UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANITA YU, JOHN BOYER and
MARY RAAB,

Plaintiffs,

vs.

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

CITY OF ANN ARBOR,

Defendant.
_____/

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DEFENDANT CITY OF ANN ARBOR'S MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED AND FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant City of Ann Arbor ("City"), by its attorneys, moves the Court to dismiss Plaintiffs' Complaint pursuant to Fed R Civ P 12(b)(1) and (6) because Plaintiffs' Complaint fails to state any claim on which relief can be granted and for lack of subject matter jurisdiction.

1. Plaintiffs fail to state any claims upon which relief can be granted.

2. Plaintiffs' claims are barred by the applicable statutes of limitations and/or laches.

3. Plaintiffs' federal claims are not ripe and cannot ripen.

4. Plaintiffs' requests for declaratory and injunctive relief are moot and not based on an active case or controversy.

5. Plaintiffs lack standing to request declaratory or injunctive relief on behalf of non-parties.

6. If Plaintiffs claims were not barred or subject to dismissal on one or more of the above grounds, they would be barred by governmental immunity under Michigan law, and/or by sovereign and/or qualified immunity under federal law.

7. The City disputes the merits of Plaintiffs' claims. However, arguments as to the lack of merit are not included in or necessary for this motion under Fed R Civ P 12(b)(1) and (6).

8. In accordance with Local Rule 7.1(a), concurrence in the relief requested was sought but not obtained.

The City relies upon the accompanying brief and exhibits thereto for support of this motion.

Wherefore, the City asks that Plaintiffs' Complaint be dismissed in its entirety with prejudice because Plaintiffs cannot cure the failings of their claims, and that this Court grant such other relief as is appropriate in the interests of justice including an award to costs and attorney fees to the City for having to defend against Plaintiffs' Complaint.

Dated: March 24, 2014

Respectfully submitted,

By: /s/ Abigail Elias
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OFFICE OF THE CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiff's Counsel, M. Michael Koroi, and I hereby certify that I have mailed by US Mail the document to the following non-ECF participant: Irvin A. Mermelstein.

/s/ Alex L. Keszler
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DEFENDANT CITY OF ANN ARBOR'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED AND FOR LACK OF SUBJECT MATTER JURISDICTION

STATEMENT OF ISSUES PRESENTED

Should all of Plaintiffs' claims be dismissed because the claims accrued on or before September 4, 2003, and are barred by the applicable statutes of limitations?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' claims under Mich. Const. of 1963, Art. X, §2 and MCL §213.23, including their requests for injunctive and declaratory relief, be dismissed because the claims accrued on or before September 4, 2003, and are barred by the applicable statutes of limitations?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' takings claims under the 5th Amendment to the U.S. Constitution as well as the claims related to those takings claims that they assert under 42 USC §1983, including claims for lack of due process, be dismissed because they are not ripe?

The City Answers: Yes

This Court Should Answer: Yes

To the extent any of Plaintiffs' claims under the U.S. Constitution are determined not to be related to their takings claims under the 5th Amendment, should they be dismissed because the claims accrued on or before September 4, 2003, and are barred by the applicable statutes of limitations?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' takings claims under the 5th Amendment to the U.S. Constitution as well as the claims related to those takings claims that they assert under 42 USC §1983, including claims for lack of due process, be dismissed with prejudice because it is not possible for them to ripen?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' requests for injunctive and declaratory relief be dismissed as moot and because they do not have a case or controversy that would allow the Court to grant that relief?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' requests for injunctive and declaratory relief for non-parties be dismissed because Plaintiffs do not have standing to make that request?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' claims under MCL §213.23 be dismissed for failure to state a cause of action upon which relief can be granted?

The City Answers: Yes

This Court Should Answer: Yes

Can this Court exercise its supplemental jurisdiction and dismiss Plaintiffs' state law claims for failure to state claims upon which relief can be granted?

The City Answers: Yes

This Court Should Answer: Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITY

CASES

UNITED STATES CONSTITUTION

MICHIGAN CONSTITUTION

STATUTES

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CASES

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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. 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. The sanitary sewer system is designed to carry sanitary sewage; it is not designed to carry 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 in streets, on land and into the Huron River) and backups of sewage into basements.

The FDD program disconnects footing drains from the sanitary sewer system and redirects the discharge, usually into the City's storm sewer system, but sometimes to a back yard if approved. Sump pumps are required to lift the water from the footing drain to the pipe that carries it away.[2] Although not legally necessary to authorize the City's FDD program, MCL §117.5j (Home Rule City Act), effective May 14, 2002, explicitly authorizes the City's FDD ordinance.[3]

Plaintiffs Boyer and Raab seek damages for the FDD they did pursuant to Section 2:51.1 of the Ann Arbor City Code and which they now claim was a

[1] The complaint and its exhibits are filed with this Court as Doc 1 pp9-56.
[2] Doc 1 pp31-32 (Ex 2 pp3-4).
[3] A copy of Sec. 2:51.1, City Code of Ann Arbor, the FDD ordinance that was in effect in 2002 and 2003, is Ex 1 to Plaintiffs' Complaint. (Doc 1 pp27-28)

taking. Plaintiffs Boyer and Raab state that their FDD was completed in 2002. (Doc 1 p18 ¶37) Plaintiff Yu brings the same claims and states that her FDD was completed on September 4, 2003. (Doc 1 p17 ¶31) Plaintiffs recognize that they own the sump pumps they had installed and that the sump pumps and footing drain system operate as an integral part of their houses; in other words, that the City does not own anything in their homes and has not taken their property. Doc 1 pp 17-18 ¶¶30-33, 35, 37; p32 Fig 2, p39 ¶16.

Plaintiffs assert seven "causes of action."[4] The first is based on a section of Michigan's eminent domain statute (MCL §213.23); the second on Art. X, §2 of the Michigan Constitution, the third on the 5th Amendment to the U. S. Constitution; and the fourth on 42 USC §1983. All of the claims relate to and arise from actions taken by the Plaintiffs in 2002 and 2003. Therefore, Plaintiffs' claims are all barred by the applicable statutes of limitations.

Plaintiffs cannot be subject to the FDD requirements of Sec. 2:51.1 again because disconnects at their properties were completed in 2002 and 2003. Nevertheless, Plaintiffs seek declaratory judgment[5] that Sec. 2:51.1 is unconstitutional and injunctive relief[6] to stop the City from enforcing Sec. 2:51.1 against them. Because their FDDs are done, their request to stop enforcement of

[4] Plaintiffs' fifth, sixth and seventh "causes of action" are just requests for relief.
[5] Plaintiffs' "Sixth Cause of Action." (Doc 1 p24 ¶¶73-74)
[6] Plaintiffs' "Seventh Cause of Action. (Doc 1 pp23-24 ¶¶68-72)

Sec. 2:51.1 as to them is moot. Thus, Plaintiffs' real request is to stop implementation and enforcement of the ordinance as to others, even though Plaintiffs do not have standing to request relief for non-parties.[7]

Plaintiffs' Complaint not only fails to state any valid claims against the City, but also establishes unambiguously the City's affirmative defense that Plaintiffs' claims are all barred by the applicable statutes of limitations.

In addition to not being timely, Plaintiffs' claims under the 5th Amendment and related claims fail because they are not ripe. None of the Plaintiffs ever sought prior relief on a takings claim under Michigan law,[8] a necessary pre-requisite for them to be able to bring their federal constitutional takings claims.

Finally, as argued in Section II.C below, Plaintiffs' claim under MCL §213.23 simply does not state a claim upon which relief can be granted.

STATEMENT OF FACTS

From 1997 into 2000,[9] the City experienced sanitary sewage overflow events that triggered a regulatory complaint from the Michigan Department of Environmental Quality. Doc 1p13 ¶19. During heavy rain events in August of 1998

[7] See the argument in Section III, below.

[8] The City does not agree that Plaintiffs have or ever had valid state law takings claims; only that they had the option to pursue those claims in state court.

[9] Overflow events continued to June 2002 before the City entered into the Administrative Consent Order (ACO) with the MDEQ that Plaintiffs refer to in the Complaint. (Doc 1 pp14-15 ¶22) A copy of the ACO, documenting the overflow events and requiring FDDs, is attached as Ex 1.

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, and in the Orchard Hills area where Plaintiff Yu lives.[10] A class action seeking damages for sewer backups into basements was brought against the City following the 2000 rain event (Doc 1 p13 ¶18).[11]

The City retained Camp Dresser & McKee to undertake a study and make recommendations. The June 2001 Sanitary Sewer Overflow Prevention Report of Camp Dresser & McKee and the Citizen Advisory Task Force[12] shows that overflows and backups were from heavy rainwater flow into a system designed 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 3 pp H-4 to H-8) 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

[10] A map (Fig. D-1) showing locations of reported basement backups in the City, and maps outlining the Orchard Hills and Morehead areas are found in the 2001 Sanitary Sewer Overflow Prevention Report, infra (Ex 3 pp D-1 to D-3).

[11] The City settled the class action 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); copy attached as Ex 2.

[12] Copies of cited pages from the Report are attached as Ex 3. Plaintiffs rely on the Report in their complaint (Doc 1 pp13-14 ¶¶20-21) and it is a public record, available on the City's web site at: http://www.a2fdd.com/SSORpt.htm.

study areas wanted a solution that would cover their properties as well. (Ex 3 p I-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. (Doc 1 pp13-14 ¶¶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. (Doc 1 p 15 ¶24) Under Sec. 2:51.1 (Doc 1 pp27-28), 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. (Doc 1 p17 ¶¶32-33) Additional funding for additional costs, if warranted, was available under Sec. 2:51.1(12). (Doc 1 p28) Ms. Yu also does not allege that her system is not working; in fact, she alleges that the sump "runs daily." (Doc 1 p17 ¶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. (Doc 1 p18 ¶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.[13]

ARGUMENT

I. STANDARD OF REVIEW

Under Fed R Civ P 12(b)(6) the court must accept as true all well-pleaded allegations in a complaint and construe them in the light most favorable to the plaintiff. *Scheuer v Rhodes*, 416 US 232, 236, 94 SCt 1683, 40 LEd2d 90 (1974); *Louisville/Jefferson County Metro Government v Hotels.com, L.P.*, 590 F3d 381, 384 (6th Cir 2009) (citation omitted);[14] For purposes of a motion under Fed R Civ P 12(b)(1) that is based on the complaint,

> "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover the plaintiff will have the burden of proof that jurisdiction does in fact exist."

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[13] *Magnuson v City of Hickory Hills*, 933 F2d 562, 567 (7th Cir 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 surcharge in lieu of an FDD is valid. The monthly surcharge may be less than the amounts about which they now complain and/or request as damages. Plaintiffs do not argue that their sump pumps are different from or impose a greater burden on them than sump pumps incorporated into houses built since the early 1980s.

[14] The Court also "may consider 'exhibits attached [to the complaint], public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein,' without converting the motion to one for summary judgment." *Rondigo, LLC v Twp. of Richmond*, 641 F3d 673, 680-681 (6th Cir 2011) (alteration in original) (quoting *Bassett v National Collegiate Athletic Ass'n*, 528 F3d 426, 430 (6th Cir 2008).

RMI Titanium Co. v Westinghouse Elec. Corp., 78 F3d 1125, 1134 (6th Cir 1996), quoting *Mortensen v First Federal Savings and Loan Ass'n*, 549 F2d 884, 890-891 (3d Cir 1977).

II. ALL OF PLAINTIFFS' CLAIMS FAIL AND SHOULD BE DISMISSED WITH PREJUDICE BECAUSE THEY ARE NOT VIABLE CLAIMS, ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS, OR ARE NOT RIPE

A statute of limitations defense is properly raised on a motion to dismiss under Fed R Civ P 12(b)(6) and the claims properly dismissed when the allegations in the complaint affirmatively establish that the time limit for bringing the claims has passed. *Jones v Bock*, 549 US 199, 215, 127 SCt 910, 166 LEd2d 798 (2007); *Cataldo v U.S. Steel Corp*., 676 F3d 542 (6th Cir 2012) cert denied, 133 SCt 1239, 185 LEd2d 177 (2013). When the statute of limitations defect is obvious on the face of the complaint, as it is here, the Court may even act *sua sponte* to dismiss the complaint. See *Pino v Ryan*, 49 F3d 51, 53-54 (2d Cir 1995).

Although dressed up in different theories, all of Plaintiffs' claims are essentially claims for alleged takings without compensation and are time-barred.

A. Plaintiffs' Claim Under 42 USC §1983 (Fourth Cause of Action) for a 5th Amendment Taking (Third Cause of Action) Is Time-Barred

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 a rights secured by the U.S. Constitution. See e.g., *Smoak v Hall*, 460 F3d 768, 777

(6th Cir 2006). Plaintiffs' 5th Amendment and due process claims, and their claim for "mandatory work and physical labor" with no federal constitutional or statutory basis, are merely asserted through 42 USC §1983. Their Fourth Cause of Action is not an independent cause of action and must be dismissed.

The limitation period for the federal claims Plaintiffs assert under 42 USC §1983 is defined by Michigan law. *Wallace v Kato*, 549 US 384, 387, 127 SCt 1091, 166 LEd2d 973 (2007); *Searcy v Oakland Cnty*, 735 FSupp2d 759, 765 (ED Mich 2010). In *Wilson v Garcia*, 471 US 261, 105 SCt 1938, 85 LEd2d 254 (1985), the United States Supreme Court held that claims brought under 42 USC §1983 are best characterized as personal injury actions, subject to the state statute of limitations for injury to person or property. See also *McSurley v Hutchison*, 823 F2d 1002 (6th Cir 1987). MCL §600.5805(10) provides a three year limitation period for injury to a person or property. This three year limit applies to the Constitutional claims that Plaintiffs bring under 42 USC §1983. *Searcy*, 735 FSupp 765 (that the statute of limitations is three years is well settled).

Although the limitations period is determined by Michigan law, the date a claim accrues for purposes of 42 USC §1983 is determined under federal law. See *Sevier v Turner*, 742 F2d 262, 272-273 (6th Cir 1984) (federal law governs the question of when the limitations period begins to run). Under federal law, "[t]he statute of limitations commences to run when the plaintiff knows or has reason to

know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Id*. at 273. As alleged in their complaint, Plaintiffs' claims arose when they disconnected their footing drains from the City's sanitary sewer system and installed sump pumps, all done for proper discharge of stormwater from their own property. Doc 1 pp17-18 ¶¶32, 37 and pp31-32 (Complaint Ex 2 pp3-4). Plaintiffs do not dispute that the FDD program was undertaken for public health, safety and welfare reasons, including a desire to eliminate the primary cause of both sanitary sewer backups into homes during large rain events and overflows of untreated sanitary sewage. Doc 1 pp13-15 ¶¶ 17-20, 22.

After notice to disconnect, Plaintiffs made the choice to have the work done, Doc 1 p17 ¶¶31, 37, taking ownership of and responsibility for the systems they added to and installed as part of their homes. Thus, as alleged in their complaint, Plaintiffs had knowledge of the events in 2002 and 2003 that they now claim constituted a taking and as a basis for their other claims. The acts complained of by each of the Plaintiffs occurred in 2002 (Boyer and Raab) or 2003 (Yu). More than ten years have passed since their claims accrued, so all their claims under 42 USC §1983 are barred by the three year limitations period and should be dismissed.

B. Plaintiffs' Claims under the 5th Amendment (Third Cause of Action) Are Not Ripe and Are Time-Barred

Plaintiffs' 5th Amendment claims are not ripe and this Court lacks

jurisdiction to hear those claims. However, because Plaintiffs' state law claims are time-barred and an untimely attempt to file state court proceedings will not restart the clock for purposes of the limitations period for their 5th Amendment claims, Plaintiffs' 5th Amendment claims cannot ripen and are time-barred by the applicable statute of limitations and/or by operation of laches.

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 federal jurisdiction and the ripeness requirements for takings claims which have since been held applicable to other types of federal constitutional 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*. Both requirements of the ripeness doctrine must be met to assert federal constitutional claims.

Plaintiffs cannot meet the second prong of the ripeness doctrine which requires a plaintiff to first pursue any available remedies in state court to completion and be denied just compensation before the federal takings claim can ripen. The rationale for this requirement "[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). In *Pearson v Grand Blanc*, 961 F2d 1211, 1214 (6th Cir 1992), the Court further explained the reasons for the ripeness requirements:

> "[T]he federal court cannot know what has been taken or what compensation has been afforded until state remedies have been utilized. Until that time, the federal court cannot determine whether a taking has occurred, whether compensation is due, or, if it has been afforded, whether it is just. These prerequisites are not technically an exhaustion requirement, but 'a product of the ripeness doctrine.'" *Id.* (quoting *Macene v MJW, Inc*, 951 F2d 700, 704 (6th Cir 1991)).

Case decisions in the Sixth Circuit and Michigan federal District Courts are consistent that a plaintiff's federal claims are premature and unripe for review by virtue of the failure to first pursue an available state remedy to completion - meaning that plaintiff must have proceeded with the state constitutional claims and been denied compensation before the federal claims can ripen. See, e.g., *Braun v Ann Arbor Charter Twp*, 519 F3d 564, 570 (6th Cir 2008); *Pearson, supra*; *Macene, supra; Seiler v Charter Twp of Northville*, 53 FSupp2d 957 (ED Mich 1999).

Most troubling in this case is that Plaintiffs failed to pursue their claims years ago, and now belatedly 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 in federal court 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*, 217 FSupp2d 206 (D RI 2002) aff'd, 337 F3d 87 (1st Cir 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 their delay, had forfeited their federal takings claims.

> "Pascoag did not satisfy the *Williamson County* prerequisites for a federal claim. We have stated that takings claims are 'unripe until the potential state remedy has been more fully pursued.' [*Gilbert v City of Cambridge*, 932 F2d 51, 65 (1st Cir 1991)]. The situation here is different. As the Rhode Island Supreme Court noted, there is a fatal flaw in Pascoag's claim: it is too late for any state law cause of action. *Williamson County* requires the pursuit of state remedies before a taking case is heard in federal court. Adequate state remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim." 337 F3d 94 (emphasis added; footnote omitted).

See also *Gamble v Eau Claire Co.*, 5 F3d 285, 286 (7th Cir1993) ("[A] claimant cannot be permitted 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

(8th Cir 1986) (plaintiffs "cannot obtain jurisdiction in the federal courts simply by waiting until the statute of limitation bars the state remedies.").

The procedural due process claims Plaintiffs assert under 42 USC §1983 pertain to the same alleged takings by the City, are similarly time-barred and also should be dismissed. *McNamara v City of Rittman*, 473 F3d 633, 639 (6th Cir 2007) (procedural due process and equal protection claims that are ancillary to taking claims are subject to the same ripeness requirements). Because none of Plaintiffs' federal claims can ever ripen because their state claims are time-barred, this Court should dismiss those claims with prejudice. *Vandor, Inc. v Militello*, 301 F3d 37, 39 (2d Cir 2002) (federal takings claim dismissed with prejudice).

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

Plaintiffs' First Cause of Action is based on MCL §213.23 as it was amended in 2006 and 2007.[15] (Doc 1 p21 ¶¶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. [16] Subsection (2) and the language requiring "public necessity of an extreme sort" upon which Plaintiffs rely (Doc 1 pp19-21 ¶¶42, 52)

[15] MCL §213.23 as it existed in 2002 and 2003 is attached as Ex 4; MCL §213.23 as it was amended in 2006 and 2007 is attached as Ex 5.

[16] 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 Ex 6)

did not exist in 2002 and 2003, the dates relevant to Plaintiffs' claims. On these grounds alone, Plaintiffs' claim under MCL §213.23 should be dismissed.

Plaintiffs' theory that the City acted contrary to statute also is contradicted by the 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.[17] See also *Board of Cnty Comm'rs of Johnson Cnty v Grant,* 264 Kan 58, 954 P2d 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 P2d 700. The City's FDD program was also approved by the Michigan Department of Environmental Quality (MDEQ) as a means to eliminate sanitary sewage overflows. (Doc 1 pp14-15 ¶22; see also Ex 1)

Thus, Plaintiffs' statutory claim fails to state a valid cause of action upon

[17] The Court upheld the city's 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.

which relief can be granted and should be dismissed.

D. Plaintiffs' Claims under Mich. Const. of 1963, Art. X, §2 (Second Cause of Action) Fails to State a Valid Claim and Is Time-Barred

Michigan courts determine whether a 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, 808 NW2d 804 (2011); *MacDonald v Barbarotto*, 161 Mich App 542, 547, 411 NW2d 747 (1987).

Plaintiffs' claims for takings under Mich. Const. of 1963, Art. X, §2 do not identify any property that has been physically appropriated by the City or any occupation of their property by property of a third party. Rather, their complaint centers on the sump pumps they own. [18] Plaintiffs allege that their sump pumps are a "physical intrusion" or "occupation" by the City, Doc 1 p20 ¶43, but this assertion is conclusory, unsupported by any facts or other basis for the conclusion. In fact, Plaintiffs rely on the language of Sec. 2:51.1 and the information in the

[18] Their 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*, 13-3112, 2014 WL 815098, at **8-9 (6th Cir Mar. 4, 2014), ___ F3d ___ (2014) (no taking, following *Loretto*) (copy attached as Ex 7).

Homeowner Information Packet, Doc 1 pp29-56 (Complaint Ex 2), both of which confirm that the sump pumps are theirs. Despite the "takings" label, their claim is simply a claim for damages for burdens Plaintiffs complain of as owners of sump pumps. Thus, even if there were merit to the claim, it is time-barred by the three year statute of limitations for injury to persons or property, MCL §600.5805(10).It also is barred by governmental, sovereign and/or qualified immunity.

Even if construed as a takings claim for purposes of this motion, 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); see *Benninghoff v Tilton*, 284637, 2009 WL 3789981, at **19-21 (Mich Ct App 11/12/09) (clarification of when the six year limitation period applies) (copy attached as Ex 8).

III. PLAINTIFFS' REQUESTS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF ARE MOOT AND TIME-BARRED, AND PLAINTIFFS DO NOT HAVE STANDING TO ASK FOR RELIEF FOR NON-PARTIES

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," 28 USC §2201(a) provides hat a court "may declare the rights and legal relations of any interested party seeking a declaration." However, because the underlying purpose

of declaratory relief is to guide parties' conduct in the future so as to avoid litigation, *The Hipage Co., Inc. v Access2Go, Inc.*, 589 FSupp2d 602, 615 (ED Va 2008), declaratory judgment is inappropriate when the alleged harm is already done and the declaration will not serve any purpose. *Tapia v U.S. Bank, N.A.*, 718 FSupp2d 689 (ED Va 2010) aff'd, 441 FApp'x 166 (4th Cir. 2011) (declaratory judgment inappropriate because "any wrong Plaintiffs suffered as a result of the allegedly deficient foreclosure has already occurred.").

Because the four 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 28 USC §2201(a), thereby also precluding declaratory relief.

Plaintiffs' request for declaratory relief also is barred by the same statutes of limitations that apply to Plaintiffs' legal claims. In *Anderson v Gates*, CV 12-1243 (JDB), 2013 WL 6355385 (D DC Dec. 6, 2013),[19] the court denied the plaintiff's requests for declaratory and injunctive relief after dismissing his claims. The court's reasoning and holding are instructive:

> "Turning last to Anderson's request for a declaratory judgment that [d]efendants' conduct deprived [him] of his rights under the U.S. Constitution and the laws of the United States[,] Compl. ¶ 63, the Court points to the 'well-established rule that the Declaratory Judgment Act 'is not

[19] ___ FSupp2d ___ (2013) (copy attached as Ex 9).

> an independent source of federal jurisdiction. Rather, the availability of [declaratory] relief presupposes the existence of a judicially remediable right. But as explained above, Anderson has no viable constitutional claim. Having dismissed all of Anderson's other claims, no actual case or controversy remains and thus this Court cannot render a declaratory judgment." 2013 WL 6355385 at *10. (Emphasis added; internal quotation marks and citation omitted).

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. [20] Plaintiffs' request is not only untimely but is also moot.

Even if analyzed under Michigan law, Plaintiffs' request for declaratory judgment should be dismissed. The analysis is similar to the analysis above under federal law. In *Lansing Sch. Educ. Ass'n v Lansing Bd. of Educ. (On Remand)*, 293

[20] 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. For standing, a plaintiff must show: (1) an injury in fact that is actual or threatened; (2) a causal connection between the defendant's conduct and the alleged injury; and (3) a substantial likelihood that the injury will be redressed by a favorable decision. *Lujan v Defenders of Wildlife*, 504 US 555, 560-561, 112 SCt 2130, 119 L Ed2 351 (1992). A complaint on behalf of others does not satisfy these requirements. *Valley Forge Christian College v Americans United for Separation of Church & State, Inc*., 454 US 464, 472, 102 SCt 752, 70 LEd2d 700 (1982).

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. 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. Plaintiffs do not speak for persons who feel strongly that the program should continue to prevent sanitary sewage overflows and basement backups of sewage due to flows from footing drains in the sanitary sewer system. 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. [21] (Doc 1 p19 ¶40), yet fail to attach the report to their complaint or include the rest of the results. A complete copy of the report is

[21] The survey was done as part of an ongoing project to evaluate sanitary sewage system flow under wet weather conditions.

attached as Ex 10.[22] 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. (Doc 1 p19 ¶40) The actual survey results also shows that 70% of the respondents[23] 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).[24] The adverse interest of those residents 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."

[22] The report is a public record available on the City's website at: http://www.a2gov.org/Documents/012414%20FDD%20Survey%20Summary%20Report.pdf.

[23] The survey only went to persons at addresses where FDDs had been done.

[24] 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.

Other comments reflect similar viewpoints:

- Comment 2 to Q #14 (p 32) - ". . . we agree that it's a good idea to disconnect from the sanitary sewer & know that our neighbors DID have sanitary flooding before the sump pumps."
- Comment 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 these reasons as well, Plaintiffs' requests for declaratory judgment should be dismissed.

B. Injunctive Relief

Plaintiffs' request for injunctive relief is time-barred and/or moot for the same reasons as Plaintiffs' request for declaratory relief. As recently stated by this Court in *Coleman v Ann Arbor Transp. Auth.*, 947 FSupp2d 777 (ED Mich 2013),

> "Where a federal court is asked to issue injunctive relief, a jurisdictional limitation also comes into play. The Supreme Court has explained that there must exist 'a live case or controversy at the time that a federal court decides the case.' *Burke v Barnes*, 479 US 361, 363, 107 SCt 734, 93 LEd2d 732 (1987) (emphasis added). In the absence of a 'live case or controversy,' the mootness doctrine is triggered, and the constitutional requirements for justiciability cannot be met. *Ky. Right to Life, Inc. v Terry*, 108 F3d 637, 644 (6th Cir 1997) ('The mootness doctrine, a subset of the Article III justiciability requirements, demands a live case-or-controversy when a federal court decides a case.' (citation omitted))." 947 FSupp2d 784.

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 is both moot and not based on a "live case or controversy."

After denying Anderson's request for declaratory relief, the court in *Anderson v Gates*, *supra*, also denied his request for injunctive relief:

> "For the same reason, [that the Court cannot render a declaratory judgment], the Court cannot entertain Anderson's request to 'enjoin the [d]efendants to reverse the Memorandum terminating Plaintiff's embed accommodation status without procedural due process.' See, e.g., *Coe v Holder*, 2013 WL 3070893, at *2 n. 4 (D DC June 18, 2013) (holding that a request for injunctive relief does not assert any separate cause of action); *Goryoka v Quicken Loan, Inc.*, 2013 WL 1104991, at *3, 519 FApp'x 926 (6th Cir Mar. 18, 2013) (holding that a request for injunctive relief is a remedy and not a separate cause of action)." 2013 WL 6355385 at *10.

Plaintiffs' request for injunctive relief includes a request for compensation (Doc 1 p24 ¶72). Even without equitable claims for compensation, courts have held that when legal and equitable relief on a claim are available concurrently, a plaintiff cannot transform a complaint at law that is barred by a statute of limitations into a complaint in equity to try to escape a statute of limitations bar and have held the claims in equity to be barred as well. *Cope v Anderson*, 331 US 461, 464, 67 SCt 1340, 1341, 91 LEd 1602, 1607 (1947); *Madison v Wood*, 410 F2d 564, 567-568 (6th Cir 1969); see also *Nemkov v O'Hare Chicago Corp.*, 592 F2d 351, 355 (7th Cir 1979) ("Equitable jurisdiction is concurrent even though plaintiff chooses to forego damages and to seek only equitable relief. Therefore, if

an action at law for damages would be barred, so too is the action in equity." (citations omitted)).

The injunctive relief Plaintiffs request also is time barred or otherwise unavailable under Michigan law. 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).

Therefore, Plaintiffs' requests for injunctive relief should be dismissed.

IV. THIS COURT HAS SUPPLEMENTAL JURISDICTION OVER PLAINTIFFS' STATE LAW CLAIMS AND SHOULD DISMISS THEM FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

Because Plaintiffs' state law and federal law claims arise out of a common nucleus of operative facts and are so intertwined with and related to the federal law claims that they form part of the same cause or controversy, this Court may properly exercise supplemental jurisdiction over Plaintiffs' state law claims and dismiss those claims along with Plaintiffs' federal law claims. 28 USC §1367(a). The requirement that the claims be so related they form part of the same case or controversy is satisfied when, as here, the claims derive from a common nucleus of operative facts. See *United Mine Workers v Gibbs*, 383 US 715, 725, 86 SCt 1130, 16 L. Ed. 218 (1966); *Detroit Edison Co. v Michigan Dep't of Envtl. Quality*, 29 FSupp2d 786, 789 (ED Mich 1998) (state law claims were within the court's

supplemental jurisdiction and properly removed because they "undeniably derive from the common nucleus of operative fact" and, therefore, share an Article III relationship with the federal claims of original jurisdiction); *Harper v AutoAlliance Int'l, Inc.*, 392 F3d 195, 209 (6th Cir 2004) ("Claims form part of the same case or controversy when they 'derive from a common nucleus of operative facts.'") (Citation omitted). When, as in this case, the same acts are alleged to "violate parallel federal and state laws, the common nucleus of operative facts is obvious and federal courts routinely exercise supplemental jurisdiction over the state law claims." *Lyon v Whisman*, 45 F3d 758, 761 (3d Cir 1995). Supplemental jurisdiction also is proper when, as here, the federal and state claims "are merely alternative theories of recovery based on the same acts." *Id.*, quoting *Lentino v Fringe Employee Plans, Inc.*, 611 F2d 474, 479 (3d Cir1979).

Plaintiffs' state claims arise from the same common nucleus of operative facts and are so intertwined with and related to Plaintiffs' federal claims that they form part of the same case or controversy as their federal claims, over which this Court has original jurisdiction. All four of Plaintiffs' substantive claims arise out of Plaintiffs' decisions to disconnect their footing drains from the City's sanitary sewer system pursuant to a City ordinance and reconfigure their footing drain discharge to go instead to the City's storm sewer system or into their back yard, with installation of sump pumps in their basements so the footing drains will

operate properly. (Complaint ¶¶ 23-28, 30-33, 37) Their state takings claim under Art. X, §2 mirror their claims under the 5th Amendment. Their claim for violation of Michigan's eminent domain statute[25] is simply another takings claim.

Plaintiffs' state law claims present no novel issues of state law. As argued above, they are subject to dismissal on the face of the complaint. For those reasons and for reasons of judicial economy, this Court should exercise its supplemental jurisdiction over these claims and dismiss them as time-barred and/or for failure to state claims upon which relief can be granted.

CONCLUSION

Plaintiffs' complaint should be dismissed in its entirety with prejudice under Fed R Civ P 12(b)(1) and (6) for the reasons argued above. Defendant City also should be awarded its costs, including attorney fees, for having to defend against this action.

Dated: March 24, 2014

Respectfully submitted,

By: /s/ Abigail Elias
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant City
OFFICE OF THE CITY ATTORNEY

[25] As discussed above, Plaintiffs rely on provisions of MCL §213.23 that did not exist at the time they disconnected their footing drains.

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiff's Counsel, M. Michael Koroi, and I hereby certify that I have mailed by US Mail, first class postage prepaid, the document to the following non-ECF participant: Irvin A. Mermelstein.

/s/ Alex L. Keszler
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INDEX OF EXHIBITS