UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LYNN LUMBARD, ANITA YU, JOHN BOYER and MARY RAAB, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

THE CITY OF ANN ARBOR,

Defendant.

CLASS ACTION COMPLAINT

Civil Action No. 5:17-cv-13428

Plaintiffs Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, on their own behalf and on behalf of all other persons similarly situated (hereinafter "Plaintiffs"), in support of this Class Action Complaint against the City of Ann Arbor (hereinafter, the "City"), allege as follows:

PRELIMINARY STATEMENT

1. This is an action against the City of Ann Arbor pursuant to the Fifth and Fourteenth Amendments to the United States Constitution arising from the City's initiation and implementation of a program of takings of private residential property by means of physical invasions and permanent physical occupations, known as "footing drain disconnections" ("FDD's") under the City of Ann Arbor "Footing Drain Disconnection Program" ("FDDP"), all as fully set forth in this Complaint.

2. The mandatory FDDs, and the resulting takings of Plaintiffs' private property and deprivation of their rights to the exclusive use and occupation of their homes, were initiated and completed without any steps taken by the City toward condemnation proceedings under Michigan law, including the payment of just compensation.

3. The Ann Arbor City Council, in Ordinance No. 32-01 in 2001 (the "Ordinance"), stated the public purposes of the FDDP to be the lessening of storm water and groundwater drainage from residences into the City's sewer system to reduce backups from the City sewers and overflows from the sewer system at the City's wastewater treatment plant into the Huron River.

4. FDD's consist of mandatory inspections and entries by City employees, City officials and the City's outside contractors for demolition, excavation and construction inside and outside Plaintiffs' houses. The FDDs at Plaintiffs houses all included permanent installations of operating hydraulic and electrical equipment, pipes, pumps, electrical wires, external drainage collectors, switches, attachment devices and other components.

5. The City's mandatory FDD construction disabled the functioning systems for storm water drainage designed and built into the Plaintiffs' houses between 1946 and 1973, as required by applicable codes and the permits issued thereunder at the time.

6. The City's FDD mandatory construction replaced these systems with the City's own "one-size-fits-all" design for drainage of storm water away from the houses, basements and crawl spaces.

7. The City designed a different physical system and route for storm water drainage; substituted electricity for gravity as the energy source for the drainage system; collected storm water inside the basement, rather than outside the basement, as built and permitted; directed water to a special collection system near the street, not to the existing as-built combined house sewer lead below the foundation; and drained the storm water discharge in the street at ground level, rather than to the as-built and as-permitted discharge to the City sewer system, safely below foundation level.

8. The City's FDD construction permanently occupies significant areas of the houses, inside and out. Schematic drawings show the areas of houses occupied permanently by physical FDD construction, equipment and piping for the Plaintiffs' houses extending from a point in the basement or crawlspace of each house and extending to the exterior of the house, across the deck or front yard and into a drainage device in the lawn extension.

9. The construction at all houses included piercing of the building envelope at street level; the running of interior pipe for up to 25 feet or more and

external trenching or drilling across front yards or back yards for drainage piping runs, up to 75 feet at the home of Plaintiffs Boyer and Raab's.

10. The City had chosen FDDs over traditional engineering methods as a means of settling an administrative enforcement case commenced against the City the predecessor agency of the Michigan Department of Environmental Quality ("MDEQ") sometime between 1998 and 2000.

11. The case was commenced under the enforcement provisions of the Michigan Natural Resources And Environmental Protection Act, MCL § 324.3101 *et seq*. ("NREPA") pertaining to abatement and control of "combined sewer overflows" from the parts of the City's sewer system consisting of or including combined sewers. MDEQ acts pursuant to a delegation of enforcement by the United States Environmental Protection ("EPA") under the Clean Water Act Amendments of 1972 ("CWA").

12. MDEQ alleged, inter alia, violations by the City of NREPA (and thus the CWA) due to massive overflows of combined sewage at the City's Wastewater Treatment Plant ("WWTP") into the Huron River from the City's combined sewer system components.

13. The combined sewers in this case are typical of other cities in the Great Lakes Basin, such as Grand Rapids and Lansing in that they were designed and constructed in the same general manner to accept storm water runoff and as a

component of combined sewage wastewater (including sanitary wastewater) from buildings, including all of the Plaintiffs' houses.

14. MDEQ alleged that the City's sewer system, due to growth, development and the resulting sewer inflows, was no longer adequate for its then-immediate or future needs for prevention of overflows of untreated combined sewage water surcharging of the City's combined sewers and overwhelming the capacity for treatment at the Ann Arbor Waste Water Treatment Plant ("WWTP"). Such overflows of combined sewage are defined by MDEQ and EPA as "Combined Sewer Overflows" or "CSO's."

15. The terms "combined sewer overflow" and "CSO" should not be confused with the terms "sanitary sewer overflows" or "SSO's," a term that only applies to overflows from separate sanitary sewers.

16. In 2003 the City and MDEQ entered into an Administrative Consent Order settling and memorializing the enforcement case (the "ACO," a copy of which is attached hereto as **Exhibit "1"**), including stipulations and findings of fact and law concerning the City's CSO non-compliance. The City of Ann Arbor paid a fine of $7,500.00 for CSO's from 1997 through 2002.

17. The City had until a date in 2003 to conclude the MDEQ enforcement case based on FDD's as the "primary means" for abatement of its violations of the CSO provisions of NREPA.

18. If it did not, it faced the imposition of conditions requiring non-FDD based long-term abatement for CSO's, including requirements by traditional engineering solutions the City had rejected for years.

19. MDEQ signed the ACO in time for the City to proceed, instead, with FDD's as the primary element of its long term plan for CSO abatement.

20. At the time the City entered into the ACO with MDEQ, as set forth in Paragraph 16, *infra*, the City of Ann Arbor knew that FDDs represented a new and unproven technology for which inadequate data existed as to its effectiveness.

21. For purposes of implementing the mandatory inspections, construction and installations of FDDs in Plaintiffs' homes, the City clothed with authority one contractor for engineering, "construction management," and "public engagement," and approximately five other hand-picked and "pre-qualified" installation and construction contractors to perform the actual FDD's.

22. The nature of the FDDs at the Plaintiffs' homes was destructive; they were unscientific in their design and implementation. According to the Michigan Bureau of Construction Codes on November 7, 2014, FDD construction was not subject to state construction codes or building codes of any kind, impermissibly depriving owners of FDD houses of the basic protection of such codes that applies to any other type of residential construction.

23. The FDDs destroyed the foundation drainage system at houses that had been constructed decades ago and appeared to be functioning as designed and replaced it with a system of unwanted operating equipment, inside and outside their homes, that is burdensome, costly, unsafe, noisy and incompatible with the peace of mind and comfort the Plaintiffs enjoyed.

24. The FDDs were performed against the will of the Plaintiffs, beginning in 2001. The City enforced its asserted right to require targeted residents to undergo FDDs by threatening financial penalties, disconnection from all City and water services, potential sewer liens and, possibly, the eventual loss of their homes.

25. The Plaintiffs herein seek an award of just compensation for the permanent physical occupations of their houses by the City, after active physical invasion.as hereinafter set forth, and any necessary injunctive and declaratory relief in connection with the implementation of such award.

26. The takings at the Plaintiffs' houses are of a continuing nature.

27. The takings at the Plaintiffs' houses have not stabilized.

28. The Plaintiffs herein are entitled to the procedural protections for plaintiffs alleging permanent physical occupations of real property set forth in *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 519 (1982), including the exclusion of evidence of public purpose or public benefit.

THE PARTIES

29. Plaintiff, Lynn Lumbard, resides, and at all times hereinafter mentioned, resided at 1515 Avondale Avenue, Ann Arbor, MI 48103 in a home constructed in 1955. During all times relevant hereto, Plaintiff Lynn Lumbard has been the fee simple owner of the home.

30. Plaintiff, Anita Yu, resides at 2362 Georgetown Boulevard, in a home she has owned since 1970, in Ward 1 of the City of Ann Arbor.

31. Plaintiffs, John Boyer and Mary Jean Raab, reside at 2273 Delaware , in a home which they have owned since 1970, located in Ward 4 of the City of Ann Arbor.

32. 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.

JURISDICTION AND VENUE

33. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331. As set forth in Paragraphs 150 through 168, below, the Plaintiffs' claims are ripe for review in federal court under *Williamson County Regulatory Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

34. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391(c).

FACTS COMMON TO ALL COUNTS

A. The City of Ann Arbor.

35. The City is located in the State of Michigan and is the county seat of Washtenaw County, home of the University of Michigan. 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.

36. 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. The City Attorney reports only to the City Council.

B. The Plaintiffs' Vested Property Rights.

37. All of the Plaintiffs' houses were built between 1947 and 1973 located in the Southwest and Northeast quadrants of the City in areas including low elevations relative to other parts of Ann Arbor.

38. The City has known at all times relevant hereto that these areas have historically high ground water levels even in dry weather and a history of flooding in heavy rain events. For example, the Lansdowne I vicinity near Michigan Stadium had a large swimming pond in the middle of the area (known at the time

as "the Cow Pond") because of heavy runoff and groundwater problems during even normal spring rains.

39. By the 1960's, the City of Ann Arbor had experienced significant population growth and corresponding development, which continued. In 1960, the population was less than 68,000. By July 2000, the City population was over 114,000.

40. Upon information and belief, the condition, capacity and types of its publicly owned and controlled sewage infrastructure did not keep pace with the rate of development. Parts of the City's sewer system were built in the 1920's. The WWTP was originally constructed in 1936.

41. Prior to November 1973, the City had approved plats for the subdivisions where the Plaintiffs' houses are located. This included three phases each for the Lansdowne and Churchill Downs developments in the southwest and for the Orchard Hills and Bromley neighborhoods in the northeast.

42. As required by law and codes in effect at the time, as a health and safety measure to protect against basement storm water seepage and flooding, all of the Plaintiffs' houses were designed and built with a drainage system to collect groundwater from storms or thaws, which seeps down from ground level and down the external walls by gravity into the foundation drain tiles (also known as "footing

drains") excavated and laid safely on the other side of the external basement foundation wall, below basement level.

43. Attached to this Complaint as **Exhibit "2"** is a City of Ann Arbor drawing of the internal and external sewer connections of a "typical Ann Arbor house," leading to a City combined sewer and from there to the WWTP. The drawing appeared in the April 2000 issue of Waterways, a City publication mailed to all water utility customers (the "2000 City Sewer Drawing").

44. On information and belief, all of the Plaintiffs' houses, and those of others similarly situated, had typical sewer connections for storm water and wastewater, including sanitary sewage.

45. As shown near the bottom of the 2000 City Sewer Drawing, as the foundation drain tiles in the house's as-built system fill, the collected storm water and groundwater flows by gravity drain into a pipe under the basement floor known as a "combined sewer lateral." The combined sewer lateral and its inflows, including sanitary waste, are shown near the footing drain flow into the combined house sewer lateral depicted near the bottom of the Drawing.

46. Also as shown on the City's 2000 drawing, the combined sewer lateral still typically drained by gravity from the combined sewer lateral which traverses the lawn area in the front of the house, and to a tap into the combined sewer in the street.

47. The combined sewer was intended to accept storm water from the house's foundation drains as a component of the combined contents of the house sewer lateral, defined by EPA as "combined sewage."

48. Upon information and belief, the Plaintiffs' homes timely passed their City building code inspections, of every type, and received Certificates of Occupancy from the City and were otherwise allowed to be constructed and occupied.

49. Further, in October 1973, the Ann Arbor City Council enacted Ann Arbor Ordinance 8-73, a copy of which is attached hereto as **Exhibit "3."** Ordinance 8-73 grandfathered all the Plaintiffs' houses from new requirements (i) for drainage of all storm water in new subdivisions, including runoff and from connected footing drain systems, into the new separate, fully enclosed storm sewers and (ii) its new prohibition against the discharge of storm water into a sanitary sewer after its effective date in November 1973.

50. The Plaintiffs, therefore, were intended to be protected against a future City administration or City Council purporting to require them to separate their storm water flows collected in their existing foundation drains from their combined sewage in the combined house sewer lateral.

51. Ordinance 8-73 was also consistent with the vested property rights the City had created under state laws by permitting construction, occupation and use by the Plaintiffs' of their homes.

52. Notwithstanding the foregoing, the City's implementation of the FDD Program before and after enactment of the FDD Ordinance targeted *exclusively or almost exclusively* those very homes permitted before November 1973.

C. Combined Sewer Overflows.

53. Heavy rain events in Ann Arbor from March 1997 through July 2000 resulted in surcharging (over-capacity conditions) in the Ann Arbor public sewer system. This resulted, *inter alia*, in massive CSO's into the Huron River, including the contaminated storm water runoff combined with untreated or partially treated sewage in the combined sewer portion of the City's sewer system.

54. For example, on August 6, 1998, the City allowed a CSO of 168,000 gallons of combined sewage to "bypass" treatment at the WWTP and discharge at "Outfall No. 4" into the Huron River, a location away from the WWTP.

55. On April 23-24, 1999, the City allowed a CSO of 1,200,000 gallons of combined contaminated storm water and domestic sewage due in large part, on information and belief, to surcharged conditions in the City's combined sewers.

56. During this period, the surcharged conditions in the City sewers caused combined sewage and storm water backups at approximately 200 private

residences within the City of Ann Arbor, many of which occurred in the City's Bromley, Dartmoor, Glen Leven, Morehead, and Orchard Hills Sewer Districts where, on information and belief, all or almost all of the City's public sewers are combined sewers.

57. In its FDDP literature and public materials the City placed the number of houses with typical connections as depicted in the 2000 City Sewer Drawing (Exhibit 2) at 20,000.

58. As of June 5, 2017, the official position of the City of Ann Arbor Water Utilities Director is that it has never had and does not operate any combined sewers.

59. The City's former Water Utilities Director, Sumedh Bahl, however, testified under oath at a deposition in 2015 that the City operates a "wet sanitary" sewer system.

60. Attached to this Complaint as **Exhibit "4"** is a Washtenaw County official storm drain map of the City of Ann Arbor issued in 2016, including both County and City storm sewers ("County Storm Drain Map). The two circled areas on the map are the areas are where all or nearly all of the Plaintiffs' houses are located.

61. As shown on the County Storm Sewer Map, there are no separate City storm sewers in those areas. In contrast, the center of the City has had extensive separate storm sewer construction.

62. According to MDEQ in 2007, "wet sanitary" sewers are classified as "combined sewers."

63. The City had previously failed to construct separate and functioning storm drains for storm water in the areas where Plaintiffs homes are located due to (i) the anticipated capital expenditures and rate increases which would be necessary to separate its combined sewer infrastructure and (ii) the fact that Ordinance 8-73 grandfathered all such homes against changes in their as-built connected footing drain systems.

64. By grandfathering the Plaintiffs' houses, the City had effectively banned future FDD's at least as to pre-November 1973 residences.

D. The Task Force Proposes Footing Drain Disconnections as Part of the "Possible Solution" to the Surcharged Sewage System.

65. In response to some residents' complaints about sewer backups, and likely in response to MDEQ's enforcement action described in the ACO (Exhibit "1") discussed at ¶¶ 15-17 of this Complaint, the Ann Arbor City Council, by Resolution 381-7-99 on July 6, 1999, approved the formation of "an advisory task force to develop solutions to minimize impact of sanitary sewer backup" (hereinafter, the "Task Force"). The Task Force membership had been selected by

City employees and officials and included numerous representatives of the City, environmental groups, City consultants and Washtenaw County officials.

66. Such Resolution called for an "engineering professional" on the Task Force. In early 2000, the City contracted with Camp Dresser McKee, Inc. ("CDMI") to fill that role.

67. The Task Force was instructed to "present possible solutions with funding options to the City Council within 18 months," that is, by January 6, 2001.

68. As part of the Task Force process, a series of public meetings was organized and managed by the City and CDMI, as were meetings for the City Council and the City Planning Commission.

69. Periodic newsletters were disseminated with the stated purpose of keeping the public informed on the work of the Task Force. These newsletters were authored by CDMI representatives and/or City staff.

70. The October 2000 Task Force Newsletter ("Task Force Newsletter No. 3") discussed, for the first time as part of a "possible solution" to the basement backup problem, an idea "to remove flows from foundation drains in individual homes," namely, FDDs.

71. The January 2001 Task Force Newsletter ("Task Force Newsletter No. 4") stated that the Bromley, Dartmoor, Glen Leven, Morehead and Orchard Hills Sewer Districts were the City's sewer backup "problem areas."

72. The Task Force reported to the public in the same document that the overall "recommendation" of the Task Force was for a program including FDD's in 1,325 homes, even though the Task Force was clearly forewarned by the date of Task Force Newsletter No. 4 that FDDs were an unproven technology.

73. At page 2 of Task Force Newsletter No. 4, the Task Force (in reporting on common questions at public meetings), included the following Q&A:

> [Question:] The Task Force says there is less 'certainty' about the 'footing drain disconnect' solution. Why?
>
> [Answer:] *We have less than complete data on the amount of wet weather flow from the foundation footing drains that gets into the sewer system during storms.* Instituting this alternative as a solution will include additional work to complete the data collection to bring the same higher level of certainty as the other solutions. Since all of the alternatives include footing drain disconnection at homes that have previously flooded, flow data collection from these locations will be used to increase the confidence in the flow projections. If the newly collected data does not increase our level of certainty about this remedy, the Task Force would recommend different protection measures for the neighborhood. *Additionally, this is a fairly new approach to dealing with flooding problems.* It will require significant cooperation from homeowners, some of whom have not experienced flooding. Education and incentives must be included in this solution.

[Emphases supplied.] The "other solutions" included traditional engineering solutions involving excavation.

74. By April 9, 2001, the Task Force members had concluded that, notwithstanding the caveats about FDDs reported to the public in Task Force

Newsletter No. 4 and in presentations to the public on February 13 and 15, 2001, its "possible solution" to sanitary sewer backups was an all-FDD "city-wide" program.

75. Later on April 9, 2001, the Task Force members made a presentation to the City Council to that effect, reporting that their "final recommendation" would be for a "Citywide FDD Program," that is, FDD construction for all homes with a connected footing drain system.

76. In subsequent presentations and communications to the City Council through at least July 2001, the Task Force explained that the success of the implementation of the FDDP would require FDD construction on private property at the estimated 20,000 private homes with connected footing drain systems in the City of Ann Arbor. This included Plaintiffs' pre-November 1973 homes that had been grandfathered in 1973 under Ordinance 8-73 against FDDs.

77. On information and belief, even though then-City Attorney and Abigail Elias and then-Assistant City Attorney Thomas Blessing were aware of the provisions of Ordinance 8-73, neither the Task Force nor the City Council were made aware of the grandfathering of homes in the five "problem areas" where the Plaintiffs' homes were located.

78. Upon information and belief, MDEQ was not aware of the vested property rights created by Ordinance 8-73.

79. On or about June 28, 2001, CDMI completed the final written report of the Task Force ("Task Force Report"). On July 9, 2001`, then-Water Utilities Director, Sue McCormick, forwarded the Task Force Report to the City Council.

80. The Task Force Report's "Final Recommendation" (consistent with its communications to the City Council on April 9, 2001) was that the City "take action to remove rain and ground water inflow sources into the City sanitary sewer system by implementing a comprehensive city-wide footing drain disconnection program within the City of Ann Arbor" contemplating the completion of FDDs in the aforesaid 20,000 homes, including the Plaintiffs' homes.

E. The Ordinance is Enacted.

81. On August 20, 2001, after presentations by City staff and review by City Attorney Elias about the proposed Footing Drain Disconnection Program and after receipt of the Task Force Report on July 9, 2001, the City passed the Ordinance as Ordinance No. 32-01, entitled "Program for Footing Drain Disconnect from POTW." (A copy of the Ordinance, codified as City of Ann Arbor Code of Ordinances Title II, Chapter 28, §2:51.1 and since amended in non-material respects to the matters in suit is attached hereto as **Exhibit "5"**) The Ordinance served four main functions.

82. First of all, the Ordinance declared "improper" all flows from the preexisting, required, lawful and long-standing connected footing drain systems as

to which vested property rights had been created by the City in the manner described in Paragraphs [13] to [22], supra, including those that had been expressly grandfathered by the City of Ann Arbor Ordinance No. 8-73.

83. In that regard, the Ordinance authorized the Director of the Utility Department ("Director") for the City to order property owners within certain "target areas" (as designated by the Director) to correct "improper storm water inflows" from their property or face a monthly fine of One-Hundred Dollars ($100.00).

84. The five "problem areas" for purposes of the Task Force were designated as the five "Target Areas" under the Ordinance.

85. 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.

86. In fact, no such contracts were entered into by the Plaintiffs and the City paid its "approved" contractors directly for the "basic install" under its own arrangements with the contractors never disclosed by the City to homeowners.

87. Third, the Ordinance authorized the City to make direct payments for a "basic install package" at a fixed maximum price, work subject to the discretion of the Director, provided, *inter alia*, that the homeowner selected one of only two

or three contractors offered by the City to the homeowner and designated by the City as “prequalified” or “approved.” The “pre-qualified contractor” system drove homeowners away from what should have been their own choice of contractors to those approved by the City. The City handpicked approximately five contractors that it then “pre-qualified” in 2001 for work under the FDDP. This included one company – Perimeter Engineering, LLC – that had been created at the behest of one or more employees of the City Water Utilities Department, approximately one year before such employee or employees left the City. Before leaving to pursue work on FDDs as a business venture, one or more of such employees helped to implement the FDDP as government workers.

88. Finally, the Ordinance made clear that the homeowner, and not the City, CDMI or the construction contractor, would be responsible in perpetuity for operating, maintaining and replacing all equipment and structures built and/or installed in the home under the FDDP, for an expressed public purpose, including labor for observation and complete responsibility for sump pumps, sump crocks, pipes, backups, drainage lines and other equipment; the furnishing of water and electricity; the purchase and installation of any backup systems; and all necessary repairs.

F. The City Was Aware that FDDs Were "Work on Private Property."

89. Before enactment, then-City Attorney Abigail Elias stated to the City Council in writing that (pursuant to Ann Arbor City Charter Section 5.2(a)(3)) she had reviewed the Ordinance for its legality.

90. Nevertheless, the only fair reading of the Task Force Report, is that the Task Force members (including Water Utilities Director McCormick and the City Administrator, Roger Frazer) were concerned about mandatory physical entries and FDDs as "work on private property."

91. The Task Force Report also reported on such concerns raised by Members of the City Council before enactment of the Ordinance. The Task Force Report urged caution on the part of the City before any formal action was taken to implement the recommendations in the Report.

92. For example, in Section I, entitled "*Additional Decision Influences,*" the following assessment was made:

> ***Work on Private Property Causes Concern*** *– For those homeowners that have previously had 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.***

[Emphasis added.] Later in the same section of the Report, 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.*

93. This concern as to the legal basis for the recommended solution was expressed later in the Task Force Report, in Section L2, 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?*

The City Task Force recommended work on private property at 20,000 homes with no idea of the legality of such actions.

94. State condemnation proceedings and payment of just compensation to homeowners *before* FDD construction was not mentioned in the Task Force Report as a "legal framework to accomplish the work required on private property" or in communications from the Task Force or from the City Attorney's Office to the City Council.

95. In Section L3 of the Report (entitled *"Proposed Implementation Steps"*), the following affirmative statement appears:

> *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.*

96. The City neither had nor could create "power to accomplish the disconnection work" for permanent physical occupations of the Plaintiffs' houses.

97. On July 9, 2001, a City Council Working/Special Session ("Council Working Session") was held at which a quorum was present and the draft FDD ordinance was presented to the City Council by the City's staff and contractors. The Council Working Session was recorded on videotape.

98. Former Ann Arbor Mayor John Hieftje asked Assistant City Attorney Blessing the following question:

> What are we going to do about the property owner who is very reluctant to take part in this program, who doesn't want anything to do with it, who thinks we are the sewer Nazis [and] doesn't want people working in their house?

99. Mr. Blessing replied that the City would obtain administrative search warrants to enter the houses and conduct inspections and searches for FDD purposes. The City did not seek or obtain administrative search warrants for entry and search of the Plaintiffs' basements and other areas of the house. The Plaintiffs were all told by CDMI and/or City personnel that the entry by these persons for purposes of the FDDP was "required," "mandatory," or similar terms.

G. The Invasion of the Plaintiffs' Homes by the City or its Agents Was Intentional and planned

100. The City created a pilot specification for Ann Arbor FDDs in 2000 and then, until at least 2012, the City, CDMI and committees and bodies on which both the City and CDMI sat, developed and/or disseminated the engineering and construction specifications and guidance for FDD construction at targeted houses.

101. Those documents and others about the FDD construction process have consistently described the FDD construction in targeted houses, including the open occupation and destruction of residential real property, as including the following actions by the City, CDMI and/or its "pre-qualified" contractors:.

1. Inspection and search of the home without warrant to find the location (in the basement or crawlspace area) of the cleanout (located inside the foundation wall) for the house's footing drains (located outside the foundation walls at footing level);
2. For houses with footing drain cleanouts in a concrete basement location (as in the vast majority of cases, including Plaintiffs Yu and Lumbard), the next step was jackhammering through the original concrete foundation floor around the internal cleanout, followed by excavation of a sump pit approximately 36 inches in diameter and 42 inches deep;
3. For houses with footing drain cleanouts (as in relatively few cases) in a crawlspace location, the next step was digging up undisturbed flooring material and excavation of a sump pit there approximately 36 inches in diameter and approximately 42 inches deep;
4. Permanent construction within each sump pit of a sump crock approximately 18 to 24 inches in diameter;
5. Installation of pipes for the drainage of foundation drain flows into the sump crock, which flows (before the FDD construction) had drained into the existing house combined sewer lateral;
6. Penetration of the building envelope near street level for a 4-inch sump pump discharge pipe;
7. Installation of an electrical sump pump in the sump crock for the purpose of elevating and discharging water collected in the sump crock, through the installed vertical and horizontal piping and including through the aforesaid

penetration of the building envelope, to the exterior of the house;

8. Construction of an external drainage system for discharges from the sump pump, including a shallow drainage line below ground and across the owner's property for conveyance of such discharges from the exterior wall of the house across the property to the lawn extension;

9. In the vast majority of cases, a tap performed by the City connecting such drain line to a specially designed, City-constructed and funded collector drain horizontally drilled and installed by the City at shallow depth lengthwise in the lawn extension ("curb drain");

10. At a relatively few houses (such as the home of Plaintiffs' Boyer and Raab), connection of the external drainage line drilled horizontally or trenched across the side or rear yard for drainage into a county storm water catch basin located off the premises of the homeowner.

102. Upon information and belief, the owners of at least 1,834 homes in the City of Ann Arbor were required to submit to such FDD construction on their private property and inside their residences pursuant to the FDDP and continue their "corvée labor" for the City, under threat of legal process without pay, which labor the City mandates and accepts in violation of federal laws against forced labor.

103. The City has detailed records which identify every home within Ann Arbor that have been subjected to FDD construction.

104. Implementation of the "FDD Program" was selective and directed at Plaintiffs (such as the named Plaintiffs) based on their addresses.

105. Upon information and belief, the vast majority of these homes (including the named Plaintiffs' homes) had not experienced sanitary or storm water backups before the Ordinance was enacted and the FDD Program was initiated.

106. Every home where FDD construction was required was physically invaded and remains permanently and physically occupied by the City, as an unwanted tenant, to the extent of at least the construction, materials, pumps and other equipment, piping, wiring, fastening devices and other items permanently erected in, onto and around their private homes and such other extent that the taking is the Plaintiff's should prove.

107. As a result of the FDD work performed by the City or its agents, the overwhelming majority of the affected homes now endure a stream of storm water and groundwater that has been rerouted from their pre-existing, lawful, external drainage to a stream of storm water and groundwater drainage into the interior of the homes, which now flows into sump crocks in the foundation floors on a regular basis.

108. Whereas these owners, before FDD construction, could rely on gravity for storm water and ground water drainage, they have been, and are now, required since then to rely upon electrical pumps for elevation and discharge of such drainage and, therefore, are dependent upon an uninterrupted electrical supply

and are exposed to the attendant and constant risks of spring and/or winter flooding of the interiors of their homes during the daytime and nighttime alike.

H. The City Knew about the Potential for Pump Failures and Power Outages.

109. During the Task Force process, many residents complained about the frequency of power failures during rain storms in the areas to be initially targeted under the FDD Program and that they would be helpless against storm water and ground water if the footing drains had been disconnected and the electricity to power their sump pumps went out.

110. In an apparent attempt to address these concerns, in Section L.1.3 of the Task Force Report the task force unanimously recommended, the following:

> **Backup Sump Pump** – This should be funded in all homes. Either a water powered or battery powered option should be made available.

111. Upon information and belief, although the Task Force Report containing the beneficial recommendation for a backup pump set forth above was widely disseminated and was available online, the decision to reject these recommendations was neither disseminated nor disclosed to the public. Upon information and belief, no newsletters or other communications were published with this information; it was not discussed at public meetings that were held; and no other efforts were made by the Task Force or the City following the issuance of the Report to publicize the efforts which had been taken to eliminate or reduce

protections which the Report recommended be made available to the targeted homes.

112. By July 9, 2001, however, City Staff and the Task Force questioned the need for a backup sump pump (electric or hydraulic) and its cost. At the Council Working Session that day, then-Mayor Hieftje stated that providing backups to residents with FDDs would be "above and beyond" what the owners needed or deserved.

113. Plaintiff Lynn Lumbard purchased a battery backup, with a recharging station, at her own cost. Some owners, such as Plaintiff Anita Yu, have gone without backups due to expense or lack of knowledge of the risk of pump failure. Others, like Plaintiffs' John Boyer and Mary Raab have spent from over $500 to over $1,000 for a hydraulic backup. The hydraulic backup runs on City water, for which the homeowner has to pay.

I. The City was Aware of the Freezing and Backup Risk from FDD "Curb Drains."

114. In the overwhelming majority of FDD installations (including that of Plaintiff Lynn Lumbard), sump pump discharges are conveyed upward and out of the house through a perforation in the building envelope at shallow depth well above the Michigan frost line of 42" depth.

115. Sump pump discharge water then travelled through a "storm water lateral," installed at shallow depth above the 42-inch Michigan frost line, to the lawn extension in front of the houses (the area between the sidewalk and the curb).

116. In the lawn extensions, the City had drilled and constructed special "curb drains" for FDD installations, at shallow depths well above the 42-inch Michigan frost line, to collect the sump pump discharges and direct them to a ground-level catch basin.

117. After enactment of the Ordinance, the FAQs posted online by the City included FAQ 27 about freezing of external drainage lines:

> [Question] What happens if the discharge line freezes in the winter or is broken?
>
> [Answer] 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 [are] 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 discharge near the home that allows water to be pumped outside the house. . . . In these cases, the emergency discharge would put the sump water next to the house until the homeowner can repair the line.

[Emphasis added.]

118. On or about March 1, 2014, the curb drain in front of Plaintiff Lynn Lumbard's home froze solid, causing an invasion of her house by water, causing drainage and expansion, all as completely foreseen by the City.

119. The same curb drain froze solid again in March 2015.

120. After having mandated that Plaintiff Lumbard abandon her as-designed and as-built footing drain systems for storm-water to a combined sewer lateral under her house and then to the City's combined sewer, the City's design called for connection of the new discharge at or just above ground level to a City-owned and City-controlled curb drain in the lawn extension, specifically designed and installed for discharges from homes where FDD construction had been performed, on which Plaintiff Lumbard was completely dependent for the discharge of storm water exiting her house as sump pump discharge.

121. By choosing to design and mandate connection to a system of external drainage consisting of pipes that convey water far above the Michigan frost line the City with certain knowledge of freezing and backup potential into Plaintiff Lumbard's home, the City included periodic flooding of Plaintiff Lumbard's home as an element of its public purpose for the FDDP.

122. The City responded to urgent calls by Plaintiff Lumbard to the City after she discovered the existence of the curb drain and the that the City had connected her discharge line to it, by sending a contractor for the City, Greg

Marker, PE, who made detailed observations in a report to the City dated April 3, 2014 about the occurrence of the frozen "curb drain" collector, its causes, the process of freezing in the external drain lines and the curb drains, and the steps over a period of days needed for a crew of workers to clear the curb drain so Plaintiff Lumbard could resume drainage of storm water from her house.

123. Mr. Marker observed that the depth of the external drain line under Plaintiff Lumbard's yard, of the curb drain in the lawn extension, and the depth of the connection between such line and such collector were between 18 and [24] inches above the 42 inch Michigan frost line, as aforesaid.

J. Owners Were Coerced Into Compliance with the FDD Program

124. The removal of footing drain flows under the FDDP was never intended to be voluntary. In fact, in the City's recent 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 recently-closed website:

> *Legal Requirements*
>
> [Question:] May I choose not to participate in the program? What are the consequences of that?
>
> [Answer:] *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.

[Emphasis added.]

125. The "pre-qualified contractor" system drove homeowners away from their own choice of contractors to those approved by the City.

126. The City handpicked approximately five contractors that it then "pre-qualified" in 2001 for work under the FDDP. This included one company—Perimeter, Engineering, LLC--that had been created at the behest of one or more employees of the City Water Utilities Department, approximately one year before such employee or employees left the City. Before leaving to pursue work on FDDs as a business venture, one or more of such employees helped to implement the FDDP as government workers.

CLASS ACTION ALLEGATIONS

127. Plaintiffs move this Court to enter an order certifying this cause as a Class Action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

128. Plaintiffs, Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, bring this class action on behalf of themselves and the following class of similarly situated persons: all homeowners within the City of Ann Arbor whose one-family and two-family homes were permitted before January 15, 1974 and were subjected to mandatory FDD's pursuant to the Ordinance ("the Takings Class").

A. Certification under Rule 23.

129. This action satisfies the numerosity, commonality, typicality and adequacy requirements of Fed. R. Civ. P. 23(a) and the requirements of Fed. R. Civ. P. 23(b)(3) militate in favor of a class certification in this case.

130. Fed. R. Civ. P. establishes five threshold requirements for class certification:

(a) The class is so numerous the joinder of all members is impracticable;

(b) There are questions of law or fact common to the class;

(c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(d) The representative parties will fairly and adequately assert and protect the interests of the class;

B. The Takings Class Meets the Requirements for Class Certification.

131. The Takings Class satisfies the numerosity standards. The Class is believed to exceed 3,000 persons ("Members") in Washtenaw County, Michigan. Joinder of all Takings Class Members in a single action is impracticable and unwieldy. Takings Class Members may be kept informed of the status of the matter and important developments by published and broadcast notice, through direct mail and/or through the use of a password accessible website.

132. There are questions of fact and law common to the Takings Class which predominate over any questions affecting individual members. The

questions of law and fact common to the Class arising out of the City's actions include, but are not limited to, the following:

(a) Whether the City was prohibited from implementing an ordinance that impaired or destroyed the Members' vested property rights;

(b) Whether the City's actions in implementing the Ordinance resulted in takings without just compensation paid or secured in advance in violation of the Fifth Amendment to the United States Constitution;

(c) Whether the City's actions in FDD construction constitutes physical takings by permanent physical occupations under *Loretto v. Teleprompter Manhattan CATV*, 459 U.S. 419 (1982);

(d) Whether FDDs are continuing takings;

(e) Whether FDDs have stabilized as takings or can every stabilize;

(f) Whether the FDD's performed at the Takings Class Members' properties has caused or will cause property values to decrease;

(g) Whether the City's actions in implementing the FDD Program at the Class Members' residences have stigmatized those properties, further affecting the properties' values;

(h) Whether the City should be required to permit Class Members to reconnect the Class Members' footing drains to the City's sewage system and to remove the sump pits, sump pumps and other equipment installed by the City or its agents in the Class Members' homes;

(i) Whether the City should be enjoined from continuing to take property pursuant to the Ordinance;

(j) Whether the FDD construction at Takings Class Members houses are partial or complete takings; and

(k) Whether the mandate of labor under the Ordinance is "forced labor" under federal statutes including 18 U.S.C. 1589(a)(3).

133. The questions set forth above predominate over any questions affecting only individual persons and a Class Action is superior with respect to considerations of judicial economy, efficiency, fairness and equity, to other available methods for the fair and efficient adjudication of this controversy.

134. The claims of the class representatives are typical of the claims of the class as the FDD's of the class members were all undertaken pursuant to the Ordinance and the policies and procedures employed by the City and its authorized agents to implement the Ordinance and most of the after-effects of FDD construction city-wide are shown in the houses of the class representatives.

135. The class representatives will fairly and adequately represent the class. The Plaintiffs, Lynn Lumbard, Anita Yu, John Boyer and Mary Raab are adequate representatives of the Takings Class because they are members of the proposed Takings Class and their interests do not conflict with the interests of the members of the Class they seek to represent. Together they have been litigating the legality of the FDDP since as early as 2014. The interests of the members of the Takings Class will be fairly and adequately protected by the Plaintiffs and their

counsel, who have extensive experience prosecuting litigation against the City over the City's FDD program, in particular. Counsel for the Plaintiffs also have investigated the FDDP for over five years including depositions of City officials and employees involved in this case and have extensive background materials concerning the Ann Arbor FDDP.

136. A class action is, by far, the most appropriate method for the fair and efficient adjudication of this controversy. The City has not acknowledged that the FDDP results in any physical invasion or occupation or otherwise results in a taking. The presentation of separate actions could create a risk of inconsistent and varying determinations on the merits, establish incompatible standards of conduct for the City and/or make it more difficult for the Takings Class Members to vindicate their rights.

137. Maintenance of this action as a class action is a fair and efficient method for the adjudication of this controversy. It would be impracticable and undesirable for each member of the Takings Class who suffered harm to bring a separate action. In addition, the maintenance of separate actions would place an undue burden on the courts and run the risk of inconsistent determinations.

THE PLAINTIFFS' CLAIMS

138. Because the Plaintiffs' homes were constructed in conformity with the then-applicable City Code provisions, building codes, and other relevant standards

and the Plaintiffs or their predecessors-in-title received building permits, Certificates of Occupancy and/or other necessary approvals from the City, the Plaintiffs and all Takings Class Members acquired vested rights to their footing drain connections to their house combined sewer laterals and of the combined sewer lateral to the combined sewer and to the use and occupations of the existing construction of their home before the FDD construction at their homes.

139. 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, rather than proven engineering solutions, such as combined sewer separation.

140. The mandatory disconnection of the Plaintiffs' footing drains and the forced installation of sump crocks, sump pumps, pipes, wiring, electrical connections, external drainage lines and related equipment constituted a physical invasion 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 *per se* taking, ousting the Takings Class Plaintiffs from their exclusive use and occupation of their property.

141. To save money, the City surreptitiously withdrew benefits that had been recommended by the Task Force appointed to evaluate available solutions to the perceived basement backup problem, such as backup sump pumps and pre- and

post-FDD radon testing with mitigation for those homes with documented increased radon levels, benefits which were publicized to the residents of Ann Arbor.

142. Moreover, the mandatory ongoing and perpetual responsibilities imposed on present and future owners for the observation, inspection, operation, repair and maintenance of the pumps and related equipment represent an unreasonable financial and personal burden upon the Plaintiffs' use and enjoyment of their property; constitute "forced labor" as defined by 18 USC §1589(a)(3); are a legal burden running with the land; and represent an inappropriate delegation by the City to its citizens of its governmental obligations pertaining to the capacity, maintenance and operation of the City's sewage system.

143. The City's public use and occupation of Plaintiffs' homes contemplated the resulting cost savings from mandatory labor.

144. The City has authority under the Ordinance to enforce such requirements.

145. The Plaintiffs, Lynn Lumbard, Anita Yu, John Boyer and Mary Raab and all other Takings Class Members have been forced to incur costs and expenses. As a direct result of the FDD construction at their homes and will continue to incur such costs and expenses in the future. The City's public use of Plaintiffs' home

contemplates that the incurrence of such costs and expenses will be perpetual, yielding significant savings to the City in implementing the FDDP.

146. Whereas Plaintiffs, Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, and all other Takings Class Members 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 ongoing burdens of mandatory labor and expense associated with the observation, maintenance and operation of the FDD components, water and/dampness problems or the fear thereof and, in general, the diminution in their quality of life as homeowners attributable to the FDDP.

147. The physical invasion and occupation of the Plaintiffs' properties deprive them of the incidents of ownership as they have lost the full bundle of rights that accompany ownership of real property, including, but not limited to, the ability to control the property and what is placed in and upon it and the right to exclude others.

RIPENESS

148. The Plaintiffs, Lynn Lumbard, Anita Yu, John Boyer and Mary Raab have used the procedures provided under the laws of the State of Michigan to challenge the inverse condemnation of their properties in State Court and have been denied just compensation.

A. Yu, Boyer and Raab Action.

149. On or about February 24, 2014, Plaintiffs, Anita Yu, John Boyer and Mary Raab, ("the Yu Plaintiffs") commenced an action against the City in the 22nd Circuit Court, County of Washtenaw, Michigan with Case Number 14-181-CC, under the caption: "Anita Yu, John Boyer and Mary Raab v. City of Ann Arbor." The summons and complaint was served upon the City on March 7, 2014.

150. On March 17, 2017, 2014, the City removed the action to the United States District Court for the Eastern District of Michigan (Southern Division) by filing a Notice of Removal and Supporting Petition which asserted that this Court had jurisdiction over the action based upon federal questions jurisdiction under 28 U.S.C. §1331. Supplemental jurisdiction over the state court claims was asserted under 28 U.S.C. §1367(a). The Docket in that removal proceeding can be found under Case No. 2:14-cv-11129-AC-MKM.

151. 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.

152. On April 3, 2014, the Yu Plaintiffs filed a motion to remand pursuant to 28 U.S.C §1447(c) on the grounds that their claims were not ripe in federal court under the *Williamson* doctrine as enunciated by the United States Supreme Court in *Williamson County Regional Planning Comm. v. Hamilton,* 473 U.S. 172

(1985), as interpreted by the decisions of the Sixth United States Circuit Court of Appeals at that time. On May 28, 2014, the Court, Hon. Avern Cohn, USDCJ presiding, granted the motion to remand and the matter was sent back to Washtenaw County Circuit Court in Ann Arbor.

153. On September 12, 2014, the Yu Plaintiffs filed a Notice of *England* Reservation with the Clerk of the Washtenaw County Circuit Court. With this *England* Reservation, the Yu Plaintiffs reserved their rights to pursue all claims arising under the laws and constitution of the United States of America, including all claims arising under the Fifth and Fourteenth Amendments to the United States Constitution. (A copy of the Yu Plaintiff's Notice of England Reservation is attached as **Exhibit "6").**

154. On June 9, 2014, the City filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(8), which was heard on November 20, 2014. This motion under MCR 2.116(C)(8) was denied, the Court noting that the complaint 'adequately stated a claim" and the motion under 2.116(C)(8), based upon the statute of limitations was denied without prejudice

155. On December 26, 2014, the Yu Plaintiffs filed their first amended complaint which contained a single cause of action under Article 10, Section 2 of the Michigan Constitution of 1963. In October of 2014, an order on consent had been entered, dismissing without prejudice the Yu Plaintiffs' federal claims.

156. On or about December 10, 2015, the City filed a motion for summary disposition under MCR 2.116(C)(10), arguing that there was no taking because the Yu Plaintiffs "owned" the FDD installations and, therefore, did not suffer any physical invasion or occupation. On January 15, 2016, an order was signed and entered, granting the City's motion.

B. The Lumbard Class Action.

157. On October 30, 2015, Plaintiff, Lynn Lumbard, on her own behalf and on behalf of a putative class of persons similarly situated, commenced an action against the City in the 22nd Circuit Court, County of Washtenaw, Michigan with Case Number 15-1100-CC, under the caption: "Lynn Lumbard, individually and on behalf of all others similarly situated v. City of Ann Arbor" ("the Class Action"). The summons and complaint was served upon the City on the date the action was commenced.

158. On September 12, 2014, a Notice of *England* Reservation was filed with the Clerk of the Washtenaw County Circuit Court in the Class Action. (A copy of the Notice of *England* Reservation in the Class Action is attached as **Exhibit "7"**). With this *England* Reservation, Lynn Lumbard, on her own behalf and on behalf of the putative class reserved their rights to pursue all claims arising under the laws and constitution of the United States of America, including all

claims arising under the Fifth and Fourteenth Amendments to the United States Constitution.

159. On or about February 11, 2016, the City filed a motion for summary disposition under MCR 2.116(C)(10), arguing that there was no taking because Lynn Lumbard "owned" the FDD installations and, therefore, did not suffer any physical invasion or occupation. On March 31, 2016, an order was signed and entered, granting the City's motion.

160. In its order, the Court granted the City's motion and dismissed the Class Action with prejudice "[f]or the same reasons Defendant City of Ann Arbor's motion was granted in Yu, et al vs. City of Ann Arbor, Case No. 14-181-CC (Circuit Court for Washtenaw County), which was heard and granted on January 7, 2016, and as otherwise stated on the record in this case."

C. Appeal to the Michigan Court of Appeals.

161. Plaintiffs, Lynn Lumbard, Anita Yu, John Boyer and Mary Raab timely appealed the orders, dismissing their respective cases, to the Michigan Court of Appeals. The appeals were later consolidated on consent. By decision dated May 9, 2017, the Court of Appeals affirmed the lower court orders in both cases.

162. In its opinion, the Court of Appeals ruled that with respect to all the plaintiffs in the consolidated appeal, "there was no taking by permanent physical

occupation in this case because plaintiffs owned the installations on their properties."

163. Upon information and belief, all class members who might seek just compensation under the procedures available in the State of Michigan courts would have their individual claims dismissed based upon the reasoning employed by the Michigan Court of Appeals.

164. Plaintiffs, Lynn Lumbard, Anita Yu, John Boyer and Mary Raab have satisfied the requirements of *Williamson* and the takings claims being advanced in this class action are now ripe for adjudication in federal court.

165. With respect to any additional plaintiffs other than Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, it would be futile for them to seek a remedy for the actual physical takings of their property in State Court. The Ordinance makes no provisions for any due process rights.

FIRST CAUSE OF ACTION
FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

166. Plaintiffs repeat and re-allege Paragraphs "1" through "165", as if more fully set forth herein.

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

168. The City's implementation and enforcement of the Ordinance has directly and particularly resulted in the taking of the Plaintiffs' properties without due process or just compensation.

169. As a result of the foregoing, the Plaintiffs and the other Takings Class Members are entitled to due process and just compensation.

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

170. Plaintiffs repeat and reallege Paragraphs "1" through "169" as if more fully set forth herein.

171. The City is a "person" subject to liability under 42 U.S.C. Section 1983 for violating the federally protected rights of others.

172. The implementation and enforcement of the Ordinance by the City of Ann Arbor, particularly and directly against the Plaintiffs and their homes, has resulted in the violation of the Plaintiffs' federally protected rights, to wit, their right not to have their primary residences 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.

173. The implementation and enforcement of the Ordinance by the City constitutes *per se* takings of the Plaintiffs' properties by actual direct or physical

invasion and actual, permanent physical occupation without due process or just compensation and the imposition of requirements for non-paid, non-volunteer mandatory work and physical labor essential to the City's public use and obtained by threats of legal process as set forth in the Ordinance in violation of 18 U.S.C. §1589(a)(3).

174. Without the cost savings to the City achieved by the use of forced labor performed by FDD homeowners and the payment by them of all expenses of their performance, the FDDP would not have been viable.

175. As a result of the foregoing, the Plaintiffs and the other Takings Class Members are entitled to due process and just compensation, including payment for their work, physical labor and the expenses they have incurred as contemplated by the City for purposes of cost savings.

THIRD CAUSE OF ACTION
INJUNCTIVE RELIEF

176. Plaintiffs repeat and re-allege Paragraphs "1" through "175" as if more fully set forth herein.

177. The Plaintiffs and the other Class Members have no adequate remedy at law.

178. In the absence of injunctive relief in conjunction with an award of just compensation, the Plaintiffs and the other Class Members 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, a responsibility that is an unrecorded burden running with the land on future owners, in violation of 18 USC §1589(a)(3); and (3) bear a financial and personal burden upon their exclusive use and enjoyment of their homes.

179. As a result, the Plaintiffs and the other Class Members 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 as to them.

180. In conjunction with an award of just compensation, the Plaintiffs and other Class Members are entitled to injunctive relief, requiring the City to permit Class Members to reverse, correct and remedy the effects of the unconstitutional taking.

FOURTH CAUSE OF ACTION
DECLARATORY RELIEF

181. Plaintiffs repeat and re-allege Paragraphs "1" through "180" as if more fully set forth herein.

182. The Plaintiffs and other Class Members are entitled to a judgment declaring (1) that the Ordinance has been unconstitutionally implemented and includes the use of mandated labor in violation of federal law; (2) that the implementation of the Ordinance has improperly resulted in takings of private property without just compensation therefor; (3) that the Ordinance has improperly allowed for such takings without condemnation proceedings under Michigan law; and (4) the relative rights and responsibilities of the parties.

FIFTH CAUSE OF ACTION
ATTORNEYS FEES

183. Plaintiffs repeat and re-allege paragraphs "1" through "182" as if more fully set forth herein.

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

WHEREFORE, the Plaintiffs respectfully request judgment as follows:

A. Certification of the proposed Class under Rule 3.501 of the Michigan Court Rules;

B. On their first cause of action, due process and just compensation as required by the Fifth Amendment to the United States Constitution

C. On their second cause of action, due process and just compensation as and for payment for their work, physical labor and the expenses they have incurred under 42 U.S.C. § 1983;

D. On their third cause of action, preliminary and permanent injunctive relief, restraining the City, its 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 as to them and granting such other injunctive relief as to the Court may seem just and proper.

E. On their fourth cause of action, a declaration that the City of Ann Arbor's FDDP ordinance is unconstitutional under the United States Constitution as implemented and further declaring the relative rights and responsibilities of the parties;

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

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

H. The costs and disbursements of this action.

Respectfully submitted,

Dated: October 20, 2017 By: ____________________________

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INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION
1	2003 Administrative Consent Order
2	1999 City Sewer Drawing
3	Ann Arbor Ordinance 8-73
4	County Storm Drain Map
5	City of Ann Arbor Code of Ordinances Title II, Chapter 28, §2:51.1
6	Yu Plaintiff's Notice of England Reservation
7	Class Action Notice of England Reservation

EXHIBIT 1

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

9-4-03
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

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 Water Utilities Director"
Others (car wash, etc.)	

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

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

ENNIFER M. GRANHOLM
GOVERNOR

STEVEN E. CHESTER
DIRECTOR

September 8, 2003

CERTIFIED MAIL **7000 0520 0016 5014 9710**

RECEIVED
SEP 11 2003
WATER UTILITIES DEPARTMENT
ADMINISTRATION DIVISION

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

EXHIBIT 2

Glossary of Terms:

- *Wastewater* – The used water that flows down drains in your home.
- *Sanitary Sewer* – Sewer pipe that conveys wastewater to the Ann Arbor Wastewater Treatment Plant.
- *Surface Drainage* – Rainwater that flows down the street or yard to a storm drain or into a creek or river.
- *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.
- *Manhole* – This is the access structure that allows field crews to inspect sewers.
- *Footing Drain* – A drainage pipe (or tile) that is installed around the base 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.
- *Downspout* – This is the pipe that takes water from the roof gutters in most houses. This can discharge onto the lawn or into a pipe in the ground.
- *Infiltration* – This is rainwater flow that enters the sanitary sewer system through underground cracks in sewers.
- *Inflow* – This is a direct connection from surface drainage into the sanitary sewer.
- *Smoke Testing* – Use of a harmless smoke to locate inflow and infiltration in sewers.
- *Dye Testing* – Use of a colorful dye to determine the locations of connections into the sewer system.
- *Flow Meters* – Used to measure flows in the sewer system.
- *Rain Gage* – Used to measure the amount of rain from storm events.
- *Computer Modeling* – Computer program used to simulate the behavior of the collection system.

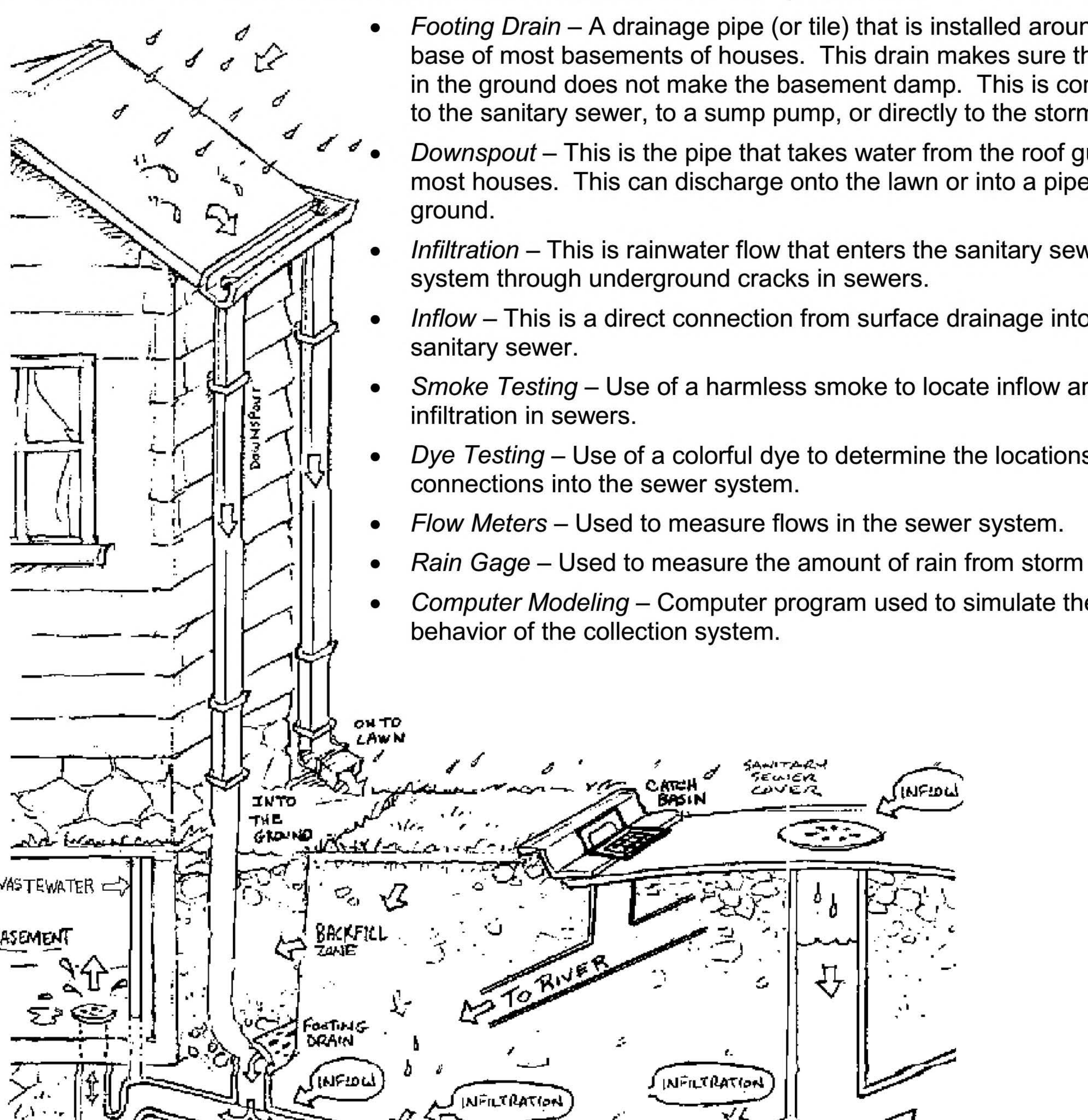


EXHIBIT 3

Mimeographed by the Clerk's Office order of the Council

First Reading February 26, 1973
Public Hearing March 19, 1973
Passed October 29, 1973

AN ORDINANCE TO AMEND SECTION 2:43 OF CHAPTER 28 OF TITLE II OF THE CODE OF THE CITY OF ANN ARBOR

The City of Ann Arbor ordains:

Section 1. That Section 2:43 of Chapter 28 of Title II of the Code of the City of Ann Arbor be and hereby is, amended to read as follows:

2:43. Prohibited Uses of Sanitary Sewer. No person shall discharge, or permit to be discharged, into any sanitary sewer, STORM WATER, SURFACE WATER, SUB-SURFACE GROUND WATER, CONDENSATE, COOLING WATER, OR SIMILAR LIQUID WASTE, EXCEPT AS PROVIDED FOR IN CHAPTER 98 OF THIS CODE. ANY DEVELOPMENT THAT IS SUBJECT TO PLAT OR SITE PLAN APPROVAL AND CONCERNING WHICH FINAL APPROVAL HAS NOT BEEN GRANTED PRIOR TO THE EFFECTIVE DATE OF THIS ORDINANCE, SHALL BE DESIGNED WITH AN ADEQUATE ENCLOSED STORM SEWER SYSTEM THAT WILL RECEIVE ALL DISCHARGES FROM THE ABOVE-MENTIONED SOURCES BY GRAVITY. THE DESIGN OF THE STORM SEWER SYSTEM SHALL BE SUBJECT TO REVIEW AND APPROVAL BY THE SUPERINTENDENT OF PUBLIC WORKS. THE ABOVE PROVISIONS SHALL NOT APPLY TO EXISTING STRUCTURES THAT HAVE FOOTING DRAINS PRESENTLY CONNECTED TO SANITARY SEWERS.

Section 2. That this ordinance shall take effect ten days from the date of its legal publication.

I hereby certify that the foregoing Ordinance was adopted by the Council of the City of Ann Arbor at its Regular Session of October 29, 1973, held in the Council Chamber, City Hall.

November 2, 1973

Jerome S. Weiss
City Clerk

James E. Stephenson
Mayor

I hereby certify that the foregoing Ordinance received legal publication in the Ann Arbor News on ____________, 1973.

Jerome S. Weiss
City Clerk

EXHIBIT 4

COUNTY
DRAIN
MAP
Evan N. Pratt, P.E.
Washtenaw County
Water Resources
Commissioner
705 N. Zeeb Rd.
Ann Arbor, MI 48107
Ph: 734-222-6860
Fax: 734-222-6803
http://drain.ewashtenaw.org
WASHTENAW COUNTY MICHIGAN
1826
Legend
County Drains
Waters of the State
Lakes
N
Feet
0
4,000
8,000
1:48,000
Map Published:
Date: 3/15/2016

EXHIBIT 5

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)

EXHIBIT 6

STATE OF MICHIGAN

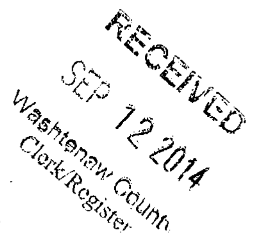
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and MARY RAAB,
Plaintiffs,

Hon. Timothy P. Connors
Case No. 181-14 CC

vs.

THE CITY OF ANN ARBOR,
Defendant.



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WOODS OVIATT GILMAN
By: DONALD W. O'BRIEN, JR., ESQ.
Temporary Admission under MCR 8.126
Co-Counsel for Plaintiffs
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OFFICE OF THE CITY ATTORNEY

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Abigail Elias (P34941)
Attorneys for Defendant
PO Box 8647
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NOTICE OF *ENGLAND* RESERVATION

Now come the plaintiffs, by their attorneys herein, and file this Notice of England Reservation pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L.Ed.2d 440 (1964). See, e.g., *DLX, Inc. v Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Braun v. Ann Arbor Charter Tp.*, 519 F.3d 564 (6th Cir. 2008).

Plaintiffs' reservation is to the disposition of the entire case by the Michigan State Courts except claims for inverse condemnation under the Michigan State Constitution **only**. *Stockler v. City of Detroit*, 936 F.2d 573 (Sixth Cir. 1991), interpreting *Hart v Detroit,* 416 Mich. 488, 331 N.W.2d 438 (1982) under *Williamson Cnty Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172; 105 S. Ct. 3108; 87 L. Ed2d 126 (1985).

1. This Notice is timely, having been filed before any hearing by this Court on or adjudication of any claim, question or issue, state or federal, on the merits of plaintiffs' case, including before any hearing or adjudication of the City's pending Motion for Summary Disposition under MCR 2.116, filed on June 9, 2014. No discovery has occurred nor has a scheduling conference of any kind occurred.

2. This case in its entirety was removed by Defendant City of Ann Arbor to the United States District Court for the Eastern District of Michigan on March 17, 2014, and remanded to this court on May 29, 2014 by the Hon. Judge Avern Cohn after a hearing on May 28, 2014 on plaintiffs' Motion for Remand for lack of subject matter jurisdiction. In ordering remand, Judge Cohn specifically found that plaintiffs' complaint asserted no federal claim and only state claims for inverse condemnation under state law and that federal subject matter jurisdiction under 28 USC §1441 did not exist. A copy of the transcript of such hearing is attached hereto as Exhibit 1.

3. Further, on March 24, 2014, the City of Ann Arbor filed in Federal Court a Motion to Dismiss, under FRCP Rule 12(b), all of plaintiffs' claims with prejudice, including their state inverse condemnation claims under the State Constitution.

4. The City's Motion was rendered moot after the Federal Court's Order of Remand to this Court, yet the City had voluntarily chosen at the very commencement of plaintiffs' case in this Court to file its dispositive motion under FRCP Rule 12(b) in federal court. In so doing, the City voluntarily submitted the case filed in this Court by plaintiffs, as they were required to do under *Williamson, supra,* to adjudication in full by the federal court and invoked the federal court's subject matter jurisdiction for that purpose. The City was prepared to litigate the case in that form, including motion practice and briefing, discovery, any evidentiary or other hearings that might be ordered by the court, and otherwise.

5. Further, the City has now indicated, in its August 20, 2014 Brief in Opposition to Plaintiffs adjourned Motion for Sanctions under MCR 2.114, its options concerning to remove this case to District Court yet again after a ruling on the City's aforesaid pending Motion for Summary Disposition. The City stated in its Brief (pp. 6-7):

> "Plaintiffs' arguments in reliance on *Bruley v City of Birmingham*, 259 Mich App 619; 675 NW2d 910 (2004)] fail to address or reconcile the City's right to remove Plaintiffs' federal takings claims to federal court once they have ripened, i.e., once this Court has rendered a decision on Plaintiffs' state inverse condemnation claims that is a denial of those claims or that Plaintiffs consider to be inadequate. See 28 USC 1441(a)." [Emphasis added.]

6. Prior to removal and since remand, plaintiffs have been and are involuntarily in State Court under *England*, supra, and for the sole purpose of ripening their claims for takings by permanent physical occupation under the Fifth Amendment to the United States Constitution.

7. Plaintiffs have not voluntarily submitted any federal claims or federal questions or issues for disposition by the Michigan State Courts, all of which are reserved by the plaintiffs for federal trial, without regard to whether they are ripe or not.

8. Plaintiffs intend to promptly seek leave, by stipulation if possible, to amend their complaint, in the interest of justice, (i) to ensure factual and legal clarity of the complaint as part of "the record" under *England*, supra, (ii) to ensure consistency between the complaint and plaintiffs' *England* Reservation, (iii) to otherwise protect the rights of plaintiffs to have their federal claims, issues and questions under the Fifth Amendment determined under federal law in federal court and (iv) to otherwise amend the complaint in the interests of the justice and the fair and efficient administration thereof.

9. Plaintiffs expose their reserved federal claims, issues and questions under federal law in this Notice of *England* Reservation only for the purpose of providing explicit notification of such reserved claims, issues and questions to this Honorable Court, as required by England.

10. Plaintiffs reserve the right to amend this Notice of *England* Reservation (in a timely manner under *England* and other federal decisions) in order to provide additional explicit notification for the Court concerning such federal claims, issues and questions. Such additional notification will contain descriptions and arguments plaintiffs would make in federal court under federal law applicable to plaintiffs' reserved federal claims, issues and questions so that the court may determine the matters before it in light of the plaintiffs' reserved federal claims, issues and notifications. This includes further notification of the federal claims, issues and questions described in Paragraph 11, below.

11. Plaintiffs' *England* Reservation extends to the following, which may be further defined by Plaintiffs in timely fashion under England:

    a. All of plaintiffs' federal claims, questions and issues under the Constitution and laws of the United States generally (including 42 USC §1983) and the Takings Clause of the Fifth Amendment;

    b. Whether plaintiffs' federally-claimed takings by permanent physical occupation (through placements of physical structures and other actions on and in plaintiffs' single family primary residences as alleged in their state cases are, under the Fifth Amendment (i) not takings, (ii) "permanent physical

occupations," "physical invasions," "physical intrusions" and similar terms of art, as determined in accordance with procedures and evidentiary limits under *Loretto v Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) or (iii) are, as contended by the City in this Court, "regulatory takings" governed by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and federal cases decided thereunder. This includes federal decisions, cited repeatedly by the City in various briefs in this case that were decided by federal courts applying federal law under the Fifth Amendment, such as *Wilkins v Daniels, Kauffman v City of New York*, 717 F Supp 84 (SD NY 1989); , *Cape Ann Citizens Ass 'n v City of Gloucester*, 121 F3d 695, Case No. 96-2327 (CA 1, 1997);

c. Whether, under federal law, plaintiffs federally-claimed permanent physical occupations authorized by the City and alleged in their complaint (to wit, by physical disconnection of plaintiffs' foundation drains, placement of fixed structures and operating equipment and other actions on and in their pre-1982 single family primary residences) withdrew plaintiffs' real estate, to the extent of the permanent physical occupation thereof, from "private ownership" under the Fifth Amendment (see *United States v Bailey*, No. 02-1078L (United States Court of Federal Claims, May 29, 2014) and cases cited therein); and

d. Whether the footing drain disconnections, other FDD construction and operations and maintenance requirements under City of Ann Arbor Ordinance 2:51.1, and as alleged in plaintiffs complaint, are required by any provision of federal law, including (as argued by the City) the Federal Clean Water Act of 1972, 33 USC 1251-1387.

Plaintiffs' reservation herein also extends to federal issues and questions relating to ripeness of their federal takings claims, **under Federal law only**. Issues and questions of federal ripeness of such claims, for state law purposes, are governed by state law including the recent decision in *Zanke-Jodway v Capital Consultants, Inc.*, No. 306206 (Mich. Ct. App, March 27, 2014) (Unpublished) (copy attached at Exhibit 2).

12. Plaintiffs intend, should the Washtenaw County Circuit Court hold adversely to plaintiffs on their state claim and questions of state law presented by their actions at bar, to return to the United States District Court for the Eastern District of Michigan for disposition of plaintiffs' federal contentions.

DATED: September 12, 2014
Ann Arbor, MI

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EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANITA YU, JOHN BOYER and MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_______________________________/

HONORABLE AVERN COHN

No. 14-11129

HEARING ON PLAINTIFFS' MOTION TO REMAND

Wednesday, May 28, 2014

Appearances:

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Ann Arbor, Michigan 48103
(734) 717-0383

M. Michael Koroi
150 N. Main Street
Plymouth, Michigan 48170
(734) 459-4040
On behalf of Plaintiffs

Abigail Elias
Office of the City Attorney
301 E. Huron Street
Ann Arbor, MI 48107
(734) 794-6170
On behalf of Defendant

\- - -

Sheri K. Ward, Official Court Reporter
(313)965-4401 · ward@transcriptorders.com

Transcript produced using machine shorthand and CAT software.

I N D E X

Motion Hearing — Page

Argument by Ms. Elias 5

Argument by Mr. O'Brien 8

Argument by Ms. Elias 8

Certification of Reporter 10

- - -

1 Detroit, Michigan
2 Wednesday, May 28, 2014
3 2:13 p.m.
4 - - -
5 **THE CLERK:** Calling Case Number 14-11129, *Yu v. City*
6 *of Ann Arbor*.
7 **THE COURT:** Give your appearances to the reporter.
8 **MR. O'BRIEN:** Yes. Donald W. O'Brien, Jr.,
9 Irvin Mermelstein and Michael Koroi for the plaintiffs.
10 **THE COURT:** Be seated.
11 **MS. ELIAS:** Abigail Elias for the City of Ann Arbor.
12 **THE COURT:** I have read your papers and I have read
13 the complaint carefully and I have seen the amount of paper
14 that's been generated. I'm going to make some comments, and
15 then if you want to comment you can.
16 As I read the complaint, plaintiff pleads as its first
17 cause of action MCL Section 213.23, which is a claim for
18 inverse condemnation under the State Constitution.
19 Count two or the second cause of action is a violation of
20 Article X, Section 2 of the Michigan Constitution, which again
21 is a claim for inverse condemnation.
22 The third count, the third cause of action claims a
23 violation of the Fifth Amendment, which again is a claim for
24 inverse condemnation.
25 The fourth cause of action is a violation of 42 U.S.C.

1 Section 1983, which is a claim for inverse condemnation phrased
2 slightly different.
3 And the fifth cause of action, injunctive relief, is
4 really not a separate cause of action but asks for injunctive
5 relief as a remedy for an inverse condemnation.
6 The sixth cause of action, the declaratory judgment, is
7 not really an independent claim but a declaration that an
8 inverse condemnation took place.
9 And the seventh cause of action is not an independent
10 claim but simply a claim for attorney's fees if plaintiff is
11 successful in establishing a cause of action for inverse
12 condemnation.
13 And all of these claims have to be adjudicated -- there's
14 a remedy under State law, which includes the Constitution, for
15 these violations, and if you prevail under State law, that's
16 the end of it. If you don't succeed, you have a right to come
17 into Federal Court.
18 And under *Williamson* the case doesn't belong here, it
19 should be remanded, because you brought it in State Court
20 knowing that you had to go to State Court first and exhaust
21 your State remedies before you could assert a Federal remedy,
22 and all of the briefing, all of the cases cited by the
23 defendant, all of the different theories are all what I would
24 call jurisprudential legerdemain.
25 Now, I don't think the plaintiff has anything it wants to

1 say further than the Court.
2 **MR. O'BRIEN:** I'll rely on my papers, Your Honor.
3 **MS. ELIAS:** I would like an opportunity to respond,
4 Your Honor, although I know and understand this is an uphill
5 battle generally.
6 **THE COURT:** No, not generally, specifically.
7 **MS. ELIAS:** I would like to make a couple of
8 comments. One is under the 1964 U.S. Supreme Court case,
9 *England v. Louisiana State Board of Education* the U.S. Supreme
10 Court held that if a plaintiff submits their Federal claims to
11 a State Court for adjudication they then run into claim
12 preclusion if they were to later try to go to Federal Court.
13 The proper way would be to notify the State Court of their
14 Federal claims, thereby preserving their right. The plaintiffs
15 in this case have not done that.
16 This Court has an obligation to take jurisdiction over
17 Federal claims if a defendant removes them. If this were to go
18 back without an *England* reservation, that would bar the City
19 from having its Federal claims adjudicated in State Court --
20 I'm sorry, before this Court because the plaintiffs have
21 precluded themselves from bringing them to Federal Court
22 because they did not file -- they did not do an *England*
23 reservation, as the courts call it.
24 That troubles me. I think that dismissal without
25 prejudice might be a better course with those Federal claims.

5:17-cv-13428-SJM-MKM Doc # 1-7 Filed 10/20/17 Pg 13 of 26 Pg ID 95

1 **THE COURT:** No, I am not going to sever the Federal
2 claims. I am not going to stay the Federal claims. They have
3 to proceed in State Court first, and they really, if they want
4 to try and assert the Federal claims in State Court and they
5 prevail, they would first have to prevail under the Michigan
6 Constitution.
7 **MS. ELIAS:** That's correct.
8 **THE COURT:** And if they prevail under the Michigan
9 Constitution, that's the end of the matter. If they don't
10 prevail under the State Constitution and the State
11 Constitutional claims are dismissed and they still feel they
12 have a right to assert the Federal claims, I think at that
13 point you could remove it to Federal Court.
14 And if the State Court chooses to adjudicate the Federal
15 claims, I don't know how you deal with that. All I know is
16 that in an inverse condemnation case there is a lack of subject
17 matter jurisdiction in this Court to adjudicate the claim until
18 their State claims are exhausted. Now, how you sort that out
19 in the State Court, I don't know, but I am not going to remand
20 the Federal -- what I could do theoretically, I suppose, and I
21 don't think anybody would be happy with this, is remand the
22 State claims to the State Court and then stay the Federal
23 claims until the State Court claims have been adjudicated and
24 are properly before me. I haven't seen a case that suggests
25 that.

1 **MS. ELIAS:** Your Honor, the cases --
2 **THE COURT:** What?
3 **MS. ELIAS:** If I -- I don't mean to interrupt.
4 **THE COURT:** No, no. Go ahead.
5 **MS. ELIAS:** The cases I have seen that have addressed
6 that type of situation have dismissed the Federal taking claim
7 or the unripe claim without prejudice. So it wouldn't be on
8 your docket, you wouldn't have it. There are, however,
9 involuntary servitude claims. Those are for remedies that are
10 different from the measure of damages or the value of property
11 taken. If they are now saying those weren't really in their
12 complaint despite having said so, then they should amend their
13 complaint. I have no objection to that.
14 **THE COURT:** All I know is that I don't have subject
15 matter jurisdiction to deal with a claim of inverse
16 condemnation under the Federal Constitution until there is an
17 adjudication -- an exhaustion, rather, of the remedies
18 available under State law.
19 No, I'm going to have to remand it, I can't keep it,
20 because the claim is of inverse condemnation under the Federal
21 Constitution, and there's no subject matter jurisdiction in an
22 inverse condemnation case until the State remedies are
23 exhausted and the only place they can exhaust the State
24 remedies is in the Washtenaw County Circuit Court.
25 Do you want to comment on that, sir?

1 **MR. O'BRIEN:** Yes, Your Honor. I think this case
2 before us today is squarely on all fours with the *Oakland 40,*
3 *LLC* case cited in our brief, which is from the Eastern District
4 of Michigan, and in that case it was commenced in circuit
5 court, removed by the defendant to Federal, Court and then the
6 defendant moved to dismiss the case for, among other reasons,
7 lack of ripeness, and what the Court said was that under the
8 statute, which is 28 U.S.C. 1447(c), we really had no choice,
9 we have no subject matter jurisdiction, we remand this case,
10 not dismiss it, not address the merits, remand the case to the
11 court in which the action was originally commenced.
12 And I think that the same should happen here. The State
13 Court can sort these things out. We did not bring this case in
14 Federal Court because of the *Williamson* doctrine, and this
15 argument I'm hearing today about *England* is the first time I
16 have heard that and I don't think that that really overrules
17 the command of 1447 where there's a lack of subject matter
18 jurisdiction on the basis of ripeness, which is a threshold
19 jurisdictional issue according to Williamson, then the case
20 ought to be remanded. That's my position.
21 **MS. ELIAS:** We obviously cited *JGA Development*, which
22 has as much weight as the *Oakland 40* case, which went in the
23 other direction and dismissed the case, albeit without
24 prejudice. If the plaintiffs concur that they are only
25 asserting inverse condemnation claims and are not asserting

1 separate claims for injunctive relief or declaratory relief or
2 involuntary servitude --
3 **THE COURT:** I don't know what involuntary servitude
4 is.
5 **MS. ELIAS:** Their claim for having to work without
6 pay.
7 **THE COURT:** I don't read it -- I read their complaint
8 as charging inverse condemnation under both State law and
9 Federal law and nothing more. The injunctive relief is
10 ancillary. I want to be careful with my language. The
11 injunctive relief is simply you can't force us to do this
12 because it's inverse condemnation. It isn't an independent
13 claim somehow, and the declaratory judgment is to declare that
14 what the City did was condemn our property without just
15 compensation, which is again inverse condemnation.
16 Now, I should think, I'm only speculating, when you get
17 back to the State court you will move to dismiss the Federal
18 claims because they can't assert a Federal claim for inverse
19 condemnation until they have exhausted. They have got the same
20 problem in State Court as they have here until they have
21 exhausted their remedies under State law. Now, why they chose
22 to plead the Federal causes of action, I don't know, you know,
23 so I'm going to have to remand it.
24 **MS. ELIAS:** Thank you, Your Honor.
25 **THE COURT:** Thank you.

1 **MR. O'BRIEN:** Thank you, Your Honor.

2 (Proceedings concluded at 2:26 p.m.)

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5 C E R T I F I C A T I O N

6 I certify that the foregoing is a correct transcription of

7 the record of proceedings in the above-entitled matter.

8

9 s/ Sheri K. Ward 6/5/2014

Sheri K. Ward Date

10 Official Court Reporter

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EXHIBIT 2

ALAINA M. ZANKE-JODWAY and TIMOTHY M. JODWAY, Plaintiff-Appellants,

v.

CAPITAL CONSULTANTS, INC, LAWRENCE FOX, JAMES E. HIRSCHENBERGER, CITY OF BOYNE CITY, ELEANOR STACKUS, RONALD GRUNCH, DAN ADKINSON, JERRY DOUGLAS, DENNIS JASON, MICHAEL CAIN, DAN MEADS, BEN SACKRIDER, PHILLIP VANDERMUS, TRI-COUNTY EXCAVATING, FIFTH THIRD MORTGAGE MI, LLC, ANN GABOS, Individually and as Trustee of the ANN GABOS REVOCABLE LIVING TRUST, and MICHAEL E. GABOS, Individually and as Trustee of the ANN GABOS REVOCABLE LIVING TRUST, Defendants-Appellees,

and

JAMES J. LUYCKX, CAROLYN S. LUYCKX, HOLLI M. SUTPHIN, KYLE SUTPHIN, CONDOMINIUM SPRING ARBOR CLUB, DEBORAH SPENCE, TIMOTHY SMITH, GREGORY P. SMITH, VICTOR THOMAS, GREGORY A. YOUNG, DIANA YOUNG, RICHARD VIARD, PATRICIA VIARD, MICHELE THOMAS, BRUCE L. TRAVERSE, and HALINA TRAVERSE, Defendants.

No. 306206

Court of Appeals of Michigan

March 27, 2014

UNPUBLISHED

Charlevoix Circuit Court LC No. 08-027622-CZ

Before: Ronayne Krause, P.J., and Fitzgerald and Whitbeck, JJ.

Per Curiam.

I. INTRODUCTION

In this complex litigation over property in Boyne City that consists of a home and two lakefront lots, Plaintiffs, Alaina M. Zanke-Jodway and Timothy M. Jodway (the Jodways), appeal a succession of decisions in favor of Defendants, who fall into seven groups:

(1) Boyne City; Eleanor Stackus, the mayor of Boyne City; Ronald Grunch, a Commissioner of Boyne City; Dan Adkinson, a Commissioner of Boyne City; Jerry Douglas, a Commissioner of Boyne City; Dennis Jason, the Director of Boyne City's Public Works; Michael Cain, Boyne City's City Manager; and Dan Meads, the Director of Boyne City's Water Department (collectively, Boyne City);

(2) Capital Consultants, Inc; Lawrence M. Fox, an engineer for Capital Consultants; and James E. Hirschenberger, an engineer for Capital Consultants; (collectively, Capital Consultants);

(3) Tri-County Excavating; Ben Sackrider, a partner of Tri-County Excavating; and Phillip Vandermus, a partner of Tri-County Excavating (collectively, Tri-County Excavating);

(4) Michael Gabos, Ann Gabos, and the Ann Gabos Revocable Living Trust (collectively, the sellers);

(5) Fifth Third Mortgage, LLC (the mortgagee);

(6) Deborah Spence, who appraised the property (the appraiser); and

(7) James J. Luyckx, Carolyn S. Luyckx, Gregory P. Smith, Timothy Smith, Holli M. Sutphin, Kyle Sutphin, Victor Thomas, Michele Thomas, Bruce L. Traverse, Halina Traverse, Richard Viard, Patricia Viard, Gregory Young, Diana Young, and the Condominium Spring Arbor Club (collectively, the neighbors).

The Jodways filed suit after Boyne City reconstructed a road outside its platted right of way and installed a catch basin on their property, without permission or an easement to do so. The defendants removed the case to the United States District Court for the Western District of Michigan, where the federal district court judge dismissed the majority of the Jodways' claims. After the federal district court remanded the remaining claims to the Charlevoix Circuit Court, the trial court issued a series of orders dismissing the remaining claims.

We conclude that the federal district court had subject matter jurisdiction to hear the Jodways' claims in federal court. We also conclude that the trial court did not abuse its discretion by striking the Jodways' supplemental witness list. The Jodways have waived, failed to preserve, or abandoned the remainder of their claims on appeal. Therefore, we affirm.

II. FACTS

A. FACTUAL BACKGROUND

In 2003, a survey revealed that portions of Bay Street were outside the platted right-of-way, and encroached on bordering properties. In March 2005, Boyne City began looking for a contractor to design and supervise the reconstruction of Bay Street. Boyne City hired Capital Consultants to design and construct the

project, and also hired Tri-County Excavating to perform construction work.

On April 25, 2005, Boyne City and Capital Consultants held a pre-construction meeting at which they discussed that Boyne City did not have a right-of-way over certain property bordering Bay Street. At a meeting on August 5, 2005, Boyne City's commissioners discussed that it was questionable whether Boyne City had a right-of-way to Bay Street in its existing location. Commissioners proposed putting the reconstruction project on hold to obtain easements. Jason, Boyne City's Public Works Director, appeared to believe that the City had acquired the property by adverse use of the road. Boyne City ultimately voted to move forward with the project.

The Jodways purchased the property from the sellers on August 3, 2005. The Jodways were not on Boyne City's mailing list and were not informed about the project when Boyne City notified residents on September 2, 2005, that the project would be commencing shortly. As part of the project, Capital Consultants and Tri-County excavating replaced the Jodways' private catch basin with a larger catch basin and connected to the Jodways' existing pipes.

In June 2006, the Jodways informed Boyne City that Boyne City did not have a drainage easement, and that the catch basin was causing storm water to flow onto their property, in turn causing flooding and erosion. The Jodways later asserted that the water discharge contained high levels of e-coli, which prevented them from using their lakefront property.

B. PROCEDURAL HISTORY

1. COMPLAINT

On September 11, 2008, the Jodways filed a complaint in Charlevoix Circuit Court against the defendants. The Jodways' complaint asserted in part that Boyne City had violated the Jodways' federal constitutional rights under the Fifth Amendment, Fourteenth Amendment, and the Contracts Clause, that Boyne City had violated the Jodways' federal rights under 42 USC 1983, and that Boyne City had taken their property without just compensation. The remainder of the Jodways' claims were state law claims.

2. REMOVAL TO FEDERAL COURT

On October 2, 2008, the defendants removed the Jodways' suit to the United States District Court for the Western District of Michigan. The defendants filed various motions for summary judgment in federal district court. The Jodways only responded to the motions by Capital Consultants and Tri-County Excavating. On June 23, 2009, a federal district court magistrate ordered the Jodways to respond to the remaining defendants' motions. After the Jodways failed to do so and failed to show good cause, the federal district court dismissed the Jodways' claims against Boyne City, the neighbors, the mortgagee, the appraiser, and the sellers for failing to prosecute the claims.

The federal district court considered Capital Consultants's and Tri-County Excavating's motions for summary judgment, and concluded that the Michigan Supreme Court's decision in *Fultz v Union Commerce Associates*[1] precluded the Jodways' negligence claim against Capital Consultants, and precluded the Jodways' claims of negligence, nuisance, and trespass against Tri-County Excavating. Noting that the Jodways' only surviving claims were state law environmental claims against Tri-County Excavating and Capital Consultants, and claims of nuisance per se, trespass, and intentional infliction of emotional distress against Capital Consultants, the federal district court remanded the case to Charlevoix Circuit Court.

3. REMAND TO CHARLEVOIX CIRCUIT COURT

After remand from federal district court, Tri-County Excavating moved for summary disposition on the Jodways' remaining environmental claims. Capital Consultants joined in the motion. Capital Consultants also asserted it was impossible for the trial court to grant relief on the Jodways' nuisance claim because Boyne City was no longer a party to the suit. The trial court granted Tri-County Excavating and Capital Consultants's motions on the Jodways' environmental claims. The trial court also granted Capital Consultants's motion for summary disposition on the Jodways' nuisance claim on impossibility grounds.

The Jodways moved the trial court to set aside the federal district court's order dismissing its claims against Tri-County Excavating and Boyne City under MCR 2.612. The trial court denied the motions, opining that the federal district court's order controlled the case and that it could not set aside the order under that court rule because the order was not a final order.

The Jodways also moved for summary disposition under MCR 2.116(C)(10) on their trespass claim against Capital Consultants, asserting that Capital Consultants trespassed on their property by knowingly locating the Bay Street reconstruction outside the right-of-way. Capital Consultants counter-moved for summary disposition, asserting that *Fultz* precluded the Jodways' claim. The trial court denied both the Jodways' motion and Capital Consultants' motion, ruling that Capital Consultants had a duty separate from its contract with Boyne City not to trespass on the Jodways' property, but

that questions of fact existed regarding whether Capital Consultants had actually trespassed.

4. THE WITNESS LIST

Following a scheduling conference, the trial court ordered the parties to file witness lists by July 1, 2010. The trial court's order informed the parties that failing to disclose witnesses by that date would "bar the introduction of the evidence or testimony at trial unless good cause is shown . . . ." The Jodways submitted a witness list, in which they purportedly reserved a right to amend their witness list.

On April 14, 2011, the day before the close of discovery, the Jodways filed an amended witness list. The Jodways proposed to add three witnesses: James Harrison, Nancy Vashaw, and Monica Ross. According to Zanke-Jodway's testimony at deposition, James Harrison made a bid on the Jodways' house, and Monica Ross conducted a market analysis of the Jodways' property.

Capital Consultants moved to strike the Jodways' supplemental witness list because it was nine months past the deadline for exchanging witness lists, it was one day before the close of discovery, and the Jodways had not moved the trial court for permission to amend. After a hearing, the trial court granted Capital Consultants' motion to strike the witness list on the basis of the Jodways' failure to comply with previous discovery orders and scheduling, and because re-opening discovery for additional depositions would be unreasonable.

The Jodways again moved the trial court for relief from judgment under MCR 2.613(C), and the trial court again ruled that relief under that court rule was inappropriate because the order was not a final order.

5. MOTION IN LIMINE ON DAMAGES

Capital Consultants subsequently brought a motion in limine, seeking to preclude the Jodways from mentioning damages at trial because the Jodways did not have any witnesses who could testify about the property's diminution in value, which was the proper measure of damages for trespass. The Jodways asserted that Zanke-Jodway was competent to testify about the value of her own property and that the cost of restoration was the appropriate measure of damages.

At arguments on the motion, the Jodways conceded that the property's diminution in value was the proper measure of damages. But the Jodways asserted that Zanke-Jodway was competent to testify concerning the property's diminution in value. The trial court ruled that Zanke-Jodway could not act as a witness because she was representing her husband and a lawyer cannot testify on behalf of a client. The trial court then granted Capital Consultants' motion in limine and dismissed the case because the Jodways did not have a witness who would testify concerning the diminution in value of the property.

III. COLLATERAL ESTOPPEL AND SUBJECT MATTER JURISDICTION

A. THIS COURT'S JURISDICTION TO CONSIDER THE ISSUE

As an initial matter, Capital Consultants asserts that this Court does not have jurisdiction to address this issue because the Jodways are appealing a federal court order. This assertion is incorrect. The Jodways appeal the Charlevoix Circuit Court's decision to enforce the federal order. They do not appeal that order itself. The final order in this case was the circuit court's August 26, 2011 order because that was the first order dismissing the last remaining claims in this case.[2] This order is appealable as of right, and the Jodways also have the right to appeal any issues related to the previous orders.[3] Therefore, we conclude that we have jurisdiction to consider this issue.

B. STANDARD OF REVIEW AND ISSUE PRESERVATION

"Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal."[4] The Jodways never raised this issue below, and it was not addressed by any court. Thus, it is unpreserved.

However, issues of subject-matter jurisdiction "can never be forfeited or waived."[5]While a party can waive the issue of the propriety of a case's removal to federal court, the party cannot waive whether the federal district court had jurisdiction.[6] Courts must consider issues of subject matter jurisdiction at any time, even if first raised on appeal.[7] Therefore, we must consider this issue.

Jurisdictional questions are questions of law that this Court reviews de novo.[8] When reviewing federal law, we are bound by the holdings of federal courts on federal questions unless the federal courts of appeal are divided on the issue.[9]

C. LEGAL STANDARDS

The doctrine of collateral estoppel precludes relitigation of an issue if there was (1) a final judgment on an issue, (2) the issue was actually litigated, (3) the issue was necessarily determined, (4) the party against whom collateral estaoppel is asserted "had a full and fair opportunity to litigate the issue, " and (5) the parties were the same parties involved.[10] A federal court's order granting summary judgment is a final disposition on the merits.[11] Therefore, the federal court's order granting

summary judgment precludes the Jodways from relitigating issues that were actually and necessarily determined.

However, a collateral attack "is permissible only if the court never acquired jurisdiction over the persons or the subject matter."[12] A claim may be removed to federal court if a party brought a civil action in state court over which "the district courts of the United States have original jurisdiction . . . ."[13] The federal courts jurisdiction to hear any case "arising under the Constitution, laws, or treaties of the United States."[14] For a federal court to have jurisdiction over a federal question, "a right or immunity created by the constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."[15] A federal court has supplemental subject matter jurisdiction over claims related to claims over which it has original jurisdiction, if those claims are part of the same case or controversy.[16]

"[I]f a [taking] claim is not ripe for review, the federal courts lack subject matter jurisdiction and they must dismiss the claim."[17] A taking claim is not ripe if the plaintiff "did not seek compensation through the procedures the State has provided for doing so."[18] A takings claim is ripe if (1) the state inflicted an actual concrete injury and (2) the plaintiff unsuccessfully sought compensation for the injury through available state procedures.[19]

D. APPLYING THE STANDARDS

The Jodways assert that the trial court erred by enforcing the federal district court's order because the federal district court lacked subject matter jurisdiction over their unripe claim. We disagree, and conclude that the Jodways' takings claim was ripe for two reasons.

First, the Jodways' federal procedural due process claim was not ancillary to their takings claim. Federal courts must also dismiss claims that are ancillary to an unripe takings claim.[20] A claim is ancillary to a takings claim if it "occurs alongside a takings claim" and does not allege a separate, concrete injury.[21] However, a plaintiff's procedural due process claim is *not* ancillary if the procedural due process claim "addresses a separate injury—the deprivation of a property interest without a predeprivation hearing."[22]

Here, the Jodways asserted that Boyne City violated their rights to procedural due process because "[o]ther Bay Street property owners received notice of the design phase, an opportunity to participate and be heard regarding the project, an express request for drainage rights over their private property and notice of the commencement of the Bay Street reconstruction while the Jodways did not." To put it another way, the Jodways asserted that Boyne City deprived them of notice and the opportunity to be heard. This injury was complete at the moment that Boyne City denied the Jodways notice. Thus, in this case, the Jodways asserted an injury separate and distinct from the taking of their property. We conclude that the Jodways' federal procedural due process claim was not ancillary to their takings claim. Therefore, the federal court had subject matter jurisdiction over the Jodways' unrelated federal claim.

Second, the Jodways' takings claim was ripe because the Jodways sought compensation in state court but the defendants removed the case to federal court. A party's takings claim is ripe if the plaintiff brings the claim in state court, but the defendants remove the claim to federal court:

[A] plaintiff cannot bring a takings claim in federal court without having been denied just compensation by the state; such a claim can come into federal court before the state has denied compensation only when the state or its political subdivision chooses to remove the case to federal court.[23]

A state waives *Williamson*'s ripeness requirement when it removes the case to federal court.[24]

Here, the defendants waived *Williamson*'s ripeness requirement by removing this case to federal district court. Therefore, this claim was ripe for review in the federal district court and the federal district court had subject matter jurisdiction over the Jodways' claims.

IV. TAKINGS CLAIM AGAINST BOYNE CITY

The Jodways contend that they are entitled to relief in their takings claims against Boyne City. We decline to review this issue because it is premised on the Jodways' success on the first issue. Because the trial court properly granted comity to the federal district court's order, Boyne City is not a party from whom the Jodways can recover.

V. DISMISSAL OF THE JODWAYS' NUISANCE, NEGLIGENCE, AND TRESPASS CLAIMS AGAINST TRI-COUNTY EXCAVATING AND CAPITAL CONSULTANTS

A. STANDARD OF REVIEW

"This Court reviews de novo issue of law."[25] We also review de novo the trial court's ruling on a motion for summary disposition.[26]

B. CLAIMS AGAINST TRI-COUNTY EXCAVATING

1. LEGAL STANDARDS

Collateral estoppel precludes relitigation of issues

on which a court has reached a valid final judgment.[27]

2. APPLYING THE STANDARDS

The Jodways assert that the federal district court improperly applied the Michigan Supreme Court's decision in *Fultz* when dismissing their claims of nuisance, negligence, and trespass against Tri-County Excavating. The Jodways appear to base this argument on success on the first issue, since they provide no authority under which this Court may review the propriety of a valid federal court order. As discussed above, the trial court properly enforced the federal district court's order. We therefore decline to determine whether the federal district court properly applied *Fultz*.

The Jodways also contend that they asserted nuisance in fact against Tri-County Excavating, as well as nuisance per se, but that the federal district court failed to address the claim. We decline to consider this issue. An issue is preserved if it is raised before, addressed, or decided by the trial court.[28] "We need not address issues first raised on appeal."[29] The Jodways have not properly preserved this issue by raising it before the trial court. Therefore, we decline to address it.

C. CLAIMS AGAINST CAPITAL CONSULTANTS

1. NEGLIGENCE

The federal district court also dismissed the Jodways' claim for negligence against Capital Consultants. For the same reasons as above, we decline to review this issue.

2. NUISANCE

As stated above, the Jodways did not assert below that the federal district court failed to address a claim of nuisance in fact. Because the Jodways have not preserved this issue by raising it before the trial court, we decline to review it.

Regarding nuisance per se, the Jodways do not address the basis of the trial court's decision. A party abandons an issue if he or she does not raise it in the statement of questions presented.[30] Further, if a party does not address the basis of the trial court's decision, we need not even consider granting them relief.[31]

The Jodways contend in their statement of issues presented that the trial court improperly applied *Fultz* to their nuisance claims. However, the trial court dismissed the Jodways' nuisance claims against Capital Consultants because of the impossibility of awarding the Jodways relief. Because the Jodways do not address the basis of the trial court's decision, we conclude that they have abandoned this issue.

3. TRESPASS

The Jodways contend that the trial court improperly applied *Fultz* to their trespass claim. However, the trial court ultimately dismissed the Jodways trespass claim because they would be unable to provide any proof on damages at trial, not because *Fultz* barred the claim. Thus, we conclude that the Jodways have also abandoned this issue by failing to address the basis of the trial court's decision.

VI. SUPPLEMENTAL WITNESS LIST

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to impose discovery sanctions.[32] The trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes or when it makes an error of law.[33]

B. LEGAL STANDARDS

The trial court has discretion to bar a witness or dismiss an action to sanction a party for failing to timely file a witness list.[34] Before deciding to bar a witness, the trial court should consider a variety of factors:

Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful [sic] or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.[35]

The trial court should take particular care to consider a variety of factors and options before exercising this sanction if barring the witness will result in the dismissal of the plaintiff's claim.[36]

C. APPLYING THE STANDARDS

The Jodways contend that the trial court abused its discretion by striking their supplemental witness list. We disagree.

The trial court considered a variety of factors when ruling on Capital Consultants's, motion. The trial court noted that the Jodways did not provide authority to support their position that a party may retain a right to

supplement a witness list in violation of a discovery order. The trial court inquired into whether the Jodways had adequately disclosed the witnesses during discovery to prevent surprise to Capital Consultants. The trial court found that the Jodways had a history of failing to comply with its orders, including discovery orders. The trial court found that the Jodways did not file supplemental answers to interrogatories regarding the new witnesses. The trial court also found that the case was at a "late stage." Finally, the trial court opined that it would be unreasonable to re-open discovery so that Capital Consultants could depose the new witnesses.

Our review of the lower court record discloses that the Jodways' assertion that they previously disclosed the witnesses during discovery is not entirely accurate. Neither the purported disclosure in the Jodways' answers to interrogatories, nor the stipulated discovery order, identifies the additional witnesses by name, indicates the subject of their proposed testimony, or even indicates that the additional witness would act as witnesses. Similarly, Zanke-Jodway mentioned at deposition that Jim Harris had bid $279, 000 on the house and that Monica Ross had done a market study concluding that the most she could get for the house was $350, 000, but Zanke-Jodway did not identify either person as a potential witness.

Further, we are not convinced that the trial court's refusal to permit these witnesses to testify resulted in the dismissal of the Jodways' case. The trial court ultimately dismissed the Jodways' case because no witness could testify concerning the property's diminution in value caused by the trespass. The Jodways conceded at the hearing on the motion that Capital Consultants's motion to dismiss that part of the reduction in the property's value to $350, 000 was due to adverse economic conditions. Even had the trial court not struck the Jodways' proposed witnesses, there is no indication that either proposed witness was competent to testify concerning the diminution in the property's value *caused by the trespass.*

We conclude that the trial court did not abuse its discretion when it struck the Jodways' supplemental witness list as a discovery sanction for failing to comply with its discovery orders. The trial court considered a variety of factors, including the Jodways' failure to comply with trial court orders, the prejudice to Capital Consultants, the lack of notice to Capital Consultants regarding the witnesses' proposed testimonies, and whether the Jodways attempted to timely cure the defect. The trial court did not need to consider further factors and options because striking the proposed witnesses did not result in the dismissal of the Jodways' case.

D. MOTION FOR RELIEF FROM JUDGMENT

The Jodways contend that the trial court erred in denying their motion for relief from judgment under MCR 2.612(C) because they had good cause to supplement their witness list. This argument utterly lacks merit.

By its language, MCR 2.612(C) applies to "a final judgment, order, or proceeding . . . ."[37]A final order is the first order dismissing the last remaining claims in this case.[38] The trial court's ruling regarding the Jodways' supplemental witness list did not dismiss the last remaining claim in the case. Therefore, it was not a final order and MCR 2.612(C) simply did not apply.

VII. MOTION IN LIMINE ON DAMAGES

A. PROPER MEASURE OF DAMAGES

The Jodways assert that the trial court incorrectly determined that the diminution in value of the property was the proper measure of damages for their claim of trespass against Capital Consultants. We conclude that the Jodways have waived this issue.

A party may not "create[] the very error that it wishes to correct on appeal[.]"[39] A party may not take a position before the trial court, take an opposite position before this Court, and expect to obtain relief.[40]

Here, at the hearing on Capital Consultants's motion to dismiss, the Jodways agreed that the proper measure of trespass damages was the property's diminution in value. Thus, if the trial court erred in determining the proper measure of damages, the Jodways' conduct at the hearing on the motion contributed to any error. We conclude that, by contributing to this error, the Jodways have waived our review of this issue.

B. WITNESSES AVAILABLE TO TESTIFY CONCERNING DAMAGES

The Jodways' next contend that the trial court erred by determining that the Jodways did not have a witness who could testify on damages because Zanke-Jodway, as a homeowner, is competent to offer testimony on the value of her own property. We decline to consider this issue because we conclude that the Jodways fail to address the basis of the trial court's decision.

Here, the trial court ruled that Zanke-Jodway was not competent to testify at trial concerning the diminution in value of the property because a lawyer may not testify on behalf of his or her client. The Jodways do not address this issue, but rather contend that Zanke-Jodway was competent to offer an opinion on the property's value because she owns it. As stated above, if a party does not address the basis of the trial court's decision, we need not even consider granting them relief.[41] We decline to address this issue because the Jodways do not address the basis of the trial court's decision.

VIII. CONCLUSION

We conclude that the federal district court did not lack subject matter jurisdiction to hear the Jodways' claims in federal court. We also concluded that the trial court did not abuse its discretion by striking the Jodways' supplemental witness list. We conclude that the Jodways have waived, failed to preserve, or abandoned the remainder of their claims on appeal.

We affirm. Defendants, as the prevailing parties, may tax costs.[42]

Notes:

[1] *Fultz v Union-Commerce Assoc*, 470 Mich. 460; 683 N.W.2d 587 (2004).

[2] See MCR 7.202(6)(1)(*i*).

[3] See MCR 7.203(A)(1); *Bonner v Chicago Title Ins Co*, 194 Mich.App. 462, 472; 487 N.W.2d 807 (1992).

[4] *Polkton Charter Twp v Pellegrom*, 265 Mich.App. 88, 95; 693 N.W.2d 170 (2005).

[5] *Arbaugh v Y & H Corp*, 546 U.S. 500, 514; 126 S.Ct. 1235; 163 L.Ed.2d 1097 (2006) (quotation marks and citation omitted). See *Travelers Ins Co v Detroit Edison Co*, 465 Mich. 185, 204; 631 N.W.2d 733 (2001).

[6] *Grubbs v Gen Electric Credit Corp*, 405 U.S. 699, 702; 92 S.Ct. 1344; 31 L.Ed.2d 612 (1972).

[7] *Lehman v Lehman*, 312 Mich. 102, 105-106; 19 N.W.2d 502 (1945); *Bowie v Arder*, 441 Mich. 23, 56; 490 N.W.2d 568 (1992).

[8] *Travelers Ins Co*, 465 Mich. at 205.

[9] *Schueler v Weintrob*, 360 Mich. 621, 633-634; 105 N.W.2d 42 (1960); *Woodman v Miesel Sysco Food Servs Co*, 254 Mich.App. 159, 165; 657 N.W.2d 122 (2002).

[10] *In re Forfeiture of $1, 159, 420*, 194 Mich.App. 134, 145; 486 N.W.2d 326 (1992).

[11] *Detroit v Qualls*, 434 Mich. 340, 356 n 27; 454 N.W.2d 374 (1990).

[12] *Edwards v Meinberg*, 334 Mich. 355, 358; 54 N.W.2d 684 (1952). See *Bowie*, 441 Mich. at 56.

[13] 28 USC 1441(a).

[14] 28 USC 1331.

[15] *Gully v First Nat'l Bank in Meridian*, 299 U.S. 109, 112; 57 S.Ct. 96; 81 L.Ed.2d 70 (1936).

[16] 28 USC 1367.

[17] *Broughton Lumber Co v Columbia River Gorge Comm*, 975 F.2d 616, 621 (CA 9, 1992).

[18] *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 U.S. 172, 194; 105 S.Ct. 3108; 87 L.Ed.2d 126 (1985).

[19] *Id.* at 193, 195.

[20] *Braun v Ann Arbor Charter Twp*, 519 F.3d 564, 573 (CA 6, 2008).

[21] *Id.* at 572.

[22] *Warren v City of Athens, Ohio*, 411 F.3d 697, 708 (CA 6, 2005). See *Nasierowski Bros Investment Co v City of Sterling Heights*, 946 F.3d 890, 893-894 (CA 6, 1991).

[23] *Sansotta v Town of Nags Head*, 724 F.3d 533, 546 (CA 4, 2013).

[24] *Id.* at 544.

[25] *DeCosta v Gossage*, 486 Mich. 116, 122; 782 N.W.2d 734 (2010).

[26] *Travelers Ins Co*, 465 Mich. at 205.

[27] *In re Forfeiture of $1, 159, 420*, 194 Mich.App. at 145; *City of Detroit*, 434 Mich. at 356 n 27.

[28] *Polkton Charter Twp*, 265 Mich.App. at 95.

[29] *Id.*

[30] MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich.App. 496, 553; 730 N.W.2d 481 (2007).

[31] *Derderian v Genesys Health Care Sys*, 263 Mich.App. 364, 381; 689 N.W.2d 145 (2004).

[32] *KBD & Assocs, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich.App. 666, 677; 816 N.W.2d 464 (2012).

[33] *Id.*; *In re Waters Drain Drainage Dist*, 296 Mich.App. 214, 220; 818 N.W.2d 478 (2012).

[34] *Dean v Tucker*, 182 Mich.App. 27, 32; 451 N.W.2d 571 (1990).

[35] *Id.* at 32-33 (footnote citations omitted).

[36] *Id.* at 32.

[37] MCR 2.612(C)(1).

[38] MCR 7.202(6)(1)(*i*).

[39] *People v Szalma*, 487 Mich. 708, 726; 790 N.W.2d 662 (2010).

[40] *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich.App. 727, 737; 832 N.W.2d 401 (2013).

[41] *Derderian*, 263 Mich.App. at 381.

[42] MCR 7.219(A).

EXHIBIT 7

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

LYNN LUMBARD, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

THE CITY OF ANN ARBOR,

Defendant.

Hon. Timothy P. Connors
Case No. 15-1100CC

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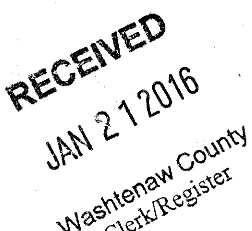

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NOTICE OF *ENGLAND* RESERVATION

Now comes the Plaintiff, by her attorneys herein, and file this Notice of England Reservation pursuant to *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S. Ct. 461, 11 L.Ed.2d 440 (1964). See, e.g., *DLX, Inc. v Kentucky,* 381 F.3d 511 (6th Cir. 2004); *Braun v. Ann Arbor Charter Tp.,* 519 F.3d 564 (6th Cir. 2008).

1. Plaintiffs' reservation is to the disposition of the entire case herein in Michigan Circuit Court, except claims for inverse condemnation under the Michigan State Constitution **only.** *Stockler v. City of Detroit,* 936 F.2d 573 (Sixth Cir. 1991), interpreting *Hart v Detroit,* 416

Mich. 488, 331 N.W.2d 438 (1982) under *Williamson Cnty Reg'l Planning Comm'n v Hamilton Bank of Johnson City,* 473 US 172; 105 S. Ct. 3108; 87 L. Ed2d 126 (1985).

2. This Notice of England Reservation is timely, having been filed before any hearing by this Court on or adjudication of any claim, question or issue, state or federal, on the merits of Plaintiffs' case.

3. Plaintiffs have been and are involuntarily in State Court only for the purposes of complying with *Government Employees v Windsor*, 353 U.S. 364, 77 S. Ct. 838, 1 L.Ed.2d 894 (1957), to the extent applicable, and ripening their federal claims for takings by permanent physical occupation under the Fifth Amendment to the United States Constitution and *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419. 73 L. Ed. 868, 102 S. Ct. 3164 (1982).

4. Plaintiffs have not voluntarily submitted any federal claims or federal questions or issues for disposition by the Michigan State Courts, all of which are reserved by the Plaintiffs for federal trial, without regard to whether they are ripe or not.

5. Plaintiffs expose their reserved federal claims, issues and questions under federal law in this Notice of *England* Reservation only for the purpose of providing explicit notification of such reserved claims, issues and questions to this Honorable Court, as required by *England*.

6. Plaintiffs reserve the right to amend this Notice of *England* Reservation (in a timely manner under *England* and other federal decisions) in order to provide additional explicit notification for the Court concerning such federal claims, issues and questions. Such additional notification will contain descriptions and arguments plaintiffs would make in federal court under federal law applicable to plaintiffs' reserved federal claims, issues and questions so that the court may determine the matters before it in light of the plaintiffs' reserved federal claims, issues and

notifications. This includes further notification of the federal claims, issues and questions described in Paragraph 10, below.

7. Plaintiffs' *England* Reservation extends to the following, which may be further defined by Plaintiffs in timely fashion under *England*:

a. All of plaintiffs' federal claims, questions and issues under the Constitution and laws of the United States generally (including under 42 USC §1983, the Takings Clause of the Fifth Amendment to the United States Constitution or any clause of the Fourteenth Amendment;

b. Whether plaintiffs' federally-claimed takings by permanent physical occupation (through placements of physical structures and other actions on and in Plaintiffs' homes and properties as alleged in their state cases) are, under the Fifth Amendment (i) takings, (ii) "permanent physical occupations," "physical invasions," "physical intrusions" and similar terms of art, as determined in accordance with procedures, burdens of proof, and evidentiary limits under *Loretto v Teleprompter Manhattan CATV Corp,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) or (iii) are "regulatory takings" governed by *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978) and federal cases decided thereunder, including federal decisions that were decided by federal courts applying federal law under the Fifth Amendment, such as *Wilkins v Daniels, Bd of Managers of Soho Intl Art Comm v City of New York, 2004 WL 1982520, 744 F3d 409 (CA 6, 2014), Kauffman v City of New York, 717 F Supp 84 (SD NY 1989), Bd of Managers of Soho Intl Art Comm v City of New York, 2004 WL 1982520 (SD NY 19, and Cape*

Ann Citizens Ass'n v City of Gloucester, 121 F3d 695, Case No. 96-2327 (CA 1, 1997);

c. Whether, under federal law, plaintiffs federally-claimed permanent physical occupations authorized by the City and alleged in their complaint (to wit, by physical disconnection of plaintiffs' foundation drains, placement of fixed structures and operating equipment and other actions on and in their pre-1982 residences and properties) withdrew plaintiffs' real estate, to the extent of the permanent physical occupation thereof, from "private ownership" under the Fifth Amendment (see *United States v Bailey,* No. 021078L (United States Court of Federal Claims, May 29, 2014) and cases cited therein) or otherwise impermissibly intruded upon or restricted their property rights; and

d. Whether the footing drain disconnection and other FDD construction and maintenance requirements under City of Ann Arbor Ordinance 2:51.1, and as alleged in plaintiffs complaint, are required by any provision of federal law, including the Federal Clean Water Act of 1972, 33 USC 1251-1387.

8. Plaintiffs' reservation herein also extends to federal issues and questions relating to ripeness of their federal takings claims, **under Federal law only.** Issues and questions of federal ripeness of such claims, for state law purposes, are governed *Zanke-Jodway v Capital Consultants, Inc.,* No. 306206 (Mich. Ct. App, March 27, 2014) (Unpublished) (copy attached as Exhibit 1).

9. Plaintiffs intend, should the Michigan Courts hold adversely to plaintiffs on their unreserved state claims and questions of state law, to proceed to the United States District Court for the Eastern District of Michigan for disposition of plaintiffs' federal contentions.

DATED: January 21, 2016
Ann Arbor, Michigan

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ATTORNEYS FOR THE PLAINTIFFS

EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 27, 2014

ALAINA M. ZANKE-JODWAY and TIMOTHY M. JODWAY,

Plaintiff-Appellants,

v

No. 306206
Charlevoix Circuit Court
LC No. 08-027622-CZ

CAPITAL CONSULTANTS, INC, LAWRENCE FOX, JAMES E. HIRSCHENBERGER, CITY OF BOYNE CITY, ELEANOR STACKUS, RONALD GRUNCH, DAN ADKINSON, JERRY DOUGLAS, DENNIS JASON, MICHAEL CAIN, DAN MEADS, BEN SACKRIDER, PHILLIP VANDERMUS, TRI-COUNTY EXCAVATING, FIFTH THIRD MORTGAGE MI, LLC, ANN GABOS, Individually and as Trustee of the ANN GABOS REVOCABLE LIVING TRUST, and MICHAEL E. GABOS, Individually and as Trustee of the ANN GABOS REVOCABLE LIVING TRUST,

Defendants-Appellees,

and

JAMES J. LUYCKX, CAROLYN S. LUYCKX, HOLLI M. SUTPHIN, KYLE SUTPHIN, CONDOMINIUM SPRING ARBOR CLUB, DEBORAH SPENCE, TIMOTHY SMITH, GREGORY P. SMITH, VICTOR THOMAS, GREGORY A. YOUNG, DIANA YOUNG, RICHARD VIARD, PATRICIA VIARD, MICHELE THOMAS, BRUCE L. TRAVERSE, and HALINA TRAVERSE,

Defendants.

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

I. INTRODUCTION

In this complex litigation over property in Boyne City that consists of a home and two lakefront lots, Plaintiffs, Alaina M. Zanke-Jodway and Timothy M. Jodway (the Jodways), appeal a succession of decisions in favor of Defendants, who fall into seven groups:

(1) Boyne City; Eleanor Stackus, the mayor of Boyne City; Ronald Grunch, a Commissioner of Boyne City; Dan Adkinson, a Commissioner of Boyne City; Jerry Douglas, a Commissioner of Boyne City; Dennis Jason, the Director of Boyne City's Public Works; Michael Cain, Boyne City's City Manager; and Dan Meads, the Director of Boyne City's Water Department (collectively, Boyne City);

(2) Capital Consultants, Inc; Lawrence M. Fox, an engineer for Capital Consultants; and James E. Hirschenberger, an engineer for Capital Consultants; (collectively, Capital Consultants);

(3) Tri-County Excavating; Ben Sackrider, a partner of Tri-County Excavating; and Phillip Vandermus, a partner of Tri-County Excavating (collectively, Tri-County Excavating);

(4) Michael Gabos, Ann Gabos, and the Ann Gabos Revocable Living Trust (collectively, the sellers);

(5) Fifth Third Mortgage, LLC (the mortgagee);

(6) Deborah Spence, who appraised the property (the appraiser); and

(7) James J. Luyckx, Carolyn S. Luyckx, Gregory P. Smith, Timothy Smith, Holli M. Sutphin, Kyle Sutphin, Victor Thomas, Michele Thomas, Bruce L. Traverse, Halina Traverse, Richard Viard, Patricia Viard, Gregory Young, Diana Young, and the Condominium Spring Arbor Club (collectively, the neighbors).

The Jodways filed suit after Boyne City reconstructed a road outside its platted right of way and installed a catch basin on their property, without permission or an easement to do so. The defendants removed the case to the United States District Court for the Western District of Michigan, where the federal district court judge dismissed the majority of the Jodways' claims. After the federal district court remanded the remaining claims to the Charlevoix Circuit Court, the trial court issued a series of orders dismissing the remaining claims.

We conclude that the federal district court had subject matter jurisdiction to hear the Jodways' claims in federal court. We also conclude that the trial court did not abuse its discretion by striking the Jodways' supplemental witness list. The Jodways have waived, failed to preserve, or abandoned the remainder of their claims on appeal. Therefore, we affirm.

II. FACTS

A. FACTUAL BACKGROUND

In 2003, a survey revealed that portions of Bay Street were outside the platted right-of-way, and encroached on bordering properties. In March 2005, Boyne City began looking for a contractor to design and supervise the reconstruction of Bay Street. Boyne City hired Capital Consultants to design and construct the project, and also hired Tri-County Excavating to perform construction work.

On April 25, 2005, Boyne City and Capital Consultants held a pre-construction meeting at which they discussed that Boyne City did not have a right-of-way over certain property bordering Bay Street. At a meeting on August 5, 2005, Boyne City's commissioners discussed that it was questionable whether Boyne City had a right-of-way to Bay Street in its existing location. Commissioners proposed putting the reconstruction project on hold to obtain easements. Jason, Boyne City's Public Works Director, appeared to believe that the City had acquired the property by adverse use of the road. Boyne City ultimately voted to move forward with the project.

The Jodways purchased the property from the sellers on August 3, 2005. The Jodways were not on Boyne City's mailing list and were not informed about the project when Boyne City notified residents on September 2, 2005, that the project would be commencing shortly. As part of the project, Capital Consultants and Tri-County excavating replaced the Jodways' private catch basin with a larger catch basin and connected to the Jodways' existing pipes.

In June 2006, the Jodways informed Boyne City that Boyne City did not have a drainage easement, and that the catch basin was causing storm water to flow onto their property, in turn causing flooding and erosion. The Jodways later asserted that the water discharge contained high levels of e-coli, which prevented them from using their lakefront property.

B. PROCEDURAL HISTORY

1. COMPLAINT

On September 11, 2008, the Jodways filed a complaint in Charlevoix Circuit Court against the defendants. The Jodways' complaint asserted in part that Boyne City had violated the Jodways' federal constitutional rights under the Fifth Amendment, Fourteenth Amendment, and the Contracts Clause, that Boyne City had violated the Jodways' federal rights under 42 USC 1983, and that Boyne City had taken their property without just compensation. The remainder of the Jodways' claims were state law claims.

2. REMOVAL TO FEDERAL COURT

On October 2, 2008, the defendants removed the Jodways' suit to the United States District Court for the Western District of Michigan. The defendants filed various motions for summary judgment in federal district court. The Jodways only responded to the motions by Capital Consultants and Tri-County Excavating. On June 23, 2009, a federal district court magistrate ordered the Jodways to respond to the remaining defendants' motions. After the

Jodways failed to do so and failed to show good cause, the federal district court dismissed the Jodways' claims against Boyne City, the neighbors, the mortgagee, the appraiser, and the sellers for failing to prosecute the claims.

The federal district court considered Capital Consultants's and Tri-County Excavating's motions for summary judgment, and concluded that the Michigan Supreme Court's decision in *Fultz v Union Commerce Associates*[1] precluded the Jodways' negligence claim against Capital Consultants, and precluded the Jodways' claims of negligence, nuisance, and trespass against Tri-County Excavating. Noting that the Jodways' only surviving claims were state law environmental claims against Tri-County Excavating and Capital Consultants, and claims of nuisance per se, trespass, and intentional infliction of emotional distress against Capital Consultants, the federal district court remanded the case to Charlevoix Circuit Court.

3. REMAND TO CHARLEVOIX CIRCUIT COURT

After remand from federal district court, Tri-County Excavating moved for summary disposition on the Jodways' remaining environmental claims. Capital Consultants joined in the motion. Capital Consultants also asserted it was impossible for the trial court to grant relief on the Jodways' nuisance claim because Boyne City was no longer a party to the suit. The trial court granted Tri-County Excavating and Capital Consultants's motions on the Jodways' environmental claims. The trial court also granted Capital Consultants's motion for summary disposition on the Jodways' nuisance claim on impossibility grounds.

The Jodways moved the trial court to set aside the federal district court's order dismissing its claims against Tri-County Excavating and Boyne City under MCR 2.612. The trial court denied the motions, opining that the federal district court's order controlled the case and that it could not set aside the order under that court rule because the order was not a final order.

The Jodways also moved for summary disposition under MCR 2.116(C)(10) on their trespass claim against Capital Consultants, asserting that Capital Consultants trespassed on their property by knowingly locating the Bay Street reconstruction outside the right-of-way. Capital Consultants counter-moved for summary disposition, asserting that *Fultz* precluded the Jodways' claim. The trial court denied both the Jodways' motion and Capital Consultants' motion, ruling that Capital Consultants had a duty separate from its contract with Boyne City not to trespass on the Jodways' property, but that questions of fact existed regarding whether Capital Consultants had actually trespassed.

4. THE WITNESS LIST

Following a scheduling conference, the trial court ordered the parties to file witness lists by July 1, 2010. The trial court's order informed the parties that failing to disclose witnesses by that date would "bar the introduction of the evidence or testimony at trial unless good cause is

[1] *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004).

shown . . . ." The Jodways submitted a witness list, in which they purportedly reserved a right to amend their witness list.

On April 14, 2011, the day before the close of discovery, the Jodways filed an amended witness list. The Jodways proposed to add three witnesses: James Harrison, Nancy Vashaw, and Monica Ross. According to Zanke-Jodway's testimony at deposition, James Harrison made a bid on the Jodways' house, and Monica Ross conducted a market analysis of the Jodways' property.

Capital Consultants moved to strike the Jodways' supplemental witness list because it was nine months past the deadline for exchanging witness lists, it was one day before the close of discovery, and the Jodways had not moved the trial court for permission to amend. After a hearing, the trial court granted Capital Consultants' motion to strike the witness list on the basis of the Jodways' failure to comply with previous discovery orders and scheduling, and because re-opening discovery for additional depositions would be unreasonable.

The Jodways again moved the trial court for relief from judgment under MCR 2.613(C), and the trial court again ruled that relief under that court rule was inappropriate because the order was not a final order.

5. MOTION IN LIMINE ON DAMAGES

Capital Consultants subsequently brought a motion in limine, seeking to preclude the Jodways from mentioning damages at trial because the Jodways did not have any witnesses who could testify about the property's diminution in value, which was the proper measure of damages for trespass. The Jodways asserted that Zanke-Jodway was competent to testify about the value of her own property and that the cost of restoration was the appropriate measure of damages.

At arguments on the motion, the Jodways conceded that the property's diminution in value was the proper measure of damages. But the Jodways asserted that Zanke-Jodway was competent to testify concerning the property's diminution in value. The trial court ruled that Zanke-Jodway could not act as a witness because she was representing her husband and a lawyer cannot testify on behalf of a client. The trial court then granted Capital Consultants' motion in limine and dismissed the case because the Jodways did not have a witness who would testify concerning the diminution in value of the property.

III. COLLATERAL ESTOPPEL AND SUBJECT MATTER JURISDICTION

A. THIS COURT'S JURISDICTION TO CONSIDER THE ISSUE

As an initial matter, Capital Consultants asserts that this Court does not have jurisdiction to address this issue because the Jodways are appealing a federal court order. This assertion is incorrect. The Jodways appeal the Charlevoix Circuit Court's decision to enforce the federal order. They do not appeal that order itself. The final order in this case was the circuit court's August 26, 2011 order because that was the first order dismissing the last remaining claims in

this case.[2] This order is appealable as of right, and the Jodways also have the right to appeal any issues related to the previous orders.[3] Therefore, we conclude that we have jurisdiction to consider this issue.

B. STANDARD OF REVIEW AND ISSUE PRESERVATION

"Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal."[4] The Jodways never raised this issue below, and it was not addressed by any court. Thus, it is unpreserved.

However, issues of subject-matter jurisdiction "can never be forfeited or waived."[5] While a party can waive the issue of the propriety of a case's removal to federal court, the party cannot waive whether the federal district court had jurisdiction.[6] Courts must consider issues of subject matter jurisdiction at any time, even if first raised on appeal.[7] Therefore, we must consider this issue.

Jurisdictional questions are questions of law that this Court reviews de novo.[8] When reviewing federal law, we are bound by the holdings of federal courts on federal questions unless the federal courts of appeal are divided on the issue.[9]

C. LEGAL STANDARDS

The doctrine of collateral estoppel precludes relitigation of an issue if there was (1) a final judgment on an issue, (2) the issue was actually litigated, (3) the issue was necessarily determined, (4) the party against whom collateral estaoppel is asserted "had a full and fair opportunity to litigate the issue," and (5) the parties were the same parties involved.[10] A federal

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[2] See MCR 7.202(6)(1)(*i*).

[3] See MCR 7.203(A)(1); *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

[4] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

[5] *Arbaugh v Y & H Corp*, 546 US 500, 514; 126 S Ct 1235; 163 L Ed 2d 1097 (2006) (quotation marks and citation omitted). See *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001).

[6] *Grubbs v Gen Electric Credit Corp*, 405 US 699, 702; 92 S Ct 1344; 31 L Ed 2d 612 (1972).

[7] *Lehman v Lehman*, 312 Mich 102, 105-106; 19 NW2d 502 (1945); *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

[8] *Travelers Ins Co*, 465 Mich at 205.

[9] *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960); *Woodman v Miesel Sysco Food Servs Co*, 254 Mich App 159, 165; 657 NW2d 122 (2002).

[10] *In re Forfeiture of $1,159,420*, 194 Mich App 134, 145; 486 NW2d 326 (1992).

court's order granting summary judgment is a final disposition on the merits.[11] Therefore, the federal court's order granting summary judgment precludes the Jodways from relitigating issues that were actually and necessarily determined.

However, a collateral attack "is permissible only if the court never acquired jurisdiction over the persons or the subject matter."[12] A claim may be removed to federal court if a party brought a civil action in state court over which "the district courts of the United States have original jurisdiction . . . ."[13] The federal courts jurisdiction to hear any case "arising under the Constitution, laws, or treaties of the United States."[14] For a federal court to have jurisdiction over a federal question, "a right or immunity created by the constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."[15] A federal court has supplemental subject matter jurisdiction over claims related to claims over which it has original jurisdiction, if those claims are part of the same case or controversy.[16]

"[I]f a [taking] claim is not ripe for review, the federal courts lack subject matter jurisdiction and they must dismiss the claim."[17] A taking claim is not ripe if the plaintiff "did not seek compensation through the procedures the State has provided for doing so."[18] A takings claim is ripe if (1) the state inflicted an actual concrete injury and (2) the plaintiff unsuccessfully sought compensation for the injury through available state procedures.[19]

D. APPLYING THE STANDARDS

The Jodways assert that the trial court erred by enforcing the federal district court's order because the federal district court lacked subject matter jurisdiction over their unripe claim. We disagree, and conclude that the Jodways' takings claim was ripe for two reasons.

First, the Jodways' federal procedural due process claim was not ancillary to their takings claim. Federal courts must also dismiss claims that are ancillary to an unripe takings claim.[20] A claim is ancillary to a takings claim if it "occurs alongside a takings claim" and does not allege a

[11] *Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990).

[12] *Edwards v Meinberg*, 334 Mich 355, 358; 54 NW2d 684 (1952). See *Bowie*, 441 Mich at 56.

[13] 28 USC 1441(a).

[14] 28 USC 1331.

[15] *Gully v First Nat'l Bank in Meridian*, 299 US 109, 112; 57 S Ct 96; 81 L Ed 2d 70 (1936).

[16] 28 USC 1367.

[17] *Broughton Lumber Co v Columbia River Gorge Comm*, 975 F2d 616, 621 (CA 9, 1992).

[18] *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 194; 105 S Ct 3108; 87 L Ed 2d 126 (1985).

[19] *Id.* at 193, 195.

[20] *Braun v Ann Arbor Charter Twp*, 519 F3d 564, 573 (CA 6, 2008).

separate, concrete injury.[21] However, a plaintiff's procedural due process claim is *not* ancillary if the procedural due process claim "addresses a separate injury—the deprivation of a property interest without a predeprivation hearing."[22]

Here, the Jodways asserted that Boyne City violated their rights to procedural due process because "[o]ther Bay Street property owners received notice of the design phase, an opportunity to participate and be heard regarding the project, an express request for drainage rights over their private property and notice of the commencement of the Bay Street reconstruction while the Jodways did not." To put it another way, the Jodways asserted that Boyne City deprived them of notice and the opportunity to be heard. This injury was complete at the moment that Boyne City denied the Jodways notice. Thus, in this case, the Jodways asserted an injury separate and distinct from the taking of their property. We conclude that the Jodways' federal procedural due process claim was not ancillary to their takings claim. Therefore, the federal court had subject matter jurisdiction over the Jodways' unrelated federal claim.

Second, the Jodways' takings claim was ripe because the Jodways sought compensation in state court but the defendants removed the case to federal court. A party's takings claim is ripe if the plaintiff brings the claim in state court, but the defendants remove the claim to federal court:

> [A] plaintiff cannot bring a takings claim in federal court without having been denied just compensation by the state; such a claim can come into federal court before the state has denied compensation only when the state or its political subdivision chooses to remove the case to federal court.[23]

A state waives *Williamson*'s ripeness requirement when it removes the case to federal court.[24]

Here, the defendants waived *Williamson*'s ripeness requirement by removing this case to federal district court. Therefore, this claim was ripe for review in the federal district court and the federal district court had subject matter jurisdiction over the Jodways' claims.

IV. TAKINGS CLAIM AGAINST BOYNE CITY

The Jodways contend that they are entitled to relief in their takings claims against Boyne City. We decline to review this issue because it is premised on the Jodways' success on the first issue. Because the trial court properly granted comity to the federal district court's order, Boyne City is not a party from whom the Jodways can recover.

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[21] *Id.* at 572.

[22] *Warren v City of Athens, Ohio*, 411 F3d 697, 708 (CA 6, 2005). See *Nasierowski Bros Investment Co v City of Sterling Heights*, 946 F3d 890, 893-894 (CA 6, 1991).

[23] *Sansotta v Town of Nags Head*, 724 F3d 533, 546 (CA 4, 2013).

[24] *Id.* at 544.

V. DISMISSAL OF THE JODWAYS' NUISANCE, NEGLIGENCE, AND TRESPASS CLAIMS AGAINST TRI-COUNTY EXCAVATING AND CAPITAL CONSULTANTS

A. STANDARD OF REVIEW

"This Court reviews de novo issue of law."[25] We also review de novo the trial court's ruling on a motion for summary disposition.[26]

B. CLAIMS AGAINST TRI-COUNTY EXCAVATING

1. LEGAL STANDARDS

Collateral estoppel precludes relitigation of issues on which a court has reached a valid final judgment.[27]

2. APPLYING THE STANDARDS

The Jodways assert that the federal district court improperly applied the Michigan Supreme Court's decision in *Fultz* when dismissing their claims of nuisance, negligence, and trespass against Tri-County Excavating. The Jodways appear to base this argument on success on the first issue, since they provide no authority under which this Court may review the propriety of a valid federal court order. As discussed above, the trial court properly enforced the federal district court's order. We therefore decline to determine whether the federal district court properly applied *Fultz*.

The Jodways also contend that they asserted nuisance in fact against Tri-County Excavating, as well as nuisance per se, but that the federal district court failed to address the claim. We decline to consider this issue. An issue is preserved if it is raised before, addressed, or decided by the trial court.[28] "We need not address issues first raised on appeal."[29] The Jodways have not properly preserved this issue by raising it before the trial court. Therefore, we decline to address it.

C. CLAIMS AGAINST CAPITAL CONSULTANTS

1. NEGLIGENCE

The federal district court also dismissed the Jodways' claim for negligence against Capital Consultants. For the same reasons as above, we decline to review this issue.

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[25] *DeCosta v Gossage*, 486 Mich 116, 122; 782 NW2d 734 (2010).

[26] *Travelers Ins Co*, 465 Mich at 205.

[27] *In re Forfeiture of $1,159,420*, 194 Mich App at 145; *City of Detroit*, 434 Mich at 356 n 27.

[28] *Polkton Charter Twp*, 265 Mich App at 95.

[29] *Id.*

2. NUISANCE

As stated above, the Jodways did not assert below that the federal district court failed to address a claim of nuisance in fact. Because the Jodways have not preserved this issue by raising it before the trial court, we decline to review it.

Regarding nuisance per se, the Jodways do not address the basis of the trial court's decision. A party abandons an issue if he or she does not raise it in the statement of questions presented.[30] Further, if a party does not address the basis of the trial court's decision, we need not even consider granting them relief.[31]

The Jodways contend in their statement of issues presented that the trial court improperly applied *Fultz* to their nuisance claims. However, the trial court dismissed the Jodways' nuisance claims against Capital Consultants because of the impossibility of awarding the Jodways relief. Because the Jodways do not address the basis of the trial court's decision, we conclude that they have abandoned this issue.

3. TRESPASS

The Jodways contend that the trial court improperly applied *Fultz* to their trespass claim. However, the trial court ultimately dismissed the Jodways trespass claim because they would be unable to provide any proof on damages at trial, not because *Fultz* barred the claim. Thus, we conclude that the Jodways have also abandoned this issue by failing to address the basis of the trial court's decision.

VI. SUPPLEMENTAL WITNESS LIST

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to impose discovery sanctions.[32] The trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes or when it makes an error of law.[33]

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[30] MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007).

[31] *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

[32] *KBD & Assocs, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 677; 816 NW2d 464 (2012).

[33] *Id.*; *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012).

B. LEGAL STANDARDS

The trial court has discretion to bar a witness or dismiss an action to sanction a party for failing to timely file a witness list.[34] Before deciding to bar a witness, the trial court should consider a variety of factors:

> Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful [sic] or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.[35]

The trial court should take particular care to consider a variety of factors and options before exercising this sanction if barring the witness will result in the dismissal of the plaintiff's claim.[36]

C. APPLYING THE STANDARDS

The Jodways contend that the trial court abused its discretion by striking their supplemental witness list. We disagree.

The trial court considered a variety of factors when ruling on Capital Consultants's, motion. The trial court noted that the Jodways did not provide authority to support their position that a party may retain a right to supplement a witness list in violation of a discovery order. The trial court inquired into whether the Jodways had adequately disclosed the witnesses during discovery to prevent surprise to Capital Consultants. The trial court found that the Jodways had a history of failing to comply with its orders, including discovery orders. The trial court found that the Jodways did not file supplemental answers to interrogatories regarding the new witnesses. The trial court also found that the case was at a "late stage." Finally, the trial court opined that it would be unreasonable to re-open discovery so that Capital Consultants could depose the new witnesses.

Our review of the lower court record discloses that the Jodways' assertion that they previously disclosed the witnesses during discovery is not entirely accurate. Neither the purported disclosure in the Jodways' answers to interrogatories, nor the stipulated discovery order, identifies the additional witnesses by name, indicates the subject of their proposed

[34] *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

[35] *Id.* at 32-33 (footnote citations omitted).

[36] *Id.* at 32.

testimony, or even indicates that the additional witness would act as witnesses. Similarly, Zanke-Jodway mentioned at deposition that Jim Harris had bid $279,000 on the house and that Monica Ross had done a market study concluding that the most she could get for the house was $350,000, but Zanke-Jodway did not identify either person as a potential witness.

Further, we are not convinced that the trial court's refusal to permit these witnesses to testify resulted in the dismissal of the Jodways' case. The trial court ultimately dismissed the Jodways' case because no witness could testify concerning the property's diminution in value caused by the trespass. The Jodways conceded at the hearing on the motion that Capital Consultants's motion to dismiss that part of the reduction in the property's value to $350,000 was due to adverse economic conditions. Even had the trial court not struck the Jodways' proposed witnesses, there is no indication that either proposed witness was competent to testify concerning the diminution in the property's value *caused by the trespass*.

We conclude that the trial court did not abuse its discretion when it struck the Jodways' supplemental witness list as a discovery sanction for failing to comply with its discovery orders. The trial court considered a variety of factors, including the Jodways' failure to comply with trial court orders, the prejudice to Capital Consultants, the lack of notice to Capital Consultants regarding the witnesses' proposed testimonies, and whether the Jodways attempted to timely cure the defect. The trial court did not need to consider further factors and options because striking the proposed witnesses did not result in the dismissal of the Jodways' case.

D. MOTION FOR RELIEF FROM JUDGMENT

The Jodways contend that the trial court erred in denying their motion for relief from judgment under MCR 2.612(C) because they had good cause to supplement their witness list. This argument utterly lacks merit.

By its language, MCR 2.612(C) applies to "a final judgment, order, or proceeding . . . ."[37] A final order is the first order dismissing the last remaining claims in this case.[38] The trial court's ruling regarding the Jodways' supplemental witness list did not dismiss the last remaining claim in the case. Therefore, it was not a final order and MCR 2.612(C) simply did not apply.

VII. MOTION IN LIMINE ON DAMAGES

A. PROPER MEASURE OF DAMAGES

The Jodways assert that the trial court incorrectly determined that the diminution in value of the property was the proper measure of damages for their claim of trespass against Capital Consultants. We conclude that the Jodways have waived this issue.

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[37] MCR 2.612(C)(1).

[38] MCR 7.202(6)(1)(*i*).

A party may not "create[] the very error that it wishes to correct on appeal[.]"[39] A party may not take a position before the trial court, take an opposite position before this Court, and expect to obtain relief.[40]

Here, at the hearing on Capital Consultants's motion to dismiss, the Jodways agreed that the proper measure of trespass damages was the property's diminution in value. Thus, if the trial court erred in determining the proper measure of damages, the Jodways' conduct at the hearing on the motion contributed to any error. We conclude that, by contributing to this error, the Jodways have waived our review of this issue.

B. WITNESSES AVAILABLE TO TESTIFY CONCERNING DAMAGES

The Jodways' next contend that the trial court erred by determining that the Jodways did not have a witness who could testify on damages because Zanke-Jodway, as a homeowner, is competent to offer testimony on the value of her own property. We decline to consider this issue because we conclude that the Jodways fail to address the basis of the trial court's decision.

Here, the trial court ruled that Zanke-Jodway was not competent to testify at trial concerning the diminution in value of the property because a lawyer may not testify on behalf of his or her client. The Jodways do not address this issue, but rather contend that Zanke-Jodway was competent to offer an opinion on the property's value because she owns it. As stated above, if a party does not address the basis of the trial court's decision, we need not even consider granting them relief.[41] We decline to address this issue because the Jodways do not address the basis of the trial court's decision.

VIII. CONCLUSION

We conclude that the federal district court did not lack subject matter jurisdiction to hear the Jodways' claims in federal court. We also concluded that the trial court did not abuse its discretion by striking the Jodways' supplemental witness list. We conclude that the Jodways have waived, failed to preserve, or abandoned the remainder of their claims on appeal.

We affirm. Defendants, as the prevailing parties, may tax costs.[42]

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

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[39] *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

[40] *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 737; 832 NW2d 401 (2013).

[41] *Derderian*, 263 Mich App at 381.

[42] MCR 7.219(A).

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: Ann Arbor’s ‘Footing Drain Disconnection Program’ Under Fire in Class Action Lawsuit