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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SECOND AMENDED BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS PURSUANT TO MCR 2.114

PRELIMINARY STATEMENT

The Plaintiffs, Anita Yu, John Boyer and Mary Raab, request sanctions pursuant to MCR 2.114 against the Defendant, City of Ann Arbor ("the City"), and its attorneys of record, Stephen K. Postema and Abigail Elias. Plaintiffs' Motion has been pending since it was first argued on August 27, 2014 before Hon. Judge Donald E. Shelton (ret.).[1]

The Plaintiffs respectfully submit that the City and its counsel have repeatedly filed documents and papers and made oral arguments in this case that contain material that is neither well-grounded in fact nor warranted by existing law or by any good faith argument for the extension, modification or reversal of existing law.

This motion is directed to the following City motions, papers and oral arguments:

(i) The City's "Brief in Support [sic] Motion for Summary Disposition for Lack of Subject Matter Jurisdiction, Because the Actions Are Time-Barred, for Failure to State Claims Upon Which Relief Can Be Granted and/or for Lack of Standing" ("City MSD Brief"), including Exhibits 4 and 6, and the oral argument thereof on November 20, 2014 ("City MSD Oral Argument"); [2] and

(ii) Exhibits 1 and 3 to "Defendant City of Ann Arbor's Motion to Dismiss for Failure to State Claims Upon Which Relief May Be Granted and for Lack of Subject Matter Jurisdiction" ("City Federal Rule 12b Brief"), and some short text quoted from pages 3 and 4 of the Motion Brief. [3]

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[1] The transcript of the August 27 hearing before Judge Shelton is attached as Exhibit A. The Plaintiffs' initial Brief in Support of Plaintiffs' Motion for Sanctions, dated August 20, 2014, is incorporated herein by this reference.

[2] The transcript of the City MSD Oral Argument ("MSD Tr.") is attached as Exhibit B.

[3] The City's MSD Brief is in the record as Exhibit "A" to the Plaintiffs' earlier Brief in Support of this Motion for Sanctions, dated August 20, 2014, and is incorporated herein by reference. The City filed its Federal Rule 12b Brief on March 24, 2014, in the United States District Court for the Eastern District of Michigan, which remanded the case to Washtenaw County Circuit Court by Order dated May 29, 2014 In

The Plaintiffs respectfully submit that specific City filings, evidence and/or oral arguments in this case have included an unusual number of instances of (i) material false statements of fact and of false factual premises; (ii) impermissible legal arguments based on such false statements and false factual premises; and (iii) omissions to include evidence or parts thereof, or to make statements of law or fact necessary to avoid the falsity of the statement or evidence itself, or of another statement, argument, assertion of fact or law, or item of evidence. The material in these City filings and oral arguments have been directed specifically to the issues that the City had made central to its arguments in support of its Motion for Summary Disposition. Of particular relevance, the City MSD Brief covered the issues of the City's legal authority under State law for FDDs (i) under State building, construction and plumbing codes, and the Stille-DeRossett-Hale Single State Construction Act and (ii) under an Administrative Consent Order (ACO-SW03-3) ("ACO") between the City and the Michigan Department of Environmental Quality ("MDEQ"), dated September 8, 2003.

Further, this Brief describes specific occasions on which the City and Ms. Elias, in particular, have argued one legal and factual case in court, yet another in extrajudicial settings, with Ms. Elias (also on behalf of the City) engaged in public, non-privileged statements and communications about many of the very same subjects. At oral argument of the City's MSD Motion, for example, Ms. Elias referred to one such extrajudicial activity—the City of Ann Arbor Sanitary Sewer Wet Weather Evaluation ("SSWWE") and its Citizens' Advisory Committee ("SSWWE CAC") apparently as evidence of "public input" into political decisions

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the interest of saving paper and costs, Plaintiffs have not attached the City's Federal Rule 12b Brief as an exhibit hereto. In federal court, this case was Case No. 2:14-cv-11129-AC-MKM (Hon. Avern Cohn); the full City Rule 12b Motion, Brief and Exhibits are, of course, available on Pacer.

[MSD. Tr. 19:2-19:6] The City's legal positions taken at the CAC for political purposes contrast sharply with those expressed in Court.

Due to limits on pages and expense, this Brief is not an exhaustive catalogue of the sanctionable materials in the City's papers in this case to date. This Brief alone, however, reveals a pattern in the City's filings and extrajudicial communications of deceptive and false statements of law and fact; fabrication of facts and factual premises; concealment from tribunals of the existence and content of material documents and facts; and deletion of material segments from a document offered by the City in evidence.

POINT I

STANDARD OF REVIEW

MCR 2.114(B) requires that every document of a party represented by an attorney be signed by at least one attorney of record. MCR 2.114(D) provides that, in signing the document, the signer certifies that:

> (1) he or she has read the document;
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact, and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"The filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions pursuant to MCR 2.114(E)." *Guerrero v. Smith,* 280 Mich. App. 647, 648; 761 NW2d 723 (2008). If the Court finds that the rule has been violated, the sanction is mandatory. *In re Goehring,* 184 Mich. App. 360, 367, 457 NW2D 375 (1990). Pursuant to MCR 2.114(F), sanctions can be imposed for frivolous claims and defenses.

By virtue of both MCR 2.113(A) and MCR 2.114(A), the rules governing the imposition of sanctions apply to "motions, affidavits and other papers" as well as pleadings. *Bechtold v.*

Morris, 443 Mich. 105, 108-09; 503 NW2D 654 (1993); *see also, Triplett v. Louise St. Amour,* 444 Mich. 170, 178; 507 NW2d 194 (1993); *Michigan Bank-Midwest v. Anderson,* 165 Mich. App. 630, 644; 419 NW2d 439 (1988).

POINT II

THE CITY'S MOTIONS AND PAPERS INCLUDE FALSE STATEMENTS, OMISSIONS AND DELETIONS ABOUT THE STATUS OF THE ACO, ABOUT THE CITY'S SANITARY SEWER OVERFLOW PREVENTION STUDY

The City's MSD Brief and the City's Federal Rule 12b Brief [4] both included arguments and exhibits, *inter alia,* concerning two very specific subjects. The first subject was the ACO entered into between the City and the Michigan Department of Environmental Quality ("MDEQ") on September 3, 2003, as authority for mandatory FDDs. Ms. Elias, in fact, **signed** the ACO for Mr. Postema, in her present capacity as Chief Assistant City Attorney. The second subject was the June 2001 "Sanitary Sewer Overflow Prevention Study" (the "SSO Study") issued by the "City of Ann Arbor Sanitary Sewer Overflow Task Force" (the "SSO Task Force"). Ms. Elias also signed both the City's MSD Brief and the City's Federal Rule 12b brief. Mr. Postema was counsel of record in federal court with Ms. Elias.

A. Omissions and False Statement Concerning the ACO

The texts of the City's arguments in its City MSD Brief and its Federal Rule 12b Brief about the ACO as authority for mandatory FDDs by the City were identical, except for the numbers of the exhibits referenced. Both arguments appear at the bottom of page 3 of each Brief in a footnote (footnote 7 in the City MSD Brief; footnote 9 in the City's Federal Rule 12b Brief). In the City MSD Brief, the City argued this key part of its case as follows:

[4] The City's filing in federal court are relevant and probative as to this Motion for Sanctions. To the extent that the specific omissions or false statements in the City's Federal Rule 12b Brief relating to the ACO and the SSO Study are the same as those in the City's MSD Brief and Oral Argument in this Court, they tend to indicate a pattern of conduct or a proclivity for dissembling on those specific subjects.

> Overflow events continued to June 2002 before the City and the MDEQ entered into the Administrative Consent Order (ACO) Plaintiffs refer to in their Complaint. (Complaint ¶22) The ACO, documenting the overflow events **and requiring FDDs**, is attached as Exhibit 4.[5]

[Emphasis added]. In this instance, the City specifically cited an official MDEQ Administrative Consent Order, which is in the public records of the City, *without any qualification* (that is, as a lawyer would be required to indicate in a case citation that the decision has been overturned). Plaintiffs submit that the City's words "requiring FDDs" clearly implied to both this Court and the Federal Court that the ACO was a document in existence and effect and that the plain meaning of "requiring FDDs" meant a requirement for FDDs that still applies to a program (the FDDP) described by the City as ongoing. Even if the question were asked whether the words actually meant "requiring FDDs in the past, but no longer," then the question should have normally been capable of resolution by reference to the documents referred to by the City as "the ACO" and attached to its Brief. In this case, the only document attached was a copy of the ACO itself.

In fact, MDEQ had long ago terminated the ACO, on November 3, 2009, at the request of the City on October 7, 2009, by means of a formal Notice of Termination (the "NOT"). A copy of the NOT is attached hereto as Exhibit E. The City and its attorneys of record did not see fit to mention the existence of the NOT, a material document, in their short arguments in the texts of two dispositive motions before the Presiding Judge; his predecessor, the Hon. Judge Donald E. Shelton (ret.); and the Honorable Avern Cohn, United States District Court Judge for the Eastern District of Michigan. They did not mention that the ACO had been a dead letter for almost five years. This was not a decision that was up to the City or its lawyers to make.

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[5] A copy of "Exhibit 4" to the City's MSD Brief is attached as Exhibit C hereto. A copy of the identical document, titled "Exhibit 1" to the Federal Rule 12b Brief, is attached hereto as Exhibit D.

Plaintiffs assert that this Honorable Court (and two other Tribunals) should, without question, have been apprised of the existence and contents of the NOT. Without it, the Plaintiffs were prejudiced by the City's obstruction of the Court's view, based on the parties' pleadings, briefs and oral arguments, of the historical sequence of the facts of the case and the relevance of the ACO as claimed authority by the City.

The Plaintiffs respectfully submit that the words "requiring FDDs" were and remain a knowing and material false statement of fact and law, with no good faith basis in fact or law. As evidence of the ACO "requiring FDDs," both "Exhibit 4" to the City MSD Brief and "Exhibit 1" to the City's Federal Rule 12b brief were false.[6]

The City and its attorneys had one last opportunity to correct the record as part of the City's MSD Oral Argument on November 20, 2014, but refused to do so. Instead, Ms. Elias argued to the Court as follows:

> The validity of the City's program **was recognized** in the Administrative Consent Order that the City and the DEQ entered into, to resolve that agency's regulatory complaint. The DEQ in that order **required the City to undertake a certain number of disconnects each year for a period of time.**

[MSD Tr. 8:5-8:8] [Emphasis added.] The City and Ms. Elias will not deny that they were well aware of the NOT before November 20, 2014. Without disclosure of the existence of the NOT to the Court, however, this odd language only served to reinforce the City's message that the ACO was still in effect. The persuasive force of arguments based on the ACO as authority for FDDs would have been defeated by a mere mention of the NOT by the City. It would have raised questions in this litigation about why the MDEQ's "recogni[tion]" of the "validity of the program" did not start until 2003 (when the ACO was signed by Ms. Elias and after the Plaintiffs' FDD construction) and why it ended in 2009 (when the NOT was signed). It

[6] It is also clear that the FDD's completed on the Plaintiffs' property in this case <u>preceded</u> the execution of the ACO. Thus, it was untrue to imply that the Plaintiff's FDD's were required by the ACO.

would also have made clear that the “period of time” for “a certain number of disconnects per year” had expired no later than November 2009 and, on information and belief, as early as 2007. With the NOT in view, it is in fact easy to tell that the two sentences are clearly historical. Concealment of the existence of the NOT appears to have been the point.

The City’s statements and arguments described above were frivolous and dishonest. Its evidence was false. This conduct is sanctionable under MCR 2.114 as to the City and its lawyers, as agents of the City. There is no proper purpose in court for such documents, and the presence of the false evidence and false statements identified above damages and endangers the record of these proceedings.

B. Omissions, Deletions and False Statements Concerning the SSO Study and SSO Task Force

As noted, the City also relied in its MSD Brief (and in its earlier Federal Rule 12b Brief) on the SSO Study in support of its argument, *inter alia*, about the public benefits of FDD construction. At the City’s MSD Oral Argument, Ms. Elias characterized as “an engineering study” [MSD Tr. 6:5-6:9] what she had specifically called at page 4 of the City MSD Brief, “The June 2001 Sanitary Sewer Overflow Prevention Report of CDM and the Citizen Advisory Task Force,” presumably to support the notion that FDDs are scientific.

Due to limitations on pages and expense, the discussion in this Brief is limited to only the two stated premises in the City’s argument described above, namely, that the study that produced the report was, in fact, an “engineering study” and that the title and issuer of the report were identified correctly by the City. Either question should have been answerable by reference to the “cited pages” [City MSD Brief at page 4, fn 9] from the “2001 Sanitary Sewer Overflow Prevention Report of CDM and the Citizen Advisory Task Force,” which the City stated in its MSD Brief that it had attached as “Exhibit 6.” *Id.* Plaintiffs suggest that when the City submits

to a court an excerpted document as evidence *in support of* a proposition in a brief, the court is entitled to rely on the City and its counsel in assuming that there is no material in the deleted portions that is *contrary* to the proposition in the brief.

In the instant case, the City's "cited pages" [MSD Brief at page 4, fn 9] included in "Exhibit 6" to its MSD Brief constituted a truncated version of the actual "Sanitary Sewer Overflow Prevention Study." (A copy of "Exhibit 6" to the City's MSD Brief is attached hereto as Exhibit F.) "Exhibit 6," most glaringly, included the "Initial Recommendations" from the SSO Study, but not the "Final Recommendations." It also omitted an Executive Summary and Sections A-C and J-L. As two clear examples of many others, one key passage and one exhibit deleted from the actual document would have disclosed to the Court that the "engineering study" was also a study of whether FDD construction—as "work on private property"—was within the "power" and "authority" of the City to do by mandate and to pay for with public funds.

This particular key deleted passage is the following part of a bulleted list headed "L3. Proposed Implementation Steps," on page L3:

> L.3 Proposed Implementation Steps
>
> Following is a description of the implementation steps needed.
>
> • 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.**
>
> • A second step would [sic] to be able to **provide a funding mechanism so that this work on private property can be paid for with public funds**. The available funding would control the schedule under which the work would proceed.
>
> • Next is the immediate disconnection of homes that have previously flooded and those homes that have a high potential for having basement flooding in the five study areas. This work would include significant amount [sic] of public information to support the program and **ensure that it is acceptable to early program participants**.

This deleted text itself shows that the SSO Study included a study of legal issues and social issues, and was not just an "engineering study," and that the issuer of the SSO Study had arguably concluded that the City **lacked** "power" to do "work on private property." A reasonable interpretation of the deleted text is that the recommendation to the City from the SSO Task Force was to obtain the "power" needed for "work on private property." (A Home Rule City, which is a creature of statute, can only exercise "power" it is given; it cannot create it.) The deleted text is quite plain that the City had no idea how to "provide a funding mechanism so that this work on private property can be paid for with public funds."

The deleted text also shows that the SSO Study participants had not come to a final judgment about the FDDP at all, and instead that a "significant amount of public information" would be necessary to "ensure that it is acceptable to the early program participants."

"Appendix Q," the key deleted exhibit, is a timeline for implementation of the FDDP after the issuance of the SSO Study. (A copy of "Appendix Q" to the SSO Study is attached hereto as Exhibit G.] "Appendix Q" raises questions on its face about the sequence of events leading up to the FDDs at the properties occupied by the Plaintiffs, whom the City admitted at the City MSD Oral Argument [MSD Tr. 7:24-7:25] were among the "earliest" "program participants." To the Plaintiffs, mandatory FDD construction has never been "acceptable."

Perhaps most notably, all the Tables of Contents, Appendices, Lists and Figures were for some reason deleted from the City's "Exhibit 6" version of the SSO Study. (A listing of the deleted Tables is attached hereto as Exhibit G.) Neither the Court nor any other reader would have been able to identify any of the material that had had been deleted. Instead, the City simply added a footnote, with a printed link to an online version of the whole report, without any indication of the materiality of its content.

The second premise of the cited SSO argument is that the title of the document excerpted in "Exhibit 6," and its issuer, are identified correctly in the text of the City MSD Brief and on the Cover Page of "Exhibit 6" as "The 2001 Sanitary Sewer Overflow Prevention Report of CDM[7] and the Citizen Advisory Task Force." In fact the title and the name of the issuer are not correct and the Plaintiffs suggest that this is not a slip or an error.

The "Citizen Advisory Task Force" in the title of the document from the Brief and the cover page for "Exhibit 6" ("Exhibit 3" in Federal Court) never existed.[8] At the City's MSD Oral Argument on November 20, 2014, Ms. Elias argued as if it did. She argued as follows concerning this body and its membership.

> Following the 1998 event, the City undertook **an engineering study** with input from a **citizen task force** to determine how to address the basement back-ups, as well as the overflows into the street and the river. The decision was made, **after input from the impacted residents who were on the task force**, as well as input from the general public, that the best way to remove the excess flow that was in the sanitary system, namely, the stormwater, was to do -- was to implement a footing drain disconnect program. This was **targeted at the five areas that had been impacted the worst in those 1998 and 2000 rain events**. **Those residents of those areas sat on the task force** and they were prioritized for the disconnects to be addressed.

[MSD Tr. 6:4-6:18] [Emphasis added.] The "task force" was referred to three times in this passage. The reference to "impacted residents who were on the task force" is vague, but the last two sentences are a clear falsehood. It is untrue that "[t]hose residents" (a reference to **all** the residents of the five Target Areas) "of five areas that had been impacted the worst" (which clearly would include the Plaintiffs) "sat on the task force and they were prioritized for the

[7] This is a reference to Camp Dresser McKee, Inc., the same entity referred to as "CDMI" in the Plaintiffs' complaint.
[8] A copy of the federal court exhibit, "Exhibit 3" to the City's Rule 12b Brief, is attached hereto as Exhibit I.

disconnects [sic] to be addressed." There has never been a body called a "Citizen Advisory Task Force" (or any "task force") for the FDDP on which all residents of target areas sat. The prioritizing she referred to in the City's MSD Oral Argument therefore never occurred. The CAC for the SSO Study consisted, as Ms. Elias knows, of one representative from each of the Target Areas—five residents. None of the Plaintiffs ever sat on a "Citizen Advisory Task Force" and pushed for mandatory FDDs in their homes.

POINT III

THE CITY FAILED TO DISCLOSE THE EXISTENCE AND CONTENT OF A NOVEMBER 7, 2014 LETTER FROM THE STATE BUREAU OF CONSTRUCTION CODES THAT IS MATERIAL TO THE ANN ARBOR FDD ORDINANCE

Attached hereto as Exhibit J is a copy of a letter to the undersigned attorney for Plaintiffs from the State Bureau of Construction Codes on November 7, 2014 ("BCC Letter"). The BCC Letter was in response to a complaint on October 27, 2014 ("BCC Complaint") "concerning the implementation by the City of Ann Arbor's Chief Development Official, Ralph Welton, of a requirement for mandatory disconnection of foundation drains from sanitary sewer lines in pre-1982 single family homes under Ann Arbor Ordinance 2:51.1." (A copy of the BCC Complaint appears at Exhibit K hereto.) The BCC Letter stated in relevant part as follows:

> Based upon our review, **it has been determined** that our agency has no authority to investigate your concerns regarding **the City of Ann Arbor's local ordinance requirements or enforcement of same.** The issues you raise within your complaint are **not regulated by the Stille-DeRossett-Hale Single State Construction Code Act, 1972 PA 230, Michigan Residential Code, the Michigan Plumbing Code and the Michigan Building Code.** The City's local ordinance falls beyond the scope of authority of this agency to address.

The BCC was very clear that the determination in the BCC Letter, quoted above, applied to "the enforcement of the City's requirement for mandatory disconnection of foundation drains from sanitary sewer lines in pre-1982 single family residences under Ann Arbor Ordinance 2:5.1

[sic].” Mr. Welton, who remained the Chief Development Official on November 7, 2014, the date of the BCC Letter, was copied by BCC.

The BCC letter pointedly put the City’s Chief Development Official on notice—while acting in the scope of his responsibilities for enforcement of State codes—that none of the State codes cited in the BCC Letter (as well as the Stille-DeRossett-Hale Single State Construction Act, MCL 125.1504, *et seq*., in its entirety) applied to FDDs under “the City’s local ordinance.” The copy to Mr. Welton put the City on notice of its existence and its contents negating the precise position taken by the City in its MSD Brief filed on June 9, 2014. In footnote 4 to the City’s MSD Brief, Ms. Elias had clearly argued for the City as follows:

> Installations must comply with the Michigan Plumbing Code; the Residential and Plumbing Codes are adopted under and part of the Single State Construction Code. MCL 125.1504.

The City, at its MSD Oral Argument, continued to maintain (with no mention of contrary authority in the City’s files) that foundation drain disconnections are required by State codes, but never disclosed either the existence or content of the BCC Letter.

Before the MSD Oral Argument, Ms. Elias was herself aware *from Mr. Welton* of at least the BCC Complaint. Mr. Welton sent the undersigned attorney for Plaintiffs an email on October 27, 2014, copying Ms. Elias, and stating that “I am in receipt of your emails and have forwarded them to the City Attorney’s office.” (A copy of the email is attached at Exhibit L.)

In Oral Argument on November 20, 2014, despite the BCC Letter, Ms. Elias again cited Michigan State building and construction codes, including the Plumbing Code and the Single State Construction Act, *at least eight times,* as requiring or authorizing FDDs or a program to require FDDs. At no time did Ms. Elias’s arguments disclose or take account of the existence or content of the BCC Letter, which had negated the City’s earlier argument in the MSD Brief concerning the Plumbing Code. Unless and until a change in BCC’s determination on November

7, 2014 as set forth in the BCC Letter, it remains the authoritative statement of the State's own position that such State building, construction and plumbing codes do not apply to FDDs under Ann Arbor's local ordinance.

With the City on notice of a copy of the BCC Letter to Mr. Welton, the City no longer had any good faith basis for its "plumbing code" arguments in its MSD Brief or at Oral Argument. The City did not mention the BCC Complaint or the BCC Letter in an attempt to distinguish the BCC Letter or otherwise address it.

On the contrary, the City was clearly aware of the currency of the building code issue at its MSD Oral Argument. Ms. Elias stated that "Plaintiffs now challenge what they--basically what they consider a retroactive application of the plumbing code to their properties." Nevertheless, without any mention of the BCC Letter, the City argued as follows:

> Since 19 -- since the early 1980s, the state plumbing code, which the City has to follow under the State Uniform Construction Code Act, the plumbing code does not allow footing drains to discharge to a sanitary sewer.

{MSD Tr. 6:23-7:2] There was no ambiguity in Ms. Elias's arguments about the State plumbing code. Her statements do not reflect a differing interpretation of the law. For example:

> The program required basically to have those homeowners bring their footing drain discharges into conformance with existing plumbing code, which has applied to all homes built since 1982 in Ann Arbor.

[MSD Tr. 7:25-8:4] Ms. Elias also referred later in her oral argument to the "State Single State Construction Code, which is what we rely on." [MSD Tr. 14:9-14:11]. By the MSD Oral Argument on November 20, without disclosing the BCC Letter and its contents and distinguishing it somehow, that statement was false and sanctionable. There was no good faith basis for it in fact or law. It specifically ignored and contradicted authority announced to the

City, directly to the City's chief code official, by BCC, the State agency with jurisdiction to interpret the specific codes cited in the City's arguments.

Rather than qualify or abandon the City's building code argument, Ms. Elias embellished it by adding specific details of the supposed plumbing code requirement:

> [O]ne of the elements of the FDD program was, if a property owner wanted it, the City would subsidize all or most of the cost of a footing drain disconnect. It's -- the amount that's reimbursed has risen over the years, **but it took care of the elements, or the required elements under the plumbing code for the disconnect to take place.**

[MSD Tr. 8:20-9:1]. The bolded statement is a fabrication. There is no such provision in the State Plumbing Code or under the Single State Construction Act. The "required elements under the plumbing code for the disconnect to take place" are also an apparent fabrication. Ms. Elias continued the City's MSD Oral Argument with the details of the supposed "required elements":

> [I]n other words, taking the pipe that went to the sanitary, installing a sump -- sump crock and a sump pump, which was sealed, and connecting that to a discharge that went either to yard, backyard or to the storm system.

[MSD Tr. 9:1-9:6] There is no provision, however, in any Michigan State plumbing, building or construction code concerning a "sump crock and sump pump, which was sealed" or stating that FDD discharges are to be directed "to yard, backyard or to the storm system."

Finally, Ms. Elias (as Ann Arbor Chief Assistant City Attorney) wrote an unprivileged, non-confidential seven-page "Memorandum to Citizen Advisory Commission [sic], SSWWE Project" (the "CAC Legal Memo"), dated November 25, 2014, a copy of which is attached as Exhibit M. In her public statement on behalf of her client at the CAC, Ms. Elias had already abandoned the entire premise of the City's later ACO arguments to this Court—that the City FDD Program has simply been implementing State building codes that have supposedly required mandatory FDDs since 1982.

Apparently addressing herself in the CAC Legal Memo (at page 2) to the question why enforcement of a 1982 plumbing code change purportedly requiring FDDs was not pursued by the City beginning in 1982, rather than in 2001, when the FDD Ordinance was enacted, Ms. Elias stated as follows:

> Even before 1987, Michigan's construction code prohibited connections of downspouts and footing or foundation drains to the sanitary sewer system. The City of Ann Arbor, like many other municipalities, **implemented a program to require disconnection of downspout discharges** to the sanitary sewer system. **Although footing drains also were supposed to be disconnected from the sanitary sewer system, that requirement was not actively pursued or enforced.**

[Emphasis added.] The last sentence of the statement, of course, contradicts any argument that the City has ever made in its papers or in Court—or extra-judicially and on the record—that FDD's were mandatory under a state construction code effective January 1, 1982. The BCC Letter (written a year later) makes untenable the City's arguments above that FDDs were ever required by Codes. Even if it were true that a state construction code required mandatory FDDs (it is not), this statement would be a frank admission by the City and Ms. Elias (on its behalf, but against the legal interest of the City and its residents) that enforcement of the FDD "requirement" was discretionary for 19 years until the FDD Ordinance was passed, implying that the City can amend a state code with a City Ordinance. BCC disagreed.

There is an additional gross falsehood as a premise in the argument. The Plaintiffs are aware that the City has encouraged residents to disconnect downspouts from the sanitary sewers as a means of removing roof drain flows from the sanitary sewer system. Other than in the CAC Legal Memo, however, the Plaintiffs have never heard from the City a claim of a mandatory downspout disconnection program, under which "footing drains also were supposed to be disconnected from the sanitary sewer system." Like the "Citizen Advisory Task Force" and the "required elements of the plumbing code," the mandatory downspout disconnection program

(with discretionary footing drain disconnections) is yet one more fabrication by the City for the purpose of winning an argument.

POINT IV:

THE CITY'S CITIZENS' ADVISORY COMMITTEE AGREED "THAT LEGAL ISSUES HAVE BEEN PLACED IN THE PARKING LOT" AND "THE CAC HAS AGREED TO CONSIDER FDDS LEGAL"

Before the CAC Legal Memo from Ms. Elias on November 25, 2014 (attached hereto at Exhibit M), she had held a non-public, in-person session at the CAC on November 12, 2014, about legal issues anticipated to be the subject of this litigation. The minutes of the November 12 meeting (showing Ms. Elias as a "SSWWE Project Team member") are attached as Exhibit N hereto.[9] The City's advocacy at the CAC for its legal positions, taken for political purposes, also included another in-person presentation by Ms. Elias, on January 9, 2014. That presentation is available on video at www.a2gov.org/stormwater and provides the public (including prospective jurors in this case) a very different narrative and set of legal arguments from those offered by the City and its attorneys of record before this Court.

The January 9, 2014 presentation by Ms. Elias was at a public meeting, Afterward, apparently on the basis of Ms. Elias's advocacy (as facilitated by City "public engagement" contractors), the CAC approved the City's legal position across the board and then voted to agree that, at the taxpayer-funded CAC, "legality" of FDDs would be "in the parking lot." Robert Czachorski, of City contractor OHM Advisors, Inc., is Project Manager of the SSWWE (including for the CAC). On February 22, 2014, Mr. Czachorski posted the following reminder for all CAC members at website for the CAC (known as "Basecamp"):

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[9] The Meeting Minutes from the Public Meeting of the CAC on January 9, 2014, at which Ms. Elias made a presentation of the City's extrajudicial legal positions, are attached as Exhibit O.

Robert Czachorski Sat, 22 Feb at 12:19pm

> Please recall that **legal issues have been placed in the parking lot** and the **CAC has agreed to consider FDDs legal unless they are found otherwise during this project**. While it is certainly possible that the legality issue may be reviewed by the courts at some point in the future, **the legal topic is not relevant to the objectives of this CAC.**

On February 23, 2014, in a post at the "legality thread" at the Basecamp website, Mr. Fleetham, the CAC facilitator, discussed the question whether the CAC's taxpayer-funded study of mandatory FDDs could be enjoined by a judge. Mr. Fleetham was a central figure in the SSWWE Study (including the legal review). The following, in relevant part, is Mr. Fleetham's post at the CAC Basecamp website, with clarifications in brackets:

> From: Charlie Fleetham
> Date: Sun, 23 Feb 2014 at 1:30pm
> ….
>
> 2. As far as I know, **the City Council is waiting for a CAC recommendation [about mandatory FDDs] by July [2014]** and has not initiated an effort to abort the SSWWE process. …
>
> 3. On Jan 9, the CAC **agreed to … take FDD legality off the table[.]**
>
> 4. Let's assume ***some court*** ruled that the Ann Arbor ordinance was illegal **and this ruling occurred within 120 days [that is, just before the** then-**scheduled** CAC **recommendation to Council in July]** why would this ruling prohibit **a committee of citizens** from **making a contrary recommendation**, especially in light of the fact that many hundreds of mandatory FDDs had been performed over the last decade?
>
> 5. [I]f this lawsuit asked for a suspension of the SSWWE, **would not the City likely appeal** this ruling (**especially considering the investment in the project**) and would not this appeal process play out **over a period of many, many months [that is beyond the stated 120-period?**
>
> 6. Again, assuming there is a lawsuit, why would a court not act **as so many courts have in this domain, order and/or wait until the conclusion of an engineering evaluation of the program before making a ruling?**
>
> … I just don't get how an **external body/individual other than Council**, can take consideration of continuing mandatory FDD off the table.

In other words, Mr. Fleetham, the CAC facilitator, appears to be describing a process in which the SSWWE CAC is in a race with the Judiciary to get a recommendation to City Council by the then-scheduled date of July 2014, on which the Council could act, before "some court" could enjoin the SSWWE "study" of mandatory FDDs.

On information and belief, the City will shortly submit the CAC's recommendations to the City Council. which event will be highly publicized, in addition to the publicity the City has conducted to dat. Plaintiffs are already deeply concerned at the degree and intentionality of the pre-trial publicity devoted to date to the CAC proceedings and to the conclusions and recommendations of a volunteer committee of non-lawyers before the pendency of this case and since the day it was filed. They are justifiably concerned about the past and future impacts on the jury pool for this case of the continued dissemination and publication by the City of information, particularly public benefit claims, that is not relevant to and thus inadmissible in Court in any inverse condemnation action based on permanent physical occupation.

As the Supreme Court held in *Electro-Tech v. H.F. Campbell Co.*, 445 N.W.2d 61, 433 Mich. 57 at fn 13 (Mich. 1989), "[i]t is also well established, however, that where governmental regulation results in a 'permanent physical occupation' of property, a taking will be found **'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.'"**

POINT V

RELIEF REQUESTED

The Plaintiffs herein clarify their prayer for relief as originally stated in their Motion for Sanctions.

The Plaintiffs seek monetary sanctions against the City and its attorneys of record, Mr. Postema and Ms. Elias, at least equal to the Plaintiffs' fees and costs occasioned by the continued burden in this case of protecting themselves from a seeming attack by the City on the record of these proceedings. Monetary sanctions, however, are insufficient in this case where the degree of damage to the record threatens the fair and efficient administration of justice, which requires a record where defects are at least identified and then corrected as part of the record.

The Plaintiffs respectfully suggest that further briefing of the Court by the Plaintiffs is necessary (i) as to the amount of such fees and costs attributable to burdens imposed upon the Plaintiffs by the City's violations of MCR 2.114(D) and (ii) as to a fuller accounting of other instances of sanctionable conduct by the City, Ms. Elias and Mr. Postema *materially affecting the record of the case*. The Plaintiffs would also support a hearing concerning the extent and nature of the damage to the record by the City and the more difficult question of assurances required from the City concerning its conduct in Court in the future. This is a not a case of a few mistakes and all the sanctionable material discussed in this Brief is in documents and oral arguments prepared and signed by Ms. Elias.

The sanctionable conduct in this case, and its effect on the record, is a problem of Constitutional dimensions, a subject that the Plaintiffs suggest be addressed by such additional briefing. In short, the City is a Defendant in an inverse condemnation case brought in accordance with *Williamson Cnt'y Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172, 105 S. Ct. 3108, 87 L. Ed2d 126 (1985). One of the core notions of the *Williamson* "state litigation requirement" is that a state takings plaintiff in Michigan has available a right to obtain Michigan Takings Clause Just Compensation through Michigan Taking Clause Due

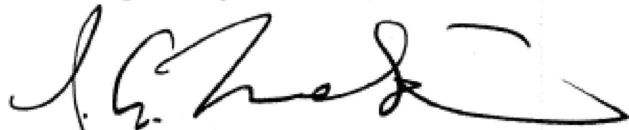
Process (in the form of a Michigan inverse condemnation action) that is guaranteed under the Article X, §2 of the Constitution of Michigan.

In directing Michigan state takings plaintiffs to Michigan state courts, *Williamson* depends on an implicit assumption of the availability of State Takings Claim Due Process. That necessarily assumes zealous advocacy by the local government, no doubt, but *Williamson* would appear to be at war with the idea of a municipal defendant that is alleged to have taken property without due process announcing publicly that "legality is in the parking lot" as to the very City actions challenged in Court.

Under *Williamson,* Michigan inverse condemnation is intended to satisfy the Due Process prong of Fifth Amendment Takings Clause. The City's actions have gone far beyond zealous advocacy and have placed real, direct and continuing burdens (in the form of a record with a growing number of instances of sanctionable content) on the ability of the Plaintiffs to pursue their rights to Due Process under the State Takings Clause.

Dated: February 5, 2015

Respectfully submitted,



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