

**IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO**

STATE OF OHIO <i>ex rel.</i>	:	CASE NO.
MICHAEL DEWINE,	:	
ATTORNEY GENERAL OF OHIO	:	JUDGE
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TIMOTHY DEARWESTER and	:	
PINEVIEW PINES ESTATES, LLC	:	
	:	
Defendants.	:	
	:	

**PLAINTIFF STATE OF OHIO’S MOTION FOR A TEMPORARY RESTRAINING
ORDER AND A PRELIMINARY INJUNCTION AGAINST DEFENDANTS
TIMOTHY DEARWESTER AND PINEVIEW PINES ESTATES, LLC**

Now Comes the Plaintiff, State of Ohio, (“State”) by and through its counsel, Attorney General Michael DeWine, at the request of the Director of the Ohio Environmental Protection Agency (“Director” and “Ohio EPA” respectively), and hereby moves this Court for a Temporary Restraining Order and Preliminary Injunction pursuant to Ohio Revised Code 6109.32 and Ohio Civil Rule 65. A Memorandum in Support is attached and incorporated as if fully stated herein. A Proposed Order for the Court’s consideration is also attached.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS

Timothy Dearwester (“Mr. Dearwester”) owns and operates the Pineview Pines Estates, LLC Mobile Home Park (“Pineview”) located at 5730 Farmersville-West Carrollton Road, West Carrollton, Montgomery County, Ohio. Mr. Dearwester also owns and operates the Pineview drinking water system, which serves approximately four-hundred (400) residents. The drinking water system is a “public water system” (“PWS”) (PWS ID Number: OH5702212) and a “community water system” as defined by Revised Code (“R.C.”) 6109.01 and Ohio Administrative Code (“Ohio Adm.Code”) 3745-81-01. The PWS obtains its drinking water from a “ground water” source as defined by Ohio Adm.Code 3745-81-01.

On January 18, 2016, Ohio EPA Inspector Mariano Haensel (“Mr. Haensel”) was notified that a pipe in the Pineview water system had frozen and burst. *Affidavit of Mariano Haensel, attached as Exhibit 1, ¶ 22.* Mr. Haensel learned that residents had been without drinking water since January 17, 2016. Exhibit 1, ¶ 22. Ohio EPA instructed Pineview to repair the pipe and, in the interim, provide residents with bottled water. Exhibit 1, ¶ 22. The repairs to the pipes were completed by 4:42 p.m. on January 19, 2016, however despite the system being re-pressurized, the water being supplied to residents was void of chlorine. Exhibit 1, ¶ 22. As of the morning of January 20, 2016, the chlorine had been restored; however a boil advisory remained in effect. Exhibit 1, ¶ 22. Notice of the boil advisory had not been provided directly to all residents, and the bottled water had been acquired, but not delivered to all residents. Exhibit 1, ¶ 22.

Boil advisories are important after depressurization events like these because water systems are more susceptible to bacterial contamination after depressurization, exposing residents to an increased risk of harm from contaminated drinking water. Exhibit 1, ¶ 16.

Therefore, without bottled water delivery, residents remain without safe drinking water. Exhibit 1, ¶ 22. Based upon a long track record with Pineview, Mr. Haensel is also not confident that the repairs will hold and fears that another disruption in water service is imminent for Pineview residents. Exhibit 1, ¶ 22.

This is not the first time the residents of Pineview have recently been without safe drinking water. On December 12, 2015, the Ohio EPA Southwest District Office was notified that a pipe elbow joint in the Pineview water system was broken, resulting in pressure fluctuations and a boil advisory for the residents of Pineview. Exhibit 1, ¶ 21. The boil advisory remained in effect and Pineview residents were without safe drinking water until December 16, 2015. Exhibit 1, ¶¶ 16 and 21.

Also, on October 27, 2015, Mr. Haensel received a complaint from the Ohio Manufactured Homes Commission that the residents of Pineview had been without safe drinking water since 7 a.m. on October 26, 2015. Exhibit 1, ¶ 9. The next day, Mr. Haensel visited Pineview to respond to the complaint and evaluate the ability of Pineview's water system to provide adequate, safe, and potable drinking water, as required by R.C. Chapter 6109. Exhibit 1, ¶ 10. To facilitate this investigation, Mr. Haensel contacted Ms. Angie Tipton, the Operator of Record of Pineview's water system who is charged with monitoring its performance, and learned that she was unaware that the residents were without safe drinking water. Exhibit 1, ¶ 11. After investigating the water system, Mr. Haensel determined that the cause of the problem was a pipe in the system (the same pipe discussed above) that routinely breaks and needs repairs. Exhibit 1, ¶ 12.

During the October 28, 2015 visit, Mr. Haensel was told that repairs were planned for November 2, 2015. Exhibit 1, ¶ 16. Initial repairs were made by November 2, 2105, but by

Friday, November 6, 2015, new issues related to the broken pipe resulted in a boil advisory and once again left the residents of Pineview without safe drinking water. Exhibit 1, ¶ 16. The boil advisory was not lifted until 4 p.m. on November 6, 2015. Exhibit 1, ¶ 14.

Despite multiple repair attempts, the pipe continues to break. Exhibit 1, ¶ 12. In fact, this breaking pipe problem is one that the Pineview water system has had for some time. Exhibit 1, ¶ 13. As early as September 26, 2014, Mr. Dearwester was warned that failure of the well providing water to his residents was “imminent.” Exhibit 1, ¶8 and *September 26, 2014 Sanitary Survey letter*, p. 2, *attached as* Exhibit 2. Mr. Dearwester was also warned that the Pineview water system “has a high likelihood of failure.” Exhibit 2, p. 3. Moreover, Mr. Dearwester was ordered to remedy this issue (and others) in Director’s Final Findings and Orders, agreed to by Mr. Dearwester and issued by the Director of the Ohio Environmental Protection Agency (“Ohio EPA”) on April 22, 2015. *April 22, 2015 Director’s Final Findings and Orders*, *attached as* Exhibit 3, Section V, ¶ 5. Despite agreeing to and signing those Orders, Mr. Dearwester has failed to comply and has failed to ensure safe drinking water is consistently delivered to the residents of Pineview. Further, Mr. Dearwester has been and remains difficult to contact about service disruptions at Pineview. Exhibit 1, ¶ 13.

The October 28, 2015, December 12, 2015, and the January 18, 2016 water service disruptions demonstrate that the Pineview public water system remains unreliable and an ongoing threat to Pineview’s residents and visitors. Exhibit 1, ¶ 13.

ARGUMENT

Due to the serious public health threat posed by a perpetually broken water system incapable of consistently providing Pineview residents with safe drinking water, immediate

temporary and preliminary injunctive relief is necessary to protect the health and safety of Pineview residents. In addition to failing to properly maintain the Pineview water system, Mr. Dearwester and Pineview have violated numerous other requirements for the safe operation of a public water supply and continue to violate Orders which they agreed to follow. Given Mr. Dearwester and Pineview's repeated non-compliance with the law and inability to provide safe drinking water, as alleged in the Complaint in this case and this Motion, an enforceable judicial order is requested to compel Mr. Dearwester and Pineview to comply with safe drinking water laws and rules and protect his tenants' health.

The Supreme Court of Ohio has stated that statutory actions granting governmental agents the right to sue for injunctive relief have a history and purpose different from equitable actions for injunctive relief. *Ackerman v. Tri-City Geriatric & Health Care, Inc.*, 55 Ohio St.2d 51, 57, 378 N.E.2d 145 (1978). The Supreme Court indicated that when the State is seeking to enjoin statutory and regulatory violations, it is not bound by the strict requirements of traditional equity, but need only prove that the conditions set forth by the statute authorizing such relief have been met. *Id.* The Supreme Court explained this principle as follows:

Unlike equitable-injunction actions which were developed in response to a rigid and often inadequate common-law system for redressing non-violent wrongs suffered by one individual at the hands of another, R.C. 3721.08 was designed by the General Assembly to benefit society by proscribing behavior (the unlicensed operation of nursing homes) which the General Assembly has determined not to be in the public interest. It would, therefore, be redundant to require the Director of Health to show irreparable damage or lack of an adequate legal remedy once he has already proved that the conditions, which the General Assembly has deemed worthy of injunctive relief exist. In addition, it would be inappropriate to balance the equities or require the Director of Health to do equity in an R.C. 3721.08 injunction action because R.C. 3721.08 injunctions and similar injunctions which authorize a government agent to sue to enjoin activities deemed harmful by the General Assembly are not designed primarily to do justice to the parties but to prevent harm to the general public.

Id. at 57 (footnotes omitted).

The principle explained in *Ackerman* has been applied to uphold grants of injunctive relief for various statutory violations. For example, in *State v. Alexander Brothers, Inc.*, the Attorney General sought to enjoin unpermitted strip mining activities under R.C. 1513.15(A), which provided injunctive authority very similar to that under which the State is proceeding in this case. 43 Ohio App.2d 154, 155, 334 N.E.2d 492 (5th Dist. 1974). The Court of Appeals held that upon a showing of violations of R.C. Chapter 1513, the trial court should grant the injunctive relief sought by the State, and that it is error for a court to condition such injunctive relief upon a showing of irreparable harm. *Id.* at 156.

Ohio courts have consistently applied the principle set forth in *Ackerman* in actions to enforce Ohio's environmental laws and rules. In a case in which the defendants had admitted to violating R.C. 1521.062, for which R.C. Chapter 1521 authorizes an injunction, the Twelfth District Court of Appeals held that the lower court had properly granted the State's motion for an injunction. *State of Ohio ex rel. Celebrezze v. Cincinnati Land Development Corp.*, 61 Ohio App.3d 747, 750, 753 N.E.2d 1144 (12th Dist. 1989). The court stated that "[w]here the state legislature establishes a statutory injunction, that injunction must be granted by the court if the statutory requirements for injunctive relief are met." *Id.* Likewise, in *State of Ohio ex rel. Brown v. Chase Foundry & Manufacturing Co.*, the Tenth District Court of Appeals held that the trial court committed prejudicial error in dismissing the State's complaint without granting an injunction for air pollution. 8 Ohio App.3d 96, 456 N.E.2d 528 (10th Dist. 1982). In that case, it was undisputed that the defendant was emitting an air contaminant from an air contaminant source without a permit in violation of R.C. 3704.05, for which R.C. 3704.06 provides the remedy of injunctive relief. *Id.* at 99-100.

The case law for the provision of injunctive remedies as set forth in statutes is consistent. Temporary or permanent injunctive relief should be issued upon a showing of a violation of the statute or rule invoked. "It is established law in Ohio that, when a statute grants a specific injunctive remedy to an individual or to the state, the party requesting the injunction 'need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law.'" *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002 Ohio 2427, 768 N.E.2d 619, citing *Ackerman v. Tri-City Geriatric & Health Care, Inc.*, supra, quoting *Stephan v. Daniels*, 27 Ohio St. 527, 536, 1875 WL 203 (1875). See, also, *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 426, 639 N.E.2d 83 (1994), citing *Johnson v. United Ent., Inc.*, 166 Ohio St. 149, 140 N.E.2d 407 (1957).

In this case, Plaintiff alleges the Defendants have failed and will continue to fail to supply safe drinking water to Pineview tenants in violation of R.C. Chapter 6109. Ohio Administrative Code 3745-81-60 requires that an owner/operator of a water system correct significant deficiencies in its water system. Significant deficiencies include any defect in the system that puts the system in violation of a drinking water requirement or causes an unacceptable risk to the public's health. Ohio Adm.Code 3745-81-01(NNNN). The Defendants have failed to correct significant deficiencies at Pineview Estates since at least September 2014. Exhibit 1, ¶ 8. This failure to address various significant deficiencies at the Pineview MHP has left Pineview residents without safe drinking water on numerous occasions in the past year.

The Ohio EPA has been made aware of water outages on January 18, 2016, December 12, 2015, November 6, 2015, and October 27, 2015, and has been informed by residents of Pineview that the park has been without water on numerous other undocumented occasions. Exhibit 1, ¶¶ 8, 14, 19, 20. During his October 28, 2015 inspection, Ohio EPA inspector Mr.

Haensel became aware that Mr. Dearwester and Pineview failed to correct significant deficiencies at the park, as required by the April 22, 2015 Director's Final Findings and Orders. Exhibit 1, ¶ 12; Exhibit 3, Section IV, ¶ 16, Section V, ¶¶ 3-7. The Defendants' failure to correct those significant deficiencies will continue to result in water outages and the provision of unsafe drinking water to the residents of Pineview.

Mr. Dearwester and Pineview's failure to address four significant deficiencies continues to jeopardize the safe drinking water for Pineview's roughly 400 residents. First, Mr. Dearwester and Pineview fail to maintain an effective and functional public water system. This results in broken pipes and a failure to consistently maintain a minimum pressure of twenty pounds per square inch gauge at ground levels at all points in Pineview MHP's distribution system, as required by Ohio Adm.Code 3745-83-01(E). Exhibit 1, ¶ 14. These disruptions deprive the public water system of the pressure needed to pump water to each residence. Exhibit 1, ¶ 14. Residents then go long periods of time, from hours to days, without running water in their homes.

Second, Mr. Dearwester and Pineview fail to maintain a minimum chlorine residual of at least two-tenths milligram per liter ("mg/L") free chlorine or one mg/L combined chlorine, as required by Ohio Adm.Code 3745-83-01(C)(1). Exhibit 1, ¶ 14. In violation of Ohio Adm.Code 3745-83-01, there was no chlorine residual in the samples tested at Defendants' public water system on October 28, 2015 and November 2, 2015. Exhibit 1, ¶ 15. In fact, the required chlorine residuals were not consistently restored until November 6, 2015, leaving Pineview MHP residents without safe drinking water for at least ten days on that occasion. Exhibit 1, ¶ 15. Chlorine residual is an important indicator of disinfection of the water. Without the appropriate

amount of required chlorine in the water, the water is not adequately disinfected and safe for Pineview residents to drink without boiling.

Third, Mr. Dearwester and Pineview continue to fail to prepare and maintain a written contingency plan for providing safe drinking water to its service area under such emergency conditions, as required by Ohio Adm.Code 3745-85-01. All community water systems are required to have contingency plans that include a statement of amounts budgeted for emergency use, a statement identifying who can authorize expenditures for such purposes, and under what conditions expenditures are authorized. Ohio Adm.Code 3745-85-01(D)(2). The Defendants' lack of an appropriate contingency plan repeatedly leaves Pineview MHP residents without drinking water until the Ohio EPA and other government agencies intervene and remedy the continually arising emergencies. This failure to provide and implement an adequate contingency plan is a violation of Ohio Adm.Code 3745-85-01(D)(2).

Finally, Mr. Dearwester and Pineview often fail to report to the appropriate Ohio EPA District Office as soon as required, which is within twenty-four hours of the discovery of any serious plant or distribution system breakdown, as required by Ohio Adm.Code 3745-83-01(H)(4). Ohio Adm.Code 3745-83-01(H)(4) requires that notification be given to Ohio EPA within twenty-four hours if a "system breakdown or condition causing or likely to cause . . . (b) [a]ny major interruption in service or disinfection; or (c) [a]ny hazard for employees, consumers, the public or the environment." Ohio Adm.Code 3745-83-01(H). The October 26, 2015 pipe breakdown resulting in water service disruption was a "major interruption in service" and Mr. Dearwester should have notified the Ohio EPA Southwest District Office of that disruption within twenty-four hours. Instead, Ohio EPA learned of the disruption from a resident complaining to the Ohio Manufactured Homes Commission. Exhibit 1, ¶ 8. This left Pineview

residents without safe drinking water for a long period of time and severely impaired Ohio EPA's ability to respond to a mismanaged emergency situation.

On December 12, 2015, Pineview MHP's water system Operator informed Ohio EPA Inspector Haensel that the same elbow pipe joint (discussed above) was once again fractured. Exhibit 1, ¶ 20. The water system then faced problems with pressure fluctuations and a boil advisory for all Pineview residents until safe water samples were taken, which was not until December 16, 2015. Exhibit 1, ¶ 20.

On January 18, 2016, Mr. Haensel was informed by Ms. Tipton that a frozen pipe burst and that the Pineview residents had been without water since January 17, 2016. Exhibit 1, ¶ 21. Pineview was ordered to deliver bottled water to the residents if repairs were not completed by the evening of January 18, 2016. Exhibit 1, ¶ 21. Although repairs were made by January 19, 2016, Defendants' inability to maintain adequate chlorine residuals resulted in a boil advisory. Exhibit 1, ¶ 22. As mentioned, boil advisories are particularly important after depressurization events (like broken pipes) because they make systems more susceptible to bacterial contamination and subject the residents to a substantial health risk. Exhibit 1, ¶ 16. Defendants made bottled water available to Pineview staff by the evening of January 20, 2106, but Mr. Haensel believes another failure of the water system is imminent. Exhibit 1, ¶ 22.

Mr. Dearwester and Pineview's chronic failure to address significant deficiencies in the water system, in violation of Ohio Adm.Code 3745-81-60(F), and ongoing failure to prepare and maintain a working written contingency plan for providing safe drinking water under emergency situations, in violation of Ohio Adm.Code 3745-85-01(D)(2), continue to deprive Pineview MHP residents of safe drinking water. A Temporary Restraining Order and Preliminary Injunction are

necessary to protect the residents of Pineview from this serious public health risk now and in the future.

CONCLUSION

Revised Code 6109.31 prohibits any person from violating any duty imposed by R.C. 6109.01 to 6109.30, or any rule adopted pursuant to such sections. Revised Code 6109.32 codifies the ability of the Ohio Attorney General, when requested by the Director of Ohio EPA, to bring an action for injunction to enforce Chapter 6109 or rules adopted pursuant to the statutes. The affidavits presented with this Motion and the facts alleged in the State's Complaint provide the Court with ample basis for granting the State's Motion.

Numerous past and ongoing serious violations of Ohio's Safe Drinking Water laws leave the residents and visitors of Pineview at risk. Compliance with the statutory requirements protects public health by making sure that clean and safe drinking water is provided to the persons served by the public water system. Although it is not necessary for the State to demonstrate irreparable harm, the risk of harm to the residents of Pineview is apparent and would be a sufficient demonstration. Continually disrupted access to safe drinking water and exposure to unsafe drinking water carry myriad immediate health risks.

Therefore, the State requests the following immediate relief:

1. Defendants shall immediately comply with R.C. Chapter 6109, including but not limited to:
 - a. Immediately providing the residents of Pineview with bottled water in the amount of four gallons of bottled water per resident available each day as long as service disruptions continue.

- b. Maintaining a minimum of four gallons of bottled water per resident on hand at all times to serve as an alternate drinking water source for Pineview residents in the event of future water service disruptions.
- c. Making arrangements for regular home delivery of water to residents who are unable to pick up the bottled water during the current and other any service disruption.
- d. Keeping Ohio EPA apprised of viable contact information for any emergency, and provide a response to Ohio EPA within a reasonable time after being contacted.
- e. Hiring a professional engineer, with prior public water system experience, to evaluate and correct structural deficiencies in the Pineview public water system, including wells, treatment, pumps, and distribution lines.

The State also asks for the following preliminary and permanent injunctive relief:

- f. Complying with the Director's Final Findings and Orders signed by the Director and journalized on April 22, 2015.
- g. Correcting all significant deficiencies identified at the Pineview MHP public water system.
- h. Utilizing proper disinfection and maintaining the required residual chlorine levels.
- i. Conducting all the sampling and monitoring for contaminants required of a public water system by R.C. Chapter 6109.
- j. Require Defendants to report any water system service disruptions to the Ohio EPA Southwest District Office within twenty-four hours.
- k. Require Defendants to write and maintain an adequate contingency plan.

Respectfully Submitted,

**MICHAEL DEWINE
ATTORNEY GENERAL OF OHIO**

/s/ Tasha N. Miracle

Lawrence S. Helkowski (0068622)

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiff State of Ohio's Motion for Temporary Restraining Order and Preliminary Injunction* was served this 21st day of January, 2016, regular U.S. Mail to:

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