

APPENDIX 4: LEGAL MEMOS

Prepared by Great Lakes Environmental Law Center

The memos included here provide additional background information and research that inform the **Legal Agreements and Considerations** section of the report. Each memo includes a comprehensive legal analysis of the topic at hand. Memos address the following topics:

Memo On How To Account For Alleys When Developing Shared GSI

Memo On Legal Issues That Arise For Shared GSI In The Landlord-Tenant Context

Memo On How To Account For Alleys When Developing Shared GSI

Disclaimer: Each green infrastructure project presents unique issues. This memorandum describes the kinds of legal issues that participants in a green infrastructure project should consider, but does not provide and should not be construed to provide actual legal advice that would apply to any particular project. For legal advice that applies to a particular project, please consult an attorney.

Alleys are spaces that must be accounted for in any GSI development, including shared GSI development. Alleys may add impervious acres to an impervious acreage calculation; alleys can be spaces that host GSI; and alleys can convey stormwater from one parcel to another. Generally, alleys may be owned by lot owners on one side of the alley, ownership may be split between owners on either side of the alley, or alleys may be owned by the City of Detroit itself. Even when an alley is privately owned, public utilities and the general public often retain easements to access the alleys. The laws that regulate ownership and management of alleys may impact all of the above.

1. Background

Creation of Alleys

Michigan's Land Division Act defines alleys as "public or private right[s] of way shown on a plan which provide[] secondary access to a lot, block, or parcel of land."¹ Alleys are created along with streets, highways, and other thoroughfares when a large tract of property is subdivided, or when a local government condemns land for the creation of an alley through its powers of eminent domain.

Michigan delegates to local governments a significant amount of authority over alleys.² As a home rule city, Detroit has the authority to provide for control of alleys in its city charter.³ It has done so mostly in Article 7 of the Charter of the City of Detroit (CCD).

Jurisdiction and Authority Over Alleys

Detroit exercises primary authority over the alleys within its limits. The State legislature may not vacate or alter any alley within the jurisdiction of a city.⁴ Detroit's control of its alleys is

¹ MCL 560.102.

² MI Const. Art VII, § 29.

³ MCL 117.4h(1).

⁴ MI Const. Art. 7, § 31.

divided principally between two different departments of the executive branch, and the City Council as the legislative branch.

Detroit's Department of Public Works (DPW) provides "for the construction, maintenance, demolition and engineering design of streets, alleys, and public buildings."⁵ The DPW's Engineering Division is responsible for issuance of permits for construction or reconstruction work conducted in public right of ways, generally, and alleys specifically.⁶

The Building, Safety Engineering, and Environmental Department's (BSEED) Environmental Affairs Division has authority over issuance of permits sanctioning work on city owned property.⁷ Improvements to public alleys are, thus, subject to BSEED approval.

The Detroit City Council may order alleys regraded and repaved, may resolve to widen, open, close, or vacate any alley, and may condemn property for the purpose of widening or opening an alley.⁸ The Detroit City Planning Commission advises the City Council on "development or renewal projects on or affecting public real property or public interests in real property; proposals for the disposition or relinquishment of public real property or public interests in real property."⁹ This would include any regrading, repaving, opening, closing, vacation, widening or other improvement of an alley. Any resolution adopted by the Commission is advisory and is not binding until adoption by the City Council.¹⁰ The Commission is assisted by the staff of the Planning and Development Department.¹¹

Improvement of an Alley

Alley reconstruction may either be ordered by the City Council upon a finding of necessity, or permitted by BSEED and DPW.

⁵ CCD, Sec 7-401.

⁶ Detroit City Code (DCC) § 50-1-1(3); § 50-3-1; ROW Permit App. p 2. DCC § 50-3-1 officially gives permitting power to "director of environmental protection and maintenance" not the Engineering Division of DPW, however, DPW's ROW permit application cites § 50-3-1 as the source of its authority. It has been said that the DPW has assumed all of the authority and responsibility of the Environmental Protection and Maintenance Department though there does not appear to be any official resolution or documentation of this.

⁷ CCD § 6-503; ROE FAQ p 1.

⁸ DCC § 16-1-4, § 50-7-2; CCD § 4-112; MCL 213.22.

⁹ CCD § 6-204.

¹⁰ CCD § 4-302.

¹¹ CCD § 4-303.

When required, alleys or portions of alleys may be ordered graded and paved by resolution of the City Council on petition of parties owning a majority of the property to be benefitted. If already paved, they may be ordered regraded and repaved by resolution of the city council, upon a finding of necessity and the recommendation of the director of the DPW.¹²

A permit from DPW's City Engineering Division is required to perform construction work in any public right of way (ROW).¹³ This includes alley reconstruction.¹⁴ A right of entry (ROE) permit, issued by BSEED's Environmental Affairs Division, is also required if the alley is City owned property.¹⁵ In such a case, the ROE permit is one of the requirements to receive a ROW permit from City Engineering.¹⁶ The approval of the ROE permit neither guarantees the approval of a ROW permit nor obviates the need for one.¹⁷

If an alley is privately owned, private owners must grant permission to enter and modify. If a private alley is still a public right of way, modifications may still be subject to DPW's approval.

Opening or Widening an Alley

The City Council may adopt a resolution to open or widen any alley upon a finding of necessity.¹⁸ Detroit has the authority to condemn any private property adjacent to the proposed improvement for the purpose of such.¹⁹

Vacating an Alley

The City Council may, by resolution, provide for vacation of an alley from city ownership.²⁰ In non-residential areas, any abutting property owner may petition City Council to vacate the alley which they abut. In residential areas, a petition for vacating any alley must be signed by not less than two-thirds of abutting property owners.²¹ In either case petitions are subject to the approval of the City Council.²² If a petition to vacate an alley is granted by City Council, petitioner is required to reimburse the City and any of its departments for the costs of removing

¹² DCC Sec 18-12-39.

¹³ DCC § 50-3-1; ROW Permit App. p 2.

¹⁴ DCC § 50-3-1.

¹⁵ ROE FAQ's p 1.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ DCC § 16-1-4; MCL 213.221.

¹⁹ MCL 213.221.

²⁰ CCD § 4-112.

²¹ DCC § 50-6-1.

²² *Id.*

or relinquishing any infrastructure in the alley.²³ Furthermore, the City may preserve any public utility, or public purpose easements in the right of way of the vacated alley.²⁴ The resolution of the City Council to vacate an alley is recorded in the Office of the County of Wayne Register of Deeds by the city clerk, and a copy of the record is forwarded to the city auditor general, as well as the director of the state department of energy, labor, and economic growth.²⁵

Property owners in residential areas may elect to keep the vacated alley open either due to the need to gain access to their garages or for reasons verified and approved by the director of the department of public works.²⁶ Even if vacation closes the alley to the public, retention of public utility easements are mandatory in residential areas.²⁷

Following vacation of the alley, abutting property owners (having become owners of the alley itself) assume responsibility for the cleanliness and maintenance of the alley. Owners may be held jointly and severally liable for dumping, littering or blight violations of a vacated alley.²⁸

Pursuant to the Subdivision Control Act, a circuit court may, by judgment, vacate part of a recorded plat to formally reflect substantive property ownership rights already in existence.²⁹ Title to an alley vacated by judgement of a circuit court vests, to the centerline of the alley, in the respective proprietors of the abutting lots on each side.³⁰

Closing an Alley

The City Council may close any alley by resolution, and in doing so, may preserve or create any rights of access or ownership held by the City or public utilities found to be necessary by the Director of Public Works.³¹

²³ DCC § 50-7-3.

²⁴ MCL 560.257.

²⁵ DCC § 50-7-5; MCL 560.256.

²⁶ DCC § 50-6-1.

²⁷ DCC § 50-6-5.

²⁸ DCC § 22-2-84; § 22-1-1.

²⁹ MCL 560.221. *Beach v Lima Twp*, 283 Mich App 504, 517; 770 NW2d 386 (2009).

³⁰ MCL 560.227a.

³¹ DCC § 50-7-2. MCL 560.257.

Renaming an Alley

A petition to rename an alley in the City may be presented to the City Council by not less than two-thirds of all abutting property owners.³² The City Council has the final say in whether the proposed name is adopted.³³

2. Practical Concerns Regarding GSI Development In Alleys

Below are some of the main considerations to bear in mind when using an alley for any kind of GSI, including shared GSI.

Private or Public Ownership, Costs and Benefits

Whether a party seeking to improve or reconstruct an alley ought to seek vacation of government ownership or leave the alley public property depends on a number of considerations and will vary case to case. Vacating an alley prior to improvement offers the benefits of eliminating the need for an ROE permit which requires purchase and proof of insurance. If, by vacation, the alley ceases to be a public right of way, the need for a ROW permit is also eliminated. However, vacation requires approval by the City Council which could take a long time, and is not guaranteed. Furthermore, private owners may need to accept liability for reimbursing the costs of relinquishment or removal of Detroit-owned infrastructure that exists in the alley prior to vacation.³⁴ Leaving Detroit the owner of an alley saves abutting property owners liability for maintenance and infrastructure, but means that improvers will be required to obtain ROW and ROE permits and purchase the insurance necessary for issuance of such permits.³⁵

Vacating an alley may jeopardize the continued existence of the alley since each abutting owner becomes an owner of a portion of the alley space and may gain the right to build on it. Improvers hoping to use an alley space for long term stormwater management would have to contract with all abutting owners for permission to reconstruct, and to limit other development of the alley following vacation.

³² DCC § 50-7-11.

³³ *Id.*

³⁴ DCC § 50-7-3.

³⁵ The Government Liability for Negligence Act expressly excludes alleys from its definition of "highway" for purposes of the highway exception to immunity. See *Collins v. City of Ferndale*, 234 Mich App 625; 599 NW 2d 757 (1999). The Highway exception excuses municipal corporations from liability for highway maintenance. MCL 691.1402.

Public Utility Easements

The closing or vacating of an alley by the City does not automatically erase rights of access held by public utilities or the public generally.³⁶ The City Council holds the authority to preserve any rights of access, or create new easements for public utilities and the public generally.³⁷ This is done on a case by case basis. The degree to which alley reconstruction may modify accessibility may depend on what types of access rights exist.

Public utility easements can be relinquished.³⁸ It requires written agreement between any interested utilities, the local government, and property owners subject to or in close proximity to the easement.³⁹

Emergency Response Access

Chapter 19 of the Detroit City Code incorporates the National Fire Protection Association's 2000 Fire Code (NFPA 1).⁴⁰ Alleys designated as "fire department access roads" by the Fire Marshal of Detroit pursuant to NFPA 1 are subject to the specifications established in NFPA 1, Ch. 18, as well as any specifications or requirements mandated by DPW. So, the extent to which such an alley could be modified may be more limited than alleys not designated as fire department access roads.

Paving and Grading an Alley; Specifications, and Variances

DPW's Engineering Division has issued standards and specifications for the layout and paving of alleys. DPW Paving Specs; DPW Alley Standards. Since the Engineering Division controls the permitting process for alley improvement, it is responsible for granting variances for alley improvements not within the promulgated standards.⁴¹

³⁶ DCC § 50-7-2. MCL 560.257.

³⁷ Id.

³⁸ MCL 560.222a.

³⁹ Id.

⁴⁰ DCC § 19-1-21.

⁴¹ If the alley is vacated, but remains a public right of way, it is still subject to DPW permit approval, so the rights of access, rather than the ownership is the dispositive factor in determining DPW jurisdiction. Upon vacation, the governing body may reserve an easement in the alley for public utility purposes and other public purposes within the right of way of the alley vacated. MCL 560.257.

Sources

The Charter of the City of Detroit (CCD)

Accessed on municode.com

The Detroit City Code (DCC)

Accessed on municode.com

National Fire Protection Association's 2000 Fire Code (NFPA 1)

Accessed on nfpa.org

BSEED ROE Permit Application (ROE Permit App.)

Available here: (from <http://www.detroitmi.gov/bseed>)
<https://drive.google.com/open?id=0Byr6VkcAgoMZdzlDU3BfUGV2ZEK>

DPW ROW Permit Application (ROW Permit App.)

Available here: (from <http://www.detroitmi.gov/PublicWorks>)
<https://drive.google.com/open?id=0Byr6VkcAgoMZV0R5R1ktLTE4R0U>

BSEED ROE FAQ (ROE FAQ)

Available here: (from <http://www.detroitmi.gov/bseed>)
(from <https://drive.google.com/file/d/0Byr6VkcAgoMZT25zOUFSMGN4WWc/view?usp=sharing>

DPW Street and Alley Standard Plans (DPW Alley Standards)

Available here: (from <http://www.detroitmi.gov/PublicWorks>)
<https://drive.google.com/open?id=0Byr6VkcAgoMZX0d2ZkRoWm1sRzA>

DPW Standard Specifications for Paving and Related Construction (DPW Paving Specs)

Available here: (<http://www.detroitmi.gov/PublicWorks>)
<https://drive.google.com/open?id=0Byr6VkcAgoMZdVJOTXpCc29hYkk>

Memo On Legal Issues That Arise For Shared GSI In The Landlord-Tenant Context

Disclaimer: Each green infrastructure project presents unique issues. This memorandum describes the kinds of legal issues that participants in a green infrastructure project should consider, but does not provide and should not be construed to provide actual legal advice that would apply to any particular project. For legal advice that applies to a particular project, please consult an attorney.

If a landlord and tenant wish to cooperatively engage in the installation and management of green stormwater infrastructure (GSI) on a leased premises, there are a couple of important issues that parties should address up front. These issues include billing practices regarding water-related services and avoiding potential legal pitfalls by specifically assigning responsibilities regarding the development and maintenance of GSI on leased premises. Without addressing these issues up front, it is possible that the tenant may be evicted, may face financial liability, or both.

1. Billing Practices and Real Estate Leases

To understand drainage fee billing practices in the landlord-tenant context, it is important to briefly address liens related to the provision of water-related services. In Detroit, the Board of Water Commissioners is responsible for periodically establishing equitable rates to be paid by the owner or the occupant of each house or building using water, drainage, or sewerage services.¹ State and local law provide that a lien is placed upon any building or premises to which water is supplied as security for the collection of any rates, assessments, or charges due or to become due for the use or consumption of water supplied to any building or premises.² Similarly, state and local law provides that a lien is placed upon any building or premises to which sewage service is connected as security for the collection of any rates, assessments, or charges due or to become due for sewage service supplied to the building or premises.³ Sewage service generally includes services provided by sanitary sewers as well as combined sanitary and storm sewer and may be interpreted to include systems to dispose of storm water runoff.⁴ As such, the state and local law can be interpreted to authorize the placement of a lien upon any

¹ Detroit Charter 7-1201

² Detroit City Code 56-2-40; MCL 123.162

³ Detroit City Code 56-3-13; MCL 123.162;

⁴ See, MCL 123.161(c) (defining sewage system as “a sewage disposal system, including sanitary sewers, combined sanitary and storm sewers, plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, or disposal of sewage or industrial wastes”); See, Detroit City Code 56-3-2 (defining sewage as “a combination of the water-carried wastes from residences, business buildings, institutions, and industrial establishments, together with such ground, surface, and storm waters as may be present.”)

building or premises for the failure to pay a drainage fee, as the drainage fee may be interpreted to be sewage service.⁵ Among other remedies, the Board of Water Commissioners may sell the building or premises at auction to recover delinquent water rates, assessments, or charges as well any sewerage service charges.⁶

In general, there are three ways that payment of water and sewage costs may be paid in the landlord-tenant context. Considering that unpaid water and sewage charges create a lien on the property, many landlords will simply assume the cost of paying for water and sewage services in the lease agreement. Absent a rent control ordinance, a landlord is free to charge the tenant more in rent based on their water and sewage charges. Detroit does not currently have any law that regulates the manner in which a landlord may increase rent in any context.

Another method is for the landlord to engage in what is commonly referred to as “third party billing.” Third party billing consists of the landlord receiving and paying water and sewage bills, paying the bills directly, and then requiring the tenant to pay the amount of the bill in accordance with a provision in the lease agreement. Some local governments have taken legislative action to regulate how landlords may engage in third party billing.⁷ Detroit currently does not have any ordinance or regulation that regulates how a landlord may engage in third party billing.

Lastly, a landlord can assign the tenant the responsibility of paying water and sewage charges in the lease agreement. Further, both state and local law provide that if a sworn affidavit of lessee responsibility for water and sewage charges is filed with the Detroit Water and Sewerage Department, then no lien will be placed upon the property if the tenant fails to pay their water or sewage bills.⁸

Below is sample language as to how landlords and tenants can address water, drainage, and sewerage costs in their respective lease agreements.

⁵ Additionally, the Michigan Revenue Bond Act permits for fees associated with services to a premises by a public improvement to be a lien on the property. MCL 141.121(3). A “public improvement” is broadly defined to include sewage disposal systems and storm water systems. MCL 141.103(b).

⁶ MCL 123.163; Detroit City Code 56-2-44 and 56-3-14.

⁷ See, e.g., Seattle Municipal Code 7.25.010 et seq.

⁸ Detroit City Code 56-2-42; 56-3-14; MCL 123.165; Affidavit of Lessee Responsibility for Water and Sewerage Bills: Individual Owner Acknowledgment, Detroit Water and Sewerage Department, available at http://www.detroitmi.gov/Portals/0/docs/DWSD/affidavit_of_lessee_responsibility.pdf?ver=2015-11-02-132641-043

Incorporating Water, Drainage, and Sewerage Charges Directly Into Rent: *The Tenant agrees to pay the Landlord rent in the amount of \$XXX.XX (hereinafter, "Rent") every month during the term of the Lease. Rent shall be paid to the Landlord in full on the first day of each month. The Rent includes amounts assessed by the Detroit Water and Sewerage Department for drainage, water, and sewerage services. The portion of the Rent attributable to amounts assessed by the Detroit Water and Sewerage Department for drainage, water, and sewerage services shall be \$XX.XX.*

Third Party Billing: *The Landlord will furnish and pay for all services provided to the premises by the Detroit Water and Sewerage Department regarding the provision of water, drainage, and sewerage (hereinafter "Water Services"). The Detroit Water and Sewerage Department will provide billing statements for Water Services to the Landlord. Costs regarding Water Services are not included in Rent. The Landlord will provide the Tenant with a separate bill ("Third Party Bill") for Water Services on a monthly basis. The bill shall only include the total amount the Detroit Water and Sewerage Department charged the Landlord for the previous month's Water Services. The Third Party Bill shall be paid by the Tenant to the Landlord within fourteen (14) days of receipt by the Tenant. The Tenant may examine billing statements provided by the Detroit Water and Sewerage Department to the Landlord upon reasonable notice and during normal business hours. The Landlord may assess a late charge of \$XX.XX for any late payment of the Third Party Bill. Additionally, the Landlord may exercise any other remedies described in this Lease if the Tenant fails to provide timely payment in accordance with this section for two consecutive Third Party Bills provided by the Landlord.*

Tenant Responsible for Water, Drainage, and Sewerage Charges: *The Tenant shall be responsible for all charges assessed by the Detroit Water and Sewerage Department regarding water, sewerage, and drainage services. Within seven (7) days of the effective date of this Lease, the Tenant shall take all necessary actions as required by the Detroit Water and Sewerage Department to assume payment responsibility for all charges assessed by the Detroit Water and Sewerage Department regarding water, sewerage, and drainage services regarding the premises.*

2. Development of Green Stormwater Infrastructure and Real Estate Leases

If either the landlord or the tenant wants to develop a GSI project on the property owned by the landlord, there are three potential methods by which the GSI project could be developed: the landlord could be the sole developer, the tenant could be the sole developer, or the landlord and tenant could develop it jointly.

The landlord is free to develop her property as she sees fit, subject to relevant laws and regulations as well as existing lease agreements. For example, local laws and regulations may require a specific land use to have a minimum number of on-site parking spaces for patrons or the lease agreement may specify that each tenant will have a specific number of parking spaces made available to its customers. In such instances, the landlord must be aware of such limitations to ensure that its replacement of parking spots with GSI does not violate local law or its lease agreement. However, in general, GSI developed solely by the landlord will always be the simplest way to add GSI to a rental property. Therefore, this report only closely analyzes the two other development scenarios, in which the tenant is the sole developer of the GSI project on the landlord's property or when the tenant and the landlord develop the GSI project jointly.

2.1 Solo Tenant Venture

If a tenant desires to pursue the development of a GSI project on the landlord's property without contribution from the landlord, there are legal obstacles to overcome. First, the tenant must consider whether the development of the GSI project is allowable pursuant to any use provisions under the lease agreement with the property owner. Second, the tenant must consider whether the GSI project would be considered as "waste" and thus subject the tenant to penalties.

2.1.1 Use Issue

Many residential and commercial lease agreements will contain clauses specifying what uses are permitted on the leased property. However, disputes may arise if the tenant uses the property for some purpose that the landlord does not approve of. In such circumstances, the lease agreement will be the focal point in determining whether the landlord has allowed the use by the terms of the lease. In instances where a lease agreement expressly states that a tenant may not use the property in a specified manner, then the expressed intent of the lease agreement will be controlling.⁹ For example, if a lease agreement expressly stated that a tenant could not develop a rain garden and the tenant proceeded to develop a rain garden, it would be a clear violation of the expressed terms of the lease agreement. However, more commonly a

⁹ *Knoop v Penn Eaton Motor Oil Co.*, 331 Mich 693; 50 NW2d 329 (1951)

lease agreement will be silent on additional uses. In such instances, Michigan courts have stated that use clauses in leases are interpreted to be permissive instead of restrictive.¹⁰ Therefore, unless a use clause specifically restricts the use of the property, courts generally will not interpret a lease agreement as only allowing the uses specified in the agreement.

It is important to note that in one instance, the Michigan Supreme Court interpreted a use provision in a lease agreement as restrictive even though the lease agreement did not explicitly state as such. In *Knoop v Penn Eaton Motor Oil Co.*, the Michigan Supreme Court considered whether a commercial lease agreement prohibited a tenant from using the landlord's property to operate a motor repair business. Notably, the lease agreement stated that the property was to be used "as a filling station for the sale of gasoline, oil, automobile supplies and accessories and any and all other merchandise handled in that vicinity by filling stations..." but did not expressly restrict the tenant from using the property for a motor repair business. While the court noted the general rule was to read use clauses in lease agreements as permissive rather than restrictive, it nonetheless noted that the plaintiff's use was financially injurious to the landlord since the rent due under the lease agreement was directly connected to the tenant's primary use of the property as a gasoline station. As such, the court noted that the use provision in the lease agreement was restrictive in the sense that it required the tenant to primarily use the property for the use specified. All other uses, while permissible as incidental uses, were not allowed as primary uses by the terms of the lease agreement. As such, in situations where a use is not expressly allowed or restricted by the lease agreement, a court may nonetheless read the use provision as restrictive if the unspecified use is injurious to the landlord.

While the specific remedy for violations of a lease agreement depends on the terms of the lease agreement, one potential remedy is termination of the lease and eviction of the tenant. Absent an expressed restriction in the lease agreement or the GSI operating in a way that is injurious to the landlord, it is likely that a use provision in a lease will be interpreted as permissive with regards to a tenant that wishes to use a portion of their landlord's property for GSI. However, the risk of eviction is severe enough that if a tenant is seriously considering undertaking a GSI project on their landlord's property, then she should seek to have the use provision of the lease agreement expressly allow for such use.

2.1.2 Waste Issue

Another form of legal liability that may arise from a tenant's development of a GSI project is a tort claim for waste. Waste is defined as the destruction, alteration, misuse, or neglect of

¹⁰ *Pearson v Sullivan*, 209 Mich 306, 313-14; 176 NW 597, 600 (1920); *Knoop v Penn Eaton Motor Oil Co*, 331 Mich 693; 50 NW2d 329 (1951)

property by one in rightful possession to the detriment of another's interest in the same property.¹¹ Accordingly, Michigan courts have held that damage to a leased premises may constitute waste.¹² Further, Michigan courts have also held that unauthorized improvements, even those improvements that may add value to the leased property, may constitute waste if those improvements materially change the nature and character of the property.¹³ As such, any permanent and material change to a landlord's property made by a tenant, regardless of whether it increases or decreases the value of the property, may be regarded as waste.

The Michigan legislature has codified the common law tort of waste in the Revised Judicature Act. It states that "[a]ny...tenant for years who commits or suffers any waste, during his term or estate, to the land, tenements, or hereditaments, without having a lawful license to do so, is liable for double the amount of actual damages..."¹⁴ Additionally, the Revised Judicature Act specifies that, after the commencement of any action based on a claim for damages for waste, the defendant may be restrained from the commission of any further waste of the land by a court order.¹⁵

While the general rule is that any permanent and material change to the landlord's property by the tenant is subjected to being regarded as waste, a landlord and tenant are free to contract around the general rule. The Michigan Supreme Court has held that if a lease grants the tenant the right to make alterations and improvements to the property, then those alterations and improvements cannot constitute waste.¹⁶

While use provisions in leases are generally read permissively in favor of tenants, any permanent improvement made to a property without the landlord's consent may be treated as waste and may subject the tenant to expensive damages. For example, a court may find that a tenant's installation of a GSI development was allowed per the use provision of the lease agreement with its landlord, but may also find that the GSI development was waste, absent some lease provision that expressly allowed for the permanent improvement to the landlord's

¹¹ *Mahrle v Enbridge Energy*, No. 331221, 2017 Mich App LEXIS 963 (Ct App June 15, 2017) (quoting 8 Powell, Real Property, § 56.01, p 56-3).

¹² *Anstays v Anerson*, 194 Mich 1 (1917)

¹³ *Id*; *Person v Sullivan*, 209 Mich 306, 314 (1920); *People v Smedly*, 1997 Mich App LEXIS 2233; *Mahrle v Enbridge Energy*, No 331221, 2017 Mich. App. LEXIS 963 (Ct. App. June 15, 2017)

¹⁴ MCL 600.2919(2)(a); Note that the Revised Judicature Act does not define "waste." When the legislature chooses to employ a common law term without indicating an intent to alter the common law, the term will be interpreted consistent with its common law meaning. *Stone v Williamson*, 482 Mich 144 (2008).

¹⁵ MCL 600.2919(4).

¹⁶ *Real Estate Stores v Harris*, 321 Mich 623, 629 (1948).

property. In such a circumstance, the tenant may be required to pay the landlord double the cost incurred to return the property to its original state.

3. Lease Agreement

If one or more tenants does play a role in the development of a green infrastructure project, then the lease agreement will be the focal point for describing the roles and responsibilities of the tenant and landlord in developing and maintaining the project as well as how the project will be financed and how the financial benefits of the project will be shared.

As detailed above, if a tenant desires to be involved in the development of a green infrastructure project on the property of their landlord, it would be advisable for the tenant to have their lease agreement include language that specifically allows for the tenant to use the property for stormwater management and include language that describes the specific, permanent improvements that the tenant will make to the property.

First, it is important that the lease specify that the tenant may use the property to manage stormwater with a specified type of green stormwater infrastructure. As mentioned above, use clauses in leases are generally interpreted permissively rather than restrictively by courts. However, some lease agreements may restrict the tenant's use to those uses specifically described in the lease agreement. Further, if an unspecified use results in some injury to the landlord, it is possible that a court may interpret the use provision as restrictive rather than permissive.¹⁷ The remedy for violating a use clause may also be drastic. While the landlord's remedies will ultimately rest on the terms of the lease agreement, it may be possible for the landlord to terminate the lease and evict the tenant in instances where a use clause has been violated. Given the potentially drastic consequences for the tenant, if a tenant desires to install GSI on the property of the landlord, the tenant would be wise to have the use clause of the lease agreement reflect that the tenant may use the property to manage stormwater.

Sample Use Clause: The tenant is permitted to use the premises to develop and maintain a green stormwater infrastructure installation, as more fully described in this lease agreement.

It is also important for the lease to specify that the tenant may make permanent improvements, expressly specify that such permanent improvements will not be regarded as waste, and specify what the nature of those improvements will be. As stated above, the general rule is that a tenant must return leased property to the landlord in the same condition as it was in at the start of the lease.¹⁸ However, a landlord and a tenant are free to contract around the general rule with a

¹⁷ See above, section 2.1.1.

¹⁸ See above, section 2.1.2.

clause that specifies how the tenant may construct permanent improves on the property of the landlord.

Sample Waste Clause: The landlord permits the tenant to develop green stormwater infrastructure on the premises in accordance with the requirements of this lease. It is hereby acknowledged that such green stormwater infrastructure will be a permanent improvement to the premises and that the green stormwater infrastructure will not be considered as waste.

In addition to the waste clause described above, the lease should contain a detailed improvements and alterations clause that addresses a number of issues regarding the siting and development of the green stormwater infrastructure. First, the clause should specify how the tenant may go about constructing the permanent improvements on the landlord's property. Frequently, landlords will desire input as to the location and design of any permanent improvements. The improvements clause should specify if the landlord will place any design or location conditions upon the development of the permanent improvement. The clause should also specify who is responsible for managing the development of the permanent improvement.

Second, the clause should specify how the construction of the permanent improvement will be financed and how the tenant will be compensated for their financial contribution. The landlord and the tenant should negotiate a specific amount of money that the tenant can contribute to the permanent improvement that will be compensated for by the landlord.

Third, the clause should also specify how the landlord will compensate the tenant for the tenant's financial contributions to the construction of the permanent improvement. This may be done in numerous ways, including but not limited to rent abatement until the tenant's agreed upon financial contribution has been fully compensated, the landlord paying the tenant for the costs of construction, or the landlord directly paying the tenant's contractor for the costs of construction. Additionally, since a green stormwater infrastructure project will likely be eligible for a drainage free credit, the landlord and tenant could arrange for the tenant to be compensated through a full or partial allocation of the drainage free credit that is reflected in the tenant's rent or utility payments. However, in situations where the tenant is being reimbursed for their payments for a green stormwater infrastructure project by the financial value of a drainage free credit, it will be important for the tenant to account for the situation in which their leasehold interest in the property terminates before the tenant has been fully compensated.