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

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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.
(Pro Hac Vice Application pending)
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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DEFENDANT CITY OF ANN ARBOR'S BRIEF IN OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION

Defendant City of Ann Arbor ("City") opposes Plaintiffs' Amended Motion for Preliminary Injunction because it is without merit. It is a request to enjoin implementation and enforcement of the City's "FDD ordinance"[1] that is untimely and moot, as Plaintiffs ask this Court to undo events that took place 11 or 12 years ago. Plaintiffs do not face imminent danger of irreparable harm if a preliminary injunction is not issued. Plaintiffs ask this Court to undo as opposed to preserve the status quo. Plaintiffs have no likelihood of success on the merits in this case. Plaintiffs' requested relief will cause harm to the City and the general public. Plaintiffs' request for preliminary injunctive relief is really a request to this Court to grant the ultimate injunctive and/or declaratory relief they seek in their Complaint. Plaintiffs do not have standing to request relief on behalf of non-parties. Plaintiffs' request for preliminary injunctive relief is barred by laches. Plaintiffs' request is otherwise unsupported by the facts or applicable law. The City has already filed a motion for summary disposition on the grounds that Plaintiffs' Complaint is barred by the applicable statute of limitations, this Court lacks jurisdiction over some of the claims, and the Complaint fails to state any claim upon which relief can be granted.[2]

Because Plaintiffs' motion for preliminary injunction so lacks legal or factual basis, the City requests under MCR 2.114(D) and (E) that this Court award the City its costs and attorney fees for having to respond to the motion, but that the order be only against counsel for Plaintiffs.

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[1] Section 2:51.1 of the Ann Arbor City Code, enacted in 2001. A copy of the version in effect in 2002/2003 is attached as Ex 1 to both Plaintiffs' Motion and Complaint. For Plaintiffs' exhibits attached to both their Complaint and Motion, this brief references the exhibit attached to the Complaint. A copy of Plaintiffs' Complaint is attached as Exhibit 1.

[2] The City's Motion for Summary Disposition was filed and served on June 9, 2014, and is set for hearing before this Court on July 30, 2014. Because of the federal claims included in Plaintiffs' Complaint, the City removed the case to U.S. District Court. Despite having put the federal claims in their complaint, Plaintiffs argued they were not ripe for consideration. On 5/29/14, the U.S. District Court remanded the case on the grounds that the Complaint stated only inverse condemnation and takings claims over which the Court did not yet have jurisdiction because they were not ripe. A copy of the Order is attached as Exhibit 2.

BACKGROUND FACTS

The City's footing drain disconnect ("FDD") program under the City's FDD ordinance is a program designed to relieve a City-wide public health, safety and welfare problem of sanitary sewer[3] backups into basements and prohibited sewage overflows into streets, onto land, and ultimately the Huron River, both of which result from surcharging of the City's sanitary sewer system from excess stormwater flow into the system during heavy rain events. The program removes stormwater flow from the sanitary sewer system to prevent those basement backups and sanitary sewage overflows and was developed after a determination that the primary source of stormwater inflow into the sanitary sewer system was older footing drains.[4] Properties built before the early 1980s discharge that stormwater into the City's sanitary sewer system, which is intended to carry sanitary sewage, not storm flows.

Although the FDD program is designed to strongly encourage participation by property owners by having the City subsidize all or most of the costs if a property owners agrees to participate promptly, a property owner can opt not to participate and instead pay a surcharge for the burden imposed on the sanitary sewer system from the property's continued discharge of stormwater into the sanitary sewer system.[5] The Plaintiffs in this case chose to participate and, in accordance with the FDD ordinance, the City subsidized all or most of the costs of their FDDs.[6] Plaintiffs did their FDDs in 2002 (Boyer/Raab; Complaint ¶37) and 2003 (Yu; Complaint ¶31).

[3] "Sanitary" sewage is the sewage flow from plumbing devices such as toilets, sinks, bathtubs, dishwashers, etc., in a structure. The City of Ann Arbor has two separate sewer systems, one for sanitary sewage and one for stormwater. Sanitary sewage is transported to the City's Wastewater Treatment Plant for treatment before discharge to the Huron River. Stormwater is conveyed and discharged to the Huron River without treatment.

[4] A footing drain is a drain around and below the foundation or footer of a building that collects groundwater, including rain water from the surface flows into the footing drain.

[5] See Ann Arbor City Code Sec. 2.51.1(15). (Complaint Ex 1)

[6] See Ann Arbor City Code Sec. 2.51.1(3). (Complaint Ex 1) Sec. 2.51.1(3) has since been amended to increase the dollar amount of the subsidy.

Footing drains for houses built since the early 1980s discharge to the City's storm sewer system or above ground; never to the City's sanitary sewer system. The FDD program disconnects pre-1980s footing drains from the sanitary sewer system and redirects the discharge to the City's storm sewer system or above ground.[7] A sump pump is required to lift the water from the footing drain to the pipe that carries it away.[8] Although not legally necessary to authorize the City's FDD ordinance, MCL 117.5j (Home Rule City Act), effective May 14, 2002, explicitly authorizes the City's FDD ordinance:

> "A city, in order to protect the public health, may adopt an ordinance to provide for the separation of storm water drainage and footing drains from sanitary sewers on privately owned property."

From 1997 into 2000 the City experienced sanitary sewage overflow events that triggered a regulatory complaint from the Michigan Department of Environmental Quality (MDEQ).[9] Complaint ¶19. During heavy rain events in August of 1998 and June of 2000, hundreds of residents experienced sanitary sewer backups into their basements, many of which occurred in the Morehead area where Plaintiffs Boyer and Raab live (Complaint ¶3), and in the Orchard Hills area where Plaintiff Yu lives (Complaint ¶2). A class action seeking damages for sewer backups into basements was brought against the City following the 2000 rain event (Complaint ¶18).[10]

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[7] Plaintiffs do not and could not assert that their sump pumps are different from sump pumps installed in houses built since the early 1980s.

[8] Installations must comply with the Michigan Plumbing Code; the Residential and Plumbing Codes are adopted under and part of the Single State Construction Code. MCL 125.1504. Section 1101.3 of the Michigan Plumbing Code, provides: "Storm water shall not be drained into sewers intended for sewage only." Section 1112.1 provides that footing drains below the public sewer level shall discharge to a sump or receiving tank and then be lifted by a pumping system.

[9] Overflow events continued to June 2002 before the City and the MDEQ entered into the Administrative Consent Order (ACO) Plaintiffs refer to in their Complaint. (Complaint ¶22) The ACO, documenting the overflow events and requiring FDDs, is attached as Exhibit 3.

[10] The City settled the case through mediated settlement. *Pohutski v City of Allen Park,* 465 Mich 675; 641 NW2d 219 (2002), was then pending for decision before the Michigan Supreme Court, creating uncertainty as to municipal liability for sewer backups. Summary disposition in favor of the City was granted in lawsuits by persons who opted out of the class. See *Helber v City of Ann*

The City retained Camp Dresser & McKee ("CDM") to undertake a study and make recommendations. The June 2001 Sanitary Sewer Overflow Prevention Report of CDM and the Citizen Advisory Task Force[11] concluded that overflows and backups were from heavy rainwater flow into a system intended to carry only sanitary sewage, with FDDs or an upsizing of in-system storage capacity reported as the initial top options to prevent overflows and basement backups in each study area, including Orchard Hills and Morehead. (Ex 5 pp H-4 to H-8)[12] The City selected FDDs as the method, based in part on public input that residents in impacted areas wanted a quick solution and residents outside the five study areas wanted a solution that would cover their properties as well. (Ex 5 p I-1)[13]

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. (Complaint ¶¶17-20, 22) Under Sec. 2:51.1, target areas were and are selected based on factors such as the location and number of sanitary sewer backups into basements. The City selected the highest priority target areas for the earlier disconnects, including the Boyer/Raab residence in 2002 and the Yu residence in 2003. Although Ms. Yu complains about the location of her sump pump, she does not allege that her system is not working; in fact, she alleges that the sump "runs daily." (Complaint ¶33) Plaintiffs Boyer and Raab allege they have flooding in their back yard and water in their basement, but state that their sump pump is fully operational. (Complaint ¶37)

Arbor, 2004 WL 2389979 (Mich Ct App 247700, 10/26/04) (attached as Exhibit 4). Under *Pohutski*, the class claims would have been barred by governmental immunity.

[11] Copies of cited pages from the Report are attached as Exhibit 5. Plaintiffs rely on the Report in their complaint (Complaint ¶¶20-21) and it is a public record, available on the City's web site at: http://www.a2fdd.com/SSORpt.htm.

[12] The Report includes a map of the City (Fig. D-1) that shows locations of reported basement backups and maps outlining the Orchard Hills and Morehead areas (Ex 5 pp D-1 to D-3).

[13] The Report contradicts the mere "belief" of Plaintiffs, asserted in their brief, that the FDD program was implemented as the cheapest method to remove excessive stormwater flow from the City's sanitary sewer system. See the cost comparisons at Ex 5 pp H-4 to H-8.

They allege no causal connection between their FDD or sump pump and the flooding and water.

Plaintiffs had a choice. They chose to disconnect and have the City pay for their FDDs. They could have chosen not to disconnect, to continue to burden the City's sanitary sewer system with rainwater from their footing drains, and to pay a monthly surcharge for that option.[14] Under the guise of a request for preliminary injunction, they now ask this Court to undo the choices they made, notwithstanding the benefit to their properties of those choices.

ARGUMENT

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008), quoting *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998). As outlined in *Bratton v DAIIE,* 120 Mich App 73; 327 NW2d 396 (1983), when considering a request for preliminary injunction, a court needs to take into consideration the nature of the request before proceeding to application of a four-prong test:

> "The grant or denial of a preliminary injunction is within the sound discretion of the trial court. The object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either. The status quo [that] will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy. The injunction should not be issued if the party seeking it fails to show that it will suffer irreparable injury if the injunction is not issued. Furthermore, a preliminary injunction will not be issued if it will grant one of the parties all the relief requested prior to a hearing on the merits. Finally, a preliminary injunction should not be issued where the party seeking it has an adequate remedy at law." 120 Mich App 79 (citations omitted; emphasis added).

Plaintiffs do not satisfy these requirements for the extraordinary relief they request.

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[14] *Magnuson v City of Hickory Hills*, 933 F2d 562, 567 (CA 7 1991), upheld that city's FDD program and held that the shut off of water to properties that did not disconnect is not unconstitutional; the City's option to pay a monthly surcharge in lieu of an FDD is no less valid.

I. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION DOES NOT MAINTAIN THE STATUS QUO PENDING LITIGATION

Plaintiffs have waited 11 and 12 years to bring this lawsuit. They are not threatened with any change. Granting the preliminary injunction they request will not maintain the status quo, which is the primary purpose of a preliminary injunction. See *Mich Coalition of State Emp Unions v Mich Civil Serv Comm'n*, 465 Mich 212, 236-237; 634 NW2d 692 (2001) ("the point of a preliminary injunction is to preserve the status quo ante and prevent the harm from occurring until a decision may be rendered on the merits"); *Pharmaceutical Research & Mfrs of Am v Dep't of Community. Health,* 254 Mich App 397, 402; 657 NW2d 162 (2002) (a preliminary injunction serves to preserve the status quo pending a final hearing); *Alliance for Mentally Ill v Dep't of Community Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1998) ("The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights.")

The status quo is, quite simply, the "situation that currently exists,"[15] or "the state of affairs at present."[16] As explained in *Gates v Detroit & Mackinac Ry Co*, 151 Mich 548; 115 NW 420 (1908), maintaining the status quo protects the rights of the parties "so that upon the final hearing the rights of the parties may be determined without injury to either." 151 Mich 551 (citations omitted). By definition, maintaining the status quo does not encompass undoing acts taken more than a decade ago.

II. PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION SHOULD BE DENIED BECAUSE IT WOULD BE THE ULTIMATE INJUNCTIVE AND DECLARATORY RELIEF THEY SEEK

A court cannot grant an injunction if it will give the plaintiff all the relief requested before a hearing on the merits. *Bratton,* 120 Mich App 79; *Psychological Services of Bloomfield,*

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[15] Black's Law Dictionary (9th ed 2009) p 1542.
[16] Garner's Dictionary of Legal Usage (3d ed 2011) p 842.

Inc v Blue Cross & Blue Shield of Michigan, 144 Mich App 182, 185; 375 NW2d 382 (1985) (trial court abused its discretion when it issued preliminary injunction that changed, rather than preserved, the status quo by granting the plaintiff the relief it requested prior to a hearing on the merits and requiring the defendant to take actions that could not be undone even if it prevailed on the merits); *Epworth Assembly v Ludington & N Ry*, 223 Mich 589, 596; 194 NW 562 (1923) (affirming denial of a temporary injunction because it would have given plaintiff all the relief requested in advance of a hearing). By their motion for preliminary injunction, Plaintiffs ask this Court to declare the City's FDD ordinance invalid. Because they did their FDDs in 2002 and 2003, this request that the FDD ordinance not be enforced or implemented against them is either an impossibility or a request that their FDDs be undone. This is part of the ultimate relief they want. For this reason as well, Plaintiffs' request for preliminary injunction should be denied.

III. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION DOES NOT SATISFY THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION

A party requesting a preliminary injunction has the burden of establishing that it should issue. MCR 3.310(A)(4). Michigan courts apply a four-prong test to decide whether preliminary injunctive relief is warranted. Plaintiffs do not satisfy these requirements:

> "Whether a preliminary injunction should issue is determined by a four-factor analysis: harm to the public interest if an injunction issues; whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. This inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant." *State Employees Ass'n v Dep't of Mental Health,* 421 Mich 152, 157-158; 365 NW2d 93 (1985). (citation omitted)

The reference in *State Employees* to "a stay" emphasizes that the purpose of a preliminary injunction is to maintain the status quo in existence at the time, or perhaps immediately before, the lawsuit is filed and the preliminary injunction is sought. Of the four factors, irreparable harm is the most important factor and a plaintiff must specifically establish

the irreparable harm. In *Pontiac Fire Fighters*, 482 Mich 13, the court held that the trial court's grant of a preliminary injunction absent a particularized showing of irreparable harm was an abuse of discretion. *Friendship Materials, Inc v Michigan Brick, Inc*, 679 F2d 100, 105 (CA 6 1982), reaches the same conclusion. See also *Contech Casting, LLC v ZF Steering Systems, LLC*, 931 F Supp 2d 809, 823 (ED Mich 2013) (irreparable harm is the most important factor).

A. Plaintiffs Will Not Suffer Irreparable Harm if a Preliminary Injunction Is Not Granted

With respect to this first and most important factor, Plaintiffs neither can nor will suffer any irreparable harm. "Irreparable injury" means "merely that the injury cannot be remedied through an award of damages," Garner's Dictionary of Legal Usage (3d ed 2011) p 483, or "[a]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction." Black's Law Dictionary (9th ed 2009) p 856. In the context of a request for preliminary injunction the Michigan Supreme Court has defined "irreparable injury" to mean, "that the injury would be a material one, in its nature serious and grievous, and such that it is extremely difficult or impossible to definitely ascertain the resulting damages and adequately make just reparation." *Minnis v Newbro-Gallogly Co*, 174 Mich 635, 641; 140 NW 980 (1913) (emphasis added). As explained in *Michigan Council 25, AFSCME v City of Detroit*, 124 Mich App 791, 795; 335 NW2d 695 (1983), a preliminary injunction should not be granted "where irreparable injury is not imminent." (Emphasis added.) In *Pontiac Fire Fighters*, because the plaintiff alleged "nothing more than an apprehension of future injury or damage" the Michigan Supreme Court held it had not shown the irreparable injury required for a preliminary injunction. 482 Mich 11. See also *Michigan AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 149; 809 NW2d 444 (2011) (a particularized showing of irreparable harm is an indispensible requirement for a preliminary injunction).

Plaintiffs allege neither specific, imminent injuries that must be stopped before they occur, nor that those injuries are non-compensable. Plaintiffs also do not articulate specifically what they want stopped or, more importantly, how that would prevent whatever irreparable (but unspecified) harm they think should be prevented. As stated in their motion and affidavits, Plaintiffs did their FDDs in 2002 and 2003 (Boyer/Raab and Yu, respectively). They face no imminent change to their status and their delay further establishes that they do not face immediate or irreparable harm that must be held in abeyance. Their request to enjoin enforcement or implementation of the City's FDD ordinance is absurdly untimely and moot.

Plaintiffs bring this action as claims for compensation for alleged takings. By definition, if their claims were properly before this court and had merit, the alleged takings are compensable and, therefore, not irreparable harm. See *Acorn Bldg Components, Inc v Local Union No 2194 of the Int'l Union, United Auto, Aerospace & Agr Implement Workers of Am, UAW*, 164 Mich App 358, 366; 416 NW2d 442 (1987) (claim that plaintiff was being "unlawfully deprived of delivering a work force to its facilities, causing stoppage of production and loss of clients" was compensable as economic injuries and did not constitute irreparable injury).

Thus, Plaintiffs fail on this first and most important prong of the four-prong test. See *Contech*, 931 F Supp 2d 823. In *Michigan AFSCME Council 25*, 293 Mich App 148, the Court of Appeals noted that the Michigan Supreme Court had "declined to consider a party's likelihood of success on the merits when the irreparable harm factor was not established," citing *Pontiac Fire Fighters*, 482 Mich 13 n 21 ("[b]ecause plaintiff failed to prove that it would suffer irreparable harm from the layoffs, we take no position on whether plaintiffs could successfully prove a breach of the CBA or an unfair labor practice"). In the absence of irreparable injury to Plaintiffs that would be prevented by the preliminary injunction they seek, this Court can deny

their motion for preliminary injunction without considering the other three prongs of the preliminary injunction test. Nevertheless, the City addresses those prongs.

B. Plaintiffs Are Not Likely to Prevail on the Merits in this Case

Ordinances are presumed valid and the burden to rebut that presumption is on the party challenging the ordinance. *Detroit v Qualls*, 434 Mich 340, 364; 454 NW2d 374 (1990). In *City of Gaylord v Maple Manor Investments, LLC*, 2006 WL 2270494 (Mich Ct App 266954, 8/8/06) (copy attached as Exhibit 6), the court rejected the plaintiffs' challenge to the City's ordinance requiring them to abandon their drinking water wells and connect to the city's water supply system. The plaintiffs cited no authority that denied the city the power to require connection to the city's water supply system. *Id* at 3. Applying the balancing test of *Penn Central Transit Co v New York*, 438 US 104; 98 SCt 2636; 57 LEd2d 631 (1978), and after holding that it must look at the effect of the regulation on the entire parcel and not just the affected portion of the parcel, the court rejected the plaintiffs' takings claim, noting that connection to the city's water system would not prevent them from using their properties as they had intended. *Gaylord* at 7.

To the extent Plaintiffs try to challenge the City's FDD ordinance as an improper retroactive application of current Plumbing Code provisions, their argument also fails. In *Downriver Plaza Group v City of Southgate*, 444 Mich 656, 665-666; 513 NW2d 807 (1994), the Michigan Supreme Court held that the proper analysis for a due process challenge to retroactive legislation is found in *Romein v General Motors*, 436 Mich 515; 462 NW2d 555 (1990), aff'd *General Motors Corp v Romein*, 503 US 181; 112 SCt 1105; 117 LEd2d 328 (1992), applying both a presumption of constitutionality and a rational basis standard of review.

A number of cities and townships across the United States[17] and Michigan[18] have

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[17] A non-exhaustive and incomplete search of one database for jurisdictions with ordinances similar to the City's FDD ordinance found: Ada, OK (Chpt 74, Div 5, Secs 74-181 through 74-

undertaken programs requiring older homes to disconnect their footing drains. In *Magnuson*, the Court described Hickory Hills' disconnect program and the basis for it:

> "It didn't matter much to Noah, but Hickory Hills, Illinois, cares very much where the water goes. The Chicago suburb maintains two separate sewer systems, one for storm water and the other for sanitary waste. Residents having homes with basements, half-basements, crawl spaces, and overhead sewers are required to install two sump pumps: one to handle sanitary waste and another to collect and divert storm water coming from gutters, window wells, floor drains, and drain tiles. Without the additional pump, storm water from these parts of the house flows into the sanitary waste sewer system, causing back-ups and flooding. Despite an ordinance banning the connection of 'storm water' sump pumps to the sanitary sewer system, the City still had a problem with property owners whose illegal hook-ups posed a potential flooding hazard.
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> "In addition to flood prevention, Hickory Hills had another reason for wanting to pull the plug on sump pump violators. Pursuant to The Clean Water Act of 1972, 33 USC §§1251-1387, the Metropolitan Sanitary District of Great Chicago ('MSD') . . . enacted comprehensive legislation requiring all municipalities under its jurisdiction (including Hickory Hills) to make deliberate efforts to eradicate the overloading of local sanitary sewer systems. . . . In an effort to comply with the MDS's mandate, Hickory Hills adopted a sewer rehabilitation program to abate the hazards caused by the infiltration of storm and ground water into the sanitary sewer system. Part of the City's strategy was to institute house-to-house inspections to 'flush out' potential sources of illegal discharge into the sanitary sewer system." 933 F2d 563.

The Court further held that "the conduct complained of is neither arbitrary nor unreasonable. It was directed toward a legitimate goal related to public health and safety." 933 F2d 567.

In *Bd of City Com'rs of Johnson Cnty v Grant,* 264 Kan 58; 954 P2d 695 (1998), the court examined the county's program to disconnect from the sanitary sewer system, sources of storm water and/or groundwater such as foundation drains on private residential properties that, like Ann Arbor's, was implemented after "exhaustive engineering surveys and studies of the

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186); Champlin, MO (Chpt 58, Art IV, Div 1, Secs 58-190 through 58-207); Fort Scott, KS (Chpt 13.15); Pittsburgh, PA (Chpt 433); Minneapolis, MN (Chpt 56); Morrison, IL (Art III, Div 2, Sec 56-186); Olympia, IL (Chpt 21, Div 3, Secs 21-43 through 21.43.6); Peoria, IL (Chpt 31, Sec 31-57); Sheboygan, WI (Chpt 26, Art VIII, Div 4, Secs 26-1002, 26-1008 and 26-1011).

[18] A non-exhaustive search of one database for jurisdictions with ordinances similar to the City's FDD ordinance found: Eastpointe (Part II, Chpt 18, Art VIII, Secs 18-212 through 18-218); Grand Rapids (Title II, Chapter 27, Article 12); Menominee (Subpart A, Chpt 28, Article III, Sec 28-87); Saginaw Charter Twp (Chpt 78, Art III, Div 3, Sec 78-172); Zilwaukee (Chpt 30, Art III, Div 4, Secs 30-411 to 30.415).

sanitary sewer system" that had identified infiltration and inflow from such sources as a major factor contributing to sewer backups and bypasses. The trial court had held that the program served a legitimate governmental interest in preventing, "to the extent feasible, sewer backups and bypasses that threaten the public health and environment." The Kansas Supreme Court's decision is premised on and implicitly approves the legitimacy of the program.

Although *Pure Waters, Inc v Michigan Dept of Natural Resources,* 873 F Supp 41 (ED Mich 1994), does not rule on the validity of an FDD program like Ann Arbor's, it discussed implementation of such an FDD program as an option, raising only the issue of cost as an obstacle and not possible invalidity of such a program. 873 F Supp 47.

Plaintiffs incorrectly cite *Laisy v City of Shaker Heights*, 33 Ohio Misc 2d 3; 496 NE2d 483 (1986),[19] for the position that an ordinance like the City's is unlawful. However, in response to the plaintiffs' challenge to the retroactive application of the city's ordinance to their property, the court held that the city's ordinance was not unconstitutionally arbitrary. 496 NE2d 486-487. However, because the city had missed two earlier opportunities to require the disconnect pursuant to its 1976 ordinance, including when the plaintiffs purchased the property in 1977 and should have been told of the obligation to disconnect, and looking at the cost to the plaintiffs, the court held the city was estopped from requiring the plaintiffs to comply with the disconnect obligation. 496 NE2d 488. *Laisy* actually supports the validity of the City's FDD ordinance.

Plaintiffs seek compensation for the FDDs they did more than a decade ago and which they now claim was a taking. Although Plaintiffs state four "causes of action" for compensation, they insist they assert <u>only</u> inverse condemnation claims.[20] Plaintiffs recognize that they own the

[19] An Ohio trial court decision.

[20] See Plaintiffs' Memorandum of Law in Support of their Motion to Remand this case from federal court, attached as Exhibit 7 (exhibits omitted), at p 1 ("The causes of action set forth in Plaintiffs' complaint are based on the inverse condemnation of Plaintiffs' property by the City")

sump pumps they installed and that the sump pumps and footing drain systems 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. Complaint ¶¶30-33, 35, 37; Complaint Ex 2 p 4 Fig 2 and Complaint Ex 2 p 11 ¶16.[21]

Because Plaintiffs' state law claims relate to and arise from events in 2002 and 2003, they are time-barred. Even if timely, Plaintiffs' inverse condemnation claims are not claims upon which relief can be granted. Plaintiffs do not allege that they have been deprived of all economically beneficial use of their properties. Plaintiffs identify no property that has been physically appropriated by the City, is physically occupied by the City, or is occupied by a third party. Their complaint focuses on the sump pumps they own. Although they allege that their sump pumps are a "physical intrusion" or "occupation" by the City (Complaint ¶43), this assertion is conclusory, unsupported by any facts or other basis for the conclusion, and contradicted by language to the contrary in Sec. 2:51.1 (Complaint Ex 1) and the information in the Homeowner Information Packet (Complaint Ex 2), both of which confirm that the sump pumps are theirs, and both of which are relied on by Plaintiffs and incorporated into their complaint. After notice to disconnect, Plaintiffs made the choice to do the FDDs, taking ownership of and responsibility for the systems they installed as part of their homes. Therefore, their takings claims do not state claims for "categorical takings." *Cummins v Robinson Twp*, 283 Mich App 677, 707; 770 NW2d 421 (2009), following *Lingle v Chevron USA Inc*, 544 US 528, 538; 125 SCt 2074, 161 LEd2d 876 (2005).

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and p 4 ("The gravamen of the Plaintiffs' complaint is that they have been deprived of just compensation to which they are entitled as a result of the inverse condemnation by the City of their property"). In its 5/29/14 Order (Ex 2), the US District Court stated that Plaintiffs' lawsuit "is a claim for inverse condemnation under state and federal law."

21 Complaint Ex 2 also is attached to the Raab Affidavit (Ex B to Plaintiffs' Motion); an earlier version is attached to the Boyer Affidavit (Ex A to Plaintiffs' Motion). Fig 2 is the same in both; ¶ 16 is not in the earlier version.

Plaintiffs fail to state regulatory takings claims under the balancing test of *Penn Central Transp Co v New York City*, 438 US 104; 98 SCt 2646; 57 LEd2d 631 (1978). See *Cummins, supra*; *K&K Constr, Inc v Dep't of Nat'l Resources*, 456 Mich 570, 577; 575 NW2d 531 (1998) (*K&K I*). In *Cummins*, following flood damage to the plaintiffs' homes, the township required the plaintiffs to rebuild using current flood resistant building code requirements adopted under the Single State Construction Code Act, MCL 125.1501 et seq. 283 Mich App 684. In the first of the consolidated cases, the Court held that the township's enforcement of the state building code was not the functional equivalent of a government appropriating private property or ousting the owner from his property. 283 Mich App 710. The Court noted that the township "never prohibited plaintiffs from using their property for the beneficial residential use plaintiffs desired," *Id*, and rejected the plaintiffs' claim for a taking because,

> "[E]ven with a negative equity, plaintiffs are still able to use their property as a residence, and the property still retains some value even if its market value has declined. The fact that using their property as a residence is more costly in the face of the necessity to repair repeated flood damage does not establish a taking." *Id.*

This conclusion is consistent with the U. S. Supreme Court's decision in *Goldblatt v Town of Hempstead*, 369 US 590, 592-593; 82 S Ct 987; 8 L Ed 2d 130 (1962).

Following *Penn Central* and *K&K Constr, Inc v Dep't of Environmental Quality,* 267 Mich App 523, 559; 705 NW2d 365 (2005) (*K&K II*), the Court then analyzed whether the township's enforcement of the state building code had singled out the plaintiffs or was, instead, "a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally." 283 Mich App 719-720. That the township enforced the state building code against "all landowners with property similarly situated" and "plaintiffs are both benefited and burdened like other similarly situated property owners" weighed heavily against finding a compensable taking. 283 Mich App 719-720. In *K&K II*, because the plaintiffs were not singled

out for wetland protection regulation they were not entitled to compensation. 267 Mich App 563. In *Chelsea Inv Group LLC v Chelsea,* 288 Mich App 239, 262; 792 NW2d 781 (2010), because the plaintiffs were not singled out during a temporary moratorium on water and sewer permits that was imposed due to health and safety concerns and applied to all developers in the area, the moratorium was not a compensable taking. See also *Gaylord, supra,* at 7.

The case before this Court is no different. Although Plaintiffs Boyer/Raab complain about the expense for having and maintaining operational sump pumps (Complaint ¶¶44-45, 47), those allegations do not state a claim for a taking. See *Cummins, supra*. Plaintiffs allege no affirmative action by the City that is directly aimed only at their property and is a substantial cause of the damages they allege, as required for a valid de facto taking or inverse condemnation claim. See *Blue Harvest Inc. v Dep't of Transp.*, 288 Mich App 267, 277-278; 792 NW2d 798 (2010) (a valid claim requires affirmative acts that directly and not merely incidentally affect the plaintiff's property); *Cummins,* 283 Mich App 708 (claim fails because plaintiffs did not allege or produce evidence of deliberative actions or causal connection to alleged damages).

Although Plaintiffs now argue that they had "vested rights" in their properties that were impacted by the FDD program, Michigan courts have held that the concept of "vested rights" applies only in the context of a zoning ordinance and does not apply in the context of a regulatory ordinance enacted to protect public health, safety and welfare. *Renne v Waterford Twp*, 73 Mich App 685, 690; 252 NW2d 842 (1977) (rejecting claim of vested rights to continue use of septic systems instead of connecting to sanitary sewer system); *Casco Twp v Brame Trucking Co, Inc*, 34 Mich App 466, 470-471; 191 NW2d 506 (1971) (zoning and regulatory ordinances distinguished; regulatory ordinances not encumbered by the concept of pre-existing, nonconforming use). The same analysis applies to a city. As explained in *People v Strobridge*,

127 Mich App 705, 710; 339 NW2d 531 (1983), the statutory provision that provides for nonconforming uses applies only to specified zoning districts established by zoning ordinances and not to regulatory ordinances that "are blind" to zoning differences. Thus, Plaintiffs' assertion of "vested rights" does nothing to advance their argument on the merits.

Finally, although Plaintiffs look to *Loretto v Teleprompter Manhattan CA TV Corp.*, 458 US 419, 102 SCt 3164, 73 LEd2d 868 (1982), for support, in *Loretto* the US Supreme Court distinguished regulations such as those that require "landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like," and which are not constitutionally suspect because they do not involve government occupation or a government-authorized occupation by a third party, as different from the case before the Court. 458 US 440. The City's FDD ordinance does not result in a taking under *Loretto*.

Thus, Plaintiffs are not likely to prevail on the merits of their claims.[22]

C. Harm to the City and to the Public if the Preliminary Injunction Is Issued Outweighs the Harm to Plaintiffs if the Preliminary Injunction Is Not Granted and the Public Will Suffer Harm If the Preliminary Injunction Is Granted

In this case, the third and fourth factors of the preliminary injunction can be addressed together as the harm to the City if the preliminary injunction were issued is intertwined with the harm to the general public if the preliminary injunction were issued.

In *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand)*, 293 Mich App 506, 515-517; 810 NW2d 95 (2011), the Court denied declaratory judgment in part because "the alleged physical injuries have already occurred" and "declaratory relief does not appear necessary to guide plaintiffs' future conduct in order to preserve their legal rights." 293 Mich App 516. The Court also emphasized the impropriety of declaratory relief that would adversely affect non-

[22] Plaintiffs do not have standing to request injunctive and declaratory relief for non-parties. Even if they did, those claims would have no more likelihood of success on the merits than Plaintiffs' own claims.

parties. 293 Mich App 517-518. The Plaintiffs in this case do not speak for persons who feel strongly that the FDD program should continue to prevent sanitary sewage overflows and basement backups of sewage due to flows from footing drains in the sanitary sewer system and who have or would benefit from the FDDs.

A January 2014 report on the results of a survey done on the experience of property owners who had done FDDs is referenced in Plaintiffs' Complaint. (Complaint ¶40). Plaintiffs' Complaint shows that 100 of the 134 respondents who had experienced sanitary sewer backups before their footing drains were disconnected did not experience sanitary sewer backups after the disconnect. (Complaint ¶40) The actual survey results[23] also shows that 70% of the respondents were Satisfied or Very Satisfied regarding the sump pump installation (p 2, Q #3), and that only 9% of the respondents had experienced sanitary sewage backups after their disconnect (p 4, #7). The interest of those residents as adverse to Plaintiffs and their request for preliminary or ultimate injunctive and/or declaratory relief is further evidenced in some of the 398 comments received as part of the survey responses. One comment is particularly relevant:

- Comment 3 to Q #14 (p 33) - ". . . I am very concerned that my neighbors who did NOT allow sump pump installation are being selfish. Houses that allowed pumps are no longer contributing to downstream back-ups. That makes me feel good."

Other comments reflect a similar viewpoint, including:

- Comment 2 to Q #14 (p 32) - ". . . we agree that it's a good idea to disconnect from the sanitary sewer & know that our neighbors DID have sanitary flooding before the sump pumps."
- Comment 9 to Q #14 (p 33) - "Because of footing disconnection and sump pump installation we can move forward with basement improvement options to reduce dampness."
- Comment 9 to Q #14 (p 33) - "I was glad that I purchased a house that had a sump pump installation already."

As discussed above, hundreds of City properties experienced basement backups of

[23] A copy of the cited and related pages of the January 2014 report is attached as Exhibit 8.

sewage during heavy rain events before the City undertook its FDD program. The City is currently examining how best to proceed to further reduce stormwater flow into its sanitary sewer system during wet weather events.[24] As reflected in the June 2014 Flow Evaluation Report from Orchard Hiltz & McCliment, Inc. ("OHM"), the engineering firm assisting with the SSWWE project, the FDDs since 2001 have been extremely successful in eliminating wet weather surcharges in the City's sanitary sewer system, particular in the Orchard Hills and Morehead areas where the Plaintiffs live.[25] Elimination of surcharges eliminates basement backups. If Plaintiffs were to reconnect their footing drains to the sanitary sewer system, it would risk causing sewage backups into basements of neighbors or others in the area, posing health risks and other harm to the public.

Plaintiffs' decade plus delay in seeking equitable relief prejudicially exacerbates the harm to the City if the injunction were to be granted and should bar their request by operation of the doctrine of laches. See *Knight v Northpointe Bank*, 300 Mich App 109, 114-115; 832 NW2d 439 app denied, 494 Mich 883; 834 NW2d 498 (2013). The City has spent approximately 20 million dollars on the FDD program, including both installation of infrastructure in the public rights of way and subsidy of FDDs on individual properties, all without legal challenge. If there were merit to Plaintiffs' challenge, a timely challenge could have been brought in 2002 or 2003 (or earlier); the City could have then considered alternatives identified in the 2001 CDM/Task Force

[24] The City's Sanitary Sewer Wet Weather Evaluation ("SSWWE") project, which includes engineering work to analyze the current operation of the sanitary sewer system and possible options moving forward, with a citizen advisory committee to provide input as to those options.
[25] A copy of the OHM Report, without Appendices, is attached as Exhibit 9. See in particular: p 3 and Table 1, concluding that the FDD program "has removed a significant amount of [Rainfall Dependant Inflow and Infiltration] from the system in 4 of the 5 priority districts;" p 19 and Table 13, showing the significant reduction of the risk that the sanitary sewer pipes would reach capacity (i.e., surcharge and cause overflows and basement backups); and p 20, Conclusion #5, that the modeled risk of basement backups has been significantly reduced in the priority districts, a conclusion supported by a heavy rain event on 6/27/13 without backups in the priority districts.

Report instead of spending those dollars and facing Plaintiffs' unreasonably belated request to this Court to require the City to undo more than a decade's worth of FDDs, all at the public's expense.

For these reasons as well, Plaintiffs' request for preliminary injunction should be denied.

IV. BECAUSE PLAINTIFFS' MOTION VIOLATES THE REQUIREMENTS OF MCR 2.114(D), SANCTIONS AND AN AWARD OF COSTS AND ATTORNEY FEES IS WARRANTED

MCR 2.114(D)(2) provides that the signature of an attorney on a pleading constitutes a certification by the attorney that "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." The motion and arguments of Plaintiffs' counsel are not well grounded in fact or law. Their motion violates MCR 2.114(D) because they have no basis in fact or law or any arguable extension of the law for their request for preliminary injunctive relief; counsel for Plaintiffs did not articulate how their request comes even close to the requirements in MCR 3.310 or satisfies the basic and fundamental purposes for which a court grants preliminary injunctive relief. Instead of seeking to maintain the current status quo pending the outcome of the litigation, Plaintiffs' counsel seek preliminary injunctive relief to undo events over a decade old, ask this Court to order now, without a hearing, the ultimate injunctive and declaratory relief they seek, asks for injunctive relief that is moot because it seeks to stop actions taken 11 or 12 years ago, and/or asks for relief both on behalf of persons who are not parties to the case and contrary to the interests of the public and persons who are not parties to the case. With no basis in either fact or law, the motion for preliminary injunction was signed and filed by Plaintiffs' attorneys in violation of the requirements of MCR. 2.114(D).

MCR 2.114(E) (Sanctions for Violation) provides for a mandatory, but appropriate, sanction "which may include an order to pay to the other party or parties the amount of the

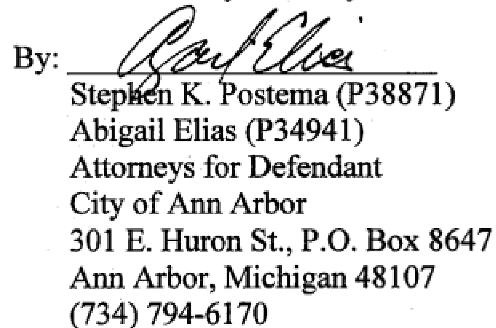
reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." See *Yee v Shiawassee Cnty Bd of Comm'rs*, 251 Mich App 379, 407; 651 NW2d 756 (2002) and *Contel Systems Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990) (sanctions are mandatory); *Briarwood v Fraser's Fabrics, Inc*, 163 Mich App 784, 793; 415 NW2d 310 (1987) (sanctions should be imposed liberally to deter abusive behavior). MCR 2.114(F) also provides that "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." Therefore, this Court should award the City its costs and attorney fees for having to defend against this groundless motion.[26]

CONCLUSION

For the reasons argued above and based on the record, this Court should deny Plaintiffs their request for preliminary injunction and should award the City its costs and attorney fees for having to defend against this meritless motion.

Respectfully submitted,

Office of the City Attorney



Dated: June 26, 2014

By: ______________________

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

[26] MCR 2.114(E) allows the Court to impose sanctions on counsel for a party and/or on the party. Although the City recognizes this decision is for the Court, the City asks that sanctions in this instance be imposed only on the Plaintiffs' attorneys, not the Plaintiffs. The record does not show that any of the Plaintiffs misrepresented facts to their counsel or otherwise caused their counsel to seek a preliminary injunction. It is a fair conclusion that the fault in writing and filing this motion rests solely with counsel for the Plaintiffs and not with the Plaintiffs.