STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

MICHAEL MCINTOSH,
Plaintiff,

v.

CITY OF ROCKFORD,
Defendant
_____/

Case No.: 17- 05218-CZ
Honorable Donald A. Johnston

MOTION

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MOTION FOR SUMMARY DISPOSITION

NOW COMES Plaintiff MICHAEL MCINTOSH, by counsel, and moves for full summary disposition pursuant to MCR 2.116(C)(10).

INTRODUCTION

This is a test case on the scope and applicability of powerful remedies provided under the *Freedom of Information Act*, MCL 15.231 et seq. Plaintiff made eight separate FOIA requests which were responded to with literally *hundreds and hundreds and hundreds* of blacked-out redactions (see **Exhibit D** to original Complaint), which Plaintiff was required to pay for out of his own pocket. See **Exhibit C** (requiring payment of $3,112.52 for, among other things, staff time to undertake wrongful redacting). After formally challenging the black-outs (which are deemed denials under FOIA) with a formal lawsuit, this Court ordered the City of Rockford to sustain the basis of its hundreds of

denials. Instead of doing so, the City concluded it could *not* sustain its burden under MCL 15.240(4), and instead produced the records ten months late—this time without any redactions. **Exhibit E.** In other words, it conceded the case that the redactions cannot be sustained upon challenge under MCL 15.240(4). The question now is what remedies are available to Plaintiff and what mandatory remedies are required against the City for hundreds of wrongful redactions. The remedy for the City's wrongful actions is literally a million dollar question due to the recent amendments under FOIA.

FACTS

On November 6, 2016, Plaintiff MICHAEL MCINTOSH made eight (8) requests under Michigan's *Freedom of Information Act* demanding the production of all of the following:

> *1. All correspondence, including notes, emails, letters, and texts, between the City of Rockford (including any of its employees, agents, officials, city council members, representatives, or attorneys) and 202 North Monroe, Prime Development, Rum Creek Properties, Inc. (including any of its employees, agents, officials, representatives, or attorneys), and/or David Klinger (including any of his employees, agents, officials, representatives, or attorneys) between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run or certain real property located in the City consisting of parcel numbers 41-06-36-403-40, 41-06-36-403-41, 41-06-36-403-42, 41-06-36-403-43, 41-06-36-403-49 (the "Property").*
>
> *2. All correspondence, including notes, emails, letters, and texts, between the City of Rockford (including any of its employees, agents, officials, city council members, representatives, or attorneys) and 202 North Monroe, Prime Development, Rum Creek Properties, Inc. (including any of its employees, agents, officials, representatives, or attorneys), and/or David Klinger (including any of his employees, agents, officials, representatives, or attorneys) between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run development in the City.*
>
> *3. All correspondence, including notes, emails, letters, and texts, by and between members of the City Council of the City of Rockford between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run development in the City.*

4. Any and all correspondence, including notes, emails, letters, and texts, by and between any employees of the City of Rockford and by and between any employees of the City of Rockford and members of the City Council of the City of Rockford between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run development in the City.

5. Any and all notes or memorandum of any employee of the City of Rockford or any member of the City Council of the City of Rockford between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run development in the City.

6. A copy of the Settlement Agreement referenced in the minutes of the City of Rockford City Council Meeting on January 11, 2016 between the City and Prime Development.

7. A copy of any deeds regarding the acquisition, transfer, or split of all or any part of the parcel identified as Parcel ID: 41-06-36-403-049.

8. Any and all purchase agreements, options to purchase, lease options, or any other real estate agreements between the City of Rockford and any individual or entity concerning all of or a portion of the parcel identified as Parcel ID: 41-06-36-403-049.

Exhibit A; see also Answer to First Am Compl, ¶7. The documents sought were in relation to the public controversy and legal action undertaken among Neighbors for Neighborhood, Monroe Street Properties, Rum Creek Properties, 202 North Monroe, and Defendant CITY OF ROCKFORD, see **Exhibit B**. Releasing these documents was politically problematic for the City given its ongoing litigation with citizens for the joint "chicanery" between Rockford and a condo developer. ***Id.***

In response to these eight (8) requests, Rockford demanded a FOIA fee of $3,112.52, claiming to have spent 35.075 hours searching for records and yet <u>*another*</u> exact 35.075 hours making copies, which is highly suspect and clearly implausible. **Exhibit C**. Nevertheless, Plaintiff paid the fee demanded in full to receive the documents. **Answer to First Am Compl, ¶10**. At no point, however, did Rockford cite or assert any exemptions within five (5) business days of the November 6, 2016 requests, MCL

15.235(5)(a). At no point, did Rockford give written notice providing a description of a public record or information on a public record that was to be separated or deleted, as required by MCL 15.235(5)(c). Instead, on December 13, 2016, Rockford produced documents containing *hundreds and hundreds* redactions without identifying or explaining any particular exemption or basis under FOIA or any other statute. This has been conceded via a 'no contest' response. **Answer to First Am Compl, ¶13**. Condensed reproduced copies of the documents were previously attached as **Exhibit D** to the original complaint and are not reattached due to its size (however, each page was given unique identifying numbers for easy reference by and among the parties and the Court). See **Answer to First Am Compl, ¶14**.

The individual pages were scanned and sequentially numbered in the exact sequence in which the documents were received from Rockford (but divided into lettered sections given the scanning size). **First Am Compl, ¶15.** Rockford purposely and intentionally then shuffled and jumbled the documents as to make the documents out of order and not in proper sequence. **Exhibit D.** Additionally, certain emails produced failed to include the attachments as part of the emails. **Exhibit J.**

In June 2017, Plaintiff brought suit challenging various aspects of the City's "response" to the eight (8) November 6, 2017 FOIA requests and thereafter sought entry of an *Evening News*[1] order. The Court granted the motion and commanded that—

> Defendant CITY OF ROCKFORD shall file with the Court and serve on Plaintiff's counsel a statement providing "complete particularized justification" as set forth in the six rules outlined in *Evening News* for each redaction made upon the records previously produced by the City (as filed with the Court as Exhibit D to Plaintiff's original complaint). For each redaction, the statement of particularized justification must identify the specific page identification number (i.e. PAGE ID: [####]) where each individual redaction is located, as to allow the Court and Plaintiff's counsel

[1] *Evening News Ass'n v City of Troy*, 417 Mich 481 (1983).

> the ability to locate the respective redaction and review the proffered complete particularized justification regarding the same.

Exhibit E. Rockford did not do so. Instead, it decided to produce copies of the prior produced documents *without* any redactions. **Exhibit F.** In essence, the City refused to meet its obligation to sustain its legal burden and instead produced the documents without redactions. **Exhibit G**. The discovery process has further resulted in Rockford conceding to having undertaken more than 500 redactions as part of its prior FOIA responses. **Exhibit I, ¶3.** This motion now follows.

FOIA PRINCIPLES

Michigan's appellate courts have repeatedly and consistently described FOIA as a "pro-disclosure statute," *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000); *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991), which must be interpreted broadly to ensure proper public access, *Practical Political Consulting, Inc v Sec of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010). FOIA is a manifestation of this state's public policy favoring public access to government-held information. *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999). FOIA provides "that 'a person' has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). "Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins*, *supra*, at 409; see also MCL 15.233(1). "Nothing in the FOIA prevents an agency from providing information it is willing to disclose." *Mager v Dep't of State Police*, 460 Mich 134, 138 fn8; 595 NW2d 142 (1999). But if it is going to withhold public documents, it has to meet its burden and it is a "heavy" one. *Penokie v Michigan Technological Univ*, 93 Mich

App 650, 663; 287 NW2d 304 (1979); *Kincaid v Dep't of Corrections*, 180 Mich App 176, 182; 446 NW2d 604 (1989)("The burden is a heavy one, and it is the duty of this Court to determine whether it has been met."). The burden is not on requester as he/she/it "need only make a showing in [] court that the request was made and denied" to bring a FOIA lawsuit. *Pennington v Washtenaw Co Sheriff*, 125 Mich App 556, 564-565; 336 NW2d 828 (1983). The burden is on the public body to sustain its decision to withhold the requested information from disclosure." *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 665; 753 NW2d 28 (2008); MCL 15.240(4); see also *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 109; 649 NW2d 383 (2002)(same). Justification of any claimed exemption must be more than "conclusory." *Evening News*, *supra*, at 503. There must be a "particularized justification." *Id.*; *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 167 (2002). A requester is also not required to allege or prove a specific public interest in disclosure or explain how the competing public interests are affected by the particular request, however, the parties will typically aid the trial court's balancing of the competing interests. *Tousignant v City of Iron River*, unpublished opinion of the Court of Appeals, issued Oct 13, 2016 (Docket No. 329893). The burden is on the public body to prove that a record is exempt under any public-interest balancing test. *Landry v City of Dearborn*, 259 Mich App 416, 420; 674 NW2d 697 (2003). If a public body fails to meet its entire burden, the court must order disclosure. *Detroit Free Press*, *supra*, at 169. A court "*shall* order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record." MCL 15.240(4).

Initial as well as future uses of information requested under FOIA are irrelevant in determining whether the information falls within exemption, as is the identity of the person seeking the information. *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006). A public body (and this Court) "should not consider the requester's identity or evaluate the purpose for which the information will be used." *State Employees Ass'n v Mich Dep't of Mgt & Budget*, 428 Mich 104, 121; 404 NW2d 606 (1987). The FOIA statute "does not require the requester to reveal why it needs or wants the information." *Id.* Additionally, FOIA also does not require a precise description of the actual records sought, as the statute's focus is on public access to information. *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 288; 713 NW2d 28 (2005).

As to FOIA exemptions, the public body "may" generally withhold any record that is expressly and actually exempt from disclosure. *Tobin, supra*, at 667; see also MCL 15.243(1)("may"); but see MCL 15.243(2)("shall"). Absent a validly invoked and proven exemption, the record must be disclosed in whole or in part. *Newark Morning Ledger Co v Saginaw County Sheriff*, 204 Mich App 215, 218; 514 NW2d 213 (1994). Partial disclosure (i.e. redacted public records) is required because FOIA itself imposes a duty on the public body to segregate, to the maximum extent practical, exempt and nonexempt material within each record. MCL 15.244(1)-(2); *Herald Co, Inc v Ann Arbor Pub Schs*, 224 Mich App 266, 275; 568 NW2d 411 (1997). Exemptions are not soft suggestions but instead "each FOIA exemption, by its plain language, advances a separate legislative policy choice." *Mich Federation of Teachers & Sch Related Personnel v Univ of Mich*, 481 Mich 657, 680 fn 63; 753 NW2d 28 (2008). The presumption is in

favor of full disclosure. E.g. *Booth Newspapers, Inc v Kent County Treasurer*, 175 Mich App 523, 551; 438 NW2d 317 (1989).

The Supreme Court in *Evening News* established a multi-step procedure to deal with disputed FOIA records to counterweigh the inherent problems of (1) only the government knowing what is in the requested documents, (2) the natural reluctance of the government to reveal anything it does not have to, and (3) the fact that courts normally look to two equally situated adversarial parties to focus and illuminate the facts and the law. *Evening News, supra*, at 515. The Supreme Court explained that—

> Where one party is cognizant of the subject matter of litigation and the other is not, the normal common-law tradition of adversarial resolution of matters is decidedly hampered, if not brought to a complete impasse. If one adds to this the natural tendency of bureaucracies to protect themselves by revealing no more information than they absolutely have to, it is clear that disclosure becomes neither automatic nor functionally obtainable through traditional methods.

Id., at 514. Thus, the three-part process was identified as controlling:

> 1. The court should receive a complete particularized justification as set forth in the six rules; or
>
> 2. the court should conduct a hearing *in camera* based on *de novo* review to determine whether complete particularized justification pursuant to the six rules exists; or
>
> 3. the court can consider "allowing plaintiff's counsel to have access to the contested documents *in camera* under special agreement '*whenever possible.*'"

Id., at 516 (emphasis added). The 'Six Rules' are :

1. The burden of proof is on the party claiming exemption from disclosure.
2. Exemptions must be interpreted narrowly.
3. The public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.
4. Detailed affidavits describing the matters withheld *must* be supplied by the agency.

5. Justification of exemption must be more than "conclusory", i.e., simple repetition of statutory language. A bill of particulars is in order.

6. The mere showing of a direct relationship between records… is inadequate.

Evening News, supra, at 503.

STANDARD OF REVIEW

A motion brought pursuant to MCR 2.116(C)(10) tests a claim's factual support. MCR 2.116(C)(10) permits summary disposition when, except as to damages, there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993); *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002).

ARGUMENT

Count 1

As for Count 1 of the First Amended Complaint, Plaintiff alleges Rockford produced documents containing redactions without the required written notice mandated by statute— a.) containing the required description of a public record or information on a public record that is separated or deleted; and b.) providing the written full explanation required pursuant to MCL 15.235(5)(d).

The law is clear: When responding FOIA requests, a public body may "grant the request;" or "issu[e] a written notice to the requesting person denying the request;" or "grant[] the request in part and issu[e] a written notice to the requesting person denying the request in part." MCL 15.235(2)(a)-(c). If denying a record in whole or in party, "the written notice *shall* contain

> (a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request
>
> ***

(c) A description of a public record or information on a public record that is separated or deleted pursuant to section 14, if a separation or deletion is made.
(d) A full explanation of the requesting person's right to do either of the following:

(i) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial.
(ii) Seek judicial review of the denial under section 10.

MCL 15.235(5)(a), (c), (d). The use of the word 'shall' in a statute indicates "a mandatory and imperative directive." *Costa v Cmty Emergency Med Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006). There is no discretion to ignore this command. See *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). Here, Rockford failed to comply with these legal requirements and violated FOIA by failing to include or issue the same. **Exhibit C**. Because of there is no material question of fact as to these violations, summary disposition is requested.

Count 2

As Count 2 of Plaintiff's First Amended Complaint, Plaintiff alleges that Rockford "produced responsive documents in a non-sequential order thereby making the usefulness and quality of the production request reduced or nullified." A copy of the documents originally produced by the City have been previously submitted into the court record as **Exhibit D** to the original complaint. A simple review of the same reveals papers completely out of order and produced in a non-sequential manner. As one example of many throughout **Exhibit D**, an email is produced (labelled as PAGE ID 2) from City Manager Young to Marcel Burgler which indicates that "attached is the traffic study conducted by Progressive." **Exhibit D, PAGE ID 2.** The following page, PAGE ID 3, is a diagram and PAGE ID 4 is a paper that jumps to page 42 of what appears to be the study.

At minimum, the first 41 pages of the study is missing and an unknown number of pages after page 42 is also missing. PAGE ID 5 is then another email.

Under FOIA, a "public record" means "a writing prepared, owned, used, in the possession of, or retained by a public body *in the performance of an official function, from the time it is created*." MCL 15.232(e). Plaintiff's FOIA requests sought "to inspect and copy or receive copies of" the certain "public records." **Exhibit A**. He did not request jumbled-up copies of public records organized in an unreasonable (and in some instances, unusable) manner. "Under the FOIA, an individual has the right to inspect, copy, or receive copies of a public record [not jumbled pages of public records] after providing the public body's FOIA coordinator with a 'written request that describes a public record sufficiently to enable the public body to find the public record.'" *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 280-281; 713 NW2d 28 (2005), citing MCL 15.233(1). A public record is a writing kept or otherwise "in the performance of an official function." MCL 15.232(e). The City does not use or hold jumbled-up versions of their records in their "official function." By producing scrambled pages of the documents, the City failed to actually produce the actual public records as held "in the performance of an official function, from the time it is created." As such, the City violated FOIA by failing to produce public records as kept in the performance of its official function. Anything else would thwart the purpose of FOIA. *Detroit Free Press v City of Warren*, 250 Mich App 164, 168-169; 645 NW2d 71 (2002) ("Under FOIA, citizens are entitled to obtain information regarding the manner in which public employees are fulfilling their public responsibilities."); *Manning v East Tawas*, 234 Mich App 244; 593 NW2d 649 (1999) (the FOIA is a manifestation of the state's public policy recognizing the need that public

officials be held accountable for the manner in which they perform the duties); *Thomas v City of New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002) (the FOIA was enacted "recognizing the need for citizens to be informed so that they may fully participate in the democratic process and thereby hold public officials accountable for the manner in which they discharge their duties"). Because of there is no material question of fact as to these violations, summary disposition is requested.

Count 3

As Count 3 of Plaintiff's First Amended Complaint, Plaintiff alleges certain documents were not produced as part of the FOIA responses from Rockford. Those documents were identified by Plaintiff's counsel as part of the discovery process. These documents include emails on Page ID 1260 ("*PUD Agreement Infrastructure.pdf*"), 1855 ("*DOC.pdf*"), 1883 ("*Dave Klinger.vcf*"), 1887 ("*202 North Monroe Street, NE (Rockford) P2 [01-0814].pdf*", 1907 ("*2015 02 05 Rockford Monroe Study.pdf*", 1909 ("*202 N Monroe Draft Diagram.pdf*"), 1926 ("*June 2015 Minutes.pdf*"), 1927 ("*15-0203_side elevation 4.pdf*"), 1949 ("*4400999_20150113_Rendering.pdf*" and "*Monroe Traffic Study.doc*"), 1951 ("*012215.pdf*"), 1952 ("*202 N Monroe Draft Diagram.pdf*"), 1961 ("*PUDSubmittal_20150113.pdf*" and "*14400999-C103-PREL-PUD.PDF*"), 1977 ("*PUDSubmittal_20150113.pdf*"), and 2021 ("*DEQ Public Hearing Notice.pdf*") of Exhibit D of the original Complaint. Each document identified above is an email which contain an attachment that was not produced or not produced in their entirety. Additionally, nine (9) others emails are known to exist which were not produced, and thereby casts doubt on the actual full and complete production of all responsive records. The nine emails include:

a. Email exchange with Lynn McIntosh and Michael Young, former city manager, and JScales, chairman of the Planning Commission at the time of the e-mail.

b. The Phase 1 section of the DIXON Environmental Report, on file at the MDEQ, is missing.

c. All attachments sent to Jerry Coon by Lynn McIntosh in September 2015, underscoring important matters regarding Brownfields, wetlands, and fair democratic process.

d. DEQ e-mail exchange with Lynn McIntosh, David Rasmussen, a public official (Planning Commissioner and chairperson of Rockford's Brownfield Re-development Authority), and Roman Wilson and David Bandlow of the DEQ.

e. PAGEID #3048: Missing page 2 of letter from DEQ re: Brownfield Plan November 2016.

f. PAGEID #3294: Missing first page of this letter from city planner, Paul LeBlanc from LSL Planners

g. Key e-mail exchange with Kimberly Carew, another resident of Rockford, whose questions regarding Public Hearings were answered by former city manager, Michael Young.

h. Copies of letters sent to Mr. and Mrs. Carew to invite them to come "talk to the manager and the mayor to get the facts."

i. Emails sent to the former city manager, Michael Young, regarding the city's removal of signs placed on residents' yards.

The Court is requested to grant summary disposition and order disclose of all these documents as requested by Plaintiff. See **Exhibit A**.

Count 4 - 204

As Counts 4 through 204 of Plaintiff's First Amended Complaint, Plaintiff alleges *at least* 200 separate instances of wrongfully redacted information which it was not entitled to be redacted under Michigan's *Freedom of Information Act*. Redaction is only appropriate when information falls within a specific FOIA exemption. *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 304; 565 NW2d 650 (1997). Rockford has the

legal burden to sustain its redactions. MCL 15.240(4). Otherwise, "a public body must disclose all public records that are not specifically exempt" under FOIA—there is no wiggle room. *King v Mich State Police Dep't*, 303 Mich App 162, 176; 841 NW2d 914 (2013). Via discovery, Rockford concedes it undertook more than *500* instances of redactions which it later, as part of this suit, removed and produced following the issuance of the *Evening News* order. See **Exhibits E - I**. However, Rockford legally cannot claim these counts are rendered completely moot by the post-lawsuit release of the non-redacted documents to Plaintiff. "The mere fact that plaintiff's substantive claim under the FOIA was rendered moot by disclosure of the records after plaintiff commenced the circuit court action is not determinative of plaintiff's entitlement to fees and costs under MCL 15.240(6)." *Amberg v City of Dearborn* (citing *Thomas v New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002)). Moreover, other remedies are further required under the new 2014 amendments to FOIA.

Attorney Fees & Costs

"If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court *shall* award reasonable attorneys' (sic) fees, costs, and disbursements." MCL 15.240(6). "[T]he prevailing party's entitlement to an award of reasonable attorney fees ... includes *all* such fees ... related to achieving production of the public records." *Meredith Corp v Flint*, 256 Mich App 703, 715; 671 NW2d 101 (2003)(emphasis in original). "A party prevails in the context of an FOIA action when the [lawsuit] was reasonably necessary to compel the disclosure, and the action had a substantial causative effect on the delivery of the information to the plaintiff." *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d

685 (2002). When a public body like the City of Rockford redacts or withholds information, the burden is on them to "to sustain its denial." MCL 15.240(4); see also *Mich Federation of Teachers, supra, at* 665; *Federated Publications, supra, at* 109; 649 NW2d 383 (2002)(same). The justification must be more than "conclusory;" there must be a "particularized justification." *Evening News*, *supra*, at 503.

Here, the City of Rockford failed to sustain its burden by simply giving up only after being ordered to provide the "complete particularized justification" required via the *Evening News* order. See **Exhibits E and F**. This lawsuit (and specifically the *Evening News* order) was reasonably necessary to compel the full disclosure (which it did, see **Exhibits F and G**) and had a substantial causative effect on the delivery of the information to Plaintiff from the City of Rockford, see **Exhibit H**. As such, Plaintiff is entitled to an award of attorney fees and costs under MCL 15.240(6) and *Thomas*.[2]

Disbursements

In addition to the traditional costs and attorney fees, Plaintiff is also entitled to an award of "disbursements." MCL 15.240(6). A disbursement is defined as "funds paid out." See http://www.merriam-webster.com/dictionary/disbursement. As such, it was clearly the goal of the Michigan Legislature to prevent a party from having to pay a single dime of court and out-of-pocket expenses when successful in obtaining relief under FOIA. As part of the FOIA fulfillment, the City demanded $790.32 in labor costs to undertake redacting. **Exhibit C**. We now know that no redactions should have or could have

[2] There is two ways to determine this amount. The first is via a typical post-judgment motion. The second is via the Bill of Costs method. This Court has the authority to cause entry of the award of attorney fees, costs, and disbursements via a bill of costs, as MCL 600.2405 provides that "[t]he following items may be taxed and awarded *as costs* unless otherwise directed:… (2) Matters specially made taxable elsewhere in the statutes or rules….[and] (6) Any attorney fees authorized by statute or by court rule." The Court's preferred methodology is requested.

occurred. Therefore, Plaintiff is also entitled to the recoupment of $790.32 as a disbursement under MCL 15.240(6). As such, awarding all disbursements (which are not otherwise attorney fees or costs) is requested, including the paid out amount of $790.32.

Punitive Damages (First Impression Issue)

The real issue of this case is the application of reworked additional mandatory remedies following the 2014 amendments to FOIA, effective July 1, 2015.[3] After July 1, 2015, this Court "shall award… punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record." MCL 15.240(7). Punitive damages relief is not technically a completely new remedy in light of the 2015 amendments, but merely became easier to obtain. The *pre*-2015 statute read—

> *If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record*, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record.

The *post*-2015 statute (i.e. current and operative statute) reads:

> If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. *The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record.* The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

MCL 15.240(7). In short, the Legislature has, by the 2014 amendment, decoupled the punitive damages remedy from the need for a prerequisite finding of a public body having

[3] See 2014 PA 563.

acted "arbitrarily and capriciously" under the prior superseded statute. Moreover, Plaintiff argues as a matter of first impression that a requester is entitled to a *separate* award of $1,000 for *each* public record that it was failed to be properly produced without redactions. The language of the statute provides $1,000.00 to the person seeking the right to inspect [or receive a copy of] *a* public record. Here, Plaintiff sought copies of *multiple* public records, at least 200 in number. **Exhibit A.** Under the plain language of the statute, for *each* public record Plaintiff was denied access via wrongful blackening redactions, he is entitled a separate award of $1,000.00. By Plaintiff's simple rough tally via **Exhibit D**, this means he is entitled, in addition to any actual or compensatory damages, to at least 200 awards of $1,000.00 each, totaling $200,000.00.

This amendment is no accident. FOIA has long been abused by governments and their officials to hide public records (often times that are embarrassing or smoking guns) that they themselves solely hold. E.g. Brianna Owczarzak, *Mother Charged $77,000 From School For Access To Emails Involving Son*, WNEM TV5, July 1, 2015, *available at* http://www.wnem.com/story/29451377/mother-charged-77000-from-school-for-access-to-emails-involving-son. The Legislature is correcting those wrongful acts of self-serving non-transparency and preventing the improper withholding of public information with strong new punitive remedies beyond mere payment of attorney fees and costs. Punitive damages are now mandatory. MCL 15.240(7). The Legislature is presumed to have intended the meaning it plainly expressed, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and clear statutory language must be enforced as written, *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). We cannot presume the Legislature meant one thing when it actually did another. *People v Feezel*, 486 Mich 184,

211; 783 NW2d 67 (2010)("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws."); *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001)("When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed."). A court is not free to rewrite an amended and stronger-worded statute because the end result may be subjectively unpalatable, and that "the object of judicial statutory construction is not to determine whether there are valid alternative policy choices that the Legislature may or should have chosen, but to determine from the text of the statute the policy choice the Legislature actually made." *People v McIntire*, 461 Mich 147, 157; 599 NW2d 102 (1999). "Contrary judicial gloss" is strictly prohibited. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). The award of punitive damages to Plaintiff is required and requested.

Civil Fines (First Impression Issue)

The 2014 amendment also added two mandatory civil fines against guilty public bodies, separately from and additional to all others types of relief discussed above. MCL 15.240(7) provides—

> If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury.

Additionally, MCL 15.240b provides—

> If the court determines, in an action commenced under this act, that a public body willfully and intentionally failed to comply with this act or otherwise acted in bad faith, the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than $2,500.00 or more than $7,500.00 *for each*

> *occurrence*. In determining the amount of the civil fine, the court shall consider the budget of the public body and whether the public body has previously been assessed penalties for violations of this act. The civil fine shall be deposited in the general fund of the state treasury.

A public body's actions are not necessarily arbitrary or capricious *if* the "decision to act was based on consideration of principles or circumstances and was reasonable, rather than 'whimsical.'" *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 126; 454 NW2d 171 (1990). The actions of the City in this case warrants both mandatory fines for the lack of any legal consideration of principles or circumstances. The City has conceded that more than *500* instances of improper redactions while having no basis to redact from the eight (8) FOIA requests made on November 6, 2016. **Exhibit I, ¶3.** It failed to sustain its original denials. By not having any basis to sustain its hundreds and hundreds of [wrongful] redactions, its actions are a willful and intentional failure to comply with FOIA or otherwise undertaken in bad faith (due to the pending lawsuit, see **Exhibit B**). Because the City acted so contrary to the FOIA statute with callous indifference, a civil fine of not less than $2,500.00 or more than $7,500.00 *for each occurrence* is now required. MCL 15.240b. At the *minimum* level required, a fine of at least 500 violations at $2,500.00 per occurrence, plus the $1,000.00 fine under MCL 15.240(7) equals a whopping fine of $1,251,000.00 (but can be up to $3,751,000.00).

This penalty is undoubtedly very bitter medicine to cure the City's violations of FOIA. But the Legislature was expressly trying to eliminate the very intentionally wrongful acts which the City undertook—improper redacting because it politically could on a retaliatory basis without any other choice to the requester. This large penalty is to curb the natural reluctance of the government to reveal anything it does not have to. *Evening*

News, supra, at 515. This is not the first time this natural reluctance has shown its ugly existence in Michigan. E.g. Kathy Hoekstra, *What Price Information? Try $7 million*, MACKINAC CENTER FOR PUBLIC POLICY, Nov 10, 2009, *available at* https://www.mackinac.org/11313. And it is not the first time the City resorted to questionable and illegal tactics in the Monroe Street Project. See **Exhibits B and K**. Courts may not inquire into the wisdom or fairness of a statute enacted by the Legislature, *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420, 430; 617 NW2d 536 (2000), and instead Courts must apply the law *as written*, *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). In this instance, the problem for the City is the Legislature's requirement of a fine *for each occurrence* and there are at least, by its own concessions, over 500 separate redactions and each redaction is an occurrence.

RELIEF REQUESTED

WHEREFORE, Plaintiff, through counsel, requests this Court grant summary disposition and issue an order or judgment

a. determining that Defendant CITY OF ROCKFORD failed to properly, lawfully, and/or timely assert any applicable FOIA exemptions at the time of its production on December 13, 2016;

b. determining that Defendant CITY OF ROCKFORD violated MCL 15.235(5), MCL 15.235(5)(c), and MCL 15.235(5)(d);

c. compelling the production of all non-produced records (Count III) withheld by Defendant CITY OF ROCKFORD;

d. finding each and every wrongful redaction to be a separate violation of Michigan's *Freedom of Information Act*;

e. commanding the recoupment of $790.32 as a disbursement in favor of Plaintiff;

f. awarding punitive damages of $1,000 for each and every record containing one or more wrongful and illegal redaction(s) in an amount of consisting of at least $200,000.00 in favor of Plaintiff;

g. imposing civil fines authorized by Michigan's *Freedom of Information Act* in the amount of at least $1,251,000.00 payable to the State of Michigan; and

h. awarding all reasonable attorney fees, costs, and disbursements required by MCL 15.240(6) in an amount to be determined by further proceedings;

Date: January 4, 2018

RESPECTFULLY SUBMITTED:

Philip L Ellison

OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Petitioner/Plaintiff
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com

***Electronic signature authorized by MCR 2.114(C)(3) and MCR 1.109(D)(1)-(2)*

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

4th day of January, 2018.

Philip L Ellison

PHILIP L. ELLISON
Attorney at Law

November 6, 2016

City of Rockford
Attn: Christine M. Bedford, Clerk/FOIA Coordinator
Office of the City Clerk
7 South Monroe Street
Rockford, MI 49341
cbedford@rockford.mi.us

Dear Ms. Bedford:

Re: FOIA Request

Pursuant to the Freedom of Information Act, MCL 15.231 *et seq*., I am formally requesting the opportunity to inspect and copy or receive copies of the following public records:

1. All correspondence, including notes, emails, letters, and texts, between the City of Rockford (including any of its employees, agents, officials, city council members, representatives, or attorneys) and 202 North Monroe, Prime Development, Rum Creek Properties, Inc. (including any of its employees, agents, officials, representatives, or attorneys), and/or David Klinger (including any of his employees, agents, officials, representatives, or attorneys) between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run or certain real property located in the City consisting of parcel numbers 41-06-36-403-40, 41-06-36-403-41, 41-06-36-403-42, 41-06-36-403-43, 41-06-36-403-49 (the **"Property"**).

2. All correspondence, including notes, emails, letters, and texts, between the City of Rockford (including any of its employees, agents, officials, city council members, representatives, or attorneys) and 202 North Monroe, Prime Development, Rum Creek Properties, Inc. (including any of its employees, agents, officials, representatives, or attorneys), and/or David Klinger (including any of his employees, agents, officials, representatives, or attorneys) between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run development in the City.

3. All correspondence, including notes, emails, letters, and texts, by and between members of the City Council of the City of Rockford between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run development in the City.

4. Any and all correspondence, including notes, emails, letters, and texts, by and between any employees of the City of Rockford and by and between any employees of the City of Rockford and members of the City Council of the City of Rockford between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run development in the City.

5. Any and all notes or memorandum of any employee of the City of Rockford or any member of the City Council of the City of Rockford between October 1, 2014, and November 3, 2016 regarding the proposed Tamarack Run development in the City.

6. A copy of the Settlement Agreement referenced in the minutes of the City of Rockford City Council Meeting on January 11, 2016 between the City and Prime Development.

7. A copy of any deeds regarding the acquisition, transfer, or split of all or any part of the parcel identified as Parcel ID: 41-06-36-403-049.

8. Any and all purchase agreements, options to purchase, lease options, or any other real estate agreements between the City of Rockford and any individual or entity concerning all of or a portion of the parcel identified as Parcel ID: 41-06-36-403-049.

I look forward to receiving your response to this request within five (5) business days, pursuant to MCL 15.235.

Thank you for your cooperation with this request. If you have any questions or need any clarifications, please feel free to contact me.

Mike McIntosh
139 N. Monroe
Rockford, MI 49341
616.745.6559

Judge accuses Rockford, developers of 'chicanery' in controversial condo project

By **John Agar | jagar@mlive.com**
Follow on Twitter
on June 07, 2016 at 9:00 AM, updated June 07, 2016 at 9:08 AM

ROCKFORD, MI - A judge has accused the City of Rockford and a developer of "chicanery" to gain approval for a controversial condominium project.

Kent County Circuit Judge Donald Johnston said it appears the city colluded with the developer of the 51-unit project and "cleverly undermined (opponents') democratic rights."

The city approved a zoning change for **Tamarack Run** by a 3-2 vote but needed a supermajority - at least four votes - after nearby property owners filed a protest petition.

When the supermajority could not be reached, Monroe Street Properties LLC and others filed a federal lawsuit against the city to challenge the denial of its re-zoning application.

A 3-2 vote to settle the lawsuit included a provision that the property would be re-zoned from residential to planned-unit development, or PUD, essentially approving the project by simple majority, the judge said.

"Sounds to me as though the City is up to some chicanery, that they couldn't get the majority vote for something they wanted, or they had a majority vote, but not a supermajority, and that they took this somewhat circuitous and vaguely devious means to get the re-zoning approved without complying with Michigan law," Johnston said, according to a transcript of an April hearing.

"And isn't that really a surreptitious means of subverting Michigan law?"

Why there's opposition to a downtown Rockford condo project

U.S. District Judge Janet Neff, who denied opponents the right to intervene in the federal case, earlier this year approved the consent judgment between Rockford and the developers.

Caleb and Kristine Sower, other property owners and **Neighbors for Neighborhood Inc**., **who oppose the condo project**,had filed a motion for preliminary injunction in Kent County Circuit Court.

They argued that the zoning issue was a state matter, not federal.

They sought a declaration that the city's settlement of the federal case is unlawful and void.

"This was collusion. We knew it from the beginning," attorney Michael Homier, representing opponents, said according to transcripts.

Developer sues Rockford over condo rejection

The city and developers responded by filing for an injunction in federal court to halt the state court action. They contend the state court filing is simply an effort to undermine the federal court's consent judgment.

A hearing is set for June 20 in U.S. District Court in Grand Rapids.

Both sides laid out their arguments in Kent County Circuit Court, with transcripts filed in the federal case.

Johnston said neighbors of the development appeared to have a "legally good claim" but he rejected their call for a preliminary injunction because the federal judge has already approved the judgment.

Attorneys Michael Bogren, representing the city, and Robert O'Brien, representing Monroe Street Properties and others with the proposed development, denied that any "chicanery" was involved.

They said the opponents are trying to interfere with a valid federal court judgment.

Bogren said City Council acted to protect the interests of the city while facing a potentially costly lawsuit.

They had to decide whether to defend a claim that the decision was "arbitrary and capricious," he said.

Johnston wasn't moved.

"Well, your Honor, I mean we had to make a judgment as to what's in the city's best interest, not a handful of residents, but the city as a whole," Bogren said.

The judge said the agreement "just has a bad smell to it."

Bogren responded: "Well, I would suggest that the residents of the City of Rockford would find it stinks a lot more if they end up having to foot a multi-million dollar judgment."

O'Brien said the project was the subject of numerous public hearings, with input by the state Department of Environmental Quality. He said the opponents have been heard, and still have a voice in the legal battle.

Neighbors for Neighborhood and No to Monroe Condo have complained about high-density housing and environmental concerns.

David Klinger and three business entities - Monroe Street Properties, Rum Creek Properties and 202 North Monroe - originally filed a filed a lawsuit in Kent County Circuit Court after the zoning amendment failed to gain the supermajority.

The case was then moved to federal court.

The developers said they spent $150,000 after the city assured them that the property would be rezoned. The Planning Commission had approved an application for re-zoning and preliminary and final development plans.

Grand Rapids developer Marcel Burgler's project would include eight 1,400-square-foot ranch-style units, 15 1,100-square-foot townhouses and, in a three-story building at the east end of the property, 28 flats measuring 900 square feet.

The land was formerly industrial property with contamination from the former Burch Body Works. The developers have agreed to pay $400,000 for environmental cleanup, city officials say.

John Agar covers crime and other issues for MLive*E-mail John Agar:* ***jagar@mlive.com*** *and follow him on Twitter at* ***twitter.com/ReporterJAgar***

City Staff: Keep original and provide copies of both sides of each sheet, along with the City's Procedures and Guidelines and Public Summary, to requestor at no charge.

City of Rockford, Kent County
7 South Monroe Street
Rockford, MI 49341
Phone: (616) 866-1537

D

EXHIBIT
C
OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

Freedom of Information Act Request Detailed Cost Itemization

Date: 12-13-16 Prepared for **Request No.:** 2 Date Request Received: 11/7/16 11/29/16 Deposit

The following costs are being charged in compliance with Section 4 of the Michigan Freedom of Information Act, MCL 15.234, and the City's FOIA Procedures and Guidelines.		
1. Labor Cost for Copying / Duplication This is the cost of labor directly associated with duplication of publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on non-paper physical media or through the Internet or other electronic means as stipulated by the requestor. This shall not be more than the hourly wage of the City's lowest-paid employee capable of necessary duplication or publication in this particular instance, regardless of whether that person is available or who actually performs the labor. These costs will be estimated and charged in 15-minute increments. All partial time increments must be rounded down. *If the number of minutes is less than one increment, there is no charge.* **Hourly Wage Charged: $**_____ **Charge per increment: $**_____ **OR** **OR** **Hourly Wage with Fringe Benefit Cost: $** 28.67 Multiply the hourly wage by the percentage multiplier: 50 % (*up to 50% of the hourly wage*) and add to the hourly wage for a total per hour rate. **Charge per increment: $** 28.67 ☐ Overtime rate charged as stipulated by Requestor *(overtime is not used to calculate the fringe benefit cost)*	To figure the number of increments, take the *number of minutes:* ____, *divide by 15 -minute increments, and round down. Enter below:* **Number of increments** x 35.075 =	**1. Labor Cost** $ 1005.60
2. Labor Cost to Locate: This is the cost of labor directly associated with the necessary searching for, locating, and examining public records in conjunction with receiving and fulfilling a granted written request. **This fee is being charged because failure to do so will result in unreasonably high costs to the City that are excessive and beyond the normal or usual amount for those services compared to the City's usual FOIA requests, because of the nature of the request in this particular instance, specifically:**_____ The City will not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating, and examining the public records in this particular instance, regardless of whether that person is available or who actually performs the labor. These costs will be estimated and charged in 15-minute time increments; All partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.* **Hourly Wage Charged: $**_____ **Charge per increment: $**_____ **OR** **OR** **Hourly Wage with Fringe Benefit Cost: $** 28.67 Multiply the hourly wage by the percentage multiplier: 50 % (*up to 50% of the hourly wage*) and add to the hourly wage for a total per hour rate. **Charge per increment: $** 28.67 ☐ Overtime rate charged as stipulated by Requestor *(overtime is not used to calculate the fringe benefit cost)*	To figure the number of increments, take the *number of minutes:* ____, *divide by 15 -minute increments, and round down. Enter below:* **Number of increments** x 35.075 =	**2. Labor Cost** $ 1005.60

3a. Employee Labor Cost for Separating Exempt from Non-Exempt (Redacting):

(Fill this out if using a City employee. If contracted, use No. 3b instead).

The City will not charge for labor directly associated with redaction if it knows or has reason to know that it previously redacted the record in question and still has the redacted version in its possession.

This fee is being charged because failure to do so will result in unreasonably high costs to the City that are excessive and beyond the normal or usual amount for those services compared to the City's usual FOIA requests, because of the nature of the request in this particular instance, specifically: personal emails

This is the cost of labor of a **City employee**, including necessary review, directly associated with separating and deleting exempt from nonexempt information. This shall not be more than the hourly wage of the **City's lowest-paid employee** capable of separating and deleting exempt from nonexempt information in this particular instance, regardless of whether that person is available or who actually performs the labor.

These costs will be estimated and charged in 15-minute time increments; All partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.*

Hourly Wage Charged: $_____

OR

Hourly Wage with Fringe Benefit Cost: $ 65.86

Multiply the hourly wage by the percentage multiplier: 50 % (*up to 50% of the hourly wage*) and add to the hourly wage for a total per hour rate.

Charge per increment: $_____

OR

Charge per increment: $ 65.86

☐ Overtime rate charged as stipulated by Requestor *(overtime is not used to calculate the fringe benefit cost)*

To figure the number of increments, take the *number of minutes:* ____, *divide by 15-minute increments, and round down. Enter below:*

Number of increments

x 12 =

3a. Labor Cost

$ 790.32

3b. Contracted Labor Cost for Separating Exempt from Non-Exempt (Redacting):

(Fill this out if using a contractor, such as the attorney. If using in-house employee, use No. 3a instead.)

The City will not charge for labor directly associated with redaction if it knows or has reason to know that it previously redacted the record in question and still has the redacted version in its possession.

This fee is being charged because failure to do so will result in unreasonably high costs to the City that are excessive and beyond the normal or usual amount for those services compared to the City's usual FOIA requests, because of the nature of the request in this particular instance, specifically:_____

As this City does not employ a person capable of separating exempt from non-exempt information in this particular instance, as determined by the FOIA Coordinator, this is the cost of labor of a **contractor** (e.g.:outside attorney), including necessary review, directly associated with separating and deleting exempt information from nonexempt information. This shall not exceed an amount equal to 6 times the state minimum hourly wage rate of _____.

Name of contracted person or firm: _____

These costs will be estimated and charged in 15-minute time increments; All partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.*

Hourly Cost Charged: $_____

Charge per increment: $_____

To figure the number of increments, take the *number of minutes:* ____, *divide by 15-minute increments, and round down to:* ____ *increments. Enter below:*

Number of increments

x _____ =

3b. Labor Cost

$_____

4. Copying / Duplication Cost:

Copying costs may be charged if a copy of a public record is requested, or for the necessary copying of a record for inspection (*for example, to allow for blacking out exempt information, to protect old or delicate original records, or because the original record is a digital file or database not available for public inspection*).

No more than the actual cost of a sheet of paper, up to maximum 10 cents per sheet for:

- **Letter** (8 ½ x 11-inch, single and double-sided): .10 **cents per sheet**
- **Legal** (8 ½ x 14-inch, single and double-sided): _____ **cents per sheet**

No more than the actual cost of a sheet of paper for other paper sizes:

- **Other paper sizes** (single and double-sided): _____ **cents / dollars per sheet**

Actual and most reasonably economical cost of non-paper physical digital media:

- ***Circle applicable:*** Disc / Tape / Drive / Other Digital Medium **Cost per Item:** _____

The cost of paper copies **must** be calculated as a total cost per sheet of paper. The fee **cannot exceed** 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A City **must** utilize the most economical means available for making copies of public records, including using double-sided printing, if cost saving and available.

Number of Sheets:	**Costs:**
x 3,110 =	$ 311.00
x _____ =	$_____
x _____ =	$_____
No. of Items:	
x _____ =	$_____
	4. Total Copy Cost
	$ 311.00

5. Mailing Cost:

The City will charge the actual cost of mailing, if any, for sending records in a reasonably economical and justifiable manner. Delivery confirmation is not required.

- The City ***may*** charge for the least expensive form of postal delivery confirmation.
- The City ***cannot*** charge more for expedited shipping or insurance unless specifically requested by the requestor.*

	Number of Envelopes or Packages:	**Costs:**
Actual Cost of Envelope or Packaging: $_____	x _____ =	$_____
Actual Cost of Postage: $_____ per stamp	x _____ =	$_____
$_____ per pound	x _____ =	$_____
$_____ per package	x _____ =	$_____
Actual Cost (least expensive) Postal Delivery Confirmation: $_____	x _____ =	$_____
***Expedited Shipping or Insurance as Requested:** $_____	x _____ =	$_____
		5. Total Mailing Cost
		$_____

☐ * Requestor has requested expedited shipping or insurance

Subtotal Fees Before Waivers, Discounts or Deposits:

☐ Cost estimate
☒ Bill

Estimated Time Frame to Provide Records:

10 days *(days or date)*

The time frame estimate is nonbinding upon the City, but the City is providing the estimate in good faith. Providing an estimated time frame does not relieve the City from any of the other requirements of the FOIA

1. Labor Cost for Copying:	$1005.60
2. Labor Cost to Locate:	$1005.60
3a. Labor Cost to Redact:	$790.32
3b. Contract Labor Cost to Redact:	$
4. Copying/Duplication Cost:	$311.00
5. Mailing Cost:	$
6a. Copying/Duplication of Records on Website:	$
6b. Labor Cost for Copying Records on Website:	$
6c. Mailing Costs for Records on Website:	$
Subtotal Fees:	$3112.52

Waiver: Public Interest

A search for a public record may be conducted or copies of public records may be furnished without charge or at a reduced charge if the City determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefiting the general public.

☐ **All fees are waived** OR ☐ **All fees are reduced by:** _____%

Subtotal Fees After Waiver: $_____

Discount: Indigence

A public record search **must** be made and a copy of a public record **must** be furnished **without charge for the first $20.00 of the fee** for each request by an individual who is entitled to information under this act and who:

1) Submits an affidavit stating that the individual is indigent and receiving specific public assistance, **OR**

2) If not receiving public assistance, stating facts showing inability to pay the cost because of indigence.

If a requestor is ineligible for the discount, the public body shall inform the requestor specifically of the reason for ineligibility in the public body's written response. An individual is ineligible for this fee reduction if **ANY** of the following apply:

(i) The individual has previously received discounted copies of public records from the same public body twice during that calendar year, **OR**

(ii) The individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. A public body may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

☐ **Eligible for Indigence Discount**

Subtotal Fees After Discount (subtract $20): $_____

Discount: Nonprofit Organization

A public record search **must** be made and a copy of a public record **must** be furnished **without charge for the first $20.00 of the fee** for each request by a nonprofit organization formally designated by the state to carry out activities under subtitle C of the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000 and the federal Protection and Advocacy for Individuals with Mental Illness Act, if the request meets **ALL** of the following requirements:

(i) Is made directly on behalf of the organization or its clients.

(ii) Is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the Michigan Mental Health Code, 1974 PA 258, MCL 330.1931.

(iii) Is accompanied by documentation of its designation by the state, if requested by the City.

☐ **Eligible for Nonprofit Discount**

Subtotal Fees After Discount (subtract $20): $_____

Deposit: Good Faith The City may require a good-faith deposit before providing the public records to the requestor **if the entire fee estimate or charge authorized under this section exceeds $50.00**, based on a good-faith calculation of the total fee. The deposit cannot exceed 1/2 of the total estimated fee. **Percent of Deposit:** _____%	**Date Paid:** 11/29/16	**Deposit Amount Required:** $ 500.00
Deposit: Increased Deposit Due to Previous FOIA Fees Not Paid In Full After a City has granted and fulfilled a written request from an individual under this act, if the City has not been paid in full the total amount of fees for the copies of public records that the City made available to the individual as a result of that written request, **the City may require an increased estimated fee deposit of up to 100% of the estimated fee before it begins a full public record search for any subsequent written request from that individual** if **ALL** of the following apply: (a) The final fee for the prior written request was not more than 105% of the estimated fee. (b) The public records made available contained the information being sought in the prior written request and are still in the City's possession. (c) The public records were made available to the individual, subject to payment, within the best effort estimated time frame given for the previous request. (d) Ninety (90) days have passed since the City notified the individual in writing that the public records were available for pickup or mailing. (e) The individual is unable to show proof of prior payment to the City. (f) The City calculates a detailed itemization, as required under MCL 15.234, that is the basis for the current written request's increased estimated fee deposit. A City **can no longer require an increased estimated fee deposit** from an individual if **ANY** of the following apply: (a) The individual is able to show proof of prior payment in full to the City, **OR** (b) The City is subsequently paid in full for the applicable prior written request, **OR** (c) Three hundred sixty-five (365) days have passed since the individual made the written request for which full payment was not remitted to the City.	**Date Paid:** _____	**Percent Deposit Required:** _____% **Deposit Required:** $_____
Late Response Labor Costs Reduction If the City does not respond to a written request in a timely manner as required under MCL 15.235(2), the City **must** do the following: (a) **Reduce the charges for labor costs** otherwise permitted by 5% for each day the City exceeds the time permitted for a response to the request, **with a maximum 50% reduction**, if **EITHER** of the following applies: (i) The late response was willful and intentional, **OR** (ii) The written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, electronic mail, or electronic mail attachment, or specifically included the words, characters, or abbreviations for "freedom of information," "information," "FOIA," "copy", or a recognizable misspelling of such, or appropriate legal code reference for this act, on the front of an envelope, or in the subject line of an electronic mail, letter, or facsimile cover page.	**Number of Days Over Required Response Time:** _____ **Multiply by 5%** **= Total Percent Reduction:** _____	**Total Labor Costs** $_____ **Minus Reduction** $_____ **= Reduced Total Labor Costs** $_____
The Public Summary of the City's FOIA Procedures and Guidelines is available free of charge from: Website: rockford.mi.us Email: _____ Phone: _____ Address: _____ **Request Will Be Processed,** **But Balance Must Be Paid Before Copies May Be Picked Up, Delivered or Mailed**	**Date Paid:** 12-13-16	**Total Balance Due:** $ 262.51

Exhibit D

All references to Exhibit D by this motion refers to the same Exhibit D as in the court file as attached to the original complaint.

It is not reproduced and attached to this motion due to its size.

See MCR 2.116(G)(5).

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

MICHAEL MCINTOSH,
Plaintiff,

v.

CITY OF ROCKFORD,
Defendant
_____/

Case No.: 17- 05218-CZ
Honorable Donald A. Johnston

ORDER

OUTSIDE LEGAL COUNSEL PLC
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mbogren@plunkettcooney.com

AT A SESSION OF THE ABOVE-COURT
HELD IN THE CITY OF GRAND RAPIDS, COUNTY OF KENT

PRESENT: Honorable Donald A. Johnston, Circuit Court Judge

ORDER ON MOTION FOR *EVENING NEWS* ORDER

On September 2, 2017, the Court heard oral argument on Plaintiff's motion for entry of an *Evening News*[1] order or alternatively for the appointment of a special master. Having considered the arguments of counsel and the papers filed related thereto, the Court orders as follows:

1. Within twenty one (21) days of entry of this Order, Defendant CITY OF ROCKFORD shall file with the Court and serve on Plaintiff's counsel a statement providing "complete particularized justification" as set forth in the six rules outlined in *Evening News* for each redaction made upon the records previously produced by the City (as filed with the Court as Exhibit D to Plaintiff's original complaint). For each redaction, the statement of particularized justification must identify the specific page identification number (i.e. PAGE ID: [####]) where each individual redaction is located, as to allow the Court and Plaintiff's counsel the ability to locate the respective redaction and review the proffered complete particularized justification regarding the same.

[1] *Evening News Ass'n v City of Troy*, 417 Mich 481 (1983).

2. Failing to resolve the issues going forward, the Court will, upon the request of a party, then proceed to Step 2 in the *Evening News* process and conduct an in-camera review to review the proffered complete particularized justification.

3. Upon the oral request of Defendant's counsel at the hearing, Plaintiff MICHAEL MCINTOSH shall provide Defendant CITY OF ROCKFORD a list of all documents he believes has not been produced pursuant to his FOIA requests, as to allow Defendant CITY OF ROCKFORD to search for and review the same. Upon the post-hearing agreement between counsel, Plaintiff MICHAEL MCINTOSH shall provide this disclosure within seven (7) days of entry of this Order.

IT IS SO ORDERED.

Date: 9/12/17

[illegible] TRUSCH

Honorable Donald A. Johnston
Circuit Court Judge

Order prepared by:
Philip L. Ellison (P74117)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

MICHAEL McINTOCH

Plaintiffs,

v.

THE CITY OF ROCKFORD,

Defendant.

Case No. 17-05218-CZ
HON. DONALD A. JOHNSTON

Philip L. Ellison (P74117)
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mbogren@plunkettcooney.com

DEFENDANT'S STATEMENT REGARDING FOIA RESPONSE

NOW COMES the defendant, City of Rockford, by and through its attorneys, PLUNKETT COONEY, and pursuant to the Court's Order dated September 12, 2017, states that it will produce unredacted copies of the public records previously provided in its response to plaintiff's FOIA request.

Respectfully submitted,

DATED: October 3, 2017

PLUNKETT COONEY

BY: Kelle Barber for
Michael S. Bogren (P34835)
Attorney for Defendant

BUSINESS ADDRESS:
950 Trade Centre Way, Suite 310
Kalamazoo, MI 49002
Direct Dial: 269/226-8822

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

MICHAEL McINTOCH

Plaintiffs,

v.

THE CITY OF ROCKFORD,

Defendant.

Case No. 17-05218-CZ
HON. DONALD A. JOHNSTON

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mbogren@plunkettcooney.com

PROOF OF SERVICE

Diane Austin, Secretary in the Law Firm of PLUNKETT COONEY, being first duly sworn, deposes and says that on the 3rd day of October, 2017, she caused a true copy of ***Defendant's Statement Regarding FOIA Response, and Proof of Service***, to be served upon all attorneys of record, and that such service was made by enclosing same in a sealed envelope with first class postage fully prepaid, addressed to the above, and depositing said envelope and its contents in a receptacle for the United States mail at Portage, Michigan, and said envelope was addressed to the above at their last known business address, as follows:

Philip L. Ellison, Esq.
OUTSIDE LEGAL COUNSEL, PLC
P.O. Box 107
Hemlock, Michigan 48626

Diane Austin
Diane Austin

EXHIBIT
G
OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

MICHAEL McINTOCH

Plaintiffs,

v.

THE CITY OF ROCKFORD,

Defendant.

Case No. 17-05218-CZ
HON. DONALD A. JOHNSTON

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AFFIDAVIT OF CHRISTINE M. BEDFORD

Christine Bedford, first having been duly sworn, states that if called as a witness in this matter could testify competently to the following facts:

1. My name is Christine M. Bedford and I have personal knowledge of the facts stated in this Affidavit.

2. I am the City Clerk for the City of Rockford, Michigan and held that position in November and December 2016.

3. I am the FOIA Coordinator for the City of Rockford and held that position in November and December 2016.

4. I received a FOIA Request from Mike McIntosh dated November 6, 2016 in my capacity as the FOIA Coordinator for the City of Rockford.

5. In consultation with the City Attorneys, Dickinson Wright, and various City officials, I provided voluminous public records in response to Mr. McIntosh's FOIA Request.

6. Among the documents produced were numerous e-mails, some of which had attachments.

7. In an effort to save Mr. McIntosh money I did not reproduce duplicative copies of attachments to e-mails that were already included in the public records being produced.

8. To the best of my knowledge at least one copy of all e-mail attachments were produced in the original response to Mr. McIntosh's FOIA Request; no e-mail attachments were intentionally withheld by the City.

9. To the best of my knowledge and ability I have produced unredacted copies of the original public records provided to Mr. McIntosh in response to his November 6, 2016 FOIA Request.

Christine M. Bedford

STATE OF MICHIGAN)
)ss.
COUNTY OF KENT)

On the 9th day of October, 2017 before me personally appeared Christine M. Bedford to me known to be the person named herein who executed the foregoing Affidavit and she acknowledged to me that she voluntarily executed same.

Notary Public
Kent County, Michigan
My Commission Expires: 5/26/19

ERIKA A. LAKE, Notary Public
State of Michigan, County of Kent
My Commission Expires 05/26/2019
Acting in the County of Kent

EXHIBIT
H
OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

171604 REV. 2/10 LPS

https://www.campusship.ups.com/cship/create?ActionOriginPair=default___PrintWindo... 10/

DIANE M. AUSTIN
2693825935
PLUNKETT COONEY - KALAMAZOO
950 TRADE CENTRE WAY
KALAMAZOO MI 49002

5 LBS

1 OF 1

SHIP TO:
PHILIP L. ELLISON, ESQ.
OUTSIDE LEGAL COUNSEL, PLC
529 W. SAGINAW STREET
HEMLOCK MI 48626

MI 486 0-04

UPS GROUND
TRACKING #: 1Z 7VV 139 03 9302 9285

BILLING: P/P

Client . Matter: 00560.71943

CS 19.5.48. WNINV50 90.0A 07/2017

TM

Quick Start

Tracking

Tracking Number | Track | Log in to save this information to your recently tracked shipments. New to UPS? Sign up | Other Tracking Options

1Z7VV1390393029285

Delivered On:
Wednesday, 10/11/2017 at 1:41 P.M.

Left At:
Receiver

Received By:
ELLISON

Proof of Delivery

Notify me with Updates

What time will your package be delivered to your home? Get **FREE** estimated Delivery Windows on most UPS packages.

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Need more information?

Get Help

Shipping Information

To:
HEMLOCK, MI US

Service

UPS Ground

Shipment Progress — What's This?

Additional Information

Shipment Category:	Package
Shipped/Billed On:	10/10/2017
Weight:	5.00 lbs

Legal

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

MICHAEL McINTOCH

Plaintiffs,

v.

THE CITY OF ROCKFORD,

Defendant.

Case No. 17-05218-CZ
HON. DONALD A. JOHNSTON

Philip L. Ellison (P74117)
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ANSWERS TO CORRECTED REQUESTS TO ADMIT TO DEFENDANT CITY OF ROCKFORD

NOW COMES defendant, City of Rockford, by and through its attorneys, PLUNKETT COONEY, and for its Answers to Plaintiff's Corrected Requests to Admit – November 22, 2017 (Resent November 28, 2017), states:

REQUEST TO ADMIT 1. Admit that the Exhibit D to the original-filed complaint in this above-captioned matter (and made part of the First Amended Complaint by reference) is a fair and accurate copy of all documents the City of Rockford produced to Plaintiff as a result of his November 6, 2016 FOIA Requests, with the exception of Plaintiff-added organizational aids (i.e. PageID with numbering and lettered sectioning documents) placed thereon.

RESPONSE: Admitted.

a. INTERROGATORY: If the answer to the previous request for admission is anything other than a complete affirmation, identify *with particularity* the factual and/or legal basis (including full citations to all laws) for your denial, including the name, home and business address, and telephone number of every person having first-hand knowledge of any portion of the facts or law; specify the substance of the facts or law that you or your attorney may seek to elicit from those persons and how those persons gained the information regarding those facts or law; and identify the contents of any written materials or computer data relied on in support of your denial (or attach copies to your answers to these discovery requests). If you are unable to admit or deny the request, identify all the information that you have available in your answer to this discovery request and specify why you cannot admit or deny the previous request for admission.

ANSWER: Not applicable.

3. REQUEST TO ADMIT: Admit that the Exhibit D to the original complaint (and made part of the First Amended Complaint by reference) contains *at least* 500 separately-made redactions (i.e. blackening out text or words) affixed by agents/officials/employees of the City of Rockford in response to Plaintiff's November 6, 2016 FOIA Requests?

RESPONSE: Admitted.

a. INTERROGATORY: If the answer to the previous request for admission is anything other than a complete affirmation, please state precisely the exact number of separately-made redactions (i.e. blackening out text or words) were made upon Exhibit D to the original complaint (and made part of the First Amended Complaint by reference)

ANSWER: Not applicable.

b. INTERROGATORY: If the answer to the previous request for admission is anything other than a complete affirmation, identify *with particularity* the factual and/or legal basis (including full citations to all laws) for your denial, including the name, home and business address, and telephone number of every person having first-hand knowledge of any portion of the facts or law; specify the substance of the facts or law that you or your attorney may seek to elicit from those persons and how those persons gained the information regarding those facts or law; and identify the contents of any written materials

or computer data relied on in support of your denial (or attach copies to your answers to these discovery requests). If you are unable to admit or deny the requests, identify all the information that you have available in your answer to this discovery request and specify why you cannot admit or deny the previous request for admission.

ANSWER: Not applicable.

DATED: December 26, 2017

PLUNKETT COONEY

BY: _____

Michael S. Bogren (P34835)
Attorney for Defendant

BUSINESS ADDRESS:
950 Trade Centre Way, Suite 310
Kalamazoo, MI 49002
Direct Dial: 269/226-8822

Open.00560.71943.19532752-1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

MICHAEL MCINTOSH,
Plaintiff,

v.

CITY OF ROCKFORD,
Defendant
_____/

Case No.: 17-05218-CZ
Honorable Donald A. Johnston

STATEMENT

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STATEMENT DISCLOSING LIST OF DOCUMENTS FAILED TO BE PRODUCED BY CITY OF ROCKFORD RELATED TO THE FOIA REQUESTS BY PLAINTIFF MICHAEL MCINTOSH

NOW COMES Plaintiff MICHAEL MCINTOSH, by and through counsel, and discloses the following documents failed to be produced by the City of Rockford as part of its December 6, 2016 production:

1. On pages stamped as Page ID 1252, 1260, 1320, 1806, 1855, 1883, 1887, 1907, 1909, 1927, 1926, 1949, 1951, 1952, 1961, 1977, and 2021 of Exhibit D of the original Complaint, each email contains an attachment which was not produced, see First Am Complaint, ¶28.

2. Nine (9) additional emails are known to exist which were not produced, and thereby casts doubt on the actual full and complete production of all responsive records, , see First Am Complaint, ¶29, including:

    a. Email exchange with Lynn McIntosh and Michael Young, former city manager, and JScales, chairman of the Planning Commission at the time of the e-mail.

    b. The Phase 1 section of the DIXON Environmental Report, on file at the MDEQ, is missing.

c. All attachments sent to Jerry Coon by Lynn McIntosh in September 2015, underscoring important matters regarding Brownfields, wetlands, and fair democratic process.

d. DEQ e-mail exchange with Lynn McIntosh, David Rasmussen, a public official (Planning Commissioner and chairperson of Rockford's Brownfield Re-development Authority), and Roman Wilson and David Bandlow of the DEQ.

e. PAGEID #3048: Missing page 2 of letter from DEQ re: Brownfield Plan November 2016.

f. PAGEID #3294: Missing first page of this letter from city planner, Paul LeBlanc from LSL Planners

g. Key e-mail exchange with Kimberly Carew, another resident of Rockford, whose questions regarding Public Hearings were answered by former city manager, Michael Young.

h. Copies of letters sent to Mr. and Mrs. Carew to invite them to come "talk to the manager and the mayor to get the facts."

i. Emails sent to the former city manager, Michael Young, regarding the city's removal of signs placed on residents' yards.

Date: October 6, 2017

RESPECTFULLY SUBMITTED:

Philip L Ellison

OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Plaintiff
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
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***Electronic signature authorized by MCR 2.114(C)(3) and MCR 1.109(D)(1)-(2)*

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

6th day of October, 2017.

Philip L Ellison

PHILIP L. ELLISON
Attorney at Law

850 F.3d 265 (2017)

202 NORTH MONROE, LLC, Plaintiff,
City of Rockford, Plaintiff-Appellant,
v.
Caleb SOWER; Kristine Sower; Larry Vis; Elsie Wayman; Jim Jennelle; Susie Jennelle; Dale Goossen; Linda Goossen; Jack McClennen; Amy Hadley; Neighbors for Neighborhood, Inc., Defendants-Appellees,
Fred Haack; Angie Haack; Kenneth E. Phillips; Troy Winters; Michelle Winters, Third Parties-Appellees.

No. 16-1982.

United States Court of Appeals, Sixth Circuit.

Argued: February 2, 2017.
Decided and Filed: March 1, 2017.

267 *267 Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 1:16-cv-00325—Janet T. Neff, District Judge.

ARGUED: Mary Massaron, PLUNKETT COONEY, Bloomfield Hills, Michigan, for Appellant. Michael D. Homier, FOSTER, SWIFT, COLLINS & SMITH, P.C., Grand Rapids, Michigan, for Appellees. ON BRIEF: Mary Massaron, PLUNKETT COONEY, Bloomfield Hills, Michigan, for Appellant. Michael D. Homier, FOSTER, SWIFT, COLLINS & SMITH, P.C., Grand Rapids, Michigan, for Appellees.

Before: GIBBONS, COOK, and KETHLEDGE, Circuit Judges.

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

After the City of Rockford (the City) failed to approve a zoning petition for property owned by 202 North Monroe, LLC (202 North Monroe), the developer sued, challenging the constitutionality of the zoning-approval process. After a number of individuals living in the vicinity of the proposed development attempted and were denied the opportunity to intervene in the litigation, the City and 202 North Monroe settled their dispute and a federal district court entered a consent judgment under which the City agreed to rezone the property and 202 North Monroe agreed to address several environmental issues.

Disappointed with this result, the proposed intervenors, other residents, and a local neighborhood association (collectively
268 the Neighbors) sued 202 North Monroe and the City in state court, seeking a declaration that the City failed to comply *268 with Michigan law when it approved the settlement agreement. 202 North Monroe and the City (now collectively plaintiffs) responded by filing this action in federal district court to enjoin the state proceeding as an improper attack on the prior consent judgment. The district court dismissed the case for lack of jurisdiction and the City now appeals. Although the district court could have exercised ancillary jurisdiction over the latter federal suit, we affirm the dismissal of plaintiffs' complaint because the Anti-Injunction Act bars a federal court from enjoining the Neighbors' state-court action.

I.

202 North Monroe owns property in the City of Rockford that it intends to develop into residential condominiums. In order to do so, it sought to have the City rezone the property from "R-2 Single Family Residential" to "Planned Unit Development." A group of residents challenged the proposal by filing a protest petition with the City. This triggered a special approval procedure under Section 403 of the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.,* which requires a super

majority (at least two-thirds) of city council members to vote in favor of the zoning proposal. The proposal subsequently failed when only three of the council's five members voted to rezone the property.

In July 2015, 202 North Monroe sued the City in state court, alleging that the City violated its substantive-due-process rights and that the City's actions constituted an unconstitutional regulatory taking of its property. The City timely removed the case to the United States District Court for the Western District of Michigan.

In federal district court, Caleb Sower, Kristine Sower, and Neighbors for Neighborhood, Inc., sought to intervene as defendants and cross-plaintiffs. They sought intervention as a matter of right, arguing that the resolution of the case would impede their ability to oppose rezoning and suggesting that, by settling the case, the City would be able to rezone the property without satisfying the super-majority approval requirement still in place as a result of their protest petition. They also sought permissive intervention, arguing that their proposed cross-claim shared a common question of law or fact with 202 North Monroe's claims against the City.

The district court denied the motion to intervene in October 2015. The court held that the intervenors' proposed interest of "defeating the rezoning application" was moot because the City had denied 202 North Monroe's application and that any concern that the City's denial could be overturned was "too generalized to support a claim of intervention of right." No. 1:15-cv-785, DE 26, Page ID 437. The district court also denied permissive intervention.

In December 2015, the City and 202 North Monroe entered into mediation and eventually reached a settlement. The city council approved the settlement by a simple majority in January 2016 after discussing the pending litigation in a closed session. On February 1, 2016, the district court approved the settlement by entering a consent judgment that "ordered, adjudged, and decreed" that:

> 1. The Subject Property is hereby rezoned from R-2 to PUD.
>
> 2. The Clerk of the City of Rockford shall cause the Zoning Ordinance Map to be amended to identify the zoning classification of the Subject Property as PUD.
>
> 3. The Planned Unit Development Agreement (the "PUD Agreement") attached hereto as Exhibit B is hereby approved.
>
> 269 *269 4. Within thirty (30) days after the date of this Judgment, the Clerk of the City of Rockford shall cause the PUD Agreement to be recorded with the Kent County Register of Deeds.
>
> . . .
>
> 14. All of Plaintiff's claims as articulated in the Complaint are dismissed with prejudice.

No. 1:15-cv-785, DE 32, Page ID 510-12. It also placed certain obligations on 202 North Monroe with respect to environmental issues at the property. The consent judgment was signed by the district judge and stated "[t]his Judgment resolves the last pending claim and closes the case." *Id.* at 512.

On March 14, 2016, the Neighbors filed a two-count complaint in Kent County Circuit Court, claiming that the City had circumvented provisions of the MZEA and the City's own zoning ordinances by "rezoning... the Property through the Consent Judgment." No. 1:16-cv-325, DE 1-1, Page ID 16. They sought both declaratory and injunctive relief on the grounds that the City was required to provide notice and to conduct a public hearing with respect to any settlement purporting to rezone property and was required to approve any such settlement by a two-thirds super majority when a protest petition had been filed. The Neighbors also filed a motion for a preliminary injunction.

On March 30, 2016, the City and 202 North Monroe filed a complaint and emergency motion for a preliminary injunction against the Neighbors in the Western District of Michigan, asking the district court to enjoin the Kent County Circuit Court from granting the Neighbors' pending motion for a preliminary injunction and to enjoin the Neighbors from otherwise seeking to invalidate the prior federal consent judgment under the All Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283. The Neighbors filed a counterclaim, seeking a declaration that rezoning property through a consent judgment was not authorized by Michigan law or the City's zoning ordinance. All parties then filed answers to the claims against them. Among other things, the Neighbors argued that plaintiffs' complaint was barred by a lack of jurisdiction.

After hearing oral argument on the jurisdictional question, the district court ruled that it lacked jurisdiction to enjoin the state-court proceeding. The court noted the broad prohibition on such action under the Anti-Injunction Act and concluded that the "relitigation exception" to the Act did not apply because the issue now being litigated in state court was never argued, raised, or decided in the prior federal proceeding and because the Neighbors lacked the requisite connection to the prior federal litigation so as to be bound by the consent judgment. The district court also noted that "principles of equity, comity, and federalism" favored "great restraint" in deciding whether to enjoin the state court. A subsequent order dismissed the complaint for lack of jurisdiction and denied the motion for a preliminary injunction as moot. The City filed a timely notice of appeal.

II.

The district court dismissed this case after finding that it lacked subject-matter jurisdiction under the Anti-Injunction Act. We review *de novo* the decision to dismiss for lack of subject-matter jurisdiction. *Howard v. Whitbeck,* 382 F.3d 633, 636 (6th Cir. 2004). We also review *de novo* the legal determination of "whether an injunction *may* issue under the Anti-Injunction
270 Act." *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe,* 589 F.3d 835, 843 (6th Cir. 2009) (quoting *Great Earth* *270 *Cos., Inc. v. Simons,* 288 F.3d 878, 893 (6th Cir. 2002) (emphasis added)). In doing so, we first consider whether there was an affirmative basis on which the district court could have exercised its subject-matter jurisdiction. We then evaluate the effect of the Anti-Injunction Act on the district court's ability to grant plaintiffs' requested relief.

A.

The City asserts that the district court could have exercised ancillary jurisdiction over the present action because "the district court had federal question jurisdiction over the original action and [the present] action was filed to preserve the federal court's judgment in the original action." CA6 R. 20, at 1. Ancillary jurisdiction allows a federal court of otherwise limited jurisdiction to consider "some matters (otherwise beyond their competence) that are incidental to the other matters properly before them." *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 378, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Ancillary jurisdiction exists, in part, "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 380, 114 S.Ct. 1673; *see also Caudill v. N. Am. Media Corp.,* 200 F.3d 914, 916 (6th Cir. 2000).

In the context of settlement agreements, a federal court can exercise ancillary jurisdiction over a subsequent action involving the settlement only if the settlement terms are "made part of the order of dismissal — either by separate provision (such as a provision `retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Kokkonen,* 511 U.S. at 381, 114 S.Ct. 1673. In such cases, any challenge to the agreement is a challenge to the court's order and the court can exercise ancillary jurisdiction to effectuate its decree. *Id.* This, however, is a narrow basis for subject-matter jurisdiction. *See McAlpin v. Lexington 76 Auto Truck Stop, Inc.,* 229 F.3d 491, 502 (6th Cir. 2000).

In *Kokkonen,* the parties settled a prior federal case on terms that they "recited, on the record, before the District Judge in chambers." *Kokkonen,* 511 U.S. at 376, 114 S.Ct. 1673. They then executed a "Stipulation and Order of Dismissal with Prejudice" pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). *Id.* at 376-77, 114 S.Ct. 1673. This document, however, did not refer to the settlement agreement or its terms and did not explicitly empower the district court to enforce the settlement. *Id.* at 377, 114 S.Ct. 1673. On these facts, a unanimous Court refused to find ancillary jurisdiction to enforce the settlement. *Id.* at 381-82, 114 S.Ct. 1673. Similarly, in *McAlpin,* we concluded that a district court order referencing a single term of a twenty-page settlement agreement was insufficient to establish ancillary jurisdiction. *McAlpin,* 229 F.3d at 502; *see also Caudill,* 200 F.3d at 916 (finding that the phrase "pursuant to the terms of the Settlement" failed to incorporate the agreement's terms).

Here, the parties do not dispute the district court's federal-question jurisdiction over the dispute that led to the consent judgment. And unlike the factual scenarios in *Kokkonen, McAlpin,* and *Caudill,* this consent judgment falls squarely within the *Kokkonen* Court's test for ancillary jurisdiction. By listing the fourteen terms of the settlement agreement in its consent judgment, the district court explicitly incorporated the parties' entire agreement. It does not matter that the district court did
271 not explicitly state that it intended to retain jurisdiction over the agreement; incorporating the terms of the settlement *271

was sufficient. *See* *Kokkonen,* 511 U.S. at 381, 114 S.Ct. 1673. Thus, the district court could have exercised ancillary jurisdiction over plaintiffs' present complaint seeking to effectuate the terms of the prior consent judgment.[1]

B.

The All Writs Act empowers a federal court to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction[ ] and agreeable to the usages and principles of law." 28 U.S.C. § 1651. This authority, however, is not unfettered. "[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to [the Anti-Injunction Act] if it is to be upheld." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 287, 90 S.Ct 1739, 26 L.Ed.2d 234 (1970). Absent an exception, there is an "absolute prohibition [against] enjoining state court proceedings." *Id.* at 286, 90 S.Ct. 1739; *see also* *Martingale LLC v. City of Louisville,* 361 F.3d 297, 302 (6th Cir. 2004). The Anti-Injunction Act provides three exceptions:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as [1] expressly authorized by Act of Congress, or [2] where necessary in aid of its jurisdiction, or [3] to protect or effectuate its judgments.[2]

28 U.S.C. § 2283. These exceptions are narrow and "should not be enlarged by loose statutory construction" because "the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts." *Atl. Coast Line R.R. Co.,* 398 U.S. at 287, 90 S.Ct. 1739; *see also* *Smith v. Bayer Corp.,* 564 U.S. 299, 306, 131 S.Ct. 2368, 180 L.Ed.2d 341 (2011). Although the City argues on appeal that all three exceptions to the Anti-Injunction Act apply, the City waived its ability to argue the first two exceptions when it failed to make such an argument before the district court. *See* *Hayward v. Cleveland Clinic Found.,* 759 F.3d 601, 614-15 (6th Cir. 2014). Thus, we consider only the relitigation exception here.

The relitigation exception is intended to implement "well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). This exception, however, "applies only as necessary to protect or effectuate a federal court judgment, and thus is not the equivalent of [those concepts]." *Hatcher v. Avis Rent-A-Car Sys., Inc.,* 152 F.3d 540, 543 (6th Cir. 1998).[3] For the exception to apply, the claim or issue
272 *272 raised in state court must have been previously presented to and actually decided by a federal court. *Chick Kam Choo,* 486 U.S. at 147, 108 S.Ct. 1684; *see also* *Smith,* 564 U.S. at 306, 131 S.Ct. 2368. Additionally, the parties in the state proceeding must be bound by the prior federal judgment. *Smith,* 546 U.S. at 312, 126 S.Ct. 941.

1.

In order to show that the claim or issue that the federal injunction is intended to insulate from state-court litigation has actually been decided by a federal court, the complaining party must make a "strong and unequivocal showing" that the same issue is being relitigated "in order to overcome the federal courts' proper disinclination to intermeddle in state court proceedings." *Huguley v. Gen. Motors Corp.,* 999 F.2d 142, 146 (6th Cir. 1993) (quoting *Am. Town Ctr. v. Hall 83 Assocs.,* 912 F.2d 104, 111 (6th Cir. 1990)). This is a "strict and narrow" prerequisite that is assessed on the "precise state of the record and [on] what the earlier federal order *actually* said," and not on a "*post hoc* judgment" by the district court "as to what the order was *intended* to say." *Chick Kam Choo,* 486 U.S. at 148, 108 S.Ct. 1684. When faced with this issue in past cases, we have examined the record in both the state and federal proceedings to determine what issues and claims were raised and decided in the prior federal proceeding, the scope of the district court's judgment in the prior federal case, and the issues and claims being raised in the pending state-court action. *See* *Hatcher,* 152 F.3d at 543; *Huguley,* 999 F.2d at 147.

Often, the similarity in issues is clear. In *Great Earth Companies,* for example, the prior federal action established that a contract's arbitration clause was valid under the Federal Arbitration Act. 288 F.3d at 894. Because the federal plaintiffs subsequently sued the same defendant in state court challenging the validity and applicability of the same clause, we found that the relitigation exception empowered the district court to enjoin the state proceeding. *Id.*

Similarly, in *Hatcher,* the plaintiffs had previously sued Avis in federal court for terminating their agency agreement. 152 F.3d at 542. After entering into a federal consent judgment, the plaintiffs sued Avis and seven of its employees in state court

making "the same factual assertions and allegations." *Id.* We concluded that the relitigation exception allowed a federal court to enjoin the claims against Avis but not against the individual employees because "no claim against them was actually decided by the federal court." *Id.* at 544.

Finally, in *Huguley,* we invoked the relitigation exception to enjoin a state court from considering a case alleging that General Motors had engaged in racial discrimination. *Huguley,* 999 F.2d at 145. We relied on a prior federal class-action consent decree that, by its explicit language, was intended to "insulate GM from [racial discrimination] claims such as the ones alleged... in the instant case," by members of a class of plaintiffs that included the complaining party. *Id.* at 147-48.

In a pair of cases, however, the Supreme Court refused to enjoin a state court considering a state-law question when a prior federal proceeding had not considered that question. First, in *Chick Kam Choo,* the Court refused to enjoin a state court from considering a liability question under Singapore law even though a federal court had previously dismissed the case under the doctrine of *forum non conveniens. Chick Kam Choo,* 486 U.S. at 148-49, 108 S.Ct. 1684. The Court noted that the federal action had not resolved the merits of the Singapore-law claim and that the federal and state courts applied
273 different *forum-non-conveniens* *273 principles. *Id.* at 148, 108 S.Ct. 1684. The Court concluded that the relitigation exception did not apply because "whether the Texas *state* courts are an appropriate forum for petitioner's Singapore law claims has not yet been litigated." *Id.* at 149, 108 S.Ct. 1684.

Next, in *Smith v. Bayer Corp.,* the Court refused to enjoin a state court from deciding whether to certify a class under state law even though a federal court had previously refused to certify the proposed class under the federal rules. *Smith,* 564 U.S. at 310, 131 S.Ct. 2368. The Court noted that the legal standards for class certification differed under state and federal procedural rules and thus "the federal court resolved an issue not before the state court." *Id.* at 309, 131 S.Ct. 2368. This was despite the fact that the underlying state claims "mirrored" those raised in the federal litigation. *Id.*

Looking to the facts before us, the City defines the issue originally presented to the federal court as "whether the City's refusal to rezone the property at issue constituted a violation of 202 North Monroe's federal constitutional rights under 42 U.S.C. § 1983." CA6 R. 20, at 20-21. This tracks the language in 202 North Monroe's initial complaint as well as the language in the federal consent judgment. If this is all that was decided, it would certainly not preclude a state court from considering the question of what Michigan law requires for a city to validly approve a proposed settlement. The Neighbors' state-court claim involves only the City's actions under state and local law. It does not address, in any way, the vindication of 202 North Monroe's federal constitutional rights.

Unfortunately, this case is not that simple. The consent judgment also establishes that "[t]he Subject Property is hereby rezoned from R-2 to PUD." No. 1:15-cv-785, DE 32, Page ID 510. In their state-court complaint, the Neighbors challenge the City's ability and authority, under state law, to rezone the property through a consent judgment without complying with the requirements of the MZEA — specifically, the super-majority approval threshold and the notice and public-hearing requirements. As relief, the Neighbors request that the state court declare the rezoning to be in violation of the MZEA, declare that the property be zoned R-2 (and not PUD), and enjoin the City or 202 North Monroe from taking any action in reliance on the rezoning. The City argues that this is an attempt to have the consent judgment declared void, that allowing the Neighbors to proceed could thwart the effectuation of a federal judgment, and that the state-court action conflicts with its intent to "resolve the issues regarding the appropriate zoning and land use for the property" through the consent judgment. [4] CA6 R. 20, at 21-24.

Despite the City's arguments, we note a number of factors that support a narrow interpretation of the consent judgment as well as a finding that the state-law issues were not actually decided. First, we are instructed to narrowly construe both the relitigation exception and the "actually decided" prong. *See Chick Kam Choo,* 486 U.S. at 148, 108 S.Ct. 1684. Second, this case differs from those where we have applied the relitigation exception — those where the state-court plaintiffs were seeking to litigate an identical claim. *See, e.g., Hatcher,* 152 F.3d at 542; *Huguley,* 999 F.2d at 145. Third, allowing the state
274 court *274 to proceed does not alleviate its obligation to consider the preclusive effect of the prior federal consent judgment. *See Smith,* 564 U.S. at 318, 131 S.Ct. 2368. Fourth, the Supreme Court's decisions in *Smith* and *Chick Kam Choo* suggest that this prong of the relitigation exception is not applicable when the state court is deciding a parallel question under state law and that question of state law, as is the case here, was not directly addressed in the earlier federal action.[5]

There is no debate that, should the state court be allowed to proceed, it might reach a result that calls into question the validity of the consent judgment's explicit language rezoning the property. The question before us, however, is not about the result but rather the scope of what was decided in reaching that result. After evaluating the record before us, we conclude

that the City has failed to make the required "strong and unequivocal showing" that the issue in state court — whether the City's approval of the settlement complied with state and local law — was previously raised, argued, and decided. *See Huguley,* 999 F.2d at 146. Accordingly, we cannot apply the relitigation exception and the state-court litigation must be allowed to proceed.

2.

Even if we were to find that the state-court issue had been previously raised and decided, we could not apply the relitigation exception unless we also concluded that the Neighbors were bound by the prior federal judgment. To do so, we would have to find that they were a party to the original federal action or that they qualified for one of the "discrete and limited exceptions" to the general rule against nonparty preclusion. *See Smith,* 564 U.S. at 312, 131 S.Ct. 2368 (citing 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4449 (2d ed. 2002) and *Taylor v. Sturgell,* 553 U.S. 880, 898, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008)).

It is clear that the Neighbors were not a party to the prior federal action. As the district court correctly recognized, they were "not named," were "expressly denied the right to intervene," were "not parties," were "not represented," and their interests "were not at all involved." No. 1:16-cv-325, DE 25, Page ID 552. The City does not dispute this point.

Instead, the City argues that the Neighbors satisfy one of the nonparty preclusion exceptions because they were "adequately represented" by the City and its elected officials. The Supreme Court has explained this exception as follows:

> [I]n certain limited circumstances, a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions and suits brought by trustees, guardians, and other fiduciaries.

Taylor, 553 U.S. at 894, 128 S.Ct. 2161 (internal citations and quotation marks omitted). This exception is established only if (1) the interests of the nonparty and its representative are aligned; (2) the representative understood itself to be acting in a representative capacity or the interests of the nonparty were otherwise protected; and, sometimes, (3) the nonparty had
275 notice *275 of the original suit. *Id.* at 900, 128 S.Ct. 2161; *see also Amos v. PPG Indus., Inc.,* 699 F.3d 448, 452-53 (6th Cir. 2012).[6]

Here, the interests of the City and the Neighbors were not aligned as indicated by the City's agreement, through the consent judgment, to rezone the property in 202 North Monroe's favor. A subset of the Neighbors had filed a protest petition challenging the zoning decision. They also attempted to intervene in the initial federal suit both to protect their interest in opposing rezoning and to ensure that the City did not settle the case in order to circumvent the super-majority approval requirement that their protest petition had imposed. The difference in interests is further evinced by the fact that the City's settlement is the basis for the Neighbor's current state-court action. Because the City could not have adequately represented the Neighbor's interests on these facts, we find that the exception to the rule against nonparty preclusion does not apply, that the Neighbors are not bound by the consent judgment, and that the relitigation exception to the Anti-Injunction Act is thus inapplicable in this case.

In closing, we note that denial of the motion to intervene, followed by settlement on the terms of the consent judgment, meant that a challenge to the rezoning through further litigation was likely. The City thus invited its current dilemma, and the district court apparently failed to foresee the implications of the denial of the motion to intervene as well.

III.

For the foregoing reasons, we affirm the decision of the district court.

[1] The Neighbors argue that even if the district court had ancillary jurisdiction, it had the discretion not to exercise such jurisdiction. Although they are correct that ancillary jurisdiction is discretionary, *see Coleman v. Casey Cty. Bd. of Educ.,* 686 F.2d 428, 430 (6th Cir. 1982) (citing *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)), the record does not indicate that the district court made any evaluation or decision with respect to its ancillary jurisdiction. And because we conclude that the Anti-Injunction Act bars the district court from acting here, we need not give the district court an opportunity to exercise its discretion with respect to ancillary jurisdiction.

[2] We refer to the third exception by its more-common name, the relitigation exception. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988).

[3] For example, *res judicata* generally precludes an issue that "should have been litigated," *Hatcher,* 152 F.3d at 543, whereas the relitigation exception applies only to those claims or issues that "actually have been decided," *id.* (quoting *Chick Kam Choo,* 486 U.S. at 148, 108 S.Ct. 1684).

[4] The City relies on *Huguley,* 999 F.2d at 147-48, to argue that intent is relevant in determining the scope of what the district court decided. *Huguley,* however, concluded that a claim was actually decided based on the "plain language" and "express terms" of a consent decree, not the subjective intent of the parties. 999 F.2d at 147.

[5] We note, however, that *Smith* and *Chick Kam Choo,* could be distinguished as allowing the litigation of procedural questions under state law after the federal procedural question had been answered, in part, because the federal court refused to reach the merits of the underlying claims.

[6] Instead of relying on this binding precedent, the City grounds its argument in *Beyer v. Verizon North Inc.*, 270 Mich.App. 424, 715 N.W.2d 328, 330 (2006) (per curiam), which considered the preclusive effect of a federal consent judgment. *Beyer* carries little persuasive value for three reasons. First, it is a decision of an intermediate state appellate court interpreting federal law. Second, it predates *Taylor*'s clarification of nonparty preclusion exceptions. Third, it is distinguishable on its facts because the interests of the state officials and the residents were much more closely aligned than those of the City and the Neighbors in this case.