Subject **Sanitary Sewer Wet Weather Evaluation Study--Brief Rebuttal of City Position Concerning Legality of FDDs**

From Irvin Mermelstein <nrglaw@gmail.com>

To Charlie Fleetham <charlie@projectinnovations.com> [and multiple other addressees]

Cc [multiple addressees]

Date 29.10.2013 03:25

Dear Charlie and Members of the Citizens' Advisory Committee,

Judy Hanway joins me in this email.

Charlie Fleetham recently provided the CAC with a write-up of the City's legal arguments to support its claim of authority to perform FDD work on private property. Charlie didn't invite a contrary view from a lawyer outside of the City, so this email is intended to provide a brief rebuttal, primarily for the CAC, of the City's position. Judy, Aram Kalousdian and I may take the liberty of providing additional relevant details in further communications.

This email addresses two discreet issues. The first section addresses the City's lack of legal "power" to implement the FDDP, as admitted in 2001 by the City **in the SSO Report**. I raised this with Charlie in a detailed email to him on September 5.

The second section is a necessary and quick debunking of the City's sudden notion that its power and authority to complete involuntary permanent FDD installations and construction on private property does not come from the City's **own** FDD Ordinance, passed **in 2001**, but rather from a completely different state statute (Section 5j of the State's Home Rule Law) that was not enacted **until 2002**. That law was **not effective until May 14, 2002,** and the City **never implemented the state statute** with a City Ordinance (as required right in the state statute itself). Section 5j is irrelevant and I don't see even a good faith basis for the argument.

1. Final SSO Report: No "Power" or "Legal Framework" to Perform FDDs Legally on Private Property

Involuntary construction and permanent physical installations on private property are at the heart of the design of the FDDP. That design was the work product of the Sanitary Sewer Overflow Task Force in 2001. Work and construction on private property was the route advocated by CDMI and its president, Mark Tenbroek, the contractor who conceived of and wrote the SSO Report. This approach was accepted by the City apparently until sometime very late (after April 2001) in the Task Force's program design work.

The Report was issued in June 2001 and made a final recommendation of the FDDP for enactmen by a City

Council Ordinance, but there was an immediate legal problem described as such in the SSO Report itself.

It's unclear why, but right in the text of the SSO Report, on Pages L2 and L3, the Task Force added a big caveat to its recommendation: in plain English, the Task Force concluded that **there was no way legally to implement the FDDP** they had just recommended because **the City had no "power" (and therefore no authority) to do the work involved in FDDs on private property**.

On Page L2, the SSO Report asked this basic question, which should perhaps have been answered much earlier:

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

The answer went even further than the question:

> **A first step is to develop a legal framework** that would allow access and work on private property. To be effective, the City of Ann Arbor **would need to have the power to accomplish the disconnection work on private property.**

The City had therefore just paid CDMI (and its public relations subcontractors) a lot of money to help the City develop a program for which the City lacked "power" (in the legal and constitutional sense) to enact or implement. It is a very damning admission in the City's own report that, as of June 2001, no one had yet figured out (or thought about) how to do the recommended and highly intrusive Ann Arbor-styleFDDs **within the law and within the City's powers**. The SSO Report recommendations were a legal mistake and CDMI wanted a legal fix.

There was, however, no legal fix to be had in City Hall. The City had already said in its own report that it had no "legal authority," "power" or "legal framework" for the FDDs prescribed in the same report. The central problem for the City Attorney in June 2001 was that municipalities **exercise** power, they don't **create** it. The lawful legal and political "powers" of municipal governments are created by the Michigan State Constitution and the United States Constitution, and conferred on local governments (or not) under State and federal laws like the Home Rule Act. Neither the City Council nor the City Attorney could create legal or political power for the City itself **of any kind** just by passing an ordinance. Most especially, they could not create "power" to deal with the private property rights of citizens in the very manner that the **Federal and State courts had already powerfully condemned as unconstitutional.**

That is just what the state of the law already was in June 2001 concerning work on private property. By **1982,** both the US Supreme Court (in the *Loretto* case) and the Michigan courts had established that there were clear and simple constitutional limits on **involuntary permanent physical installations** (like FDDs) on private real property. These limitations came into play if, **before the involuntary installation,** the owners had been neither accorded "due process" about taking their property nor paid "just compensation" for the real property rights to be taken. Those are required by both the federal and state constitutions, including the US Fifth Amendment Takings Clause. **It is a fact that FDD Ordinance, however, was implemented entirely without any due process or just compensation for homeowners.**

These landmark decisions of the courts meant **before the SSO Task Force was formed in 2000,** that if a permanent physical installation had occurred because of an **"enforced consent"** under an enactment (like the FDD Ordinance), and the installation created **more than a "trivial" burden** on the property owner, **then**

that installation would be held to be an unconstitutional "taking" of private property for which the owner would have to be paid.

Such takings were held to be of a particularly disfavored type called "*per se* takings," because the Supreme Court views physical takings as **crossing constitutional red lines** concerning real property rights.

The next obvious important question is: Even if a court agreed with a plaintiff that her FDD "consent" was enforced, **what does a "trivial" burden mean?** In the 1982 *Loretto* case, the US Supreme Court examined a simple "enforced consent" permanent physical installation (under a NY State law) of **static cable wires** in a non-living utility space within a privately-owned apartment building in New York City. The City argued that the cable wires were not burdensome to the owner—they were out of the sight of tenants and were maintenance and operation-free—and that cable access **was a civic benefit**.

But Justice Thurgood Marshall rejected New York City's arguments in the strongest terms and ruled that the cable wires installation was an "enforced consent" ***per se* physical taking** and thus illegal. The City couldn't leave a permanent installation behind when it left. The Court said that even cable wires installed by enforced consent created a **"more than trivial"** burden on the owner's "right to exclude." The Court stated that the "right to exclude" is the core right of private property ownership and **that the City's civic purpose for the taking—good, bad or simply lacking—was irrelevant.**

There are some things that American governments cannot do, and it was no secret in 2001 that involuntary permanent physical installations on private real property, like the FDDs described in the SSO Report, had for all intents and purposes been prohibited by the courts long before then. I have told the City this for over a year. The City would have to explain whether this problem was missed in 2001 before the finalSSO Report or simply ignored. Either is possible.

As for "enforced consent," it is a fiction that there is an opt-out in the FDD Ordinance. What is in fact there is a $1200/per year fine or tax, with no due process, on the exercise of a resident's right to exclude, which is so carefully protected by the Loretto case. It's not surprising that only three people "opted out. FDDs under the FDD Ordinance are "enforced consent" installations, just as they were designed to be. The*Loretto* rule, by the way, was just affirmed by the US Supreme Court in December 2012 in the *Arkansas Game* case.

Concerning "just compensation," the Loretto installations were legally **far less burdensome** than **any** FDD, **even without any flooding out of the sump**. Cable wires don't flood basements, but FDDs often do and **every** FDDs requires mandatory operation, maintenance, repair, replacement, physical labor, etc. Those are not "trivial" burdens in comparison to cable wires. These are all **parts** of the burden on the homeowner (including the installation itself) and are all compensable in a lawsuit filed by any resident with an FDD, past or future. The relevant statute of limitations is 15 years.

The apartment house owner in NY received $1 in compensation from New York City, but she established a national legal standard. FDDs under the Ann Arbor Ordinance are **all** takings and **none** are $1 takings. These takings are going to be very expensive and going ahead with such takings by the City, which was known to be beyond the powers of the City, was taking an enormous risk with the City's finances and future. That risk is now preparing to mature while the City is considering doing further FDDs. Those will be expensive too.

The part of the SSO Report, in fact, is little noted by the City, as is the fact the legal problem in 2001 was

so clearly recognized as an actual lack of municipal "power" from any constitutional source. **That was an insurmountable problem** and the verdict from the City Attorney in 2001 should have been, without doubt, that (i) the built-in "no power" problem of the FDDP design (admittedly a mistake by CDMI and the Task Force) could not be fixed and (ii) that FDDs could **never** be done Constitutionally without condemnation proceedings and just compensation **for each house.**

Further, Michigan condemnations go at the very high costs established by Article X, Sec 2 of Michigan Constitution. FDDs should **never** have been understood by the City and the City Attorney as anything other than very expensive and slow to do, not a quick, cheap alternative to upgrading the sanitary sewer infrastructure. If that had been understood, the City would have had to go back to the drawing board, but it would have avoided doing the expensive involuntary FDDs that will now have to be paid for in court.

Instead, for reasons that are not apparent, the City determinedly walked itself right into **1,821 per se physical takings** under the FDD Ordinance. The Ordinance is simply a virtual cookbook for doing the admittedly unlawful FDDs designed by the Task Force and recommended in the SSO Report. Those FDDs, as predicted by the SSO Report, were all unlawful and I don't think the City's current priority should be figuring out whether to do more FDDs under the FDD Ordinance. The problem for the City is figuring out how the City is going to cope with the costs of paying for the almost 2,000 FDDs already done. Effectiveness of FDDs is legally and practically irrelevant.

Section 5j: Not Self-Executing, Not Retroactive and Not Relevant

I reviewed Section 5j of the Home Rule Law months ago and dismissed it for a number of reasons discussed here. The City's reliance on Section 5j, in fact, appears to be a shift in its position on its authority to do FDDs on private property. The City's apparent position now is that **the FDD Ordinance cannot stand on its own feet** (with which I agree), and instead suddenly needs to be propped up by a later-enacted statute **and** suggestions of retroactivity. I don't see any good faith basis for this argument. The problems discussed above are on top of that.

Section 5j would have had to solve, in 2002, the power/no power issue from the SSO Report in 2001 **and** it would have had to be retroactive. Section 5j does not create a "power," and when the State wants to confer "power" on a City, not just an authorization, it says so specifically. Section 5a of the Home Rule Act, for example, states that cities shall "have power" to maintain their own record keeping systems. Section 5j just doesn't do that.

The second major defect in the City's argument is that Section 5j **was not self-executing** in Ann Arbor or anywhere else. In any Michigan city, Section 5j just sat on a shelf **unless an ordinance was passed after May 14, 2002 to implement it.** That is its effective date, as stated in the law itself. **No such ordinance was ever introduced or passed.** I doubt that it was even considered, because Ann Arbor had already passed its own custom-made FDD Ordinance, which went way beyond any sort of program that a Section 5j ordinance would have allowed.

Section 5j is also only prospective (forward-looking only) and **not retroactive.** It did not authorize or validate or affect in any way any ordinance **passed before May 14, 2002,** including an ordinance about footing drains. The authorization to cities was only to pass future Section 5j ordinances after its effective date and not before. There is no basis for arguing to the contrary.

No Michigan court would interpret Section 5j to, in effect, authorize unconstitutional per se physical takings

under the FDD Ordinance. For example, there is **nothing** in Section 5j that would have authorized the City to impose mandatory operation and maintenance obligations **only** on City residents with FDD installations **and** at their own cost and expense. It's the cable wires problem—combined with the machinery, it's way too great a burden under the hair-trigger Loretto rule.

A final indication that the City has done nothing under Section 5j is that the statute specifically authorized funding of projects under a Section 5j ordinance **by Special Assessments.** Special Assessment procedures could have killed the FDDP, because the affected owners would have had due process rights to be heard and to challenge FDDs as "benefits" or as a "benefit" to their specific properties. A variety of votes and approvals would have been required for the Special Assessment. None of this ever happened relating to footing drain "separations" under Section 5j.

The FDD Ordinance is the only authority (valid or invalid) the City ever created and the only one the City or its contractors have ever relied for involuntary residential FDDs. The FDD Ordinance doesn't get any help from the irrelevant Section 5j.

I'll address the City's "retroactive building code" theory and your other points in an email later today or tomorrow.

Irv Mermelstein

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