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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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

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INTRODUCTION

Plaintiffs' complaint, which they filed on February 27, 2014,[1] stems from the footing drain disconnect (FDD) that they did or had done on each of their properties in 2002 (Boyer/Raab) and 2003 (Yu) pursuant to Ann Arbor City Code Sec. 2:51.1 (the FDD ordinance).[2] Footing drains collect storm and groundwater from under and around a building. Properties constructed before the early 1980s discharged that stormwater into the City's sanitary sewer system, which is intended to carry sanitary sewage, not storm flows. The large volume of stormwater flow during heavy rain events surcharges the sanitary system, causing public health concerns due to both prohibited overflows (sewage flow into streets, on land and into the Huron River) and backups of sewage into basements.

Footing drains for houses built since the early 1980s discharge either to the City's storm sewer system or above ground; never to the City's sanitary sewer system. The FDD program disconnects footing drains from the sanitary sewer system and redirects the discharge to the City's storm sewer system or above ground.[3] As shown in Ex 2 to Plaintiffs' complaint (pp 3-4), a sump pump is required to lift the water from the footing drain to the pipe that carries it away.[4] 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.

Plaintiffs Boyer and Raab seek compensation for the FDD they did in 2002 (Complaint

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[1] Plaintiffs' Complaint and its exhibits are attached as Exhibit 1. Based on Plaintiffs' federal claims, the City removed the case to federal Court. As discussed below, the federal court remanded the case to this Court, accepting Plaintiffs' representation that they assert only inverse condemnation claims, and that their federal claims are unripe so that the court lacks jurisdiction over those claims.

[2] A copy of Sec. 2:51.1 that was in effect in 2002 and 2003 is Ex 1 to Plaintiffs' Complaint.

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

[4] 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.

¶37), which they now claim was a taking. Plaintiff Yu brings the same claims and states that her FDD was completed on September 4, 2003. (Complaint ¶31) Plaintiffs recognize that they own the sump pumps they installed and 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. Complaint ¶¶30-33, 35, 37; Ex 2 p 4 Fig 2 and Ex 2 p 11 ¶16.

Plaintiffs assert four "causes of action" for compensation. The first is based on a section of Michigan's eminent domain statute (MCL 213.23), the second on Art X, Sec 2 of the Michigan Constitution, the third on the 5th Amendment to the US Constitution, and the fourth on 42 USC 1983. Despite their different labels and content, including claims that appear to be claims for damages for "involuntary servitude" and not compensation for the value of property taken,[5] Plaintiffs insist they assert only inverse condemnation claims in their complaint.[6] Because Plaintiffs' state law claims relate to and arise from events in 2002 and 2003, they are barred by the applicable statutes of limitations. In addition, neither Plaintiffs' claim under MCL 213.23 nor their claim under Art X, Sec 2 states a claim upon which relief can be granted.

Plaintiffs' federal takings claims under the 5th Amendment and 42 USC 1983 are not ripe and fail because Plaintiffs have not pursued to completion their state inverse condemnation

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[5] See Complaint ¶¶65-66 and ¶44.

[6] See Plaintiffs' Memorandum of Law in Support of their Motion to Remand this case from federal court, attached as Exhibit 2 (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") 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 Order Granting Plaintiffs' Motion to Remand, the US District Court stated that Plaintiffs' lawsuit "is a claim for inverse condemnation under state and federal law." A copy of the 5/29/14 Order is attached as Exhibit 3. The City relies on Plaintiffs' assertion they bring only inverse condemnation claims, but reserves its rights to bring a new motion, adding defenses of governmental immunity and release as appropriate, if Plaintiffs change their position to claim that their complaint contains other claims or causes of action.

claims, a necessary prerequisite to bringing a federal takings claim. Their federal claims should, at a minimum, be dismissed as unripe. Because Plaintiffs' state claims are time-barred, Plaintiffs' federal takings claims cannot ripen and should be dismissed with prejudice.

Plaintiffs cannot again be subject to the FDD requirements of Sec. 2:51.1 because disconnects at their properties were completed in 2002 and 2003, yet they also seek declaratory judgment that Sec. 2:51.1 is unconstitutional (Fifth Cause of Action, Complaint ¶¶73-74) and injunctive relief to stop the City from implementing or enforcing Sec. 2:51.1 against them (Sixth Cause of Action, Complaint ¶¶68-72.) Because their FDDs are done, their requests to stop Sec. 2:51.1 as to them are both moot and time-barred. Plaintiffs do not have standing to request injunctive and declaratory relief for non-parties.

BACKGROUND FACTS

From 1997 into 2000 the City experienced sanitary sewage overflow events that triggered a regulatory complaint from the Michigan Department of Environmental Quality (MDEQ).[7] Complaint ¶19. During heavy rain events in August of 1998 and June of 2000, a large number 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).[8]

The City retained Camp Dresser & McKee (CDM) to undertake a study and make

[7] 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 4.

[8] 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 cases brought by individuals who opted out of the class. See *Helber v City of Ann Arbor*, 247700, 2004 WL 2389979 (Mich Ct App, 10/26/04) (attached as Exhibit 5).

recommendations. The June 2001 Sanitary Sewer Overflow Prevention Report of CDM and the Citizen Advisory Task Force[9] 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 __ pp H-4 to H-8)[10] The City selected FDDs as the way, based in part on public input that residents in impacted areas desired a quick solution and residents outside the five study areas wanted a solution that would cover their properties as well. (Ex __ p I-1) The FDD program implemented by the City includes payment by the City of the costs of the required elements of the FDDs. City Code Sec 2:51.1(3) (Complaint Ex 1).

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) They also admit that FDDs under Sec. 2:51.1 would be done in target areas to reduce stormwater inflows into the City's sanitary sewer system. (Complaint ¶24) Under Sec. 2:51.1 (Complaint Ex 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. Ms. Yu complains about the location of her sump pump and the cost to locate it elsewhere. (Complaint ¶¶32-33) Funding for additional costs, where warranted, was available under Sec. 2:51.1(12). (Complaint Ex 1) Ms. Yu does not allege that her system is not

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[9] Copies of cited pages from the Report are attached as Exhibit 6. 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.

[10] The Report includes a map of the City (Fig. D-1) showing locations of reported basement backups and maps outlining the Orchard Hills and Morehead areas (Ex 6 pp D-1 to D-3).

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) 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.[11]

ARGUMENT

I. STANDARDS OF REVIEW

A. MCR 2.116(C)(4) - Lack of Subject Matter Jurisdiction

A motion under MCR 2.116(C)(4) for lack of subject matter jurisdiction presents a question of law for the Court to decide. *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 175 (2008). The motion may be decided on the basis of the pleadings, as well as documentary evidence submitted by the parties to support or oppose the motion, provided there is no genuine issue of material fact. *Id*; MCR 2.116(G)(2). In this case, the City's motion under MCR 2.116(C)(4) may be decided on the basis of the pleadings, without additional evidence.

B. MCR 2.116(C)(7) - Claims Barred by Statutes of Limitations

A statute of limitations defense is properly raised on a motion to dismiss under MCR 2.116(C)(7) and the claims properly dismissed when the allegations in the complaint affirmatively establish that the time limit for bringing the claims has passed. For purpose of MCR 2.116(C)(7), this Court must accept the well-pleaded allegations in Plaintiffs' complaint as

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[11] *Magnuson v City of Hickory Hills*, 933 F2d 562, 567 (CA 7 1991), upheld the 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 valid as it is far less draconian.

true and construe them in the Plaintiffs' favor. *Kuebler v Equitable Life Assur Soc of the US*, 219 Mich App 1, 5 (1996). Although a party moving for summary disposition under MCR 2.116(C)(7) may present affidavits or other documentary evidence to counter allegations in a complaint, in this case that is not necessary because the statute of limitations defect of Plaintiffs' claims is obvious on the face of their complaint. Because neither the facts nor the legal effect of those facts are in dispute in this case, whether Plaintiffs' claims are barred by the statute of limitations is a question for this Court to decide as a matter of law. *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238 (2001).

C. MCR 2.116(C)(8) - Failure to State Claims Upon Which Relief Can Be Granted, Including Lack of Standing to Seek Relief on Behalf of Others

In deciding a motion under MCR 2.116(C)(8), this Court may rely only on the pleadings, including written instruments attached as exhibits to the complaint. MCR 2.113(F)(1) and (2); *Slater v Ann Arbor Pub Sch Bd of Educ,* 250 Mich App 419, 427 (2002) (exhibit attached or referred to in a pleading becomes a part of the pleading for all purposes). Only well pled factual allegations in a complaint and any reasonable inferences or conclusions that can be drawn from them are taken as true. *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672 (2006). If no factual development could justify a right of recovery as a matter of law, summary disposition should be granted. *Id.*

II. PLAINTIFFS' FEDERAL TAKINGS CLAIMS (THIRD AND FOURTH CAUSES OF ACTION) ARE NOT RIPE AND ARE TIME-BARRED

Because Plaintiffs have not pursued their state inverse condemnation claims to completion, their 5th Amendment claims are not ripe and this Court lacks jurisdiction to hear those claims. Because Plaintiffs' state law claims are time-barred and their untimely attempt to file state court proceedings does not restart the clock for purposes of the limitations period for

their 5th Amendment claims, Plaintiffs' 5th Amendment claims cannot ripen.

A. This Court Lacks Subject Matter Jurisdiction over Plaintiffs' Federal Takings Claims Because They Are Not Ripe

Plaintiffs argued (Exhibit 2) and the federal court already ruled in this case that Plaintiffs' federal takings claims are not ripe (Exhibit 3). This Court, like the federal district court, lacks subject matter jurisdiction over those claims. *Williamson Cnty Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172, 105 SCt 3108, 87 LEd2d 126 (1985), defines the concept of finality as a threshold condition for the ripeness requirements for federal takings claims. *Williamson* established a two-prong ripeness test and held that a federal takings claim may not be brought until (1) the municipality has reached a final decision on the use to which an owner may put his property, and (2) the owner has first sought redress of the alleged constitutional deprivations through all available state remedies and procedures, and pursued such remedies to completion. *Id.*

Plaintiffs cannot meet the second prong of the ripeness doctrine, which requires a plaintiff to first pursue to completion any available remedies in state court and be denied just compensation before the federal takings claim can ripen. The rationale is that "[i]f a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson,* 473 US 194-195; see also *Palazzolo v Rhode Island,* 533 US 606, 121 SCt 2448, 150 LEd2d 592 (2001).

Michigan courts apply the *Williamson County* ripeness analysis to federal takings claims in state court actions. In *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 80-91; 445 NW2d 61 (1989), cert den 493 US 1021; 110 SCt 721; 107 LEd2d 741 (1990), the Michigan Supreme Court affirmed and applied the finality and ripeness requirements of *Williamson County* to

federal takings claims in a state court action. See, also, *Braun v Ann Arbor Twp*, 262 Mich App 154; 682 NW2d 755 (2004); *Hendee v Putnam Twp*, 486 Mich 556; 786 NW2d 521 (2010).

Plaintiffs' Third and Fourth Causes of Action, which they insist are only federal takings claims, are not ripe as a matter of undisputed facts and law.[12] This Court cannot yet hear those claims and they must be dismissed for lack of subject matter jurisdiction under MCR 2.116(C)(4). As argued in the next section, the dismissal should be with prejudice because these claims can never ripen.

B. Plaintiffs' Federal Takings Claims Can Never Ripen and Should Be Dismissed with Prejudice

Most troubling in this case is that Plaintiffs failed to pursue their claims years ago, and belatedly now try to assert both state and federal claims despite their delay. A plaintiff cannot sit on claims without action for an extended period of time and then attempt to restart the running of the statute of limitations for the federal claims on the grounds that the statute of limitations bars him or her from seeking compensation in state court. In *Pascoag Reservoir & Dam, LLC v Rhode Island*, 337 F3d 87, 94 (CA 1 2003), the Court affirmed the decision of the District Court that the plaintiffs' federal takings claim was time-barred by the state statute of limitations and/or laches. The Court recognized that a federal takings claim is ripe only after a state court renders a final decision on the merits, and that the federal statute of limitations normally does not begin to run in a federal takings claim until the claim is ripe under federal law, but held that the plaintiffs, by failing to bring a timely state cause of action, had forfeited their federal takings claims. See also *Gamble v Eau Claire Cnty*, 5 F3d 285, 286 (CA 7 1993) ("[A] claimant cannot be permitted

[12] 42 USC 1983 does not create a cause of action; it is merely a procedural mechanism for Plaintiffs to assert their claims that the City deprived them of rights secured by the US Constitution. See, e.g., *Smoak v Hall*, 460 F3d 768, 777 (CA 6 2006). Plaintiffs' 5th Amendment claims are merely asserted again through 42 USC 1983.

to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open."); *Harris v Missouri Conservation Comm'n*, 790 F2d 678, 681 (CA 8 1986) (plaintiffs "cannot obtain jurisdiction in the federal courts simply by waiting until the statute of limitation bars the state remedies").

As argued below, Plaintiffs' state inverse condemnation claims are barred by the applicable statute of limitations period. Because Plaintiffs' state law claims are time-barred, their federal takings claims can never ripen and should be dismissed with prejudice. See *Vandor, Inc v Militello*, 301 F3d 37, 39 (CA 2 2002) (federal takings claim dismissed with prejudice).

III. PLAINTIFFS' STATE LAW CLAIMS FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED AND ARE TIME-BARRED

Although the claims in Plaintiffs' First and Second Causes of Action are dressed in different terms, Plaintiffs insist that both counts are claims for inverse condemnation.

A. Plaintiffs' Claim under MCL 213.23 (First Cause of Action) Fails to State a Claim upon Which Relief Can Be Granted and Is Time-Barred

Plaintiffs' base their First Cause of Action on MCL 213.23 as it was amended in 2006 and 2007.[13] (Complaint ¶¶49-54) MCL 213.23 governs eminent domain actions brought by a unit of government; it does not create a cause of action against a municipality.[14] In addition, subsection (2) and its language requiring "public necessity of an extreme sort," on which Plaintiffs rely (Complaint ¶¶42, 52), did not exist in 2002 and 2003, the dates relevant to Plaintiffs' claims. On these grounds alone, their claim under MCL 213.23 should be dismissed.

Plaintiffs' theory that the City acted contrary to statute also is contradicted by the

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[13] MCL 213.23 as it existed in 2002 and 2003 is attached as Exhibit 7; MCL 213.23 as it was amended in 2006 and 2007 is attached as Exhibit 8.

[14] See *LaBelle Ltd P'ship v Cent Michigan Univ Bd of Trustees*, 305626, 2012 WL 3321728 (Mich Ct App, 8/14/12) at pp 3-4, recognizing that MCL 213.23 does not provide a cause of action. (Copy attached as Exhibit 9)

Michigan Home Rule City Act, which specifically authorizes FDD ordinances like the City's:

> "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." MCL 117.5j

Ordinances designed to eliminate the overloading of local sanitary sewer systems stem from requirements of the Clean Water Act of 1972, 33 USC 1251-1387. See *Magnuson,* 933 F2d 563.[15] See also *Board of Cnty Comm'rs of Johnson Cnty v Grant*, 264 Kan 58; 954 P 2d 695 (1998), in which the Kansas Supreme Court affirmed the trial court's finding there was "a legitimate governmental interest in adopting municipal codes . . . designed to prevent, to the extent feasible, sewer backups and bypasses that threaten the public health and environment." 954 P 2d 700. Plaintiffs acknowledge the City's FDD program was approved by the MDEQ as a means to eliminate sanitary sewage overflows. (Complaint ¶22) For these reasons as well, Plaintiffs' claim under MCL 213.23 fails to state a claim upon which relief can be granted and should be dismissed under MCR 2.116(C)(8).

For the same reasons argued below as to Plaintiffs' Second Cause of Action, Plaintiffs' claim under MCL 213.23 also is time-barred and should be dismissed under MCR 2.116(C)(7).

B. Plaintiffs' Claim under Mich Const of 1963, Art X, Sec 2 (Second Cause of Action) Fails to State a Claim upon Which Relief Can Be Granted and Is Time-Barred

1. Failure to State a Claim

Plaintiffs' claim under Mich Const of 1963, Art X, Sec 2 fails to state a claim for inverse condemnation. Plaintiffs do not allege that they have been deprived of <u>all</u> economically beneficial use of their properties. Plaintiffs also identify no property that has been physically

[15] The court upheld the City of Hickory Hills' actions under its FDD ordinance. Responding to an argument by the plaintiffs, the court noted "[a] perfect 'fit' between the problem and the remedy, however, is not required." 933 F2d 567.

appropriated by the City, that is physically occupied by the City, or that is occupied by a third party. Their complaint focuses on the sump pumps they own.[16] 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, Complaint ¶¶31, 37, taking ownership of and responsibility for the systems they added to and installed as part of their homes.[17] 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).

Their claims 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

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[16] Plaintiffs' claim is like the takings claim rejected in a challenge to an ordinance that mandated abandonment of a functional septic tank and connection to a township sewer system for public health and welfare reasons. *Renne v Waterford Twp*, 73 Mich App 685, 689-690; 252 NW2d 842 (1977); see also *Loretto v Teleprompter Manhattan CA TV Corp.*, 458 US 419, 102 SCt 3164, 73 LEd2d 868 (1982) (regulations such as those that require "landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like," are not constitutionally suspect because they do not involve government occupation or a government-authorized occupation by a third party.) 458 US 440; *Wilkins v Daniels*, 744 F3d 409 (CA 6 2014) (snake and animal regulation, including chips, not a taking, following *Loretto*).

[17] Plaintiffs' actions negate their takings claims. The compensation requirement for property taken for public use does not apply "where the owner actually gives or dedicates his property to the public use." *Bumpus v Miller*, 4 Mich 159, 162-163 (1856).

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 that the negative equity in their homes resulting from application of the building code denied them all economically beneficial use:

> "This claim is without merit because even 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.*

The Court further looked at the township's enforcement of the state building code under the *Penn Central* balancing test, following *K&K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559; 705 NW2d 365 (2005) (*K&K II*), and looked at whether the township had singled out the plaintiffs or whether the challenged regulation was, instead, "a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally." 283 Mich App 719-720. The township's enforcement of the state building code to "all landowners with property similarly situated . . . 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 at 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. In *Gaylord v Maple Manor Investments, LLC*, 266954, 2006 WL 2270494

(Mich Ct App 8/8/06) (attached as Exhibit 10), the Court held that an ordinance requiring the defendants to connect to the city's water supply system did not effect a regulatory taking, noting, "it is readily apparent that connecting to the municipal water system will not interfere with defendants' primary expectation concerning the uses of the affected parcels". Id at *7.[18]

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.[19] See *Cummins, supra*. Plaintiffs allege no affirmative action by the City that is directly aimed 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 at 708 (claim fails because plaintiffs did not allege or produce evidence of deliberative actions or causal connection to alleged damages). Thus, Plaintiffs' claims fail to state inverse condemnation claims.

2. Barred by Applicable Statute of Limitations

Michigan courts determine which statute of limitations applies by looking at the "true nature of the complaint, reading the complaint as a whole and looking beyond the parties' labels to determine the exact nature of the claim." *Anzaldua v Neogen Corp*, 292 Mich App 626, 631;

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[18] The decisions in these cases are consistent with *Lingle*, in which the US Supreme Court observed that "government regulation - by definition - involves the adjustment of rights for the public good, and that [g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 544 US 537 (citations omitted).

[19] Plaintiffs Boyer/Raab also mention briefly that they have experienced flooding and water damage (Complaint ¶46), which they attribute to the footing drain disconnect program generally and not to the FDD on their property or the sump pump in their house. If these narrative statements are intended as a claim, it fails under in *Froling v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2008) (claim for taking due to flooding failed because the city took no affirmative action directly aimed at plaintiff's property).

808 NW2d 804 (2011); *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987). Even if Plaintiffs' complaint is assumed for purposes of this motion to state a claim for inverse condemnation, the claim is barred by a six year statute of limitations. See *Hart v City of Detroit*, 416 Mich 488, 503, 331 NW2d 438 (1982) (in a takings case that is not a dispute over title to property as in an adverse possession case, the six year limitations period in MCL 600.5813 applies).

The Court of Appeals recognized in *Difronzo v Village of Port Sanilac*, 166 Mich App 148; 419 NW2d 756 (1988), that there is "no specific statute of limitations which by its terms is applicable" for the alleged de facto taking by encroachment at issue in that case and applied the fifteen year limitation period in the adverse possession limitation statute. 166 Mich App 152-154. However, the fifteen year period in MCL 600.5801(4) is a period for a property owner to act to recover land adversely occupied by another. Adverse possession by the City would have required action by the City that was "actual, visible, open, notorious, exclusive, continuous, under cover of claim of right and uninterrupted for the statutory period." *Hart*, 416 Mich 497. When the "occupation" is permitted or invited by the owner, as in this case, the Plaintiffs' claim is not in the nature of adverse possession. See *Benninghoff v Tilton*, 284637, 2009 WL 3789981 (Mich Ct App 11/12/09) (copy attached as Exhibit 11), 2009 WL 3789981, at *19 When there is not even an occupation or deprivation of property rights by the City, i.e., when the Plaintiffs "occupy" their own properties, their claim also is not in the nature of adverse possession. Thus, although Plaintiffs have not lost all title to their properties, they also have not lost any title to or interest in their properties. Under these circumstances, the fifteen year limitation period applied in *Difronzo* is not appropriate. Instead, the six year limitation period applied in *Hart* should be applied. Because Plaintiffs' claims arose twelve and thirteen years ago, they are time-barred.

IV. PLAINTIFFS' REQUESTS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF ARE MOOT AND TIME-BARRED, AND FAIL THE REQUIREMENTS FOR THE RELIEF REQUESTED

A. Declaratory Judgment

A request for declaratory relief is not a cause of action; it is simply a request for a form of relief. Provided there is "a case of actual controversy," a Michigan court "may declare the rights and other legal relations of an interested party seeking a declaratory judgment." MCR 2.605(A)(1).

In *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand)*, 293 Mich App 506, 515-517; 810 NW2d 95 (2011), looking at the requirement of an "actual controversy" in MCR 2.605(A)(1) and other factors, the Michigan Court of Appeals held that the declaratory relief the plaintiffs requested could not be granted. The court's decision to deny declaratory judgment was based in part on the fact that "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. In this case, because the FDDs at Plaintiffs' properties were completed years ago and stopping the FDD program as they request would not allow them to reconnect their footing drains to the sanitary sewer system, the same analysis and conclusion should apply in this case.

In *Lansing Sch. Educ. Ass'n* the Court also emphasized the impropriety of declaratory relief that would adversely affect non-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. Plaintiffs reference a portion of a January 2014 report on the results of a survey done on the experience of property

owners who had disconnected their footing drains from the City's sanitary sewer system.[20] (Complaint ¶40), but do not attach the report to their complaint or include the rest of the results. A complete copy of the report is attached as Exhibit 12.[21] Even without looking at the report, Plaintiffs' complaint shows that 60% of the respondents did NOT report some or a significant increase in anxiety, and that 100 of the 134 respondents who had experienced sanitary sewer backups before their footing drain were disconnect did not experience sanitary sewer backups after the disconnect. (Complaint ¶40) The actual survey results also shows that 70% of the respondents[22] were Satisfied or Very Satisfied regarding the sump pump installation (p 2, Q #3), that 45% would recommend a sump pump installation to a neighbor (p 3, Q #4), that the total restoration costs for the 90 respondents who had experienced sanitary sewage backups before their disconnect was $310,150 (p 3, #6), and that only 9% of the respondents had experienced sanitary sewage backups after their disconnect (p 4, #7).[23] The interest of those residents as adverse to Plaintiffs and their request for 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 similar viewpoints:

- Comment 2 to Q #14 (p 32) - ". . . we agree that it's a good idea to disconnect

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[20] The survey was done as part of an ongoing project to evaluate sanitary sewage system flow under wet weather conditions and develop recommendations for the City going forward.
[21] The report is a public record available on the City's website at: http://www.a2gov.org/Documents/012414%20FDD%20Survey%20Summary%20Report.pdf.
[22] The survey only went to persons at addresses where FDDs had been done.
[23] The survey results for these questions are not selected to decide or debate the effectiveness or merits of the FDD program; they are selected to show that there are many residents who do not agree with Plaintiffs, and who would be adversely affected, without having a voice, by the declaratory relief Plaintiffs request.

from the sanitary sewer & know that our neighbors DID have sanitary flooding before the sump pumps."

- Comment 8 to Q #14 (p 33) - "It was an important consideration when we were purchasing the house to know that since installation of sump with backup battery there had been no further flooding."
- 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."

For this reason as well, Plaintiffs' request for declaratory relief should be dismissed.

Because the causes of action that underlie Plaintiffs' request for declaratory relief are time-barred, unripe or otherwise do not state claims upon which relief can be granted, because the actions that Plaintiffs wish addressed by the declaratory relief they seek are over and done, no actual controversy exists as required by MCR 2.605(A)(1), thereby also precluding declaratory relief. *Taxpayers Allied for Constitutional Taxation v Wayne Cnty.*, 450 Mich 119, 128; 537 NW2d 596 (1995) ("Limitations periods are applicable not to the form of the relief but to the claim on which the relief is based."). The Court further noted that "[d]eclaratory relief may not be used to avoid the statute of limitations for substantive relief." 450 Mich 129. In *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429; 761 NW2d 846 (2008), following *Taxpayers*, the Michigan Court of Appeals held:

> "[W]hen the statute of limitations would bar granting relief on the underlying substantive claim, it also bars the same claim when stated as one seeking declaratory relief. Holding otherwise is equivalent to rendering an advisory opinion on a moot issue, one for which the relief requested cannot be granted." 281 Mich App 455-456 (citation omitted).

Plaintiffs' request for declaratory relief is moot and time-barred by the limitations periods that apply to the claims on which the request for declaratory relief is based.

Per their complaint, Plaintiffs disconnected their footing drains from the City's sanitary sewer system in 2002 and 2003. Plaintiffs request a declaratory judgment as to the validity of

Sec. 2:51.1, pursuant to which they disconnected their properties from the City's sanitary sewer system more than a decade ago. The City is not currently enforcing or applying the provisions of Sec. 2:51.1 against the Plaintiffs or their properties. The declaratory relief requested by Plaintiffs would not impact Plaintiffs or their properties and would not alter their relationship with the City. Plaintiffs' request for declaratory relief is time-barred and moot and should be dismissed per the "actual controversy" requirement of MCR 2.605(A)(1) and *Tenneco., supra.*

In addition to not speaking for persons who do not agree with their position, Plaintiffs do not have standing to request declaratory judgment or injunctive relief on behalf of others. In *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010), the Michigan Supreme Court "restored" the standing doctrine for Michigan courts to "a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing." 487 Mich 372. However the Court explicitly preserved the "actual controversy" and "interested party" requirements of MCR 2.605(A)(1) for a party to seek declaratory relief, as articulated in both *Associated Builders & Contractors v Director of Consumer & Indus Services*, 472 Mich 117, 125-126; 693 NW2d 374 (2005), and *Shavers v Kelley*, 402 Mich 554, 588-589; 267 NW2d 72 (1978). 487 Mich 372, n 20. The Court remanded the case to the Court of Appeals to determine if the plaintiffs satisfied the requirements of MCR 2.605(A)(1), 487 Mich 378, resulting in the Court of Appeals decision in *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand)*, discussed above, that the plaintiffs could not obtain declaratory relief.

B. Injunctive Relief

Plaintiffs' request for injunctive relief is time-barred and/or moot for the same reasons as Plaintiffs' request for *declaratory* relief. See *Terlecki v Stewart*, 278 Mich App 644, 663-664; 754 NW2d 899, 912 (2008) (an injunction is an equitable remedy, not an independent cause of

action; because time bar and dismissal of claims left no viable claim, equitable relief in the form of an injunction was unavailable). A plaintiff cannot escape a statute of limitations bar by transforming a complaint into a complaint in equity; the claims in equity are barred as well. *Cope v Anderson*, 331 US 461, 464; 67 SCt 1340; 91 LEd 1602 (1947).

Because a halt to enforcement of the ordinance as requested by Plaintiffs would not benefit or otherwise have any impact on Plaintiffs, given that their footing drains were disconnected over a decade ago and their properties are no longer subject to the disconnect requirements they want stopped, Plaintiffs' request for injunctive relief also is moot; they are not currently "interested parties" for purposes of their request to enjoin the FDD ordinance.

A request for injunctive relief requires "a balancing of the benefit of an injunction to a requesting plaintiff against the damage and inconvenience to the defendant, granting an injunction as appears most consistent with justice and equity under all the surrounding circumstances of the particular case," taking into account,

> "(a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment."

Kernen v Homestead Dev Co, 232 Mich App 503, 514–515; 591 NW2d 369 (1998) (quotation format condensed); recently followed by *Wayne Cnty Ret Sys v Wayne Cnty*, 301 Mich App 1, 28-29; 836 NW2d 279 (2013), appeal granted, 495 Mich 983; 843 NW2d 924 (2014).

Plaintiffs' request for injunctive relief fails under these factors: (1) Their request for injunctive relief includes a request for compensation (Complaint ¶72), which is already covered in their inverse condemnation claim for compensation. (2) As discussed above, Plaintiffs do not represent persons who have benefited or will benefit from the FDD program and want it to

continue; an injunction to stop the FDD ordinance and program as to non-parties would harm those third parties and the general public. (3) An injunction might expose the City to possible liability by stopping a program that serves to prevent sanitary sewer backups into homes and other buildings. (4) Plaintiffs' delay in seeking injunctive relief, which they could have requested when they got notice more than a decade ago that they were subject to the FDD ordinance, means their request is time-barred, as well as prejudicing the City, given the number of FDDs that have been done since 2001 and the cost to the City to fund both the construction of receiving infrastructure and the FDDs. For these reasons, Plaintiffs' requests for injunctive relief should be dismissed.

CONCLUSION

Plaintiffs' complaint should be dismissed in its entirety with prejudice under MCR 2.116(C)(4), (5), (7) and/or (8) for the reasons argued above. Defendant City also should be awarded its costs, including attorney fees, for having to defend against this action.

Dated: June 9, 2014

Respectfully submitted,

By: _____

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Abigail Elias (P34941)
Attorneys for Defendant City
OFFICE OF THE CITY ATTORNEY

INDEX OF EXHIBITS

Exhibit 1: Plaintiffs' Complaint, including Exhibits

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Exhibit 5: *Helber v City of Ann Arbor*, 247700, 2004 WL 2389979 (Mich Ct App, 10/26/04)

Exhibit 6: June 2001 Sanitary Sewer Overflow Prevention Report of Camp Dresser & McKee and the Citizen Advisory Task Force (excerpts; full report available online)

Exhibit 7: MCL 213.23 as it existed in 2002 and 2003

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Exhibit 9: *LaBelle Ltd. P'ship v Cent. Michigan Univ. Bd. of Trustees*, 305626, 2012 WL 3321728 (Mich Ct App, 8/14/12)

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Exhibit 11: *Benninghoff v Tilton*, 284637, 2009 WL 3789981 (Mich Ct App 11/12/09)

Exhibit 12: City of Ann Arbor 2013 Sanitary Sewage Wet Weather Evaluation Project; Footing Drain Disconnection (FDD) Survey Results, January 24, 2014

Exhibit 1: Plaintiffs' Complaint, including Exhibits

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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Exhibit 1: Plaintiffs' Complaint, including Exhibits

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and MARY RAAB,

Plaintiff,

Donald E Shelton

Hon:

Case No. 14-181 CC

vs.

THE CITY OF ANN ARBOR,

Defendant.

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There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction and occurrence as alleged in this Complaint that is either pending or was previously filed and dismissed or transferred or otherwise disposed of after having been assigned to a judge in this court.

COMPLAINT

Plaintiffs Anita Yu, John Boyer, and Mary Raab, for their complaint against the Defendant, City of Ann Arbor, by their attorneys Irvin Mermelstein, Esq., M. Michael Koroi, Esq., and Daniel W. O'Brien, Esq. respectfully allege as follows:

I. PRELIMINARY STATEMENT

1. This is an action commenced against the City of Ann Arbor ("the City") pursuant to MCL § 213.23, Article 10 § 2 of the Michigan Constitution, 42 U.S.C. § 1983 and the Fifth Amendment to the United States Constitution. The plaintiffs herein seek compensatory damages, injunctive relief and a declaration that Ann Arbor Ordinance 2:51.1 ("the Ordinance), enacted to implement the City's mandatory Footing Drain Disconnection Program (FDDP) is unconstitutional and has resulted in a taking of the plaintiffs' private property for public use without due process of law or just compensation.

II. THE PARTIES

2. Plaintiff, Anita Yu, resides at 2362 Georgetown Boulevard., in a home she has owned since at least 1982, in Ward 1 of the City of Ann Arbor.

3. Plaintiffs, John Boyer and Mary Raab, reside at 2273 Delaware Drive , in a home which Plaintiff Mary Raab has owned since 1970, located in Ward 4 of the City of Ann Arbor.

4. The City is a municipal corporation, organized and existing under the laws of the State of Michigan, with an office for the transaction of business located at Larcom City Hall, 301 East Huron Street, Ann Arbor, Michigan 48104.

III. JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction over this matter pursuant to MCL § 600.601(1).

6. Venue is appropriate in this circuit pursuant to MCL § 600.1615.

IV. BACKGROUND

A. The City of Ann Arbor

7. The City is located in the State of Michigan and is the county seat of Washtenaw County. Upon information and belief, the City was founded in 1824 and currently has a population of approximately 115,000 people, making it the fifth largest city in the State of Michigan. In 1960, the population was less than 68,000.

8. Upon information and belief, the City has a total land area of 28.7 square miles. The City is situated on the Huron River and, in general, the west-central and northwestern parts of the City maintain the highest elevation and the lower elevation sections of the City are along the Huron River and to the southeast.

9. The City is governed by a City Council that has eleven voting members: the mayor and ten City Council members. The City is divided into five wards each of which elects two City Council members. The mayor is elected city-wide and is the presiding officer of the City Council.

B. History of the FDDP

10. In the last quarter of the twentieth century, the City experienced significant population growth and corresponding development. Upon information and belief, the City's infrastructure, including its storm and sanitary sewers and drainage facilities, did not keep pace with the rate of development. As a result, there was insufficient capacity during storm events and sanitary sewer overflows ("SSO's") grew more common from the City's Waste Water Treatment Plant into the Huron River.

11. In the 1960's, the City approved plats for subdivisions in southeastern Ann Arbor, including three phases each for the Lansdowne I and Churchill Downs developments. Upon information and belief, the City was well aware at the time that these areas had demonstrable groundwater problems. The Lansdowne I vicinity had a large pond in the middle of the area

(known at the time as "the Cow Pond") because of heavy runoff and groundwater problems during normal spring rains.

12. Construction began in Lansdowne and Churchill Downs around 1966. Groundwater problems persisted at that time.

13. All houses were lawfully constructed with footing drain connections to the sanitary sewer lines; as so constructed, they all passed their inspections and received Certificates of Occupancy. Approximately 20,000 per 1982 single family homes in Ann Arbor were constructed with legal footing drain connections to the sanitary sewer system.

14. In 1982, the Michigan State Building (plumbing) Code was amended to prohibit the connection of footing drains to sanitary sewer lines. This change in the state law did not purport to require removal of pre-existing connections of residential footing drains to the sanitary sewers nor did it require the installation of any alternative methods of drainage or other retrofitting.

15. Groundwater and runoff conditions in many areas of the City (including the subdivisions in which plaintiffs' homes are located had worsened since construction of plaintiffs' homes). In 1997, the engineering firm Black and Veatch conducted a study of the storm sewer system in the City of Ann Arbor. Upon information and belief, this study concluded that there were severe problems in the City of Ann Arbor storm sewer system and made recommendations as to how these problems could be corrected. In its 1997 *Storm Water Master Plan Report* to the City, the Black and Veatch firm listed a number of inadequacies in the then present storm water conveyance system including the age of the system's components, increased flows beyond the system's design capacity, increased runoff resulting from expanding development, sedimentation occurring during construction-related runoff, channel bank erosion, structural failures and the construction of private storm water facilities including detention basins which were not being

adequately maintained. With respect to the Malletts Creek watershed, the Black and Veatch firm specifically recommended that the existing storm water conveyance system be replaced.

16. Upon information and belief, the City rejected the Black and Veatch report and did not undertake any of the recommended actions.

17. Heavy rain events in Ann Arbor in August of 1998 and June of 2000 resulted in surcharging (overcapacity conditions) in the Ann Arnor sanitary sewer system at least partly due to the cracked conditions of the sewers, which promoted and promotes infiltration of storm water into the sanitary sewer system.

18. As a result of the number of homes affected, City residents demanded an end to the sewer backups and, in fact, a class action was commenced on behalf of the affected homeowners. At the same time, the Michigan Department of Environmental Quality (MDEQ) demanded that the City take action to end the overflows.

19. Starting in 2000, MDEQ demanded mitigation of sewer flows from the City to prevent further unpermitted 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 sewers due to the anticipated capital expenditures which would be necessary to upgrade the underground infrastructure.

20. The City contracted with Camp Dresser McKee (CDMI) to propose a solution which would satisfy the demands of the MDEQ. In June, 2001, CDMI issued its *Sanitary Sewer Overflow Prevention Study* (*"the Study"*) to the City. The study's recommendation was that the City "take action to remove rain and groundwater inflow sources into the City sanitary sewer system by implementing a comprehensive city-wide footing drain disconnection program within the City of Ann Arbor."

21. Notably, CDMI the study made no representation as to the legality of its recommended alternative and, in fact, urged caution on the part of the City before any formal action was taken before the City undertook to implement the recommendations in *the Study*. For example, in the Section I. entitled "*Additional Decision Influences*," the following assessment was made:

> ***Work on Private Property Causes Concern*** – *For those homeowners that had previously have basement flooding, they generally said that work on their property (basement and lawn) would be acceptable. However, there were some affected homeowners who were very resistant to allowing any work to be performed. There was also a general concern from unaffected homeowners regarding potential work on their property.*

Later on in that same section of *the Study*, the following concern was raised:

> ***Can the City Work on Private Property?*** – *The option of footing drain disconnection was seen as a viable solution only if access to private property could be arranged. The Council was interested in how other communities had handled this issue.*

This concern as to the legal basis for the recommended solution was expressed later in *the Study*, in Section L. entitled "*Final Recommended Program,*" where the following question was raised:

> ***Legal Authority*** – *Can and will the City of Ann Arbor have the legal framework to accomplish the work required on private property?*

Upon information and belief, the City never sought or obtained a definitive legal analysis of its power and authority to enact legislation requiring mandatory FDD's or, if it did, that analysis has never been made public.

22. Upon information and belief, the City negotiated with the MDEQ and persuaded the agency to accept the FDDP as a solution to the ongoing problems with sanitary sewer overflows within the City of Ann Arbor. On September 4, 2003, a consent order was entered between the City and the MDEQ which, among other things, required the City to undertake 155 Footing Drain Disconnects (FDD's) per year for four years for a total of 620 FDD's. By the time

the consent order was entered into, approximately 150 FDD's had already been performed and were not, therefore, "required" by the consent order. This included the FDD's included in the Plaintiffs' homes.

C. **The Ordinance**

23. On August 20, 2001, the City passed the Ordinance entitled "Program for Footing Drain Disconnect from POTW." (A copy of the ordinance is attached hereto as Exhibit "1.")

24. The Ordinance served four main functions. First of all, the ordinance determined that preexisting, legally permitted and long-standing footing drain connections were "improper." In that regard, the Ordinance authorized the Director of the Utility Department ("Director") for the City to order property owners within a certain "target areas" to correct "improper storm water inflows" from their property or face a monthly fine of One-Hundred Dollars ($100.00).

25. In fact, in the City's latest iteration of its "Homeowner Information Packet" (*v8.4-8/8/2013*), the City included the following item in the "Frequently Asked Questions" section of its website:

> ***Legal Requirements***
>
> *May I choose not to participate in the program? What are the consequences of that?*
>
> Participation in this program is mandated by city ordinance. The FDD program offers Homeowners the opportunity to have the City pay for installation if the work is completed within the schedule of the program. If the homeowner does not comply with the notices to arrange disconnection, a surcharge of $100 per month will be charged to the homeowner for the additional costs associated with handling un-metered footing drain flows into the sewer system. Disconnection is still required and if done after the 90 day notice expires, the disconnection work will no longer be paid by the city.

(A copy of the most recent Homeowner Information Packet is attached hereto as Exhibit "2").

26. Second, the Ordinance allowed the Director to establish a list of private contractors approved to perform work under the program and established a protocol pursuant to which the homeowner would purportedly enter into a direct contractual relationship with a contractor and the City would not be a party.

27. Third, the Ordinance authorized the City to pay for some or all of the approved work subject to the discretion of the Director. The Ordinance and the Homeowners Information Packet delivered to the designated property owners penalizes those homeowners who wish to have their own contractors perform the FDD or to perform the FDD themselves, by reserving the right of the City to deny all or part of the aforesaid subsidy and deprive such homeowner of City services otherwise provided free (such as permitting, inspection, and direct payment of the FDD Contractor) to property owners who selected a pre-qualified" contractor and the accompanying services of CDMI.

28. Finally, the Ordinance made clear that responsibility for maintaining any improvements constructed under the FDDP, including the maintenance of sump pumps and other equipment, the furnishing of water and electricity, the purchase and installation of any backup systems and all necessary repairs would rest with the homeowner, and not the City or the contractor.

D. The FDDP is implemented.

29. Upon information and belief, as of the date of this complaint, more than 2,000 involuntary FDD's have been completed.

30. The City and/or CDMI delivered a Homeowners Packet to Plaintiff, Anita Yu, during or about the first three months of 2003. The Homeowner 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. The FDD was to be accompanied by the permanent installation of a sump pump and other equipment inside and outside the basement of her home.

31. As required by the Homeowner 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 under the FDDP to, and did, complete an FDD inside and outside of her home on September 3, and September 4, 2003.

32. As a part of the FDD completed in her home, construction and plumbing work was performed which disconnected her exterior footing drains from the sanitary sewer system, Instead, the required facilities directed ground water and storm water into plaintiff Anita Yu's crawl space through pipes installed through holes drilled through the exterior wall of her home for collection in a sump constructed and installed inside her home as part of the FDD.

33. The groundwater and storm water introduced into the crawlspace by the City or its contractors or independent contractors flows through the pipes drilled through her wall and into the sump throughout the year. The FDD included permanent installation of an electric sump pump to pump water out of the sump, up a vertical pipe approximately eight feet long to be expelled through piping installed through holes drilled through her interior wall and to the exterior of her house for discharge. She currently has no flooding from her sump pump out onto the floor of the crawlspace, by the sump pump runs daily. The sump and sump pump were installed in a location accessible to plaintiff, Anita Yu, only with difficulty as she suffers from a disabling condition that it makes it impossible for her to perform the operation and maintenance mandated by the FDDP and the FDD Ordinance without hiring a contractor at her own cost. Prior to the disconnect, she never experienced any flooding in her basement or crawlspace and had no water flowing into and through her crawl space into a sump pump.

34. Plaintiff, Anita Yu, did not experience a sewer backup before the Ordinance was enacted.

35. Before the disconnect, Ms. Yu had complete peace of mind as a result of the absence of any flooding or other water problems and now she is required to operate and maintain, at her own expense, equipment installed by force of law.

36. The disconnect of Ms. Yu's footing drain was completed *before* the September 4, 2003 entry of the Consent Order between the MDEQ and the City.

37. Plaintiffs, John Boyer and Mary Raab, under threat of compulsion, completed the footing drain disconnect in 2002. Prior to that time, their basement had been dry and they had experienced no flooding, dampness or other water problems in their home. In conjunction with the disconnection of their footing drain, a sump pump was installed in their basement which discharges into their backyard. Since their footing drain was disconnected, their backyard and basement have flooded on a significant and recurring basis. Two flooding events were particularly severe, with the basement living space under water while the sump pumps were fully operational.

38. Mr. and Mrs. Boyer have borne the entire cost of the FDD, including "upgrades" such as a Six-Hundred Dollar ($600.00) backup hydraulic pump that should have been installed initially, together with cleanup costs, electrical costs and the costs of four to six gallons per minute of City water required to run the hydraulic backup during the regular power outages experienced in their home in Ward 4.

39. The disconnect of the Boyer/Raab footing drain was completed *before* the September 4, 2003 entry of the Consent Order between the MDEQ and the City.

E. The Survey

40. In January of 2014, the City released the results of its *2013 Sanitary Sewage Wet Weather Evaluation Project Footing Drain Disconnection (FDD) survey*. According to the survey statistics, 2350 surveys were mailed and 850 responses were received. In particular, the following results were noted:

- Of 850 responses, 134 respondents (16%) reported experiencing sanitary sewage backups prior to FDD/sump pump installation. Of these 134 respondents, 34 of the 134 reported continued sanitary sewage backups and 42 of the respondents who *did not* have sanitary sewage backups before the FDD experienced them afterwards.

- Of the 426 respondents who reported experiencing water flooding/ seepage/ dampness problems before the FDD/sump pump installation, 247 experienced continuing flooding/seepage/ dampness problems after the FDD/sump pump installation.

- The total restoration cost for water flooding/seepage/dampness after the FDD sump pump installation among the 158 respondents was Four-Hundred and Fifty-Six Thousand Dollars ($456,000.00) and the average restoration cost was Three-Thousand, Two-Hundred and Ninety-Seven Dollars ($3,297.00).

- Among the respondents, almost 40% reported some, or a significant increase in, anxiety as a result of the installation of the sump pumps.

V. THE PLAINTIFFS' CLAIMS

41. Because the Plaintiffs' homes were constructed in conformity with the then applicable building code and other relevant standards and the Plaintiffs or their predecessors-in-title received Certificates of Occupancy and/or other necessary approvals from the City, the Plaintiffs acquired vested rights to the footing drains and related storm water and sanitary sewer facilities related thereto.

42. Upon 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.

43. The mandatory disconnection of the Plaintiff's 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.

44. Moreover, the ongoing and perpetual responsibilities for the operation and maintenance of the sump pumps and related equipment represent an unreasonable financial and personal burden upon the Plaintiffs' use and enjoyment of their property and represent an inappropriate delegation by the City to its citizens of its governmental obligations.

45. 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.

46. In addition, Plaintiffs John Boyer and Mary Raab have incurred costs and expenses attributable to flooding and water damage resulting from the FDDP and, upon information and belief, will continue to incur such costs and expenses in the future.

47. Whereas the Plaintiffs previously enjoyed the peace of mind and repose which comes from having dry basements and no water problems, they have, since the implementation of the FDDP, experienced the inconvenience associated with the installation of the sump pump and related equipment, the ongoing burdens associated with the maintenance and operation of the sump pumps and, in general, the diminution in their quality of life attributable to the FDDP.

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.

FIRST CAUSE OF ACTION
MCL SECTION 213.23

49. The Plaintiffs' repeat and re-allege Paragraphs One through Forty-Eight as if more full set forth herein.

50. The City, through its enactment, implementation and enforcement of the FDDP Ordinance has taken private property for public use as that term is defined in MCL Section 213.23.

51 In so doing, the City has acted in derogation of the requirements of MCL Section 213.23.

52. Alternatively, if the City had attempted to comply with the requirements of MCL Section 213.23, it would have failed in its burden of proving that the taking was necessary in accordance with Section 213.23 (2) because no public necessity of an extreme sort existed, the property taken will not remain subject to public oversight and the property was not selected on facts of independent public significance or concern, including blight.

53. The City has, therefore, proceeded in violation of law and in violation of the Plaintiffs' constitutional rights.

54. As a result of the foregoing, the Plaintiffs are entitled to just compensation.

SECOND CAUSE OF ACTION
MICHIGAN CONSTITUTION

55. Plaintiffs repeat and re-allege Paragraphs One through Fifty-Four as if more fully set forth herein.

56. Article X, Section 2 of the Michigan Constitution reads, in pertinent part, as follows: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

57. The City, through its enactment, implementation and enforcement of the FDDP Ordinance, has taken the Plaintiffs' properties without due process or just compensation.

58. The Ordinance represents the City's official policy.

59. As a result of the foregoing, the Plaintiffs are entitled to just compensation.

THIRD CAUSE OF ACTION
FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

60. Plaintiffs repeat and re-allege Paragraphs One through Fifty-Nine as if more fully set forth herein.

61. The Fifth Amendment to the United States Constitution provides, in pertinent, that private property shall not be taken for public use without just compensation.

62. The City's enactment, implementation and enforcement of the FDDP Ordinance has resulted in the taking of the Plaintiffs' properties without due process or just compensation.

63. As a result of the foregoing, the Plaintiffs are entitled to just compensation.

FOURTH CAUSE OF ACTION
42 U.S.C. SECTION 1983

64. Plaintiffs repeat and re-allege Paragraphs One through Sixty-Three as if more fully set forth herein.

65. The City is a "person" subject to liability under the Federal Civil Rights Act of 1871 (42 U.S.C. Section 1983) for violating the federally-protected rights of others. The enactment, implementation and enforcement of the FDDP ordinance by the City of Ann Arbor has resulted in the violation of the Plaintiffs' federally protected rights, to wit, their right not to have

their property taken without just compensation or due process and their right to be free from mandatory work and physical labor under the Ordinance solely for the supposed benefit of others without pay or protection of law.

66. The enactment, implementation and enforcement of the FDDP Ordinance by the City constitutes a taking of the Plaintiffs' properties by physical invasion and physical occupation without due process or just compensation and the imposition of requirements for mandatory work and physical labor.

67. As a result of the foregoing, the Plaintiffs are entitled to just compensation and to payment for their work, their physical labor and their expenses.

FIFTH CAUSE OF ACTION
INJUNCTIVE RELIEF

68. Plaintiffs repeat and re-allege Paragraphs One through Sixty-Seven as if more fully set forth herein.

69. The Plaintiffs have no adequate remedy at law.

70. In the absence of injunctive relief, the Plaintiffs will continue to (1) endure the physical invasion and physical occupation of their property, (2) assume ongoing and perpetual responsibility for the operation and maintenance of the sump pumps and related equipment installed in their homes for the supposed benefit of others without pay and (3) bear an unreasonable financial and personal burden upon their use and enjoyment of their property.

71. As a result, the Plaintiffs are entitled to injunctive relief, restraining and enjoining the City, its agents, representatives and employees, and all others acting on its behalf or in its stead from taking any further steps to implement or enforce the ordinance.

72. In addition to just compensation, the Plaintiffs are entitled to injunctive relief, requiring the City to reverse, correct and remedy the effects of the unconstitutional taking, and payment for their non-volunteer work and physical labor required by the Ordinance.

SIXTH CAUSE OF ACTION
DECLARATORY JUDGMENT

73. Plaintiffs repeat and re-allege Paragraphs One through Seventy-Two as if more fully set forth herein.

74. The Plaintiffs are entitled to a judgment, declaring that the FDDP Ordinance is unconstitutional, on its face and as implemented, because it authorizes the City to take private property without just compensation therefor and because it allows for such takings without any judicial determination of public use, all in violation of Michigan State Law and the Michigan Constitution, as well as the laws of the United States and the United States Constitution.

SEVENTH CAUSE OF ACTION
ATTORNEYS' FEES

75. Plaintiffs repeat and re-allege paragraphs One through Seventy-Four as if more fully set forth herein.

76. As a result of the facts and circumstances of this matter, the Plaintiffs are entitled to reasonable attorneys' fees as allowed by law.

WHEREFORE, the Plaintiffs Yu Boyer and Raab respectfully request judgment as follows:

A. On their first cause of action, just compensation in accordance with Michigan State Law;

B. On their second cause of action, just compensation in accordance with the Michigan State Constitution;

C. On their third cause of action, just compensation in accordance with 42 U.S.C. Section 1983;

D. On their fourth cause of action, just compensation in accordance with the Fifth Amendment to United States Constitution;

E. On their fifth cause of action, preliminary and permanent injunctive relief restraining and agents, representatives and employees and all others acting on its behalf or in its stead from taking any other further steps to implement, or enforce the FDD Ordinance and granting such other injunctive relief as to the Court may seem just and proper.

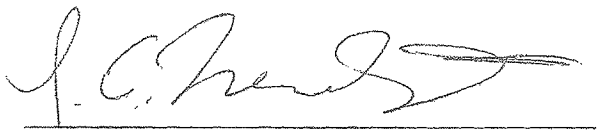
F. On their third cause of action, a declaration that the City of Ann Arbor's FDDP ordinance is unconstitutional, both on its face and as implemented, and declaration further determining their respective rights and responsibilities of the parties;

G. On their seventh cause of action, reasonable attorneys' fees as allowed by law;

H. Such other and further relief as the Court may deem just and proper; and

I. The costs and disbursements of this action.

Respectfully submitted,



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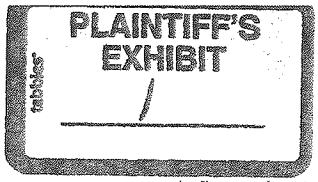

2:51.1. Program for footing drain disconnect from POTW.

(1) *Purpose:* The purpose of this Program is to significantly reduce improper stormwater inflows in the most cost-effective manner, in order to eliminate or reduce instances of surcharged sanitary sewers due to improper inflows, which are inimical to public health and welfare; reduce the chance of a sanitary sewer backup into occupied premises; and to maximize efficient operation of the District's wastewater treatment plants.

(2) *Definitions:* For purposes of Section 2:51.1 of the Ann Arbor City Code:

1. Improper stormwater inflow shall mean any direct connections (inflow) to the public sewer of sump pumps (including overflows), exterior floor drains, downspouts, foundation drains, and other direct sources of inflow (including but not limited to visible evidence of ground/surface water entering drains through doors or crack in floors and walls) as noted during field inspections by the Utility Department.

2. Participating owner(s) shall mean those persons that own property within a target area as may have been defined by the Director and who have notified the Director of their decision to participate in the program within 90 days of having been ordered by the Director to correct improper stormwater inflows from their property and meet the eligibility requirements of Section 2:51.1(4).

(3) *Scope of Program:* All improper stormwater inflow disconnection costs shall be at the owner's expense, except, in accordance with this funded program, the POTW may either reimburse the participating owner of a premises, or pay directly to the participating owner's contractor, for qualifying work up to a maximum of $3,700.00 ("Funding Cap"), or as may be adjusted under 2:51.1(12), for corrective work to remove improper stormwater inflows for which the initial building construction permit was in existence prior to January 1, 1982 or prior to the date the premises became under City of Ann Arbor jurisdiction. This funding program is referred to in this Section as the "Reimbursement Program," regardless of whether payment is made as reimbursement to the participating property owner or as direct payment to the participating property owner's contractor.

(4) *Eligible Participants.* This program may be utilized only for: (a) Improper stormwater inflows for which the initial building construction permit was in existence prior to January 1, 1982 or, (b) for premises in areas which came into the jurisdiction of the City of Ann Arbor at a later date, improper stormwater inflows which were in existence prior to the date of such inclusion.

(5) In every instance where the Director is required to act or approve an action, the action or approval may be performed by a person designated, in writing, by the Director to act as his or her designee.

(6) *Target Areas; Orders.* The Director may implement and make available this Reimbursement Program throughout the City, or instead only in target areas within the City determined by the Director as having the highest priority for reduction of stormwater inflows based on surcharging problems. When the Director issues orders for removal of improper stormwater inflows in an area where the program is being implemented, the Director shall inform the owner of the availability of the Reimbursement Program. Participation in the Reimbursement Program shall be voluntary; owners declining to participate shall be required to proceed with removal of the improper inflow at the owner's expense.

(7) *Scope of Work.* The Director shall determine for each participating premises the scope of work for reduction of improper stormwater inflows and sewer backup prevention, which may be paid for with Program funds, with the goal of achieving the most cost-efficient and timely reductions. If work paid for under this Program does not eliminate every improper stormwater inflow for a participating premises, the Director is not precluded from issuing supplemental orders under Chapter 28 of Title II concerning the participating premises. For each participating premises the maximum cost which may be paid with POTW funds to an owner or owner selected contractor shall be the Funding Cap set under 2:51.1(3) or as may be adjusted under 2:51.1(12). If additional work is required it shall be performed at owner expense.

(8) *Approved Contractors.* The Director may establish a list of private contractors or contractor teams (referred to as "contractor (s)" throughout this section) approved for performing work under this Program based on qualifications including experience, quality of work and insurance. Participating owners may propose additional contractors for inclusion in the approved list.

(9) *Contractor Selection.* Participating owners shall select an approved contractor in accordance with a process established by the Director. Participating Owners may either select a private contractor from the list or agree to perform the work by him or herself.

1. If the participating owner selects a contractor from the list of approved private contractors to perform the work, after Director review and approval of the contractor selection and contract price, the owner shall contract with the selected contractor for performance of the approved scope of work. The City of Ann Arbor shall not be a party to the contract. The owner's contract shall require the contractor to secure any building permits as may be necessary and shall specify that the owner's final payment to the contractor shall not be made until (i) the work is inspected and approved by the Director and approved by the owner, whose approval shall not be unreasonable withheld, (ii) a release of lien from all contractors or subcontractors performing work on the premises is obtained.

2. If the participating owner elects to perform the work his or herself, the scope of work, plans and specifications shall be approved in advance by the Director. The Director may establish rules authorizing reimbursement or partial

reimbursement for owner-performed work. No payment shall be made until the work is complete, inspected and approved by the Director. To be eligible for reimbursement, a request for payment must be accompanied by supporting receipts for materials, supplies and equipment.

(10) *Release.* As a condition to participation in the program the owner shall release the City of Ann Arbor, and their officers and employees from all liability relating to the work.

(11) *Payment.* After the work is inspected and approved by the Director and approved by the owner, the Director shall authorize payment for 100% of the cost of the approved work (subject to the funding cap set under 2:51.1(3) or as may be adjusted under 2:51.1(12)) from POTW funds approved for this purpose. Partial payments may not be made except that, at the sole discretion of the Director, a final payment may be made, less a reasonable retention for ensuring the completion of punch list items. Payment may be made to the owner, to the contractor, or jointly to the owner and contractor, in the Director's sole discretion.

(12) *Funding Cap Appeals.*

1. Notwithstanding any maximum reimbursement amount stated elsewhere within this section, the Director, upon a written request from a participating owner, may approve an amount 35% greater than the maximum where extraordinary construction or configuration circumstances require additional construction activity that cause extraordinary expense to achieve the program goals. Extraordinary construction or configuration circumstances do not include those situations where upgrades to the property that do or may increase the value of the property are required to accomplish the sanitary sewer disconnect. The written request from a participating homeowner must be received by the Director no later than 30 days after substantial completion of the construction of the approved scope of work.

2. Notwithstanding any maximum reimbursement amount stated elsewhere within this Section, the City Administrator, upon a written request from a participating owner may approve an increase of any amount, not withstanding any maximum amount stated elsewhere with this Code, in the Funding Cap for a particular premises where extraordinary construction or configuration circumstances require additional construction activity that cause extraordinary expense to achieve the program goals and those expenses can not be accommodated within the 35% available under 2:51.1(12)1. The written request must be delivered to the City Administrator and must be received no later than 30 days after substantial completion of the construction of the approved scope of work.

3. Unless specific appeal procedures are otherwise provided in this code, participating owners aggrieved by a decision regarding a reimbursement amount may appeal that decision. Persons aggrieved by the decision of the Director shall file a written appeal to the City Administrator within 5 days of the decision. Persons aggrieved by the decision of the City Administrator shall file a written appeal of the City Administrator's decision to the City Council within 5 days of the decision.

(13) *Maintenance.* Participating owners shall be responsible for maintaining any improvements constructed under this Program.

(14) *Director Rules.* Within the limitations set forth by this Section 2:51.1, the Director may establish such further criteria and rules as are required to implement this Program.

(15) *Surcharge; Disconnection; Enforcement.*

1. The Director or designee shall provide written notice by certified mail to the sewer user, property owner or other responsible person of any violation of Section 2:51.1 of this Code. This notice shall describe the nature of the violation, the corrective measures necessary to achieve compliance, the time period for compliance, the amount of the monthly surcharge until corrected and the appeal process.

2. For structures or property with actual or potential improper stormwater inflows, the sewer user, property owner or other responsible person shall be given 90 days to correct the illegal or improper activities or facilities contributing to the discharge, infiltration of inflow into the POTW. If corrective measures to eliminate the illegal or improper discharge, infiltration or inflow into the POTW are not completed and approved by the Utility Director or designee, within 90 days from the date of the notice provided in section 2:51.1(15)1, then the director shall impose upon the sewer user, property owner or other responsible person a monthly surcharge in the amount of one hundred dollars ($100.00) per month until the required corrective measures are completed and approved. If the property owner or responsible party fails to pay the monthly surcharge when due and payable, then the city may terminate the water and sewer connections and service to the property and disconnect the customer from the system. Any unpaid charges shall be collected as provided under Chapter 29 of Title II.

(Ord. No. 32-01, § 1, 8-20-01; Ord. No. 37-02, § 1, 9-3-02)

Footing Drain Disconnection Program HOMEOWNER INFORMATION PACKET

City of Ann Arbor
Public Services Area
www.a2fdd.com

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PROJECT BACKGROUND

Within the City of Ann Arbor, there are groups of homes that have experienced basement backup problems. Many of these have been the result of wastewater backing up from the sanitary sewers through basement floor drains, especially during periods of heavy rainfall. This wastewater presents a potential health risk and can cause damage to the structure and to belongings stored in the basement.

In addition, this excess groundwater places a strain on the sanitary sewer system and must be treated at the Waste Water Treatment Plant. Due to current and future regulations in the State of Michigan, it is critical the Utilities Department minimize the amount of unnecessary groundwater sent as wastewater to the Treatment Plant.

In 1999, the City formed the Sanitary Sewer Overflow Prevention Advisory Task Force to understand the causes of basement backup and develop solutions to the problem. The Task Force was comprised of homeowners, city staff and experts in related disciplines. In addition, the Task Force hired the engineering firm of CDM to assist in the data gathering and analysis. Throughout the project, the Task Force sought to provide the public with project information and solicit homeowner feedback to develop a recommendation that meets the diverse needs of the citizens.

TASK FORCE FINDINGS AND SOLUTIONS

The Task Force study determined that during heavy storms, rainwater from home footing drains overloads the sanitary sewer system and is the primary cause of basement backups. It was determined that even homes with no current basement backup problems were significant contributors to the basement backup problem for neighboring homes.

There are basically two ways to handle this problem: either reduce the amount of rainwater entering the sanitary sewer system, or provide more capacity in the system to store or carry these flows. Based on analysis and public feedback, the Task Force determined that reducing the amount of rainwater entering the system would be preferable to the public, environmentally responsible and most cost effective.

Therefore, the Task Force recommended that the Mayor and City Council implement a comprehensive citywide footing drain disconnection program within the City of Ann Arbor in order to reduce the amount of rainwater flowing into the sanitary sewer system.

The Task Force recommended a citywide program for a number of reasons.

- This basement backup problem is not confined to the five study areas.
- All buildings with connected footing drains contribute to the basement backup problem.
- Footing drain disconnection supports the City in a proactive approach to pending regulatory guidelines in the State of Michigan.
- Decreasing the amount of storm water flow that gets to the Water Treatment Plant reduces both the costs of treatment and the chances for potential overflows into the Huron River.

WHAT IS FOOTING DRAIN DISCONNECTION?

As shown on Figure 1, footing drains are small (4-inch diameter), perforated drainage pipes located near the foundation of your house. They are intended to keep rainwater that seeps through the ground from building up along the foundation or basement walls. In many homes, the downspouts, which carry rainwater from the gutters, discharge near the foundation walls. This water drains through the soils and into the footing drains. In most homes constructed before the 1980s, the footing drains are connected to the house sanitary connection (house lead) as shown in the figure above. This house lead carries the footing drain flow and wastewater from the house to the sanitary sewer system.

When it is not raining this is not normally a problem, but during a severe storm event too much rainwater can enter the sanitary sewer system. This excess flow can cause the mixture of rainwater and wastewater to backup in the house lead of some homes and cause basement backups.

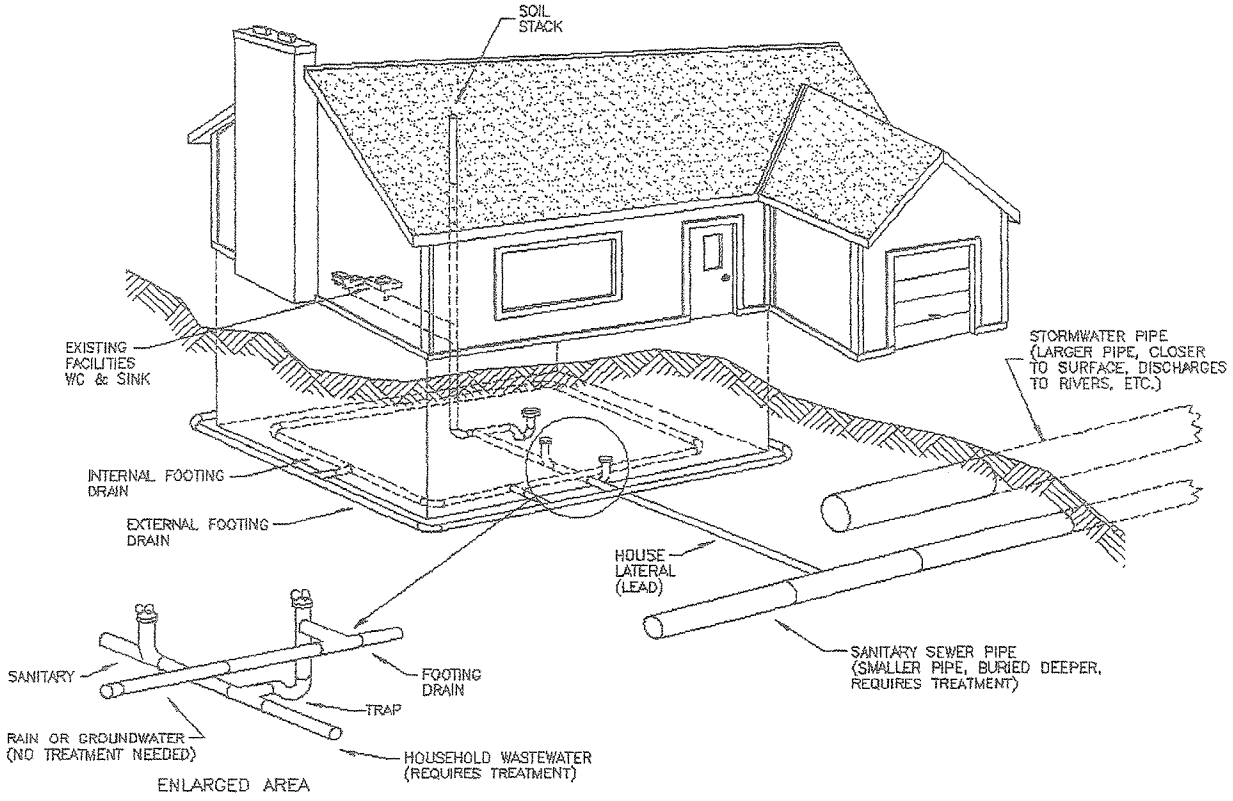


Figure 1 – Pre-construction Conditions

Footing drain disconnection is performed to remove the rainwater flows from the sanitary sewer system. This is done by disconnecting the footing drains from the house sanitary lead and installing a sump pump to move water from the footing drains into the storm water system. There may be some alternatives to sending the flow into the storm water system in some neighborhoods or homes. The creation of rain gardens or use of low areas in backyards are possibilities. A priority is placed on safe disposal of the storm water. For the vast majority of

homes the connection to the sanitary house lead is inside the basement, and the sump is installed in the basement as shown in Figure 2 below.

In homes that have experienced basement backups or are at risk for basement backup, the city can provide funding to install check valves to keep water from flowing back into the home from the sanitary sewer system.

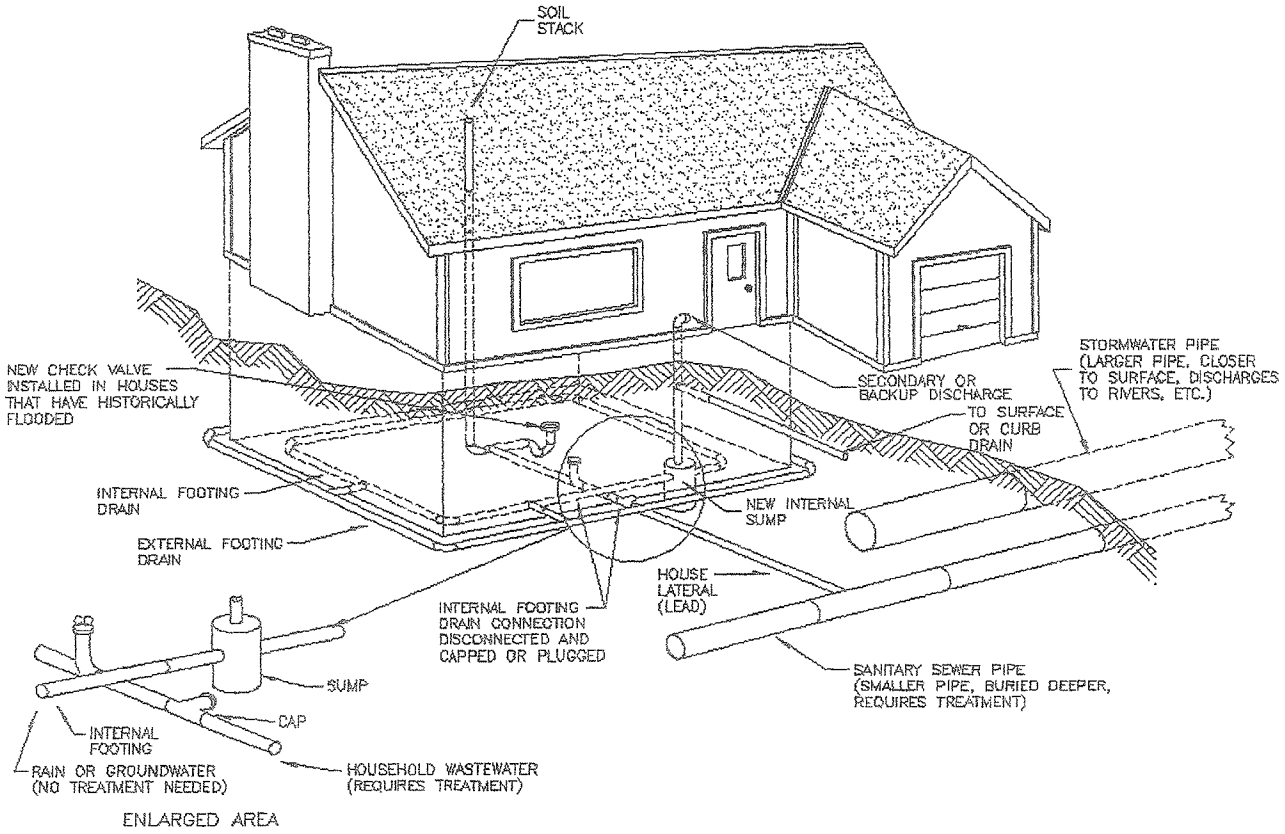


Figure 2 – Basement Sump Construction

WHY DISCONNECT FOOTING DRAINS?

The purpose of disconnecting footing drains is to keep rainwater out of the sanitary sewer system. During dry weather, the sanitary system has plenty of capacity to carry wastewater. In neighborhoods where footing drains are connected to the sanitary system, however, rainwater can overfill the sanitary system during heavy storms resulting in the rainwater/wastewater mix backing up into basements. Keeping rainwater out of the house 'lead' greatly reduces the amount of rainwater getting into the sanitary system, which protects downstream residents and reduces costs at the wastewater treatment plant. It also frees the house connection to carry wastewater to the sanitary system.

All homes built in the City of Ann Arbor since January of 1982 have disconnected downspouts and footing drains with sump pumps in the basements or with gravity discharge leads to a storm

water system. Surface discharge of downspouts allows more rainwater from roofs to be absorbed by the ground and reduces the amount of water being treated and released into the Huron River.

Footing drain disconnection has the following advantages:

- Protects homeowners who have had sanitary backups during severe storm events.
- Takes rainwater out of the sanitary system, reducing problems for downstream residents and eliminating treatment costs for the rainwater.
- Preserves natural features and protects watershed by minimizing undesirable discharges to the Huron River.
- Provides short-term and long-term protection for those at risk.
- Provides the lowest rate impact of all the possible solutions.

WHAT WILL HAPPEN AT MY HOME?

After you receive this homeowner information packet, you should contact the FDD Construction Manager (see page 8 for contact information) to arrange for the initial assessment at your home. This will be an excellent opportunity to ask specific questions about your home, and to learn more about the steps of the program. Next, you will choose from a list of pre-qualified contractors, obtain estimates and arrange a contract. (See page 8 for a list of the contractors) The actual construction work should take from 1 to 3 days of in-home construction. Construction photos are available on the project website www.a2fdd.com.

Curb drain installation work has most likely already been performed by a city hired contractor in the lawn extension area between the curb and sidewalk. The contractor installed a 6-inch diameter pipe with individual connections for each house that will collect the flows from sump pumps in individual homes and direct it to the storm sewer. Lastly the area that was disturbed was restored with new grass seeding and occasionally sidewalk or driveway aprons were replaced.

Initial Assessment will be conducted by the FDD Construction Manager with the homeowner and will include actions to:

- Determine if your footing drains are connected
- Identify possible locations for sump pump installation
- Assess site drainage options, including identification of any needed changes in downspout connections.
- Assess options for installation of sump discharge lead (piping) to an approved discharge location.

Inside work will be confined to the basement and will include:

- Removal of a section of the basement floor to access pipes and to install the sump.
- Disconnection of the footing drains from the house lead and routing of new discharge lines.
- Installation of a new electrical circuit.
- Installation of the sump and sump pump. The sump is typically 24 inches in diameter and 30 inches deep. The cover is sealed and level with the basement floor.

- Repairs to the work area (i.e., replacing concrete, tiles, etc.)
- For homes that have previously experienced basement backup or those deemed to be at-risk for basement backup, installation of check valves on all plumbing fixtures located in the basement or a single check valve to protect all facilities in the basement.
- Clean up of the work area.

Work in the yard includes:

- Installation of a small pipe to carry footing drain water from the sump pump to the previously installed curb drain or an approved alternative.
- Cleanup and restoration of any areas impacted by the installation.

WHAT WILL IT COST? HOW IS IT FUNDED?

The City will provide funding for the 'core' work. A typical household should cost $4,100 to disconnect. Exceptional circumstances within a household may warrant payment beyond the $4,100. Prior to signing a contract, a homeowner may request additional city support which will require competitive estimates from 2 different contractors. This request will be reviewed and may be approved by the City Project Manager and, if necessary, the City Administrator. Financing for this project comes from sewer use fees. Items funded include:

- Parts and labor for standard sump and pump installation
- Parts and labor for discharge pipes
- Parts and labor for electrical work
- Basic restoration of interior and exterior work areas including lawn reseeding and if necessary restoring the floor, ceiling surface or drywall patching.

The Homeowner will be responsible for the following costs where applicable:

- Additional features or restoration beyond what is required for basic installation and items classified as home improvements or exceed building code requirements (e.g. replacement of inadequate electrical service panel, construction of new enclosure for sump, etc.)
- Backup Sump Pump - In the event of a power failure, the primary sump pump will not function. This can result in groundwater collecting around the outside of your basement walls and floor where it can seep through cracks in the concrete or through the sump lid. The plumbing contractors can install, at the homeowner's expense, either battery or water-powered backup pumps that will operate during an electrical failure or if your primary pump fails. You need to assess your desire for this additional level of protection as only you can understand the impacts moisture would have on your belongings in your basement, and the frequency of power failures in your neighborhood. Based on our experience with power failures during storm events, homeowners are advised to strongly consider the need for a backup system. (See questions 20-23 in the Frequently Asked Questions section for additional information)
- Maintenance
- **Homeowner pays all costs plus a monthly surcharge** if the work is not completed within 90 days after receiving the 90-day notice to disconnect (see required timing below)

WHAT DO I NEED TO DO?

As a homeowner please review and complete the steps below to aid in a reliable and trouble free disconnection.

1. Become informed by reviewing the supplied materials in this packet and attending the scheduled neighborhood meeting.
2. Arrange an in-home assessment with a Construction Manager to determine the need for a disconnection, discuss your options for getting the work done and get all your questions answered. We ask that during the in-home assessment/pre-inspection, to please kindly put them away until after the assessment has been completed.
3. Review the list of pre-qualified contractors (page 8) and make an appointment with one or more to receive an estimate of costs for the work to be done in your home.
4. Review costs that are funded by the City and identify any additional options you may want or need to contract for at your personal expense.
5. Submit the necessary forms to secure funding pre-approval to the Construction Manager.
   - Form 1 –Reaffirms that you understand that the contractor you hire is responsible for the work done at your property not the city of Ann Arbor. This is required of every homeowner.
   - Form 2 – This is only needed if the estimated cost exceeds the limit of $4,100. Two estimates will be needed from different contractors for funding pre-approval above the $4,100.

     When funding has been pre-approved the construction management staff will notify you by phone.
6. Ensure that the footing drain disconnection work gets completed properly:
   - Arrange a contract to get the work done with your selected contractor.
   - Discuss scheduling and basement preparation with the contractor.
   - Clear the work area so that the contractor can perform the work. (Contractor will provide specifics). If desired, add additional dust protection to exposed areas.
   - Monitor the work underway to ensure it meets your contract agreements. Consult the Construction Manager if help is needed. The contractor will arrange for city building inspections to occur during the work.
   - Review finished work with the contractor to ensure you understand maintenance and operations of your system.
7. Host a final walkthrough/post-inspection with the Construction Manager to ensure that all work has been completed according to code and according to your contract. If all work has been completed as contracted, the city will issue payment to the contractor for the pre-approved amount.
8. Provide written feedback on the contractor and the overall project to the City.

WHEN DO I NEED TO COMPLETE THIS WORK?

The City and the construction management team work actively with property owners to ensure that all requirements of this program are understood and that construction occurs in timely manner. This packet is the first outreach to homeowners. Within the next two months, any homeowners who have not initiated a contract to disconnect will receive a courtesy reminder. If no action is taken following that reminder, property owners will then receive a certified letter from the city. By city ordinance, property owners are mandated to complete the disconnection of their footing drains within 90 days of receiving a certified letter entitled "90-Day Notice" from the City. If the disconnection is not completed by the end of the 90-days the homeowners risk losing city funding for the work and possibly a surcharge on their sewer bill of $100 per month for unmetered sewage entering the system. If adjustments need to be made to the mandated

timing for completion, please communicate directly with the Construction Manager to review the unique circumstances in your home.

CONTACT NAMES AND NUMBERS

Construction Management Staff:

- Construction Managers
  - Justin Woods ..... [734.794.2780]
  - Karen Duff ..... [734.794.2780]
- CDM Project Manager – Jay Zawacki ..... [734.794.2780]

City of Ann Arbor Staff:

- Project Manager – Anne Warrow .....[734.794.6410 ext. 43639]
- Interim Public Services Director – Craig Hupy ..... [734.794.6310]

PRE-QUALIFIED CONTRACTORS

Hutzel Plumbing
Contact: Nancy Cummins
2311 S. Industrial Highway
Ann Arbor, MI 48104
Phone: (734) 665-9111
Fax: (734) 665-9238

RDC Residential Services
Contact: Richard Connors
Plymouth, MI 48170-5823
Phone: (734) 564-2801
Fax: (734) 414-0729

Bidigare Contractors
Contact: John Bidigare
P.O. Box 700464
Plymouth, MI 48170
Phone: (248) 735-1113
Fax: (248) 735-1114

Perimeter
Contact: Steve Rojeck
8385 Jackson Road
Ann Arbor, MI 48103
Phone: (734) 424-9280
Fax: (734) 424-2037

FREQUENTLY ASKED QUESTIONS

Background Questions: Reasons for Back Ups, Alternative Solutions

1. Are there alternatives to managing the water other than Footing Drain Disconnection? Why was this option chosen?

The SSO Task Force studied the issue of basement backups in 2000 to 2001 and identified three viable alternatives to solving these problems; footing drain disconnection, installing larger sewer pipes and building storage basins. This work found that footing drain disconnection (FDD) addressed the root cause of the basement backups, which was stormwater entering the sewer system during rain events. On average, every home with a connected footing drain adds 3,500 to 10,500 gallons per year of clean water that must be conveyed to the Wastewater Treatment Plant and treated before release to the Huron River. FDD was cheaper overall and, very importantly, reduced the chance of exceeding the Wastewater Treatment Plant capacity. FDD also provides the greatest security of the solutions as its capability to work effectively is not limited to certain size rainstorms.

2. Can I avoid the need for footing drain disconnection if I take actions such as redirecting my downspouts, sloping soil away from the foundation or installing low flow fixtures?

While those are excellent approaches to reduce some causes of wet basements and to reduce the volume of water that goes to the Wastewater Treatment Plant, this will not prevent enough water from entering the sewer system inappropriately. Footing drains still collect much of the rainfall that enters the ground. To protect your own and your neighbors' basements, the large volume of water entering the sewer system from rain storms must not enter the sewer system and FDD is the practical means identified to do this.

3. Why do I need to have this done and not my neighbors?

All buildings that have connected footing drains are scheduled for FDD work over the coming years. The schedule was established on a priority basis to disconnect the homes identified as needing protection from future basement backups and to accommodate a cost efficient installation process within a neighborhood.

4. I get water in my basement now. Will this solve that problem or make it worse?

This work will only address basement water problems that are caused by heavy rain events resulting in basement backups through floor drains. It will not improve or worsen other causes of wet basements such as leaks through cracks in basement walls or floors due to poor site drainage and/or poor or blocked footing drainage pipes.

5. What is the role of development in this problem? These basement backups have happened since our neighborhood has grown.

In tracking the source of the heavy flows that entered the system during rain storms in the year 2000, a Task Force of engineering professionals and community members identified that footing drains contributed 70-90% of the total volume of flow in the sewer system making this source the major cause of basement backups.

The existing sanitary sewer system without footing drain flow is more than adequate to handle recent and future development as planned for in existing treatment plant designs. New developments do not have footing drains connected to the sanitary system and will not add wet weather flows to the collection system.

Installation Process: Costs, Homeowner Choices, Restoration

6. Do I have to use a particular contractor (low bidder)?
Homeowners choose which pre-qualified contractor they want to provide them a bid. Homeowners only need to arrange one bid if the work can be accomplished within the $4,100 average estimate. If costs exceed $4,100, two estimates are needed. The homeowner may select either of the contractors, but must pay the differential between the lowest bid and the higher bid if the more costly contractor is selected.

7. Can I use another contractor who is not pre-qualified?
No. The City of Ann Arbor has developed a process for pre-qualifying contractors so that it is clear that they understand the methods and materials needed for a complete installation. Using other contractors would be more expensive for Ann Arbor to manage and would reduce the ability to support quality construction. With several contractors already pre-qualified, there is adequate choice for homeowners to make a selection. Exceptions to using the pre-qualified contractors may be allowed but the homeowner may not receive full reimbursement for all costs not pre-approved for work using pre-qualified contractors. Homeowners are encouraged to seek information/guidelines for reimbursement from FDD project staff before beginning work eligible for FDD funding. Contractors willing to do this type of work are encouraged to contact the city to seek pre-qualification status.

8. Can I perform the disconnection work myself?
Yes. Homeowners can perform the work. In this case, the homeowner would need to apply for all of the necessary permits, would have to comply with the construction specifications and materials of construction, and would be reimbursed for materials only. This reimbursement would only be made after the Construction Manager had completed the final walkthrough/post-inspection of the work.

9. What will this cost me as a homeowner?
The City will cover the costs necessary to complete an installation of the sump and basic restoration. Homeowners may choose to pay for additional items to meet their desires for more security and enhanced restoration. Some homeowners choose to purchase a backup pump or do additional landscaping work.

10. What does basic restoration mean?
Basic restoration inside the home means returning the home to the level of finish it had previous to the work. Concrete is replaced and smoothed, tiles are replaced with a closest match of available tile and the work site is cleared and cleaned. Outside the home, holes are filled in and grass seed is sown.

11. How do I know the contractor is installing quality components?
All work done by the pre-qualified contractors is in compliance with a very specific set of specifications for both the components to be used and the process for disconnection.

12. What will happen to my yard?
Every effort is made to minimize the amount of excavation and disruption in the yard. The least amount of yard disruption would be a small hole near the foundation wall where the discharge line exits your home. For more difficult installations due to the topography, type of soil or location of the discharge line, a trench across the lawn may be needed.

13. How long does construction last? How dusty is it? How disruptive?
Construction lasts for 2-3 days. Contractors protect flooring and hang protective plastic to minimize the mess. There will be concrete removed and this can generate dust and is noisy. See homeowners' surveys for rating on contractor cleanliness and courtesy.

14. How will this affect the radon levels in my basement?
Everything that is installed in the basement will be sealed, protecting the home from any additional radon exposure. If you do chose to get a water powered back-up, the lid may not be fully sealed.

15. Will my floor drain still work?
Yes. Footing drain disconnection does not affect the functioning of the floor drains. If there is a floor drain that goes to your footing drains it must be abandoned by plumbing code.

Maintenance and Operations

16. Who owns/maintains the sump, pump and additional plumbing lines?
Once installed, the sump pump and lines are owned and maintained by the homeowner.

17. What happens when my sump pump doesn't work? What if the check valves (sewage backflow prevention devices) fail?
If your sump pump stops working, water from the footing drains will not be pumped out to your discharge lines and this water can collect in your basement. As with any primary appliance, it is critical that homeowners keep sump pumps in good repair. The design life of pumps is usually five years, but most sumps pumps will operate for 10 to 15 years before needing replacement. Check valves need to be tested and maintained regularly or they could fail to operate and allow a basement backup to occur.

18. Is there a warranty?
Yes, the work and the sump pump have warrantees through your contractor.
The sump pump warranty is normally 1 year. Warranty for installation work will be outlined in your contract with the contractor.

19. Why is the City mandating a system that has potential to fail when I have never had a problem related to this before?
Any system like this does have the potential to fail, typically because of a loss of power or because the sump pump fails to operate. However, the alternative is that your home or the home of your neighbor could experience a basement backup when footing drain flows overwhelm the sewer system and the Wastewater Treatment Plant in times of heavy storms. Building code in Ann Arbor and in most other communities changed in 1982 to require that footing drains use sump pumps or similar systems to direct footing drain flows to the stormwater system or to an alternative onsite system like a rain garden or detention basin.

20. What is a backup sump pump and why would I need one?
A backup sump pump is a secondary pump that will operate if the primary sump pump fails due to a power outage or mechanical failure. Under normal conditions, the primary sump will start running when the water in the sump reaches a certain level. If a power failure occurs during a period of heavy rain, the water level will continue to rise past that level without the primary pump operating, and the water can build up in the footing drains and in the soil around the basement. Basement wetness can result from water pressure building up around the outside of the

basement walls, where it can seep through cracks in the concrete walls or floor. Water may also seep through the sump lid.

The decision to purchase a backup system is dependent upon each homeowner's individual needs. The factors that should be considered are the level of finish of the basement, the frequency of power outages, past wetness problems, and home elevation relative to surrounding areas. Power outages frequently occur during storm events and it is advisable to have a backup system installed if you are concerned about basement wetness.

21. What if I have a floor drain near the sump, wont the ground water seeping into the basement flow out through the floor drain near the sump?

Not necessarily. If the pump fails to pump out the ground water from your sump the water can build up in the footing drains and in the soil around the basement. Basement wetness can result from water pressure building up around the outside of the basement walls, where it can seep through cracks in the concrete walls or floor. The location that the water seeps through the basement walls or floor may not be near a floor drain and in that case the water may not drain out. Water may also seep through the sump lid into the basement and if there is a floor drain nearby the ground water may drain out through the floor drain without dispersing across the entire basement floor.

Please note that relying on draining the ground water out through the floor drain to the sanitary sewer system during a power outage or pump failure is counteractive to the goals of the footing drain disconnection program and it is not a reliable long term solution because it allows the water to enter the basement before it drains out, potentially causing damage.

22. What are the options for a backup system?

Backup sump pump systems are homeowner options and must be paid for by the homeowner. These backup systems exceed building code requirements and are considered a home improvement that is not fundable by City project dollars. The battery backup system is the most commonly chosen back up system by homeowners. For a short list of advantages and disadvantages of the different back-up sump pump systems please continue reading below. For further information regarding these back-up options please speak with a contractor or look up manufacturer information.

A battery back-up sump pump is an emergency backup pump that draws its power from an industry standard deep-cycle marine battery and pumps the water out of the sump during the loss of electricity or failure of the primary sump pump at half the capacity of the primary system. The pump is installed in the sump and the battery pack is on the floor nearby. Battery based systems are usually fully automatic and maintain a full charge while the power is on and switch over automatically when the power turns off (indicated by an alarm).

Advantages

- Low maintenance requirements other than replacing the battery and checking the distilled water level in battery.
- Low up front cost
- Easy to install
- Works if primary pump fails

Disadvantages

- Limited amount of energy in battery to power pump. Time varies by manufacturer of battery and backup pump, generally 7-24 hrs.
- Cost of battery replacement

A water powered back-up system is an emergency backup pump that uses the pressurized fresh water supply in the house to create suction that draws the water from the sump up through the discharge pipe to the outside of the house. It will require installing copper pipes from the nearest water supply pipe to the sump area. The pump starts automatically if the power turns off or if the primary pump fails.

Advantages
- Power provided by city water pressure. As long as there is water pressure in your house the backup pump will work.
- Works if primary pump fails

Disadvantages
- Uses about 2 gallons of pressurized fresh water to pump out 1 gallon of sump water. Water usage will show up on the water bill.
- More expensive installation cost than battery backup
- Every 3 years, a licensed certified plumber has to verify that sump water is not mixing with the pressurized potable water
- Additional water supply pipes around sump area
- Sump cover may not be radon sealed

A manual start portable gasoline generator could also be used to provide power to the primary pump. These can be found at hardware stores and can vary in price from a few hundred to several thousand dollars. It will require that an extension cord is run from generator outside the house to the sump pump. Before purchase you would also need to verify that the generator will meet your power needs including the sump pump.

Advantages
- May cost less than battery back-up pump
- Portable generator has multiple uses

Disadvantages
- Have to be home to start the generator
- May have to refuel generator often
- No second backup pump

An automatic standby generator can be used to power select circuits in the house such as the sump pump, furnace, refrigerator and other appliances during power outages. The generator would start automatically when the power goes off and can be installed to be powered by natural gas, propane or gasoline. Usually it has to be professionally installed.

Advantages
- Power selected circuits or entire house for longer periods of time
- Starts automatically

Disadvantages
- Installation and maintenance costs
- No second backup pump

23. If my sump pump fails to operate, isn't this as bad as having a basement backup?
No. If your sump pump fails, the water that comes out of your sump is clean water from the ground around your basement. Normally this would drain to the nearest floor drain. On the other hand, if there was a basement backup caused by a surcharged sanitary sewer system, there is the potential that much more flow would enter your basement. This water would contain sanitary sewage, which is a more significant problem to manage.

24. How will this effect local surface water issues? (We already have street/yard trouble)

The water that currently flows through the footing drains will be routed to the stormwater system or to an alternative discharge site like a rain garden for homes that can accommodate that within their yard. In very large storms when basement backups can take place, the stormwater drainage system is designed to pond these excess flows in the streets until the downstream drainage system can accommodate these flows. The FDD generated flows are a small portion of these flows and would normally result in less than an inch of additional standing water for short periods of time. A storm water system which holds back or delays a portion of the large volume of flow, caused by heavy rains, helps preserve the natural ecosystem of the Huron River.

25. I was told check valves were not allowed due to the potential to heave the basement floor. Is that true?

If footing drains are disconnected from the sanitary plumbing as part of a check valve installation, this problem will not occur. However, using check valves can result in heaving the basement floor IF installed when footing drains are still connected to the sewer system and if that sewer surcharges. The FDD program disconnects the footing drains from the sewer system and pumps the water out to discharge lines leading to the stormwater system to prevent this potential problem. The backflow prevention (check) valves that are installed on floor drains and other basement facilities as part of the FDD process are able to contain the pressure generated by the surcharged sewers in the basement plumbing.

26. How noisy is the pump? How often will it run?

The pump sounds much like a refrigerator motor. How often the pump runs depends on the amount of water being removed from your footing drains. In homes completed to date, this has been quite variable.

27. What happens if the discharge line freezes in the winter or is broken?

It is possible for the discharge lines to freeze as they are installed above the frost line. Normally, the water discharged from the sump pump is warm enough to flow without freezing to the storm drainage system. Additionally it is a cyclic flow which means it flows very fast while the pump is operating and hardly at all when not. This means that if the lines placed with the proper grade they should not contain water for an extended period of time therefore minimizing possible freezing. If it does freeze, there is an emergency air gap near the home that allows water to be pumped outside the house. Also, homeowner construction of fences and lawn watering systems could break the discharge line. In these cases, the emergency discharge would put the sump water next to the house until the homeowner can repair the line. The winter of 2002/2003 proved to be a good test for the potential of freezing discharge lines with several periods of extremely cold weather and a considerable frost depth. None of the 75+ installed discharge lines had any reported freezing problems.

28. How much will it cost to run my sump pump?

It has been estimated that the average property owner will pay less than a dollar a year for electricity to run the sump pump. Of course, some will be higher and some lower depending on the amount of water that is pumped.

29. If I have to replace the sump pump, what are the costs for doing this?

Sump pumps can be purchased from local home improvement and hardware stores for less than $150. Often the property owner can install these units, but it not, estimates to replace the

sump pump can be obtained from local plumbers. A common rule of thumb is that installation costs are equal to the equipment being replaced.

Legal Requirements

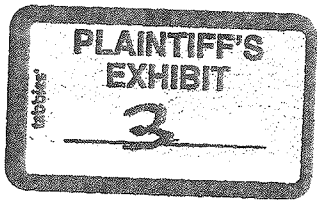
30. May I choose not to participate in the program? What are the consequences of that?

Participation in this program is mandated by city ordinance. The FDD program offers homeowners the opportunity to have the City pay for installation if the work is completed within the schedule of the program. If the homeowner does not comply with the notices to arrange disconnection, a surcharge of $100 per month will be charged to the homeowner for the additional costs associated with handling un-metered footing drains flows into the sewer system. Disconnection is still required and if done after the 90 day notice expires, the disconnection work would no longer be paid for by the city.

GLOSSARY OF TERMS

- *Check Valve* - pipe fitting or valve which allows flow in one direction only e.g., prevents flow from coming into the house but allows flow to leave the house when a backup condition does not exist
- *Computer Modeling* – Computer program used to simulate the behavior of the collection system.
- *Downspout* – This is the pipe that takes water from the roof gutters in most houses. This should discharge onto the lawn.
- *Flow Meters* – Used to measure flows in the sewer system.
- *Footing Drain* – A drainage pipe (or tile) that is installed around the foundation of most basements of houses. This drain makes sure that water in the ground does not make the basement damp. This is connected to the sanitary sewer, to a sump pump, or directly to the storm sewer.
- *House Leads* - sewer pipe connecting an individual house to the City sewer
- *Infiltration* – This is rainwater flow that enters the sanitary sewer system through underground cracks in sewers.
- *Infiltration Device* - underground chamber that handles flow discharged from the sump pump, this chamber allows water to infiltrate into ground rather than discharge to storm sewer (limited to sandy soils or other soils that drain well)
- *Inflow* – This is a direct connection from surface drainage into the sanitary sewer.
- *Manhole* – This is the access structure that allows field crews to inspect sewers.
- *Rain Gage* – Used to measure the amount of rain from storm events.
- *Sanitary Sewer* – Sewer pipe that conveys wastewater to the Ann Arbor Wastewater Treatment Plant.
- *Storm Sewer* – A different pipe that takes rainwater collected in catch basins located in the street and conveys these flows to a creek or river.
- *Sump Pump* - pumps footing drain flows from lowest drainage point (sump) to the City storm sewer
- *Surface Drainage* – Rainwater that flows down the street or yard to a storm drain or into a creek or river.
- *Wastewater* – The used water that flows down drains in your home.

PAGE LEFT BLANK INTENTIONALLY to use for taking notes during neighborhood meeting, initial in-home assessment and/or meetings with contractors.



CITY OF ANN ARBOR, MICHIGAN
100 North Fifth Avenue, P.O. Box 8647, Ann Arbor, Michigan 48107-8647
http://www.ci.ann-arbor.mi.us

Public Services Area

Footing Drain Disconnection Program
www.a2fdd.com

Sump & Sump Pump Maintenance Document

Save This Information!

Please keep this and any equipment manufacturer's documents in immediate vicinity of your sump pump for convenient reference!

Last Updated February 9, 2012

Maintenance of the Sump and Sump Pump System

The sump pump installed in your basement needs to be inspected and tested regularly to ensure that it is operating properly. It is recommended that the homeowner follow all manufacturer recommendations for inspections, inspection intervals, testing, and replacement of parts for all components in the system. Like all mechanical devices, components of the system may wear out and this periodic attention gives the opportunity to identify any problems and have them repaired before they cause problems.

To help ensure that the sump pump is in top operating condition before the spring thaw and rainy season take place, the following steps should be followed as part of routine maintenance. If you have an emergency or urgent problem and you are not sure what needs to be done or how to diagnose the problem, it is recommended that you contact a licensed plumber or licensed contractor.

These recommendations are not intended to replace your manufacturer recommendations. Please refer to your owner's manual for specific information regarding your installed components. If you are not comfortable completing any of the following steps described, you may wish to contact a contractor to perform these steps.

Also the recommendations in this booklet are mainly for homes that had sump pumps installed as part of the City of Ann Arbor Footing Drain Disconnection Program. Therefore the instructions that follow are for submersible sump pumps within a sealed sump. The steps and sump pump system setup differ significantly for pedestal pumps that generally sit above the basement floor.

SUMP and PUMP Maintenance Steps:

1) Make sure that you are familiar and comfortable with your sump and sump pump system setup. Please consult Appendix A on page 7 for pictures of different system setups.

2) **BEFORE INSPECTING AND/OR SERVICING PUMP, MAKE SURE IT IS UNPLUGGED.**

3) **Remove the cover of the sump:** There are 3 common types of lids, each requiring slightly different removal methods.
    a) **One-piece cover:** Remove sump lid by unscrewing the bolts that hold the cover down. When loosened adequately, slide the lid up the pipes and cords that pass through it. This should allow for enough room to complete the following steps. If more space is needed the lid can also be rotated around the discharge pipe to one side to provide more room.

    b) **Two-piece cover:** This type of cover has two sections that are either separate or joined with a hinge joint. One section usually has the discharge pipe from the pump exiting through it. The other section usually has a white round cap plugged into a hole. Unscrew the bolts that hold down the section that DOESN'T have the discharge pipe through it. Carefully fold open or remove the section where the bolts were loosened. This should allow for enough room to perform maintenance. Keep the section of the lid with the discharge pipe attached to the sump. If more space is required then loosen the section with the pipe through it as described in step 1(a) above.

    c) **Plexi-glass (clear) Cover:** This is a see-through plexi-glass cover that is usually rectangular and sealed to the basement floor, rather than the sump frame. It also requires additional steps to re-seal once opened. The clear lid may or may not be attached with screws that tap into the concrete foundation. If there are screws they will have to be loosened and removed from the lid and put in a place where they won't be lost. Grab an edge or corner of the lid, and carefully lift it upwards until the sealant or caulk around that edge has loosened from the floor. Put the lid down and lift another area of the cover where the caulk or sealant is still attached to the floor. Repeat lifting action until the entire seal between the lid and floor is loose. Now slide the lid upwards allowing the pipes to pass through it. This should allow for enough room to perform maintenance, otherwise try rotating the lid around the PVC discharge pipe to allow for more room.

4) **Visual Inspection:** Perform a visual inspection of the sump and pump for defects. You will probably need a bright flashlight see down to the bottom of the sump.
    a) Inspect the sump for debris that may obstruct the on/off float switch or pump intake. Debris could include rocks, mud, concrete or pieces of the plastic or tile pipe. If you attempt to remove debris from the sump, be sure to unplug the

sump pump first to avoid electrocution or harm from the pump. Keep in mind at all times that pumps have moving parts so do not attempt to handle during operation.

Inspect the sump for evidence of sediment entering the sump from the incoming foundation (footing) drain(s). If there is a layer of sand around the sides of the sump and/or at the bottom this may be evidence that sediment is entering the sump from the footing drains. While a small amount of sediment or sand at the bottom of the sump is normal, excessive amounts are problematic. If there is evidence that an excessive amount of sediment is entering the sump it is recommended that you contact a qualified contractor to determine if additional action is needed. Usually the trail of fine sand or sediment can be tracked to the incoming foundation drains that are typically located about six to twelve inches below the top of the sump.

Visually inspect the pipes, check valves and electrical cords for any loose connections or damage.

b) IF YOU HAVE UNPLUGGED THE SUMP PUMP, MAKE SURE TO PLUG THE SUMP PUMP IN AGAIN AFTER THE VISUAL INSPECTION! Check that the circuit breaker is in the ON position.

5) **Test the pump:**
   a) Add water to the sump until the sump pump starts. On average 3-4 gallons of water will be needed to activate the pump but it could be more or less depending on the system configuration. While in operation a small stream/spray of water should be visible from the discharge pipe near the pump or from the pump itself. This is a weep hole installed to prevent the pump from air locking. If you cannot see this discharge, you will need to clean the discharge pipe and top of pump to clear the discharge hole. **Before attempting to clean the discharge pipe be sure to unplug the sump pump first to avoid electrocution or harm from the pump. Keep in mind at all times that pumps have moving parts so do not attempt to handle during operation. IF YOU HAVE UNPLUGGED THE SUMP PUMP, MAKE SURE TO PLUG THE SUMP PUMP IN AGAIN AFTER THIS STEP!** Check that the circuit breaker is in the ON position.

   b) If the pump doesn't activate after pouring in water to several inches above the submersible sump pump then:
      i. Visually verify that the float switch is not obstructed, and that it is fully extended up towards the water surface.
      ii. Verify that the sump pump is plugged into the electrical outlet properly.
      iii. Verify that the circuit breaker is in the ON position.
      iv. Lastly verify that the electrical outlet has power, possibly by temporarily plugging in another appliance to that outlet. If the wall

outlet is not working properly you may need to contact an electrician to diagnose and fix the problem.

c) **If Equipped With a BATTERY Back Up Pump:**
   i. Check the distilled water level in the battery (unless the battery is a maintenance free type). Consult the manufacturer maintenance manual for detailed instructions.
   ii. Inspect the sump for debris that may obstruct the On/Off float switch or pump intake at the bottom of the pump. Before attempting to remove debris shut off the power source to the primary and back up pump. Keep in mind at all times pumps have moving parts so do not attempt to handle during operation.
   iii. Unplug the primary sump pump (if not already done) and add water until the back up pump operates (note: this pump may not have a weep hole). **IF YOU HAVE UNPLUGGED THE SUMP PUMP, MAKE SURE TO PLUG PUMP IN AGAIN AFTER THIS STEP!**
   iv. During step iii) observe the alarm associated with this system. Reset if necessary.

d) **If Equipped With a WATER Powered Back Up Pump:**
   i. Check to make sure that the water supply valve is in the ON position. For a handle-operated ball valve the handle is parallel to the pipe when open (on) and perpendicular to the pipe when closed (off).
   ii. Inspect the sump for debris that may obstruct the on/off float. Before attempting to remove any debris shut off the water supply valve and unplug the primary pump from the electrical wall outlet. Keep in mind at all times that sump pumps have moving parts so do not attempt to handle during operation.
   iii. Unplug the primary sump pump (if not already) and make sure that the water supply valve is in the on position. Add water until the back up pump operates (note: this pump may not have a weep hole). **IF YOU HAVE UNPLUGGED THE SUMP PUMP, MAKE SURE TO PLUG PUMP IN AGAIN AFTER THIS STEP!**
   iv. Have the backflow preventers inspected by a licensed certified plumber every 3 years.

6) Replace the sump cover, reconnect all pump electrical plugs back into the wall sockets and check that all power sources for the primary and backup system are in the "ON" position to be sure the entire system is operational. If the sump has a clear plexi-glass cover make sure that the cover is sealed to the basement floor with new sealant (and concrete screws if needed) to prevent radon from entering the basement through the footing drains and unsealed sump.

OTHER:

1) Visually inspect all alarm mechanisms (if applicable), exposed metal parts and connections to evaluate if corrosion is present. It may be appropriate to apply a silicone water repellant spray to deter corrosion. Refer to manufacturer usage instructions to apply silicone spray.

2) **On the outside of your house**
   a. If your sump discharges to the ground surface of your yard, check the discharge point to ensure that debris has not collected at that point thereby obstructing the flow from the pipe. Clean the area to be sure flow is not inhibited if necessary.

   b. If the sump pump discharges to an underground pipe that connects to the storm sewer system or an infiltrator check the air gap and cleanout assembly at the exterior wall of house. The discharge pipe needs to be clear of obstructions. Make sure that the air gap by the house wall where the smaller 2-inch pipe drops into the larger 4-inch diameter cleanout assembly is free of natural debris such as twigs, leaves, mulch, gravel or topsoil. Next open up the cleanout cap of the assembly with a large adjustable wrench or a pipe wrench and check the interior of the cleanout assembly for the same items mentioned. Once done put the cleanout cap back on.

3) **Other resources**
   a. Sump and Sewage Pump Manufacturers Association has an excellent free troubleshooting guide at http://www.sspma.org/trouble/index.html and other related material available by purchase.

   b. Your pump manufacturer's owner's guide. If you no longer have the original copy, a replacement can usually be found at your pump manufacturer's website, refer to list below or use a search engine.
      i. Flotec Pumps - http://www.flotecpump.com/
      ii. Hydromatic Pumps – http://www.hydromatic.com/
      iii. Zoeller Pumps - http://www.zoeller.com/zcopump/zcohome.htm

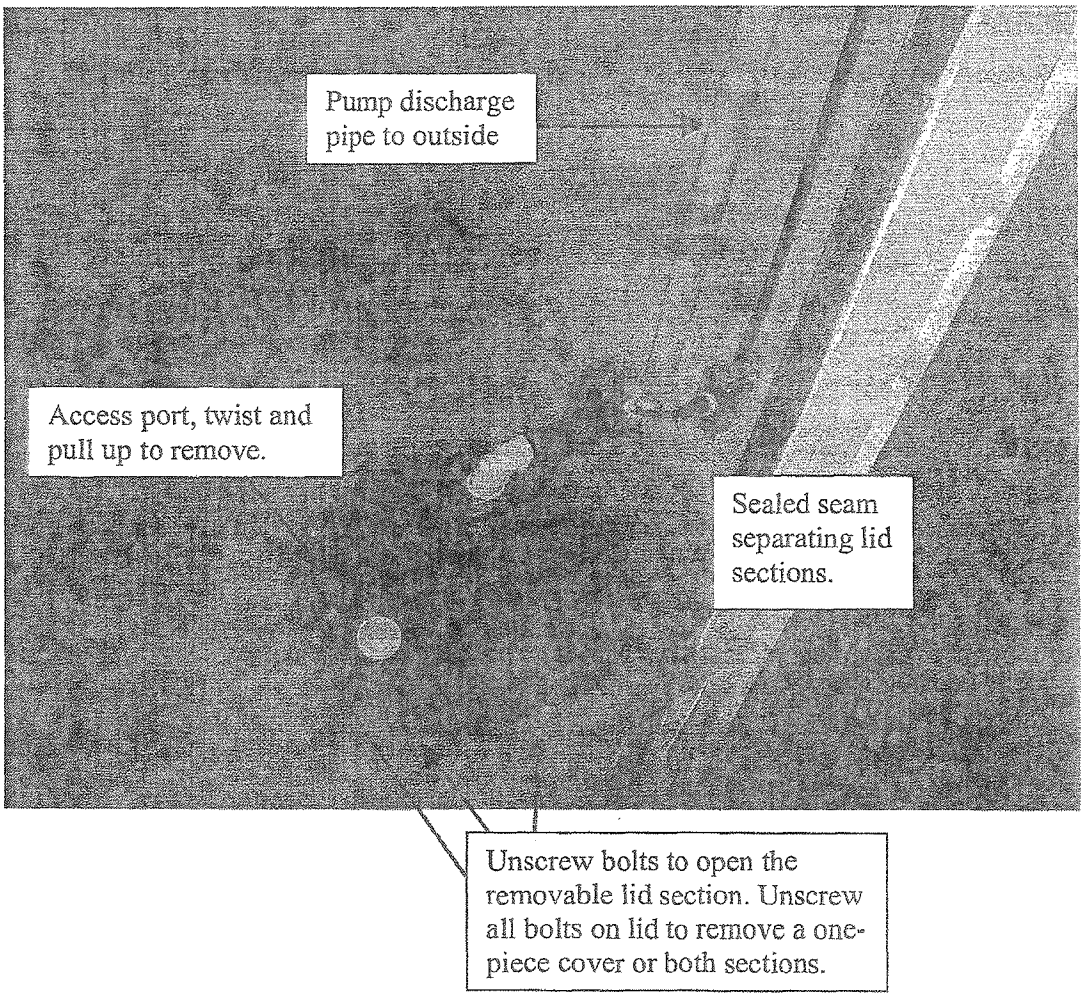
If you do not feel comfortable completing any of these steps it is strongly recommended you have a contractor inspect these features to ensure the components work properly.

APPENDIX A

Maintenance Graphics

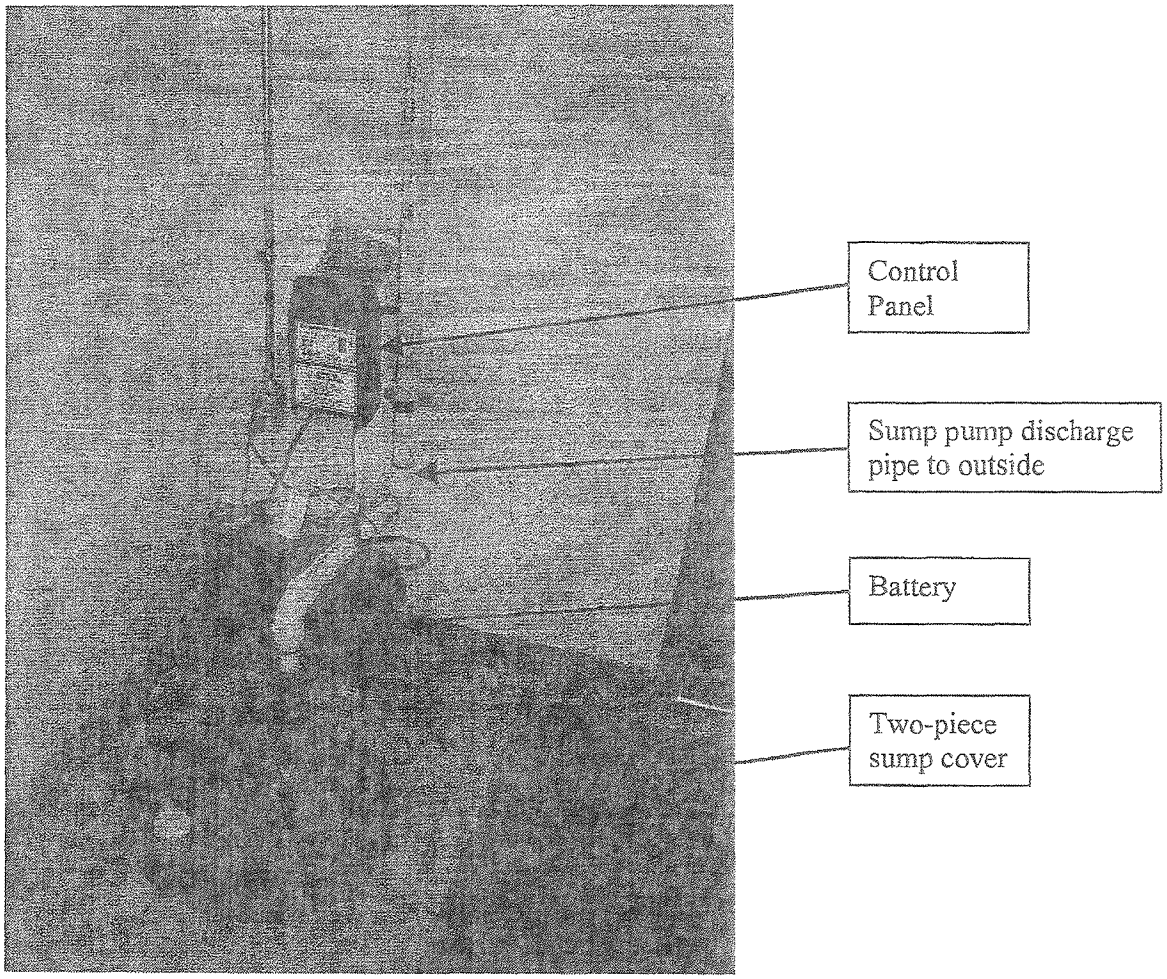
Sump with Two-Piece Cover

(One-piece lid has similar look without the visible seam)



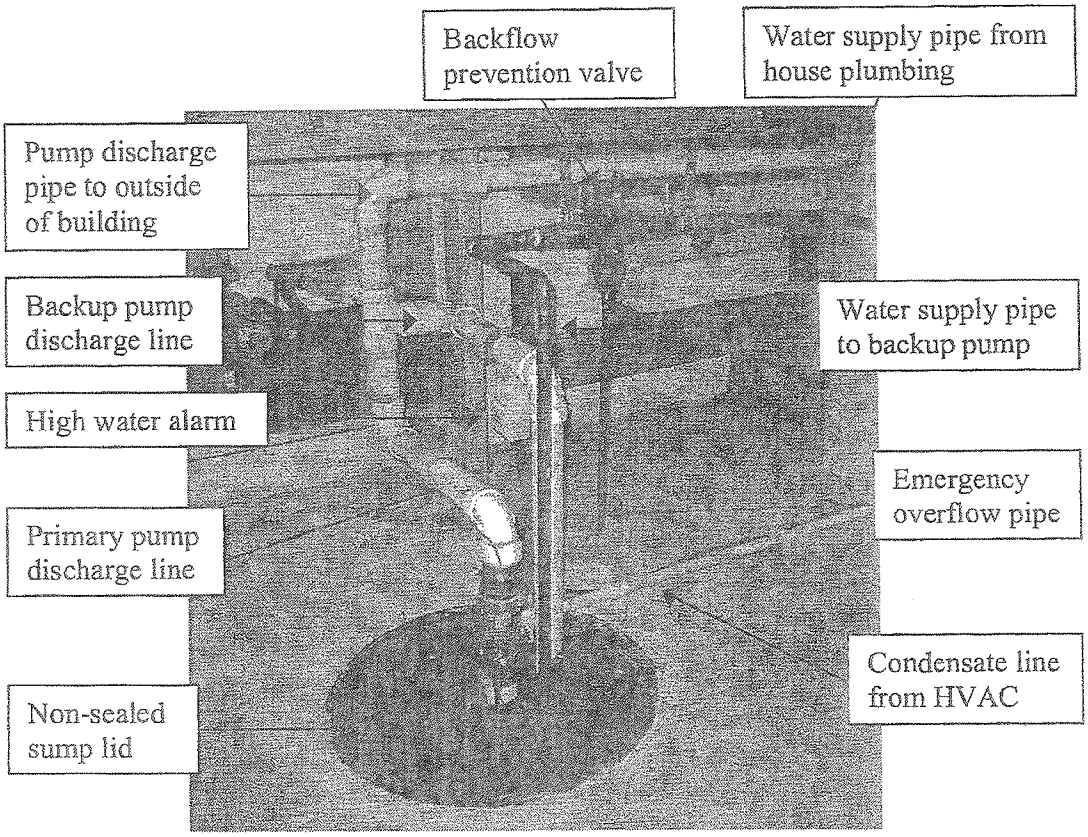
Battery Powered Backup Pump System

(Consult the manufacturer manual for maintenance recommendations and instructions)

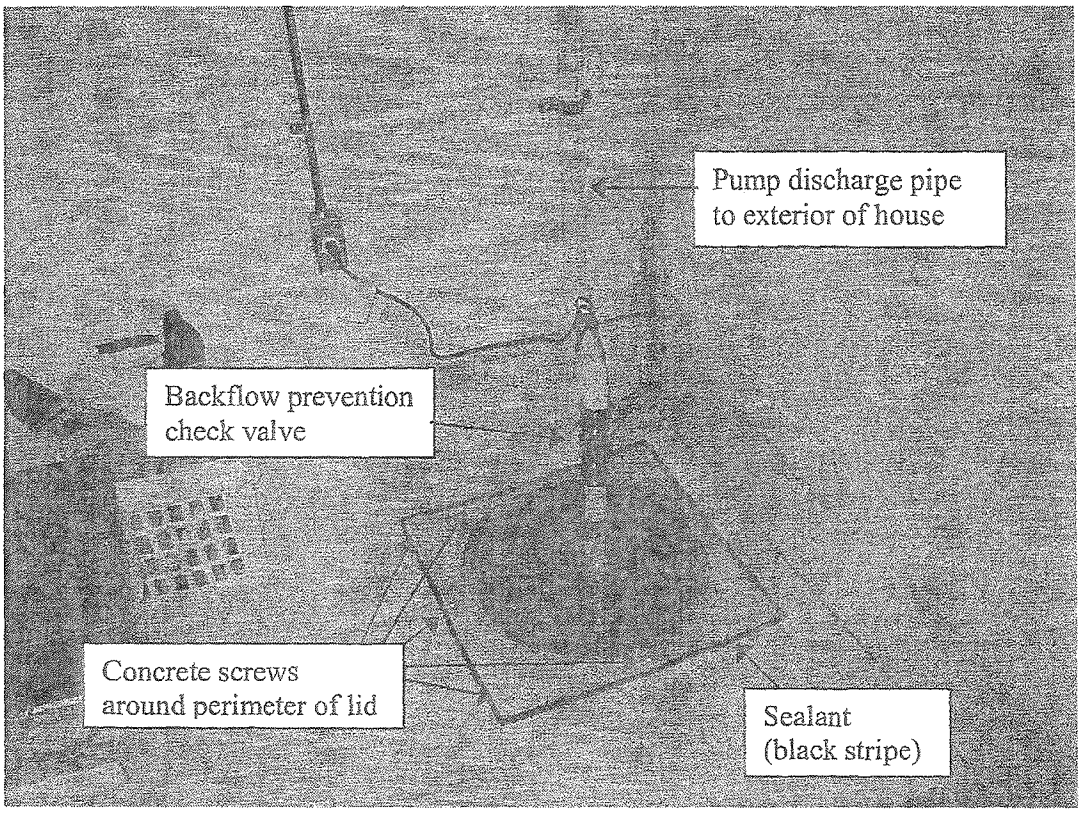


Water Powered Backup Pump System

(Consult the manufacturer manual for maintenance recommendations and instructions)



Sump with Clear Lid



MAINTENANCE LOG		
Date	Initials	Comments

Exhibit 2: Plaintiffs' Motion to Remand and Memorandum of Law in Support

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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_____/

Exhibit 2: Plaintiffs' Motion to Remand and Memorandum of Law in Support

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANITA YU, JOHN BOYER, and MARY RAAB,

Plaintiffs,

vs.

CITY OF ANN ARBOR

Defendants.

PLAINTIFFS' MOTION TO REMAND PURSUANT TO 28 U.S.C. § 1447(c)

Case No.: 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

MOTION BY:	Plaintiffs, Anita Yu, John Boyer and Mary Raab
RELIEF REQUESTED:	An order remanding this action to the Circuit Court for the County of Washtenaw, State of Michigan
SUPPORTING PAPERS:	Sponsoring Declaration of M. Michael Koroi, Esq. with exhibit and Memorandum of Law
BASIS FOR RELIEF REQUESTED:	The Plaintiffs respectfully submit that this Court lacks subject matter jurisdiction until such time as the Plaintiffs' claims have been determined in state court. Because the State of Michigan affords the Plaintiffs an adequate procedure to adjudicate their claims of inverse condemnation, the case is not ripe for review in the federal courts.
PLACE:	United States District Court Eastern District of Michigan Theodore Levin U.S. Courthouse 231 W. Lafayette Blvd. Detroit, Michigan 48226
TIME:	To be set by the Court

Dated: April 3, 2014

By: /s/ M. Michael Koroi

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

vs.

CITY OF ANN ARBOR

Defendants.

CERTIFICATE OF SERVICE

Case No.: 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

I, Salem F. Samaan hereby certify that I have on this 3rd day of April, 2014, electronically filed Plaintiffs' Motion to Remand Pursuant to 28 U.S.C. §1447(c), Memorandum of Law in Support of the Plaintiffs' Motion to Remand, the Declaration of M. Michael Koroi and the instant Certificate of Service by utilizing the CM/ECF system established by the court, which sent notification of the filing to:

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By: /s/Salem F. Samaan
SALEM F. SAMAAN (P31189)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

vs.

CITY OF ANN ARBOR

Defendants.

Case No.: 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

MEMORANDUM OF LAW IN SUPPORT OF THE PLAINTIFFS' MOTION TO REMAND

DATED: April 3, 2014
Plymouth, Michigan

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CONCISE STATEMENT OF THE ISSUES PRESENTED

This motion to remand is brought pursuant to 28 U.S.C. §1447(c) and seeks the remand of this action in its entirety to the Circuit Court for the County of Washtenaw in the State of Michigan on the grounds that the claims of the plaintiffs, Anita Yu, John Boyer and Mary Raab (hereinafter "Plaintiffs") and any defenses of the defendant, City of Ann Arbor ("the City") are not ripe for review in federal court. Ripeness is a threshold jurisdictional issue of the Court's subject matter jurisdiction. According to 28 U.S.C. §1447(c), "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded" (emphasis added).

The State of Michigan provides, in the form of inverse condemnation actions, an adequate procedure for seeking just compensation for the Plaintiffs' claims. Under the United States Supreme Court's opinion in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), this case is not ripe for federal review until there is a final determination in state court. The Supreme Court's holding in *Williamson County Reg'l Planning Comm'n* has been followed by both the United States Circuit Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan. It is respectfully submitted that, in addition to remand, the Plaintiffs should also be awarded their attorneys' fees and costs associated with the City's improvident removal.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Cases

Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, et al., 729 F. 2d 402 (6th Cir. 1984) 7
Her Majesty the Queen in Right of the Province of Ontario v. The City of Detroit, 874 F. 2d 332 (6th Cir. 1989) 2
Macene v. County of Wayne, 951 F. 2d 700 (6th Cir. 1991) 8
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River City Capital, L.P. v. Bd. of County Comm'ers, Clermont County, Ohio, 491 F. 3d 301 (6th Cir. 2007) 9
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28 U.S.C. §1447(c) 1, 3, 7, 8

Other Authorities

Article 10 §2 of the Michigan Constitution 4, 7
MCL §213.23 4

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Balzer v. Bay Winds Fed. Credit Union, 622 F. Supp 2d 628 (W.D. Mich. 2009) 4
Digital 1 Media, Inc. v. Van Almen, No. 8:09-cv-1097-33(TBM), 2010 U.S. Dist. LEXIS 83536 at *11 (M.D. Fl., July 27, 2010) 11
Eaton v. Charter Twp. of Emmett, No. 06-1542, 2008 U.S. App. LEXIS 6603 (6th Cir., March 21, 2008) 8
Fox & Horan v. Beiny, No. 92-cv-2067(LJF), 1992 U.S. Dist. LEXIS 9621 at *6 (S.D.N.Y., June 29, 1992) 6
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Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, et al., 729 F. 2d 402, 406 (6th Cir. 1984) 7
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Lewis v. Exxon Mobil Corp., 348 F. Supp. 2d 932, 933 (W.D. Tenn. 2004) 3
Macene v. County of Wayne, 951 F. 2d 700, 704 (6th Cir. 1991) 8
Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 547, (2005) 11
Merkur Steel Supply, Inc. v. City of Detroit, 261 Mich. App. 116 (Mich. Ct. App. 2004) 8
Miranti v. Lee, 3 F. 3d 925, 928 (5th Cir. 1993) 11
Oakland 40, LLC v. City of South Lyon, No. 10-14456(JCO), 2011 U.S. Dist. LEXIS 53158 (E.D. Mich., May 18, 2011) 9
Pullman v. Jenkins, 305 U.S. 534, 540, 59 S. Ct. 347, 83 L. Ed. 334, (1939) 3
River City Capital, L.P. v. Bd. of County Comm'ers, Clermont County, Ohio, 491 F. 3d 301, 307 (6th Cir. 2007) 9
Rosecrans v. William S. Lozier, Inc., 142 F. 2d 118, 124 (8th Cir. 1944) 3
Rosenberg v. GWV Travel, Inc., 480 F. Supp. 95, 96 (S.D.N.Y. 1979) 5
Southern Pacific Trans. Co. v. City of Los Angeles, 922 F. 2d 498, 508 (9th Cir. 1990) 12
State of Tennessee v. C.C. Manifest of Tennessee, Inc., 362 F. Supp. 759, 763 (E.D. Tenn. 1973) 3
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Union Planters Nat'l Bank v. CBS, Inc., 557 F. 2d 84, 89 (6th Cir. 1977) 3
Warthman v. Genoa Twp. Bd. of Trs., 549 F. 3d 1055, 1059 (6th Cir. 2008) 11
Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) passim
Willman v. Riceland Foods, Inc., 630 F. Supp. 2d 999, 1000-1001 (E.D.Ark. 2007) 3
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28 U.S.C. §1331 passim
28 U.S.C. §1367(a) 2, 5
28 U.S.C. §1441(a) 4
28 U.S.C. §1447(c) 1, 3, 7, 8
42 U.S.C. §1983 3, 5, 6

Other Authorities

Article 10 §2 of the Michigan Constitution 4, 7
Fifth Amendment to the United States Constitution 4, 7
MCL §213.23 4

PRELIMINARY STATEMENT

This motion to remand is brought pursuant to 28 U.S.C. §1447(c) and seeks the remand of this action in its entirety to the Circuit Court for the County of Washtenaw in the State of Michigan on the grounds that the claims of the plaintiffs, Anita Yu, John Boyer and Mary Raab (hereinafter "Plaintiffs") and any defenses of the defendant, City of Ann Arbor ("the City") are not ripe for review in federal court. The causes of action set forth in Plaintiffs' complaint are based on the inverse condemnation of the Plaintiffs' property by the City and, under well-established law from the United States Supreme Court, the Sixth Circuit Court of Appeals and the United States District Court for the Eastern District of Michigan, this Court lacks subject matter jurisdiction so long as the Plaintiffs' claims remain unadjudicated in state court. Because it is incontrovertible that the State of Michigan provides an adequate procedure for inverse condemnation claims, the Plaintiffs' federal takings and due process claims are not ripe for review under the test set forth in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) and its progeny. Accordingly, because this Court lacks subject matter jurisdiction, the Plaintiffs' motion to remand this action to the Circuit Court for the County of Washtenaw should be granted and the Plaintiffs should be awarded their costs and attorneys' fees.

STATEMENT OF THE CASE

On February 24, 2014, the Plaintiffs commenced their action against the City in the 22nd Circuit Court, County of Washtenaw, Michigan under the caption: "Anita Yu, John Boyer and Mary Raab v. City of Ann Arbor" with Case Number 14-181-CC, and assigned to Circuit Court Judge Donald E. Shelton. The Summons and Complaint was served upon the City on March 7, 2014.

On March 17, 2014, the City removed the action to the United States District for the Eastern District of Michigan (Southern Division) by filing a Notice of Removal and Supporting Petition which asserted that this Court has jurisdiction over the action based on federal question jurisdiction under 28 U.S.C. §1331. Supplemental jurisdiction over the state court claims was asserted pursuant to 28 U.S.C. §1367(a).

On March 24, 2014, the City filed a motion to dismiss for failure to state claims upon which relief may be granted and for lack of subject matter jurisdiction (Docket No. 2). The City's arguments in support of its motion to dismiss will not be addressed in the Plaintiffs' papers filed in support of its motion to remand, except where otherwise noted.

ARGUMENT

POINT I

THE STANDARDS ON A MOTION TO REMAND

"The party seeking a removal bears the burden of establishing its right thereto." *Her Majesty the Queen in Right of the Province of Ontario v. The City of Detroit*, 874 F. 2d 332, 339 (6th Cir. 1989), *citing Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98, 42 S. Ct. 35, 66 L. Ed. 144 (1921); *see also, Lewis v. Exxon Mobil Corp.*, 348 F. Supp. 2d 932, 933 (W.D. Tenn. 2004), *citing Pullman v. Jenkins,* 305 U.S. 534, 540, 59 S. Ct. 347, 83 L. Ed. 334, (1939). Any doubt as to whether removal is proper should be resolved in favor of remand to state court. *Union Planters Nat'l Bank v. CBS, Inc.*, 557 F. 2d 84, 89 (6th Cir. 1977).

The merits of a plaintiff's claim should not be determined on a motion to remand. *See, e.g. Rosecrans v. William S. Lozier, Inc.*, 142 F. 2d 118, 124 (8th Cir. 1944) ["The merits of plaintiff's claim cannot, of course, be determined on a motion to remand"]; *Willman v. Riceland Foods, Inc.*, 630 F. Supp. 2d 999, 1000-1001 (E.D.Ark. 2007) ["...there is a strong presumption in favor of remand. Because of this presumption, the merits of a plaintiff's claim cannot be determined on a motion to remand, and a district court has no responsibility to settle an

ambiguous question of state law."]; *State of Tennessee v. C.C. Manifest of Tennessee, Inc.*, 362 F. Supp. 759, 763 (E.D. Tenn. 1973) ["...the Court does not in any way pass on the federal constitutional claims sought to be asserted by the defendant. Rather, those claims are reserved for such consideration as may be proper upon remand."]. Thus, the only issue properly before the Court at this juncture is whether or not it possesses subject matter jurisdiction.

Remand, rather than dismissal, is the appropriate remedy where the federal court lacks subject matter jurisdiction. According to 28 U.S.C. §1447(c), "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded" (emphasis added). Where a case has been removed from state court, remand, rather than dismissal, is warranted. *See, e.g. Armstrong v. Armstrong*, 508 F. 2d 348, 350 (1st Cir. 1974) ["[w]hile we agree with the district court's conclusion that the action may not be entertained in a federal forum, this should have dictated a remand to the state court rather than a dismissal]. *Balzer v. Bay Winds Fed. Credit Union*, 622 F. Supp 2d 628 (W.D. Mich. 2009) [where a district court lacked subject matter jurisdiction over removed action, the case was remanded to the Circuit Court for the State of Michigan, rather than dismissed].

POINT II

THE CLAIMS FOR RELIEF IN THE PLAINTIFFS' COMPLAINT ALLEGE INVERSE CONDEMNATION BY THE CITY

The Preliminary Statement in the Plaintiffs' Complaint reads as follows:

> 1) This is an action commenced against the City of Ann Arbor ("the City") pursuant to MCL §21323, Article 10 §2 of the Michigan Constitution, 42 U.S.C. §1983 and the Fifth Amendment to the United States Constitution. The Plaintiffs herein seek compensatory damages, injunctive relief and a declaration that Ann Arbor Ordinance 2:51.1 ("the Ordinance"), enacted to implement the City's mandatory Footing Drain Disconnection Program (FDDP) is unconstitutional and has resulted in a taking of the Plaintiffs' private property for public use without due process of law or just compensation.

(A copy of the Plaintiffs' Complaint is attached to the accompanying Declaration of M. Michael Koroi, Esq. as **Exhibit "1"**). The Complaint sets forth in detail the factual background supporting the Plaintiffs' claims and, in the paragraph immediately preceding the enumeration of the Plaintiffs' causes of action, indicates that those claims are predicated upon allegations of inverse condemnation by the City:

> 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 or otherwise damaged, resulting in the *de facto* or **inverse condemnation** of the Plaintiffs' properties. [1]

(See **Exhibit "1"**) (emphasis added). For the purposes of a motion to remand, the Court must assume the truth of all well-pleaded allegations. *See, e.g. The Bar Ass'n of Baltimore City v. Posner*, 391 F. Supp. 76, 79 (D. Md. 1975). "The issue of whether an action should be remanded to the State Court must be resolved by reference to the Complaint at the time the Petition for Removal was filed." *Rosenberg v. GWV Travel, Inc.*, 480 F. Supp. 95, 96 (S.D.N.Y. 1979); *See also Glendora v. Pinkerton Sec. and Detective Serv.*, 25 F. Supp. 2d 447, 450 (S.D.N.Y. 1998); *Fox & Horan v. Beiny*, No. 92-cv-2067(LJF), 1992 U.S. Dist. LEXIS 9621 at *6 (S.D.N.Y., June 29, 1992). 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.

POINT III

THE PLAINTIFFS' INVERSE CONDEMNATION CLAIMS ARE NOT RIPE FOR FEDERAL REVIEW

The City has removed this case to federal court, pursuant to 28 U.S.C. §1441(a) on the basis that this Court has original jurisdiction of all civil actions arising under the Constitution,

[1] The City's pending motion to dismiss is based almost exclusively on the statute of limitations and the Plaintiffs' alleged failure to exhaust state administrative remedies, issues which are more properly evaluated by Michigan state courts. The Michigan Supreme Court has considered and addressed the appropriate statute of limitations in inverse condemnation actions. If the motion to remand is granted, the Court need not reach these substantive issues.

laws or treaties of the United States, as set forth in 28 U.S.C. §1331. Because the Plaintiffs have included claims under both the Fifth Amendment to the United States Constitution and 42 U.S.C. §1983, the City argues that removal is proper and that the Court can exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367(a). While original jurisdiction under 28 U.S.C. §1331 may be necessary for removal, the City's arguments fail to take account of additional requirements that the courts have superimposed on this bare statutory predicate in order to limit federal court jurisdiction.

One of those limitations is the requirement for ripeness, which is raised squarely by the City's attempt to remove from state court claims like those advanced by the Plaintiffs in their complaint. In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), the United States Supreme Court held that, so long as a state court provides an adequate procedure for seeking just compensation for a taking, the case is not ripe for federal review. 473 U.S. at 195. In *Williamson*, the plaintiff, Hamilton Bank of Johnson City, sued the defendant planning commission and its staff in the United States District Court for the Middle District of Tennessee, alleging that the application of various zoning laws and regulations to its property amounted to a "taking" of that property without just compensation. Following a trial, the jury awarded the plaintiff $350,000 as compensation and, following a grant of judgment notwithstanding the verdict in favor of the defendants, the United States Court of Appeals for the Sixth Circuit reversed and reinstated the verdict. The Sixth Circuit concluded that the application of the zoning ordinance and associated regulations constituted a taking under the facts of that case. *Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, et al.*, 729 F. 2d 402, 406 (6th Cir. 1984). The Supreme Court reversed and remanded, ruling that, even if the application of the disputed regulations effected a taking, the case was brought in federal court prematurely. As the Court stated: "if a State provides an adequate procedure for seeking just compensation, the property

owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." 473 U.S. at 195.

The teachings of *Williamson* govern this case and require that the action be remanded to Michigan Circuit Court for adjudication. The Plaintiffs in this action recognized that, even though the federal courts have original jurisdiction over claims involving a federal question, including their Fifth Amendment and 42 U.S.C. §1983 claims, they nevertheless were obligated to commence this action in Michigan State Court because their federal claims were not yet ripe. In the case at bar, the City appears aware of the ripeness doctrine but unaware of its particular application to cases of inverse condemnation, including the Plaintiffs' case.[2]

There is no question but that the State of Michigan provides an adequate just compensation procedure. "In Michigan, the doctrine of inverse condemnation is long recognized and constitutionally established." *Macene v. County of Wayne*, 951 F. 2d 700, 704 (6th Cir. 1991). "The Michigan Constitution provides an inverse condemnation remedy for property owners whose property is taken for public use." *Eaton v. Charter Twp. of Emmett*, No. 06-1542, 2008 U.S. App. LEXIS 6603 (6th Cir., March 21, 2008), *citing Mich. Const. Article 10, §2.* By filing an action for inverse condemnation, property owners may seek compensation for a taking. *Merkur Steel Supply, Inc. v. City of Detroit*, 261 Mich. App. 116 (Mich. Ct. App. 2004) "[a]n inverse condemnation suit is one instituted by a private property owner whose property, while not formally taken for public use has been damaged by a public improvement undertaking or other public activity." For purposes of determining whether or not a case is ripe for federal review, it matters not whether the alleged taking is styled as "physical" or "regulatory." *River City Capital, L.P. v. Bd. of County Comm'ers, Clermont County, Ohio*, 491 F. 3d 301, 307 (6th Cir. 2007).

[2] Indeed, the City cites *Williamson* in its memorandum supporting its Motion to Dismiss (Docket No. 2 at p.10). In essence, the City is asking the District Court to assert subject matter jurisdiction where it has none, make a determination on the merits and then dismiss the case, rather than remand it. Paradoxically, the City has removed the case from the only court it acknowledges has subject matter jurisdiction over the dispute.

Remand is warranted, regardless of whether the case was commenced in federal court by the Plaintiffs or removed there by the Defendant. In *Oakland 40, LLC v. City of South Lyon,* No. 10-14456(JCO), 2011 U.S. Dist. LEXIS 53158 (E.D. Mich., May 18, 2011), a case procedurally similar to the case at bar, the plaintiff filed suit in Oakland County Circuit Court asserting both state and federal claims for inverse condemnation. The defendant, City of South Lyon, removed the case to the United States District Court for the Eastern District of Michigan and then filed a motion to dismiss. Like the City in this case, the City of South Lyon also removed the case based on federal question jurisdiction under 28 U.S.C. §1331. While both parties agreed that the plaintiff's federal takings and due process claims were not ripe for federal court review, the City in that case, as here, also sought dismissal of claims, rather than remand. Rejecting this argument, the District Court denied the motion to dismiss and, instead, remanded all of the claims to state court for adjudication:

> Defendant takes issue with the Court's denial of its motion to dismiss. However, the granting of the Plaintiff's motion to remand precludes the relief that Defendant sought in this Court. The Court clarifies, however, that it denied Defendant's motion to dismiss because the appropriate remedy was remand, not dismissal. As should be clear by the above discussion, the Court's disposition of this case is not intended to affect the state court's adjudication of the federal or state claims. *See Smith v. Wisconsin Dept. of Agriculture,* 23 F. 3d at 1142 ("[State] doctrines of standing and ripeness are the business of the [state] courts, and it is not for us to venture how the case would there be resolved.").

2011 U.S. Dist. LEXIS 53158 at *8. Notwithstanding the arguments made by the City of South Lyon that it would be futile to remand the matter to state court because the state court would dismiss the claims against the defendants for lack of standing,[3] the District Court held that it was required to remand under 28 U.S.C. §1447(c):"[a]lthough it appears counterintuitive to remand *federal* claims to state court, Plaintiff is correct. Under 28 U.S.C. §1447(c), this Court 'shall'

[3] This is the same argument the City has advanced in support of its motion to dismiss, in addition to its statute of limitations argument. Again, if the Court hears the Plaintiffs' motion to remand first and orders the action remanded to state court, this issue need not be reached.

remand the case if the Court lacks subject matter jurisdiction; and ripeness is a jurisdictional requirement." *Id.* at *5.

The removal of this case from Washtenaw County Circuit Court to district court was improvident. The City was well aware of the ripeness doctrine and knew or should have known that, under *Williamson*, the case did not belong in federal court for review until the Plaintiffs had pursued Michigan's "adequate procedure for seeking just compensation."

POINT IV
COSTS AND EXPENSES

This totally unnecessary removal to federal court by the City has required the Plaintiffs to incur additional costs and expenses, mainly in the form of attorneys' fees, which would otherwise not have been required, had the matter proceeded on an orderly basis in Michigan State Court. 28 U.S.C. §1447(c) provides in pertinent part that: "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorneys' fees, occurred as a result of the removal." The Plaintiffs respectfully request that this Court award to the Plaintiffs the attorneys' fees incurred in connection with the City's removal of this action prematurely to federal court, including the costs incurred in connection with the preparation and processing of this motion to remand, the review of the City's motion to dismiss and any other efforts associated with the removal. "An award of attorneys' fees and costs pursuant to 28 U.S.C. §1447(c) falls "squarely within the discretion of the district court..." *Warthman v. Genoa Twp. Bd. of Trs.*, 549 F. 3d 1055, 1059 (6th Cir. 2008). "Absent unusual circumstances, courts may award attorneys' under §1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 547, (2005). It is respectfully submitted that, given the obvious impediments to federal court review posed by the ripeness doctrine under *Williamson* and its progeny, a doctrine with which the City was obviously familiar--the removal was not objectively reasonable.

A showing of bad faith is not required as a predicate to an award of attorneys' fees under the removal statute. *See, Miranti v. Lee*, 3 F. 3d 925, 928 (5th Cir. 1993); *Digital 1 Media, Inc. v. Van Almen*, No. 8:09-cv-1097-33(TBM), 2010 U.S. Dist. LEXIS 83536 at *11 (M.D. Fl., July 27, 2010). "It is not necessary to show that the removing party's position was frivolous, unreasonable or without foundation." *Allstate Ins. Co. v. Pfizer, Inc.*, 861 F. Supp. 2d 866, 873 (W.D. Mich. 2012) *quoting Martin*, 546 U.S. at 138. "Ripeness is a "threshold jurisdictional question." *Southern Pacific Trans. Co. v. City of Los Angeles*, 922 F. 2d 498, 508 (9th Cir. 1990). Thus, in determining the removability of this action, the City was bound not just to consider federal question jurisdiction under 28 U.S.C. §1331, but also the barriers posed to removal of well-pleaded inverse condemnation actions based upon the ripeness doctrine. The City cannot both cite the ripeness doctrine in support of its motion to dismiss, and also be heard to argue that it was objectively reasonable for the City to ignore this doctrine as it applies to removability of inverse condemnation actions.

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that an order of remand of the Circuit Court for Washtenaw County be granted, together with the costs and attorneys' fees associated with the City's improvident removal.

DATED: April 3, 2014
Plymouth, Michigan

Respectfully submitted,

/s/M. Michael Koroi
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANITA YU, JOHN BOYER, and MARY RAAB,

Plaintiffs,

vs.

CITY OF ANN ARBOR,

Defendants.
_____/

INDEX OF EXHIBITS

EXHIBIT	TITLE
A.	Declaration of M. Michael Koroi, Esq.
B.	Circuit Court Complaint and Attachments

Exhibit 3: Order Granting Plaintiffs' Motion to Remand (5/29/2014)

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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_____/

Exhibit 3: Order Granting Plaintiffs' Motion to Remand (5/29/2014)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANITA YU and MARY RAAB,

Plaintiffs,

vs. Case No. 14-11129

CITY OF ANN ARBOR, HON. AVERN COHN

Defendant.
_____/

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND (Doc. 7)

This is a claim for inverse condemnation under state and federal law removed by Defendant from the Washtenaw County Circuit Court to this Court. Now before the Court is Plaintiffs' Motion To Remand Pursuant To 28 U.S.C. § 1447(c) (Doc. 7). The Court held a hearing on the motion on Wednesday, May 28, 2014. For the reasons explained on the record, the Court lacks subject-matter jurisdiction under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Accordingly, Plaintiff's motion to remand is GRANTED and this case is REMANDED to the Washtenaw County Circuit Court.

SO ORDERED.

S/Avern Cohn
UNITED STATES DISTRICT JUDGE

Dated: May 29, 2014

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, May 29, 2014, by electronic and/or ordinary mail.

S/Sakne Chami
Case Manager, (313) 234-5160

Exhibit 4: Administrative Consent Order between the City and MDEQ

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

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_____/

Exhibit 4: Administrative Consent Order between the City and MDEQ

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

STEVEN E. CHESTER
DIRECTOR

September 8, 2003

CERTIFIED MAIL **7000 0520 0016 5014 9710**

Ms. Sue McCormick, Director of Utilities
City of Ann Arbor
P.O. Box 8647
Ann Arbor, Michigan 48107-8647

SUBJECT: Administrative Consent Order ACO-SW03-003

Dear Ms. McCormick:

Enclosed please find a fully executed Administrative Consent Order (Consent Order) for the City of Ann Arbor (City). This Consent Order was entered into between the Department of Environmental Quality (DEQ) and the City on September 4, 2003. Payment of the cost reimbursement and the civil penalty, payable to the DEQ, as required in the Consent Order, was received on September 2, 2003.

Please contact me if you have any questions. Thank you.

Sincerely,

Jodie N. Taylor

Jodie N. Taylor, Environmental Engineer
Enforcement Unit
Field Operations Section
Water Division
517-373-8545
517-373-2040 Telefax

Enclosure
cc/enc: Mr. Jon Russell, DEQ
Ms. Edwyna McKee, DEQ

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

In the matter of administrative proceedings against:

ACO-SW03-003
Date Entered: September 4, 2003

City of Ann Arbor
100 North Fifth Avenue
P.O. Box 8647
Ann Arbor, Michigan 48107
_____/

ADMINISTRATIVE CONSENT ORDER

This proceeding results from allegations by the Water Division (WD) of the Department of Environmental Quality (DEQ). The DEQ alleges that the City of Ann Arbor (City), which owns and operates a wastewater treatment plant (WWTP), located at 49 South Dixboro Road, Ann Arbor, County of Washtenaw, Michigan, is in violation of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA) MCL 324.3101 et seq.; and the rules promulgated under Part 31. The City and the DEQ agree to resolve the violations set forth in the Findings section of this Consent Order and to terminate this proceeding by entry of this Consent Order.

I. STIPULATIONS

The City and the DEQ stipulate as follows:

1.1 The NREPA, MCL 324.101 et seq. is an act that controls pollution to protect the environment and natural resources in the state.

1.2 Article II, Pollution Control, Part 31, Water Resources Protection, of the NREPA (Part 31), MCL 324.3101 et seq., and rules promulgated pursuant thereto, provides for the protection, conservation, and the control of pollution of the water resources of the state.

1.3 Section 3109(1) of Part 31 states: "A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to: the public health, safety, or welfare; to domestic, commercial, industrial, agricultural, recreational, or other

uses that are being made or may be made of such waters; to the value or utility of riparian lands, or to livestock, wild animals, birds, fish, aquatic life, or plants or to the growth or propagation, or the growth or propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired."

1.4 Section 3112(1) of Part 31 states: "A person shall not discharge any waste or waste effluent into the waters of this state unless that person is in possession of a valid permit from the Department."

1.5 The DEQ is authorized by Section 3112(2) of Part 31 of the NREPA to enter orders requiring persons to abate pollution and, therefore, the Director has authority to enter this Consent Order with the City.

1.6 The Director has delegated authority to the Division Chief of the WD to enter into this Consent Order.

1.7 The City and the DEQ agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by the City that the law has been violated.

1.8 This Consent Order becomes effective on the date of execution ("effective date of this Consent Order") by the WD Chief.

1.9 The City shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section III, Compliance Program, of this Consent Order.

II. FINDINGS

2.1 The City discharges treated municipal wastewater from its WWTP through outfall 001A to the Huron River authorized by National Pollutant Discharge Elimination System Permit Number MI0022217 issued by the DEQ on December 19, 2000.

2.2 The City completed a Sanitary Sewer Trunk Line Study in 1995. The study was undertaken to evaluate the major sewage transport system to determine what system improvements would be needed to meet the City's immediate and future sewage transportation needs. Sewer system improvements were identified. Specific modifications were prioritized and the work is ongoing.

2.3 During heavy rain events the City's sanitary sewer system experiences excessive inflow and infiltration resulting in Sanitary Sewer Overflows (SSOs). The following chart lists the dates and discharge volumes of SSOs that occurred between March 1997 and June 2002, from the City's sanitary sewer system and/or bypasses at the WWTP.

List of Dates and Volume of Discharges from the City of Ann Arbor Sanitary Sewer System:

Date of SSO	Volume Discharged (gallons)	Cause of SSO
March 31, 1997	200	Sewer blockage
September 5, 1997	Unknown	Sewer blockage
March 9, 1998	Unknown	Surcharging manholes at three separate locations due to heavy rains. Basement floodings also occurred.
July 8, 1998	150-200	Sewer blockage
August 6, 1998	168,000	Bypass at outfall 002 due to heavy rains. Hydraulic pumping capacity exceeded.
September 29, 1998	Unknown	Broken sanitary sewer line
March 30, 1999	Unknown	Sewer blockage
April 23-24, 1999	1,120,000	Bypass at outfall 005 due to heavy rains.
July 10, 2000	Unknown	SSO on Swift Run Trunk Line due to heavy rains.
July 6, 2001	Unknown	Sewer blockage caused by roots
October 17, 2001	2,000	Heavy rained caused flows to inadvertently enter influent channel at plant which was under construction and overflow to storm sewer.
April 22, 2002	200	Plugged sanitary sewer main
June 24, 2002	700	Force main break

III. COMPLIANCE PROGRAM

IT IS THEREFORE AGREED AND ORDERED THAT the City will take the following actions to work toward the elimination of SSOs and prevent further violations of Part 31 of the NREPA:

FOOTING DRAIN DISCONNECTION (FDD) PROJECT

3.1 In order to eliminate SSOs, flow must be removed from the sanitary sewer system. The primary method of flow reduction selected by the City is FDD. The scope of services for monitoring flow removals achieved by the FDDs is contained in Appendix A. Field investigation by City personnel revealed the range of footing drain flows to the sanitary sewer system to be 2–15 gallon/minute (gpm) per individual footing drain connection. Using an assumed average flow of 4 gpm per footing drain connection, the City shall perform FDDs within the sanitary sewer system at 620 locations. Footing drain connections at 155 locations will be removed from the City sanitary sewer system on or before **June 30, 2004 and every year thereafter by June 30 through June 30, 2007 or until 620 FDDs are completed as required by this Consent Order.**

Monitoring of flows from a representative sampling of FDDs will occur during the first two years of the project, from January 2001 to January 2003. The purpose of this monitoring is to confirm the flows being removed from the sanitary sewer system. Should the City fail to confirm that adequate flows are being removed from the sanitary sewer system flow monitoring shall continue at the discretion of the Jackson District Office Supervisor.

3.2 Flow monitoring and hydraulic modeling shall be conducted system-wide to certify that the system meets or will meet criterion based upon a corrective action plan. The criterion specified shall be the design criterion for transport throughout the sewer system of peak flows equal to the maximum hourly flow produced by a historically typical 25-year, 24-hour precipitation event during growth conditions and normal soil moisture and provide storage for subsequent treatment of excess flow which is generated by a 25-year, 24-hour precipitation event; or shall be the performance criterion of transport throughout the sewer system of peak flows produced by historically typical precipitation events resulting

in a predictable long-term average occurrence of SSOs no more frequently than one every ten years. This certification shall be submitted to the DEQ, WD, District Supervisor, 301 E. Glick Highway, Jackson, Michigan 49201, on or before **June 30, 2006**.

OFFSET MITIGATION PROGRAM

3.3 The City shall immediately implement an Offset-Mitigation Program (O-MP) that requires for each new premise connected to the system, that there shall be a reduction of 1,680 gallons per day (gpd) per residential equivalent unit of peak flow I/I in the City's sanitary sewer system. Pre-existing residential dwelling units served by on-site sewage treatment systems shall be exempt from required offset-mitigation. Each single-family residential unit (r.u.) shall be equivalent to 350 gpd. Dry weather flows for other uses shall be determined based on the city's Table A, which is contained in Appendix B. Credits shall be granted by the DEQ based on a 4-gpm rate for residential footing drains. Credits may be achieved through the removal of illegitimate connections, the removal of footing drains, roof drains, parking lot drains or other approvable actions that remove flow from the City's sanitary sewer system. The City shall submit to the DEQ the total number of credits achieved, the descriptions of actions taken, addresses where actions were taken and the calculations supporting those credits with each Part 41 permit application. The total number of credits granted to the City at the onset of this O-MP shall be 179, which is based upon the number of FDDs completed by the City since the start of the City's program in October 2000 and completed prior to June 30, 2003. The 179 is a credit bank and does not count against the 155 FDD per year required in Paragraph 3.1. Subsequent credits shall be granted to the City annually on June 30 each year based upon actual FDDs (155) completed during the previous 12 months with no credit being earned for the first 145 FDDs removed per year, for each year during the term of this Consent Order.

Where new premises are connected to the City system in areas outside the jurisdictional boundary of the City, the DEQ shall require the Part 41 permit applicant to demonstrate as a condition of the permit issuance that the collection system capacity exists or is being provided by a specific agreement with the City. The DEQ shall accept a statement with supporting documentation consistent with the Part 41 permit application process from the

City certifying that collection system capacity is available, along with supporting data, as sufficient demonstration for the permit applicant. Collection system capacity for premises connected in areas outside of the City's jurisdiction may be provided by contractual means, specified agreement or off-set mitigation as provided for in the O-MP contained herein.

3.4 An annual progress report detailing the number of footing drain locations disconnected and any additional flow removed to offset development from the City sanitary sewer system, including any flow monitoring data obtained to confirm flows, to confirm that the objectives of the FDD project are being met for the 12 months preceding June 30 shall be submitted to the DEQ on or before **July 30 of each year beginning July 30, 2004 and ending July 30, 2007**.

The DEQ will verify the data in the annual report in a timely manner after receipt of the report. Should the City fail to prove that the objectives of the FDD project and O-MP have been achieved, the DEQ reserves the right to delay issuance of Part 41 permits until the City can prove that said objectives have been met. The O-MP may be modified by mutual agreement at the request of the City or the DEQ. The O-MP shall terminate upon the expiration date of this Consent Order.

SWIFT RUN TRUNK PROJECT

3.5 The City shall submit an approvable work plan and accompanying schedule for improvements that are to be made to the Swift Run Trunk sewer in order to work toward the elimination of SSOs and to correct capacity issues to the DEQ on or before **June 30, 2005**. The approvable schedule shall be incorporated into this Consent Order as an enforceable requirement by reference. See Section IV for specifications regarding DEQ approval of the Swift Run Trunk submittals.

3.6 The City shall submit all reports, work plans, specifications, schedules, or any other writing required by this section to the District Supervisor, WD, DEQ, 301 E. Louis B. Glick Hwy., 4th Floor, Jackson, Michigan 49201. The cover letter with each submittal shall

identify the specific paragraph and requirement of this Consent Order that the submittal is intended to satisfy.

IV. DEQ APPROVAL OF SUBMITTALS

4.1 All work plans, proposals, and other documents, excluding applications for permits or licenses, that are required by this Consent Order shall be submitted by the City to the DEQ for review and approval.

4.2 All work plans, proposals, and other documents required to be submitted by this Consent Order shall include all of the information required by the applicable statute and/or rule, and all of the information required by the applicable paragraph(s) of this Consent Order.

4.3 In the event the DEQ disapproves a work plan, proposal, or other document, it will notify the City, in writing, of the specific reasons for such disapproval. The City shall submit, within thirty (30) days of receipt of such disapproval, a revised work plan, proposal, or other document which adequately addresses the reasons for the DEQ's disapproval. Disapproval of the revised work plan, proposal and other document constitutes a violation of the Consent Order requirements and is subject to stipulated penalties according to Section IX.

4.4 In the event the DEQ approves with specific modifications, a work plan, proposal, or other document, it will notify the City, in writing, of the specific modifications required to be made to such work plan, proposal, or other document prior to its implementation and the specific reasons for such modifications. The DEQ may require the City to submit, prior to implementation and within thirty (30) days of receipt of such approval with specific modifications, a revised work plan, proposal, or other document which adequately addresses such modifications. If the revised work plan, proposal or other document is still not acceptable to the DEQ, the DEQ will notify the City of this disapproval. Disapproval of the revised work plan, proposal and other document constitutes a violation of the Consent Order requirements and is subject to stipulated penalties according to Section IX.

4.5 Any delays caused by the City's failure to submit an approvable work plan, proposal, or other document when due shall in no way affect or alter the City's responsibility to comply with any other deadline(s) specified in this Consent Order.

4.6 No informal advice, guidance, suggestions, or comments by the DEQ regarding reports, work plans, plans, specifications, schedules or any other writing submitted by the City will be construed as relieving the City of its obligation to obtain written approval, if and when required by this Consent Order.

V. EXTENSIONS

5.1 The City and the DEQ agree that the DEQ may grant the City a reasonable extension of the specified deadlines set forth in this Consent Order. Any extension shall be preceded by a timely written request to the Jackson District Supervisor at the address in paragraph 3.2, and shall include:

a. Identification of the specific deadline(s) of this Consent Order that will not be met,

b. A detailed description of the circumstances which will prevent the City from meeting the deadline(s),

c. A description of the measures the City has taken and/or intends to take to meet the required deadline; and

d. The length of the extension requested and the specific date on which the obligation will be met.

The DEQ shall respond in writing to such requests. No change or modification to this Consent Order shall be valid unless in writing from the DEQ, and if applicable, signed by both parties.

VI. REPORTING

6.1 The City shall verbally report any violation(s) of the terms and conditions of this Consent Order to the Jackson District Supervisor by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with a written report within five (5) business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). The City shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

VII. RETENTION OF RECORDS

7.1 Upon request by an authorized representative of the DEQ, the City shall make available to the DEQ all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to Part 31 of the NREPA or its rules. All such documents shall be retained by the City for at least a period of three (3) years from the date of generation of the record unless a longer period of record retention is required by Part 31 of the NREPA, or its rules.

VIII. RIGHT OF ENTRY

8.1 The City shall allow any authorized representative or contractor of the DEQ, upon presentation of proper credentials, to enter upon the premises of the Ann Arbor WWTP at all reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of the DEQ to conduct tests and inspections pursuant to the NREPA and the rules promulgated there under, or any other applicable statutory provision.

IX. PENALTIES

9.1 The City agrees to pay to the State of Michigan **TWENTY-FIVE HUNDRED ($2,500) DOLLARS** as partial compensation for the cost of investigations and enforcement activities arising from the discharge of sanitary sewage to waters of the state. Payment

shall be made within thirty (30) days in accordance with paragraph 9.5.

9.2 The City agrees to pay a civil penalty of **SEVENTY FIVE HUNDRED ($7,500) DOLLARS** for the illegal discharge of sanitary sewage to waters of the state. Payment shall be made within thirty (30) days in accordance with paragraph 9.5.

9.3 The City agrees to pay stipulated penalties of **ONE THOUSAND ($1,000) DOLLARS** per day for each failure to meet the requirements or dates of the corrective program set forth in Section III, Compliance Program of this Consent Order. The City shall pay accrued stipulated penalties by check made payable to the State of Michigan and delivered to the address in paragraph 9.5 no later than ten (10) days after the end of the month in which violations occurred and without request from the DEQ.

9.4 To ensure timely payment of the above civil fine, costs, and stipulated penalties, the City shall pay an interest penalty to the General Fund of the State of Michigan each time it fails to make a complete or timely payment. This interest penalty shall be based on the rate set forth at MCL 600.6013(6), using the full increment of amount due as principal, and calculated from the due date for the payment until the delinquent payment is finally made in full.

9.5 The City agrees to pay all funds due pursuant to this agreement by check made payable to the State of Michigan and delivered to the Michigan Department of Environmental Quality, Financial & Business Services Division, Revenue Control Unit, P.O. Box 30657, 525 West Allegan Street, 5th floor south, Lansing, MI 48909. To ensure proper credit, all payments made pursuant to this Order must include the **Payment Identification Number WTR3010**. All funds shall be paid within thirty (30) days of entry of this agreement unless otherwise noted.

9.6 The City agrees not to contest the legality of the civil fine or costs paid pursuant to paragraphs 9.1, and 9.2, above. The City further agrees not to contest the legality of any stipulated penalties or interest penalties assessed pursuant to paragraphs 9.3 and 9.4, above, but reserves the right to dispute the factual basis upon which a demand by the DEQ for stipulated penalties or interest penalties is made.

9.7 Any penalty not received by the DEQ for a violation under this Consent Order within the deadline defined herein constitutes a separate violation subject to additional stipulated penalties.

X. DISPUTE RESOLUTION

10.1 Unless otherwise provided in this Consent Order, the dispute resolution procedures of this section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Order. However, the procedures set forth in this section shall not apply to actions by the state to enforce obligations of the City that are not disputed in accordance with this section. Initiation of formal or informal dispute resolution shall not be cause for the City to delay the performance of any compliance requirements or response activity.

10.2 Any dispute that arises under this Consent Order shall in the first instance be the subject of informal negotiations between the parties. The period of negotiations shall not exceed twenty (20) days from the date of written notice by any party that a dispute has arisen, unless the time period for negotiations is modified by written agreement between the parties. A dispute under this section shall occur when one party sends the other party a written notice of dispute. If agreement cannot be reached on any issue within this twenty (20)-day period, the DEQ shall provide a written statement of its decision to the City and, in the absence of initiation of formal dispute resolution by the City under paragraph 10.3, the DEQ position, as outlined in its written informal decision, shall be binding on the parties.

10.3 If the City and the DEQ cannot informally resolve a dispute under paragraph 10.2, the City may initiate formal dispute resolution by requesting review of the disputed issues by the DEQ, WD Chief. This written request must be filed with the DEQ, WD Chief within fifteen (15) days of the City's receipt of the DEQ's informal decision that is issued at the conclusion of the informal dispute resolution procedure set forth in paragraph 10.2. The City's request shall state the issues in dispute; the relevant facts upon which the dispute is based; any factual data, analysis, or opinion supporting its position; and all supporting documentation upon which the City bases its position. Within twenty-one (21) days of the WD Chief's receipt of the City's request for a review of disputed issues, the WD Chief will

provide a written statement of decision to the City, which will include a statement of his/her understanding of the issues in dispute; the relevant facts upon which the dispute is based; any factual data, analysis, or opinion supporting her/his position; and all supporting documentation relied upon by the WD Chief's review of the disputed issues. The WD Chief's time period for review of the disputed issues may be extended by written agreement of the parties.

10.4 The written statement of the WD Chief issued under paragraph 10.3 shall be a final decision and is binding on the parties unless, within twenty-one (21) days under the Revised Judicature Act after receipt of DEQ's written statement of decision, the City files a petition for judicial review in a court of competent jurisdiction that shall set forth a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Order.

10.5 An administrative record of the dispute shall be maintained by DEQ. The administrative record shall include all of the information provided by the City pursuant to paragraph 10.3, as well as any other documents relied upon by DEQ in making its final decision pursuant to paragraph 10.3. Where appropriate, DEQ shall allow submission of supplemental statements of position by the parties to the dispute.

10.6 In proceeding on any dispute as to whether the City has met its obligations under this Consent Order, and on all other disputes that are initiated by the DEQ, the DEQ shall bear the burden of persuasion on issues of both fact and law. In proceedings on all other disputes initiated by the City, the City shall bear the burden of persuasion on issues of fact and law.

10.7 Notwithstanding the invocation of dispute resolution procedures under this section, stipulated penalties shall accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Order, but payment shall be stayed pending resolution of the dispute. Stipulated penalties shall be paid within thirty (30) days after resolution of the dispute. The City shall pay that portion of a demand for payment of stipulated penalties that is not subject to dispute resolution procedures in accordance

with and in the manner provided in Section IX (Penalties). Failure to make payment by the City within the 30-day deadline constitutes a separate violation of the agreement and is subject to additional stipulated penalties.

XI. FORCE MAJEURE

11.1 The City shall perform the requirements of this Consent Order within the time limits established herein, unless performance is prevented or delayed by events that constitute a "Force Majeure." Any delay in the performance attributable to a "Force Majeure" shall not be deemed a violation of the City's obligations under this Consent Order in accordance with this section.

11.2 For the purpose of this Consent Order, "Force Majeure" means an occurrence or non-occurrence arising from causes not foreseeable, beyond the control of, and without the fault of the City and that delay the performance of an obligation under the Consent Order, such as, but not limited to: an Act of God, untimely review of permit applications or submissions by the DEQ or other applicable authority, and acts or omissions of third parties that could not have been avoided or overcome by the City's diligence, such as, but not limited to strikes, lockouts, court orders and the unavailability of contractors to perform the work. "Force Majeure" does not include, among other things, unanticipated or increased costs, changed financial circumstances, or failure to obtain a permit or license as a result of the City's actions or omissions.

11.3 The City shall notify the DEQ, by telephone, within forty-eight (48) hours of discovering any event which causes a delay in its compliance with any provision of this Consent Order. Verbal notice shall be followed by written notice within ten (10) calendar days and shall describe, in detail, the anticipated length of delay, the precise cause or causes of delay, the measures taken by the City to prevent or minimize the delay, and the timetable by which those measures shall be implemented. The City shall adopt all reasonable measures to avoid or minimize any such delay.

11.4 Failure of the City to comply with the notice requirements and time periods under paragraph 11.3, shall render this Section XI void and of no force and effect as to the

particular incident involved. The DEQ may, at its sole discretion and in appropriate circumstances, waive in writing the notice requirements of paragraph 11.3, above.

11.5 If the parties agree that the delay or anticipated delay was beyond the control of the City, this may be so stipulated and the parties to this Consent Order may agree upon an appropriate modification of this Consent Order. If the parties to this Consent Order are unable to reach such agreement, the dispute shall be resolved in accordance with Section X (Dispute Resolution) of this Consent Order. The burden of proving that any delay was beyond the reasonable control of the City and that all the requirements of this Section XI have been met by the City rests with the City.

11.6 An extension of one compliance date based upon a particular incident does not necessarily mean that the City qualifies for an extension of a subsequent compliance date without providing proof regarding each incremental step or other requirement for which an extension is sought.

XII. GENERAL PROVISIONS

12.1 With respect to any violations not specifically addressed and resolved by this Consent Order, the DEQ reserves the right to pursue any other remedies to which it is entitled for any failure on the part of the City to comply with the requirements of the NREPA and its rules.

12.2 The DEQ and the City consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to Part 31, MCL 324.3101 et seq.; and enforcement pursuant to Part 17, Michigan Environmental Protection Act, of the NREPA, MCL 324.1701 et seq.

12.3 This Consent Order in no way affects the City's responsibility to comply with any other applicable state, federal, or local laws or regulations.

12.4 The WD, at its discretion, may seek stipulated fines or statutory fines for any violation of this Consent Order. However, the WD is precluded from seeking both a stipulated fine under this Consent Order and a statutory fine for the same violation.

12.5 Nothing in this Consent Order is or shall be considered to affect any liability the City may have for natural resource damages caused by the City's ownership and/or operation of the Ann Arbor WWTP. The State of Michigan does not waive any rights to bring an appropriate action to recover such damages to the natural resources.

12.6 In the event the City sells or transfers the Ann Arbor WWTP, it shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer. Within thirty (30) calendar days, the City shall also notify the WD Jackson District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. The purchaser and/or transferee of this Consent Order must agree, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be forwarded to the WD Jackson District Supervisor within thirty (30) days of assuming the obligations of this Consent Order.

12.7 The provisions of this Consent Order shall apply to and be binding upon the parties to this action, and their successors and assigns. The City shall give notice of this Consent Order to any prospective successor in interest prior to transfer of ownership and shall notify the DEQ of such proposed sale or transfer.

XIII. TERMINATION

13.1 This Consent Order shall remain in full force until terminated by a written Notice of Termination issued by the DEQ. Prior to issuance of a written Notice of Termination, the City shall submit a request consisting of a written certification that the City has fully complied with the requirements of this Consent Order and has made payment of any fines, including stipulated penalties, required in this Consent Order. Specifically, this certification shall include:

a. The date of compliance with each provision of the compliance program in section III, and the date any fines or penalties were paid,

b. A statement that all required information has been reported to the District Supervisor; and

c. Confirmation that all records required to be maintained pursuant to this Consent Order are being maintained at the Ann Arbor City Hall.

The DEQ may also request additional relevant information. The DEQ shall not unduly withhold issuance of a Notice of Termination.

Signatories

The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

DEPARTMENT OF ENVIRONMENTAL QUALITY

Richard A. Powers, Chief
Water Division

9-4-07
Date

CITY OF ANN ARBOR

By: John Hieftje, Mayor

8-25-03
Date

Kathleen M. Root, City Clerk

8-26-03
Date

Approved as to substance

By: Roger W. Fraser, City Administrator

8/21/03
Date

Sue McCormick, Director
Water Utilities Department

8/20/03
Date

Approved as to form

for By: Stephen K. Postema, City Attorney

8-20-03
Date

APPROVED AS TO FORM:

8/28/03
By: Alan F. Hoffman, Assistant Attorney General
For: A. Michael Leffler
Assistant Attorney General in Charge
Natural Resources, Environmental Protection and Agriculture Division
Michigan Department of Attorney General

APPENDIX A

Footing Drain Disconnection (FDD) Program Scope of Services and Other Activities

These final activities are performed to provide verification on removal of flows from the system and to assist with other public engagement needs.

Activity D1 Monitoring

Activity Objective: Coordinate sump pump discharge monitoring program. This effort will include the installation of sump pump monitors and collection of sump pump monitoring information as required. Install and collect information from rainfall gages. Provide 20 sump pump monitors for installation during the life of the project. Install half of the monitors for collection of data over an annual collection period and move the other half periodically (monthly) to gather data from a variety of sites. Install a total of five rain gages within the study areas. Provide analysis of the sump pump operational data and rainfall information. Calculate average footing drain flows from this monitoring information.

Approach and Work Plan

To assess the effectiveness of citywide implementation of the FDD program, footing drain discharges will be evaluated by monitoring the performance of the installed sump pumps. Sump pump monitors are recommended since a relatively small number of homes will be disconnected. Because of this, the flows in the sewer would be dominated by homes that are still connected and it would be difficult to determine the impacts of the disconnected homes using sewer monitoring. The CM will coordinate and install all sump pump discharge monitoring and rain gage monitoring equipment. This effort will include 20 sump pump event monitors and five tipping bucket rain gages installed, one in each of the five study areas.

The installed sump pump monitors will determine the on and off times of the sump pumps to within 0.5 seconds. During installation of the monitors, the pumping rates of the installed sump pump and discharge system will be measured for flow verification/calibration. From these two sources of information, the discharge rates versus time (hydrographs) will be developed. These will be evaluated based on the rainfall that took place for different storms. The sump pump monitors will be downloaded using a communication line installed to the outside of the home. The team will maintain 20 sump pump monitors during the life of the project. A total of 10 of these monitors will be installed at locations that are fixed for a year of monitoring and the remaining 10 monitors will be moved monthly. The fixed monitoring devices will remain in place to allow better understanding of the seasonal variation observed between the monitors. The remaining monitors will provide information on the variability of discharge throughout the areas that have FDD construction.

Statistics on the peak flows generated will be tied to GIS to determine whether spatial and/or topographic trends exist. If the GIS analysis indicates trends that can be extrapolated to the rest of the City, this analysis will be performed. If not, a general extrapolation of results will be made citywide with all assumptions documented. Through these monitoring efforts and extrapolation to the remainder of the City, a better understanding of how the long-term FDD program affects sanitary flows will be gained.

Products and Deliverables

- Provide raw and compiled data files from the monitoring work.
- Produce annual technical memoranda on sump pump performance.
- Provide a draft and final report that documents the collected information and evaluates program effectiveness at the end of the project. 6 – paper copies and 6 CD's of the final report will be provided with report in digital PDF and original format files.

APPENDIX B
TABLE A

TYPE OF FACILITY OR USE	DESIGN DRY WEATHER FLOW RATE
Single Family Residence	350 gpd
Two Family Residence	700 gpd
Apartment to a single family unit (up to 400 sq. ft)	200 gpd
Motels with kitchenettes, apartments, condos, mobile homes, trailers, co-ops, etc. up to 600 sq. ft. of gross floor area	200 gpd/unit
Motels with kitchenettes, apartments, condos, mobile homes, trailers, co-ops, etc. up to 601 – 1200 sq. ft. of gross floor area	275 gpd/unit
Motels with kitchenettes, apartments, condos, mobile homes, trailers, co-ops, etc. greater than 1200 sq. ft. of gross floor area	350 gpd/unit
Motel unit less than 400 sq. ft	100 gpd/unit
Motel unit greater than 400 sq. ft.	150 gpd/unit
Hospital (without laundry)	150 gpd/bed
Hospital	300 gpd/bed
University housing, rooming house, institutions	75 gpd/capita
Cafeteria (integral to an office or industrial building)	2.50 gpd/capita
Non-Medical Office space	0.06 gpd/sf gr. floor area
General Industrial Space	0.04 gpd/sf gr. floor area
Medical Arts (doctor, dentist, urgent care)	0.10 gpd/sf gr. floor area
Auditorium/Theater	5 gpd/seat
Bowling alley, tennis court	100 gpd/crt - alley + food
Nursing Home	150 gpd/bed
Church	1.50 gpd/capita
Restaurant (16 seat minimum or any size with dishwasher)	30 gpd/seat
Restaurant (fast food)	20 gpd/seat
Wet Store - Food processing	0.15 gpd/sf gr. floor area
Wet Store no food (barbershop, beauty salon, etc.)	0.10 gpd/sf gr. floor area
Dry Store (no process water discharge)	0.03 gpd/sf gr. floor area
Catering Hall	7.50 gpd/capita
Market	0.05 gpd/sf gr. floor area
Bar, Tavern, Disco	15 gpd/occupant + food
Bath House	5 gpd/occ. + 5gpd/shower
Swimming Pool	20 gpd/capita
Service Stations	300 gpd/double hose pump
Shopping Centers	0.02 gpd/sf gr. sales area
Warehouse	0.02 gpd/sf gr. area
Laundry	425 gpd/laundry machine
Schools, nursery and elementary	10 gpd/student
Schools, high and middle	20 gpd/student
Summer Camps	160 gpd/bed
Spa, Country Club	0.30 gpd.sf. gr. floor area
Industrial Facility, Large Research Facility	"Determined by Authority of
Others (car wash, etc.)	Water Utilities Director"

Values in Table A are from or derived from the following sources:
Michigan Guidelines for Subsurface Sewage Disposal, 1977
Schedule of Unit Assignment Factors, 1988, Oakland County Public Works (Michigan)
Basis of Design, Scio Township (Michigan)
Sewer Design, 1992, Los Angeles Bureau of Engineering
Equivalent Residential Unit Determination, University of Central Florida
Standard Handbook of Environmental Engineering, 1989, Robert Corbitt

Exhibit 5: *Helber v City of Ann Arbor*, 247700, 2004 WL 2389979 (Mich Ct App, 10/26/04)

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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_____/

Exhibit 5: *Helber v City of Ann Arbor*, 247700, 2004 WL 2389979 (Mich Ct App, 10/26/04)

2004 WL 2389979
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Paul HELBER, Diane Helber, Susan Irwin, John Irwin, James Nieters and Pamela Nieters, Plaintiffs-Appellants,
v.
CITY OF ANN ARBOR, Defendant-Appellee.
Howard ANDREWS and Muriel D. Andrews, Plaintiffs,
and
Kathy Ann MOILANEN, Edward M. Vuylsteke, Lawrence Thall, Marcella Thall and Michael Thall, Plaintiffs-Appellants,
v.
CITY OF ANN ARBOR, Defendant-Appellee.
Warren G. PALMER, Zerilda Palmer, Robert Zimmerman, Enid Zimmerman, Gregory Hawkins and Masada Habhab, Plaintiffs-Appellants,
v.
CITY OF ANN ARBOR, Defendant-Appellee.
Carol JACOBSON, Jed Jacobson, Dilip Nigam and Sabita Nigam, Plaintiffs-Appellants,
v.
CITY OF ANN ARBOR and Washtenaw County Drain Commissioner, Defendants-Appellees,
and
LANS BASIN, INC., Defendant.

No. 247700, 247701, 247702, 247703. | Oct. 26, 2004.

Before: HOEKSTRA, P.J., and OWENS and HOOD, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

***1** These four consolidated appeals involve trespass-nuisance and unconstitutional taking claims raised by plaintiff homeowners against defendants city of Ann Arbor and the Washtenaw County Drain Commissioner arising from August 1998 and June 2000 sewer backups into plaintiffs' basements. Plaintiffs appeal as of right, challenging the circuit court's orders granting defendants summary disposition of plaintiffs' claims pursuant to MCR 2.116(C)(8) (failure to state a claim). We affirm.

I

Plaintiffs first contend that the circuit court erred in finding that they failed to state a claim of trespass-nuisance within either their original or amended complaints.

> This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law....
>
> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). [*Maiden v. Rozwood*, 461 Mich. 109, 118-120; 597 NW2d 817 (1999) (citation omitted).]

Because this case arose before our Supreme Court's April 2, 2002, decision in *Pohutski v. City of Allen Park*, 465 Mich. 675; 641 NW2d 219 (2002), this Court must apply the limited trespass-nuisance exception to governmental immunity delineated by the Supreme Court in *Hadfield v. Oakland Co Drain Comm'r*, 430 Mich. 139; 422 NW2d 205 (1988). In *Hadfield*, the Supreme Court defined "trespass-nuisance" as "a direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity." *Id.* at 145. The Supreme Court set forth as follows the necessary elements of a trespass-nuisance claim:

> Therefore, we find that plaintiffs will successfully avoid a governmental immunity defense whenever they allege and prove a cause of action in trespass or intruding nuisance.

> Trespass-nuisance shall be defined as trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage. The elements may be summarized as: condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government). [*Id.* at 169.]

The plaintiff need not establish that the government acted with negligence. *CS & P, Inc v. City of Midland,* 229 Mich.App 141, 145-146; 580 NW2d 468 (1998).

In this case, the circuit court found that plaintiffs' pleadings failed to sufficiently allege the first element of a trespass-nuisance claim, a condition of trespass or nuisance. " '[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it." ' *Hadfield, supra* at 151, quoting Prosser & Keeton, Torts (5th ed), § 87, p 622. "Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v. Cleveland-Cliffs Iron Co,* 237 Mich.App 51, 67; 602 NW2d 215 (1999). A "direct or immediate" invasion "for purposes of trespass is one that is accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of the plaintiff's land"; " '[i]t is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." ' *Id.* at 71, quoting 1 Restatement Torts, 2d, § 158, comment i, p 279.[1] The trespasser must intend to intrude on the property of another without authorization to do so. *Buskirk v. Strickland,* 47 Mich. 389, 392; 11 NW 210 (1882) (finding the defendants liable in trespass for acts intentionally done that directly and necessarily caused immediate injury); *Jackson Co Hog Producers v. Consumers Power Co,* 234 Mich.App 72, 82-83; 592 NW2d 112 (1999); *Cloverleaf Car Co v. Phillips Petroleum Co,* 213 Mich.App 186, 195; 540 NW2d 297 (1995). " 'Any intentional and unprivileged entry on land is a trespass without a showing of damage, since those who own land have an exclusive right to its use." ' *Adkins v. Thomas Solvent Co,* 440 Mich. 293, 304; 487 NW2d 715 (1992), quoting Prosser & Keeton, Torts (5th ed), § 87, p 623.

***2** After carefully reviewing plaintiffs' amended complaints, we conclude that plaintiffs successfully alleged that they had ownership interests in the invaded properties. Plaintiffs also arguably alleged that they suffered an unauthorized direct or immediate intrusion when they averred that the city's negligence proximately caused the flooding of their basements with sewage and water. *Adams, supra* at 71 n 15. But the amended complaints contain no allegations that the city committed any specific act of physical invasion. The closest plaintiffs come to setting forth an act of physical invasion by the city appears within ¶ 14 of the amended complaints, wherein plaintiffs allege that sometime before or on August 6, 1998, "defendant improperly constructed and/or engineered and/or maintained the sewerage system that flooded into plaintiffs' basements." Paragraph fourteen does not explain with specificity any action or conduct by the city that constitutes a direct or immediate physical invasion.[2] See *Churella v Pioneer State Mutual Ins Co,* 258 Mich.App 260, 272; 671 NW2d 125 (2003) (explaining that conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action). While ¶ 17 asserts that the city accumulated water and sewage, and ¶ 18 states that the sewage and water invaded plaintiffs' properties, neither paragraph alleges any act by the city that amounted to a direct or immediate physical invasion.

Even assuming that conclusory ¶¶ 14 and 15 adequately state some action by the city that directly or immediately invaded plaintiffs' properties, the amended complaints contain no allegations that the city intended to perform any specific action that caused the physical invasions. *Buskirk, supra* at 392. The amended complaints' only mention of the city's intent appears within ¶ 17, which avers that the city "intentionally caused the accumulation of water and sewage" by operating its sewer system, but this paragraph does not assert that the city intentionally committed any act that caused the physical invasion.[3] Consequently, plaintiffs did not sufficiently plead the existence of a trespass by the city in support of the first element of a trespass-nuisance cause of action. *Hadfield, supra* at 169.

With respect to the drain commissioner, the defendant-appellee in Docket No. 247703, we observe that an identical analysis applies. The Jacobsons and Nigams asserted that the drain commissioner had an easement "through plaintiffs' properties for th[e Pittsfield-Ann Arbor Drain,]" and that on August 6, 1998 and June 25, 2000, "sewage from the city's sanitary sewerage and water from the county drain flooded into the basements of the plaintiffs." The remaining general

allegations and paragraphs of Count I are copied verbatim from the other plaintiffs' amended complaints, with the slight modification of references to water from the drain pipe and the drain commissioner as an additional defendant. Because the Jacobsons and Nigams set forth substantive allegations concerning the drain commissioner identical to those alleged against the city, they failed to sufficiently allege that the commissioner committed a trespass. [4]

***3** Plaintiffs also could state a claim with respect to the first element of trespass-nuisance if their amended complaints adequately set forth the existence of a nuisance. The Michigan Supreme Court has described the following components of a private nuisance:

> According to the Restatement, an actor is subject to liability for private nuisance for a nontrepassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm[,] (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Adkins, supra* at 304, citing 4 Restatement Torts, 2d, §§ 821D-F, 822, pp 100-115.]

See also *Cloverleaf Car Co, supra* at 193, quoting *Adkins, supra* at 304.

The amended complaints establish that plaintiffs have rights in their respective properties. Several paragraphs of the amended complaints may be interpreted as alleging that the flooding of plaintiffs' properties resulted in significant harm: ¶¶ 9-10 state that the flood waters included "feces, dirt, debris, [and] noxious odors"; ¶ 26 alleges that the flooding caused "damages as alleged below"; and ¶ 36 includes in the list of plaintiffs' damages personal and real property destruction, diminution in property values, health impairment, "[l]oss of the normal use and enjoyment of their property," and "mental stress and emotional anguish." But the amended complaints do not describe any specific conduct by the city that amounted to the legal cause of the basement flooding. As discussed above, ¶¶ 14 and 15 assert that before or on August 6, 1998, the city "improperly constructed and/or engineered and/or maintained the sewerage system from which came the intrusions that flooded into plaintiffs' basements," and that the "negligence in constructing and/or engineering and/or designing and/or maintaining the sewerage system" proximately caused the flooding. These allegations do not supply any example of a specific act by the city that led to the flooding. *Churella, supra* at 272. Paragraph seventeen avers that the city accumulated water and sewage, but not that the city did anything with these to cause the flooding. The only other potentially relevant paragraph in the amended complaint is ¶ 23, which alleges the following:

> By causing water and sewage accumulations in its sewerage system to physically intrude into plaintiffs' homes, defendant unreasonably interfered with the use and enjoyment by plaintiffs of their properties.

Once again, this paragraph conclusorily maintains that the city caused the flooding, without explaining with any specificity what actions by the city comprised the cause. *Churella, supra.*

***4** Even assuming that plaintiffs sufficiently set forth conduct by the city that caused the invasions of water and sewage, the amended complaints do not allege that "the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct." *Adkins, supra* at 304. The amended complaints characterize the flooding as an unreasonable interference with "plaintiffs' use and enjoyment of ... their properties," but, as discussed above, nowhere allege that the city committed an intentional invasion. Although the amended complaints make a general allegation of the city's negligence within ¶¶ 14-15, Count I of the complaints does not adequately assert that the invasion by the city qualified as "unintentional *and* otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct" (emphasis added). *Churella, supra.*

Because plaintiffs do not allege the necessary nuisance elements that the city took a specific action to legally cause the invasion, or that the invasion occurred intentionally and unreasonably or was unintentional and otherwise actionable, we conclude that plaintiffs failed to state a claim regarding nuisance in support of the first element of a trespass-

nuisance claim. Pursuant to the same logic, the substantively identical allegations of the Jacobsons and Nigams against the drain commissioner likewise do not sufficiently establish a nuisance.[5] Because plaintiffs failed to allege against either the city or the drain commissioner its commission of a trespass or nuisance, we conclude that the circuit court properly granted defendants' motions for summary disposition of plaintiffs' amended trespass-nuisance counts pursuant to MCR 2.116(C)(8).

II

Plaintiffs next argue that the circuit court should have permitted them to further amend their amended complaints to state a claim of trespass-nuisance. "[D]ecisions granting or denying motions to amend pleadings ... are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v. Khera*, 454 Mich. 639, 654; 563 NW2d 647 (1997).

The Michigan Court Rules govern the amendment of pleadings. Relevant to this case, in which the circuit court granted summary disposition of plaintiffs' amended complaints pursuant to MCR 2.116(C)(8), the court rules provide as follows:

> If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified. [MCR 2.116(I)(5).]

MCR 2.118(A)(2) provides:

> Except as provided in subrule (A)(1),[6] a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

***5** Michigan courts have interpreted subrule (A)(2) as ordinarily providing a party the opportunity to amend his pleading, and have reasoned that a court should deny the opportunity to amend only for the following reasons: (1) undue delay by the moving party; (2) the moving party's dilatory motive or bad faith in seeking amendment; (3) the moving party's " 'repeated failures to cure deficiencies by amendments previously allowed' "; (4) the granting of the motion to amend would cause the opposing party undue prejudice; and (5) futility of the proposed amendment. *Weymers, supra* at 658-659, quoting *Ben P Fyke & Sons v. Gunter Co*, 390 Mich. 649, 656; 213 NW2d 134 (1973). "The trial court must specify its reasons for denying the motion; failure to do so requires reversal unless the amendment would be futile." *Dowerk v. Oxford Charter Twp*, 233 Mich.App 62, 75; 592 NW2d 724 (1998). An amendment qualifies as futile when "it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v Kindercare Learning Centers, Inc*, 231 Mich.App 689, 697; 588 NW2d 715 (1998).

We affirm the circuit court's denial of plaintiffs' requests for leave to further amend their amended complaints because they did not comply with the court rules, specifically MCR 2.118(A)(4), which contains the following requirement:

> *Amendments must be filed in writing*, dated, and numbered consecutively, and must comply with MCR 2.113. Unless otherwise indicated, an amended pleading supersedes the former pleading. [Emphasis added.]

Neither in response to the city's and drain commissioner's renewed motions for summary disposition, nor thereafter, did plaintiffs present to the circuit court, in writing or otherwise, the substance of any further proposed amendments. Plaintiffs simply added their one-sentence request for leave to amend at the conclusion of their responses to the city's renewed motion for summary disposition. This Court has held that a trial court does not abuse its discretion by denying a request to amend when the plaintiff has failed to comply with the written amendment requirement of MCR 2.118(A)(4). *Lown v. JJ Eaton Place*, 235 Mich.App 721, 726; 598 NW2d 633 (1999); *Burse v. Wayne Co Medical Examiner*, 151 Mich.App 761, 768; 391 NW2d 479 (1986). Furthermore, plaintiffs neglect to substantiate within the record the content of the amended pleadings they desire to file, thus precluding this Court from addressing the merits of their amendment argument. See *Burse, supra.*

Accordingly, although the circuit court relied on the ground of futility, we uphold the court's denial of plaintiffs' requests for leave to again amend Count I of their amended complaints because of their failures to comply with the court rules. *Lane, supra* at 697 (explaining that this Court will not reverse where the trial court reached the correct result for the wrong reason).

III

Plaintiffs further maintain that the circuit court erred in dismissing their unconstitutional taking claims pursuant to MCR 2.116(C)(8). We again review de novo the circuit court's summary disposition ruling. *Maiden, supra* at 118-120.

***6** The Michigan Constitution contemplates that the government may exercise the power of eminent domain to acquire private property for a public use. Const 1963, art 10, § 2. Additionally, "Michigan recognizes a cause of action, often referred to as an inverse or reverse condemnation suit, for a de facto taking when the state fails to utilize the appropriate legal mechanisms to condemn property for public use." *Peterman v Dep't of Natural Resources,* 446 Mich. 177, 187-188; 521 NW2d 499 (1994). " 'Taking' is a term of art with respect to the constitutional right to just compensation and does not necessarily mean the actual and total conversion of the property." *Hart v. Detroit,* 416 Mich. 488, 500; 331 NW2d 438 (1982). "Under Michigan law, a 'taking' for purposes of inverse condemnation means that the governmental action has permanently deprived the property owner of any possession or use of the property." *Spiek v. Dep't of Transportation,* 456 Mich. 331, 334 n 3; 572 NW2d 201 (1998) (citation omitted); *Charles Murphy, MD, PC v. Detroit,* 201 Mich.App 54, 56; 506 NW2d 5 (1993). "Whether a 'taking' occurs for which compensation is due depends on the facts and circumstances of each case." *Hart, supra* at 500.

"Since no exact formula exists concerning a de facto taking, the form, intensity, and the deliberateness of the governmental actions toward the injured party's property must be examined." *In re Acquisition of Land-Virginia Park,* 121 Mich.App 153, 160; 328 NW2d 602 (1982); *Heinrich v. Detroit,* 90 Mich.App 692, 698; 282 NW2d 448 (1979). A governmental entity's actions might amount to a taking of private property despite that the agency never directly exercised control over the property, provided that some action by the government constitutes a direct disturbance of or interference with property rights. *In re Acquisition of Land, supra* at 159. For example, "[t]h [e Michigan Supreme] Court has applied the constitutional restriction to a variety of takings; for example, *to situations of trespass from flooding waters escaping from artificial reservoirs, Ashley v Port Huron,* 35 Mich. 296 (1877); *Herro v. Chippewa Co Rd Comm'rs,* 368 Mich. 263[; 118 NW2d 271] (1962)." *Buckeye Union Fire Ins Co v. Michigan,* 383 Mich. 630, 642; 178 NW2d 476 (1970) (emphasis added).

Generally, "[w]hether there is a taking depends on the character of the invasion, not the amount of damage resulting, as long as it is substantial. Compensation cannot be recovered for an interference with property rights which is not substantial in nature." 29A CJS, Eminent Domain, § 82(a), p 228.

> "The constitutional provision is adopted for the protection of and security to the rights of the individual as against the government," and the term "taking should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where *the value is destroyed by the action of the government,* or *serious injury is inflicted to the property itself,* or *exclusion of the owner from its enjoyment, or from any of the appurtenances thereto.* In either of these cases it is a taking within the meaning of the provision of the constitution. "A partial destruction or diminution is a taking." Mills, Em Dom § 30; *Pumpelly v. Green Bay* [*& Mississippi Canal Co,* 80 U.S. 166; 20 L Ed 557 (1871)]; *Cushman v. Smith,* 34 Me 247 [(1852)]; *Grand Rapids* [*Booming*] *Co v. Jarvis,* 30 Mich. 308 [(1874)]. [*Pearsall v. Eaton Co Bd of Supervisors,* 74 Mich. 558, 561-562; 42 NW 77 (1889) (emphasis added).]

***7** See also *In re Acquisition of Land, supra* at 160.

With respect to the nature of the government's act of invasion, this Court has held that to afford the basis for a taking, the government must have " 'abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." ' *Hinojosa v Dep't of Natural Resources,* ___ Mich.App ___; ___ NW2d ___ (Docket No. 248185, issued September 9, 2004), slip op at 7,[7] quoting *Heinrich, supra* at 700; see also *In re Acquisition of Land, supra* at 161. Furthermore, the plaintiff in an inverse condemnation action bears the burden of establishing that the government's conduct proximately caused an invasion and destruction of his private property rights. *Peterman, supra* at 190-191; *Hinojosa, supra,* slip op at 7; *Heinrick, supra* at 699-700. The plaintiff must satisfy this burden by proving " 'that the government's actions were a *substantial* cause of the decline of his property's value." ' *Hinojosa, supra,* slip op at 7, quoting *Heinrich, supra* at 700 (emphasis in original).

These cases suggest that under the Michigan Constitution a taking claim requires a showing that (1) a direct invasion

of the plaintiff's private property occurred, (2) the invasion permanently infringed on some property right of the plaintiff, (3) the infringement qualified as substantial, in other words that it destroyed the value of the property, inflicted serious injury to the property, or excluded the plaintiff from his enjoyment of the property or its appurtenances, (4) the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property, and (5) some act of the government amounted to a proximate or substantial cause of the infringement.

Here, the circuit court granted summary disposition of the inverse condemnation/unlawful taking claims within the first group of complaints that plaintiffs filed in October and November 2000, pursuant to MCR 2.116(C)(8). The court did not evaluate at length the unlawful taking claims that plaintiffs filed within their April 2002 amended complaints, but simply dismissed these counts on the basis of futility.

We conclude that the circuit court properly granted defendants summary disposition of the unconstitutional taking claims contained within Count II of the initial complaints filed in October and November 2000. Paragraphs fifteen and sixteen of the original complaints sufficiently asserted that contaminants and water directly invaded plaintiffs' properties. But the original complaints fail to allege the existence of any permanent infringement. Furthermore, nowhere within Count II of the original complaints do plaintiffs set forth any abuse by the government of its legitimate powers in affirmative actions directly aimed at plaintiffs' properties, or any specific governmental act that proximately or substantially caused the infringement on their properties; ¶ 15 only generally alleges that defendants' "activities in and connected to the sewers and drain resulted in releases of water and contaminants which was transported into plaintiffs' homes." [8]

***8** Although the circuit court did not analyze in detail Count II within plaintiffs' amended complaints, the court properly granted summary disposition of these counts according to MCR 2.116(C)(8). The amended complaints set forth a direct physical invasion of plaintiffs' properties within ¶¶ 29 and 30, which maintain that water and sewage from the city's sewer system (as well as the county drain) "physically invaded and settled upon plaintiffs' lands and properties," and that defendants "specifically directed ... water and sewage to these plaintiffs' properties." Paragraphs thirty-one and thirty-two of the amended complaints allege that the invasion permanently infringed on plaintiffs' property rights: the "physical invasions of plaintiffs' lands and properties by water and sewage unjustifiably and unlawfully interfered with ... and permanently deprived plaintiffs of their exclusive right to utilize their lands" as private residences (¶ 31), and defendants' acts "constitute permanent takings of part of private property" (¶ 32). The amended complaints also appear to assert a substantial infringement of plaintiffs' property rights within ¶ 35, which avers that "[a]s a result of these takings plaintiffs have sustained damages to their lands and properties as alleged below," and ¶ 36, which complains that plaintiffs' endured "[p]hysical damages to their real property," "[d]iminution in the value of their property," and "[l]oss of the normal us [sic] and enjoyment of their property."

But the unconstitutional taking counts within the amended complaints fail to allege or describe any specific act of defendants that proximately or substantially caused plaintiffs' injuries. Paragraph twenty-seven of amended Count II reasserted and "incorporated into this count" the first twenty-six paragraphs of the amended complaints. Of the earlier paragraphs, the following contain allegations relevant to the question of proximate cause by defendants:

> 14. On or before August 6th, 1998 defendant[s] improperly constructed and/or engineered and/or maintained the sewerage system from which came the intrusions that flooded into plaintiffs' basements.
>
> 15. As a proximate result of ... defendant[s'] negligence in constructing and/or engineering and/or designing and/or maintaining the sewerage system [and the county drain] the plaintiffs' basements were on the dates stated above flooded with water and sewage.

These paragraphs generally allege that defendants proximately caused the intrusions onto plaintiffs' properties, but do not identify with specificity any conduct by the city or drain commissioner that proximately or substantially resulted in the infringements. Because conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action, we conclude that the circuit court likewise correctly dismissed the amended unconstitutional taking counts for failure to state a claim. *Hinojosa, supra,* slip op at 6-8; *Churella, supra* at 272. [9]

IV

***9** Plaintiffs lastly assert that the circuit court erred in denying them an opportunity to amend their unconstitutional taking claims. We conclude that the circuit court properly denied plaintiffs permission to proceed with amended Count II against either defendant because the amended counts qualify as futile. As discussed in part III, *supra*, the allegations within amended Count II still fail to state a claim of unconstitutional taking by the city or drain commissioner. *Lane, supra* at 697. Even assuming that amended Count II stated a valid claim of unconstitutional taking, no evidence supported at least two elements of the unconstitutional taking claim, and the circuit court properly could have dismissed the amended count pursuant to MCR 2.116(C)(10). *Id.* (explaining that this Court will not reverse where the trial court reached the correct result for the wrong reason). To the extent that plaintiffs' argument may be construed as an assertion of entitlement to amend Count II a second time, we observe that plaintiffs did not present to the circuit court, in writing or otherwise, the substance of any further proposed amendments to their pleadings, *Lown, supra* at 726, and plaintiffs neglect to substantiate within the record the content of any further amended pleadings they desire to file, which precludes this Court from addressing the merits of their amendment argument. See *Burse, supra* at 768.

Affirmed.

Footnotes

1 In *Adams, supra* at 71 n 15, this Court equated the direct or immediate invasion of trespass "as something akin to proximate cause."

2 Plaintiffs restated this nonspecific allegation within ¶ 15.

3 We reject plaintiffs' suggestion that "[a]s to a trespass condition, it is not necessary for someone to show that the governmental agency intended to intrude upon the private property of the individual." Plaintiff relies on *CS & P, supra* at 141. In *CS & P*, after listing the three elements of a trespass-nuisance claim, this Court observed that the "trespass-nuisance doctrine applies only to state and local governments." *Id.* at 145, citing *Cloverleaf Car Co, supra* at 193. This Court inserted a footnote in which it observed:

> A person who is not a governmental agency must intend to intrude upon the private property of another in order to be liable under a trespass theory. *Cloverleaf, supra* at 195. A private actor is not liable for a negligent intrusion onto the property of another. *Id.*

This Court in *CS & P* did not expressly purport to hold that a governmental entity may be liable for an act of trespass, despite that the entity engaged in no intentional action. This Court did not reach such a conclusion in *Cloverleaf Car Co, supra* at 195, which involved an alleged trespass by a private company. Furthermore, the footnote in *CS & P* is nonbinding dicta because the Court in *CS & P* did not have to address the question whether a governmental agency could be reliable for a trespass absent its intentional act. *Carr v. City of Lansing*, 259 Mich.App 376, 383-384; 674 NW2d 168 (2003). Plaintiffs direct us to no other authority for the proposition that a governmental entity need not have committed an intentional act to be liable in trespass.

Plaintiffs correctly observe that in a trespass-nuisance action, the plaintiff need not establish that the governmental defendant acted with negligence. *CS & P, supra* at 145-146. But this fact does not conflict with the intentional act requirement of a trespass action, as plaintiffs suggest. The intent requirement in a trespass action only contemplates that the trespass must have occurred because of some volitional act by the defendant. *Buskirk, supra* at 392 (finding a trespass arising directly and necessarily from "acts intentionally done"). Plaintiffs confuse the separate inquiries (1) whether an act qualifies as intentional or volitional, and (2) with what standard of care the defendant performed the act.

4 The more abbreviated original complaints likewise did not contain within Count I any allegation of a specific act of physical invasion by defendants, and no allegation regarding either defendant's intent to perform a specific action that resulted in physical invasion.

5 The original complaints also failed to describe any specific conduct by either defendant that constitutes the legal cause of the basement flooding, or that the invasions qualified as either intentional and unreasonable or unintentional and otherwise actionable.

6 Subrule (A)(1) vests a party with the right to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading ... or within 14 days after serving the pleading if it does not require a responsive pleading."

7 In the recent decision in *Hinojosa*, this Court upheld the trial court's grant of summary disposition of an unconstitutional taking claim against the state pursuant to MCR 2.116(C)(8) because the plaintiffs failed to allege that the state abused its authority via an affirmative action directed toward the plaintiffs' property; plaintiffs merely alleged "at most" that the state had failed to abate an alleged nuisance. *Id.* at 1-2, 6-8.

8 To the extent that the original complaints cited in support of Count II the Fifth Amendment to the United States Constitution, our Supreme Court has observed that "[b]oth the Michigan and federal constitutions prohibit the taking of private property for public use without just compensation," and that the "Taking Clause of the state constitution is substantially similar to that of the federal constitution." *Tolksdorf v. Griffith*, 464 Mich. 1, 2; 626 NW2d 163 (2001). Therefore, our discussion of this issue illustrates that Count II of the original complaints likewise failed to state a claim of unconstitutional taking under the United States Constitution.

9 Even assuming that plaintiffs stated valid amended unconstitutional taking claims against the city and drain commissioner, the circuit court nonetheless properly could have granted summary disposition of the taking claims pursuant to MCR 2.116(C)(10). After carefully reviewing the voluminous reports, some of which are more than twenty years old, and other documentary evidence that plaintiffs attach to their brief on appeal, we observe no evidence that (1) any plaintiffs experienced a permanent infringement of their private property rights, or (2) either the city or drain commissioner committed any act specifically directed toward plaintiffs' properties that constituted an abuse of its legitimate powers.

End of Document

Exhibit 6: June 2001 Sanitary Sewer Overflow Prevention Report of Camp Dresser & McKee and the Citizen Advisory Task Force (excerpts; full report available online)

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

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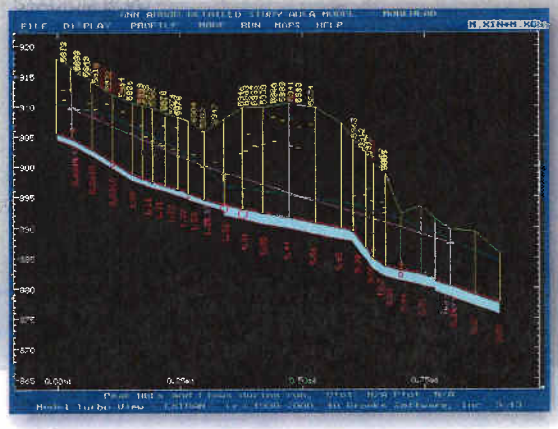
Exhibit 6: June 2001 Sanitary Sewer Overflow Prevention Report of Camp Dresser & McKee and the Citizen Advisory Task Force (excerpts; full report available online)

City of Ann Arbor

Sanitary Sewer Overflow Prevention Advisory Task Force



Report
Sanitary Sewer Overflow Prevention Study

CDM Camp Dresser & McKee

June 2001

D. Problem Background

Contents

D.1 Basement Backup Locations
D.2 History of Flooding in Study Areas
D.3 Previous Mitigation Attempts Specific to Study Areas

D.1 Basement Backup Locations

Information has been gathered on the locations where basement backup conditions have been reported. Figure D-1 shows these locations. In cases where multiple basement backups have taken place at the same home, these are noted in the figure.

The review of the historical flooding locations has shown that the flooding problems have been clustered in some cases. To make the analysis of the causes of these flooding problems manageable, the neighborhoods with the most significant clusters of problems were selected for this project. These project areas are described below.

D.2 History of Flooding in Study Areas

A general description of the five study areas is provided below along with observations on critical

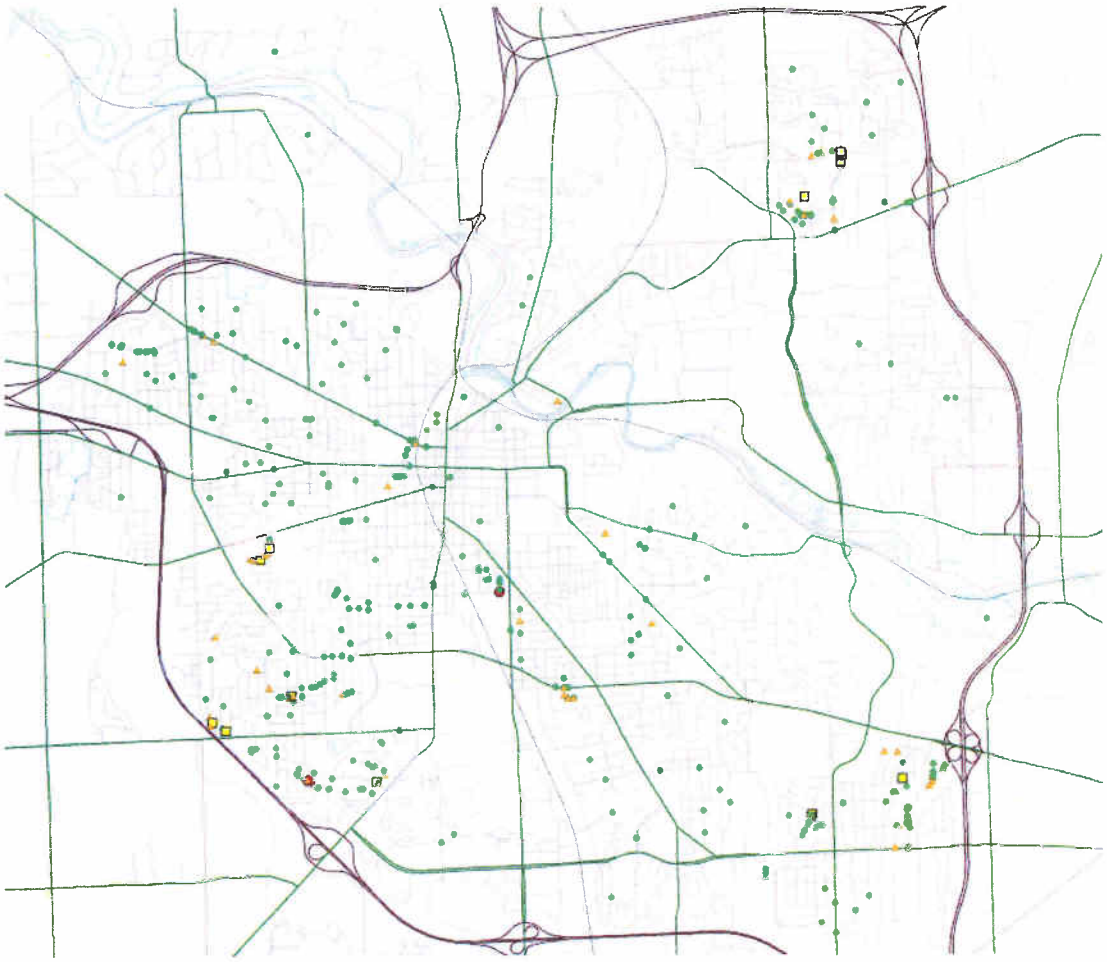


Figure D-1 Historical Flooding Locations

issues. Maps outlining boundaries of the study areas and the locations within each of these sewersheds where monitoring equipment was installed are provided in Figures D-2 and D-3. These monitoring efforts areas are described in more detail in the following sections.

D.2.1 Orchard Hills

The Orchard Hills study area is roughly bounded by Plymouth Road to the south, Rumsey to the north, Bunker Hill Road to the west, and Georgetown Boulevard to the east. There is a single discharge point from this study area on Georgetown as the sanitary sewer flows south to Plymouth Road. Sanitary Sewer backups and basement flooding have mainly been reported along Bluett and Georgetown. Flooding problems have been present in this area since the 1960s. A retention basin was constructed in 1979 at the corner of Bluett and Georgetown to reduce the problems that homeowners have experienced. Basement flooding has continued since the construction of this facility.

D.2.2 Bromley

The Bromley study area is roughly bounded by Plymouth Road to the south, Bluett Road to the north, Nixon to the west, and Prairie to the east. There is a single discharge point from this study area as the sewer flows south to Plymouth Road. Sanitary sewer backups and basement flooding have mainly been reported along Briarcliff Street and Burlington, two streets that are lower in elevation than other streets in the study area.

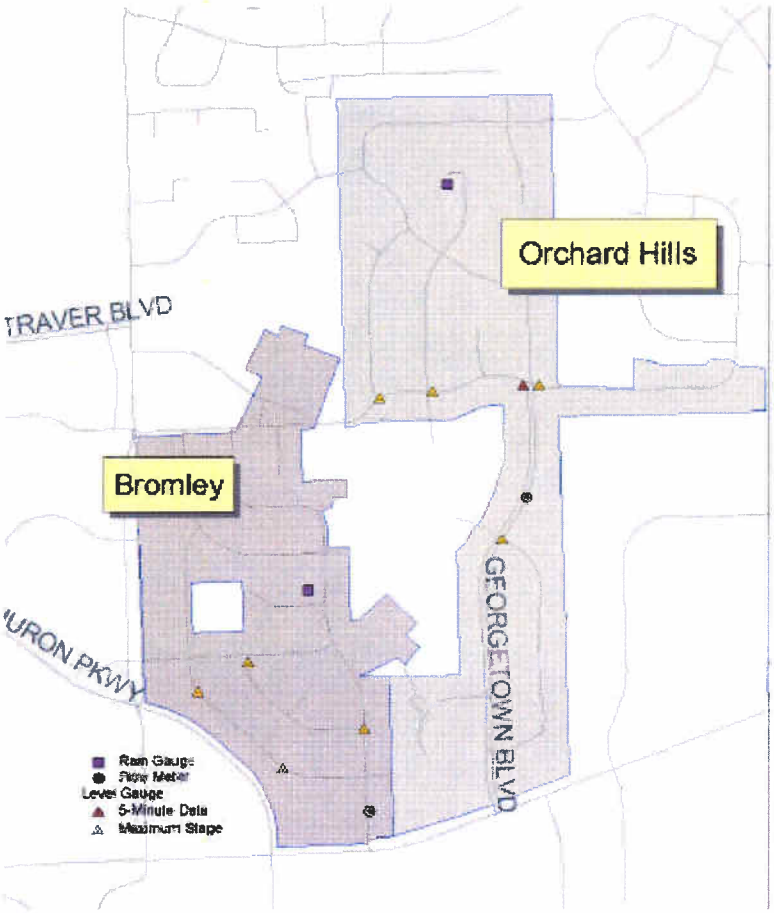


Figure D-2 Orchard Hills and Bromley Field Gages

D.2.3 Dartmoor

The Dartmoor study area is roughly bounded by Liberty to the north, south to Pauline, east to Ivywood, and west to I-94. There are areas west of I-94 that contribute flow to the study area. A portion of this contributing area is outside of the City of Ann Arbor.

There is a single discharge point from this study area on Dartmoor Road. Sanitary sewer backups and basement flooding have not traditionally been a problem in this area, but basement flooding problems were reported along Dartmoor Road in the August 1998 storm and in June of 2000. The reported problems are along the main sewer that discharges from the study area. New development has taken place on the west side of this study area in the past few years.

Flows from both Scio Township and a section of Ann Arbor west of I-94 and north of Liberty Road discharge through a pumping station on Liberty Road, west of I-94. These flows discharge upstream from the Dartmoor Road sewer.

The study area discharges under Liberty Road and combines with the flows Liberty Washington area north of the Dartmoor study area. To account for the interaction of these two areas, the Liberty Washington area discharge was also monitored to understand its impacts on the Dartmoor study area. The trunk sewer accepting the discharge from both the Dartmoor study area and the Liberty Washington area consists of two parallel lines that flow through Virginia Park to Virginia Avenue and Bemidji Drive.

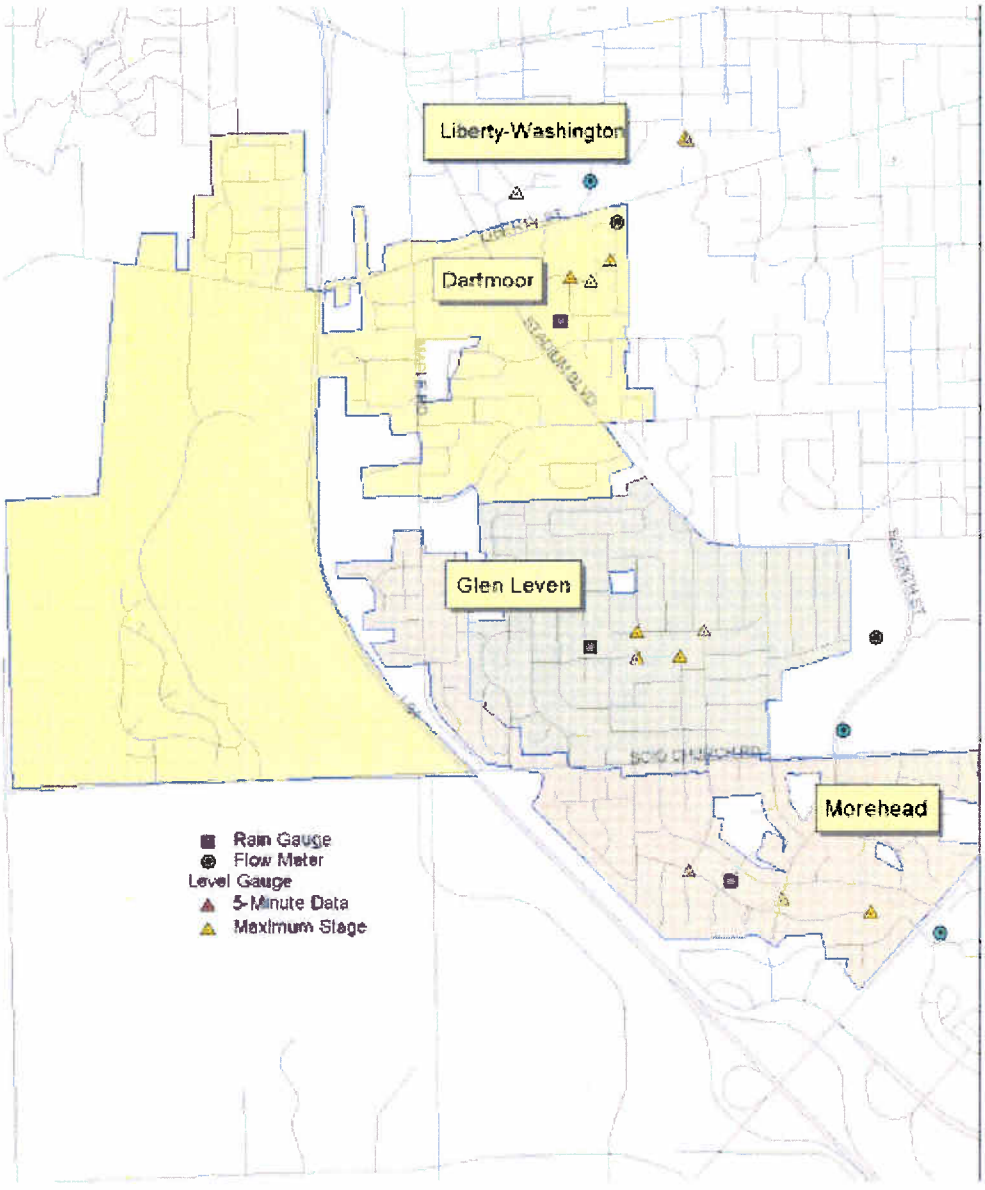


Figure D-3 Dartmoor, Glen Leven, Morehead, and Liberty-Washington Field Gages

D.2.4 Glen Leven

This study area extends roughly from Stadium to the north, Scio Church to the south, I-94 to the west, and Woodland to the east. There are two discharge points from this study area. Sanitary sewer backups and basement flooding have been reported along Avondale Avenue and Weldon Boulevard. There are also other areas within this study area that have experienced problems during the 1998 storm.

D.2.5 Morehead

The Morehead study area is roughly bounded by Scio Church on the north, south to Northbrook, west to I-94, and east to Ann Arbor-Saline. There is a single discharge point from this study area. Sanitary Sewer backups and basement flooding have mainly

H. Initial Recommendations

Contents

H.1 Selection Criteria
H.2 Alternative Ranking and Selection
H.3 Initial Selected Alternatives

H.1 Selection Criteria

To properly evaluate the alternatives developed under this project, evaluation criteria were developed. These criteria allowed each alternative to be ranked with respect to each criteria and selection of an alternative based on the results. This resulted in a more objective evaluation of each alternative. The following is a discussion of the criteria used. In all cases, the methodology used was to assign a rating that increases with positive impacts (or no impacts) and provided lower ratings for those cases where the impacts (negative) were the largest.

H.1.1 Quality of Life Issues

Several of the selection criteria were associated with quality of life because they either enhanced or detracted from the ability of homeowners affected by these alternative solutions to enjoy the amenities provided by the City of Ann Arbor. The following is a discussion of the specific elements of the quality of life grouping and how they were evaluated for each alternative.

Impact on Open Space/Park/School Areas

In some cases, the alternative may have impacted an open space, park, or school area. These impacts may be temporary in the case of construction of a sewer passing through these areas, or of a permanent impact if a new facility was located in these areas. Alternatives having permanent impacts received the lowest rating.

Impact on Natural Features

Natural features include such things as existing wetlands, forested areas, natural watercourses and wildlife. Alternatives that required construction in these areas received a lower rating. Alternatives that included large facilities that would impact the character of these natural features itself after construction received a lower rating. Temporary construction could also destroy the natural character of the land or watercourse and received a lower rating.

Impact on Receiving Waters

Certain types of alternatives could impact the amount and type of discharge to the receiving waters, potentially affecting humans and wildlife. Alternatives that reduced SSO discharges or the potential for SSO discharges received the highest rating while those alternatives that increased the discharges to the river received a lower rating.

Customer Disruption (Outside Study Areas)

This element measures that amount of construction disruption resulting from an alternative on Ann Arbor residents and businesses outside of the study areas. The highest rated alternatives were those that did not have any work outside of the study areas.

Customer Disruption (Inside Study Areas)

This element measured the amount of construction disruption resulting from an alternative on Ann Arbor residents and businesses inside the study areas. The highest rated alternatives were those that had limited disruption on everyday activities such as driving and walking around the study area neighborhoods, and involved less construction noise and dust.

Odor Issues

This item addressed those alternatives that could generate odors. The highest rated alternatives were those that did not have the potential for generating odors.

Maintenance Access Issues

Maintenance access could be required for some alternatives, such as storage facilities. In these cases, the homeowners may be impacted by increased noise and vehicular traffic. The highest rated alternatives had no additional maintenance access compared to current conditions.

Time for Implementation

Many alternatives would most likely be installed using construction phasing. The highest rated alternatives provided a complete solution in the shortest amount of time.

Certainty of Solution

Each of the alternatives was developed to solve the basement flooding problems for rainfall events similar to those that occurred in August 1998 or June 2000. In some cases, the information used to evaluate the control option was not complete. In these cases, the alternative received a lower rating because of the potential that the control option might not provide a complete solution for all of the homeowners.

H.1.2 Costs Issues

A second category evaluated was on the cost elements of the alternative, including construction costs, maintenance costs, operational costs, and the potential SSO costs that may be required to address the pending SSO regulations. These issues are described below:

Construction Costs

Construction costs included the cost for engineering, design and construction services. The lowest cost alternatives for a study area received the highest rating, while the highest cost alternatives received the lowest ratings.

Maintenance Costs

Alternatives that included components requiring periodic maintenance by the Water Utilities Department received the lowest ratings. Alternatives that minimized these annual cost requirements were the most highly rated.

Operational Costs

Alternatives that reduced the cost of operations at the WWTP by reducing annual flows were the most highly rated. Alternatives that required additional operational cost at the WWTP received a lower rating.

Future SSO Costs

Pending SSO regulations could impact the costs of treating flows generated during wet weather. Alternatives that reduced these requirements to treat these wet weather flows received the highest ratings while alternatives that increased the costs related to an SSO received a lower rating.

H.1.3 Construction Issues

The final set of criteria used to evaluate the alternatives was based on construction issues. This criteria was used to rate the alternatives based on how quickly and easily they could be built.

Construction Constraints

For alternatives that had facilities, utilities, or natural features to contend with that add to the complexity and/or risk of the construction, the alternative received a lower rating. Alternatives that would be constructed in areas with minimal conflicts received the highest ratings.

Contractor Availability

If the alternative used standard construction techniques and equipment and if there are many available contractors, then the alternative was highly rated. If the construction requires special equipment and only a few firms were qualified to perform the work, the alternative received a low rating.

Traffic Control

Traffic control is required for construction activities that take place in the street right of way. Highly

rated alternatives had minimal requirements for traffic control and alternatives that had low ratings required high traffic control requirements.

Construction on Private Property

Alternatives that required coordination with private property owners received the lowest rating. Alternatives that did not have construction on private property received the highest rating.

Easement Availability

Alternatives that required the acquisition of easements to complete the construction activities received the lowest rating. Alternatives that included work in existing easements received the highest ratings.

Construction Season Constraints

In some cases, components of the alternatives could only be constructed during fair weather periods. Underground construction is limited during cold weather due to frozen ground and weight limits on roads imposed by frost laws. Alternatives that were constrained by the construction season received the lowest rating. Alternatives that could continue construction throughout the year received the higher ratings.

H.2 Alternative Ranking and Selection

H.2.1 Methodology

The selection criteria described in the previous section were applied to the different alternatives described in Section G of this report for each study area. The rating values assigned to each alternative ranged on a continuum between 0 and 5 for each of the selection criteria. Lower values were less favorable and higher values were more favorable alternatives.

After development of the criteria ratings, different weights were applied to each of the criteria. These weighting values ranged between 1 and 4, with 1 having the least importance and 4 having the highest importance. Once this was completed, the total rating for each alternative was calculated. The highest total composite rating was used to select the preferred alternative. This alternative was given a ranking of 1. The other alternatives within each study area were then ranked according to the decreasing rating values. The calculations for each study area are provided in the Decision Matrix, shown in Table H-1.

As a final step, a calculation was performed to understand how close the other alternatives were to the rating received by the preferred alternative. This allowed the project team to determine if alternative solutions could be selected in each study area based on other factors.

H.2.2 Decision Matrix Development

The decision matrix developed for the evaluation of the alternatives is presented in Table H-1. This matrix embodies all of the ratings, weights, and calculation of the alternative ranking described in the previous section. The headings across the top of the table provides a short description of all of the alternatives and provides the ratings that were assigned by the Task Force for all selection criteria, as well as the weighting factors developed by the Task Force for each selection criteria.

As an example, in Orchard Hills, the highest weighted score for this study area is the "Upsize/ Storage" option with a total of 137 points, As a result, this alternative received an Alternative Ranking of 1 (the most favorable alternative). The second ranked alternative is the Footing Drain Disconnection alternative with a total of 136 points.

The table also includes the construction cost for the alternative solutions that were developed for reference in applying cost ratings to selection criteria. This cost is shown for the work inside of the study areas as well as the cost of improving the trunk sewer system if needed. These detailed costs are provided in Appendices F and G.

Table H-1 Alternative Decision Matrix

		Rating																										
		Quality of Life (21)									Cost (11)				Construction (10)						Value		Costs (Millions $)			Rank		
		Impact on Open/Park/School Areas	Impact on Natural Features	Impact on Receiving Waters	Customer Disruption (Outside Study Areas)	Customer Disruption (In Study Areas)	Odor Issues	Maintenance Access Needs	Time for Implementation	Certainty of Solution	Construction Costs	Maintenance Costs	Operational Savings	Future SSO Costs	Construction Constraints	Contractor Availability	Traffic Control During Construction	Construction on Private Property	Easement Availability	Construction Season Constraints	Total (Weighted)	Total (Unweighted)	Construction Cost in Study Area	Trunk Sewer Construction Costs[1]	Total Construction Cost	Alternative Ranking	Best Alternative Cost	Percent of Highest Weighted Option
	Weight	**3**	**4**	**2**	**2**	**2**	**1**	**1**	**2**	**4**	**4**	**2**	**3**	**2**	**2**	**2**	**1**	**3**	**1**	**1**								
Area	**Option**																											
Orchard Hills																												
	Relief	3	3	0	0	2	4	5	4	5	1	1	0	0	4	5	1	5	5	2	109	24	2.9	0.4	3.3	4		80%
	Upsize/Relief	3	3	0	0	3	5	5	4	5	1	5	0	0	5	2	2	5	5	2	117	27	2.8	0.4	3.2	3		85%
	Upsize/Storage	3	4	3	4	2	2	2	3	4	5	4	1	3	3	4	2	4	3	0	137	29	2.2	0.0	2.2	1	2.2	100%
	Footing Drain Removal	5	2	5	5	0	4	2	2	2	4	4	5	5	3	4	4	0	4	4	136	37	2.3	0.0	2.3	2		99%
Bromley																												
	Relief	3	3	0	0	2	4	5	4	5	1	1	0	0	4	5	1	5	5	2	109	24	2.1	0.4	2.5	4		78%
	Upsize/Relief	3	3	0	0	3	5	5	4	5	2	5	0	0	5	2	2	5	5	2	121	28	2.0	0.4	2.4	3		86%
	Upsize/Storage	3	4	3	4	2	2	2	3	4	4	4	1	3	3	4	2	4	3	0	133	28	2.0	0.0	2.0	2		95%
	Footing Drain Removal	5	2	5	5	0	4	2	2	2	5	4	5	5	3	4	4	0	4	4	140	38	1.6	0.0	1.6	1	1.6	100%
Dartmoor																												
	Relief	1	1	0	0	2	4	5	4	5	0	1	0	0	3	5	1	5	5	2	89	22	1.8	3.1	4.9	4		64%
	Upsize/Relief	3	3	0	0	3	5	5	4	5	0	5	0	0	5	2	2	5	5	2	113	26	1.8	3.1	4.9	2		81%
	Upsize/Storage	1	0	3	2	4	2	2	3	4	3	4	1	3	1	4	2	4	1	0	101	23	2.8	0.0	2.8	3		72%
	Footing Drain Removal	5	2	5	5	0	4	2	2	2	5	4	5	5	3	4	4	0	4	4	140	38	1.9	0.0	1.9	1	1.9	100%
Glen Leven																												
	Relief	3	3	0	0	2	4	5	4	5	0	1	0	0	4	5	1	5	5	2	105	23	4.6	2.4	7.0	5		77%
	Upsizing	3	3	0	0	3	5	5	4	5	0	5	0	0	5	2	2	5	5	2	113	26	4.6	2.4	7.0	4		83%
	Upsize/Storage 1	2	3	3	4	2	2	2	3	4	3	4	1	3	3	4	2	4	2	0	121	26	4.3	0.0	4.3	3		89%
	Upsize/Storage 2	3	3	3	4	2	2	2	3	4	5	4	1	3	3	4	2	4	2	0	132	28	4.0	0.0	4.0	2		97%
	Footing Drain Removal	5	2	5	5	0	4	2	2	2	4	4	5	5	3	4	4	0	4	4	136	37	4.1	0.0	4.1	1	4.1	100%
Morehead																												
	Relief	3	3	0	0	2	4	5	4	5	0	1	0	0	4	5	1	5	5	2	105	23	4.2	1.3	5.5	5		78%
	Upsizing	3	3	0	0	3	5	5	4	5	0	5	0	0	5	2	2	5	5	2	113	26	4.4	1.3	5.7	4		84%
	Upsize/Storage 1	3	3	3	4	2	2	2	3	4	4	4	1	3	3	4	2	4	3	0	129	28	3.2	0.0	3.2	3		96%
	Upsize/Storage 2	4	3	3	4	2	2	2	3	4	5	4	1	3	3	4	2	4	2	0	135	28	2.9	0.0	2.9	1	2.9	100%
	Footing Drain Removal	5	2	5	5	0	4	2	2	2	3	4	5	5	3	4	4	0	4	4	132	36	3.4	0.0	3.4	2		98%

Definitions

Rating: Range from 0 to 5. In this range, 0 = lowest benefit and 5 = highest benefit

Weight: Range from 1 to 4. In this range, 1 = lowest importance and 4 = highest importance

Value: The higher the alternative value, the better the alternative is considered

Ranking: Ranges from 1 to 5. In this range, 1 = best alternative with higher rankings representing less attractive alternatives. These rankings are based on the weighted values

Minimum	**12.5**	**0.0**	**12.6**	**12.7**
Maximum	**16.8**	**7.6**	**23.4**	

Notes

[1] Trunk sewer costs attributed to these alternatives are a portion of more extensive upgrades needed to handle wet weather flows

Table H-2 Alternative Ranking

Alternative Solutions	Alternative Cost (Millions of $) Study Area	Trunk Sewer	Total Project	Ranking	Percent of Preferred Option
Orchard Hills					
Upsize/Storage	2.2	0.0	2.2	1	100%
Footing Drain Removal	2.3	0.0	2.3	2	99%
Upsize/Relief	2.8	0.4	3.2	3	85%
Relief	2.9	0.4	3.3	4	80%
Bromley					
Footing Drain Removal	1.6	0.0	1.6	1	100%
Upsize/Storage	2.0	0.0	2.0	2	95%
Upsize/Relief	2.0	0.4	2.4	3	86%
Relief	2.1	0.4	2.5	4	78%
Dartmoor					
Footing Drain Removal	1.9	0.0	1.9	1	100%
Upsize/Relief	1.8	3.1	4.9	2	81%
Upsize/Storage	2.8	0.0	2.8	3	72%
Relief	1.8	3.1	4.9	4	64%
Glen Leven					
Footing Drain Removal	4.1	0.0	4.1	1	100%
Upsize/Storage 2	4.0	0.0	4.0	2	97%
Upsize/Storage 1	4.3	0.0	4.3	3	89%
Upsizing	4.6	2.4	7.0	4	83%
Relief	4.6	2.4	7.0	5	77%
Morehead					
Upsize/Storage 2	2.9	0.0	2.9	1	100%
Footing Drain Removal	3.4	0.0	3.4	2	98%
Upsize/Storage 1	3.2	0.0	3.2	3	96%
Upsizing	4.4	1.3	5.7	4	84%
Relief	4.2	1.3	5.5	5	78%

H.2.3 Alternative Ranking

Once the decision matrix was developed, the alternative rankings for all of the alternatives were compiled. The alternative costs and rankings are summarized in Table H-2. In Table H-2, the highlighted alternatives are the most highly ranked ones as well as those having a rating score within 10% of the most highly rated, or preferred, alternative. These highlighted alternatives were viewed as the most viable for implementation.

H.3 Initial Selected Alternatives

The following sections provide a description of the alternatives that were selected initially for each study area. Note that in some areas there was more than one viable alternative that could be implemented, and the final option selected was based on other constraints that might face the City of Ann Arbor.

H.3.1 Orchard Hills

In the Orchard Hills Study area the most highly ranked alternative was the Upsizing and Storage option with a total cost of $2.2 million. This alternative had the lowest construction cost of all of the evaluated alternatives because it made use of the existing retention storage in Georgetown Boulevard. This option also included immediate footing drain disconnection for those homes that had previous basement flooding problems and those homes that had the potential for basement flooding.

The second ranked alternative, footing drain disconnection, had a rating that was 99% of the most highly ranked alternative. This alternative had a construction cost of $2.3 million, which was slightly higher than the preferred alternative. As with the Upsizing and Storage option, this alternative would include immediate footing drain disconnection for those homes that have previously had basement flooding problems and those homes that have the potential for basement flooding. Once this was completed, disconnected footing drain flows would be monitored to establish the final number of footing drain connections requiring removal to provide adequate protection within the study area.

H.3.2 Bromley

In the Bromley Study area the most highly ranked alternative was the use of Footing Drain Disconnection with a total cost of $1.6 million. This alternative also has the lowest construction cost of all of the evaluated alternatives. This option includes immediate footing drain disconnection for those homes that have previously had basement flooding problems and those homes that have the potential for basement flooding.

Once this work is completed, these disconnected footing drain flows would be monitored to establish the final number of footing drain connections that need to be removed to provide adequate protection within the study area. If it were found that sufficient flows could not be removed through the use of a Footing Drain Disconnection program, then the Upsizing and Storage alternative could be used as the final corrective alternative. Alternatively, Footing Drain Disconnection could proceed and used in combination with a smaller Storage/Upsize option.

The second ranked alternative, Upsizing and Storage, had a rating that was 95% of the most highly ranked alternative. This alternative has a construction cost of $2.0 million, which is higher than the highest ranked alternative. As with the Footing Drain Disconnection alternative, this alternative would include immediate footing drain disconnection for those homes that have previously had basement flooding problems and those homes that have the previously had basement flooding problems and those homes that have the potential for basement flooding.

The two lowest ranked alternatives each include increasing sewer capacity. Both of these alternatives had considerably lower ratings and significantly larger construction costs. These alternatives should only be considered if the two most highly rated alternatives couldn't be constructed for either regulatory, construction, or institutional issues.

H.3.3 Dartmoor

In the Dartmoor study area the most highly ranked alternative is the use of footing drain disconnection with a total cost of $1.9 million. This alternative also has the lowest construction cost of all of the evaluated alternatives. This option includes immediate footing drain disconnection for those homes that had previous basement flooding problems and those homes that have the potential for basement flooding.

Once this work is completed, these disconnected footing drain flows would be monitored to establish the final number of footing drain connections that need to be removed to provide adequate protection within the study area. If it were found that sufficient flows could not be removed through the use of a footing drain disconnection program, then another alternative would need to be used as the final corrective alternative or the footing drain disconnection alternative could be combined with one of the other alternatives evaluated to create a hybrid alternative.

The other alternatives for solving the basement flooding problems in this area each had a significantly lower rating compared to Footing Drain Disconnection. The primary reasons were significantly higher costs and impacts on quality of life issues where construction needed to take place.

H.3.4 Glen Leven

In the Glen Leven study area the most highly ranked alternative is the use of Footing Drain Disconnection of between 55% and 70% of the homes with a total cost of $4.1 million. This alternative has a slightly higher construction cost compared to the other alternatives. This option includes immediate footing drain disconnection for those homes that have previously had basement flooding problems and those homes that have the potential for basement flooding.

Once this immediate footing drain disconnection work is completed, these disconnected footing drain flows would be monitored to establish the final number of footing drain connections that need to be removed to provide adequate protection within the study area. This work would be used to determine the number of residential footing drains that would need to be disconnected to provide the desired level of protection for the residents in this study area.

If sufficient flows could not be removed through the use of a footing drain disconnection program, then the second highest ranked alternative, Upsizing and Storage Alternative 2, would be used as the final corrective alternative. This alternative includes a single storage facility possibly located near South Seventh Street and the Pioneer High School property.

The second ranked alternative described above had a rating that was 97% of the preferred alternative. This alternative had a construction cost of $4.0 million, which was slightly lower than the highest ranked alternative. As with the Footing Drain Disconnection program, this alternative included immediate footing drain disconnection for those homes that had previous basement flooding problems, and those homes that had the potential for basement flooding.

The three lowest ranked alternatives each included increasing sewer capacity and one included multiple storage facilities. Each of these alternatives had considerably lower ratings and significantly larger construction costs. These alternatives should only be considered if the two most highly rated alternatives couldn't be constructed for either regulatory, construction, or institutional issues.

H.3.5 Morehead

In the Morehead study area the most highly ranked alternative was the use of Upsizing and Storage with a total cost of $2.9 million. This alternative included increasing capacity in the section of the district flowing through Tudor and Saxon streets. It also included a storage facility and discharge of wet weather flows out of the district in the area of South Seventh Street and Morehead. Finally, a new sewer segment and storage facility would be located near Ann Arbor Saline Road and Mallets Creek. This

option included immediate footing drain disconnection for those homes that have previously had basement flooding problems, and those homes that have the potential for basement flooding.

There were two other highly rated alternatives; Footing Drain Disconnection with 98% and Upsizing and Storage (variation of most highly ranked Upsizing and Storage option) with 96% of the highest ranked alternative. Because these top three alternatives were so closely rated, they could all be used to provide a successful outcome. Each of these alternatives included immediate footing drain disconnection for those homes that had previous basement flooding problems, and those homes that had the potential for basement flooding. Because of this, it is recommended that a final decision on the selected alternative await completion of the immediate footing drain disconnection work and a flow removal evaluation.

If it were found that sufficient flows could not be removed through the use of a footing drain disconnection program, then one of the Upsizing and Storage Alternatives could be used as the final corrective solution.

The two lowest ranked alternatives each included increasing sewer capacity. Each of these alternatives had considerably lower ratings and significantly larger construction costs. These alternatives should only be considered if the three most highly rated alternatives could not be constructed for either regulatory, construction, or institutional issues.

I. Additional Decision Influences

Contents

I.1 Stakeholder Input
I.2 Regulatory Framework
I.3 Project Delivery Methods

I.1 Stakeholder Input

Once the alternative analyses were completed and the decision matrix prepared, a series of neighborhood meetings with homeowners were held and City Council was briefed on the pending program. These presentations are provided in Appendices J and K. Based on input received from these sessions, an implementation program was developed. Survey forms from these sessions are included in Appendix L. The following are the issues resulting from those sessions.

I.1.1 Customers

Neighborhood meetings were held in Bromley and Orchard Hills, in Dartmoor, and in Glen Leven and Morehead. These meetings were conducted to present the different alternatives that had been evaluated and to provide information on the advantages and disadvantages of each alternative. The costs for the different alternatives were also presented. From those meetings, a number of common themes were received from the attendees:

Quick Action is Needed - For those affected by the flooding problems, it was clear that homeowners wanted to have a quick remediation of the problem in their area so that they would no longer be at risk for flooding.

All Affected Homeowners Want Protection - Homeowners from areas outside of the five study areas made it clear that they also wanted a solution to the flooding problem as soon as possible.

Work on Private Property Causes Concern - For those homeowners that had previously have basement flooding, they generally said that work on their property (basement and lawn) would be acceptable if this would resolve their problem. However, there were some affected homeowners who were very resistant to allowing any work to be performed. There was also a general concern from unaffected homeowners regarding potential work on their property.

How Work is Paid For - In general, the homeowners believed that costs of the program should be paid for by the Water Utilities Department as a system cost. There was recognition that all users of the system should pay for the resolution of the basement flooding issue.

Uniform Solution Desired - There was confusion about how the City would handle situations where a limited number of homes would need to be disconnected to eliminate the flooding. Some homeowners felt singled out and believed that a uniform application of work on private property would be fairer.

Don't Move the Problem Downstream - As in other meetings, it was clear that homeowners wanted to see the problem resolved in a way that did not just move it to another group of homeowners.

Natural Features are Important to Homeowners - There was significant resistance to those alternatives requiring construction in areas that would impact natural features.

Environmentally Sensitive Solutions Supported - In general, homeowners wanted alternatives that dealt with the basement flooding issue in an environmentally sensitive manner.

I.1.2 City Council

A presentation was made to the Ann Arbor City Council on April 9, 2001 to outline the different alternatives, the preliminary costs and implementation issues associated with them. The following were comments that came out of this session.

Additional Decision Influences

Which Solutions Have Been Successful Elsewhere - The City Council was interested in how each of the different options had performed in other communities. The issue of how excessive footing drain flows had been handled in other communities was discussed. The Council was particularly interested in communities that had instituted a footing drain disconnection program successfully.

Can the City Work on Private Property - The option of footing drain disconnection was seen as a viable solution only if access to private property could be arranged. The Council was interested in how other communities had handled this issue.

How Would the Work be Paid For - For work on private property, the issue of what was appropriate for individual homeowners and the City to pay was discussed.

What are the Future SSO Requirements - There are pending SSO regulations that have impacts on discharges and on the operation of the WWTP. The Council was interested in how each of the alternatives would impact the ability of the City to comply with these new requirements.

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

This feedback from customers and Council members indicated to the Task Force that the rankings on the decision matrix should be modified to better represent community values and interests. This effort led to a review of the advantages of footing drain disconnection for all 5 study areas.

I.2 Regulatory Framework

The control of sanitary sewer overflows has been under increasing scrutiny in recent years. While discharges of untreated wastewater to the open environment has been illegal for many years; the infrequent and emergency nature of these discharges has limited the regulatory response. Following is a summary of the regulations being adopted.

I.2.1 State and Federal Regulations

On January 5, 2001 EPA signed and issued a draft rule on sanitary sewer overflows (SSOs). The following is an overview discussing the impact of the official draft regulation:

- ***Municipal Satellite Collection System*** - This section of the regulation will require owners of satellite collection systems to obtain a no discharge NPDES permit or issue a permit amendment to the owner of the POTW facility that receives wastewater from the satellite collection system.
- ***Municipal Sanitary Sewer Systems*** - Capacity, Management, Operation and Maintenance (C-MOM) Programs. As a result of this requirement, all NPDES permittees will be required to develop and implement a C-MOM program following the standards prescribed in the regulation. A complete C-MOM program is quite comprehensive.
- ***Municipal Sanitary Sewer Systems*** - Prohibition of Discharges. This portion of the regulation defines the general prohibition of SSO discharges and the use of enforcement discretion for SSOs caused by "severe natural conditions" and affirmative defenses for discharges caused by other factors beyond the "reasonable control" of the utility. The affirmative defense clause is very important to provide appropriate liability protection for SSOs that are beyond the control of the utility.
- ***Municipal Sanitary Sewer Systems*** - Reporting, Public Notification, and Recordkeeping. This rule defines what is considered an SSO and defines--in a certain level of detail--procedures for agency notification, public notification, and recordkeeping. In the current versions of the regulation, US EPA has broadened the definition of SSOs to include discharges that reach waters

of the US, as well as overflows that do not reach waters of the US such as wastewater backups into buildings caused by the utility operation.

- ***Pending State of Michigan Regulations*** - Several bills are being developed in the State legislature that may limit the liability of communities having an approved SSO prevention plan. The new bills would provide funding for the SSO programs. These new legislation will be reviewed once enacted.

I.3 Project Delivery Methods

There are alternative methods that can be used to contract for the construction work that needs to be performed. Each of these methods has implications on the completion schedule of the work and on the ultimate cost for the work to be performed. Following is a description of the different methods that could be employed for the alternatives described above.

I.3.1 Design/Bid/Construct

Under the traditional delivery method, the City would own a separate design contract to prepare a biddable project. Once this is completed, a contractor (or contractors) would be selected to perform the different projects. The City would own all of the contracts and would manage the construction work being undertaken by the contractor. This may include a shop drawing review, request for information, and resident services components. The construction contractor would be selected using low-bid format.

I.3.2 Design with Construction Manager

Under the traditional construction manager approach, a design would be prepared, as with conventional Design/Bid/Construct and a construction contractor (or contractors) would be selected. Under this approach, the City would also enter into a contract for a construction manager to handle the coordination with the construction contractor as well as the homeowners.

I.3.3 Construction Manager at Risk

Under this approach, the City would hold the contract with the designer and also the Construction Manager. Under this approach, however, the Construction Manager would then hold the contracts for the construction contractors. This would provide the flexibility to use a variety of subcontractors for different aspects of the work (plumbing, electrical, trenching) and locations where the work is being performed. The bidding of the work could also be performed throughout the project as the work progresses. The Construction Manager would also control the schedule under which the work is performed. The contract with the Construction Contractor could either be lump sum or on a not to exceed or unit cost basis.

I.3.4 Design/Build

In this approach, the Construction Management team also includes the Designer. Under this approach the City sets general objectives. The Design/Build team is responsible for the preparing the design and implementing the design in the field. As in Construction Manager at risk, the Design/Build contractor holds all construction contracts. These could be bid competitively by the D/B contractor.

This approach has the advantage of not having to have a complete design for all areas before the work starts. It allows the Design/Build contractor to adjust the design to the conditions as the construction process unfolds. This approach allows enough design to be prepared to begin the work and provides the flexibility to make changes in the field. This may be particularly helpful for footing drain disconnection work since each homeowner will have different ideas of what is important to them.

Exhibit 7: MCL 213.23 as it existed in 2002 and 2003

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

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Exhibit 7: MCL 213.23 as it existed in 2002 and 2003

M.C.L.A. 213.23
MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 213. **CONDEMNATION**
ACQUISITION OF PROPERTY BY STATE AGENCIES AND PUBLIC CORPORATIONS

213.23. Authority to take private property

Sec. 3. Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act.

HISTORICAL AND STATUTORY NOTES

1998 Main Volume

Source:
P.A.1911, No. 149, § 3, Eff. Aug. 1.
C.L.1915, § 355.
P.A.1925, No. 37, Eff. Aug. 27.
C.L.1929, § 3765.
C.L.1948, § 213.23.
P.A.1966, No. 351, § 1, Imd. Eff. Dec. 21.
C.L.1970, § 213.23.

CONSTITUTIONAL PROVISIONS

1998 Main Volume

U.S.C.A. Const.Amend. 5, provides, in part:

" * * * nor shall private property be taken for public use, without just compensation."

U.S.C.A. Const.Amend. 14, provides, in part:

" * * * nor shall any State deprive any person of life, liberty, or property, without due process of law."

Article 10, § 2, provides:

"Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

CROSS REFERENCES

Acquisition of state land by United States, see §§ 3.201 et seq., 3.258.
Aeronautics commission, see §§ 259.101, 259.104.
Airports,
Generally, see § 259.126 et seq.

Exhibit 8: MCL 213.23 as it was amended in 2006 and 2007

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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Exhibit 8: MCL 213.23 as it was amended in 2006 and 2007

Michigan Compiled Laws Annotated
Chapter 213. Condemnation
Acquisition of Property by State Agencies and Public Corporations (Refs & Annos)

M.C.L.A. 213.23

213.23. Authority for taking of private property; taking of private property for transfer to private entity; "public use" defined; burden of proof as to taking for public use; compensation for principal residence taken for public use; pretext public use taking; preservation of rights, grants, or benefits afforded to property owners as of December 22, 2006

Effective: January 9, 2007
Currentness

Sec. 3. (1) Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public use and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency, a division of a state agency, the office of the governor, or a division of the office of the governor for the purpose of acquiring lands or property for a designated public use, the unit of a state agency to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation, or otherwise. For the purpose of condemnation, the unit of a state agency may proceed under this act.

(2) The taking of private property by a public corporation or a state agency for transfer to a private entity is not a public use unless the proposed use of the property is invested with public attributes sufficient to fairly deem the entity's activity governmental by 1 or more of the following:

(a) A public necessity of the extreme sort exists that requires collective action to acquire property for instrumentalities of commerce, including a public utility or a state or federally regulated common carrier, whose very existence depends on the use of property that can be assembled only through the coordination that central government alone is capable of achieving.

(b) The property or use of the property will remain subject to public oversight and accountability after the transfer of the property and will be devoted to the use of the public, independent from the will of the private entity to which the property is transferred.

(c) The property is selected on facts of independent public significance or concern, including blight, rather than the private interests of the entity to which the property is eventually transferred.

(3) As used in subsection (1), "public use" does not include the taking of private property for the purpose of transfer to a private entity for either general economic development or the enhancement of tax revenue.

(4) In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking of private property because the property is blighted, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.

(5) If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. In order to be eligible for reimbursement under this subsection, the individual's principal residential structure must be actually taken or the amount of the individual's private property taken leaves less property contiguous to the individual's principal residential structure than the minimum lot size if the local governing unit has implemented a minimum lot size by zoning ordinance.

(6) A taking of private property for public use, as allowed under this section, does not include a taking for a public use that is a pretext to confer a private benefit on a known or unknown private entity. For purposes of this subsection, the taking of private property for the purposes of a drain project by a drainage district as allowed under the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630, does not constitute a pretext to confer a private benefit on a private entity.

(7) Any existing right, grant, or benefit afforded to property owners as of December 22, 2006, whether provided by the state constitution of 1963, by this section or other statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the 2006 amendatory acts that added or amended this subsection. [1]

(8) As used in this section, “blighted” means property that meets any of the following criteria:

(a) Has been declared a public nuisance in accordance with a local housing, building, plumbing, fire, or other related code or ordinance.

(b) Is an attractive nuisance because of physical condition or use.

(c) Is a fire hazard or is otherwise dangerous to the safety of persons or property.

(d) Has had the utilities, plumbing, heating, or sewerage disconnected, destroyed, removed, or rendered ineffective for a period of 1 year or more so that the property is unfit for its intended use.

(e) Is tax reverted property owned by a municipality, by a county, or by this state. The sale, lease, or transfer of tax reverted property by a municipality, a county, or this state shall not result in the loss to the property of the status as blighted for purposes of this act.

(f) Is property owned or under the control of a land bank fast track authority under the land bank fast track act, 2003 PA 258, MCL 124.751 to 124.774. The sale, lease, or transfer of the property by a land bank fast track authority shall not result in the loss to the property of the status as blighted for purposes of this act.

(g) Is improved real property that has remained vacant for 5 consecutive years and that is not maintained in accordance with applicable local housing or property maintenance codes or ordinances.

(h) Any property that has code violations posing a severe and immediate health or safety threat and that has not been substantially rehabilitated within 1 year after the receipt of notice to rehabilitate from the appropriate code enforcement agency or final determination of any appeal, whichever is later.

Credits

Amended by P.A.2006, No. 367, Eff. Dec. 23, 2006; P.A.2006, No. 368, Eff. Dec. 23, 2006; P.A.2006, No. 656, Imd. Eff. Jan. 9, 2007.

Notes of Decisions (44)

Footnotes

1 P.A.2006, No. 368; P.A.2006, No. 656.

M. C. L. A. 213.23, MI ST 213.23

The statutes are current through P.A.2014, No. 33, of the 2014 Regular Session, 97th Legislature.

End of Document

Exhibit 9: *LaBelle Ltd. P'ship v Cent. Michigan Univ. Bd. of Trustees*, 305626, 2012 WL 3321728 (Mich Ct App, 8/14/12)

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

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Exhibit 9: *LaBelle Ltd. P'ship v Cent. Michigan Univ. Bd. of Trustees*, 305626, 2012 WL 3321728 (Mich Ct App, 8/14/12)

2012 WL 3321728
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

LABELLE LIMITED
PARTNERSHIP, Plaintiff–Appellant,
v.
CENTRAL MICHIGAN UNIVERSITY BOARD
OF TRUSTEES, Defendant–Appellee.

Docket No. 305626. | Aug. 14, 2012.

Court of Claims; LC No. 11–000016–MZ.

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

Opinion

PER CURIAM.

***1** LaBelle Limited Partnership ("LaBelle") appeals as of right the Court of Claims' grant of summary disposition [1] in favor of the Board of Trustees of Central Michigan University ("the Board") based on lack of standing. We affirm.

LaBelle owns and operates two hotels, a restaurant and a convention center ("LaBelle facilities") on two parcels of land it leases from Central Michigan University ("CMU"). Originally, the parcels of land were leased by LaBelle Leasing Company ("LaBelle Leasing"), but the leases were later assigned to LaBelle. [2]

On December 2, 2010, the Board "announced plans to permit [ ] private developer, Lodgco, LLC [("Lodgco")], to construct and operate a 150–room hotel, conference center and restaurant" attached to CMU's football stadium ("proposed project"). During a meeting on December 2, 2010, the Board also voted to permit CMU to negotiate a contract with Lodgco to lease the land on which the proposed project would be constructed. The lease was to be presented to the Board for approval thereafter.

On January 28, 2011, LaBelle filed a verified complaint for "injunctive and other relief" to "protect its leasehold interest." The complaint alleged (1) "unlawful use of public property for private benefit" in violation of MCL 213.23, (2) "unlawful creation of a lien on public property" in violation of MCL 390.558, and (3) "violation of applicable zoning" ordinances.

Barton LaBelle, one of LaBelle's general partners, was deposed on June 15, 2011. When Barton LaBelle was questioned regarding what he was attempting to accomplish with the instant lawsuit, he replied "I'd like to have the Court decide whether it's legal for the university to build a privately owned and operated hotel on their state property." While Barton LaBelle admitted that two of LaBelle's hotels were on state property, he advised that "the world's changed since we built ours." When asked to elaborate on his position, Barton LaBelle testified that case law and a "referendum in 2005, 2006, precludes the use of state property for private purposes." Barton LaBelle explained further that, "My understanding, it was a vote by the people of the State of Michigan to preclude using property acquired through imminent [sic] domain or through taxpayer money for private purposes." Barton LaBelle further stated that he was unsure which of CMU's properties were purchased and which were acquired by eminent domain.

The following testimony was elicited from Barton LaBelle regarding the alleged harm LaBelle would suffer as a result of the proposed project.

> *Q.* Okay. Now, do you believe that construction of this project that is the subject matter of your lawsuit would be harmful to you?
>
> *A.* Certainly.
>
> *Q.* In what way would it harm you?
>
> *A.* Well, the hotel business industry, as a whole, is a—in economic terms, is an elastic business in that in any given night, any given market, only so many rooms are going to be sold. Somewhat different than the restaurant business. The restaurant business is somewhat elastic in that the more choices people have, the more they'll actually eat out. That's not true with hotel rooms, so from that standpoint, there's only going to be so many hotel rooms sold in this market for a given night, and any intrusion of competition comes in pretty much affects other operations within the same market area.
>
> ***2** *Q.* So do you believe that if this project that is the subject of this lawsuit is constructed, that Labelle Limited Partnership will rent fewer hotel rooms?

A. Of course. But I might add that we are not objecting to competition. Evidence to that fact is the fact that we were willing to sell land to Lodgco to build the same property—the same type of property a half mile away from us, so the motivation here is not to prohibit competition, even though, in either location, they would be competitive. The issue here is location of the proposed hotel on stadium land—on state-owned land. That is our objection.

Q. And why do you object to that?

A. Because taxpayer money is being used—some of our money that we've paid in taxes is being used to provide a business location for a private developer.

Q. Just as was done for you in University Park?

A. But it was legal then; it's not legal now, in our opinion.

When Barton LaBelle was further questioned regarding the harm LaBelle would suffer as a result of the proposed project, the following testimony resulted:

Q. Would the project that is the subject of this lawsuit cause Labelle Limited Partnership any harm other than what you've already described to me?

A. In a specific sense or a general sense?

Q. Both. Let's start with specific and then we'll go to general.

A. Okay. In a specific sense, not any more harm than what I have described.

Q. Okay.

A. In a general sense, I think it's a poor precedent to use taxpayer money to allow private development to then turn around and compete with other taxpayers, really in a more subsidized manner, and the people—as far as I know, the legislature, and the people in the state of Michigan have agreed with that premise.

And I might add, too, that the impetus, as I mentioned earlier and I would like to expand on it—the impetus on our development on state land or University Park at the time was because there was a need for hotel rooms at the time, determined by the university at the south end of the town. There weren't any. That particular need for hotel rooms at the south end of town does not exist now; there are plenty. And as documented in the Smith reports and the other market occupancy publications that are put out monthly, the occupancy in the Mount Pleasant market is under 60 percent, the general hotel occupancy. That corresponds to our evidence—or our history. We are running under 60 percent. The state of Michigan is running under 60 percent, so there isn't a shortage of hotel rooms like there was when the university induced us to come onto their property and build a hotel. We spent $3 million.

Barton LaBelle then testified that the leasehold interest that he is attempting to protect as described in the complaint was the "[c]ompetitive nature of the business" of his two hotels, restaurant and conference center. He explained that LaBelle did not "want a competitive venture sitting on state-owned land[.]"

***3** Thereafter, the Board filed a motion for summary disposition "based on lack of standing," which the Court of Claims granted.[3] The Board asserted that preventing competition was not a valid basis for suit and that LaBelle failed to assert and cannot demonstrate that "it has a substantial interest that will be detrimentally affected in a manner different from the citizenry at large" if the proposed project is completed.

A motion brought pursuant to MCL 2.116(C)(10) tests the factual sufficiency of the complaint.[4] When opposing a motion brought under this section, the plaintiff may not rest solely on its complaint, but must provide testimonial and/or documentary evidence.[5] Summary disposition under this section is proper when considering all of the proffered evidence in the light most favorable to the nonmoving party, it is found that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[6] This Court reviews the Court of Claims' decision to grant or deny a motion for summary disposition de novo.[7]

On appeal, LaBelle argues that the Court of Claims erred when it found that LaBelle lacked standing to bring suit for injunctive or declaratory relief to prevent the construction of the proposed project. We disagree.

LaBelle first asserts that it has standing to bring suit for injunctive relief as the proposed project would result in a nuisance per se because it violates the applicable zoning ordinance.[8] MCL 125.3407 provides that "a use of land ... used, erected, altered, razed, or converted in violation of a zoning ordinance ... is a nuisance per se." "[T]he quantity of

proofs required of an individual to prove a public nuisance" are reduced when violation of a local ordinance is considered a nuisance per se.[9] A plaintiff seeking injunction of a nuisance per se is, however, required to demonstrate that it suffered "damages of a special character distinct and different from the injury suffered by the public generally."[10] Thus, contrary to LaBelle's assertion, standing is not conferred by virtue of a plaintiff's proximity to the proposed project and demonstration of special damages is necessitated.

Although Barton LaBelle testified that he did not object to the increased competition that would result from the proposed project, he also testified that the leasehold interest that he was attempting to protect was the "[c]ompetitive nature of the business." Additionally, Barton LaBelle testified that the damages that LaBelle will allegedly suffer if the proposed project proceeds are that LaBelle will rent fewer hotel rooms. Because LaBelle's damages are purely economic in nature and this Court has held that "proof of general economic ... losses [is insufficient] to show special damages," LaBelle's argument that it has standing to seek injunctive relief for violation of a local zoning ordinance must fail.[11]

LaBelle's assertion that it has standing to bring suit for injunctive relief for the "unlawful use of public property for a public benefit"[12] also lacks merit. LaBelle's complaint states that under "MCL 213.23(1), (2), (3), and (6), CMU is prohibited from transferring private property acquired with state funds for public use to a private entity, such as Lodgco, LLC."

***4** A court has the discretion to determine whether a litigant has standing "[w]here a cause of action is not provided at law."[13]

> A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.[14]

LaBelle admits and review of MCL 213.23 reveals that the statute does not specifically confer standing on LaBelle to sue the Board for injunctive relief. Additionally, LaBelle references no "statutory scheme" that "implies that the Legislature intended to confer standing" on a nearby property owner to enforce the statute.[15] Moreover, as the only alleged injury to LaBelle from the proposed project is economic, which is insufficient to prove special damages, LaBelle lacks standing.[16]

LaBelle also unsuccessfully asserts that it has standing to bring suit for injunctive relief for the "unlawful creation of a lien on public property."[17] The statute again fails to confer standing on LaBelle to sue, and LaBelle has not cited a statutory scheme implying that standing under this statute was intended by the Legislature.[18] As such, it is required that LaBelle demonstrate that it "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large" necessitating injunctive relief.[19] Because LaBelle's claim is for economic damages due to increased competition, which is not sufficient to show special damages, the Court of Claims properly found that LaBelle did not have standing.[20]

Moreover, standing to seek a declaratory judgment is established when "a litigant meets the requirements of MCR 2.605."[21] MCR 2.605 states that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment[.]" "An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights."[22] Because our Supreme Court has determined that a plaintiff's desire to prevent increased competition is not an "actual controversy," as the Court of Claims aptly noted, declaratory relief is not warranted.[23]

LaBelle also argues that the Court of Claims erred when it failed to mention the affidavit of Barton LaBelle and found that the affidavit of L. Glen Stanton failed to create a genuine issue of material fact to justify denial of the Board's motion for summary disposition. We disagree. This Court notes that while the Court of Claims' opinion fails to specifically mention the consideration that it gave to the affidavit of Barton LaBelle, Barton LaBelle's affidavit contains the same allegations of damages as Stanton's affidavit, thus any error asserted by LaBelle lacks merit.

***5** Additionally, review of both affidavits reveals that neither affidavit establishes "damages of a special character distinct and different from the injury suffered by the public generally" to confer standing on LaBelle.[24] The affidavits state that the proposed project would: (1) "change the character of the 'neighborhood' now enjoyed by patrons

of the LaBelle facilities;" (2) "increas[e] the number of inebriates and those under the influence of alcohol on football Saturdays, to the detriment of the peace and quiet of the 'neighborhood' now enjoyed by patrons of the LaBelle facilities;" (3) cause "congestion and traffic and danger to pedestrians and other motorists in the immediate area, including patrons of the LaBelle facilities;" (4) compromise the personal safety of the LaBelle patrons "by the increased hazard of drinking and driving that will arise from the operation of a hotel, parking structure, and bar on the stadium property;" (5) "impair the architectural purity of the existing oval stadium as viewed by patrons of the LaBelle facilities;" (6) "further saturate the limited local market for transient housing, and thereby diminish the value of the existing LaBelle facilities;" and (7) cause a greater hazard of "fire, earthquake, and like dangers" resulting from the stadium hotel being taller than surrounding structures, "thus importing [additional] risks to LaBelle facilities and patrons." While each of the allegations of damages are phrased specifically to address how LaBelle will be affected by the proposed project, review of their content reveals that none of the damages are of "a special character distinct and different from the injury suffered by the public generally."[25] Any damage resulting from the change to the neighborhood, traffic, safety, or architectural purity would also be experienced by the general public and is not specific to LaBelle, thus relief is not warranted.

Affirmed.

Footnotes

1 MCR 2.116(C)(10).
2 On April 18, 2011, LaBelle Leasing Company assigned the ground leases it had with CMU to LaBelle Limited Partnership, which the Board consented to on June 20, 2011.
3 MCR 2.116(C)(10).
4 *Lakeview Commons LP v. Empower Yourself, LLC,* 290 Mich.App 503, 506; 802 NW2d 712 (2010).
5 MCR 2.116(G)(4).
6 *Coblentz v. City of Novi,* 475 Mich. 558, 567–568; 719 NW2d 73 (2006).
7 *Dressel v. Ameribank,* 468 Mich. 557, 561; 664 NW2d 151 (2003).
8 MCL 125.3407.
9 *Towne v. Harr,* 185 Mich.App 230, 232; 460 NW2d 596 (1990).
10 *Id.* at 232–233.
11 *Unger v. Forest Home Twp,* 65 Mich.App 614, 617; 237 NW2d 582 (1975).
12 MCL 213.23.
13 *Lansing Sch Ed Ass'n v. Lansing Bd of Ed,* 487 Mich. 349, 372; 792 NW2d 686 (2010).
14 *Id.*
15 MCL 213.23.
16 *Unger,* 65 Mich.App at 617.
17 MCL 390.558.
18 *Lansing Sch Ed Ass'n,* 487 Mich. at 372.
19 *Id.*
20 *Unger,* 65 Mich.App at 617.
21 *Lansing Sch Ed Ass'n,* 487 Mich. at 372.
22 *Lansing Sch Ed Ass'n v. Lansing Bd of Ed (On Remand),* 293 Mich.App 506, 515; 810 NW2d 95 (2011).
23 See *Anderson v. Village of Rochester,* 263 Mich. 130, 132; 248 NW 571 (1933).
24 *Towne,* 185 Mich.App at 232.
25 *Id.*

Exhibit 10: *Gaylord v Maple Manor Investments, LLC*, 266954, 2006 WL 2270494 (Mich Ct App 8/8/06)

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Exhibit 10: *Gaylord v Maple Manor Investments, LLC*, 266954, 2006 WL 2270494 (Mich Ct App 8/8/06)

2006 WL 2270494
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

CITY OF GAYLORD, Plaintiff-Appellee,
v.
MAPLE MANOR INVESTMENTS, LLC, Thomas McHugh, Gladys McHugh, Eric Jensen, Randy Russell, Frank A. Moore, the Bernadette Seidell Trust, Mark LaForest, Huffmaster Associates, LLC, Jaunice S. Cesaro as trustee of the Eliseo V. Cesaro Living Trust, Gerald Beattie, Sue E. Beattie, Defendants,
and
the Francesco R. Mazzella Trust, the Yolanda Mazzella Trust, Larry K. Miller, Mary E. Miller, Lynneadair Totten and William Totten, Defendants-Appellants.

Docket No. 266954. | Aug. 8, 2006.

Synopsis

Background: Homeowners brought action for declaratory and injunctive relief after city enacted ordinances which required homeowners to connect to city water system. The Circuit Court, Otsego County, granted city's motion for summary disposition, and homeowners appealed.

Holdings: The Court of Appeals held that:

[1] city had authority under the police power to enact ordinances;

[2] ordinances were rationally related to the legitimate public purpose of ensuring a clean and safe water supply and thus did not violate homeowners' due process rights;

[3] ordinances were not required to substantially advance a legitimate state interest in order to survive homeowners' takings claim;

[4] ordinances did not constitute a regulatory taking; and

[5] ordinances did not constitute a tax passed in violation of the Headlee Amendment.

Affirmed.

West Headnotes (5)

[1] Water Law
Compulsory connection to centralized public water supply, and termination of use of wells

Home rule city had authority under the police power to enact ordinance which required homeowners to connect to city water system, even though ordinance affected homeowner's valuable property right to groundwater. M.C.L.A. Const. Art. 7, § 22; M.C.L.A. § 117.3(j).

Cases that cite this headnote

[2] Constitutional Law
Water, sewer, and irrigation

Water Law
Compulsory connection to centralized public water supply, and termination of use of wells

City ordinances which required homeowners to connect to city water system were rationally related to the legitimate public purpose of ensuring a clean and safe water supply and thus did not violate homeowners' due process rights. U.S.C.A. Const.Amend. 14; M.C.L.A. Const. Art. 1, § 17.

Cases that cite this headnote

[3] Eminent Domain
Water supply in general

City ordinances which required homeowners to connect to city water supply were not required to substantially advance a legitimate state interest in order to survive homeowners' takings claim.

U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

Cases that cite this headnote

[4] Eminent Domain

Water supply

City ordinances which required homeowners to connect to city water supply did not constitute a regulatory taking; ordinances were a legitimate exercise of the city's police power, there was no evidence that connection to city water supply reduced homeowners' property values, and connection to city water supply did not reduce homeowners' primary expectations concerning their uses of the affected parcels. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2.

Cases that cite this headnote

[5] Water Law

Compulsory connection to municipal supply

Water Law

Charges as Taxes or Assessments

City ordinances which required homeowners to connect to city water supply did not constitute a tax passed in violation of the Headlee Amendment, which prohibits taxes not approved by a majority of the city electors; there was no evidence that city raised revenue through the operation of its water system or that city's charges for water use were disproportionate to the costs of the services provided, and homeowners had ultimate control over the amount of water used and thus ultimate control over the amount of their water bills. M.C.L.A. Const. Art. 9, § 31.

Cases that cite this headnote

Otsego Circuit Court; LC No. 04-010967-CZ.

Before: CAVANAGH, P.J., and SMOLENSKI and TALBOT, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

***1** In this action for declaratory and injunctive relief, defendants the Francesco R. Mazzella Trust, the Yolanda Mazzella Trust, Larry K. Miller, Mary E. Miller, Lyneadair Totten and William Totten [1] appeal as of right the trial court's grant of summary disposition in favor of plaintiff City of Gaylord (the City) pursuant to MCR 2.116(C)(9) and denial of defendants' motion for summary disposition pursuant to MCR 2.116(I)(2). We affirm.

I. Facts and Procedural History

Defendants all own property formerly located in Bagley Township in Otsego County. Between 1993 and 1996, the City annexed territory encompassing the defendants' parcels. Prior to the City's annexation, defendants' properties were each served by private wells and septic systems. However, pursuant to Gaylord Ordinances, § 5302,

> Except as otherwise provided in Section 5304.2, the owner of all houses, buildings, structures, tenements, premises or improvements situated within the City of Gaylord, in or on which water is used or consumed and abutting on any street, highway, alley or right-of-way in which there is now or hereafter may be located facilities of the City of Gaylord to supply potable water, shall connect to such facilities and use the same for all water used or consumed on the premises. Such connections shall be made within ninety (90) days of official notice to do so. Provided, however, that the requirements of this section shall apply only in the event that the potable water facilities are within two hundred (200') feet of the nearest property line.

Further, after the annexation, the City enacted the following ordinance applicable to the parcels in the areas annexed:

> As to any property which has come within the jurisdiction of the City of Gaylord through a contract pursuant to Public Act 425 of 1984 or through annexation, between the dates of November 17, 1994 and November 17, 1996, and which has an operating well in use on the effective date of this amendment, the following shall apply:
>
> a. The use of such water well shall be discontinued and said well abandoned and sealed off upon the earlier of 1) a sale of the property, or 2) when said well in no longer operable or needs to be reworked or replaced, or 3) at such time as the premises are connected to the Gaylord Water Supply System, or 4) November 17, 2001. [Gaylord Ordinances, § 5304.2]

After some time, the City notified defendants that, pursuant to these City ordinances and an ordinance requiring connection to the City's sewage system, defendants would have to connect to the City's water and sewage system and cease using their wells. Although defendants connected to or agreed to connect to the City's sewage system, defendants refused to connect to the City's water system and cease using their wells.

In October 2004, the City filed the present action seeking declaratory and injunctive relief. In its complaint, the City asked the trial court to declare that defendants were required to connect to the City's water system and that the failure to do so constituted a nuisance. Defendants responded by arguing that the City did not have the authority to compel defendants to cease using their wells and connect to the City's water system. In May 2005, the City moved for summary disposition pursuant to MCR 2.116(C)(9) and defendants moved for summary disposition pursuant to MCR 2.116(I)(2).

***2** In November 2005, the trial court issued its opinion and order. The trial court determined that the City ordinances, which required defendants to connect to the City's water system and cease using their wells, were valid and enforceable exercises of the City's police power. Accordingly, the trial court granted the City's motion for summary disposition and ordered defendants to connect to the City's water system.[2] The trial court also denied defendants' motion for summary disposition. Defendants then appealed as of right.

On appeal, defendants do not contest the factual basis of plaintiff's claims. Instead, defendants present various arguments attacking the validity of the ordinances passed by the City, which require defendants to cease using their wells and connect to the City's water system. Because these ordinances are invalid, defendants argue, the trial court should have granted summary disposition in favor of defendants pursuant to MCR 2.116(I)(2). We disagree.

II. Standards of Review[3]

This Court reviews de novo the grant or denial of a motion for summary disposition. *Cawood v. Rainbow Rehab. Ctr,* 269 Mich.App. 116, 118, 711 N.W.2d 754 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v. Ameribank,* 468 Mich. 557, 561, 664 N.W.2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v. Globe Life Ins. Co.,* 460 Mich. 446, 454-455, 597 N.W.2d 28 (1999)."A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."*West v. Gen. Motors Corp.,* 469 Mich. 177, 183, 665 N.W.2d 468 (2003). This Court also reviews de novo issues of constitutional law. *Wayne Co. v. Hathcock,* 471 Mich. 445, 455, 684 N.W.2d 765 (2004).

III. The Police Power

Defendants first contend that enactment of the ordinances constitute an invalid application of the City's police power. We disagree.

A. Authority to Regulate

[1] The City is a home rule city. Pursuant to Const 1963, art 7, § 22, home rule cities have the power to "adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law."This grant of authority has been broadly construed to not only include those powers specifically granted, but also all powers not expressly denied. *AFSCME v. Detroit,* 468 Mich. 388, 410, 662 N.W.2d 695 (2003)."Among the powers that may properly be exercised by a home rule city

is the police power."*Belle Isle Grill Corp. v. Detroit*, 256 Mich.App. 463, 481, 666 N.W.2d 271 (2003); see also MCL 117.3(j) (requiring city charters to include provisions for the "public peace and health and for the safety of persons and property."). [4] Except where limited by constitution or statute, the police power of a home rule city " 'is of the same general scope and nature as that of the state.'"*Belle Isle Grill Corp, supra* at 481, 666 N.W.2d 271, quoting *People v. Sell*, 310 Mich. 305, 315, 17 N.W.2d 193 (1945).

***3** It is well settled that ordinances are presumed valid and the burden is on the person challenging the ordinance to rebut the presumption. *Detroit v. Qualls*, 434 Mich. 340, 364, 454 N.W.2d 374 (1990). Defendants have not identified any statute or constitutional provision that expressly denies municipalities the power to require property owners to connect to a municipal water supply and use only the municipal water on the premises. [5] Instead, relying on *Jones v. Bd of Water Comm'rs of Detroit*, 34 Mich. 273 (1876), defendants contend that municipalities may never compel persons to purchase water. Defendants' reliance is misplaced.

In *Jones*, the Court was presented with the question as to whether the Legislature had the power to enact a statute that required the Detroit board of water commissioners to levy an assessment against lots within Detroit that fronted water lines, but whose owners did not pay for water service. *Id.* at 273.The Court held that the statute was in effect a tax and, therefore, subject to the limitations imposed on general taxes. *Id.* at 275.This, the Court noted, was in contrast to the rates paid by water consumers.

> The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness, like that enforced on mechanics' contracts, or against ships and vessels. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them. [*Id.* at 274.]

Because *Jones* concerned the validity of a general tax passed by the state Legislature rather than the validity of a regulatory ordinance enacted pursuant to a municipality's police power, it is inapplicable to the facts of this case. Further, taken in context, the *Jones* Court's statement that "[n]o one can be compelled to take water unless he chooses," merely recognized that water consumers ultimately have control over the amount of their water bill because they control the amount of water that they consume. *Id.* Consequently, *Jones* does not stand for the proposition that municipalities lack the authority to compel property owners to connect to a municipal water supply and consume only municipal water on the premises. [6]

Defendants also erroneously argue that, because the right to withdraw groundwater is a valuable property right, the City necessarily lacks the authority to compel defendants to cease using their groundwater. We agree that the right to use groundwater is a valuable property right. See *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*, 269 Mich.App. 25, 105, 709 N.W.2d 174 (2005) ("[T]his state has long recognized that private persons obtain property rights in water on the basis of their ownership of land."). However, we do not agree that home rule cities lack the authority to enact ordinances that affect property rights. It is well established that the police power allows the government to regulate land use.*Paragon Properties Co. v. Novi*, 452 Mich. 568, 576, 550 N.W.2d 772 (1996). Hence, the fact that the City's ordinances affect a property right will not, absent more, render the ordinances invalid. Furthermore, to the extent that defendants' argument could be interpreted as a challenge based on due process, that argument too is unavailing.

B. Substantive Due Process

***4** Both the state and federal constitutions guarantee that no person will be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Landon Holdings, Inc. v. Grattan Twp.*, 257 Mich.App. 154, 173, 667 N.W.2d 93 (2003). These constitutional provisions afford persons both substantive and procedural protections.*People v. Sierb*, 456 Mich. 519, 522-523, 581 N.W.2d 219 (1998). The substantive protections of the Due Process Clauses "secure the individual from the arbitrary exercise of governmental power."*Electronic Data Systems Corp. v. Flint Twp.*, 253 Mich.App. 538, 549, 656 N.W.2d 215 (2002) (EDS). However, "courts will uphold legislation

as long as that legislation is rationally related to a legitimate government purpose."*Crego v. Coleman,* 463 Mich. 248, 259, 615 N.W.2d 218 (2000). In order to prevail under this test, "a challenger must show that the legislation is 'arbitrary and wholly unrelated in a rational way to the objective of the statute.'"*Id.,* quoting *Smith v. Employment Security Comm.,* 410 Mich. 231, 271, 301 N.W.2d 285 (1981).

[2] On appeal the City contends, as it did before the trial court, that the ordinances promote the public health, safety and general welfare by ensuring a safe water supply. Defendants counter that there is no rational connection between the requirement that they connect to the municipal water supply and the City's stated goal of ensuring a safe water supply because defendants' water supplies are currently safe. Simply stating that the public has an interest in clean water, defendants assert, "does not legally or logically justify depriving defendants of their right to use their own clean, uncontaminated groundwater."(emphasis removed). We disagree with defendants' assertion and hold that the ordinances are rationally related to the legitimate government purpose of ensuring a clean and safe supply of potable water. [7]

In Michigan, it is well-settled that a municipality may require property owners to connect to a public sewer system. See *Bedford Twp. v. Bates,* 62 Mich.App. 715, 717-718, 233 N.W.2d 706 (1975), *Renne v. Waterford Twp.,* 73 Mich.App. 685, 689-690, 252 N.W.2d 842 (1977), *Bingham Farms v. Ferris,* 148 Mich.App. 212, 217-218, 384 N.W.2d 129 (1986). Such ordinances are a valid means of dealing with the *potential* as well as the actual health menaces posed by sewage, because even the failure of a few septic systems could have serious health consequences for the entire community. *Bedford Twp, supra* at 718, 233 N.W.2d 706, quoting *Sanitation District No. 1 of Jefferson Co. v. Campbell,* 249 S.W.2d 767, 772 (Ky., 1952). For this reason, a municipality may rationally determine that it is in the best interests of the community as a whole to require property owners with septic systems to abandon those systems-even though the systems are properly functioning and the chances of failure are slight-and connect to public sewer as a prophylactic measure against potential harms. See *Renne, supra* at 695-696, 252 N.W.2d 842 ("If the Legislature chooses to nip in the bud a potential for disease transmission rather than to utilize curative measures after the fact, we decline to second-guess its decision.") and *Bingham Farms, supra* at 217-218, 384 N.W.2d 129 ("The legislative policy has dispensed with the need for individual determinations by declaring that septic tanks pose a threat to the public health, and it is beyond the province of the judiciary to quarrel with that judgment."). This same rationale applies to the preservation of the public health through ordinances requiring property owners to connect to a municipal water supply.

***5** It is a basic and legitimate function of government to promote the health of the community by ensuring a pure water supply. *Stern v. Halligan,* 158 F.3d 729, 732 (C.A.3, 1998). Private wells are subject to an array of contaminates that may adversely affect the health of those persons who directly consume contaminated water and which may indirectly affect the health of the whole community.

> Potential dangers include: carcinogenic radon, radium-226, and radium-228; salt from road-salting stockpiles or saline aquifers; pesticides; fertilizers; explosive methane; MTBE (a gasoline additive); fuel from leaking underground tanks; bacteria-laden waste from leaking septic tanks, broken sewer lines, pets, farm animals, or wildlife; and chemical or other hazardous waste. Furthermore, private wells are generally shallower than public supply wells and thus more easily contaminated. [*Id.* (citation omitted).]

As with septic systems, the government may properly conclude that the best way to address the potential for harm is through prophylactic measures such as mandating connection to the public water supply. The court in *Stern* aptly noted that,

> [a] municipal water supply replaces a myriad of private water sources that may be unmonitored or, at best, difficult, expensive, and inefficient to monitor. Therefore, a legislature may rationally conclude that a public water supply is the simplest and safest solution for its citizenry as a whole without proof of danger to each and every affected person. [*Id.*]

Because promoting the public health by ensuring a safe and pure water supply is a legitimate government interest and the City could rationally believe that requiring its citizenry to connect to the municipal water supply would promote

that objective, see *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1983), we conclude that the enactment of the ordinances was a proper exercise of the City's police power. *Crego, supra* at 259, 615 N.W.2d 218. [8]

IV. Takings

Defendants next argue that the ordinances constitute an unconstitutional taking of defendants' water rights. Specifically, defendants contend that the ordinances do not substantially advance a legitimate government interest and deny defendants an economically viable use of their land without compensation. Therefore, defendants argue, the ordinances are invalid and unenforceable. We disagree.

A. Takings Under the "Substantially Advances" Test

[3] Both the state and federal constitutions prohibit the taking of private property for public use without compensation. *Adams Outdoor Advertising v. East Lansing (After Remand)*, 463 Mich. 17, 23, 614 N.W.2d 634 (2000), citing U.S. Const, Am V, and Const 1963, art 10, § 2. [9] Although these constitutional provisions apply to formal condemnation through the state's inherent power of eminent domain, they also apply to cases involving regulatory takings. *Merkur Steel Supply v. Detroit*, 261 Mich.App. 116, 129-130, 680 N.W.2d 485 (2004)."A regulatory taking occurs when the state effectively condemns, or takes, private property for public use 'by overburdening that property with regulations.'"*Dorman v. Clinton Twp.*, 269 Mich.App. 638, 646, 714 N.W.2d 350 (2006), quoting *K & K Construction Inc. v. Dep't of Nat'l Resources*, 456 Mich. 570, 576, 575 N.W.2d 531 (1998). In *K & K Construction*, our Supreme Court noted that, "[w]hile all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land."*K & K Construction, supra* at 576, 575 N.W.2d 531, citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

***6** Relying on *K & K Construction*, defendants first contend that the ordinances in question effect an unconstitutional taking because they do not substantially advance a legitimate state interest. However, since the decision in *K & K Construction*, the United States Supreme Court has clarified that the "substantially advances" formula announced in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) and recited by our Supreme Court in *K & K Constr Inc*, is not an appropriate test for determining whether a regulation effects a taking. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 531, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

In *Lingle*, the Court clarified "that the 'substantially advances' formula was derived from due process, not takings, precedents."*Id.* at 540.The Court further characterized the selection of this due process language as "regrettably imprecise." *Id.* at 542.The problem, the Court explained, was that the "substantially advances" formula suggests a means-ends test. *Id.*

> It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 846, [118 S.Ct. 1708, 140 L.Ed.2d 1043] (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"). But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment. [*Id.*]

The Court further explained that, instead of addressing the challenged regulation's effect on private property, "the 'substantially advances' inquiry probes the regulation's underlying validity."*Id.* at 543.

> But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property *"for public use."*It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking."Conversely, if a government action is found to be impermissible-for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process-that

> is the end of the inquiry. No amount of compensation can authorize such action. [*Id.* (citation omitted, emphases in original).]

For this reason, the Court determined that the "substantially advances" formula is not a valid method for identifying regulatory takings that require just compensation. *Id.* at 545.Hence, whether the ordinances in question substantially advance a legitimate government interest has no bearing on whether the ordinances effected a taking of defendants' property. Therefore, to the extent that defendants argue that the ordinances constitute an unconstitutional taking because the ordinances do not substantially advance a legitimate state interest, that argument must fail.

B. Takings Under the Balancing Test

***7 [4]** Defendants next contend that the ordinances also constitute a regulatory taking under the traditional balancing test stated in *Penn Central Trans Co. v. New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). We disagree.

Under the balancing test, the reviewing court must engage in an ad hoc factual inquiry to determine whether the regulations deny the property owner economically viable use of his land. *K & K Construction, supra* at 576-577, 575 N.W.2d 531.This inquiry centers on three factors, "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations."*Id.* at 577, 575 N.W.2d 531, citing *Penn Central, supra* at 124.Further, when examining the effect of a regulation on a parcel of property under the balancing test, the reviewing court "must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel."*K & K Construction, supra* at 578-579, 575 N.W.2d 531; see also *Penn Central, supra* at 130-131.

Defendants have failed to establish a taking under the balancing of these factors. Initially we note that, although defendants characterize the City's actions as mere attempt to obtain a monopoly over a "common commodity", as discussed above, we have found that the City's regulations are a legitimate exercise of its police power. Further, although defendants claim that the costs incurred in connecting and the periodic fees are "very significant," defendants failed to present any evidence that connection to the City's municipal water supply would reduce the value of their properties. Without such evidence, it is difficult to assess the economic effect of the regulations on defendants' properties. See *K & K Construction, supra* at 588, 575 N.W.2d 531 ("While there is no set formula for determining when a taking has occurred under this test, it is at least 'clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains.' "), quoting *Bevan v. Brandon Twp.*, 438 Mich. 385, 391, 475 N.W.2d 37 (1991). Finally, although defendants have arguably invested in their current water supplies and expected a return on those investments, it is readily apparent that connecting to the municipal water system will not interfere with defendants' primary expectations concerning the uses of the affected parcels. See *Penn Central, supra* at 136.There is simply no evidence that connecting to the City's water system will interfere with defendants' current use of the properties or prevent them from developing their properties in the future. For these reasons, we cannot conclude that the ordinances effect a regulatory taking under the *Penn Central* balancing test.

Because the City did not need to demonstrate that the ordinances substantially advanced a legitimate government interest and there is no evidence that the ordinances deprived defendants of economically viable use of their properties, defendants have failed to establish that the ordinances effected an unconstitutional taking.

V. Headlee Amendment

***8 [5]** Finally, defendants argue that the ordinances constitute a tax passed in violation of Const 1963, art 9, § 31 (the Headlee Amendment). Specifically, defendants contend that the costs associated with connecting to the City's water system and the periodic charges for the water provided by the City's water department constitute a tax rather than a fee. Therefore, because these ordinances were passed without complying with the requirements of the Headlee Amendment, defendants conclude, the ordinances are illegal. We disagree.

The Headlee Amendment states in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above

> that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [*Id.*]

It is undisputed that the ordinances were not approved by a majority of the qualified electors of the City. Accordingly, if the charges associated with the ordinances constitute a tax, the charges are in violation of the Headlee Amendment. However, if the charges are merely user fees, the charges are not subject to the requirements of the Headlee Amendment. Whether the charges imposed by the ordinances constitute a "tax" or a "user fee" is a question of law that this Court reviews de novo. *Bolt v. Lansing*, 459 Mich. 152, 158, 587 N.W.2d 246 (1998).

In determining whether a charge is a user fee rather than a tax, three criteria are to be considered. *Id.* at 161, 587 N.W.2d 264.First, a user fee must serve a regulatory purpose rather than a revenue-raising purpose. Second, the user fee must be proportionate to the costs of the service provided. The third criterion is whether the persons subject to the charge are able to refuse or limit their use of the commodity or service. *Id.* at 161-162, 587 N.W.2d 264.

Defendants have presented no evidence that the City raises revenue through operation of its municipal water system. Likewise, defendants have presented no evidence that charges are disproportionate to the costs of the services provided. Finally, although the ordinances mandate connection to and use of the City's water supply for all water used or consumed on the affected premises, defendants have ultimate control over the amount of water used and, therefore, have ultimate control over the amount of their water bill. [10] Consequently, taking all these factors under consideration, we conclude that the charges are properly characterized as user fees rather than taxes.

VI. Conclusion

Pursuant to its general police power, the City has the authority to enact regulations that regulate public safety, public health, morality, and law and order. Requiring property owners to connect to a municipal water supply is rationally related to the legitimate government interest of promoting the public health by ensuring a safe and pure water supply. Therefore, the ordinances do not offend the limitations imposed by substantive due process. Further, the ordinances do not deprive defendants of economically viable use of their properties. Thus, the ordinances do not effect an unconstitutional taking. Finally, the charges imposed by the ordinances are properly considered user fees rather than taxes. Accordingly, the requirements of the Headlee Amendment are inapplicable to them.

***9** Because the ordinances are valid and enforceable, the trial court did not err when it determined that summary disposition in favor of the City was appropriate.

Affirmed.

Footnotes

1 The remaining defendants are not parties to this appeal.

2 The City's complaint also asked the trial court to declare that defendants were required to connect to the City's sewer system. In its opinion, the trial court agreed that the City could require defendants to connect to the City's sewer system and ordered defendants to do so. However, because defendants had already connected to the City's sewer system or agreed to do so by the time of the ruling, the propriety of that order is not at issue.

3 On appeal, defendants argue that the trial court should have granted summary disposition in their favor pursuant to MCR 2.116(C)(8) and (I)(2). However, before the trial court, defendants argued that summary disposition was appropriate under MCR 2.116(C)(8), (C)(10) and (I)(2). Indeed, defendants requested that "summary disposition be granted in their favor both because the Plaintiff has failed to state a claim on which relief can be granted and because there is no material fact in dispute...." Because defendants moved for summary disposition under MCR 2.116(C)(10), the trial court could properly consider evidence submitted by the parties. Likewise, although the trial court stated that its decision was based on MCR 2.116(C)(9), it is clear from its opinion that it considered the factual bases supporting defendants' claims that the ordinances were unconstitutional. Therefore, we shall review defendants' claims under MCR 2.116(C)(10). See *DeHart v. Joe Lunghamer Chevrolet, Inc.*, 239 Mich.App. 181, 184, 607 N.W.2d 417 (1999).

4 Under its police power, the state may regulate public safety, public health, morality, and law and order. *People v. Derror*, 475 Mich. 316, 338, 715 N.W.2d 822 (2006), citing *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

5 We reject defendants' contention that the Legislature's failure to enact a statute specifically permitting home rule cities to compel connection to a municipal water system, despite enacting such a provision for sewage systems creates an inference that home rule cities lack such authority. See MCL 333.12753. As already noted, home rule cities have not only those powers specifically granted to them, but also all powers that have not been expressly denied. *AFSCME v. Detroit, supra* at 410, 662 N.W.2d 695.Therefore, the fact that the Legislature specifically granted municipalities the power to compel persons to connect to a municipal sewer system does not affect a home rule city's inherent police power.

6 Likewise, each of the remaining cases cited by defendant dealt with determining whether a charge was a user fee or a tax. See *Preston v. Bd. of Water Comm'rs,* 117 Mich. 589, 598, 76 N.W.2d 92 (1898) (holding that the water rates were not taxes), *Ripperger v. Grand Rapids,* 338 Mich. 682, 686, 62 N.W.2d 585, 586-587 (1954) (holding that the sewage charges in question were not taxes), and *Bolt v. Lansing,* 459 Mich. 152, 158-159, 587 N.W.2d 246 (1998) (citing both *Ripperger, supra* and *Jones, supra* for the proposition that one factor relevant to determining whether an assessment was a user fee or tax is to determine whether the property owner is able to refuse or limit their use of the commodity or service). Therefore, they too are inapplicable to the facts of this case.

7 We note that defendants also argued that, as written, the ordinance requiring them to use the City's water for all water consumed on the premises is “grossly overbroad,” because it could conceivably be a violation of the ordinance to consume bottled water on the regulated premises. However, because defendants failed to properly develop this argument, we decline to address it. See *Mitcham v. Detroit,* 355 Mich. 182, 203, 94 N.W.2d 388 (1959).

8 We note that the majority of the courts that have addressed issues similar to those advanced by defendants have concluded that requiring a property owner to connect to a municipal water supply and abandon private wells is a legitimate exercise of the police power. See *Village of Algonquin v. Tiedel,* 345 Ill.App.3d 229, 280 Ill.Dec. 493, 802 N.E.2d 418 (2003), *Kusznikow v. Twp. Council of Twp. of Stafford,* 322 N.J.Super. 323, 730 A.2d 930 (1999), *Town of Ennis v. Stewart,* 247 Mont. 355, 807 P.2d 179 (1991), *Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach,* 241 Va. 114, 400 S.E.2d 523 (1991), *Rupp v. Grantsville City,* 610 P.2d 338 (Utah, 1980), *Lepre v. D'Iberville Water & Sewer Dist.,* 376 So.2d 191 (Miss., 1979) and *Shrader v. Horton,* 471 F.Supp. 1236 (W.D.Va., 1979), but see *City of Midway v. Midway Nursing & Convalescent Center, Inc.,* 230 Ga. 77, 195 S.E.2d 452 (1973).

9 The Takings Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 122, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

10 We reject defendants' contention that whether a charge is voluntary is a function of the affected persons' ability to refuse to use the service or commodity at all. The Court in *Bolt* stated that this factor hinged on whether the property owners “were able to refuse *or limit* their use of the commodity or service.”*Bolt, supra* at 162, 587 N.W.2d 264 (emphasis added).

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Exhibit 11: *Benninghoff v Tilton*, 284637, 2009 WL 3789981 (Mich Ct App 11/12/09)

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

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2009 WL 3789981
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

Michael BENNINGHOFF, Laurie Benninghoff, Kris Kallembach, Dermot Putnam, Gail Kaplan, and Friends of 121st Avenue, Plaintiffs–Appellants,
and
Ganges Township, Plaintiff/Counter–Defendant–Appellant,
v.
John D. TILTON, Mary E. Tilton and Harold A. Stege and Suzanne B. Stege, as trustees of the Harold A. Stege Trust, Defendants/Counter–Plaintiffs–Appellees,
and
Allegan County Road Commission, Defendant.
Michael Benninghoff, Laurie Benninghoff, Kris Kallembach, Dermot Putnam, Gail Kaplan, and Friends of 121st Avenue, Plaintiffs–Appellees,
and
Ganges Township, Plaintiff/Counter–Defendant–Appellee,
v.
John D. Tilton, Mary E. Tilton and Harold A. Stege and Suzanne B. Stege, as trustees of the Harold A. Stege Trust, Defendants/Counter–Plaintiffs–Appellants,
and
Allegan County Road Commission, Defendant.

Docket Nos. 284637, 284736. | Nov. 12, 2009.

West KeySummary

1 Judgment
Particular Cases

Questions of fact existed regarding whether and when the public might have established a prescriptive right to use private land at end of public highway as a public beach, thus precluding summary disposition. A public highway that ended at Lake Michigan gave the general public the right of ingress and egress to Lake Michigan, and owners of private property surrounding the area where the highway met the lake sought to restrain the public from using the beach for purposes other than ingress and egress to Lake Michigan. MCR 2.116(C)(10).

Allegan Circuit Court; LC No. 06–039595–CH.

Before: M.J. KELLY, P.J., and K.F. KELLY and SHAPIRO, JJ.

Opinion

PER CURIAM.

***1** In this real property dispute, both plaintiffs and defendants appeal as of right various actions taken by the trial court. On appeal, the primary issues are whether the general public can obtain a prescriptive right to use private land as a public park or beach and whether the public has in fact established the right to use the land at the point where 121st Avenue intersects Lake Michigan as a public beach.[1] We conclude that, under Michigan law, the general public can obtain prescriptive rights to use private land as a public beach. However, in this case, we conclude that there are questions of fact as to whether and when the public might have established a prescriptive right to use the end of 121st Avenue as a public beach. For that reason, we conclude that the trial court erroneously granted summary disposition on this claim. Similarly, because there are questions of fact as to whether and when the public might have obtained such a prescriptive right, the trial court erred to the extent that it concluded that defendants' inverse condemnation claim was untimely. The timeliness of defendants' inverse condemnation claim cannot be ascertained absent resolution of these fact questions. Accordingly, we reverse in part, affirm in part, and remand for further proceedings.

I. Basic Facts and Procedural History

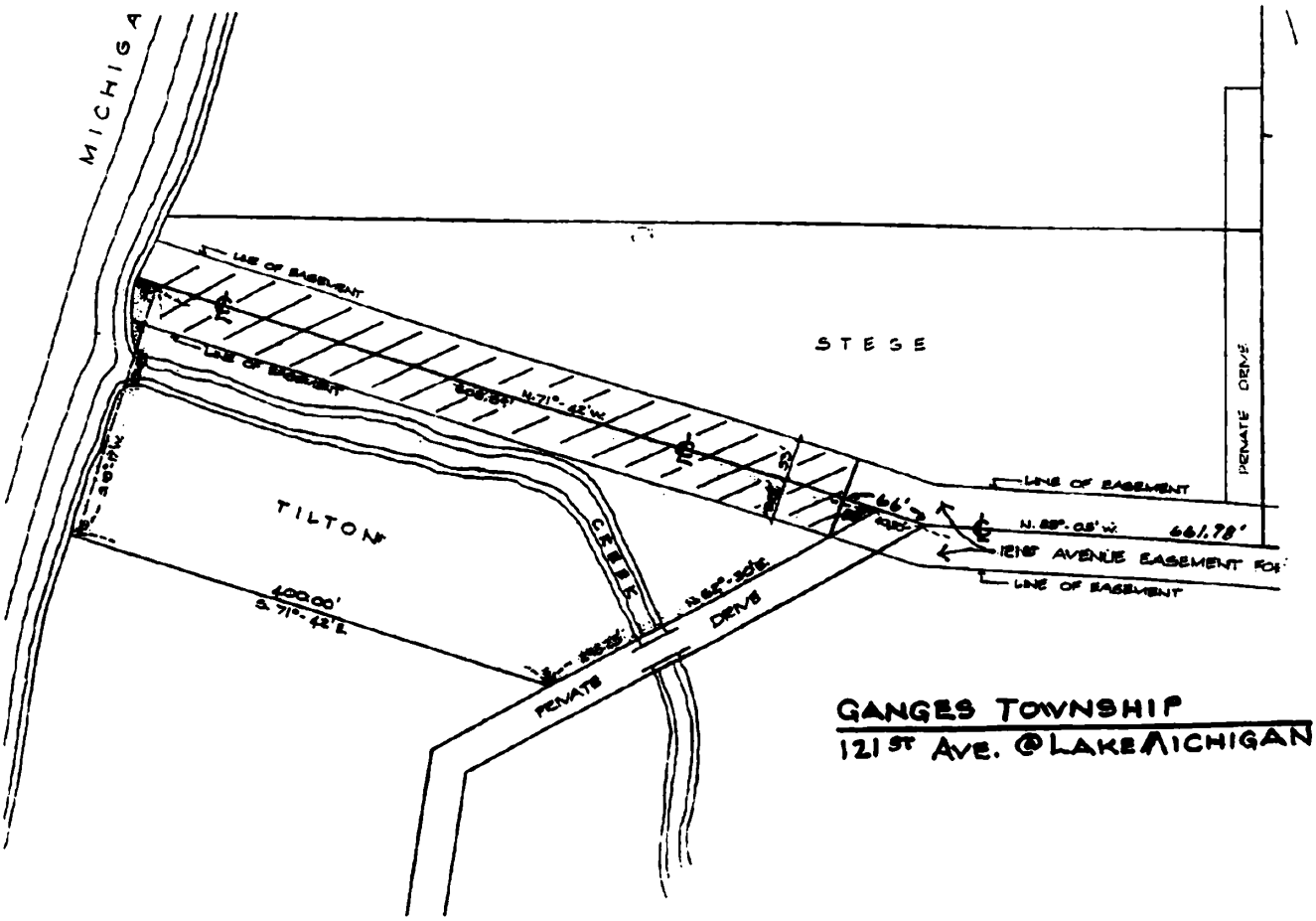
A. The Land at Issue and the Parties

This case involves a dispute over the public's right to use the beach at the point where 121st Avenue intersects with Lake Michigan in Allegan County, Ganges Township. In the late nineteenth century, 121st Avenue, which was then called Plummerville Road, led up to the shoreline and then turned south to cross a creek that currently sits on the north end of the property owned by Defendants/Counter–Plaintiffs John D. Tilton and Mary E. Tilton. The road then proceeded into the small logging community of Plummerville. After the area was completely logged, the people of Plummerville abandoned the town. The bridge over the creek was eventually lost and Plummerville Road was thereafter shown to end in Lake Michigan. Eventually, the owners of the land on either side of 121st Avenue erected private residences.

The disputed road end was formerly under the jurisdiction of defendant Allegan County Road Commission (the Road Commission). [2] However, during the course of this litigation, the Road Commission transferred jurisdiction to Ganges Township.

Defendants/Counter–Plaintiffs John D. Tilton, Mary E. Tilton, and the Harold A. Stege Trust (the Stege Trust) own properties adjacent to the point where 121st Avenue ends at the Lake Michigan shoreline. John and Mary Tilton own the property immediately south of 121st Avenue on Lake Michigan. At the north end of the Tilton's property there is a creek—called Plummerville Creek—that flows into Lake Michigan. The Stege Trust owns the roughly triangular shaped property to the north of 121st Avenue. Harold A. Stege and Suzanne B. Stege are the trustees for the Stege Trust. The Stege Trust's property narrows as it approaches Lake Michigan. As a result, the Stege Trust's property contains a very narrow strip of shoreline. [3]

***2** The following map depicts the Tilton property—including the position of Plummerville Creek—and the Stege Trust property in relation to each other and 121st Avenue:



Plaintiffs Michael Benninghoff, Laurie Benninghoff, Kris Kallembach, Dermot Putnam, and Gail Kaplan are owners of lots near the disputed area of shoreline. They do not have direct access to Lake Michigan. As a result, they and

their lessees use the beach at the end of 121st Avenue for swimming, picnicking and general recreation. Friends of 121st Avenue is an organization formed during the course of this litigation to support the general public's right to use the beach at the end of 121st Avenue for swimming, picnicking and general recreation. [4]

B. *Marshall v. Ganges Township*

Although the suit underlying this litigation began in 2006, this is not the first time that the public's use of the end of 121st avenue resulted in litigation. In June 1962, Kenneth and Teresa Marshall sued Ganges Township, the Road Commission, and various private persons over the public's use of 121st Avenue. [5] The case was assigned to Judge Raymond Smith.

In their complaint, the Marshalls alleged that they purchased the land that was to the north of the creek that is currently on the Tilton's property and which included the end of 121st Avenue. The Marshals further alleged that, in the Spring of 1960, Ganges Township or the Road Commission cleared 121st Avenue westward from the point where it turned south all the way to the beach and made a parking area right in front of the Marshalls' home. The Marshalls stated that the general public used the road and parking area to access the beach and as a "lover's lane." The Marshalls also indicated that they complained to law enforcement agencies, but stated that such complaints proved "no deterrent to drinking parties in plaintiffs' front yard and on their beach during daylight hours and evenings into the wee hours of the morning."

The Marshalls also alleged that, because neither Ganges Township nor the Allegan County Road Commission maintained the "road" in the preceding thirty years, the disputed section was not a public road. For that reason, the Marshalls asked the trial court to decree that the portion of 121st Avenue west of the point where the road turns south is private property and that neither Ganges Township nor the Road Commission has any right or title to the property. The Marshalls explained that a contrary ruling would undermine their enjoyment of their land:

> That the value of land purchased by plaintiffs is of little value if the road is a public one from the point where [the] road turns south across the creek west to the beach, as the beach in front of plaintiffs' house would be public beach with no privacy for plaintiffs, and the home built by plaintiffs will have little value as a summer home.

In his March 15, 1963 opinion, Judge Smith noted that whether the disputed portion of 121st Avenue was a public road depended on whether it had been impliedly dedicated to the public. Judge Smith noted that dedication must first be implied by public use:

> ***3** The dedication, if any, must be implied from the public use of the property under [MCL 221.20]. The record discloses that the public used the road to travel to Plummerville and later to the fish house which remained for a number of years before it was destroyed by fire. There is also evidence that the public used the road to haul gravel from the beach, to launch their boats, and to fish for smelt in the early Spring. A somewhat more extensive use was made by the public to provide access to the beach for picnics, outings and bathing. For these purposes the public used the beach which would have been the extension of the road in a straight line westerly. That notice was made of public use of the road is evidenced by the attempts to discourage such use and the persistence of public officials to keep the road open. Naturally the road was not intended for year around use so that the work that was done on it was only commensurate with its limited use, until 1960, when it appears that the Township of Ganges desired to dispel all doubt and ordered the work which resulted in these suits. In the opinion of the court the public use was sufficient to put private interests on notice.

Judge Smith then explained that, since at least 1946, the Allegan County Road Commission had worked the road section at issue. Judge Smith stated that the work done on the road was to "allow access to the beach," which he noted

was the "desired goal of the public users." Because the public had used the road and the Road Commission had accepted the road through improvements and maintenance, Judge Smith concluded that the road was dedicated to the public by use.

On March 27, 1963, Judge Smith signed a partial judgment in favor of Ganges Township and the Allegan County Road Commission. The judgment dismissed the Marshalls' suit against Ganges Township and the Road Commission and decreed that "the road commonly referred to as Plummerville Road is a public highway" through "to Lake Michigan."

C. The Present Litigation

1. Origins and Nature of the Complaint

The present litigation has its origins in the efforts by the Tiltons and Steges to limit the public's use of the beach at the end of 121st Avenue. The Tiltons and Steges have acknowledged that 121st Avenue is a public highway that ends in Lake Michigan and have recognized that this gives the general public the right of ingress and egress to Lake Michigan. However, the Tiltons and Steges have also sought the help of municipal authorities in restraining the public from using the beach for purposes other than ingress and egress to Lake Michigan. The Tilton and Stege families do not want the general public to use the road end for bathing, picnicking, camping, partying or any other recreational activities, which they believe exceed the scope of the public's right to use the road end for ingress and egress to Lake Michigan. [6] Indeed, defendants contend that members of the general public routinely engage in dangerous, unsanitary and obnoxious behaviors on the beach area at the end of 121st Avenue. These alleged activities include: driving down to the water's edge, starting open fires on the beach, having sex, permitting unleashed dogs on the beach, public urinating and defecating, overnight camping, theft and vandalism, among others.

***4** The Tiltons and Steges were unsuccessful in gaining the help of Ganges Township in preventing the conduct about which they complained. As a result, the Tiltons and Steges turned to the Road Commission and the county sheriff. The Road Commission agreed that the public's right to use the road end was limited and placed signage at the road end warning the public about those limits. The sign warned: "121st Avenue Right of Way For Ingress & Egress Only Other Uses Constitute Recreational Trespassing." This statement originated from the prohibition found in the recreational trespass act (RTA), see MCL 324.73101, *et seq.* The Tiltons and Steges also prevailed on the Allegan County Sheriff to increase its efforts to enforce the limitations.

In May 2006, plaintiffs—with the exception of Friends of 121st Avenue, which did not yet exist—sued the Tiltons, the Stege Trust and the Steges, as the Stege Trust's trustees, to protect the general public's right to use the road end as a public beach. In their complaint, plaintiffs alleged that, since the late 1980s, the Tiltons have "led a campaign to close public access to the beach" and that the Steges support that effort. Plaintiffs alleged that the Tiltons' efforts included writing letters to municipal officials, calling the police, harassing beach users, and inducing the Road Commission to post signage limiting the uses of the road end. Plaintiffs asserted that the Tiltons' efforts were contrary to Judge Smith's opinion in the *Marshall* litigation, which clearly settled the public's right to use the beach at the end of 121st Avenue for general recreational activities.

Plaintiffs' complaint stated four claims. In Count I plaintiffs asked the trial court to declare that Judge Smith's opinion in the *Marshall* litigation established that "the 121st Avenue Road End and Beach is open to the public for all historical uses including swimming, sunbathing, lounging, picnicking, and other common beach uses." In Count II plaintiffs asked the trial court to declare that the RTA does not apply to the end of 121st Avenue. In Count III plaintiffs alleged that the public had used the end of 121st Avenue for normal beach activities for as many as 150 years and that Ganges Township and the Road Commission had maintained the road end for those uses. These actions, plaintiffs alleged, established a prescriptive right for the public's use of the road end for normal beach activities. Plaintiffs also alleged that Judge Smith's opinion in the *Marshall* litigation also effectively "held that a prescriptive right to recreational public use exists at the 121st Avenue Beach." For these reasons, plaintiffs asked the trial court to order that the public has a prescriptive right to use the road end as a public beach. In Count IV plaintiffs stated allegations substantially similar to those in Count III, but asserted that the facts establish the public's right to a prescriptive easement over the road end for use as a public beach.

***5** In their answer to plaintiffs' initial complaint, defendants alleged, as an affirmative defense, that Ganges Township's "claims constitute inverse condemnation and a taking of Defendants' lawful property rights in violation of the

Constitution of the State of Michigan." Defendants also filed a counter-complaint against Ganges Township, which contained three counts.

In Count I, defendants alleged that Ganges Township's actions in participating in the suit constitute an attempt to "take" defendants' property for a public purpose without conducting formal condemnation proceedings. Plaintiffs also alleged that Ganges Township has "for many years, fostered and encouraged the use of the 121st Avenue Road End for uses and purposes beyond the scope of a highway by user under state law." For these reasons, defendants asked the trial court to enjoin Ganges Township from interfering with defendants' property rights and award damages for the losses occasioned by Ganges Township's interference. In Count II, defendants alleged that, based on its efforts to encourage the public to exceed the scope of the public's right to use the road end, Ganges Township should be held responsible for any damages caused by the general public under the RTA. Finally, in Count III, defendants asked the trial court to declare that Ganges Township's attempt to assert rights to the road end were beyond the scope of its governmental purpose.

In July 2006, defendants moved to join the Road Commission as a necessary party to the litigation. The trial court granted the motion on August 15, 2006. In December 2006, the Road Commission informed the trial court that it had relinquished control of the road end at issue to Ganges Township. In February 2007, the Road Commission moved for its dismissal from the case. The trial court granted the Road Commission's request on March 8, 2007.

In September 2006, plaintiffs, which at that point included the Friends of 121st Avenue, filed an amended complaint. The amended complaint stated four counts substantially similar to the counts in plaintiffs' original complaint.

2. Summary Disposition Before Judge Benson

Judge Beach initially presided over plaintiffs' suit. However, by February 2007, the case had been transferred to Judge Benson.

In February 2007, defendants moved for summary disposition of plaintiffs' claims. Defendants argued that the individual plaintiffs and the Friends of 121st Avenue lacked standing to assert the claims at issue because they did not have any rights greater than the general public in the disputed road end and individuals may not normally assert the rights of the general public. As for Ganges Township, defendants argued that Judge Smith's opinion in the *Marshall* litigation had no independent legal significance because courts speak through their judgments and Judge Smith's judgment only established that 121st Avenue was a public highway through to Lake Michigan. Defendants also argue that the highway-by-user statute cannot be used to establish a public park, rather it is limited to road uses. Because Michigan law clearly limits the public's ability to use roads that end in navigable water for purposes of ingress and egress only, defendants further argued that the trial court should dismiss plaintiffs' request for a declaration that Judge Smith's opinion gave the public rights to use the road end for sunbathing, picnicking, and other recreational uses. Likewise, defendants contended that Ganges Township could not otherwise obtain greater rights than those accompanying an implied dedication of a highway-by-user through a prescriptive easement or adverse possession.

***6** Defendants also asked the trial court to dismiss plaintiffs' claim asking for a declaration that the RTA did not apply. Defendants contended that the RTA did apply because it prohibits persons from entering or remaining on the land of a another to engage in recreational activities without permission and the public did not have permission to use the road end for anything other than access to the public trust and Lake Michigan.

In February 2007, Ganges Township moved for summary disposition of defendants' counter claims. Ganges Township first argued that the implied dedication of 121st Avenue transferred the fee simple to the disputed road end to the Road Commission and then Ganges Township as the Road Commission's successor. For that reason, Ganges Township argued, defendants do not have any interest in the road end at issue and cannot, therefore, assert that Ganges Township has unlawfully permitted the general public to exceed the scope of any easement. In the same vein, Ganges Township also argued that the Tiltons' deed did not purport to convey the land under the road and, therefore, the Tiltons had no right to contest the use of the road end.

Ganges Township also argued that defendants' inverse condemnation claim must be dismissed because Ganges Township already owns the road end in fee and, therefore, defendants would not be entitled to compensation for property rights that had already lapsed. Further, Ganges Township argued that it was not attempting to "take" property rights

with its suit, but rather was asking the trial court to recognize and declare the nature and extent of Ganges Township's existing rights. Finally, Ganges Township argued that it has exercised its rights to the road end for far more than the six-year period of limitations applicable to inverse condemnation actions. As such, it argued that defendants' inverse condemnation claim was untimely.

Ganges Township argued that the trial court should also dismiss defendants counter-claim under the RTA because Ganges Township owned the fee under the road and had given the general public the right to use the road end for recreational activities. Ganges Township also argued that this claim was invalid because there was no longer a sign conspicuously prohibiting access and was otherwise untimely.

Finally, Ganges Township argued that its actions to assert and preserve its property interests in the road end are within the scope of its municipal authority. For that reason, Ganges Township asked the trial court to dismiss defendants' counter-claim based on public purpose.

In March 2007, plaintiffs moved for summary disposition in their favor on their claims. Plaintiffs argued that summary disposition in their favor was appropriate because Judge Smith's opinion in the *Marshall* litigation established that the public's right to use the road end for picnicking, sunbathing, swimming and other recreational uses was embodied in the dedication of the road. Thus, based on Judge Smith's opinion, defendants were estopped from relitigating whether the public could use the road end for general recreational purposes.

***7** In the alternative, plaintiffs argued that the undisputed evidence established that longstanding public use and control of the road end for those purposes vested the public with prescriptive rights to continue using the road end in those ways. In support of its argument, plaintiffs submitted the minutes of several meetings of the Board of Ganges Township. The minutes revealed that Ganges Township regularly considered and acted on requests concerning the road end and beach area, which was often referred to as “streamland .” The requests included the removal of tires from the wooded area and creek, removal of trees from the beach, the placement of a gate, the placement of a sign prohibiting overnight camping, and requests to regulate open fires on the beach.

On April 13, 2007, Judge Benson heard oral arguments on the parties' competing motions for summary disposition. On May 3, 2007, Judge Benson issued his opinion and order concerning the motions for summary disposition.

Judge Benson first determined that the individual plaintiffs and the Friends of 121st Avenue had standing to bring the claims at issue. Judge Benson then determined that an implied dedication under the highway-by-user statute is limited to contemplated road uses, which did not include use of the highway as a “beach.” For that reason, he granted defendants' motion as to plaintiffs' claim premised on Judge Smith's opinion and judgment in the *Marshall* litigation.

Judge Benson next addressed plaintiffs' claim that the public obtained a prescriptive right to use the road end for recreational purposes. He noted that this area of the law was not well-developed, but that to the extent that the public could obtain recreational rights through prescription, plaintiffs had to present evidence that the government took action to facilitate and control the recreational use. Judge Benson noted that it was undisputed that the general public used the road end for recreational purposes. However, he concluded that there was no evidence that any public entity took steps to facilitate and control the public's recreational uses. He explained that Judge Smith's opinion in the *Marshall* litigation and the other evidence cited by the parties only referred to governmental actions that were consistent with the government's regulation of the road as a road—that is, the governmental actions did not implicate the use of the road end as a public park. For that reason, Judge Benson also granted defendants' motion as to plaintiffs' count for a public prescriptive right.

Likewise, Judge Benson rejected the notion that the individual plaintiffs had established a prescriptive easement.[7] Because plaintiffs right to use the road end depended on the right of the public as a whole, Judge Benson determined that plaintiffs could not meet the exclusivity requirement for a prescriptive easement. For that reason, he also granted defendants' motion as to plaintiffs' count for a prescriptive easement.

***8** Finally, Judge Benson also determined that the RTA does apply to persons whose use of the road end exceeded the scope of the implied dedication by user. For that reason, defendants were entitled to invoke that act to prohibit those uses. Consequently, he also granted defendants' motion as to plaintiffs' request for a declaration that the RTA did not apply to the public's use of the road end.

After having determined that each of plaintiffs' claims must be dismissed, Judge Benson turned to defendants' counter-claims against Ganges Township. He first determined that the public only has an easement for 121st Avenue and that the language in the Tiltons' deed did transfer the fee underlying the southern 33 feet of the easement. For those reasons, he concluded that defendants did have standing to raise their claims.

Judge Benson also determined that Ganges Township's recent actions attempting to authorize the public to use the road end as a beach exceeded the scope of the dedication to the public. Because Ganges Township's actions occurred within six years, he also concluded that the period of limitations did not bar defendants' claim for inverse condemnation. Therefore, he denied Ganges Township's motion to dismiss that claim.

Judge Benson also determined that Ganges Township could properly participate in the present case in order to protect the public's interest in the road end, but that it could also be liable for damages caused by its actions under the RTA. For those reasons, Judge Benson denied Ganges Township's motion to dismiss defendants' claim based on the RTA and granted its motion as to defendants' “public purpose” claim.

On May 17, 2007, Ganges Township moved for reconsideration of Judge Bensons' opinion and order denying Ganges Township's motion for summary disposition as to defendants' claims for inverse condemnation and damages under the RTA. Judge Benson denied the motion in an opinion and order entered May 30, 2007.

In June 2007, the Supreme Court Administrative Office assigned the case to Judge Kolenda.

3. Summary Disposition Before Judge Kolenda

On January 13, 2008, Ganges Township moved for summary disposition of defendants' remaining counter-claims. In its motion, Ganges Township again argued that defendants' claim for inverse condemnation should be dismissed. Ganges Township noted that our Supreme Court had rejected the continuing wrong doctrine and that the public's use of the road end for recreational purposes had been going on for more than fifteen years. Consequently, Ganges Township contended, defendants' inverse condemnation claim was time-barred. Ganges Township also argued that any harm to defendants' property values occurred as a result of the longstanding public use of the road end before Ganges Township asserted any rights to the road end. For that reason, Ganges Township argued that defendants' could not establish the harm element of an inverse condemnation claim. Finally, Ganges Township also argued that use of the road end as a public beach was consistent with the implied dedication. For all these reasons, Ganges Township asked Judge Kolenda to dismiss defendants' inverse condemnation claim.

***9** Ganges Township also argued that it was not a person within the meaning of the RTA and, therefore, could not be liable under that act. In the alternative, it argued that it had governmental immunity and that any acts giving rise to liability occurred more than three years before defendants filed their counter-claims and, as a result, the claim premised on the RTA was untimely. For these reasons, Ganges Township asked Judge Kolenda to dismiss defendants' claim under the RTA as well.

On March 17, 2008, Judge Kolenda issued his opinion and order on Ganges Township's second motion for summary disposition. Benninghoff Exhibit 3. Judge Kolenda first noted that a government takes property when an encroachment onto private property has progressed to the point that its permanent nature is evident. He then determined that the evidence clearly demonstrated that any taking of private property for public use occurred long ago: “The Tiltons' letter of August, 1987, to counter-defendant township makes plain that, at least by then, it was transparent that the use of the ‘road end’ about which the counterclaim complains had existed for years, had become permanent, and was of the same extent it is today.” Further, he determined that, when the Road Commission transferred jurisdiction to Ganges Township, the transfer included the “taken use.” Therefore, Judge Kolenda concluded, defendants' claim for inverse condemnation was untimely and must be dismissed.

Judge Kolenda also concluded that defendants' claim premised on the RTA must also be dismissed. He explained that the complained-of uses are within the scope of Ganges Township's interest in the road end and, for that reason, are by definition not unauthorized.

For the reasons stated, Judge Kolenda dismissed defendants' remaining counter-claims. Although Judge Kolenda did not explicitly state that he was revising Judge Benson's earlier order, he explained that he could properly do so:

> Because Judge Benson's earlier denial of a similar motion did not terminate this action, his order "is subject to revision," MCR 2.604(A), not only by him, but also by the undersigned. Inapplicable is the prohibition in MCR 2.613(B) on one judge setting aside another judge's orders or judgments. That prohibition is not absolute; there is an exception when the original judge is "absent or unable to act." Because Judge Benson was a retired, visiting judge, the lapse of his assignment triggers that exception, which means that this Court is free to revisit and revise any and all of his orders in this case. *People v. Herbert,* 444 Mich. 466, 471–471, 511 N.W.2d 654 (1993).

On the basis of these statements, Judge Kolenda's opinion could be understood to have determined that the Road Commission had at some point more than fifteen years ago acquired the right to use the end of 121st Avenue as a public beach and transferred that right to Ganges Township.

4. Post Summary Disposition Proceedings

On April 4, 2008, plaintiffs appealed as of right. This Court assigned plaintiffs' appeal docket number 284637. On April 7, 2008, defendants appealed as of right. This Court assigned docket number 284736 to defendants' appeal. This Court then ordered the appeals consolidated. See *Benninghoff v. Tilton,* unpublished order of the Court of Appeals, entered May 16, 2008 (Docket Nos. 284637; 284736).

***10** On May 29, 2008, defendants moved for a stay of Judge Kolenda's opinion and order and enforcement of Judge Benson's opinion and order during the pending appeal. Defendants explained that Ganges Township has interpreted Judge Kolenda's opinion and order to overrule Judge Benson's opinion and order and even adopted a resolution directing the township supervisor to take action to maintain, enable, and enhance the road end for all beach purposes. Defendants argued that Ganges Township's actions will harm them and that the trial court should stay enforcement of Judge Kolenda's opinion and order and enjoin Ganges Township from taking any action pending the present appeals.

On June 25, 2008, Judge Dewane of Berrien County heard oral arguments on defendants' motion for a stay pending appeal. On June 27, 2008, Judge Dewane entered his opinion and order concerning the motion for a stay. In his opinion, Judge Dewane stated that Judge Kolenda's opinion impliedly vacated Judge Benson's order and that he did not have the authority to revive Judge Benson's order. Judge Dewane agreed, however, that the status quo should be preserved. For that reason, he ordered the replacement of the sign referring to the RTA and stayed implementation of Ganges Township's resolution.

On July 11, 2008, plaintiffs moved for clarification or reconsideration of the stay. On July 30, 2008, Judge Dewane signed an order clarifying what constituted the status quo, but otherwise denying reconsideration of the stay. On August 8, 2008, defendants moved for clarification or reconsideration of Judge Dewane's order of June 30, 2008, which clarified the status quo requirement of the stay. On August 14, 2008, Judge Dewane denied defendants' motion.

These appeals followed.

II. The Public's Right to Use the Road End as a Beach

A. Standard of Review

Because this issue directly affects the proper resolution of the parties' remaining claims of error, we shall first determine whether the trial court properly granted summary disposition of plaintiffs' claim that the general public had obtained a prescriptive right to use the end of 121st Avenue as a public beach. On appeal, plaintiffs recognize that Judge Benson dismissed their claims based on a public prescriptive right and public prescriptive easement, [8] but argue that Judge Kolenda vacated Judge Benson's opinion and order and impliedly determined that plaintiffs had established that the public had a prescriptive right to use the road end as a beach. In the alternative, plaintiffs contend that Judge Benson erred when he dismissed their claim based on a public prescriptive right. Defendants argue that Judge Kolenda's opinion did not alter Judge Benson's earlier dismissal and Judge Benson properly dismissed plaintiffs' claim after plaintiffs failed to present evidence establishing that a governmental entity took actions to control or facilitate the public's use of the road end as a beach.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *AutoAlliance Int'l, Inc. v. Dep't of Treasury*, 282 Mich.App. 492, 498–499, 766 N.W.2d 1 (2009). A trial court properly grants summary disposition under MCR 2.116(C)(10) when, "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Whether the doctrine of collateral estoppel applies to a particular issue is a question of law that this Court also reviews de novo. *VanVorous v. Burmeister*, 262 Mich.App. 467, 476, 687 N.W.2d 132 (2004).

B. Waiver of Appeal

***11** As a preliminary matter, we must address plaintiffs' contention that defendants have waived their right to appeal Judge Kolenda's opinion and order. On appeal, plaintiffs contend that, in his ruling on defendants' motion for a stay, Judge Dewane construed Judge Kolenda's opinion and determined that Judge Kolenda vacated Judge Benson's earlier opinion, which had earlier dismissed plaintiffs' claims. In order to properly challenge Judge Kolenda's decision to vacate Judge Benson's opinion and order, plaintiffs further argue, defendants had to appeal Judge Dewane's ruling, which they did not do. By failing to appeal Judge Dewane's ruling, plaintiffs argue that defendants waived their right to challenge whether Judge Kolenda's opinion vacated Judge Benson's opinion. This Court reviews de novo questions of law, such as the scope of this Court's jurisdiction, the proper interpretation of court rules, and whether issue preclusion applies. See *Chen v. Wayne State University*, 284 Mich.App. 172, 191, 771 N.W.2d 820 (2009); *Adair v. Michigan*, 470 Mich. 105, 119, 680 N.W.2d 386 (2004).

Typically, a party may challenge any order leading up to the final judgment or order from which that party has appealed. *People v. Torres*, 452 Mich. 43, 57 n. 14, 549 N.W.2d 540 (1996). For that reason, defendants were not required to specifically appeal each and every order issued by the lower court in order to preserve their appeal. In any event, Judge Kolenda's opinion and order was the final order in this case, see MCR 7.202(6)(a)(i), and defendants appealed that order as of right. Once defendants appealed that order, this Court had jurisdiction to consider the propriety of that order. MCR 7.203(A)(1). Likewise, defendants' appeal of Judge Kolenda's order effectively deprived the trial court of the authority to set aside or modify that order. MCR 7.208(A). Accordingly, even if Judge Dewane purported to make a binding interpretation of Judge Kolenda's opinion and order, Judge Dewane did not have the authority to do so. Finally, although the trial court could properly enter a stay after defendants' appeal, see MCR 7.208(F) and MCR 7.209(E), such stays are subject to review by this Court even without a direct appeal, MCR 7.209(D). Thus, defendants would not have had to directly appeal Judge Dewane's stay in order to challenge it on appeal. Consequently, defendants have not waived their right to challenge the propriety of Judge Kolenda's opinion and order by failing to appeal Judge Dewane's stay.

C. Public Prescriptive Easement

It is well established in Michigan that a public entity can directly acquire title to property from a private owner through adverse possession or obtain a prescriptive easement in the same way that a private party can. See, e.g., *Jonkers v. Summit Twp.*, 278 Mich.App. 263, 747 N.W.2d 901 (2008) (holding that township acquired the land occupied by a boat launch through adverse possession); *Village of Manchester v. Blaess*, 258 Mich. 652, 242 N.W. 798 (1932) (holding that the village failed to establish that it acquired a prescriptive easement over the land at issue as a highway or as a parking lot); *Bachus v. West Traverse Twp.*, 107 Mich.App. 743, 310 N.W.2d 1 (1981) (indicating that township failed to establish adverse possession to a park), remanded to circuit court 412 Mich. 870, 313 N.W.2d 282, remanded to Court of Appeals 413 Mich. 914, 320 N.W.2d 55 (1982); *Bachus v. West Traverse Twp. (On Remand)*, 122 Mich.App. 557, 332 N.W.2d 535 (1983); see also Restatement 3d, Property, Servitudes, § 2.18. Similarly, the general public may acquire a prescriptive easement over private land for recreational purposes. *Kempf v. Ellixson*, 69 Mich.App. 339, 244 N.W.2d 476 (1976). However, use by the general public alone cannot establish such an easement. *Id.* at 343–344, 244 N.W.2d 476. Instead, the general public's use must culminate in governmental action to control and facilitate the public's use. *Id.*

***12** In the present case, plaintiffs contend that the public has acquired a prescriptive right to use the beach at the end of 121st Avenue for general recreation—that is, as a public beach—under three theories. First, plaintiffs contend that Judge Smith actually determined that the public had a prescriptive right to use the road end as a public beach. Second, plaintiffs argue that, even if Judge Smith's opinion and order did not determine that the public had acquired such a prescriptive right, the scope of the dedication under

the highway-by-user statute is determined by the nature of the uses that supported the public's use during the statutory period, which included use of the road end as a beach. Because the public's use included use of the road end as a public beach, the scope of the dedication found under the highway-by-user statute in the *Marshall* litigation includes use of the road end as a public beach. Finally, plaintiffs contend that the undisputed evidence demonstrates that the general public has acquired a prescriptive right to use the road end as a public beach. Defendants disagree with each of these contentions.

1. Judge Smith's Opinion in the *Marshall* Litigation

Plaintiffs' contention that Judge Smith's opinion in the *Marshall* litigation actually settled this question implicates the preclusion doctrine of collateral estoppel. "The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *Nummer v. Department of Treasury*, 448 Mich. 534, 541, 533 N.W.2d 250 (1995). "Generally, '[f]or collateral estoppel to apply, a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment. In addition, the same parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel.' " *Id.* at 542, 533 N.W.2d 250, quoting *Storey v. Meijer, Inc.*, 431 Mich. 368, 373 n. 3, 429 N.W.2d 169 (1988).

As noted above, defendants' predecessors in interest, the Marshalls, sued Ganges Township and the Road Commission, among others, in 1962. In the *Marshall* litigation, the Marhsalls requested a declaration that the end of 121st Avenue was private property. Although the Marshalls made allegations that suggested that the general public used the road end as a public beach, the public's use of the road end as a beach was not the focus of the litigation. Instead, the Marshalls argued that the road end was private property because neither Ganges Township nor the Road Commission had maintained *the road* in the past thirty years. That is, the Marshalls argued that the road end was not dedicated to the public—as a road—because Ganges Township and the Road Commission had not accepted it. Thus, although the Marshalls lamented that a ruling that the road end was public would certainly result in the general public continuing to use the beach, the sole issue presented by the Marshalls—as to Ganges Township and the Road Commission—was whether the road end had in fact been impliedly dedicated to the public and accepted by Ganges Township or the Road Commission. Similarly, the answer filed by Ganges Township and the Road Commission focused on whether the road end had been accepted *as a road.* Finally, and not surprisingly, Judge Smith's opinion and judgment also focused on whether the road end was dedicated to the public.

***13** In his opinion and order concerning the road end, Judge Smith clearly focused on whether the road end had been impliedly dedicated to the public under MCL 221.20. To that end he considered the elements necessary to establish a dedication under MCL 221.20. Based on the public's use of the road end and the efforts by the Road Commission to maintain and improve the road end, Judge Smith determined that the elements necessary to establish an implied dedication had been met. He did not, however, address the scope of the easement that accompanies a dedication under MCL 221.20; the scope of the dedication was simply not at issue. Understood in this context, Judge Smith's finding that the general public used the beach area for general recreation was proffered as support for his determination that 121st Avenue was accepted through to the point where it intersected Lake Michigan—it was not intended to settle the scope of the permitted activities for the road end. Likewise, Judge Smith's judgment makes it clear that he only decided one issue: that 121st Avenue was a public highway through to Lake Michigan. Judge Smith's opinion and judgment did not decide the scope of the public's easement or otherwise determine that the public could, consistent with the implied dedication, use the road end as a public beach. Because the parties to the Marshall litigation did not litigate the scope of the easement granted to the public under MCL 221.20 and the trial court did not address that issue or enter a judgment granting relief other than a determination that the road at issue was dedicated under MCL 221.20, collateral estoppel does not preclude a determination that the public's rights in the road end are limited to ingress and egress. *Nummer*, 448 Mich. at 542, 533 N.W.2d 250.

2. Scope of the Dedication Under MCL 221.20

At no point during the *Marshall* litigation did any party raise the possibility that the general public had acquired a fee simple interest in the land underlying 121st Avenue through adverse possession. Instead, the *Marshall* litigation centered on whether the road section at issue had been impliedly dedicated to the public under MCL 221.20. Under MCL

221.20, the Legislature declared that three types of roads shall be deemed public highways:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act.

Further, the statute provided that those highways that are or become highways through use "shall be 4 rods in width...." *Id.* With the enactment of the statute now codified at MCL 221.20, the Legislature modified the common law with regard to how the public can obtain title to a highway through prescription. *Kentwood v. Sommerdyke,* 458 Mich. 642, 654, 581 N.W.2d 670 (1998) (noting that, with the enactment of MCL 221.20, the Legislature modified the common law by eliminating the need to prove a fictional event—an actual dedication by the landowner); *Rigoni v. Michigan Power Co.,* 131 Mich.App. 336, 343, 345 N.W.2d 918 (1984) (noting that MCL 221.20 is a form of prescriptive easement for public use).

***14** Generally, the establishment of a highway through prescription conveys only an easement for highway purposes.[9] *US Gypsum Co. v. Christenson,* 226 Mich. 347, 350, 197 N.W. 497 (1924) ("The township did not have the fee of the land. The public had the usual easement for highway purposes, no more."). And the public's prescriptive right is limited to those uses understood to accompany a right of way. See *Eyde Bros. Dev. Co. v. Easton Co. Drain Comm'r,* 427 Mich. 271, 286, 398 N.W.2d 297 (1986) (holding that a public easement in a highway established by user includes all proper and contemplated uses for the easement); *Robinson v. Flint & PMR Co.,* 79 Mich. 323, 327, 44 N.W. 779 (1890) (noting that the common law governs the extent of the public's right to use a highway and that, although the owner of cattle could drive his cattle along a highway, he could not use the highway as a pasture because such use was not an incident of travel); *Platt v. Ingham County Road Commission,* 40 Mich.App. 438, 440, 198 N.W.2d 893 (1972) (stating that the right of way includes those uses that are necessary to make the easement effective). Where a road ends in a navigable body of water, the public's right-of-way includes the right to access the surface of the water to engage in the activities normally permitted to the general public on navigable waters—that is, transportation, boating, swimming, and fishing. *Thies v. Howland,* 424 Mich. 282, 288, 295–296, 380 N.W.2d 463 (1985); *Backus v. Detroit,* 49 Mich. 110, 115, 120, 13 N.W. 380 (1882) (holding that a common law dedication of a road conveyed a right to use the road for mere passage and, because the road at issue ended in a navigable river, the public also had the right of access from the "highway by land to the highway by water"); *Jacobs v. Lyon Twp.,* 199 Mich.App. 667, 671, 502 N.W.2d 382 (1993). However, the public's easement for a right-of-way does not generally include riparian rights-even when the right-of-way ends at a body of water. As such, where a right-of-way ends in a privately owned body of water that is not navigable, the general public will have no right to enter into and use the private body of water. *Pigorsh v. Fahner,* 22 Mich.App. 108, 116, 177 N.W.2d 466 (1970) (holding that the public would have no right to use the lake at issue even if the public had established a highway-by-user that intersected with the lake because the uplands surrounding the lake were privately owned and there were no navigable inlets or outlets to the lake), affirmed 386 Mich. 508, 194 N.W.2d 343 (1972). And, even where the right-of-way ends in a navigable body of water, the scope of the easement generally does not include the right to sunbathe, picnic, camp, grill, or use the road end for other park or recreational activities. See *Higgins Lake Property Owners v. Gerrish Twp.,* 255 Mich.App. 83, 103–104, 662 N.W.2d 387 (2003) (stating that, where a road end provides access only, lounging, sunbathing, and picnicking would exceed the scope of the uses). Notwithstanding these limitations, plaintiffs contend that the scope of the easement actually conveyed under MCL 221.20 will vary depending on the public use during the prescriptive period.

***15** A plain reading of this statute makes it clear that it applies only to the establishment of rights-of-way; indeed, the statute states that it applies to "all roads that shall have been used *as such* " for the requisite period of time. MCL 221.20 (emphasis added). Further, our Supreme Court has long recognized that this statute was intended to remedy defects in the establishment and recording of highways. To that end, the statute establishes the criteria after which a private landowner will be estopped from asserting any rights inconsistent with the public's use of the land as a road. See *Stickley v. Sodus Twp.,* 131 Mich. 510, 519, 91 N.W. 745 (1902). Thus, establishing a public highway by user requires proof that the road was used by the public *as a*

road and maintained by a governmental entity *as a road.* See *Comstock v. Wheelock,* 63 Mich.App. 195, 201, 234 N.W.2d 448 (1975) (stating that, because MCL 221.20 applies to highways, the plaintiffs had to show that the land at issue was used as a highway); *Cimock v. Conklin,* 233 Mich.App. 79, 87–88, 592 N.W.2d 401 (1998) (holding that the highway-by-user statute requires a road to be used as a highway). If these conditions are met, the public gains a prescriptive right to continue using the road *as a highway. Comstock,* 63 Mich.App. at 198–200, 234 N.W.2d 448 (noting that the trial court determined that plaintiffs only asserted a public right to continue using the property at issue for recreational purposes under MCL 221.20 and citing authority for the proposition that the public can have no prescriptive right in the property for recreational uses under the highway-by-user statute). It does not follow that use of the road as something other than a road—even when accompanied by use of the road as a road—will nevertheless convey a prescriptive right to those extra uses under MCL 221.20. Rather, MCL 221.20 only establishes the public's right to use a road as a public highway. Even if one were to conclude that the statutory language could be read to permit a more expansive easement, because MCL 221.20 alters the common law applicable to the public's ability to obtain a highway by user, it must be narrowly construed. *Summers v. Hoffman,* 341 Mich. 686, 694, 69 N.W.2d 198 (1955). Therefore, MCL 221.20 must be limited to its apparent purpose: establishing a prescriptive right in the public to use land as a right of way. All prescriptive rights differing in character from those normally accompanying a right of way must be established under the common law applicable to adverse possession or prescriptive easements. Accordingly, those rights beyond those accompanying a right-of-way must be established through open, notorious, adverse and continuous use for a period of fifteen years. *Higgins Lake Property Owners,* 255 Mich.App. at 118, 662 N.W.2d 387. And, in cases involving use by the general public—as opposed to direct use by a specific public entity—a public entity must take steps to assert control over the public's use before the public's use can vest into a prescriptive right. *Kempf,* 69 Mich. at 343, 37 N.W. 691.

***16** Although there is nothing to prevent the public from establishing both a prescriptive right to a right-of-way under MCL 221.20 and a prescriptive right to use the end of that right-of-way as a public beach during the same litigation, it is clear from the record that the *Marshall* litigation involved only whether 121st Avenue was a highway-by-user under MCL 221.20. For that reason, the trial court's determination that 121st Avenue was a public highway conveyed only a public easement for a right of way over the disputed section of road. Any additional prescriptive rights in excess of those typically conveyed under MCL 221.20 would have to have been separately established under the common law, which was not done.

3. Prescriptive Rights for Recreational Use

Although defendants are apparently correct when they state that there is no appellate opinion that has determined that the public actually established a prescriptive right to use land for recreational uses, we disagree with defendants' implied assertion that Michigan law does not recognize such a possibility. As noted above, there are cases establishing that a public entity can acquire interests in property through adverse possession and prescriptive easements. It is also well established that the general public can obtain a prescriptive easement for a right-of-way. See MCL 221.20. And, although the right was often framed as an implied dedication to the public, it has existed since the state's founding. See *Kentwood,* 458 Mich. at 650, 581 N.W.2d 670 (noting that the first version of the highway-by-user statute was enacted in 1838). There is also no authority or public policy that directly prohibits the public from obtaining a prescriptive right to use land for something other than a highway, such as for public parks or beaches. Indeed, this Court implicitly recognized that the general public can obtain a prescriptive right to use land for recreational purposes in *Kempf,* 69 Mich.App. at 342–344, 244 N.W.2d 476.

In *Kempf,* this Court examined—in relevant part—whether the trial court properly determined that front lot owners had riparian rights in Higgins Lake and that the public had not established the right to use the front lot owners' property for recreational purposes. *Id.* at 340–342, 244 N.W.2d 476. In examining the issue, this Court first determined that the back lot owners had not established that the dedicated boulevard conveyed anything other than the right typically accompanying a roadway. *Id.* at 342, 244 N.W.2d 476. The Court then turned to the trial court's determination that the public had not established "rights to use the waterfront area by prescription." *Id.* at 343, 244 N.W.2d 476.

Before turning to the facts adduced at the trial court level, this Court first held that the public cannot establish a prescriptive right without some action by the representatives of the public:

> We think it safe to say that unless there has been some action by representatives of the public, i.e. the government, a "public" easement cannot be established by prescription. Recreational use of an area by various individuals over a period of years is insufficient to establish a public easement.
>
> ***17** "Not all use of beaches or shorelines gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches.
>
> "There are many beaches along our entire shoreline that area [*sic*] resorted to by local residents and visitors alike without giving rise to prescriptive easements. It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches." *City of Daytona Beach v. Tona–Rama, Inc.*, 271 So.2d 765, 770 (Fla.App., 1972). [*Kempf,* 69 Mich.App. at 343, 244 N.W.2d 476.]

The Court determined that this requirement was comparable to the requirement that there be proof that the public has accepted a roadway through some action to control and maintain the roadway before the public can establish a prescriptive right under the highway-by-user statute. *Id.* The Court then concluded that there was no proof of public acceptance in the case before it: "We believe that establishment of public recreation rights by prescription requires at a minimum governmental action to facilitate and control recreational use. It does not appear that the public has established by prescription any recreational easement over the area in question." *Id.* at 343–344, 244 N.W.2d 476. For that reason, the Court affirmed the trial court to the extent that it had ruled that the public did not "have recreation rights inconsistent with the front lot owner's riparian rights." *Id.* at 344, 244 N.W.2d 476.

The analysis in *Kempf* was not hypothetical; this Court determined that, in order to establish a public prescriptive right, there must be proof—at a minimum—of governmental actions to control and facilitate the recreational use. *Id.* at 343–344, 244 N.W.2d 476. Thus, the Court in *Kempf* determined that the general public could have, but failed, to establish a prescriptive right. This Court has since applied *Kempf* to additional claims that the general public has acquired a prescriptive right to use an otherwise private beach for public recreation. See *Higgins Lake Property Owners,* 255 Mich.App. at 119–120, 662 N.W.2d 387. Accordingly, Michigan courts have recognized that the general public may obtain prescriptive rights to beaches as well as highways.

In the present case, Judge Benson determined that plaintiffs' claim that the public had obtained a prescriptive right to continue using the end of 121st Avenue as a public beach failed as a matter of law because there was no evidence from which a fact-finder could conclude that either Ganges Township or the Road Commission had taken the necessary governmental action to facilitate or control the public's use of the beach. He came to this conclusion because the only evidence cited by plaintiffs involved actions by Ganges Township and the Road Commission that were consistent with the use of 121st Avenue as a road. In contrast, Judge Kolenda apparently determined that there was no factual dispute that Ganges Township or the Road Commission had in fact "taken" defendants' property at some point in the past and that the public now had the right to use the end of 121st Avenue as a public beach. For that reason, he concluded that the public was not trespassing on the road end within the meaning of the RTA. We disagree with both judges' conclusions.

***18** Since before the *Marshall* litigation, both Ganges Township and the Road Commission have taken various actions with regard to both the improved portion of 121st Avenue and the unimproved portion at the point where 121st Avenue intersects with Lake Michigan. As Judge Smith found in his opinion, the Road Commission has graded, improved and cleared 121st Avenue since at least 1946. He also noted that the Road Commission modified the end of the improved portion of 121st Avenue to include space for parking and that the public made use of the area for picnics, outings and bathing. Further, there is evidence that either Ganges Township or the Road Commission erected barriers to control vehicle access to the portion of 121st Avenue between the improved portion and Lake Michigan. Although this evidence is consistent with the use of 121st Avenue as a right-of-way for ingress and egress alone, a fact finder could also infer that these actions were taken to facilitate or control the public's use of the end of 121st Avenue as a public beach. Where facts are capable of multiple inferences, it is for the jury to determine what inferences may be fairly drawn from the evidence. *People v. Hardiman,* 466 Mich. 417, 428, 646 N.W.2d 158 (2002). Therefore, Judge Benson erred when

he determined that these acts could not support plaintiffs' claim premised on a public prescriptive right. Further, there is also significant evidence that Ganges Township entertained requests by the general public concerning the public's use of the area at the end of 121st Avenue as a public beach and acted to control or facilitate such use.

At summary disposition, plaintiffs submitted the minutes of various meetings by the Board of Trustees for Ganges Township from 1987 to 2004. These minutes demonstrate that the Board frequently considered the maintenance and improvement of the disputed end of 121st Avenue, including questions about the installation of a gate, parking at the end of the road, tree removal, and the regulation of activities on the beach. It is also significant that the board's minutes often refer to the point where 121st Avenue meets Lake Michigan as "streamland." This appellation suggests that the public and board thought of the area as a park space rather than a right-of-way; this in turn permits an inference that the board's actions were taken for the purpose of maintaining and controlling the area as a park space rather than as a right-of-way. The minutes also show that the Board used public funds and public employees to collect and dispose of tires in the area of the beach and may have erected signs to regulate the use of the beach area. Again, although these actions could be consistent with use of the right-of-way to access Lake Michigan, these actions also support an inference that Ganges Township or the Road Commission acted to control the public's use of the road end as a public beach open for general recreation. Therefore, given the totality of the evidence, we conclude that there is a question of fact as to whether and when the public established a prescriptive right to use the end of 121st Avenue as a public beach.

III. Period of Limitations and Inverse Condemnation

A. Standard of Review

***19** We shall next address defendants argument that Judge Kolenda erred when he dismissed their counterclaim for inverse condemnation as untimely. This Court reviews de novo a trial court's decision to grant summary disposition. *AutoAlliance,* 282 Mich.App. at 498–499, 766 N.W.2d 1. Whether a statute of limitations bars a particular cause of action is a question of law that this Court reviews de novo. *Moll v. Abbott Laboratories,* 444 Mich. 1, 26–28, 506 N.W.2d 816 (1993).

B. The Applicable Period of Limitations

As already noted, there is a question of fact as to whether and when the public might have established a prescriptive right to use the end of 121st Avenue as a public beach. Accordingly, we agree with defendants' contention that Judge Kolenda erred to the extent that he dismissed defendants' claim for inverse condemnation as untimely; whether defendants' inverse condemnation claim is untimely will ultimately depend on the findings after a trial on the merits. Therefore, to the extent that Judge Kolenda determined that there was no question of fact as to the timeliness of defendants' inverse condemnation claim, he erred. Nevertheless, we elect to address the period of limitations applicable to defendants' claim for inverse condemnation. We do this despite the fact that the parties agree that the applicable period is six years. It is well settled that it is the exclusive province of the courts to state what the law is. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177–180, 2 L Ed 60 (1803). And it is equally well settled that the parties' stipulations as to the applicable law cannot bind this Court or the lower court. *In re Finlay Estate,* 430 Mich. 590, 595, 424 N.W.2d 272 (1988). Because this issue will directly affect the proceedings on remand, we now clarify the applicable period of limitations.

The seminal Michigan case dealing with the period of limitations applicable to an inverse condemnation claim is *Hart v. Detroit,* 416 Mich. 488, 331 N.W.2d 438 (1982). In *Hart,* our Supreme Court had to determine whether a claim for inverse condemnation could be constitutionally barred by a period of limitation and, if it could, whether the applicable period was three years under the statute now codified at MCL 600.5805(10), six years under MCL 600.5813, or fifteen years under MCL 600.5801. *Id.* at 496–497, 331 N.W.2d 438. The Court first determined that the Legislature may constitutionally limit a claim based on inverse condemnation through a period of limitations. *Id.* at 494–496, 331 N.W.2d 438. The Court then turned to the applicable period.

The Court examined whether the fifteen-year period applicable to actions for the recovery of land applied to the facts in *Hart. Id.* at 497, 331 N.W.2d 438. The Court explained that there were fundamental differences between an action for compensation based on inverse condemnation and actions premised on adverse possession: inverse condemnation is "a taking of private property for a public use without the commencement of condemnation proceedings." *Id.* at 494, 331 N.W.2d 438. Where such a

taking has occurred, the person whose property has been taken is entitled to compensation. *Id.* Further, with an inverse condemnation action, the party instituting the action usually concedes that the condemnor has taken the property without formal condemnation proceedings. *Id.* at 497, 331 N.W.2d 438. In contrast, the passage of the fifteen-year period under MCL 600.5801 for the recovery of land establishes the point at which the title of those who slept on their rights terminates and "vests ... in the party claiming adverse possession"; *Gorte v. Dep't Transportation*, 202 Mich.App. 161, 168, 507 N.W.2d 797 (1993), and, unlike cases involving inverse condemnation, "if title to the property is secured by the adverse possessor, the original owner is not entitled to payment." *Hart*, 416 Mich. at 498, 331 N.W.2d 438; see also *Bumpus v. Miller*, 4 Mich. 159, 162–163 (1856) (noting that the constitutional provision requiring compensation for property taken for public use does not apply to cases "where the owner actually gives or dedicates his property to the public use, or where, from his long acquiescence in the use of it by the public, a donation or dedication is presumed by law."). [10] This is because the loss of an interest in property through adverse possession by the public—whether characterized as an implied dedication or otherwise—does not constitute a governmental taking; rather, it is the property owner's failure to assert his or her rights in the face of public use that resulted in the lapse of the property interest. *Texaco, Inc. v. Short*, 454 U.S. 516, 530, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982) ("In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect."); see also *Kentwood*, 458 Mich. at 663, 581 N.W.2d 670 (stating that a lapse under the highway-by-user statute, MCL 221.20, is the result of the property owner's failure to assert his rights rather than the result of state action and, therefore, there is no taking that requires compensation); see also *id.* at 671, 581 N.W.2d 670 (Taylor, J., concurring in part and dissenting in part) (concluding that "because the right of way, as a prescriptive easement, would not have attained status as a highway by user but for the abutting land-owner's acquiescence in the use of a portion of his land as a highway, the landowner's acquiescence precludes any finding of a taking.").

***20** After noting the distinctions between adverse possession and inverse condemnation, the Court in *Hart* concluded that the fifteen-year period under MCL 600.5801 did not apply to the facts before it:

> 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 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 plaintiff having continual ownership rights. [*Hart*, 416 Mich. at 499, 331 N.W.2d 438 (citation omitted).]

However, the Court did not foreclose the possibility that the fifteen-year period might apply to some inverse condemnation actions such as where "a plaintiff retains ownership rights in the property when suit is brought...." *Id.* In such a case, the analogy to an action premised on adverse possession may be applied. *Id.* The Court then concluded by determining that the six-year period stated under MCL 600.5813 applied to the facts of its case. *Id.* at 503, 331 N.W.2d 438.

Thus, based on the analysis in *Hart*, where a government entity has taken property for a public purpose, but where the owner retains ownership rights in the property, the owner's action for inverse condemnation would be subject to the fifteen-year period of limitations. See, e.g., *Difronzo v. Port Sanilac*, 166 Mich.App. 148, 153, 419 N.W.2d 756 (1988). This is consistent with the fact that, after the passage of fifteen years, the adversely held property right vests in the adverse holder. *Gorte*, 202 Mich.App. at 168, 507 N.W.2d 797. As such, the underlying owner must bring suit within the fifteen-year period to either eject the government—and presumably obtain compensation for the temporary taking—or force the government to properly condemn the property. This was precisely the situation in *Difronzo.*

In *Difronzo*, the plaintiff sued for inverse condemnation after the defendant constructed a walkway and harbor facilities on his property. *Difronzo*, 166 Mich.App. at 151–152, 419 N.W.2d 756. Defendant moved for summary disposition on the grounds that plaintiff's complaint, which was filed fourteen years after the encroachments, was untimely under the six-year period stated under *Hart. Id.* at 150, 153, 419 N.W.2d 756. The trial court agreed with the defendant's claim

that the six-year period applied, but this Court disagreed. *Id.* at 153–154, 419 N.W.2d 756. This Court held that the fifteen-year period applicable to adverse possession applied because the plaintiff still held a present interest in the lake frontage and riparian rights. *Id.*

The Court in *Difronzo* correctly concluded that the fifteen-year period applied; the encroachments had not yet vested title in the defendant and, for that reason, the plaintiff still held the affected property rights even though the defendant had clearly interfered with his ownership through its encroachments. If the six-year period had been applied, the plaintiff presumably could have sued to eject the defendant, but could not have received compensation for the temporary taking. And, in the event that the trial court refused to order the removal of the encroachments, see *Etherington v. Bailif,* 334 Mich. 543, 555, 55 N.W.2d 86 (1952) (explaining that, under certain circumstances, a trial court may permit an encroaching party to keep the land by paying compensation to the actual land owner), the plaintiff would have been left without either the property taken or compensation. Under such circumstances, the public entity would essentially have the power to adversely possess private property in six years rather than the fifteen years applicable to ordinary citizens. By applying the fifteen-year period under such circumstances, courts ensure that the property owner will have the full panoply of remedies available.

***21** In contrast, where the plaintiff has completely lost his or her ownership interest in the property through government action other than through adverse possession, as was the case with the tax sale in *Hart,* the divested owner will nevertheless have six-years from the date he or she lost his or her property in order to seek compensation. See *Hart,* 416 Mich. at 498, 331 N.W.2d 438 (explaining that, under the facts of that case, compensation was the only viable alternative). Finally, it bears repeating that, where the owner has lost an interest in property as a result of adverse possession or through the vesting of a prescriptive easement, there is no taking for which compensation must be made, *Kentwood,* 458 Mich. at 663, 581 N.W.2d 670; *Hart,* 416 Mich. at 498, 331 N.W.2d 438; as such, an inverse condemnation claim premised on a vested adverse possession or prescriptive easement is necessarily untimely.

In this case, the relevant period of limitation is the fifteen-year period applicable to actions for the recovery of land. MCL 600.5801(4); *Difronzo,* 166 Mich.App. at 153, 419 N.W.2d 756. As alleged, the facts indicate that the general public has been exceeding the scope of the easement applicable to the stretch of 121st Avenue between the improved highway and Lake Michigan for more than 50 years. And, to the extent that a governmental entity has intervened to facilitate and control the public's use of the affected land, it has essentially asserted to the whole world that it has the right to determine who may use the land and in what manner they may use it. See *Missaukee Lakes Land Co. v. Missaukee County Rd. Comm'n,* 333 Mich. 372, 379, 53 N.W.2d 297 (1952) (explaining that potentially permissive use by the public is insufficient to establish a highway-by-user, the public's use must be accompanied by some act on the part of the governmental entity that is so open, notorious, and hostile that it places the landowner on notice that his title is denied). Such an assertion is no less an encroachment than the construction of a walkway and harbor facilities on private land. See *Difronzo,* 166 Mich.App. at 151–152, 419 N.W.2d 756. For that reason, defendants had fifteen years from the date they were on notice that the government was asserting its right to facilitate and control the public's continued use of the road end as a public beach to either oust the governmental entity and seek damages for a temporary taking or demand that the governmental entity institute proper condemnation proceedings. See *Cimock,* 233 Mich.App. at 87–88, 592 N.W.2d 401 (noting that there was evidence that the governmental entity had maintained the road at issue for the statutory period, but that there must also be evidence that public at large used the road as a road during the same period). Consequently, if the general public obtained a vested prescriptive right to use the road end as a beach, defendants' inverse condemnation claim would fail as a matter of law; defendants would not be entitled to compensation for the loss in property rights and Ganges Township's actions thereafter to control and facilitate the public's use of the road end as a beach would not be inconsistent with defendants' remaining property rights. *Kentwood,* 458 Mich. at 663, 581 N.W.2d 670. If, however, the public had not acquired a prescriptive right to use the road end as a beach prior to the present suit, defendants would still own the underlying property rights and could proceed with their inverse condemnation action and seek damages for any actions by Ganges Township that amounted to a temporary taking. [11] *Difronzo,* 166 Mich.App. at 153–154, 419 N.W.2d 756.

IV. Recreational Trespass Act

A. Standard of Review

***22** Finally, we shall address the parties' competing claims about whether the RTA applies to the land at issue. This Court reviews de novo the proper interpretation of statutes such as the RTA. *AutoAlliance,* 282 Mich.App. at 499, 766 N.W.2d 1.

B. Analysis

1. General Application of the Recreational Trespass Act

The RTA provides for the punishment of persons who enter onto the land of another without permission to engage in recreational activities. See MCL 324.73101 *et seq.* Under the statute, a person is prohibited from entering or remaining "upon the property of another person" in order "to engage in any recreational activity ... without the consent of the owner" if the property is "fenced or enclosed" or "posted in a conspicuous manner against entry." MCL 324.73102(1). The statute also provides that a property owner may give oral or written consent for a person to enter or remain on the property, may orally revoke or amend the permission and may place conditions for entering or remaining on the property. MCL 324.73102(5). County prosecutors or municipal attorneys may prosecute violations of the RTA, MCL 324.73108, and a "peace officer may seize property and otherwise enforce this part upon complaint of the landowner or his or her lessee or agent." MCL 324.73106(2). Likewise, a property owner may bring civil suit against a person who commits a recreational trespass. MCL 324.73109.

Because the statute prohibits persons from entering or remaining on the "property of another" person, MCL 324.73102(1), it necessarily does not apply to one's own property. Similarly, the statute does not apply where the person entering or remaining on the property of another has permission to enter or remain on the property. *Id.* An easement is an interest in property that gives the easement holder the right to use the property of another for a specific purpose, *Heydon v. MediaOne of Southeast Mich., Inc.,* 275 Mich.App. 267, 270, 739 N.W.2d 373 (2007)—that is, although the easement holder does not own the underlying fee, the easement holder nevertheless has an enforceable property right in the use of the underlying fee. See *Dep't of Natural Resources v. Carmody–Lahti Real Estate, Inc.,* 472 Mich. 359, 378–379, 699 N.W.2d 272 (2005). Therefore, to the extent that an easement holder's actions in entering onto or remaining on the underlying fee are within the scope of the easement, the easement holder is not entering onto or remaining on "the property of another." MCL 324.73102(1). Instead, the easement holder is exercising his or her own property right. *Carmody–Lahti Real Estate, Inc.,* 472 Mich. at 378–379, 699 N.W.2d 272. Therefore, even though the land underlying 121st Avenue belongs to defendants, the RTA does not apply to the general public's use of 121st Avenue as long as that use is within the scope of the public's easement. However, Michigan law has long recognized that it is a trespass for an easement holder to exceed the scope of his or her easement. *Schadewald v. Brule,* 225 Mich.App. 26, 40, 570 N.W.2d 788 (1997). The same applies to members of the general public who exceed the scope of the rights held under the public trust doctrine. See *Glass v. Goeckel,* 473 Mich. 667, 697–698, 703 N.W.2d 58 (2005) ("The public trust doctrine cannot serve to justify trespass on private property."). Thus, the RTA applies to easement holders who exceed the scope of their easement—that is, trespass on the underlying fee—for recreational purposes. Consequently, whether the RTA applies in this case depends on the nature and extent of the general public's easement at the point where 121st Avenue intersects with Lake Michigan, which must be determined on remand after a trial on the merits.

2. Application to Ganges Township

***23** On appeal, Ganges Township argues that defendants' counterclaim premised on the RTA must be dismissed. Ganges Township relies in part on the argument that the act cannot apply to the road end at issue because its own actions fall within the scope of its property right in the road end. As noted above, there is a question of fact as to nature and extent of any interest in the road end held by Ganges Township on behalf of the public beyond that normally accompanying an easement for a highway-by-user. Nevertheless, Ganges Township also argues that the counterclaim must be dismissed for three additional reasons. First, Ganges Township argues that defendants' do not own a property interest in the road end and, therefore, do not have standing to bring an action under the RTA. Second, Ganges Township argues that it is not a person within the meaning of the RTA. And, lastly, Ganges Township argues that defendants' are barred under governmental immunity from asserting any claim against it under the RTA.

We agree that defendants cannot sue Ganges Township under the RTA because the statute does not create an exception to governmental immunity. [12] Actions for trespass are distinct from inverse condemnation actions premised on a takings. *Peterman v. Dep't Nat. Resources*, 446 Mich. 177, 206–207, 521 N.W.2d 499 (1994). And there is generally no exception for actions premised on trespass to the immunity provided under MCL 691.1407(1). *Pohutski v. City of Allen Park*, 465 Mich. 675, 689–690, 641 N.W.2d 219 (2002). Likewise, governmental immunity applies even when the relief sought is injunctive rather than monetary. See *Jackson County Drain Commissioner v. Village of Stockbridge*, 270 Mich.App. 273, 284–285, 717 N.W.2d 391 (2006). Hence, under MCL 691.1407(1), Ganges Township would be entitled to governmental immunity as long as it were engaged in a governmental function and none of the statutory exceptions applied.

In this case, the statutory exceptions clearly do not apply and Ganges Township's actions to regulate and protect the public's right to use township property are clearly governmental functions. Consequently, Ganges Township would be entitled to governmental immunity for violations of the RTA under MCL 691.1407(1) unless the RTA itself established an exception to governmental immunity. See *State Farm Fire & Casualty Co. v. Corby Energy Services, Inc.*, 271 Mich.App. 480, 485, 722 N.W.2d 906 (2006) (noting that the Legislature may create exceptions to governmental immunity outside the governmental tort liability act). In order to waive governmental immunity, the statute must expressly create an exception or the exception must follow by necessary inference. *Id* .

Under the RTA, there is no express exception to the application of governmental immunity. Accordingly, any exception must follow by necessary inference from the imposition of liability within the statute. The RTA imposes liability on persons; and it does not define persons to include governmental entities. Further, the references to persons in the RTA implicate individuals rather than public entities. See, e.g., MCL 324.73102(4) (stating that a “person other than a person possessing a firearm may ... enter on foot upon the property of another person for the sole person of retrieving a hunting dog.”) and MCL 324.73103(1) (stating that a “person shall not discharge a firearm....”). Accordingly, one cannot necessarily infer that the Legislature intended to create an exception for governmental immunity when it subjected a “person” to liability under MCL 324.73109. *State Farm Fire & Casualty Co.*, 271 Mich.App. at 485, 722 N.W.2d 906. Because there is no exception to governmental immunity for claims under the RTA, Ganges Township was entitled to summary disposition of that claim on the basis of governmental immunity.

V. Conclusion

***24** Judge Smith's opinion and order in the *Marshall* litigation did not establish the public's right to use the land at the point where 121st Avenue intersects Lake Michigan for any purposes beyond those normally conveyed under MCL 221.20. Further, the scope of a dedication under MCL 221.20 does not vary based on the nature of the public uses giving rise to the dedication. Accordingly, the *Marshall* litigation only established the public's right to use 121st Avenue for ingress and egress to and from Lake Michigan. Therefore, the trial court properly dismissed plaintiffs' claims to the extent that they were premised on the preclusive effect of Judge Smith's opinion and order.

However, Judge Smith's findings are evidence concerning the public's use of the road end and concerning the actions taken by the governmental entities to assert control over 121st Avenue. Based on Judge Smith's findings from the *Marshall* litigation and the other submissions on the motions for summary disposition, there were questions of fact as to whether and when Ganges Township or the Road Commission took actions to facilitate and control the public's use of the road end *as a public beach.* Because there were questions of fact on these issues, the trial court erred to the extent that it dismissed plaintiffs' claim based on a public prescriptive right and to the extent that it dismissed defendants' inverse condemnation claim as untimely. [13]

Finally, to the extent that the trial court determined that the RTA *could* apply to persons who exceed the scope of the public's right to use 121st Avenue, it did not err. Moreover, because the RTA does not establish an exception to governmental immunity, the trial court also did not err when it dismissed defendants' claim against Ganges Township based on the RTA, even though it did so for different reasons. See *Coates v. Bastian Bros., Inc.*, 276 Mich.App. 498, 508–509, 741 N.W.2d 539 (2007).

For these reasons, in docket number 284637, we affirm the trial court to the extent that it dismissed plaintiffs' claims other than their claim premised on a public prescriptive right to use the end of 121st Avenue as a public beach. Likewise, in

docket number 284736, we affirm the trial court to the extent that it dismissed defendants' claims other than its claim for inverse condemnation. Because there are questions of fact as to whether and when a governmental entity might have taken actions to facilitate and control the public's use of the road end as a public beach sufficient to begin the running of the applicable period of limitations, we reverse the trial court's decision to dismiss plaintiffs' claim premised on a public prescriptive right to use the road end as a public beach in docket number 284637, and reverse the trial court's decision to dismiss defendants' counterclaim for inverse condemnation in docket number 284736. These claims cannot be resolved absent findings concerning the nature of any public entities' actions to facilitate and control the public's use of the road end and the timing of those actions. Therefore, these claims must be tried on the merits.

***25** Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. None of the parties having prevailed in full, none may tax costs. MCR 7.219(A).

Footnotes

1 Throughout this opinion, we shall use the phrase "prescriptive rights" to refer to the property rights accompanying an easement established by prescription. See, e.g., *Hoag v. Place*, 93 Mich. 450, 458, 53 N.W. 617 (1892) (referring to the property rights obtained as prescriptive rights and stating the elements for obtaining a prescriptive "right or easement in the lands" of another).

2 The Road Commission is not a party to this appeal.

3 We shall collectively refer to John and Mary Tilton, the Harold A. Stege Trust, and Harold and Suzanne Stege as defendants.

4 We shall refer to Michael Benninghoff, Laurie Benninghoff, Kris Kallembach, Dermot Putnam, Gail Kaplan, Friends of 121 st Avenue, and Ganges Township collectively as plaintiffs.

5 For ease of reference, we shall refer to this as the *Marshall* litigation. The Marshalls' suit was joined with a companion case.

6 For ease of reference, we will henceforth refer to these uses as public beach uses in order to differentiate those uses from the more limited use for ingress and egress to and from Lake Michigan.

7 Although Judge Benson addressed whether the individual plaintiffs had established a private prescriptive right, it does not appear that plaintiffs alleged a claim that they individually or collectively had a private prescriptive right to use the road end as a beach. Instead, plaintiffs apparently relied solely on the general public's longstanding use of the road end as a beach.

8 We note that, as alleged, plaintiffs' counts three and four are nearly identical. Therefore, we shall treat these counts as a single claim alleging that the general public's longstanding use had vested into a prescriptive right to continue using the road end as a public beach.

9 Relying on *Kentwood*, 458 Mich. at 663–665, 581 N.W.2d 670, plaintiffs argue that the establishment of a highway-by-user under MCL 221.20 conveys all title in the affected property to the governmental entity—not just an easement. However, as recently as 1986, our Supreme Court reiterated that a dedication implied by user under MCL 221.20 conveys only an easement and not a fee. See *Eyde Bros. v. Easton Co. Drain Comm'r*, 427 Mich. 271, 281 n. 4, 282, 398 N.W.2d 297 (1986) (noting that a statutory dedication transfers a fee, but an implied dedication by user conveys only an easement for use as a highway). While we question whether our Supreme Court intended to make a sweeping and dramatic change to over 100 years of settled law with its decision in *Kentwood*, whatever the effect of that decision, see, e.g., *Blackhawk Dev. Corp. v. Village of Dexter*, 473 Mich. 33, 49, 700 N.W.2d 364 (2005) (approvingly quoting *Eyde Bros* for the proposition that the establishment of a highway-by-user conveys a public easement for use as a highway), at the time of the *Marshall* litigation, the establishment of a highway-by-user conveyed only an easement. Consequently, defendants retained the fee underlying the property at issue.

10 The majority of courts that have considered the issue have concluded that a state does not have to pay compensation for property interests that it acquired through adverse possession or prescription. See *Des Plaines v. Redella*, 365 Ill.App.3d 68, 301 Ill.Dec. 722, 847 N.E.2d 732 (2006); *Gainesville v. Morrison Fertilizer, Inc.*, 158 S.W.3d 872, 876 (Mo.App., 2005) (holding that a "public entity's acquisition of private property for a public use by adverse possession extinguishes the former owner's constitutional right to receive just compensation."); *Algermissen v. Sutin*, 133 N.M. 50, 59, 61 P.3d 176 (N.M., 2002) ("The general rule is that acquisition of an easement by prescription is not a taking and does not require compensation to the landowner."); *Stickney v. City of Saco*, 770 A.2d 592, 603 (Me., 2001) (noting that the owner's takings claim expires upon the passage of the period of limitations for a prescriptive easement); *Rogers v. Marlin*, 754 So.2d 1267, 1273 (Miss.App., 1999) ("Similarly, damages are never a part of adverse possession, which is what a prescriptive easement is. Unlike eminent domain ... the original owner of the property over which the prescriptive easement in question runs has long since forfeited his right to demand payment for the easement over his property."); *Weidner v. Alaska*, 860 P.2d 1205, 1212 (Ala, 1993) (holding that the passage of the prescriptive period extinguished the owner's right to compensation); *State ex rel A.A.A. Investments v. City of Columbus*, 17 Ohio St.3d 151, 478 N.E.2d 773 (Ohio, 1985); *Board of County Commissioners of Saguache County v. Flickinger*, 687 P.2d 975, 983–985 (Colo., 1984); *Petersen v. Port of Seattle*, 94

Wash.2d 479, 618 P.2d 67 (Wash, 1980); *City of Ashland v. Hardesty*, 23 Or.App. 523, 543 P.2d 41 (1975); *Dunnick v. Stockgrowers Bank of Marmouth*, 191 Neb. 370, 215 N.W.2d 93 (1974); *Kentucky v. Stephens*, 407 S.W.2d 711 (Ky., 1966). Only one court has concluded that a property owner may seek compensation even after title has transferred to the state through adverse possession. See *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F Supp 2d 206 (District RI, 2002), affirmed on other grounds 337 F.3d 87 (C.A.1, 2003).

11 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. *Hart*, 416 Mich. at 498, 331 N.W.2d 438. 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. See *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233–234, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003); *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

12 For that reason, we decline to address Ganges Township's standing argument.

13 Given our resolution of the issues, we decline to address whether and to what extent Judge Kolenda's opinion and order modified Judge Benson's earlier opinion and order.

End of Document

Exhibit 12: City of Ann Arbor 2013 Sanitary Sewage Wet Weather Evaluation Project; Footing Drain Disconnection (FDD) Survey Results, January 24, 2014

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

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Exhibit 12: City of Ann Arbor 2013 Sanitary Sewage Wet Weather Evaluation Project; Footing Drain Disconnection (FDD) Survey Results, January 24, 2014

City of Ann Arbor
2013 Sanitary Sewage Wet Weather Evaluation Project
Footing Drain Disconnection (FDD) Survey Results
January 24, 2014

I. Introduction

This report contains the results of the FDD survey conducted under the auspices of the Sanitary Sewer Wet Weather Evaluation Project (SSWWEP). The results include survey statistics, quantitative results, key findings, and an appendix of respondent comments. A video summarizing the project is available at: http://www.a2gov.org/government/publicservices/systems_planning/waterresources/sanitary-sewer-project/Pages/default.aspx.

iPhone Users Only:

The tag below connects to the website. To use it, download the app from iTunes or use the web browser on your phone at http://gettag.mobi

In 2013, under the direction of City Council, Ann Arbor launched the SSWWEP to evaluate its FDD Program. The project objectives include measuring whether the Footing Drain Disconnection program reduced stormwater flow to the sanitary system, assessing the risk of sewer backups in the City, researching and evaluating new ways to control the impacts of stormwater on the sanitary system, and recommending the method(s) to further reduce wet weather impacts to the sanitary system. The City engaged OHM Advisors to provide engineering consulting and public engagement facilitation services. With OHM support, the City formed a Citizens Advisory Committee (CAC) to review project data and to provide a recommendation on the go-forward direction for addressing basement backup risks.

A key element of the CAC's recommendation may address the future of the FDD program. To support the evaluation of the FDD program, CAC sponsored a survey of all Ann Arbor residences and multi-family dwellings that have undergone an FDD installation. With support from OHM, the CAC developed a survey and OHM administered it. The survey process consisted of a postcard alert to all FDD sites (homeowners + multi-family dwellings), followed a week later by a survey package containing an introductory letter, a survey and a stamped return envelope. The letter introduced the project, the survey purpose, and also identified an online URL for people who wanted to complete the survey on a digital device. 2350 surveys were mailed by Dec. 4, 2013 with a response deadline of Dec. 20. By Dec. 20, 764 surveys had been received via mail and online. Since Dec. 21 an additional 86 surveys were received via mail and entered into the survey database.

On Jan. 9, 2014, the OHM team distributed a draft summary of the survey highlights to the CAC and the public in attendance. Craig Hupy, Public Area Service Administrator congratulated the CAC on the positive role they had played in sponsoring the designing of the survey. He invited the CAC to help the City identify retroactive and future improvements in the FDD program and pledged that City staff would carefully analyze the survey and develop a go-forward corrective action plan.

II: Survey Statistics

A. Total surveys completed

- 2350 surveys mailed
- 850 responses – 133 completed online; 717 returned by mail
- 36% response rate (Note: typical response rate for a municipal survey ranges from 20% to 40%.)

B. Validity of survey results

- Confidence level that the sample results represent responses from the entire set = 99%
- Margin of error = 3.6% +/-

C. Geographic dispersion of responses. TBD. Respondent addresses are being correlated.

II. Results from the FDD Survey

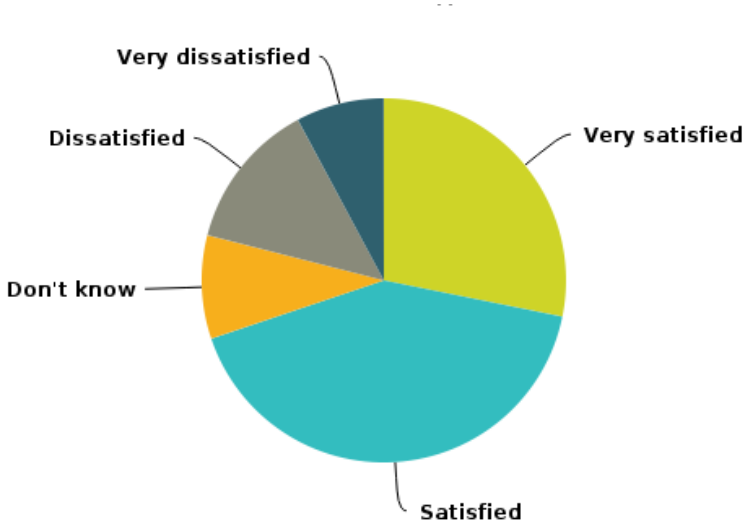
Question #1: Address of residence - entered into the database for analysis along with names and emails as provided.

Question #2: Did you live in the residence PRIOR to the sump pump installation.

Yes = 715 respondents or 84% No = 133 respondents or 16%

Question #3: Overall level of satisfaction regarding sump pump installation.

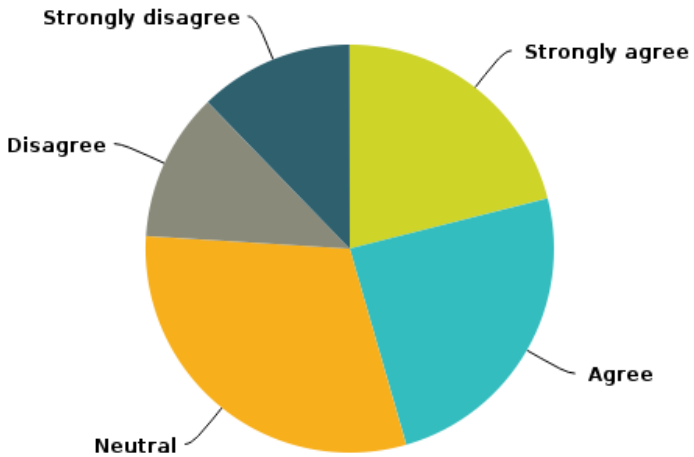
- Very Satisfied = 28%
- Satisfied = 42%
- Dissatisfied = 13%
- Very Dissatisfied = 8%
- Don't know = 9%



Key Finding:
While the majority of survey respondents report satisfaction or neutral feelings regarding their sump pump installation, about 21% of respondents report feeling degrees of dissatisfaction with the installation.

Question #4: **I would recommend a sump pump installation to a neighbor:**

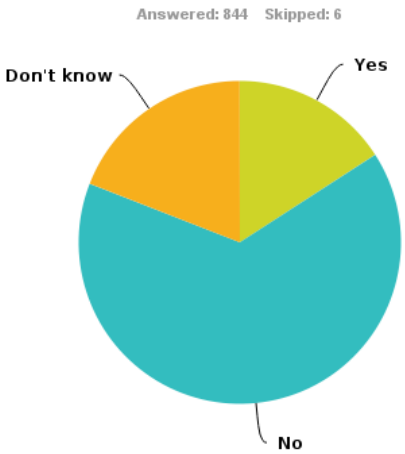
- Strongly Agree = 21%
- Agree = 24%
- Neutral = 31%
- Disagree = 12%
- Strongly Disagree = 12%



Key Finding:
45% would recommend a sump installation to a neighbor. This is almost twice as many as those that would not.

Question #5: **Did the residence experience sanitary sewage backups in the basement PRIOR to footing drain disconnection?**

Yes = 16%
No = 65%
Don't Know = 19%



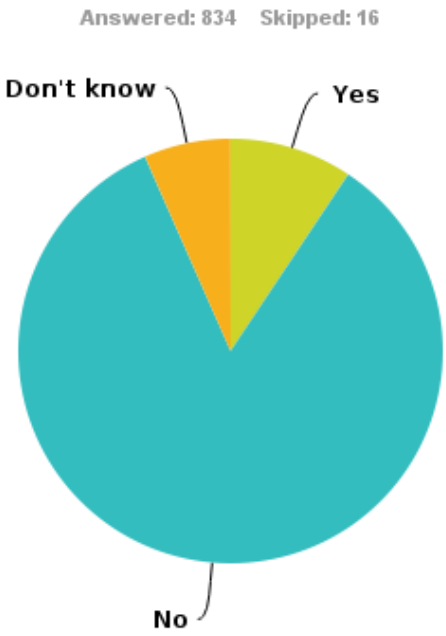
Key Finding:
134 of 850 or 16% of respondents reported experiencing sanitary sewage backups PRIOR to FDD/sump pump installation.

Question #6: **If the answer to #5 was YES, the total restoration costs listed by those who experienced sanitary sewage backups.**

Total costs = $310,150 for 90 respondents

<u>Question #7:</u> Has the residence experienced sanitary sewage backups in the basement AFTER footing drain disconnection?

Yes = 9%
No = 84%
Don't Know = 7%



Key Findings:
100 of the 134 respondents that reported experiencing sanitary sewage backups PRIOR to FDD/sump pump installation did NOT experience them after FDD/sump pump installation.

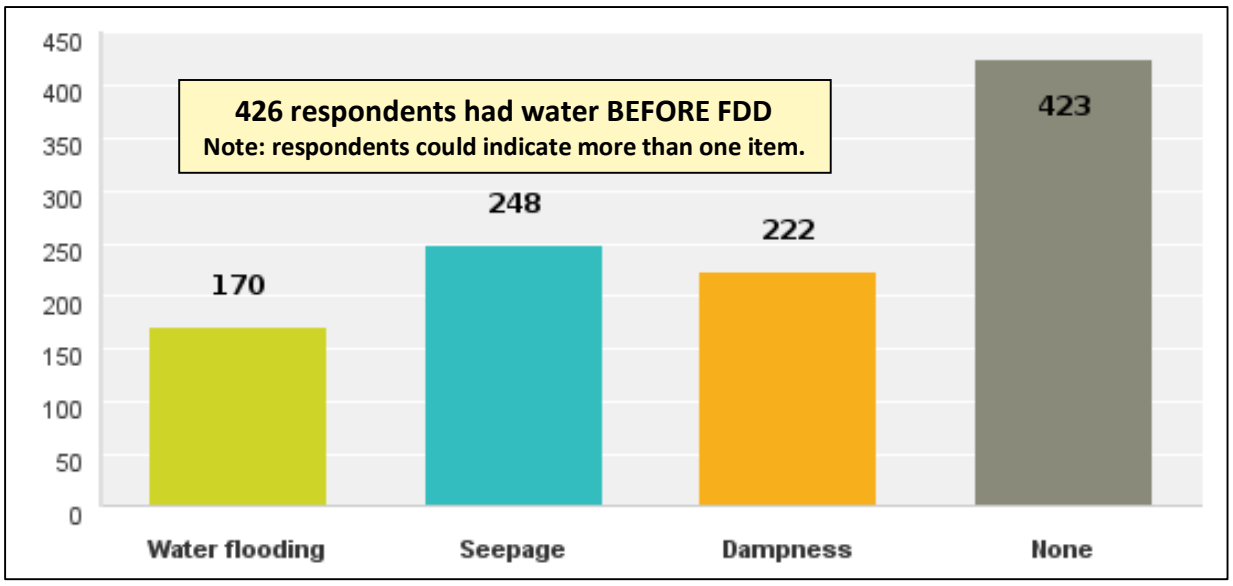
34 of the 134 continue to have sanitary sewage backups.

42 respondents that did not have sanitary backups BEFORE FDD experienced them AFTER FDD.

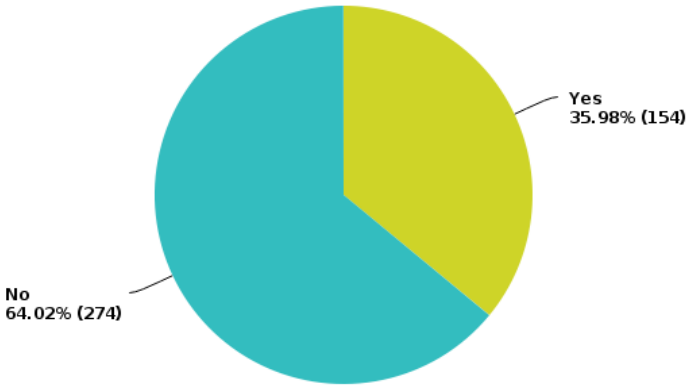
<u>Question #8:</u> If answer to #7 is YES, indicate dates / costs

Total costs = $66,470 for 67 respondents

Question #9: **Did the residence experience water flooding/seepage/dampness in the basement PRIOR to footing drain disconnection?**



Question #10: **If boxes were checked in Question #9, was your basement damaged PRIOR to the FDD?**



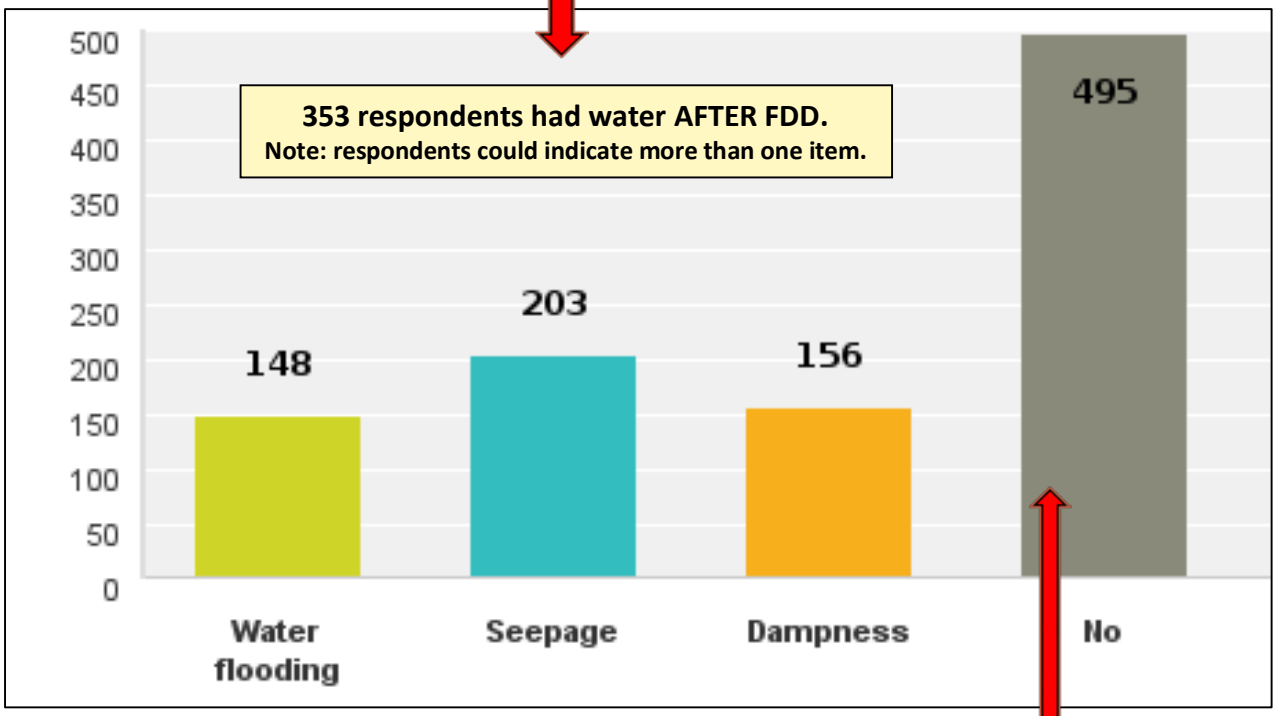
Key Finding:
Yes = 154 respondents or 36%
No = 274 respondents or 63%

Key Finding:
426 respondents, 50% of the total sample, reported experiencing water flooding/seepage/dampness BEFORE FDD.

<u>Question #11:</u> Did the residence experience water flooding/seepage/dampness in the basement AFTER footing drain disconnection?

Key Findings:
106 respondents who reported no flooding/seepage/dampness BEFORE FDD said they did experience flooding/seepage/dampness AFTER FDD.

247 respondents who had experienced flooding/seepage/dampness BEFORE FDD CONTINUED to experience flooding/seepage/dampness AFTER FDD.



Of the 495 respondents who reported NO water flooding/seepage/dampness AFTER FDD, 178 respondents HAD reported water flooding/seepage, dampness BEFORE FDD.

Totals:
278 respondents reported RELIEF from sanitary and/or water issues after FDD.

148 respondents reported NEW sanitary and/or water issues after FDD.

Question 12: Total restoration costs for water flooding/seepage/dampness AFTER footing drain disconnection.

Total restoration costs = $456,000 (158 respondents reporting)

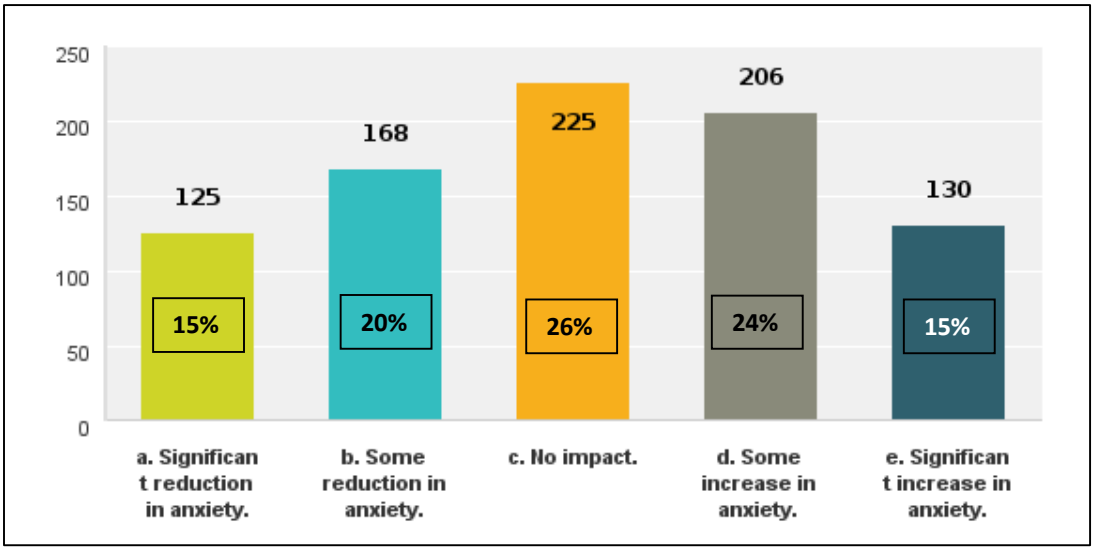
Key Finding: The average restoration cost was $3,297.

Question #13: Any non-restoration costs incurred since sump pump installation?

346 Respondents out of 850

Replacing sump pump(s)	$67,680
Replacing sump pump check valve	$2,913
Adding battery and/or water siphon backup	$92,494
Relocating sump pump	$1,750
Interior modifications to conceal sump pump, etc.	$24,646
Landscaping repair	$52,809
Additional power generator	$107,997
Other costs related to the sump pump installation	$195,064
Total:	**$545,353**

Question #14: How has the installation of a sump pump affected your peace of mind?



Key Finding:
Almost 40% reported some or significant increase in anxiety.

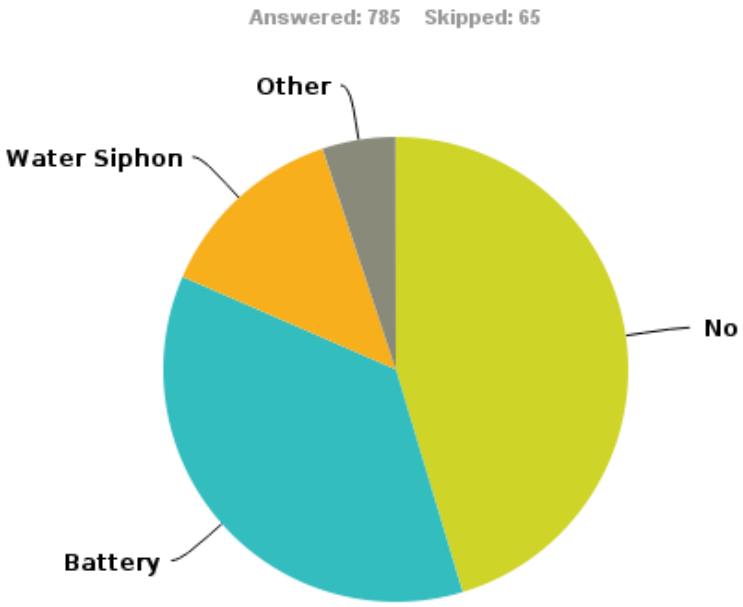
Question #15: Distribution of concerns about sump pumps.

Answer Options	Not concerned	Concerned	Very concerned
Sump pump malfunction.	31% - 229	43% - 323	26% - 193
Lack of a backup system.	47% - 323	33% - 227	19% - 131
Replacing sump pump.	41% - 293	41% - 293	18% - 127
Water flooding from sump pump hole.	53% - 367	31% - 213	17% - 118
Disrupted my basement design/style.	72% - 502	16% - 110	13% - 90
Reduction in property value due to sump pump.	67% - 464	22% - 151	11% - 76
Noise from the pump.	73% - 521	19% - 134	8% - 60
Going up and down stairs to check on sump pump.	73% - 501	18% - 124	9% - 60

Question #16: Does your sump pump have a backup system?

No = 41%
Battery = 36%
Water Siphon = 13%
Other = 5%

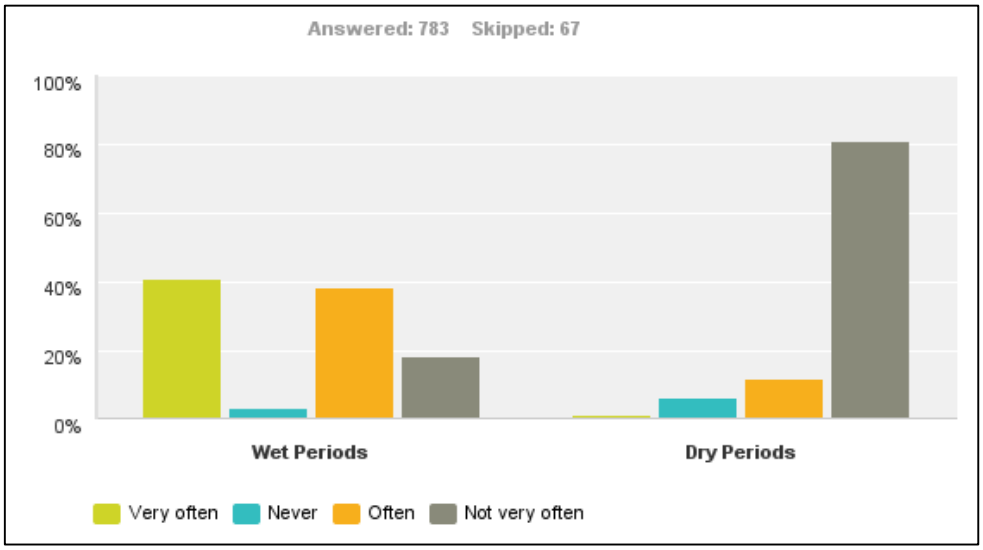
Key Finding:
Almost half of survey respondents don't have a backup system.



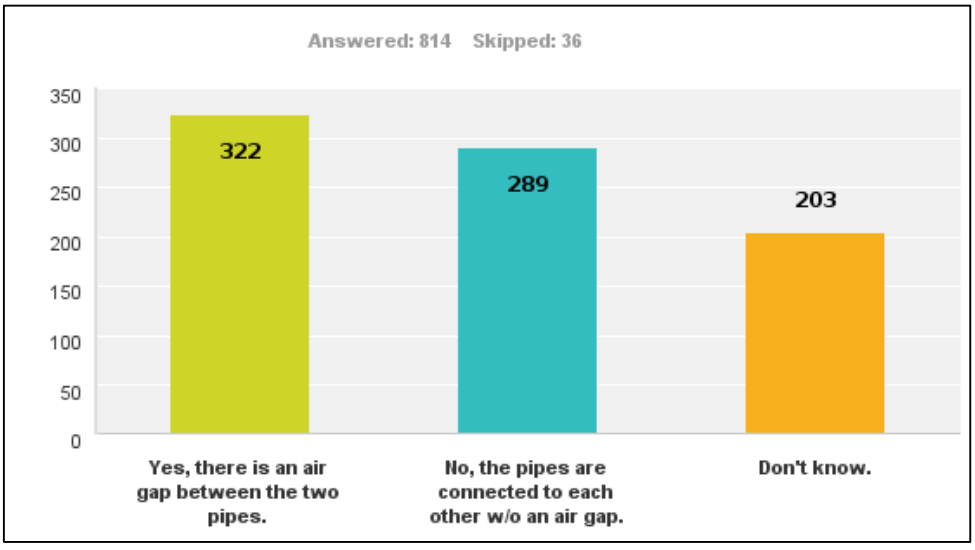
Question #17: Frequency at which sump pump operates?

Wet Periods
Very Often/Often = 79%
Not Very Often/Never = 21%

Dry Periods
Very Often/Often = 13%
Not Very Often/Never = 87%



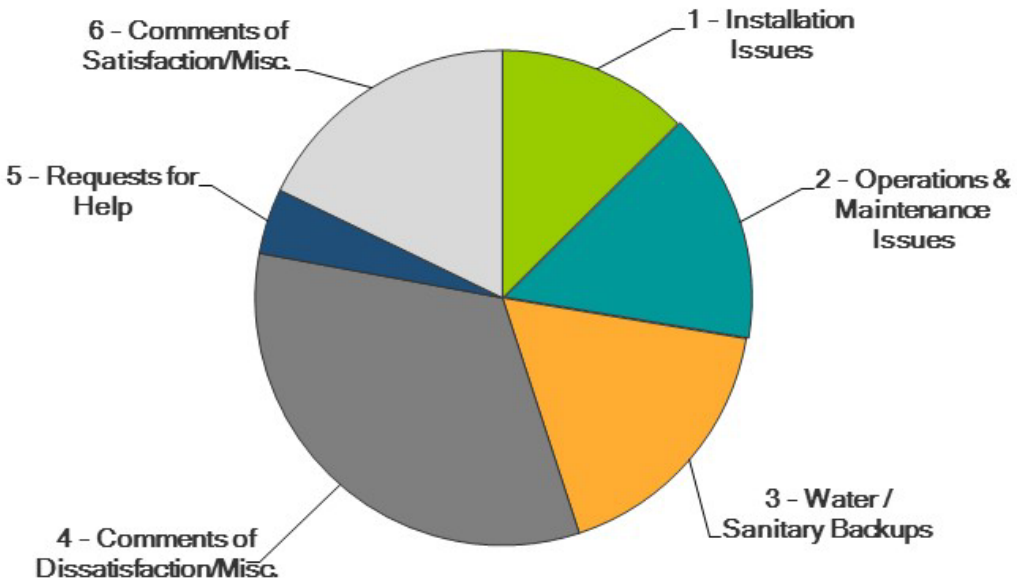
Question #18: Is there an air gap between the two pipes?



In addition to these results, there are five mentions of an "air gap" in the 307 comments, with the majority of those stating that they are not sure whether their home has one and would like someone to check their connection.

Distribution of Survey Comments:

398 Survey respondents provided comments - Total includes comments for Questions 14 and 19
Comments* were categorized as follows:



Comment Categories:

1. **Installation Issues** = 50 (13%)
2. **Operations & Maintenance Issues** = 60 (15%)
3. **Water/Sanitary Backups** = 69 (17%)*
4. **Comments of Dissatisfaction/Misc.** = 131 (33%)
5. **Requests for Help** = 17 (4%)
6. **Comments of Satisfaction/Misc.** = 71 (18%)

* Any comment mentioning water/sanitary backup in the basement was put in Category #3.

Appendix 1 –

City of Ann Arbor Footing Drain Disconnection Survey Comments

Category #1: Installation Issues – comments from questions #19 & #14 – total of 53

Comments from Question #19

1. The installer damaged the paint in numerous places on our basement stairs.

2. A trench was dug very near a tree. Shortly after, the tree began to decline significantly. We believe this was a result of the work near the tree. We need to have it removed.

3. There is an obstruction 8 feet in from the sanitary clean out that snags debris and clogs the sewer. Perhaps roots entering from the pipe that used to drain the footing?

4. Air gap is present but no leaf guard was installed as shown. Debris must be removed by hand.

5. Perimeter footing drains replaced concurrent with sump pump install (combination of interior and exterior).

6. Recommend that any homeowner strongly consider upgrading sump pump and having a back-up system added at installation.

7. Hutzel did a horrible job from the house to the street!

8. I begged not to have to do this and I feel that my personal rights were violated because I was forced into it. Now there is moisture around the sump pump to the extent that the tiles are loose, less storage space, worry about performance and maintenance, moisture outside perhaps? The garage floor area seems to have been affected, effort and time needed to investigate further and make repairs, financial loss for repairs and if our home is devalued, and emotional stress. I HATE what the city has done to my house and to my life.

9. Sump pump wire rested in spot that prevented pump from operating. Called plumber, quickly found problem, fixed for $110; Pump operation should be checked by installer so that wire cannot prevent from coming on.

10. We were one of the first repairs as we had so many instances of sewage backup and floor was jack hammered up in 5 places to install check valves . . . these are problematic as i have already had to clear two of them including one from Mr. Rooter.

11. Basement floor cracks due to jack hammer use. Unsure if west-front footing drain is connected to sump. Seepage along west front of basement.

12. Having sump pump installed has ruined floor in utility room because installers had to drill and patch numerous holes. Cement is falling apart around pump rim. I hate the sump pump and think it was a waste of money to be installed. Never had an issue prior to installation, now it's another piece of equipment to clean and maintain.

13. Had to replace vinyl tile in room with sump pump, due to installation at my expense and labor.

14. City never did final inspection to verify completion. Floor tiles left undone and ceiling was not restored. Trench settled and no filling by city. The sump has air hammer every time it operates and no reply from city about what to do. No follow through!

15. Trench area is low - needs raising also some seed did not take.

16. This was required by the city and the added cost was a burden. Had to pay extra to tap into the storm drain because the city wouldn't allow any other type of drainage system. It delayed placement of the drainage system due to inspections that were needed and it tore up my yard and driveway.

17. Left big trench in my yard from install.

18. This has destroyed my downstairs family area. It has ruined antique furniture. It used to be a place for my grandchildren to sleep. No more. It's a pit down there. I have been here 41 years. Thanks for your input and response. Basement flooded AFTER disconnect.

19. When the floor drain in the laundry room was installed, the drain is NOT the lowest point in the floor. The lowest point is the check valve next to it.

20. Currently we are experiencing a "sink hole" in the lawn where the discharge tube connects to the street connection. This is also undermining the sidewalk and three sections of side walk are caving in.

21. Should have been placed at back of house.

22. Re the above: The discharge pipe nests into the drain pipe with about 1/4" gap all around. The ends of the pipes are not separated as shown above, and there is no green leaf guard.

23. Landscaping has never recovered. Damage still visible.

24. We wanted (and still want to) do what is right for the drainage/sewer/water system. So we were and aren't necessarily upset by the disconnect program. However, we were not pleased with the cost and also are not happy with where the pump is in the basement . . . it is in a bad location and takes away from the appeal of the basement . . . and to have placed it in another area would have been cost prohibitive. As a result our home value has likely decreased. FYI - after FDD, we had matter come up through floor drain when city was flushing/cleaning lines in neighborhood. This hadn't happened before FDD in the 15 years we had been at this house, but don't know if this is related in anyway. We never had water in our basement until we got the sump pump.

25. Pipes are directly under my bedroom. Disturbing sleep.

26. This was unnecessary and has made my home environment less desirable due to the noise and appearance of floor that was never repainted as promised.

27. I wasn't here, but it was as if they tried to find the most inconvenient spot in the middle of the basement to put the sump.

28. Very poor work performed by a landscape company after sump pump placement.

29. 2009-2012: failed concrete in Lansdowne widespread. Inadequate grading, poor drainage, standing water, basement wall cave-ins, curb cuts nonfunctional due to improper street resurfacing. Asphalt foundation water proofing poorly applied, dampness at wire tie's thru walls.

30. The location of the sump pump is EXTREMELY bad.

31. It was a significant cost, was railroaded through by the city without regard for the elevation of my property or the history (none) of issues at this location, and has caused real and potential degradation of my property, and potential degradation of my health (from radon). I am more concerned about radon since the floor integrity was breached, and the basement floor now has 2 different tile types and a thickness difference.

32. We have had extensive problems that have cost us over $10,000 that are directly attributable to the Footing Drain Disconnection program. We are very unhappy and have considered taking legal action. Spent $7,000 on digging new drains to redirect water from backyard to front yard due to improper sump pump installation. In addition, we had to excavate and reseal the basement foundation due to leaks caused by the drainage problems caused by the improper sump pump installation.

33. The installation of a sump pump just about assures those never having trouble with water in the basement will have the problem at some time in the future. When power is lost for a protracted period, flooding is apt to occur. Because I am unable to remove the cover (repairmen have great difficulty trying too), I once had to siphon water through the cover hole with a pop bottle. Neighbor with backup system says that doesn't really work very well. Installation did make a mess of utility area arrangement. I understand the problem and agree with the necessity, but lament I just the same. Suggest some indication on outside of envelope as to contents. Looks like an ad to sell something - addressed to Homeowner from an unknown addressee. It almost went straight into the wastebasket.

34. Lawn was torn up, damage was never repaired. Sump pump coupling burst - flooding basement. Sump pump seems inoperable.

35. I can't get to my crawl space anymore - danger - power outages are very scary without footing drainage.

36. Very loud and cheaply done. Cracked sidewalk and killed yard. Also placed under master bedroom and ruined wall and carpet putting it in!

37. My front yard grass is not as good as used to be (dry quicker than before)

38. Landscaping - where dug to street has permanent dip in lawn; seeded with mostly weeds.

39. Good idea getting pump but entire process messed up by basement walls and bookcases.

40. Repeated sound of water "rattling" through pipe after a rain; danger of flooding basement if rainstorm knocks out power. This would flood more houses than before disconnect program! They should have enlarged sanitary drain pipes instead of destroying integrity of basements!

41. Was not pleased with the landscape/ground restoration. Poor grass seed placement and little/no mulch. Also some setting of the trench backfill.

42. An unnecessary inconvenience for us, still need to repair basement floor and have sump camouflaged as it is in the middle of living area in basement.

43. Never had a problem before. They didn't do it right the first time. The second time they had to dig up the basement floor again to connect it. Ended up with a cracked basement wall, we carpet, paneling, and another big mess.

44. Do I need the air gap for my connection outside?

45. Regarding #12 & #13, haven't incurred costs YET because we haven't dealt with it yet but will need to - sump pump was located in finished area of basement instead of unfinished area - we were not consulted. Will need to have backup system (did research when first installed - no good options and all costly!) Will need to somehow "box out" sump pump area or relocate because it's an eyesore and in carpeted area not near a drain - a big problem if leaks or backs up - will need to replace carpet and repair damaged landscaping. Caused problems that take effort and money to deal with when we never had problems in the first place!

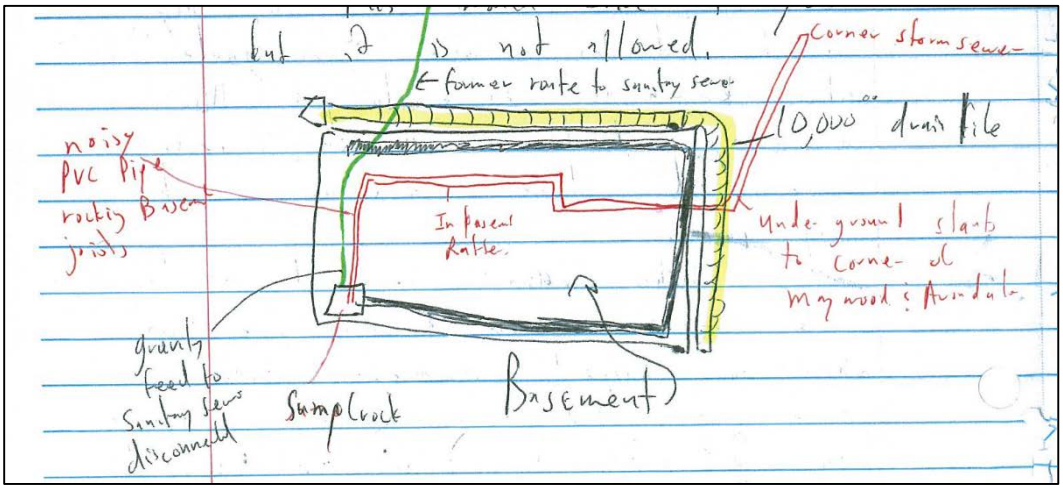
46. Gravity drainage, which is what used to be in our house, is always best. The sump pump basin is not large enough and was not installed low enough in the ground to prevent water pooling in the crawl space - a major problem.

47. Should I be concerned that there is no air gap where the pipes connect?

48. I have an air gap question, please contact me.

49. Unfortunately, this is a program that was necessitated by poor, unconscionable choices by the city decades ago. Who in their right mind would have allowed drained storm water into the sanitary sewers? Now people have to use sump pumps, which so prone to failure, either mechanical or loss of power (which typically happens during big storms. Backup systems are not reliable, and they make the sump covers even less radon tight which may cost lives from radon caused lung cancer. Poor quality work seen. Covers are not radon tight in addition. Cannot see through opaque cover simply.

50. Prior to having the disconnect and sump pump installation, we paid to have all the footing drains dug up and replaced on the south and east side of the house. These were tied to an internal drain tile that drained by gravity from sump crock (ceramic) into the sanitary sewer. Everything was dry after that. No one else on the street was disconnected. My neighbor, therefore discharges into my side yard and the whole neighborhood drains downhill into my basement. So the gravity discharge to the sewer was disconnected and replaced by a sump pump and it runs constantly in the spring. My neighbor discharges into a “garden” also known as a mosquito pit. Also, a sump discharges at our property line and drains eventually into my basement. Why wasn’t she disconnected? So whenever the power goes out which has happened numerous times, more than 10 times (several times for 24-72 hours) without power! When power goes off we use a water hydraulic pump backup. This recently dislodged and stuck inside the float of the electric pump which then flooded the basement. So we can’t have carpet in the basement and the peeling paint on the concrete floor is a mess. Here is the question: why can’t we have a gravity system for backup during emergency power outage then use the electric sump for normal operation? This would solve the problem but it is not allowed.



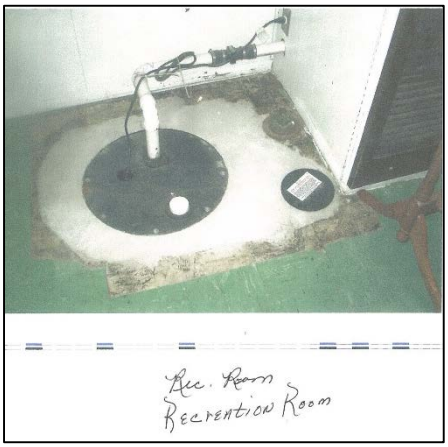
51. Thanks for the encouragement we received after having communication with your Survey Company. We purchased this home in January 1968. In April 1968 after returning from a Gospel concert in Detroit, we were advised by one of our neighbors to check our basement for water. We were heartbroken; because upon purchasing this house, we were not informed of sewage backup in the neighborhood. Sequoia Parkway island was an open ditch but we had no idea that problems existed. That night we had three (3) feet of sewage in the basement. Since that time, we have had problems after problems.

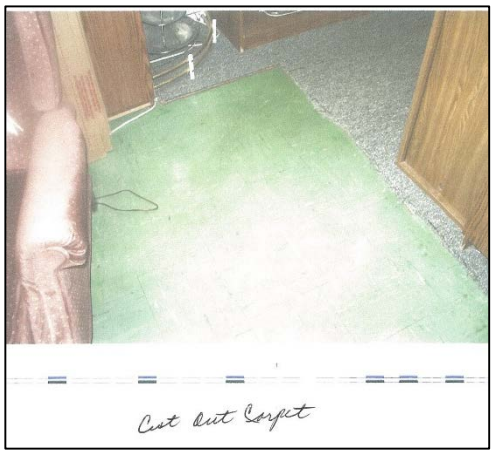
    After work was done on Sequoia Parkway (the ditch was enclosed and the pump installed) and after a few years had passed, we decided to redecorate our recreation room for the family – our mistake.

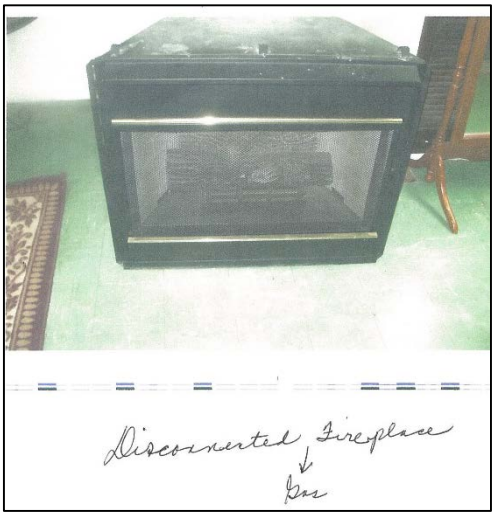
    Finally, the City of Ann Arbor contracted the Perimeter Company - owned by one of the city's former employees - to install a sump pump in our recreation room (it was left in a very unprofessional condition as indicated by the photographs). We have had one malfunction of the sump pump since installation and water overflowed over most of basement. The city employee came out but we had to clean the basement.

    Our wall-to-wall carpet was removed - except where certain heavy items were - by contractors hired by the city in one of the earlier episodes. In that case, the contractors cut around those heavy items and disconnected our gas fireplace. We have called Perimeter several times and the City of Ann Arbor - Susan McCormick's office before she left Ann Arbor - and complained about the condition that was left. To this day, we have not received a call from either the City or Perimeter. There have not been any repairs or communications since this occurred. The gas fireplace is still disconnected, the carpet has not been reinstalled and the deplorable finish on the sump pump is the same.

    We could have sold this house, but we cannot with a good and honest conscience. We have added a carport, a shower in the basement, a family room and extended the master bedroom since we purchased this house.
    We are grateful for your giving us this opportunity to let someone know the problems we have endured.







Comments from Question #14

1. No problems prior to installation. With a 5 year warranty on the pump, potential for failure exists. Loss of power during a storm when the pump will be needed, but won't function. Also, concern about radon with a hole in my basement floor. No radon testing was included in the pump installation. The contractors (Perimeter) who did the job were excellent.

2. A defective part was installed and I had to pay $122 for a repair. This convinced me that I was given a poor quality pump and expect more problems down the road.

Category #2: Operations & Maintenance Issues - from questions #19 & #14 – total of 60

Comments from Question #19

1. I would never have a sump pump without a backup system, since stormy weather that knocks out power is the time when you most likely need a sump pump!

2. Cost of replacing battery pretty high; unclear what maintenance needs to be done to sump pump; tore up yard and street. Also neighbor's yard.

3. This past year we had to have our pipe to the street fixed because it had become filled with mineral deposits. I was told that this is not common, but it caused flooding around my house on the outside, because the water had no place to go once it discharged into the pipe. It just cascaded like a fountain until someone came out to fix it. This whole project has been a disaster for me and my family. Our pump runs often and we have worn out six of them since the first installation about 10 years ago. Fortunately I am handy and have been able to replace the pumps by myself. Otherwise I would have spent over $4000 on pumps. Thank goodness for the backup pumps which have saved our butts (and our basement) many, many times when the power goes out or when the main pump fails. This fiasco has cost me a fortune and I would like to be reimbursed for all of my expenses. I don't think I should have to sue the city to recover my costs, but I have complained many times and have had no satisfaction. Telling me that I am one of the few that has these kinds of problems does not make me feel any better. Before the installation I had no flooding or sewage backup or any water problems at all. Now every thunderstorm or heavy rain we have to worry. If you only knew how many nights I had to spend down the basement watching over the pump! We have had to use bilge pumps from my boat to keep the water level down in heavy rain situations.

4. We are concerned at the increase in radon levels in our basement since the installation of the sump pump.

5. I am considering having a natural gas generator to turn on when electrical power goes off.

6. Battery backup has an alarm that sounds when recharging is slow. This happens somewhat frequently, so we have typically silenced the alarm.

7. The backup battery is quite heavy. When I wanted to have the battery checked for possible replacement, I had to find someone who could bring the 30lb battery upstairs and put it in my car and then ask him again to take it back downstairs. This is difficult and before sump pumps I didn't have to deal with this.

8. We have never experienced sewage backup and/or water dampness in our basement but our next door neighbors have. I am concerned about the electric consumption when the battery is constantly being recharged.

9. I am uneasy during power outages since the batter backup system is not working. New battery and possibly the charger needed. Added expense.

10. The little cage is already chewed and has gaps. Are there replacement cages for the gap or perhaps a metal one?

11. As far as I know, the sump pump has not run since it was installed.

12. Sanitary sewage backups were caused by sewer pipe blockage. Once activated, the backup pump seems to run continuously. This seems to be wasteful of water and would be particularly bad if it occurred while we were on a vacation. Also, because of the backup pump, I can no longer turn off the water at the meter when leaving for an extended period of time.

13. Have already had to replace sump pump battery ($580) - battery fumes triggered CO detector, causing extreme anxiety for 2 days until repair! Serviceman refused to perform service outside business hours. Feel free to call if you would like more details.

14. Even during huge storms with vast amounts of rain, I very rarely hear our sump pump come on (no hearing loss). This is the most concerning and have no way to be sure it's actually working properly so we go and check for water very frequently. Installer told us we could now get flooding when we never had it before.

15. I was unaware of the necessity of checking/replacing my backup battery with any frequency.

16. At times where the sump pump operates water squirts out where the air gap is shown in your picture, although my connection does not have an air gap.

17. It has never kicked on - we're on top of a hill. I know one should "never say never" but I can say "up to now, never".

18. Currently considering battery backup system.

19. Question 17, small amount of water spills out from here whenever the pump pumps out water.

20. It involves more additional expense than anticipated. It is noisy in the family room. We have already had to replace it once. It has caused more anxiety due to the issues if it fails or we have a power outage. We had to stay up into the early morning hours manually emptying the sump pump during a power outage. I have questions about the project.

21. The installer returned to drill air hole somewhere near pump so that the pump wouldn't stop working so often. This helped initially however the drain noise increased dramatically and the fix no longer appears to work as I need to frequently open the cover and jostle the pipe to make the pump work.

22. Pipe hammers loudly when pump turns off. Mechanical pump switch has failed frequently. A solid state switch would have been preferable.

23. The original battery exploded (literally) about a year or so after installation and threw acid and acidic smoke throughout my office, which is located in the basement in the same room as the sump pump.

24. Sump pump installed in January 2003, malfunctioned in January 2007 and was replaced at that time.

25. There is an odor coming from the sump pump in hot muggy weather.

26. The noise of the sump pump is much louder than we expected.

27. Sometimes there is an odor, very noticeable!

28. Part of issue . . . pumps don't have on/off light to know it is engaged.

29. Have battery backup but unreliable. Power goes out, it starts beeping and has to be reset over and over - problematic!

30. I have unplugged my sump pump because there is an electrical malfunction in the unit. I refuse to pay to fix this city made problem.

31. Had a Watchdog battery installed with the sump pump. Found that system to be more problem then the pump. Sometimes there was a constant beeping from the battery which was impossible to turn off. Distilled water had to be added many times. When the battery had to be replaced, I decided not to. So now I worry about the basement flooding with no backup system.

32. DTE's electricity is obsolete and poor. Sump pump motors aren't very good. If the motor is running and there is a "stuttering" surge (off-on rapid succession), the motor goes out, so the battery backup is useless. Hence the expense of a water siphon backup.

33. I have come to the conclusion that I have to replace the sump pump every 2 years. Since Aug. 2011 last sump that went bad had new pump put in Aug. 2013. I wish I never had this done.

34. The sump motor had to be replaced because it "froze up" due to disuse - i.e. not enough water flowing into sump.

35. Backflow malfunctioned. City, insurance co, all didn't want to touch it! "Out of warranty".

36. The only reason we did this was to avoid fines from the city of Ann Arbor. The costs to us have been over $5,000 so far!!!

37. This whole concept is a disaster for homeowners, we spend a significant amount of time way from Ann Arbor and have zero confidence in system, even with the water backup in place. It takes up a lot of space, is noisy, unreliable and creates many problems for us, without providing any benefits. I will be very upset if this program is canceled without restoring our basement to its original state. We will be screwed in the same way we were when we paid to replace our sidewalks and then the city decided to pay for everyone else!

38. My concerns are: continuing maintenance of whole system - replacement of backup battery; replacement of sump pump; electrical outages when gone on trips. I am very concerned.

39. The initial pump installation used two pumps that went out of production in a couple of years, forcing us to replace them with new ones. Repair parts were not available.

40. I was very unhappy about the sump pump noise - not mentioned by owner. City wouldn't do anything since I hadn't signed the contract which was done by previous owner. It seems that Hutzel put the sump pump in then I had to pay them to do it right. I did not like that.

41. Very concerned about backup due to power outage of system failure.

42. Sump pump has malfunctioned setting off alarm repeatedly. It is currently disconnected from power supply. Trying to decide how to proceed.

43. They put the pump in the basement which is only 3 feet high and every time the backup starts beeping, it is hard to fix and have replaced battery twice and we never had a problem.

44. Way too much noise!

45. Pump failed and had to be replaced at my expense.

46. Cost a lot of money because we go to Florida in the winter, I had to purchase a generator to make sure it runs when power is out.

47. Would have been and still helpful to receive instructions on maintenance backup.

48. PVC pipe from sump pump to outside began to shutter when sump pump runs. This occurred AFTER warranty period, and estimated costs to repair (cut through dry wall, re-run pipes, patch, paint, etc.) are in the thousands of dollars. Very dissatisfied with program. Lawn was never adequately repaired - cost $750 to repair. City contractor unresponsive.

49. We are not sure if the sump pump is operating correctly. One week of very heavy rain resulted in seepage.

50. What maintenance is needed?

51. I have a question about the outside drain.

Comments from Question #14

1. Was installed incorrectly first time had to reinstall. Had small leak in backup, small leak in PVC pipes, fixed. Pipes run the length of house and is very loud under our bed room. I am a light sleeper. During rain it runs every minute. Our back yard is flat and the water pools like a swamp, so it runs a lot.

2. Didn't purchase the back-up sump pump. Short life of sump-pump.

3. None of these yet but I can't find anyone including plumbers who will check it. I have no one to maintain it so it's a problem waiting to happen that I would not have had to deal with prior.

4. We do not know what is expected in maintenance, what type, what contract, what is the back-up method if anything goes wrong. Do not have the cash to change for a system that we know and the pump is next to the only windows that could be transform in egress windows in our basement.

5. 1) Power outages occur monthly, duration varies, up to 36 hours (so far). 2) At time of installation no roots in system; now have roots and will be excavating, etc. pump clogs, 3) line along street barely 2' below grade; fear freezing or clogging of catch-basin outlet of pipe, 4) exchanged reliable passive system for headaches; anxiety; maintenance; and $$$ + energy cost, 5) wet season finds duty cycle of 10 seconds on, 30 seconds off annoying (accompanied by check valve thud)

6. Pump requires frequent adjustment.

7. We had no issues prior to the requirement to have this installed. I know that at some point the motor will go bad so regardless if I have a backup generator or not the only way we will know the motor is bad is when we have water in the basement and there will be damage to the carpeting and furniture.

8. Occasional high pitched whine of unknown origin. Battery recharging??? Just having a large hole in the basement floor is disconcerting.

9. Battery is too expensive and we are not convinced of the reliability. We are in our 70's and would not be able to maintain the battery.

Category #3: Water / Sanitary Backups - comments from questions #19 & #14 – total 66

Comments from Question #19

1. Originally we had 2 sump pumps installed before the program of footing drain disconnection. When we had an addition added to our house (1973) the contractor destroyed some of our footing drains. After considerable expense we had 2 sumps installed that took the water that was seeping into our basement and connected them to the storm sewer. This fixed the problem of flooding and seepage from the outside to the inside. Then in 2005 Richard Conners, one of your "pre-qualified" installers replaced our old pumps and sold us a battery (marine) backup system at considerable expense. On Aug. 4, 2009 on one of the 2 pumps, the clamps came loose and water was being ejected all over the basement. Conners came and replaced the clamps for $145. However the battery backup system didn't help nor alert me to the malfunction. On Feb. 5, 2010, I discovered a huge electric bill and checked that the pumps had been running continuously in quite some time and our lower basement under the new addition had 3 inches of water on the floor. Conners didn't want to come but we insisted and he came and replaced the rubber fitting with a stronger plastic arrangement with the check valve inside. The battery was weak and the warning system did not work and within a week the battery completely failed. The control system was underwater and must have been damaged. Conners told me I was supposed to add water to the battery once a year but that was the first time he told me that. The manual never mentioned that! Anyways, I no longer have any backup or warning system, so I routinely go and check that all is working. Fortunately, this year I checked and found that other clamps that Conners had installed had come loose and broke. I purchased new clamps and installed them. This lasted a few weeks and then the rubber connectors came out. My daughter bought new connectors and new clamps and we reinstalled them. We did not experience such problems before 2005 but we did replace the sump pumps several times. I think that Conners installed a higher quality pump since these pump themselves have not failed. Our problem seems to have been faulty installation and our expensive warning and backup system that did not work when it was needed. It was my impression that Conners was not an experienced plumber or installer. I did not like the way he connected our floor drain to the pump system. We had 2 floor drains. He cemented one over and so the water under the house was forced to go the other floor drain while was connected to the old pump system, so eventually it all is tied in with the new system. But it makes me uneasy as I think it is a makeshift system. I do believe you do need to help the people whose sewage system backup because the city's sewage system can't handle excess rainfall but there must be a better way than messing up footing drain that were working before the disconnection. Also, you should have done a better job of vetting the installers. One of my neighbors also used Conners and another used Hutzel. Neither to my knowledge had any subsequent difficulties. I hope you pay attention to the things I have written here rather than just doing a statistical analysis of the short question and answer.

2. Before installation we had no problem; after we had 3 times wet basement, now we always worry it will happen again.

3. Q2: Sump pump installed May 2010; I was very stressed about the $700 cost of the battery backup. Q3: Working so far, but didn't really need/want one – makes noise, uses power. Q5: I'm had one MAJOR, then 2 minor sewage backups due to the City's tree roots growing into the pipe! Q7/8: Sept. 2010: Entire basement flooded; Sept. 2011, Aug. 2012, & Aug. 16, 2013: minor, just around drain. I moved here in Jan. 2008 and there were NO sewer backups until 4-1/2 month AFTER the sump pump was installed! Q13: I also worry about cost of battery replacement – I am a retired senor! Now I worry about a power failure and flooding in the sump area, whereas none before. Q15: Concerned about replacing the battery backup. I always check the lights on the sump pump. Unsightly! Q19: I was VERY satisfied with the company that installed the sump: Perimeter – punctual, efficient, courteous, and competent) Now I worry about a power failure and flooding in the sump area, whereas none before. Also, I worry about cost of battery replacement - I am a retired senior.

4. Our neighbor reported that he was unaware of flooding problems in our house when we had our first flooding incident in Nov. 2010. He has been in his house approximately 20 years and his opinion indicates to me that the system before the FDD seemed to work well. I understand the reasoning for the disconnection, but based on my experience, I don't think the initial sump pumps were installed or load tested properly (especially our battery-based backup pump). We have spent significant money to reduce the amount of water flowing towards our house (landscape drainage, new downspouts), but our sump pump still runs very often probably due to high groundwater levels and water coming up into the sump from the ground. During very wet periods (heavy rain or spring thaw), our main pump can trigger as quickly as every 30 seconds, running for 10 seconds at a time. It was also a professional plumber's opinion that the footing drain tile entrance into our pit was placed too low to allow a decent amount of water to collect in the pit before it flowed back into the drain tile. This necessitates running the pump more often. First basement flooding ("incident #1") occurred 5 months after we purchased the house due to main sump pump failure and battery-powered backup system not working (I think the backup system float switch caught on the wall of the pit and never activated, probably due to poor installation). I think this was roughly 5 years after the footing drain disconnection and sump pump installation. Neighbor reported to us that he was unaware of any flooding problems in our house and has lived on street approximately 20 years.

5. Flooding during power outage. City funding did not provide for a robust system.

6. City installed pump did not have backup and flooded basement when power went out during heavy rains this past June. Would not have had that problem if no sump pump. $10,000 in damages - most but not all covered by insurance. Not happy at all with sump pump program.

7. We had a very complicated situation - already had one sump and we installed a second pump and redirected the initial sump and routed it out to the yard. We have concerns (based on the color of the grass) that the water is not going all the way to the storm drain . . . this whole process and the subsequent flooding have been a real pain.

8. The sump pump installed by city backed up because the float got stuck. I had to replace sump pump and paneling in basement.

9. The sump pump has vibrated and moved in the hole and the float has pushed against the wall and stopped floating when full of water, so the pump didn't turn on and water overflowed the hole and made the floor and carpet wet, twice. Also concerned that power outage will have the same problem - overflow of water. I have extended the protective metal ring, as it wasn't wide enough before. The backup battery or water injection pump would be something we will eventually get, though a little pricy when we first considered it.

10. Being a good citizen, when we got the letter telling us we needed to have our storm sewer disconnected, everyone in town would be, we thought, the city had thought things through and it would be fine. The installation process was frustrating, having many workman carrying buckets from our basement, certainly what are they doing and how would our home be changed forever? I bought this house in 1970 and wanted to live in town, with services and no well, no sump pump, no septic tank. Police, street lights and garbage pickup. Services, for which the additional tax dollars, compared to living in the country would be worth it.30 large containers of soil was removed from our back yard so that where the long drain went, the grass would be ground would be flat. Certainly these folks, understand the ground settles and we have a permanent impression in our lawn a constant reminder of what had allowed. The first summer we had the sump, in July the power went out, not a storm, but a substation fire and we were out for many hours. In the evening we went to my mother's to watch TV and returned home to still no power, dark as all can imagine, and this constant water is running noise. We had installed a water backup system and it was working and working and working. We had 6 inches of water in our basement, yes, the water was being dumped right back around our house, the open pipe was right outside our kitchen window. We were drowning ourselves! We had no idea how to stop the water. Midnight we called the person in our neighborhood that was the Ombudsman, and called every person we could think of. Yes, Hutzel who installed it. Dark and flashlights and finally one neighbor came over and he knew how to stop any more water from running. Another neighbor on the street had the same thing occurring. My husband got the city engineers out on Monday and we lost a lot in our basement and yes, Coaches cleaned it up and yes, we paid our $1,000 deductible. And, yes the engineering error on this backup system was corrected. But, we still have a sump, and we have a second one and we had more trouble, when the float failed and when we had a couple other large storms. And, it is terrible! Costly, worrisome, permanent damage to our home and yard. And, why? And, where is our compensation? Why do we have these expenses and worries and the same taxes? Our next door neighbor waited to get his installed until I guess he decided he had no choice, but they installed his to run to the curb and not through the whole back yard. They have sold and are gone from town and now we have a new neighbor. A couple weeks ago I got a call from a friend who wanted to come and stay. We have a full house, but a nice finished basement, yes?! My first thought is, what is the weather forecast? No rain I hope. The March when the tornado hit in Dexter, we had water up to our front door. Another mess, but no one cares. My husband had the city engineers here again that time too, but no help and why should we suffer? We also own a rental at 1720 Tudor; we had to have a sump put in there too. No disasters yet, but it will need to be replaced, and inspected, and so on and so on. We own some other AA properties and will not just get the things installed, again, because the city says so. Such trust we placed in our government and City!

11. Due to exterior basement wall excavation to install the discharge pipe, my basement now leaks every time there's a moderate rain event. The cinder block walls have cracked where mortar used to be. Prior to sump pump installation this was never a problem. City should pay to have this fixed as problem will only get worse.

12. It isn't the pump that was the problem. It works fine, the installation in a formally dry basement caused all sorts of ground water to enter the basement. Ruining carpet, wall board, and furniture. The subsequent silence from the city was particularly galling. I would now rather I had opted to pay the $100/month extortion instead of this miss.

13. We are in a quad-level with less than a full basement, sump pump took valuable storage space away. I don't believe the sump pump itself took away home value, but being in the now-designated "problem area" may have. The "program" may have created a new wall seepage issue that was not there previously, or it could be a coincidence. Program seemed to create a new seepage issue where we didn't have before.

14. Dislike whole project. No one could ever sleep in bedroom above sump; noise level; 2 additional holes dug, grass didn't grow where they seeded. This is the worst band-aid fix for a problem that goes back to when sub was built. Yes, many floods lost everything. City saying not responsible.

15. We bought our house because it did not flood and did not have a sump pump. Now we have the pump's constant noise and the backup is a constant problem. We cannot lift the full battery and carry it upstairs. The sump pump is installed under our unlit staircase which is pretty inaccessible. We have never checked to see if it works because we can't really get in the tight space and figure it out while holding a flashlight. The battery backup has to be continually repaired and/or replaced - at GREAT inconvenience and expense! It also needs constant maintenance. The sump took one of our few fuses in our house. It's extremely noisy because it's under our staircase and our house has an open floor plan and is small. It runs constantly during wet times. Our basement is now damp whereas it never was before (we've been here since 1991). We would not have bought here if we knew we would have to have this sump pump retrofit like this. We know of several people who've had to replace the pumps. We dread this expense. We do not know how to do this work ourselves so must hire it out. This pump is a constant source of irritation.

16. I think this program was a disaster for our family. In February 2008, your team installed the system and left the exhaust pipe extending about 8ft from the house as the ground was frozen and they couldn't connect to the sewer. So the water kept running back toward my house and eventually broke through the foundation and flooded my basement for a week. I had to install a B-Dry system at my expense for over $2500. I contacted the FDD program and I was told, too bad. I appealed to the city and they rejected my request to cover the costs out of hand without even hearing me out. It still leaves a bad taste in my mouth and bank account.

17. We did not have water problems prior to installation; though previous residents may have (pre-1993). We had a backup shortly after FDD installation due to faulty check valve. We replaced orangeberg and have had no further problems.

18. This is the worst thing possible. The drain disconnect has cost me thousands of dollars. The installation destroyed my basement floor, holes dug, tiles not replaced, check valve at toe stubbing level. I've had 2 major floods, both happened during summer storms when the power went out. Both times I was traveling and did not know until I came home. Coach's Catastrophe Carpet Care came both times; $2,200 the first time - all furniture, carpet, everything had to be thrown out, the second cost was $1,800, the same thing, everything had to be thrown away. I bought a generator at a cost of $7,000, then the pump stopped working - another flood. Replaced the pump for a few hundred dollars. I am a 73 year old widow on a fixed income, living alone. This program has cost me thousands of dollars, destroyed my peace of mind and had a negative impact on the value of my home. Also, I would be interested in knowing whether anyone has paid the onerous fines we were threatened with.

19. We had a sump pump previously and so Perimeter did not replace our pump at the time and left us with a pump. We recently had that pump installed by Perimeter (November 2013) because the backup was running and not stopping. Our sanitary backups and dampness in the basement do not seem to have any relationship to the FDD.

20. Around May 31, 2011, a storm passed thru Ann Arbor, I was traveling and arrived home to find our sump pump was running and found the original check valve used in the installation had failed resulting in the sump pump pulling in the water from outside of the house and depositing that water in the basement due to the check valve failure. I immediately pulled the plug for the pump but there was a water spill in the basement that covered almost all of the basement floor and as we had wall to wall carpeting on the floor that was now soaked from the pump location all the way across to the stairwell. I saved the rug by using our carpet cleaner to get rid of all the water it had absorbed taking 2 days to complete that job. There were lots of others in our neighborhood with similar problems that day and as a result I couldn't get anyone to come to look at our house. I replaced the check valve with a much more robust one that is still in the system. We have never had any problems with the system since that incident.

21. I never had any problems until I had the footing drain disconnect. This summer the City came out due to multiple floods and installed a bigger sump pump and replaced my battery backup. I have not had any more problems since but I am waiting until the spring before I say everything is ok.

22. There definitely has been more water in my basement since the sump pump came in heavy rain. It is in the area of the pump, but I don't know whether it came from the pump. Also, the installer had agreed to leave the lid easy to open so I could check on things and he did not. I need the original information that came from the city to better manage this situation and don't know where to obtain that. I need to be able to get into the area below the floor - to see or make modifications.

23. We never had water problems in our basement until after the footing drain disconnect. Now we have seepage through one wall whenever the ground is saturated with water. All spring and much of the fall.

24. I wish I had not gotten it installed. The house was functioning well for about 40 years. In the last 5 years since the pump was installed, we have had dampness and a couple of sewage backups.

25. I had very rare water infiltration prior to the installation of the FDD. Since I have had multiple instances which required me to pay for landscaping to help mitigate. I have had water soak my basement carpet many times but did not list the cost to replace as I am reluctant to do so. Overall I wonder why this needed to be done.

26. In our yard and with crawl space, we've had intermittent dampness, etc. and have waterproofed crawl space and spent a lot of money for water drainage in yard.

27. I would like to remove the sump pump. Since installation we have had flooding (none in the 10+ years prior to the installation), had to pay to get it fixed, lost items due to flooding and have lost storage space due to pump. Plus we worry about additional flooding and pump failure. It prevents us from remodeling our basement.

28. I was very concerned about the sump pump being unable to handle the extreme amount of water during the storm with the Dexter tornado. There was some seepage through the basement floor during that storm.

29. Before installation we had zero problem in the front of the basement since - we have had water twice. Fortunately we try to keep anything of value off the floor.

30. Never had any backup problems before sump pump installation. Now am totally dependent on it to prevent basement flooding in wet weather and spring melt - if there is power outage for example. In 2008, the main pump motor had seized up and the batter backup pump meter also seized up - flooded and ruined the finished basement. Also, the only tie-in to the footing drain meant the sump had to go in my finished media room, very disruptive.

31. We have lived in our house for the past 42 years and never had any water in our basement until after the sump pump was installed and malfunctioned twice!

32. Do not hear pump. Basement is damper than before pump. We are absent 6 months of the year. Stated purpose of this was to stop sewer backups. Did it?

33. Very unhappy about disruptive installation and the fact that the mostly dry basement became wet AFTER the sump pump was installed--with little government concern about our complaints.

34. The flooding experienced before sump pump was originally put in - this was due to rain water coming in under basement door. I have a walk up and out basement. The flood in June was due to a power outage. The battery life is 4hrs. The outage was at least 8hrs. on a very rainy day. Therefore the flood. Since then I have purchased sump pump insurance.

35. The sump pump that was installed did not last. Flooding has been a significant concern since I bought the house in 2009. The previous owners claimed they never had water damage, but I have had 3 major floods and 3 or 4 minor floods since 2009. I just got a backup sump pump system installed last month, and I am hoping I can sleep better now whenever it rains.

36. We were not pleased with the program from the beginning and the fact that we were required to participate. In all the time my wife and I have lived here we never had storm water or sewage water come into the basement until this year. Now we are worried whenever we go on vacation and we are on watch whenever we get a heavy rain storm. It's very disappointing. What will happen with our house (and all the other homes) that have undergone the disconnect should the city decide to discontinue the program? That's an expensive miscalculation!

37. We used Richard Connors/RDC for our digging and sump pump replacement. He was NOT pleased with us when he had to come back and fix the trench he had to re-dig that caused a problem going from the pipe to the street. I'm just sorry Sue McCormick didn't have to endure what we residents went through. We had $8,000-$10,000 of damage from the malfunctioning sump pump. We had a sewer backup with another $2,000 clean up. We never had a drop of water in our basement before the sump pump fiasco. We had to endure the digging up of a trench in our finished basement. This process/program was costly and infuriating from start to finish.

38. We are convinced that the water flooding in our basement was due to reconstruction of Stadium Blvd. We are on the corner lot and never had this amount before or ever in the last 25 years. The flow had to be changed with construction.

39. Sump pump (and backup) failed, flooding basement, lost stuff, replaced carpet, painted. Worry now about repeat. Lawn has long trench - not filled properly - needs soil. New driveway segment not sealed to street need asphalt. Can we ask the program to come back and fix lawn and asphalt or is it way too late? (Annoying, we had no water problem before.)

40. We indicated we did NOT want a sump pump in our basement. Our basement was DRY following the interior perimeter drain work done by the company. Since the disconnect sump pump installation we have had one serious flooding and one serious seepage. Since we were not given a choice in this matter (and we were told all of Ann Arbor would be required to have a disconnect pump, apparently no longer true) this has turned out to be a very unpleasant experience. We were told if we wanted a backup system, generator, etc. we would have to pay for it.

41. We never had water in our basement until we got the sump pump!

42. Water (storm) came up through the floor drains, but the sump pump never turned on.

43. Per Hutzels, the sewage backup that occurred in March 2012 was due to the flapper/seal between the sump line and sewage line becoming stiff over the 10 years it was there, so it did not work properly. They replaced it. I suggest that the city replace these about every 8 years to prevent seal failure in a lot of homes.

44. The installation did absolutely nothing to prevent sewer backups.

45. Concerned about: power outages, having to install backup pump and pump failure when there is no power outage. We have new water issues due to the installation.

46. Our basement had not flooded for 34 years until after sump pump installation.

47. We NEVER had damp basement walls or seepage prior to the disconnection of the footing drains. We are NOT happy with this having been forced on us.

48. Sewer backup was due to collapsed sewer pipe, not drainage. Several flooding events since sump pump installation, none before, flooding events caused property damage and personal injury - very unhappy and anxious about sump pump each time it rains heavily.

49. Water damage to home office / basement from malfunctioning water siphon backup (twice).

50. Putting in the sump pump has caused more water problems in the basement. Also I had to install a new battery after some flooding. Water now comes up from the drainpipe when it rains and causes a pool of water on the basement floor. The seepage has not decreased since the pump was installed.

51. I want to be re-connected to the footing drain. After the failure of the pump I am very anxious that my basement will flood again. I hate the sound and the upkeep. I was never afraid of flooding before the pump was installed. Now, I am consistently afraid the pump will fail and cause damage and cost me $$. I hear it when I try to sleep. It's like someone flushing a toilet every few minutes.

52. When the drain from the neighborhood collects the rain our creek floods and so does our yard. My largest concern is that when there is rain the creek rises and so does the level of the sump pump in the basement. Our house the next house right after the drain outlet. We have had flooding in our yard, almost into the basement.

53. Our basement flooded when the pump wires loosened somehow. Only an accidental brush restored power.

54. We CAN NOT have flooding in the neighborhood like we did in 2011/2012. Not only did my basement get wet but flooding also occurred in the garage from very high water levels (at least 3" standing water), high enough to flow into my garage.

55. Before the footing drain disconnection project, the basement never flooded. Since then, we've had multiple incidences of flooding after strong rain. Coincidence?

56. Why don't I have an air gap on exit pipe?

57. My 50-year old VCT tile was removed last spring and new VCT installed. The old tile was still attached nicely. The new tile is already lifting from all the water down there. I did not realize until now that the new appearance of large amounts of water could have been from the disconnection of footing drain.

58. Regarding questions 5,6,7,9 - the pipe damage, which resulted in basement flooding would still have happened with the sump pump, so don't conclude that since no damage has occurred in the 5 months since the pump was installed that it's the reason for the lack of problems, 60-yr. old rusty pipes caused our flooding.

59. I have water in egress window.

60. The blue container in the picture is what I placed to keep the water from going all over the area. Here are pictures of our defective pump on two occasions. Then the pump went out after repairs and water seeped into basement from under floors flooding with nowhere else to go. Replaced new sump pump. Never had a problem until you installed this thing. Would never recommend doing this. We never had water or leakage in basement before. We built and have lived in this house for 40+ years!!!

61. Since the sump pump was installed I haven't had any major backups like the ones from 1998 & 2000. I've had 1 or 2 times where I had stinky black water come up from the basement drain, but it wasn't clear to me if the mess came from just the section between the drain and the whole house check valve or if it came from further out. I don't think it was a sanitary sewer backup (or maybe just minimal). I also had an instance where clear water filled up the pipe/space between the check valve and the basement floor. The plumber thought it was ground water leaking in there but had no idea why. It reached the level of the basement floor by the time it was discovered. I don't remember having trouble with rainwater coming in the basement windows until the past 5 years. It seeps through the concrete at the base of the windows and also at the base of the wall where it meets the floor. I had a drain installed parallel to the driveway, out to the street, which has resolved the problem on that side, but water still seeps in along the south wall. Frankly, I don't pay attention to how often the sump pump comes on. I'll never trust the basement EVER, so I have water alarms everywhere.

62. The radon fan they installed at the same time was very noisy at first, but now I can barely hear it, and it lowered our radon number 80%. Two neighbors sump pump battery backup systems have failed and caused alarms and were difficult to get fixed. We've hadn't heard the pump run, so, a year or so ago I poured water into the sump until it ran just to make sure it worked. Our neighbor (higher than us) did some work that changed the surface drainage and caused significant seepage into our basement through the south wall and window wells, but the sump never ran.

63. The sump pump that was installed in our home must have been a poor quality item. I called the city when it failed and asked about a warranty. I was told it had a 1 year warranty. When we went to replace it there were no pumps available with less than 5-yr. warranty. That fact leads me to believe the pump the city installed was of poor quality. Our basement flooded as we were out of town when this occurred. Our finished basement was ruined. We have no peace of mind!

64. I was part of the pilot installation. A battery backup would have been useful. Have some issues with overflow around air gap, as mine discharges into a 20 foot long underground pipe and thence into a rain garden -would guess some animal(s) have built a nest in the discharge line. Leaks do not seep back around foundation. Installer never finished the tile around floor drain and sump - would have been nice to have that done. Otherwise have same pump, runs fine, while I can suppress the noise and transmitted vibration, I like to hear that the pump is running vs. not. I still cannot understand my neighbor's issues - while on the Task Force (Morehead rep.) I dealt with three poor installations, but never heard of anyone thereafter having issues with backups and only one incident of the pump causing a clear water problem (discharged into a gravel bed next to the foundation ... short circuited into footing drains and pump could not keep up). Seems to me that a lot of my neighbors expect sumps to handle serious water seepage issues that have nothing to do with sewer backups and that they were and are part of the stormwater and sanitary sewer overflow problems, no sump pump should run more than a few minutes an hour due to rainfall - any that do need further investigation to see why. The idea that a water pooling in backyards and flowing up against casement windows has anything to do with FDD or can be resolved with FDD is almost like a witch hunt! Maybe the stormwater program will wake people up, especially if they look at the scope and magnitude planned - but should be sobering to think that w/o the FDD the previous floods would not be mitigated for another few years with large public works that have yet to be approved and funded - the FDD was always intended as a low cost stop gap solution that avoided digging up streets and making major system changes - too bad that message did not get out before groups like a2underwater started disseminating misinformation and council did their squeaky wheel response. At this point someone in authority needs to make a public statement backed by real data not anecdotes that establishes what, if any, connection there is between the FDD and recent flooding. Good engineers and engineering efforts have been disparaged and maligned. CDM may have problems getting future work with the city." I would like to know how to clear the FDD and getting it restarted; also "homemade" battery backup solutions. After first backup, could not sleep during storms - installed water alarms. Second backup occurred with son and wife in hospital, very traumatic.

65. I don't think there's an air gap. I'm not home to check. This project has been awful for me and my property. I've invested thousands of dollars and still can't count on a dry basement. Worse, I'm always afraid during heavy rains and whenever the power fails (which is fairly often in my neighborhood). I lost my investment in the basement remodel and am not confident that I could do it again without risking my investment. I'm really concerned about resale value when I finally sell my home. I certainly can no longer say that I have a dry basement and I would need to disclose the hassles of maintaining the sump pump. I spent $10,000 when I first moved in to seal basement and drain to sanitary sewer footing drains. I was completely dry for 10 years and remodeled downstairs. After the disconnect and sump pump, I had a huge flood which ruined it all. I have had numerous small floods, water flows, leaks and dampness ever since. So have neighbors on both sides of me. The pump is often insufficient to keep up with the water and the battery backup is not enough to last through power failures. I'm very anxious whenever the power fails and very worried when I go away for work or vacation. My neighbor has hooked my pump up to his generator through my basement window several times but this is not a great thing to have to rely on. I am not comfortable dealing with a generator myself. The sump pump and the battery have also died and been replaced twice.

Comments from Question #14

1. We opted not to include battery back-up when we installed the sump pump, and we should have. We have gotten water when the power has done off in storms.

Category #4: Comments of Dissatisfaction/Misc.- comments from questions #19 & 14 – total 125

Comments from Question #19

1. We never wanted or needed this and felt we were forced into installing this. Plus, we had to pay quite a bit so we did not trip over it while coming down the stairs. It is ugly and noisy. Very unhappy! Thanks A2 city.

2. I am very unhappy due to the water in my basement and the cost to me to get it fixed.

3. We have always had a dry basement. My primary concern now is a malfunctioning pump and a flooded basement.

4. I wish that this survey had been sent to us sooner. I don't remember a lot of details.

5. Next time you send out an important survey, don't do it around the holidays when folks are busy, just getting to this now. (Jan. 3)

6. A footing drain disconnect only works if the footing drains are working . . . otherwise the water still finds a way in.

7. Never had a problem before. Complete waste of time and money. During damp periods it goes off every 45 seconds to 1 minute. The pipes are in the floor and the master bedroom. We hear it all the time.

8. Since we lived in an area where someone downhill had gotten flooding, we were one of the first to go through the FDD program. Our footing drains were no longer functioning at that time. It seems wasteful to have had this done as the equipment is all BRAND NEW looking. It never has run. If there were some way to monitor flow from footing drains to sanitary sewer prior to the FDD that might have been a good first step, and might have saved the expense of the program in our case.

9. We had to get one per the city of Ann Arbor. Everyone was supposed to. We feel mislead.

10. I wish we were not forced to have it put in (penalty if we didn't). Never had problems before forced to put it in.

11. The city and contractors where very professional during the experience. Brigadere contractor were very clean and did a great job with landscaping and tried to insulate to keep noise down, it didn't work, but at least they offered to help by adding the insulation. Although there were many problems with the installation, which had to be redone several times and passed it even passed inspection. Overall, I don't agree with the program! With all the building going on in the city (high rises) and new subdivisions and apartments being built, I don't see how this will help. Our neighborhood was built before they graded, so our lot is flat and collects water in the back yard, therefore making the pump run continuously when wet. The water that is pumped must run the length of our ranch basement therefore putting more pressure on the pump to get water out. New home were built with sump in mind and generally pump up and out, our is retrofitted for an older home design so the city had a limited budget to work with and had to do it the cheapest way, not the correct way in my opinion. They gave us options to place it in different places but each of the options had its negatives (asbestos tiles in basement, placement under bedrooms, or pumping out to yard but signing a release due to water going to neighbor's yard).

12. We were dissatisfied with the city's role in the installation (inspector not available, no communication). The installer (Bidagare) was excellent.

13. I was so upset when I was forced to add a sump pump to my nice dry basement. I still don't understand why. Others in Ann Arbor have never been approached at all to do this. I found out neighbors on Maple Rd. were given a choice, I was forced. If I didn't do it, I'd be charged an additional $250 more a month. The first estimate was going to totally destroy my finished basement to add your unnecessary sump pump. Thank goodness my 2nd estimate - Richard worked creatively to help preserve most of my basement space.

14. After researching this topic and having numerous contractor bids to stop water seeping ($5,000-$7,800 estimated to replace tiles) and spending several hundred dollars to seal obvious cracks in the driveway and basement window wells above grade basement walls, I cannot see that this project was any benefit to homeowners. On top of this mandatory project, the financial burden associated with the sidewalk repair, which fell to some Arbor residents, is financially stressful.

15. Hard to believe that disconnecting a half dozen houses in this neighborhood of several hundred old homes are worth the anguish I suffer. Is it a coincidence of roots and standing pool of water?

16. Limited area was selected because one neighbor with broken orange-board pipe complained to city -- not very scientific or engineered fact based; others in area (across street) were not required. I believe one person with order did it without penalty. Apply policy evenly, and base it on engineering data, not misinformed complaints.

17. We never had basement flooding issues prior to sump pump installation. Our greatest disappointment with the program was that while battery backups were strongly recommended, they were NOT paid for by the city. We feel the addition of the sump pump has added a potential liability to our household. I hope the sanitation system is no longer overwhelmed but I wish we didn't need a pump and I'd like to know if this program has been effective.

18. I'm going to be very unhappy if people are allowed to avoid putting in sump pumps as a result of changes made after this survey or if improvements are made that I don't get to take advantage of because mine has already been done.

19. The gravity drain system works with or without power, it boggles my engineering mind that anyone would want to switch to a system that requires power in order to prevent basement flooding! After all when is your power most likely to fail? All together "during a storm". And since Ann Arbor has not buried the power lines, our power fails fairly often. Adding insult to injury is the fact that the sump is located in the middle of the primary basement area, making any options for finishing more difficult.

20. I felt threatened by the City of Ann Arbor to have this installed or else we were going to be fined $100/mo. for not complying. I learned that my next door neighbor refused to sign the Liability Agreement for the city and there were no repercussions and they do not have a sump pump in their home. This is consistent with the city's policies in similar situations such as sidewalk repairs. I paid for mine under threat of the city. Now the city is paying for the people's sidewalks who didn't comply. I think people will learn their lessons with this cities government to not comply. It cost you every time.

21. I understand the reasons for the project and support the intended outcomes, but really question whether this was a cost-effective solution. From my immediate perspective we had no problem. I wonder if the flooding of the sewage treatment facility might not have been averted by a centralized, systemic correction rather than a distributive one.

22. Will probably not own another home with a sump pump.

23. I wouldn't recommend this, there was no problem to begin with, concerned for more basements floods.

24. I resented being required to have FDD done. I would be happy if it were undone so I didn't have this sump pump in my cellar.

25. I think the whole project is a bunch of malarkey initiated by the complaints of a few vocal residents. It has cost an inordinate amount of time and money by the city and residents. It seems just stupid to me.

26. I want my old footing drain to be re-connected. I want to get rid of this sump pump.

27. I'm sorry I ever let this happen!

28. Having lived at this home for over 40 years and NOT experienced any drainage/water problems, it is our hope that the sump pump hole in our basement floor will not flood our lower level in the future.

29. At least in our case, there seemed to be no reason, no benefit, and significant expense, for this change.

30. When power is out, you must reset the battery. We are gone 3 months per year and this is a concern. Refill battery with water every 2-3 months.

31. Battery backup is only a short term solution if power fails. Purchased portable generator for longer solution. Still an issues if not at home for extended period of time.

32. I don't like it, I hate it. I liked it better the other way.

33. Sump pump is another burden of home-ownership. Failure can happen anytime. Also, they are noisy. A sump pump could keep me from purchasing a house.

34. I believe that this is not a good solution. More unclean water is being dumped into the storm drains. The drain capacity is being exceeded. There is no maintenance of the pipes from the homes to the storm drains. Critters in the storm drains and blockages cause backups. Sewage capacity should be expanded instead.

35. Houses on Iroquois are built on very sandy soils. Newly installed sump pumps on the east end of the street have never cycled. Homes on the west have had sewage backups before and after sump installation. This costly installation was unnecessary for half the street and did not stop sewage backup on the other half. Is this a good use of tax money?

36. We would never have done this if it was not mandatory.

37. We had no flooding problems prior - now we have to worry about power failure and continually adding water to battery.

38. Installation seems a waste of money in areas where flooding has not been a problem. The new system introduces a potential malfunction problem that did not exist before.

39. I am a renter and this is NOT a basement but my home!! I am now very anxious about this system in general but especially because all my possessions are at risk (especially if the power goes out). Duplexes should have been exempt from this repair!! You changed a system that worked perfectly.

40. I saw no need to have the sump pump installed. I've lived in this house for 40 plus years and never had a water or sewer problem.

41. As an alternate backup system, I propose ensuring that a floor drain is within 5' of the sump pump installation. Some homes already have a floor drain near the pump while other homes have drains across the basement. There would be minimal additional cost and keep basements dryer in cases of total pump failure.

42. If I leave the house I hope the sump pump works - I did not have to think about it before - I think the cost and the extra cost and worry to me - sump pump and flooding now - pump not working - no trouble before, dumbest the city of Ann Arbor has done. I am 87 years old.

43. I would like to go back to the way it was before it was installed.

44. I consider this project a boondoggle. I suspect that 90% of Ann Arbor homes do not require a sump pump for their own needs. Its validity, if any, lies solely in a possibly reduced load on the water treatment system. This project does nothing to address sewer overflow problems due to sewer designs subject to surge or gravity loads.

45. We have lived here for 45 years and have never had a problem in our basement until this thing.

46. Really believe this was not required for my house

47. We don't feel we needed the sump pump.

48. Basement NEVER had any issues and never have seen the need to do this so that we now have to worry about it not working.

49. This survey comes off as quite biased against the FDD program (as opposed to an objective evaluation, especially Q's 13, 14, 15). Also, questions #9 & #11 should have had a "don't know" option for homeowners like us who purchased this home after the pump was installed.

50. We have lived in this house and have had a dry basement for over 47 years. I question that any of this was necessary!!

51. This house has had at least 5 basement floods. The first flood occurred shortly after the house was built in the 1960s and the residents then (my parents) had moved in. Since they had just moved in, many boxed possessions were stored in the basement and were a total loss. I don't have money figures for that initial loss, but it was considerable. A check valve was installed after the 1998 flood and prevented subsequent flooding. The sump pump was installed when the city was facing lawsuits from residents around the city. The history of the city's response to flooding has been: 1) it was a rare 100-yr. flood; 2) it was a rare 50-yr. flood; 3) it was a rare 25-yr. flood; 4) we're being sued so we'll disconnect drains and install sump pumps; 5) let's send out a survey.

52. I particularly worry about long term power outages when the battery would no longer be working.

53. In our situation I feel the whole project was a waste. We sit on high ground. Sump pump well has been dry since the day of installation.

54. The city of Ann Arbor was aware of this problem for many years and did nothing to install proper drainage for this entire area.

55. We did not need this stupid sump pump. We have incurred many costs because of it including increase in electric bills.

56. I never had any problem in my basement and I was very angry that I had to pay for the installation of this ugly thing that will probably cause problems I never had.

57. In my opinion, the footing drain disconnect program and required sump pumps are a horrible idea. When we are away from the house for several days, we cannot turn off the main water in the house because the sump backup system operates off of water. Therefore, we are exposed to potential water damage. We will not buy another house that has a sump pump because there are so many negative ramifications.

58. Don't forget the expense and aggravation of checking/cleaning floor drain check valves and laundry sink check valves. Also the mental stress leaving house unattended while on vacation.

59. Have lived at this location 30+ years and have never had water/sewage in basement - now worry every time it rains that pump will fail and we'll have a wet basement.

60. The sump pump has given me many headaches, and costly!

61. The city should pay to restore my basement to its prior condition.

62. We live on the top of a hill and never had any problems with flooding. We now are dependent on the sump pump during the spring especially. We went along with the disconnect because we were told it was mandatory and would prevent flooding for some of our neighbors. I resent the fact that Ann Arbor government is now questioning the footing disconnect program. This is typical of the indecision of this town. We are now stuck with the sump pump and others are now going to get away with keeping footing drains. If this is the town's plan, I anticipate a major outcry from those of us who are already stuck with sump pumps.

63. The city has caused sewer backups when they "jet clean" the sanitary sewer. Twice this has happened to us. Two neighbors also had waste material packed around floor drains in their basements. What benefit has the footing drain disconnect resulted in? Sanitary sewer overflows are still occurring. Millions of dollars are being spent at the wastewater plant. Having no sanitary sewer backups since the sump pump (except for the jetting backups) was put in has nothing to do with the disconnect program. Monitoring alarms and redundant backup systems helps prevent sanitary sewer backups.

64. Lack of equity and fairness in treating all homeowners equally is a big dissatisfaction. I am aware of homes that did not have the installation because the city would have had to pay very substantial sums to refinish a finished basement. So the notion of this being a mandated solution to a problem only apparently applies if it is convenient or cheap for the city.

65. Thanks for adding something that I didn't need. Way to add to my furniture expense. City should have stayed out of my basement. You should come and take it out or give me a backup at no cost. I never had a problem with long term power out, now I will have a problem thanks for that!

66. Do not like the whole idea - if my power goes my basement will flood. Battery backups only last a few hours. Plus, the pump makes a loud "thump" when the valves shut. I would take it out if I could. And no doubt it was so Ann Arbor did not have to expand its own sewage system!

67. Never had any problems with drainage prior to installation of sump pump. Now I have the risk of a power outage or sump pump malfunction resulting in a flooded basement. So I am now worse off and dissatisfied with the footing drain program.

68. Flooding was not a concern for us but now we have to worry about what will happen when the sump pump grows old and fails. We bought this house to raise a family in, but this whole mess of a system/project makes us reconsider whether we'll stay for the long term in the neighborhood.

69. We are unhappy because selected early on for this project at an expense (now and future maintenance) to us. Perhaps the city should have had a "test" neighborhood and provided homeowners with backup systems.

70. Annual check of back water valve $100/per year.

71. I know why the program was put in place and it makes economic sense for the city. But any failure of the pump system and you will get a flooded basement. I wanted an emergency overflow that ran to the floor drain, but the inspector would not allow it!!! This is crazy as that would solve my concerns for when I am away for extended periods.

72. I understand the need to change the flow of rain water but the sump pump is now a point of entry for flood water in the event of a pump failure, power outage or backup system failure. I strongly dislike the footing drain disconnect.

73. I cannot tell you how angry I was and still am that the city of Ann Arbor forced this on me. I feel it devalued my property and made my previously perfectly fine house vulnerable to the elements. Who wants to destroy their house's secure infrastructure?

74. We are very UNHAPPY we were forced to install something that caused flooding in our basement and we can't fix it up until city of Ann Arbor fixes the disconnect problems!

75. I wish we hadn't hurried to have it done. We thought we were being environmentally correct and responsible citizens.

76. I wasn't having problems with flooding before the sump pump was installed. I haven't noticed a change. I just have something to monitor now. I'm concerned about the lack of air space in the way sump pump exits the house.

77. All of this brought on by poor city planning!

78. Do not like water-powered backup pump and recommend against it. City is ridiculous in requiring back-flow testing on this backup.

79. This was a totally unnecessary imposition by the city and I'm not happy I was forced to do it.

80. I am pleased with the flood mitigation ideas that have been proposed. Until they are implemented, I live in fear of our next flood. I don't plan to replace flood damaged furniture until that time.

81. This project should NEVER have gotten as far as it did and adversely affecting so many homeowners. Very infuriating. We should be reimbursed for damage and defective pumps and batteries and everyone who bothered with this survey should get a gift certificate.

82. Don't see the point of poking a hole in my dry basement.

83. Foundation Systems of Michigan repaired my drainage system because the original drain tile was broken.

84. I saw no valid reason for this installation.

85. I have never been happy about being forced into this installation. WE have never had backup problems prior to the pump. Although it works now, I worry about flooding should the pump fail or the electricity goes out for an extended period.

86. I wish I did not have a sump pump so that I would not have to worry about power outages. My basement never had storm water problems. Now I have to hope my expensive backup system works.

Comments from Question #14

1. Sump pump was needed here because p-joint in drain pipe would fill with sand and we'd get flooding with normal rain when that caused a clog. Pump eliminates that problem but it runs often and cannot handle the major area floods.

2. Especially when power goes out.

3. Now I have to worry about the pump whenever I go on vacation. We lose our power all of the time and have lost it for multiple days on a number of occasions. The battery back-up works well for a couple of days, but I never had any problems before the pump installation and it has cost me many thousands of dollars to maintain.

4. Concerned about power outages. No battery or generator on sump pump.

5. It never has run once. Sump well is bone dry. This was not a needed installation.

6. I begged not to have to do this because our basement floor was perfect. My worst fears have been realized.

7. Whenever it rains, we worry, whenever we lose power with rain, we worry.

8. Just a slight increase. I don't think the sump pump has ever even gone off.

9. Always a worry when power goes out. It is a concern when we are out of town.

10. Sump is good, but now there is potential of Sump backing up!

11. I had another house in Ann Arbor without sump pump and slept great, now with a sump pump I am kept awake every time it rains listening for the pump to cycle.

12. One more thing to worry about - especially when we have heavy rains.

13. We already had a sump pump in a lower area of the basement. Why were we forced to put in an additional sump pump? This sump pump has NEVER run.

14. Basement still damp, worried if sump pump stops.

15. With every severe storm there is concern that we could/will lose power and we will again have flooding in the basement.

16. We never know if the flood will happen again.

17. Since there has never been a sewer backup as long as I've lived here (1972), the sump pump has not improved anything for me, though I certainly understand about not wanting to overload the sanitary sewer system with rainwater runoff during storms, and see the need for a sump pump to remedy that. But of course now if the sump pump fails I *will* have a leakage problem that I never would have had back in the "bad old days"!

18. I had no problems before with a gravity, fail safe system. Now I must rely on a mechanical system that can fail.

19. Failure of sump pump a possibility.

20. Need allow a bypass to the sanitary (like the original system) for when pump goes out. This would solve the peace of mind issue. I have a full backup, but long outages overwhelm the battery. Also pump went out and needed replacement. Plumbers say that is common after 5 years or so. The concept makes sense, but dry basements can become wet if sump fails.

21. City should pay to fix these problems!!!

22. Every time we are away from the house for more than a day or so, we now have to worry about electrical outages, which often occur with heavy rain storms, and also sump pump malfunction. We never had this worry before. We had a sound, poured cement basement that was trouble free aside from occasional dampness if the dehumidifier failed to operate.

23. Before, gravity took the water away. Now, if the battery and power go out, I could have flooding.

24. My largest concern is that when there is rain the creek rises and so does the level of the sump pump in the basement. Our house the next house right after the drain outlet. We have had flooding in our yard, almost into the basement.

25. Now I worry about the sump pump working or the water back up functioning. Very, very upsetting and expensive.

26. A sump pump has not prevented basement flooding in heavy rains. I'm always worried.

27. Worried about power outages.

28. This caused mold in our basement we had never seen before! We're figuring out now what we should try to fix this problem.

29. Concerns about long-term power outages and primary pump malfunction.

30. Still worry if electricity goes down.

31. If we lose power and generator fails, our basement may flood.

32. If we have a power outage during a wet season and we are not at home, there could be serious flooding in our basement.

33. Additional cost of replacing batteries for battery backup and noise of the sump pump.

34. I never worried about flooding in my basement. Now I have to worry about it. Sump pump overflow should've been allowed to flow into the sanitary sewer to prevent flooding in case of pump failure.

35. If electricity is out for any length of time and the batter runs out of juice, we're screwed.

36. It's very loud and unnecessary.

37. Never had a problem previously, yet city mandated FDD program forced channeling of all footer drain runoff (previously fully external to house system) into a new sump hole within our finished basement and water removal is now dependent upon an electric sump pump (and additional battery back-up sump pump installed at our cost).

38. I would prefer to not have to wonder if it will go on, or if it can handle the volume, or that if the power goes out that the backup battery will work.

39. Slight increase in anxiety originates from dependence on sump to remove water collected through the drain tile. If pump malfunctions or power is lost for extended period, basement floods. Previously water would just drain out, and there was no need for a sump pump. I also understand, however, civic need to reduce burden on sanitary system.

Category #5: Requests for Help - comments from questions #19 total of 18 & 14: no comments

Comments from Question #19

1. This house was purchased in 2005. The inspector missed water logged carpet in partially finished basement. Two sides of my house was excavated and a drain/gravel was installed at parameter of home. Two sump pumps were installed. The finished basement was demolished because of mold (still unfinished). Protech did the mold remediation. The work cost $12,000 and the basement remains unfinished. Would like someone to check pipe, I feel I was taken advantage of regarding install of 2 sump pumps.

2. We still have damage from the sewage backup. The pump hangs up on sticks from time to time and spills out water. We put in a battery but it makes a whining noise when in use. It took years for the grass to grow back where the ground was dug up to connect the sump line directly to the sewer. Why doesn't my discharge pipe attach to anything?

3. City didn't make recommendation on battery backup or siphon system is better. Battery backup lasts less than 3 hours. What good is that? If it rains there is potential for basement flooding. Can siphon system be added now? Please let us know. Siphon does not require electricity.

4. Installer was very good, but I am concerned that I do not know how to operate or maintain the sump pump.

5. What contract, what is the back-up method if anything goes wrong? Do not have the cash to change for a system that we know and the pump is next to the only windows that could be transform in egress windows in our basement. Knowing what type of sump pump would be nice, it goes less often recently and we have no idea of what is going on.

6. Originally very disruptive as many items had to be removed from the crawl space, then installation was delayed, so I had a basement full of "stuff." Worry about sump pump failure during a power outage now, but don't know if battery back-up is particularly reliable. New worry now that I realize I don't have an air gap. Is this bad? I never had flooding/sanitary back-up problems before, so for me, the sump pump wasn't a great advantage, just another thing to worry about and maintain.

7. We have no confidence in backup system. During power outages, alarm sounds, but cannot be reset. Fortunately, any outages have been short in duration. What will happen if not home during an outage?

8. I don't know how to check things for proper function. I don't think I should have had to replace the pump so soon.

9. This is a tri-level house and a backup could damage the family room. Can only get (have) $10,000 of insurance for backup from outside. Two backup batteries have burned out in spite of maintenance. Need more initial options such as double or triple pump, better float switch, etc. If the pump fails, there is a flood in spite of the backup battery.

10. We checked the pump after 4-1/2 years, after the dry hot summer and before predicted heavy rain. It was not working! What if this happened when we were gone on a trip?

11. What is the average life span of the sump pumps installed by the city and how will I know it needs to be replaced? Who pays for the replacement of a sump pump put in by the city?

12. Should I have an air gap? Please respond.

13. I'm not sure if I have a backup system or not, plumber told me I didn't but installer said he put one in - non-battery. HELP!!

14. Do not hear sump pump coming on or off during rains. No way of checking if pump is operating or not.

15. Concerned with increased radon levels since installation. We do yearly checking but no mitigation was recommended yet.

16. The sump pump failure was due to power outage in my area. The pump began working again once power was restored. I am seeking/researching backup solutions to avoid future problems.

17. Basically I have no idea how to maintain the pump - nothing was left or mailed after repeated calls - game up. Tile removed and utility closet door off and cannot put back because pipes run outside of closet through closet door opening. Door is still leaning against wall. Pump is so loud it shakes at times.

18. My backyard floods terribly since the footing drain was disconnected. It literally is a swamp--I have ducks floating in my backyard after a heavy rain. The massive amounts of water have killed off a lot of the landscaping plants in the back of property. I don't even bother to plant anything back there anymore. I have drains all over my yard that used to work, and the water just sits over the top of them now. I want to know what is causing the flooding in my backyard and what can be done about it.

Category #6: Comments of Satisfaction/Misc. - comments from questions #19 & #14 – total 68

Comments from Question #19

1. Our basement is in clay soil and was built without proper drainage around the outside of the basement walls. This led to entrapment of water outside the basement walls and resulted in bowing and cracking of the walls, and flooding of basement. Repair of cracks, installing proper drainage and sump pump fixed all these problems and cost about $50,000.

2. We sometimes get a puddle in the basement after a heavy rain and the pump does not seem to have changed that other than that the installation was very neat and not disruptive.

3. Our house seems to be at a low point so water movement seems a continuing issue here. The pump helps, but it gets overwhelmed with the major flooding events. Power outages are always a concern although we have yet to exceed the battery life of our backup pump. Our new replacement pump is quieter than the old one but the noise and the fact that area flooding still occurs limits our usage of our basement. Still, I have to say the disconnect improved things for us although at considerable expense (referring to pump replacements every 5 - 7 years into an indefinite future). I would like to know how to improve drainage and water control around our house and long term implications of water flow for our house.

4. The city was initially reluctant to help but then were persuaded and I was grateful.

5. We know there was moisture in the basement prior to our living here, however we don't know the exact nature of the problem nor when it occurred (eg before or after sump pump installation). As such, I have left several questions blank.

6. I would be happy to answer any questions as I am appreciator of corrections made through the efforts of Everdry and the diversion program of the Ann Arbor contractor.

7. Our experience was excellent: Courteous personnel, prompt job, good clean up, no bill to me.

8. Also received radon abatement which was extremely beneficial and resulted in the greatest peace of mind.

9. This is so new to me. I'm not sure what to say or expect. Presently, to the best of my knowledge, everything is working OK.

10. I'm satisfied, there have been no problems of any kind.

11. It was completed before we purchased the home. I don't think it has ever even flipped on to run. No problems at all. I forget it is even there.

12. VERY happy with the sump pump. Our old system used to discharge onto the street, so the street was always flooded as well as the basement. Now, hardly any flooding or water anywhere.

13. My home is on high ground so it did not need to connect to a buried pipe to send rain water to the Huron River. Before the FDD project, gravity without pipes sent my footing water to the River.

14. City and Hutzels did a GREAT job. There was a water main break in the street on Prairie St. at noon and in front of 3 houses down. The city came immediately and had it fixed by nightfall. GREAT JOB!

15. Very pleased overall with the FDD. My basement has been very dry and more pleasant since the FDD was done. My only problem was that I had to replace the sump pump.

16. The only water coming into the basement is from surface water through a high crack - none from my tile; sewer pipe problem is unrelated to the disconnect.

17. Continue disconnect program; those who object aren't thinking rationally! Bidigare did a great job!

18. Perimeter did a great job inside and out (yard).

19. The main difference after installation is: there is no damp or moldy smell when I go down the basement steps NOW! It was evident after the several week installation process. I'm pleased!

20. We were part of the Pilot program when the FDD program was started. We have had separate installations of the sealed caps and the discharge air gap since the original installation. We have been very satisfied with the results so far.

21. Work men did a very good job.

22. Perimeter did a great job. I had to replace pump and battery.

23. I am much less concerned about sewage backups since the sump pump was installed.

24. Pump worked very well for 2 yrs.; 5 or so months ago it malfunctioned and water came thru cracks above drain lines. Perimeter fixed it, but water was significant - though much better than before.

25. Excellent work!

26. I have lived in this neighborhood (Ivywood previously) since 1970. With the sump pump installation in the entire neighborhood I finally have peace of mind.

27. So happy with this new system!! Greatly relieved, thank you so much!

28. Pump was installed free - company was installing a pump in a house across the street.

29. We were very glad to have the pump installed. We had heard about flooding in this basement before we had the house. It provides peace of mind and has worked well for years ago.

30. The company "Bidigare" was very pleasant to work with and provided some extra work on other home plumbing issues in exchange for the permission to perform the diversion. Work was performed professionally and efficiently.
31. No worse than before / possibly a little better.

32. Moved in in May and have not ever heard by sump pump running. Doesn't mean that it has, however.

33. Replaced sump pump and get basement waterproofed within 2 years of footing drain disconnection. New pump is much more reliable and much quieter. Original was loud and stopped working very quickly.

34. We had minor issues, but no problems like most of our block.

35. I wish I had it from the very beginning. Water does serious damage.

36. Shortly after drain disconnection, we had Everdry waterproof our basement because of leakage from the floor and walls. They hooked up their drain to the sump pump and took over the warranty. We have not had any problems since both of these procedures were completed.

37. I was/am pleased it isn't as noisy as I had feared. I hardly notice it. "Perimeter" company was highly recommended to me and they did very good work!

38. Since it was installed there have been no problems. Eventual replacement would be a concern.

39. We're happy with the work.

40. Before sump pump was installed I had B-DRY SYSTEM put in the basement and no problems since. If the pump runs, I never hear it. The discharge if any goes in the backyard, not hooked up to the street drain.

41. Since we've owned the house (8 years), we never had any issues.

42. With installation of Everdry tile system, our basement flooding has ceased.

43. In Nov. 1988 we had water shooting into the basement between the cement blocks. We called three companies. I am not sure which one we hired, except that they could do the job in a few days - the other two could not do it for weeks or months. The system has worked fine ever since and there has been no water in the basement. The general opinion was that the leakage happened because it had been a very dry summer and fall.

44. We had the orangeberg tile replaced at the same time as the footing drain disconnect and also had the footing drains cleaned out. All this has made a big difference for us.

45. Very professionally done.

46. We had our sump installed by a construction company when they waterproofed our basement walls. We have a very wet area and this has made a huge difference in the basement. Had to install more drain tile in basement as well. We spent much more than the city reimbursed, but it's working.

47. Thank you for doing this, there is a misperception of how many citizens dislike this solution to sanitary overflow and basement backups.

48. Lived here less than 1 year. No obvious water problems yet.

49. Thanks you to the city for installing initial sump pump.

50. I cannot tell when, if or how sump pump is working! No problems before sump pump installation.

51. I have never heard the sump pump come on!

52. Basement does not flood since the sump pump was installed.

53. Sump pump installation made me feel more comfortable purchasing the home.

54. We live on the top of the hill and had no problems before installation. Neighbors on bottom of hill had many wetness problems.

55. Seepage was corrected years ago with B-Dry system.

56. Dampness in basement largely due to old footer drain (also tied into gutter). Sump adds peace of mind.

57. I had the B-Dry system installed several years ago. I haven't worried since.

58. I'm glad the house already had a sump pump when we bought it.

Comments from Question #14

1. We've only been in the residence since March 22, 2010. Haven't had any problems as such since.

2. Never had to worry about basement flooding before--however, we agree that it's a good idea to disconnect from the sanitary sewer & know that our neighbors DID have sanitary sewer flooding before the sump pumps.

3. Our previous sewer backups were the result of tree roots infiltrating the line and a previous owner (pre 1998) installed a b-dry system and sump pump due to moisture, so we have not really experienced any changes due to the FDD. 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.

4. The only time my yard flooded on 20 years was the summer before last when we had the really wet season with a particularly heavy rain storm. We bought a portable pump to move water from the yard before it reached basement windows, but no water came in, and the drains did not flood or back-up into the house. All before the project installation.

5. Since we moved in after I don't know any difference.

6. Good, except we worry when the power goes out. We have no backup.

7. I only marked answers that I felt were relevant in my case. A sump pump was installed in this residence prior to the footing drain disconnection. This sump pump was used to connect to the new drain system. The footing drains around the house had stopped working years before. I think this is an excellent program. I have had no problems. In addition to the footing drain disconnect, the placement of a backup valve in the main sewage pipe was an important step."

8. It was an important consideration when we were purchasing the house to know that since installation of sump with backup battery there had been no further flooding.

9. Because of footing disconnection and sump pump installation we can move forward with basement improvement options to reduce dampness.

10. I was glad that I purchased a house that had a sump pump installed already.

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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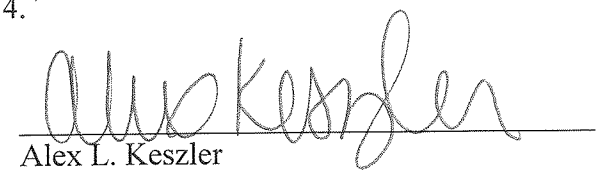
PROOF OF SERVICE

I hereby certify that I mailed, first class postage prepaid, a true and correct copy of the City's Brief in Support of 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 in the above entitled matter to the above-named counsel for the Plaintiffs at the above addresses, including a courtesy copy to Donald W. O'Brien, postage pre-paid, this 9th day of June, 2014.



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