. The Plaintiffs' complaint and their affidavits submitted in support of their motion for a preliminary injunction and in opposition to the City's motion for summary disposition make clear that their submission to the FDDP Ordinance was hardly the granting of permission to the City's agents, much less an invitation to them to invade their property. Given the consequences of disobeying the Ordinance, the Plaintiffs' acquiescence was required.

POINT IV

THE PLAINTIFFS' FEDERAL CLAIMS SHOULD NOT BE DISMISSED

The City also contends that the Plaintiffs' federal claims can only be adjudicated *after* the state law claims are resolved and should be dismissed (Brief, Point III (A). Since the City's argument that the Plaintiffs' federal claims can never ripen is based upon its unsupportable position that the Plaintiffs' state law claims are time-barred (*see* Point III above), the argument as to the federal claims (that they should be dismissed with prejudice) must fall, as well. Insofar as the City is arguing that, regardless of the outcome

of the Plaintiffs' state law claims, the federal claims must still be dismissed as unripe (without prejudice), that position too is inconsistent with the applicable law, including controlling authority from the Michigan Court of Appeals.

In some states, claimants can present their federal claims along with their state takings claims, as an alternative ground for relief in the event that state law does not ultimately provide what might, under federal law, constitute just compensation. *See. e.g., M.C. Assocs. v. Town of Cape Elizabeth*, 2001 Me. LEXIS 89 (Sup. Ct. Me., June 15, 2001); *Bruley v. City of Birmingham*, 259 Mich. App. 619 (Ct. of App. 2003); *appeal dismissed*, 2004 Mich. LEXIS 636 (April 1, 2004); *Guetersloh v. State*, 930 S.W. 2d 284 (Tex. App. 1996). In *M.C. Assocs.*, the Supreme Judicial Court of Maine explained why the federal takings claims should be allowed to proceed in tandem with the state law claims:

> Although state takings claims must be resolved before a federal claim arises, they need not be resolved in separate proceedings in state court. As a matter of prudence, courts often address federal constitutional issues only after resolving issues arising under the state constitution...The Superior Court erred, therefore, when it dismissed MC's federal claims on the basis of ripeness.

2001 Me. LEXIS 89 at *9. There is nothing in the United States Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)[3], which requires the state court evaluating the state law takings claims to dismiss the related federal law claims.

Michigan is one of those states where the courts do not read *Williamson* to require dismissal of federal takings claims on ripeness grounds while the state law takings claims are pursued. In *Bruley v. City of Birmingham*, 259 Mich. App. 619 (2004), the Michigan Court of Appeals was asked to dismiss the plaintiff's Fifth Amendment claims based upon the *Williamson* case. The Court instead, reversed the lower court, which had granted summary disposition to the City of Birmingham on that point:

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[3] In *Williamson*, the United States Supreme Court held that, so long as a claimant seeking compensation for an alleged taking by a governmental entity has an adequate remedy under state law, he or she must first pursue that remedy in state court before seeking comparable relief in federal court. In Michigan, inverse condemnation is that remedy. *River City Capital, LLP v Board of Comm'rs of Clermont County*, 491 F.3d 301 (2007).

> *Williamson*, therefore, stands for the proposition that a party cannot bring its federal Taking Clause claim in federal court until its state claims are resolved. However, *Williamson* does not serve to preclude a party from bringing its state and federal claims at the same time in a state court. Here, Bruley asserted that the city's ordinance amounted to a taking as well as a violation of her due process rights and equal protection rights. These claims were based on both the Michigan Constitution and the United States Constitution. *The trial court could determine whether the city's passage of the ordinance amounted to a taking under the Michigan Constitution. In doing so, the trial court could also determine whether the passage of the ordinance amounts to a taking under the United States Constitution.* We therefore fail to see Williamson's applicability to this case. ... The trial court erred in granting summary disposition of Bruley's federal claims on that basis.

259 Mich. App. at 631 [emphasis added]. The City's argument that the Plaintiffs' federal takings claims should be dismissed for lack of ripeness calls for an unwarranted extension of *Williamson*.

In the City's reply brief submitted in further support of its motion for summary disposition (p. 9), it makes no genuine effort to distinguish the case at bar from the Michigan Court of Appeals' decision in *Bruley*. Contrary to the City's position in its motion papers, *Bruley* holds that federal takings claims should not be dismissed but, rather, should be adjudicated along with the state law takings claims. In continuing to advance an argument that has been clearly and unequivocally rejected by the Michigan Court of Appeals, the City is "caus[ing] unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(3). This defense or argument should be withdrawn and sanctions awarded.

CONCLUSION

This case, understandably, involves issues of great importance to the City of Ann Arbor and its citizens. The City has invested heavily in its FDD program and its officials, including the City Attorney's Office, would surely be second-guessed if the FDDP was invalidated or otherwise restricted as a result of a challenge to its constitutionality or if it was determined that the homeowners who have been targeted by the FDDP were entitled to compensation. The City is entitled to zealous representation, as are the Plaintiffs. The Plaintiffs believe, however, that the City and its attorneys have crossed the line set by MCR 2.116 and have advanced positions that are not well grounded in law or fact. At this early stage of

the litigation, the Plaintiffs ask the Court to sanction the City and, in so doing, establish some boundaries for the case going forward.

Dated: August 19, 2014

Respectfully submitted,

Donald W. O'Brien Jr., w/c

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