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TO: City of Detroit Water and Sewerage Department Board of Water Commissioners

FROM: Debra N. Pospiech, Esq., Chief General Counsel

RE: Class Action Lawsuits from 2021 Rain Events

DATE: March 9, 2023

As this Honorable Body is aware, ten class action lawsuits were filed against the City of Detroit/Water and Sewerage Department and/or the Great Lakes Water Authority after the unprecedented, once-in-a-1,000-year rain event on June 25, 2021.¹ The lawsuits allege that defects in the sewage disposal system were known but not remedied in a timely manner and were the substantial proximate cause of flooding and basement backups. Plaintiffs also made claims for inverse condemnation, trespass, nuisance and gross negligence. Bush Seyferth, the City/DWSD's outside legal counsel, filed motions for summary judgment last summer. GLWA filed motions as well and other defendants filed concurrences. Hearing on the motions occurred on August 18, 2022, before the Honorable Annette Berry. Judge Berry issued her rulings on March 3, 2023, *in favor of defendants*. The judge dismissed all cases and all counts. Below is a summary with further details about the ruling.

Opinion & Order in the Ven Johnson Matters.

- Count I: Inverse Condemnation
 - The Court dismissed the claim and agreed with the City's argument that the plaintiffs failed to allege a single affirmative act by the City directly aimed at plaintiffs' property. On that basis, she held that plaintiffs could not establish that the City, through its actions or inactions, substantially caused diminution of property values or directed any action at plaintiffs.
- Count II: Trespass and Nuisance
 - Plaintiffs stipulated to the dismissal of these claims after the City moved for summary disposition.
- Count III: Gross Negligence against GLWA and John Does 1-10
 - The City is not a defendant to this claim. However, the Court dismissed the claim on government immunity grounds and also held that the individual defendants are afforded immunity too because the claims arise out of the performance of their duties.

¹ Additionally, approximately 30,000 property owners and insurance companies filed a notice of claim that they incurred damages due to the June 2021 rain event. The claims process proceeds on a parallel path to the lawsuits and 24,000 claims have been denied to date.

- Count IV: Sewage Disposal System Event Exception (SDSE) to Governmental Immunity
 - Regional System
 - Substantial Proximate Cause/Sewer Capacity
 - The Court agreed with the City and GLWA’s arguments that there is nothing defective about the 10-year, one-hour design standard.
 - While plaintiffs pointed to alleged defects in the regional system and recommended improvements, the Court found that the alleged failures only exacerbated the overburdening of the system. Put simply, even if the system operated at full capacity and the recommended repair improvements were made, the damage would still have occurred.
 - Legal Authority
 - The Court agreed with the City’s argument that, at the time of the rainstorm, it lacked the legal authority to repair any alleged defect in the regional system at the time of the events. Thus, plaintiffs cannot satisfy the SDSE exception to hold the City responsible for the alleged regional-system failures.
 - Local System Defects
 - The Court was persuaded by DWSD Chief Operating Officer Sam Smalley’s affidavit and found plaintiffs failed to rebut the affidavit with any known defect in the local system. On that ground, the Court held that plaintiffs failed to satisfy the SDSE exception.

Opinion & Order in the *Dubrulle* Matter.

- The *Dubrulle* opinion is a truncated version of the opinion in the Ven Johnson matters, because it only asserts a claim under the SDSE exception. While the *Dubrulle* opinion does address a few of the different arguments asserted by the their attorney David Dubin, the holdings are nearly identical.

Potential Next Steps for Plaintiffs - Reconsideration/Appeals

- Plaintiffs may move for reconsideration under MCR 2.119(F) by March 24, 2023. This tolls their deadline to file an appeal until the Court rules on the motion for reconsideration.
- Plaintiffs may appeal Judge Berry’s opinion as of right. They must file their claim of appeal by March 23, 2023, or if a timely motion for reconsideration is filed, 21 days after an order on the motion is entered. They then have 56 days after the claim of appeal and transcript are filed to file their opening brief. Afterward, we then have 35 days to respond.

Remaining Matters.

There is a pending class action lawsuit regarding the July 16, 2021, rain event and two outstanding insurance subrogation lawsuits. Your General Counsel concurs with outside counsel's strategy for next steps on these cases.

If any member of the Board would like a closed session to discuss these cases further, we are happy to schedule same. Outside counsel can be available as well.

Thank you for your attention.

DNP

cc: DWSD:

Gary A Brown, Director, DWSD
Matthew Phillips, Chief of Staff
Samuel Smalley, Chief Operations Officer
Istakur Rahman, Chief Financial Officer
Anil Gosine, Chief Strategy and Process Officer
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