

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ORLEANS

COUNTY OF ORLEANS,

Petitioner,

AFFIRMATION

-against-

Index No.: _____

GENESEEE COUNTY INDUSTRIAL
DEVELOPMENT AGENCY d/b/a GENESEEE
COUNTY ECONOMIC DEVELOPMENT CENTER
GENESEEE GATEWAY LOCAL DEVELOPMENT
CORPORATION; STAMP SEWER WORKS, INC.;
G. DEVINCENTIS & SON CONSTRUCTION CO., INC;
CLARK PATTERSON LEE; and
HIGHLANDER CONSTRUCTION, INC.

Respondents.

JENNIFER C. PERSICO, ESQ. under the penalties of perjury, affirms as follows:

1. I am an attorney at law licensed to practice in the State of New York. I am a partner at Lippes Mathias LLP, attorneys for the Petitioner, County of Orleans and, as such, I am fully familiar with the facts and circumstances in this matter, and I make this affirmation upon personal knowledge.

2. I make this affirmation in support of Petitioner’s application for a Temporary Restraining Order enjoining Respondents from construction of a sewer line in Orleans County.

3. The allegations and exhibits set forth in the accompanying Verified Petition are incorporated herein by reference.

4. The Respondents are attempting to construct a nine (9) mile sewage pipeline from the STAMP site in Genesee County into and through Orleans County with the end result being the

discharge of millions of gallons per day of chemical wastewater into Old Orchard Creek in Orleans County.

5. Orleans County has never consented to this and is therefore seeking an immediate temporary restraining order enjoining any further construction of the sewer line pending a hearing and determination on its Petition.

6. As is demonstrated in the Verified Petition and the other supporting documents, absent injunctive relief, Respondents will continue to construct the sewer line despite Orleans' County's objection. They have violated both substantive and procedural laws to get to this point and there is no reason to believe they will not continue to do so absent judicial intervention.

7. Despite lacking the necessary approvals, easements and permits to finish construction of the sewer line, Respondents have been aggressively pushing forward to trespass into Orleans County. Upon information and belief, they are already drilling in the Wildlife Refuge, and it is likely only a matter of hours or days until they begin construction in Orleans County.

8. Importantly, construction in the Wildlife Refuge can only take place between August 15 and October 31. As is demonstrated by the maps attached hereto as Exhibit A, Respondents intend to complete the construction of the sewer line through the Wildlife Refuge by October 15, 2023 which necessarily means that they will be trespassing into Orleans County in the immediate future.

9. The irreversible impacts of installation of miles of sewer line (over the objection of the sovereign government of Orleans County) certainly qualifies as irreparable harm. As is more fully set forth below and in the Verified Petition, exhibits and Memorandum of Law, Petitioner also amply demonstrates likelihood of success on the merits and that the equities are in its favor

thus warranting a temporary injunction pending a hearing on the preliminary injunction and resolution of the declaratory judgment and Article 78.

10. In order to be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits; (2) irreparable injury if provisional relief is not granted; and (3) that a balancing of the equities demonstrates that the moving party is entitled to injunctive relief.

11. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

12. Petitioner meets the criteria for both a temporary restraining order and a preliminary injunction pending resolution of this action.

Likelihood of success on the merits.

13. An Industrial Development Agency (“IDA”), such as the Genesee County Economic Development Corporation (“GCEDC”), is a corporate governmental agency constituting a public benefit corporation.

14. General Municipal Law §854(4), which governs IDAs, provides that “no agency shall use its funds or provide financial assistance in respect of any project wholly or partially outside the municipality for whose benefit the agency was created without the prior consent thereto by the governing body or bodies of all the other municipalities in which a part or parts of the project is, or is to be, located, and such portion of the project located outside such municipality for whose benefit the agency was created shall be contiguous with the portion of the project inside such municipality.”

15. Thus, GCEDC is prohibited from using its funds to finance the construction of the force main in Orleans County without the consent of Orleans County. GCEDC has never received consent from Orleans County to undertake this project.

16. The documentary evidence submitted with the Verified Petition clearly demonstrates that GCEDC and Respondents, Genesee Gateway Local Development Corporation (“GGLDC”) and Stamp Sewer Works (“SSW”), conspired to violate the specific prohibition against IDAs financing projects in other Counties without that County’s consent.

17. The GCEDC unequivocally violated the express language of GML §854(4) when it entered into contracts worth millions of dollars for design, engineering and construction work to be done in Orleans County without its consent; when it millions of dollars towards those contracts; when it paid for easements in Orleans County; and when it paid for and conducted the Eminent Domain Proceeding Public Hearing in an attempt to take easements in Orleans County.

18. The SSW similarly violated the law by failing to comply with its statutory obligation pursuant to Trans. Corp. Law §121 to provide services to the municipality in which it is located and again when it attempted to improperly use the eminent domain powers granted pursuant to Transportation Corporations for the sole purpose of doing that which GCEDC is prohibited from doing – taking land in Orleans County.

19. SSW was illegitimately formed by GGLDC and is not an actual active sewer corporation. It owns no sewage plant, owns no land, has no plan to construct a sewage plant, has no contracts for construction of any sewer facilities nor the sewer lines contemplated in the Notice. There is no reasonable explanation for the existence of SSW except that it was formed solely to circumvent the GML prohibition against IDAs financing projects outside their jurisdiction without consent.

20. Permitting an IDA to form what can only be called a sham corporation to do that which it is specifically prohibited from doing is patently unjust and in contravention of the letter and spirit of the law.

21. A governmental entity's serious substantive and procedural violations of applicable laws are in and of themselves sufficient to establish a likelihood of success on the merits.

22. Based upon the documentary evidence, there can be no serious question that the Respondents violated the law, thus establishing Petitioner's likelihood of success on the merits.

Irreparable injury if provisional relief is not granted.

23. If Respondents are not enjoined from further action, they will proceed to construct a nine (9) mile sewer pipeline through Orleans County for the sole purpose of discharging polluted water into Old Orchard Creek. If that is allowed to happen, the serious and irreparable harm to the environment, the economy, the residents and to Old Orchard Creek is virtually incapable of quantification.

24. Respondents unilaterally decided to permanently alter Orleans County waters. The Iroquois National Wildlife Refuge lies in both Genesee and Orleans Counties. This land, which is federally protected and essentially undeveloped, is largely comprised of marshlands known as the Alabama Swamp. Petitioner has an immediate and vested interest in protecting its own watershed. Every inch of pipe installed in the Refuge, regardless of the County, will permanently impact the quality and composition of Orleans County waters.

25. The same logic applies to the ultimate discharge of greywater into Oak Orchard Creek. From the first gallon of greywater dumped into Oak Orchard Creek, Respondents will have unilaterally impacted the quality and composition of Orleans County waters. Financial compensation will not remove Respondents' industrial forever chemicals from Petitioner's water.

26. Further, Petitioner stands to incur significant and irreparable injury to its robust tourism-based salmon fishing industry. Oak Orchard Creek empties into Lake Ontario at Point Breeze – a nationally renowned salmon fishing location that accounts for a significant amount of tourism income for Petitioner.

27. Once the construction is underway, the land cannot be un-disturbed. Moreover, inasmuch as the Respondents do not have the necessary easements to complete the construction, it is likely that if construction starts, it will be forced to stop. All the destruction and displacement will have been done for nothing and it will sit that way until this dispute is resolved.

Balancing of the equities

28. In light of the scope of the damage that will result from the installation of this sewer line, no adequate remedy at law exists. There is simply no way to calculate the damage to the ecosystem, the tourism economy, the residents and the sovereignty of local governments that would ensue should the Respondents not be enjoined.

29. On the other hand, the Respondents would only suffer monetary damages easily calculable by them. Given that this project started in 2010, Respondents can hardly argue that missing one construction season is going to put them significantly off course, much less that a temporary restraining order pending a hearing would amount to more than a minor annoyance. It is of course worth noting that any inconvenience or additional expense incurred in this situation would be an entirely self-inflicted wound. Respondents cannot cry foul after they have violated a host of laws in their effort to force their sewage into another community by any means necessary.

30. Moreover, according to the SSW Notice of Public Hearing and the testimony at the Public Hearing, the sewer line cannot be completed unless SSW is able to obtain the easements on

the properties owned by David Schloss and Allison Adkinson, Donald and Dana Quackenbush and Brennan and Valerie O'Connor. (See Notice of Public Hearing)

31. Neither SSW nor GCEDC has obtained those easements. In fact, Petitioner is the owner of the easements that GCEDC/SSW needs to complete construction of the force main and has no intention of selling them to Respondents. Moreover, SSW tabled the eminent domain proceeding and has not made any further progress towards obtaining the necessary easements.

32. Therefore, while Respondents' may have started construction and intend to get as far as they can into Orleans County, they will not obtain the necessary easements before the weather and/or the permit limitations require them to stop.

33. Thus, any claim that the issuance of a temporary restraining order will irreparably interfere with the construction schedule is wholly lacking in merit. Respondents started construction without having all their ducks in a row and did so at their own risk. This behavior is entirely consistent with their actions throughout this entire process. They make decisions and then try to steamroll other affected parties. This is an insufficient reason to deny injunctive relief. In fact, it tips the equities even further in favor of the Petitioner.

34. The existence of a factual dispute will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. A petitioner need make only a prima facie showing of a right to relief.

35. A petitioner is entitled to a temporary restraining order ("TRO") if the petitioner can show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be held.

36. Petitioner has satisfied its burden of demonstrating immediate and irreparable injury, loss or damages unless Respondents are immediately restrained from proceeding with construction of the force main pending final determination of this matter.

37. Counsel for GCEDC, GGLDC and SSW, Phillips Lytle, LLP, advised that they were not authorized to accept service of the attached application, nevertheless as they have appeared on behalf of the governmental bodies named as Respondents in the various legal proceedings in connection with this project thus far, we provided them copies of the relevant documents via electronic mail, in addition we served, via electronic mail copies of the application upon Peter Zeliff, Paul Battaglia and Criag Yunker in their capacities as Board Members for GCEDC, GGLDC and SSW. We served, via electronic mail, a copy of the instant application upon Mark Masse, VP of Operations for GCEDC; Daniel Duprey of Clark Patterson Lee and Highlander Construction via its general email. We were unable to obtain an email address for G. DeVincentis & Sons, but inasmuch as they are under contract with GCEDC, it is presumed that GCEDC is able to advise them of this application.

WHEREFORE, Petitioner respectfully requests that this Court issue a Temporary Restraining Order pending resolution of the issues raised in the Petition and for such other and further relief and for such other and further relief this Court deems appropriate.

DATED: September 11, 2023
Buffalo, New York

LIPPES MATHIAS LLP

/s/Jennifer C. Persico
Jennifer C. Persico, Esq.
Alexander W. Eaton, Esq.
Attorneys for Petitioner, County of Orleans
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202
(716) 853-5100
jpersico@lippes.com
aeaton@lippes.com