

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

City of Seneca, South Carolina,
City of Westminster, South Carolina, and
County of Oconee, South Carolina

Plaintiffs,

vs.

Pioneer Rural Water District of Oconee and
Anderson Counties,

Defendant.

Pioneer Rural Water District of Oconee and
Anderson Counties,

Third-Party Plaintiff,

vs.

Oconee Joint Regional Sewer Authority,

Third-Party Defendant.

CASE NO.: 2017-CP-37-00187

**MOTION FOR WRIT OF
MANDAMUS AND MEMORANDUM
IN SUPPORT THEREOF**

Comes now the Defendant and Third-Party Plaintiff, Pioneer Rural Water District of Oconee and Anderson Counties (“Pioneer”), by and through its undersigned counsel, respectfully petitioning the Court for a Writ of Mandamus, pursuant to Rule 65(f)(1), SCRCF, and would show unto the Court as follows:

Introduction and Background Facts¹

Pioneer's Enabling Statute

Pioneer is a special purpose, rural water district that supplies the water needs of approximately 7,000 customers in southern Oconee County and Northwestern Anderson County. Its approximately 130 square mile service area is bounded on the north by Westminster and Seneca, on the east and south by Coneross Creek and Lake Hartwell, Choestra Creek, and Highway 20.

Pioneer, like numerous other rural water districts in South Carolina, operates under an enabling act, codified at S.C. Code §§ 6-13-210 *et seq.* (the "Act"). The Act provides, among other things, that

It shall be the purpose and function of the district to acquire, construct and operate a waterworks system, utilizing therefor water from available sources, by purchase or otherwise, at such convenient points as the district shall select to provide a flow of water through pipes to the areas described in Section 6-13-220, and to such other domestic, commercial or industrial users who can be conveniently and economically served within or without the service area as herein provided.

S.C. Code § 6-13-230.

To accomplish its purpose, Pioneer was granted specifically enumerated powers and "all other powers that may be necessary or incidental in carrying out the functions herein prescribed and exercising the powers herein granted."

In about June 2012, the Act was amended to require that, before Pioneer invested in any new facility or took other action that obligated Pioneer for one million dollars or more, Pioneer had to provide an independent audit by an accounting firm, including the potential impact of the action on Pioneer's ratepayers, and present the audit at a public meeting. The Act requires that

¹ The facts set forth herein come primarily from the Affidavits of Terry L. Pruitt and Michael Odom, each of which is filed contemporaneously herewith.

the audit be verified by the South Carolina Office of Regulatory Staff (“ORS”). S.C. Code Ann. § 6-13-240(B), (C).

Pioneer is Subject to Arbitrary and Steep Price Increases

Pioneer has purchased water on the wholesale market to meet the needs of its customers since its inception in 1965. Its main suppliers have been Westminster, from which it began purchasing water in 1965, and Seneca, from which it has purchased water since 1987. Currently, about 60% of Pioneer’s water is supplied from the waterworks system of Seneca, and about 40% is supplied from the waterworks system of Westminster. Because Pioneer purchases its water from Seneca and Westminster, it is subject to price increases whenever Seneca and/or Westminster decide to raise prices.

Pioneer’s customers have been subjected to substantial increases in water prices charged by Seneca and Westminster between 2008 and 2012, including an indefensible 174 percent rate overall increase by Westminster, which included a 30% increase (from \$1.81 to \$2.36 per thousand gallons) in June 2012. The average annual increase in water prices charged to Pioneer by Seneca and Westminster has been 4.55 percent for the period between 2003 and 2017.

Pioneer Seeks an Alternate Approach

Because Pioneer no longer wanted to be subjected to arbitrary price increases by Seneca and Westminster, in or around 2007 Pioneer began exploring alternative means for providing water to its customers at fair and reasonable prices. To this end, Pioneer engaged an engineering firm, Design South Professionals, Inc. (“Design South”), to conduct a feasibility study for the construction of a water treatment facility (the “Facility”) to be added to the Pioneer waterworks system, and Pioneer received its first feasibility study back from Design South on or about October 31, 2007. The results of the study made clear that construction of the Facility would

result in substantial cost savings to Pioneer's customers. Once Pioneer had this feasibility study, it began to work on plans to construct the Facility, and those plans have been the subject of public meetings since 2008, including requests for public input to the Army Corps of Engineers.

Plaintiffs' Awareness of and Support for the Facility

While Plaintiffs feign ignorance of Pioneer's plans for the Facility and now bring this action in an effort to thwart Pioneer's efforts to get out from under the thumb of Seneca and Westminster's arbitrary water prices, Pioneer's very public plans to build the Facility are no surprise to any of the Plaintiffs. Moreover, Oconee County in particular actively promoted and supported the construction of the Facility for years before its recent change of heart; Oconee has gone from praising the project and donating land for the Facility, to attacking the construction by any means at its disposal, including the arbitrary and politically motivated withholding of the building permit for the Facility.

Pioneer's original plan for the Facility was to build it along Tugaloo Drive in Fair Play, South Carolina. To that end, Pioneer acquired two parcels of property in Fair Play in December 2010. However, the original proposed location of the Facility met with public resistance from local residents. In an effort to promote the Facility and mediate this resistance, Oconee County offered Pioneer a 25-acre tract of land in its Golden Corner Commerce Park ("Commerce Park") for \$132,000 as an alternate location for the Facility. In September of 2012, Pioneer's Board of Directors voted unanimously to accept Oconee County's offer and made plans to relocate the Facility to the Commerce Park.

Prior to March 2013, Pioneer engaged a Seneca accounting firm to conduct the independent audit concerning the Facility, and that audit was presented at a public meeting in March 2013. The independent audit demonstrated that Pioneer would save nearly \$6 million in

future water costs by building a waterworks facility that drew water out of Lake Hartwell instead of continuing to purchase water from Seneca and Westminster. By a report issued on April 10, 2013, the independent audit concerning the Facility was verified by ORS, as required by the 2012 amendment to the Act.²

In connection with its new plans to move the Facility to the Commerce Park, Pioneer amended its requests for DHEC permits, performed a new survey, and took other steps to prepare to relocate construction of its proposed Facility to the new location. Pioneer also continued the process of seeking long-term funding for the Facility through the U.S. Department of Agriculture. In or about June 2013, Oconee County tabled the final decision on whether to sell Pioneer property within the Commerce Park, though Oconee County continued to make clear that it supported the Facility.

Oconee County concluded that it had a higher use for the Commerce Park property. However, in or about July of 2014, Oconee County offered to contribute to Pioneer at no charge an approximately 70-acre parcel adjoining the Commerce Park on the other side of Cleveland Creek for the Facility. Oconee County was aware the property would be used for the Facility. Oconee County's decision not to charge for this new parcel was made because it recognized that that the property was otherwise unmarketable because of the location of wetlands on the property, and because it understood that it had caused Pioneer to invest substantial time and money in revising its plans to relocate the Facility to the Commerce Park in reliance on Oconee County's original agreement to sell a parcel within the Commerce Park to Pioneer.³

² A true and correct copy of the April 10, 2013 ORS report is attached as Exhibit D to Pioneer's Answer, Counterclaims, and Third-Party Complaint ("Pioneer Answer").

³ This offer was reported in online articles in *UpstateToday* dated July 26, 2014 and August 22, 2014, true and correct copies of which are attached as Exhibit F to the Pioneer Answer.

Pioneer accepted Oconee County's offer to donate the 70-acre parcel and, once again, invested money and time in revising plans so that it could relocate its Facility to suit the needs of others, including Oconee County. At a public meeting in August 2014, Oconee County Council voted unanimously to approve the conveyance of the property to Pioneer, and the deal was finalized by unanimous vote at the Oconee County Council meeting of September 16, 2014.⁴

After Oconee County provided Pioneer with a new site in 2014 upon which to build the Facility, Design South submitted revised site design plans and specifications to DHEC based on the new location, along with a revised construction permit application. On or about December 10, 2015, DHEC approved the construction permit based on the revised site design plans and specifications.⁵ Those approved plans and specifications included plans for a septic system to handle the wastewater generated from the Facility.⁶

Pioneer Applies for its Building Permit

On or about November 1, 2016, Pioneer entered into a contract with The Harper Corporation ("Harper") for the construction of the Facility. As part of its contract with Pioneer, on or about February 8, 2017, Harper submitted a building permit application for the Facility to Oconee County pursuant to Oconee County Ordinance Section 6-82.

According to Oconee County Ordinance Section 6-81, the Oconee County Codes Department was established for the purpose of administering the county building codes, including the 2015 South Carolina Building Code. According to the 2015 South Carolina

⁴ A true and correct copy of the Oconee County Council minutes for the September 2014 meeting are attached as Exhibit G to the Pioneer Answer.

⁵ A true and correct copy of the approval document is attached as Exhibit H to the Pioneer Answer.

⁶ A true and correct copy of the portion of the site design plans that includes the proposed septic system design is attached as Exhibit I to the Pioneer Answer.

Building Code, which is made applicable to Oconee County through Oconee County Ordinance Section 6-81, certain action is required on properly submitted building permit applications:

[A] 105.3.1 Action on application. The building official **shall examine** or cause to be examined applications for permits and amendments thereto **within a reasonable time after filing**. If the application or the construction documents do not conform to the requirements of pertinent laws, the building official shall reject such application in writing, stating the reasons therefor. If the building official is satisfied that the proposed work conforms to the requirements of this code and laws and ordinances applicable thereto, the building official **shall issue a permit therefor as soon as practicable**. [Emphasis added].

Oconee County Abuses Its Discretion by Arbitrarily and Unreasonably Refusing to Issue the Building Permit Based on a Manufactured Premise – “Approval” from OJRSA

On March 31, 2017, Oconee County Council held a special meeting and the Facility was part of the discussion at that meeting.⁷ In the minutes of the special meeting, Oconee County expressly admits that it has no legal basis to withhold approval of the building permit:

[Oconee County Attorney] Mr. Root updated Council on other issues relative to staff’s investigation of Pioneer Rural Water District’s construction of the water plant. He stated that during the last special meeting on this issue, **staff was instructed to investigate all means possible to enjoin or stop the construction of the water treatment facility**. This lawsuit is one of the avenues that is being pursued, and others continue to be under review. **He noted that research regarding the issuance or non-issuance of the building permit revealed no legal basis for Council to direct non-issuance**, that it was an administrative decision for the Planning Department to make. [Emphasis added].

During the week of April 10, 2017, Harper inquired as to the status of the building permit, and was advised by Oconee County that the Oconee County Building Standards had reviewed and approved the building permit application for all trades, but gave only one, invalid excuse as to why it has not issued the permit: Oconee County now claims it is awaiting

⁷ A true and correct copy of the minutes of this special meeting, as found on the Oconee County Council website, is attached as Exhibit M to the Pioneer Answer.

“approval” of the Oconee Joint Regional Sewer Authority (“OJRSA”) in order to issue the permit.

OJRSA Has No Approval Authority Over the Building Permit Process and No Legal Basis to Interfere with the Private Wastewater System for the Facility

For its part, OJRSA takes the unsupported position that the design for the project should include tying into the County pump station rather than installing a septic system on-site.⁸

OJRSA’s position is legally (and as a matter of engineering) invalid. There is no legal requirement that the Facility connect to public sewer. On the contrary, the Oconee County Sewer Ordinance is clear in providing that owners of buildings are required to connect toilet facilities directly with the public sewer only when (a) the building at issue abuts on any street, alley, or right-of-way in which there is a public sanitary sewer, and (b) such public sewer is within 300 feet of the property line:

...Except as provided in this division, it shall be unlawful to construct or maintain any privy, privy vault, septic tank, cesspool, or other facility intended or used for the disposal of wastewater. The owner of all houses, buildings or properties used for human occupancy, employment, recreation, or other purposes, abutting on any street, alley, or right-of-way in which there is a public sanitary sewer, is hereby required at the expense of the owner to install suitable toilet facilities therein, and to connect such facilities directly with the public sewer in accordance with the provisions of this article, within 90 days after the date of official notice to do so, **provided that such public sewer is within 300 feet of the property line.** Under unusual or specific circumstances, the general superintendent may waive this section.

Oconee County Sewer Ordinance, Section 34-143 (1995) (Emphasis added).

Where a public sanitary sewer is not available according to the provisions of this article, building sewers shall be connected to private wastewater disposal systems, subject to the requirements of the county or DHEC....

Oconee County Sewer Ordinance, Section 34-171 (1995).

⁸ It bears noting that this connection is for two toilets in the Facility for use by employees; it has nothing to do with the water treatment process.

Pioneer's facility is more than 300 feet from the public sewer operated by OJRSA. Accordingly, under the terms of the ordinance, public sewer is "not available" and there is no requirement that Pioneer connect to the public sewer. Instead Pioneer is permitted to construct its own private wastewater disposal system subject to the requirements of the county or DHEC. As noted above, Pioneer's private wastewater disposal system – a septic system on its property – has been approved under DHEC's requirements and DHEC has issued a construction permit for the site design of the Facility that includes a septic system.

In an Admittedly Political Attempt to Derail the Facility, OJRSA Attempts to Inject an Arbitrary, Unreasonable, and Legally Unsupported Requirement into the Building Permit Process

Pioneer notified OJRSA that it was planning the construction of its septic system, but the OJRSA has arbitrarily, capriciously, grossly negligently, and in bad faith claimed to Pioneer, erroneously and without any legal basis, that Pioneer must connect its toilet facilities to the public sewer, even though the public sewer is more than 300 feet of Pioneer's property line and even though there is no requirement in the ordinance for such a connection. Compliance with OJRSA's unlawful mandate would require a substantial delay in the project, and an estimated \$150,000-\$200,000 in costs associated with designing, engineering, and installing the connection to the public sewer more than 400 feet away from Pioneer's property.

On or about March 14, 2017, Oconee County Administrator Scott Moulder advised the General Manager of Pioneer that, as a political matter, Mr. Moulder needs to be able to tell Oconee County that he required Pioneer to connect to the public sewer that cost Oconee County several million dollars to construct, and that he could not have any entity in the Oconee economic development park that was not connected to the public sewer.

The statements by Mr. Moulder are not only incoherent (given that Oconee County persuaded Pioneer to construct the Facility outside the park in the first place), but they confirm

that the refusal of OJRSA to allow the Facility to proceed with a septic system is a sham devised purely for political purposes. In addition to the admission by Mr. Moulder set forth above, Bob Faires, one of Seneca's representatives on the OJRSA, attended a Pioneer board meeting on March 7, 2017 and advised the Pioneer board, in open session, that the Mayor of the City of Seneca would not let him release a sewer approval letter (i.e., a letter from OJRSA confirming the appropriateness of the DHEC-approved septic system for the Facility) because of "politics." Mr. Faires also advised the Pioneer board that he thought it would be "crazy" to connect the Facility to the public sewer, because it would take so long and be so expensive to pump the limited amount of sewage expected from the Facility up to the OJRSA sewage treatment plant, several miles away.

Argument

PIONEER IS ENTITLED TO A WRIT OF MANDAMUS TO VINDICATE ITS RIGHT TO THE IMMEDIATE ISSUANCE OF THE BUILDING PERMIT.

Oconee County Has No Sound Basis for Withholding the Building Permit and OJRSA Has No Role in the Building Permit Process

As demonstrated above, there is no factual dispute concerning the arbitrary and capricious refusal of Oconee County to issue a building permit for the Facility. Oconee County is on record, in the minutes of its own special meeting of March 31, 2017, as admitting that it has "no legal basis for [Oconee County] Council to direct non-issuance" of the building permit. The only excuse offered by Oconee County for its refusal to issue the permit is invalid, as it claims it is waiting on some sort of "approval" by OJRSA for the septic system included in the design of the Facility, which septic system has already been approved by DHEC.

There is no legal requirement that a separate application for approval of the septic system for the Facility be submitted to OJRSA. Moreover, given that the Facility is more than 300 feet

from the public sewer, there is no legal requirement that the Facility connect to the public sewer, and the Oconee County ordinance unequivocally permits the Facility to operate with its own private wastewater disposal system. In short, OJRSA has no proper role in the building permit process whatsoever.

Rather than approving the building permit, as required, Oconee County officials have arbitrarily, capriciously, grossly negligently, and in bad faith refused to approve the building permit for purely political reasons, without any proper legal grounds to do so, and Oconee County has admitted as much. In similar fashion, OJRSA has also admitted that it has no legal basis to attempt to inject a requirement that Pioneer connect the Facility to public sewer and that its refusal to provide approval (as indicated earlier, Pioneer contends that, under the circumstances here, there is no requirement for OJRSA “approval” in the first place) is purely political. OJRSA goes one step further, however, and is on record as saying that connecting the Facility to the public sewer system would be nonsensical.

Applicable Law

To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty of respondent to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999). Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion. *Id.*

“The writ of mandamus issuing out of the Courts of common law is the proper remedy to enforce the performance of such official acts as are of absolute obligation upon the officers

called upon to perform them, and are essential to a due administration of the government, when performance has been improperly refused.” *Runion v. Latimer*, 6 S.C. 126, 6 Richardson 126 (1875); *Sanford v. South Carolina State Ethics Com'n*, 385 S.C. 483, 685 S.E.2d 600 (2009).

Importantly, even if an act of a public official includes some discretion by that official, “mandamus will lie where the refusal . . . is arbitrary, unreasonable, and an abuse of discretion.” *Lake v. Mercer*, 214 S.C. 189, 194, 51 S.E.2d 742, 744 (1949). While Pioneer contends that the decision to issue a building permit is not discretionary (recall the building permit ordinance mandates issuance: “the building official shall issue the permit as soon as practicable”), even if there is some discretion on the part of a building official in the issuance of a building permit:

We recognize that under certain circumstances courts may use their mandamus powers to compel an administrative agency to act by exercising its judgment or discretion. Courts will not issue a writ of mandamus to compel or control the action of an administrative agency in the discharge of statutory duties involving the exercise of judgment or discretion **unless the attempted performance of the duty or the omission thereof amounts to illegal action or is an arbitrary or capricious abuse of discretion.**

In re Interest of Tyson, 282 S.C. 212, 218, 318 S.E.2d 279, 283 (Ct. App. 1984) (internal citations omitted) (emphasis added).

Oconee County Admits its Refusal to Issue the Building Permit is Arbitrary, Unreasonable, and an Abuse of Discretion; a Writ of Mandamus is Thus Required to Force Performance of its Duty

Pioneer has performed every prerequisite necessary to compel the issuance of a building permit and for approval by OJRSA, to the extent any such approval is even required (which Pioneer denies), of its DHEC-approved septic system for the Facility. Pioneer’s application for a building permit for the proposed Facility, together with the construction documents, if any, submitted in support thereof, conform to the requirements of all applicable codes, laws, and ordinances, and Pioneer has a clear legal right to the issuance of a building permit.

Pioneer's application for a DHEC construction permit, which was approved by DHEC, conformed to the requirements of all applicable codes, laws, and ordinances concerning approval of a septic system for the Facility, and Pioneer has a clear legal right to proceed with construction of its septic system without interference by OJRSA.

As indicated above, Oconee County has already advised Harper, the contractor constructing the Facility, that the building permit is approved for all trades, and the only reason Oconee is withholding the building permit is an invalid one – that Oconee is waiting for OJRSA to approve the septic system for the Facility.

Pioneer does not concede that OJRSA has the right or authority to approve or withhold approval of the septic system for the Facility. OJRSA has admitted, on multiple occasions, that only politics is holding up its approval of the septic system at the Facility, and OJRSA has no legal basis to interfere with the construction of that septic system. Accordingly, Oconee County has a legal duty to grant a building permit to Pioneer “as soon as practicable.”

Likewise, OJRSA – to the extent it has authority to approve of such a septic system (which Pioneer denies) – has a legal duty to approve of the DHEC-approved septic system at the facility so as not to interfere with construction of the same. In the alternative, OJRSA has a legal duty to inform Oconee that OJRSA has no authority to withhold approval of the septic system.

“A governmental body's decision ‘is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.’” *Pressly v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001) (internal citations omitted). Here, both Oconee County and OJRSA have **admitted** that

there is no valid reason to withhold approval of the building permit (Oconee County) or “approval” of the septic system for the Facility (OJRSA), which septic system has been approved as part of the DHEC construction permit for the site. There is no ordinance or other legal authority that justifies any further delay in the issuance of the building permit. The withholding of the building permit is purely political.

Pioneer is entitled to the building permit for the Facility that Oconee County is arbitrarily and unreasonably withholding, in an abuse of discretion, for purely political reasons. Oconee County’s withholding of the building permit for the Facility is causing and will cause substantial damages and irreparable harm to Pioneer, including millions of dollars in charges that will result from any delay in the construction of the Facility or termination of the contract for construction of the Facility that results from the improper refusal to issue the permit, together with the possible loss of funding, and Pioneer has no other legal remedy to secure the issuance of the building permit to allow it to continue construction of the Facility.

Conclusion

Given the facts set forth above, including Oconee County’s approval of the building permit for all trades and its admission that it has no legal basis to withhold the building permit for the Facility, Oconee County’s refusal to grant a building permit to Pioneer for the Facility is arbitrary, unreasonable, and an abuse of discretion. Given the facts set forth above, including OJRSA’s admissions that it withholding approval of the septic system for Pioneer’s Facility only for political reasons, OJRSA’s attempt to require connection to its sewer line and its refusal to approve the septic system for the Facility are arbitrary, unreasonable, and an abuse of discretion. Pioneer has no other legal remedy to secure its right to a building permit and approval of the septic system for the Facility.

For all of the foregoing reasons, Pioneer is entitled to the issuance of a writ of mandamus compelling the immediate approval of its septic system for the Facility, to the extent any such further approval is even required, and issuance of a building permit for the Facility, together with and an order that Oconee County and OJRSA be liable for the attorneys' fees and costs incurred by Pioneer in securing such a writ or writs.

WHEREFORE, Pioneer respectfully requests:

1. The Court issue a writ of mandamus requiring Plaintiff Oconee County to issue a building permit for the Facility immediately;
2. To the extent it deems necessary, that the Court also issue a writ of mandamus requiring Third-Party Defendant OJRSA to cease and desist purporting to require connection of the Facility to OJRSA's sewer line, and to provide approval for the construction of the DHEC-approved septic system for the Facility; and
3. That the Court award such other and further relief, including preliminary relief, as it deems just and proper.

Respectfully submitted,

WYCHE, P. A.

s/ Troy A. Tessier

J. Theodore Gentry (SC Bar No. 64038)
Troy A. Tessier (SC Bar No. 13354)
Camden Navarro Massingill (SC Bar No. 101319)
44 E. Camperdown Way
Greenville, SC 29601
Telephone: 864-242-2800
Facsimile: 864-235-8900
E-Mail: tgency@wyche.com
ttessier@wyche.com
cmassingill@wyche.com

AND

Alice W. Parham Casey (SC Bar No. 13459)
801 Gervais Street, Suite B
Columbia, SC 29201
Telephone: 803-254-6542
Facsimile: 803-254-6544
E-Mail: tcasey@wyche.com

Dated: May 2, 2017

**ATTORNEYS FOR DEFENDANT/THIRD-PARTY
PLAINTIFF**