MEMORANDUM

TO: Citizen Advisory Commission, SSWWE Project

FROM: Abigail Elias, Chief Assistant City Attorney

SUBJECT: Responses to Concerns Raised about FDD Programs

DATE: November 25, 2013

I. Citizen Advisory Committee (CAC) Question of Concern: Is Mr. Mermelstein's argument that Ann Arbor did not and does not have the legal right to enact an FDD program valid?

Answer: No.

II. Mr. Mermelstein's First Argument:

- The City passed an FDD Ordinance in 2001, which is Section 2:51.1 of the City Code
- Implementation of 2002 Home Rule (5j) (Section 5j, added to the Michigan Home Rule City Act) is required to empower the City to enact its FDD ordinance.
- Since the City didn't implement 2002 Home Rule (5j), the FDD ordinance is invalid.

Answer:

1. The timing of the Michigan legislature's enactment of Section 5j of the Michigan Home Rule City Act (MCL 117.5j) relative to the City's enactment of Section 2:51.1 of the Ann Arbor City Code does not invalidate Section 2:51.1.

MCL 117.5j provides:

> *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. The legislative body of a city may determine that the sewer separation authorized by this section is for a public purpose and is a public improvement and may also determine that the whole or any part of the expense of these public improvements may be defrayed by special assessment upon lands benefited by the public improvement or by any other lawful charge. A special assessment authorized by this section shall be considered to benefit only lands where the separation of storm water drainage and footing drains from sanitary sewers occurs.*

- Mr. Mermelstein is correct that Ann Arbor enacted Section 2:51.1 of the City Code in 2001 and that the Michigan legislature enacted MCL 117.5j in 2002.
- The addition of Section 5j to the Michigan Home Rule City Act provides additional authority for Section 2:51.1 of the Ann Arbor City Code, but the City's enactment of Section 2:51.1 in advance of the legislature's enactment of MCL 117.5j does not invalidate the enactment of Section 2:51.1.
- It is unclear what Mr. Mermelstein thinks the City needed to do to "implement" MCL 117.5j. The state legislature enacted it, and it did not require further action by any municipality to take effect.
- Finally, the City did not need MCL 117.5j for authority to implement an FDD program. As discussed below, MCL 117.5j is not the sole authority for the City's FDD program.

2. The federal Clean Water Act also provides authority for the City's FDD program as follows:

- The federal Water Quality Act amendments in 1987 to the federal Clean Water Act require municipalities to take steps to prevent sanitary sewer overflows. Such overflows, resulting in the discharge of pollutants into rivers and streams violate a municipality's National Pollution Discharge Elimination System (NPDES) permit.
- Even before 1987, Michigan's construction code prohibited connections of downspouts and footing or foundation drains to the sanitary sewer system. The City of Ann Arbor, like many other municipalities, implemented a program to require disconnection of downspout discharges to the sanitary sewer system. Although footing drains also were supposed to be disconnected from the sanitary sewer system, that requirement was not actively pursued or enforced.
- Because the flow of storm water into a sanitary sewer system is one of the primary causes for sanitary sewer overflows, Ann Arbor, like many other municipalities, subsequently implemented its FDD program.
- In addition, by Administrative Consent Order entered into with the Michigan Department of Environmental Quality as a result of some sanitary sewer overflow events from the City's sanitary sewer system (ACO-SW03-003, September 4, 2003), the City agreed to undertake a program to disconnect footing drains as a way to try to eliminate future sanitary sewer overflow events. As noted above, such overflows violated the City's NPDES permit.

3. Ann Arbor's FDD program is not unique. An Internet search for "foundation drain disconnect sanitary sewer storm" brings up numerous examples, including ordinances and other public documents published by the municipality or agency requiring the disconnections. Because of the absence of any easily available database with all or even multiple municipal codes in it, we have not compiled a list of all such ordinances and programs. Nevertheless, searches in legal databases for court and administrative decisions that have addressed one or another aspect of a footing drain disconnect program has found no case or decision that has found any aspect of any such program to be unconstitutional or otherwise legally invalid.[i] Following are brief summaries of pertinent points in some of those cases and decisions:

(1) Magnuson v City of Hickory Hills, 933 F2d 562 (7th Cir. 1991).

Hickory Hills, Illinois, had a program to eliminate illicit sewer connections due to the requirements of the federal Clean Water Act. Because of some procedural snafus and because they had been threatened with a water shut off for failure to comply with the disconnect requirements of the sewer rehabilitation ordinance, the Magnusons, who were homeowners subject to the Hickory Hills ordinance, brought a lawsuit in federal court. The case was dismissed by the trial court and the Magnusons appealed. This decision of the federal court of appeals describes the Hickory Hills' program including the legal basis for its implementation:

> *It didn't matter much to Noah, but Hickory Hills, Illinois, cares very much where the water goes. The Chicago suburb maintains two separate sewer systems, one for storm water and the other for sanitary waste. Residents having homes with basements, half-basements, crawl spaces, and overhead sewers are required to install two sump pumps: one to handle sanitary waste and another to collect and divert storm water coming from gutters, window wells, floor drains, and drain tiles. Without the additional pump, storm water from these parts of the house flows into the sanitary waste sewer system, causing back-ups and flooding. Despite an ordinance banning the connection of "storm water" sump pumps to the sanitary sewer system, the City still had a problem with property owners whose illegal hook-ups posed a potential flooding hazard.*

i We found one Ohio trial court decision that upheld a footing drain disconnect ordinance against various challenges, but held it invalid as applied to one property because of the enormous cost imposed on that property owner.

> *In addition to flood prevention, Hickory Hills had another reason for wanting to pull the plug on sump pump violators. Pursuant to The Clean Water Act of 1972, 33 U.S.C. § 1251-1387, the Metropolitan Sanitary District of Great Chicago ("MSD") (now called the Metropolitan Water Reclamation District of Greater Chicago) enacted comprehensive legislation requiring all municipalities under its jurisdiction (including Hickory Hills) to make deliberate efforts to eradicate the overloading of local sanitary sewer systems. To effectuate this goal, the MSD sued towns who failed to undertake or complete a sewer repair program. In an effort to comply with the MSD's mandate, Hickory Hills adopted a sewer rehabilitation program to abate the hazards caused by the infiltration of storm and ground water into the sanitary sewer system. Part of the City's strategy was to institute house-to-house inspections to 'flush out" potential sources of illegal discharge into the sanitary sewer system. 933 F2d at 693.*

The Magnusons' lawsuit challenged Hickory Hills' threat to shut off their water if they failed to disconnect, arguing there wasn't a rational relationship to the problem the City wished to remedy. The court rejected that argument:

> *The Magnusons may be right in theorizing that there exist better ways to shore up the flooding problem in Hickory Hills. A perfect "fit" between the problem and the remedy, however, is not required. When rights of a fundamental nature are involved, regulation limiting these rights may be justified only by a compelling state interest. See Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 728, 35 L.Ed.2d 147 (1972). We do not consider the right to continued municipal water service such a fundamental right; therefore, all that is required is that there be a reasonable relationship between the continued water service and the conditions imposed by the City. We will strike down the conduct in question only if it is "arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare." Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L.Ed. 303 (1926). See also Coniston Corp. v. Village of Hoffman Estates, 844 F,2d 461, 467 (7th Cir. 1988); Burrell v. City of Kankakee, 815 F.2d 1127, 1129 (7th Cir. 1987).*
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> *Here, the conduct complained of is neither arbitrary nor unreasonable. It was directed toward a legitimate goal related to public health and safety. The City could use the threat of water service termination in order to insure the success of the sewer rehabilitation program, a program aimed at complying with legislation requiring all municipalities under MSD jurisdiction to make deliberate efforts to eradicate the overloading of local sanitary sewer systems. . . . The case for cutting off water service for failure to comply with a sewer rehabilitation program is even more compelling [than a case upholding the shut off of water for failure to pay for garbage disposal], because the two services are fundamentally interdependent. Common sense informs us that any decrease in the flow of tap water necessarily would diminish the amount of water entering the sewer system. Because the Magnusons have failed to come forward with any credible evidence showing that the City's program is arbitrary or unreasonable, their substantive due process claim fails. 933 F2d at* 567.

Although the Magnuson case did not address any "takings" claims as outlined by Mr. Mermelstein (see Section III, below), the court did address and support the legitimacy of Hickory Hills' disconnect program. The court did not did not even hint at any possible unconstitutionality of the program.

(2) Board of City Commissioners of Johnson County v Grant, 264 Kan 58 (1998)

Johnson County, Kansas, implemented a program to disconnect from the sanitary sewer system, sources of storm water and/or groundwater such as foundation drains on private residential properties. The County implemented this "Private I & I Removal Program" after "exhaustive engineering surveys and studies of the sanitary sewer system" that had identified infiltration and inflow from such sources as a major factor contributing to sewer backups and bypasses. The lawsuit arose when defendant Grant and eight other homeowners refused to allow inspection of their homes to determine if they had a connection to the sanitary sewer system that had to be disconnected under the Private I & I Removal Program.

The trial court had held that the program served a legitimate governmental interest in preventing, "to the extent feasible, sewer backups and bypasses that threaten the public health and environment," and that the ability to enforce the Program's provisions, including inspections, was necessary. The Kansas Supreme Court upheld the trial court's decision.

Although the Grant decision does not explicitly address the issues raised by Mr. Mermelstein, the courts' decision was premised on and implicitly approved the legitimacy of the Private I & I Removal Program.

(3) Pure Waters, Inc. v Michigan Dept. of Natural Resources, 873 F Supp 41 (ED Mich, 1994)

The facts and issues in Pure Waters, which was a challenge to a plan to build a large retention for control of combined sewer overflows (CSO), generally are not relevant to the situation in the City of Ann Arbor. However, in its discussion of options to control CSO the court commented that,

> *The removal of storm water inflow sources that originate on private property such as foundation drains and sump pumps can be very expensive to remove. It also may be difficult to enforce their permanent removal from the sanitary system. 873 F Supp at 47.*

The court raised only the issue of cost as an obstacle and did not raise as a possible obstacle the legal invalidity of an FDD program.

(4) Village of Bourbonnais v Illinois Environmental Protection Agency, PCB 83-71 (Illinois Pollution Control Board) (1983) (1983 WL 25566).

The disconnect program described in this administrative decision is similar to Ann Arbor's. In this matter, the Village of Bourbonnais and Kankakee Water Co. petitioned for a temporary variance to allow bypass and discharge of untreated flows to the river due to excess infiltration and inflow of storm water into the sanitary sewer system. A "major problem" was "the difficulty in reducing inflow from sources such as sump pumps, downspouts and footing drains."

The variance was granted for a limited period of time, with conditions that included a requirement that an existing "house-to-house inspection program for detection and removal of downspouts, footing drains and sump pump connections to the sanitary sewer system" be continued, along with a requirement that all residents be given 90 days to disconnect all such connections to the sanitary sewer system arid, if not done, that property owners be fined and then disconnected by the Village/Water Company within 90 days. In addition, water would be shut off to any property that had not disconnected.

(5) Town of Highland v Lieberman, 944 NE2d 994 (Ct. of Appeals, Indiana, Unreported) (2011).

This case was decided under Indiana law and is not reported; it is relevant here only for its description of the separation programs. This lawsuit was brought for damages due to a sewer back up following a heavy rainfall event, even though the Highland Sanitary District had implemented "Separation Programs" to remove storm water flow from the sanitary sewer system, including disconnection of storm water flow into the sanitary sewer system from private properties. The validity of the separation program was not questioned by the court.

III. Mr. Mermelstein's Second Argument:

- Ann Arbor's **FDD** program was/is unconstitutional because it violates private property rights as established in a Supreme Court case (Loretto). The Loretto ruling implies that Ann Arbor's FDD program was/is an unconstitutional taking of private property by the City and therefore illegal.

Answer:

1. The facts and circumstances and decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), are not close or relevant to the situation at hand and the decision has no bearing on the FDD ordinance or program.

    - Loretto involved a New York law that required a landlord to permit a cable television company to install its (the cable company's) cable facilities upon the landlord's property, resulting in a physical occupation of the landlord's building by the cable facilities. The Supreme Court ruled that the law was unconstitutional.
    - In contrast, a footing drain disconnection and installation of sump pump facilities brings a property into compliance with the City's 1982 construction code. No physical occupation by City equipment or the equipment of a third party is involved.
    - The home improvements — sump pump and line connecting to storm sewer — become and are part of the property where they are installed. They are owned by the property owner, not by the City. The City is not placing City facilities within any homes or on any private properties and is not taking any space in those homes or properties for City facilities or facilities of a party other than the property owner.
    - The facilities that the property owner installs under the FDD program are no different than the facilities built into a home that was built originally with a footing drain that discharges to the storm sewer system; both of those property owners have the same maintenance and operation responsibilities relative to those facilities.
    - The sump pump facilities benefit the property, its owner and its occupants because they help prevent sanitary sewage backups into the property's basement, which is a known health hazard.

2. The installation of a sump pump provides direct and indirect benefits to the property owner.

    - Storm water flow from footing drains that are connected to the City's sanitary sewer system contribute to the surcharging of the sanitary sewage system in heavy rain events, with the result that the sanitary sewer flow may back up through basement floor drains. This impacts both properties with footing drains connected to the sanitary sewer system and to properties in their neighborhood, even if those properties have footing drains that discharge to the storm sewer system. A property owner benefits in a similar manner when other properties in the neighborhood disconnect footing drains from the sanitary sewer system.

- The prevention of sanitary sewage backups through basement floor drains benefits not only the property owner but also the surrounding neighborhood and the entire community. This program and its objective are for the health and safety of the community, including the property owners who undertake the disconnections.

N. What exposure do CAC members have if a legal action is brought against the CAC or individual members for recommendations that emerge from the CAC?

Although we can never guarantee that nobody will sue the CAC or its members for their recommendations, we think a case brought against the CAC or its members would be without merit and would be quickly thrown out by a court. Following are some general principles that should apply.

- The CAC and its members should not be subject to any lawsuits for the recommendations they make. The CAC will only make recommendations; it will be the City, acting through the City Council and staff; that will make the decision how to proceed. There shouldn't be a factual basis for any claims against the CAC and its members.
- The CAC, as a body established to advise the City of Ann Arbor, is not a body that can be sued separate from the City; if a lawsuit were brought, it would have to be against the City.
- The CAC and its members are exercising quintessential government functions that do not fall into any of the exceptions to governmental immunity under Michigan law. In other words, even if the CAC were negligent in making its recommendations, governmental immunity would shield the CAC and its members from liability.
- Although the immunity analysis under federal law is different than under Michigan law, there also should be no grounds for any claims against the CAC and its members for providing their views and advice to the City decision makers.

There are always some exceptions to one or more applicable principles of law, and there is never a guarantee or 100% certainty when questions are asked about lawsuits and probable outcomes. However, we are not aware at this time of any exceptions that would apply. We think it highly unlikely any exceptions would apply, and we are reasonably confident as to how courts would view such a lawsuit.

Finally, the City has never had to respond to a lawsuit against volunteer members of a citizen advisory committee - or any similar committee or task force - for doing what the committee or task force was formed to do. In the event that were to happen with the CAC and/or its members, the City would represent the CAC and its members. As with the representation of City employees, representation of individual CAC members would require them to assist with and be cooperative relative to the defense of the case.