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Issued: August 22, 2023

Michigan Supreme Court Denies Leave to Appeal FishPass Case

On August 22, 2023, the Michigan Supreme Court denied leave to appeal in the FishPass case, which confirms the Court of Appeals decision and allows the City of Traverse City to implement the project. At issue in this lawsuit was whether the City Charter required a public vote prior to construction of the FishPass Project. The Court of Appeals unanimous ruling agreed with the City's position and held that no public vote is required.

According to the Michigan Supreme Court, "The application for leave to appeal the October 20, 2022 judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court."

City Attorney Lauren Tribble-Laucht who argued the City's case before the Michigan Court of Appeals, indicated, "The Michigan Supreme Court's decision to uphold the Michigan Court of Appeals ruling regarding the FishPass project is indeed a positive development. This decision affirms the City's choice to implement the project, which aims to replace the aging Union Street Dam, protecting the health and safety of downtown Traverse City, while also restoring and improving the ecological health of the waterways in the area."

The Michigan Court of Appeals decision did not address whether the property was actually parkland. Instead the Court held that assuming it was parkland a vote still would not be required under the City Charter. According to the Court's opinion in October 2022, "...the Project will result in a net gain of parkland and *more* public use. The Property will remain a park under the Project." Furthermore, "The trial court based its decision largely on the Project's research elements, but occupying space on the Property for purposes of conducting research related to the passage of fish, which matter has been part of the operation of the Dam and a characteristic of the Property since the addition of the fish ladder in 1987, does not transform the park into something other than a park. Moreover, engaging in environmental research concerning the habitat of species found in the area has a natural connection to the Property's purpose and use as a park. There is no evidence that the Project involves selling, exchanging, leasing, or alienating the Property. The City retains ownership of the Property throughout the duration of the Project. Authorizations to perform work or research on the Property do not entail the sale of the Property, an exchange of the Property, the leasing of the Property, or the alienation of the Property. At most, they convey a simple license."

FishPass is the capstone of an approximately 20 year restoration project on the Boardman/Ottaway River, Traverse City, Michigan, re-connecting the river with Lake Michigan. In 2021, a required MDEQ Dam

Safety Unit inspection was performed and indicated a downgraded rating from Good to Fair/Poor condition. FishPass will replace the deteriorating Union Street Dam with a new, complete barrier to all fish that will have the ability to sort and selectively pass desirable fishes while blocking harmful invaders like sea lamprey. While fully automated selective passage is the long-term goal of the project, passage of any fish during the initial 10 years will be coordinated with fishery management agencies, limited in number, and restricted to fishes native to the upper Great Lakes.

Traverse City Mayor, Richard I. Lewis stated, “We are committed to working closely with our partners to ensure the effective implementation of FishPass, and we are confident that this project will deliver significant benefits for years to come. We look forward to seeing the positive impact that FishPass will have on the Boardman/Ottaway River. ”

“FishPass is an innovative project that is set to transform the way we manage and protect our waterways. The City and its partners have worked tirelessly to bring this project to fruition, and are extremely happy about this decision. This state of the art project is designed to selectively pass fish and protect the Boardman/Ottaway River, providing a sustainable solution that benefits both the environment and the community. By creating a safe and secure passage for fish to navigate through, we are helping to provide access to the habitat that has already been restored through the Boardman/Ottaway River Restoration project. This decision is a huge step forward ensuring the health of our waters and the safety and wellbeing of our community for future generations,” said Department of Public Services Director Frank Dituri.

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