

C-3

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

**PROVIDENCE FARM COLLECTIVE
CORP.,**

NOTICE OF PETITION

Petitioner/Plaintiff,

Index No. _____

For an Order and Judgment Pursuant to
Articles 78 of the Civil Practice Law and Rules
and for a Declaratory Judgment Action,

Assigned Justice:

-against-

Hon. _____

**TOWN OF ORCHARD PARK, and WAYNE
BIELER, as Town Engineer, and THE ERIE
COUNTY WATER AUTHORITY,**

**ORAL ARGUMENT
REQUESTED**

Respondents/Defendants.

SIR(S), PLEASE TAKE NOTICE:

MOTION MADE BY:

Petitioner, PROVIDENCE FARM
COLLECTIVE CORP.

DATE, TIME & PLACE OF MOTION:

_____, 2025, at ___ Part
___ of the New York State Supreme Court,
Courthouse, Erie County, Buffalo, New York.

NATURE OF THE PROCEEDING:

Petition to pursuant to CLPR 7803(3) to
determine that the actions of Respondent
Town of Orchard Park and Respondent
Wayne Bieler, the Town Engineer, in refusing
to issue a letter and/or take the necessary
action to permit Erie County Water Authority
to connect water service for Petitioner
Providence Farm Collective Corp., and that
Respondent Town's insistence on Petitioner
agreeing to the formation of a new Water

District before the Town will take such action is arbitrary capricious and an abuse of discretion, and in the alternative pursuant to CPLR 7803(1) to compel Respondent Town of Orchard Park and Respondent Wayne Bieler to perform a duty enjoined upon them by law and issue such a letter, and pursuant to CPLR §§ 3001 and 3017(b) for a declaratory judgment determining that the Erie County Water Authority has sole authority to determine water service connection for Petitioner Providence Farm Collective Corp.

SUPPORTING PAPERS:

Verified Petition verified by Karen A. Prendergast, Co-President of Providence Farm Collective Corp.; Affidavits of Isaac Frisina, and Kristin M. Heltman-Weiss, the Affirmation of Paul D. Weiss, Esq. and Memorandum of Law in support thereof.

RELIEF REQUESTED:

An order pursuant to CPLR §7806, to set aside Respondent Town of Orchard Park and Respondent Town Engineer Wayne Bieler's failure to so issue such letter as arbitrary, capricious and an abuse of discretion and compelling Respondents Town of Orchard Park and Wayne Bieler and to issue a letter and/or take the necessary action to permit Erie County Water Authority to connect water service for Petitioner Providence Farm Collective Corp., and directing judgment to be entered thereon, and further issue a declaratory judgment pursuant to CPLR 3001 and CPLR 3017 (b) determining that the Erie County Water Authority may connect water service for Petitioner Providence Farm Collective, declaring that Respondent Town's insistence on Petitioner Providence Farm Collective Corp. agreeing to the formation of a new Water District is arbitrary and capricious and an abuse of discretion, and for such other and further relief as the Court may deem just and proper together with costs and disbursements of this proceeding and attorney's fees.

GROUNDS FOR RELIEF:

CPLR Article 78 and CPLR §§ 3001 and 3017(b), and related case law.

RESPONDING PAPERS:

If any, together with any answering affidavits are required to be served no later than seven (7) days prior to the return date of this petition, in accordance with CPLR §403(b) and CLPR 2214(b).

Dated: Kenmore, New York
January 10, 2025

s/Paul D. Weiss
BARTLO, HETTLER, WEISS & TRIPI
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**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

**PROVIDENCE FARM COLLECTIVE
CORP.,**

**VERIFIED
PETITION/COMPLAINT
UNDER CPLR ARTICLE
78 AND SEEKING
DECLARATORY RELIEF**

Petitioner/Plaintiff,

Index No. _____

For an Order and Judgment Pursuant to
Articles 78 of the Civil Practice Law and Rules
and for a Declaratory Judgment Action,

Assigned Justice:

-against-

Hon. _____

**TOWN OF ORCHARD PARK, and
WAYNE BIELER, as Town Engineer, and
THE ERIE COUNTY WATER
AUTHORITY,**

**ORAL ARGUMENT
REQUESTED**

Respondents/Defendants.

Petitioner, PROVIDENCE FARM COLLECTIVE CORP., by and through its attorneys,
BARTLO, HETTLER, WEISS & TRIPI, Paul D. Weiss, Esq., of Counsel, for its Verified
Petition for mandamus to review, in the alternative mandamus to compel, of determination by a
body or officer pursuant to CPLR Article 78 and for a declaratory judgment alleges as follows:

PRELIMINARY STATEMENT

1. This case challenges Respondents/Defendants Town of Orchard Park (“Respondent Town”) and Orchard Park Town Engineer Wayne Bieler (“Respondent Bieler” and collectively “TOWN RESPONDENTS”) preventing Respondent/Defendant Erie County Water Authority (“Respondent ECWA”) from connecting public water service to Petitioner Providence Farm Collective Corp.’s (“PETITIONER”) property and barn in the Town of Orchard Park, New York 14127.

PARTIES

2. Petitioner, PROVIDENCE FARM COLLECTIVE CORP. (“Petitioner”), is a non-profit, Internal Revenue Code Section 501(c)(3) corporation located at 5701 Burton Road in the Town of Orchard Park, New York 14127, within an Agricultural District under Article 25-AA of New York’s Agriculture and Markets Law.

3. Respondent TOWN OF ORCHARD PARK is a municipal corporation organized and existing under and by virtue of the laws of State of New York and maintains offices for the conduct of business located at 4295 South Buffalo Street, Orchard Park, New York 14127.

4. Respondent BIELER is the Town Engineer for the Town of Orchard Park and is named in his official capacity as the Town Engineer. Respondent Bieler’s official place of business is located at 4295 South Buffalo Street, Orchard Park, New York 14127.

5. Respondent ERIE COUNTY WATER AUTHORITY (“Respondent ECWA”), is a public benefit corporation established and created by New York Public Authorities Law § 1053 and maintains offices for the conduct of business located at 395 Main Street, Room 350, Buffalo, New York 14203-2494. Respondent ECWA is named herein as a necessary party as it provides

public water to Town of Orchard residents, businesses and farms through the water lines it services and maintains.

JURISDICTION AND VENUE

6. This action is brought against the Town Respondents, pursuant to Article 78 of the CPLR to compel Town Respondents to permit Respondent ECWA to connect Petitioner to public water, challenge Town Respondents' failure to grant such permission and/or making such permission contingent upon Petitioner's acceptance of an unrelated condition, that is, agreement to a new water district, as arbitrary and capricious and otherwise an abuse of discretion, and declaring that ECWA has the sole authority to connect Petitioner to public water service under the terms of the Lease-Management Agreement by and between Respondent ECWA and Respondent Town.

7. This action is also brought against all Respondents under the general original jurisdiction of this Court under Article VI, Section 7 of the New York State Constitution.

8. This Court has personal jurisdiction over all Respondents under CPLR § 301 because Respondents all work in or conduct substantial business in New York State.

9. The Court also has jurisdiction under CPLR § 3001.

10. This action is timely under CPLR § 217(1) because it was brought within four (4) months of December 19, 2024, the date of the Town Respondents' failure to authorize Respondent ECWA to connect its water supply to Petitioner's property and new barn.

11. Venue is proper in this Court under CPLR §§ 503(a), 506(b), 7502, and 7804(b) and because all material events occurred in Erie County.

12. The relief requested is authorized pursuant to CPLR §§ 3001, 7801, 7803, and related case law.

STATEMENT OF FACTS

13. Petitioner Providence Farm Collective Corp. is a nonprofit farm founded in 2019. Petitioner is Western New York's only non-profit farm that directly provides fresh produce to underserved populations and supports access to rural farmland, farming and business education, technical assistance, markets, and the opportunity to farm for income to underserved communities in Western New York. In fact, in 2023 and 2024, Petitioner provided over 100,000 pounds of fresh produce to over 11,000 people in 2023 and 14,000 people in 2024. *See* Affidavit of Kristin M. Heltman-Weiss, sworn to on the 9th of January 2025, ¶ 2 (“Heltman-Weiss Aff. ¶ ____”).

14. Petitioner's member farmers are from eleven (11) diverse communities who have come together to grow healthy, nutritious food for people in Western New York. Petitioner has been recognized at the local, state, and national levels for its efforts, including Erie County's 2023 Environmental Excellence Award, the Western New York Sustainable Business Roundtable 2023 Community Impact Award, and the 2023 National Edible Communities Sustainability Award. Petitioner's leaders have also been awarded such commendations as the 2024 Empower Through Agriculture Award from the New York State Department of Agriculture and Markets, and the New York State 2024 Women in Leadership Award which was presented to Executive Director Kristin Heltman-Weiss. Heltman-Weiss Aff. ¶¶ 2, 3.

15. In 2021 a benefactor purchased thirty-seven (37) acres of highly productive agricultural land within the Town of Orchard Park and Petitioner began renting the land. Through a successful fundraising campaign in conjunction with the Western New York Land Conservancy, Petitioner was able to raise sufficient funds to purchase the land and to build a

modern barn to meet the needs of Petitioner's members and replace the one-hundred (100) year old inadequate barn on the property. Heltman-Weiss Aff. ¶¶ 4, 6.

16. On April 6, 2021, being new to the Town and unfamiliar with the Orchard Park Town government, and in an effort to establish themselves as good neighbors in the Town, Executive Director and then-President of the Board, Kristin Heltman-Weiss reached out with an email to Town Supervisor Eugene Majchrzak, Town Board Member Joseph Liberti, and then-Town Board Member Conor Flynn. Heltman-Weiss Aff. ¶ 7.

17. On May 17, 2021, although engaged in the very busy planting season, but anticipating Petitioner's pressing need for a modern barn, Ms. Heltman-Weiss followed up with Conor Flynn, the only responsive Town Board member, requesting how to access county water. She specifically wrote that she had been "advised that a municipal source of water is the safest source for [Petitioner] PFC. Consequently, I would like to talk with the folks in [Orchard Park] government who are charged with water oversight." Heltman-Weiss Aff., Exhibit B.

18. It is important to note that Petitioner was and is seeking access to municipal water for the purpose of providing water to the new 5,280 square foot barn. This includes water for washing and packing of produce, for a kitchen that is involved with further processing of produce, and for bathrooms and showers to be used by its farmers and staff during the long days they spend in the hot sun during growing season. Petitioner does not seek access to municipal water for irrigation purposes. The water for irrigation originates in a surface fed pond on the property. Affidavit of Isaac Frisina, sworn to on the 9th of January 2025, ¶ 2 ("Frisina Aff. ¶ ____").

19. On June 30, 2021, continuing her effort to seek access to municipal water, Ms. Heltman-Weiss met with Town Clerk, Remy Orffeo and then-Town Code Enforcement Officer

Steve Bremmer. She asked if Petitioner needed to be a certified public water supply, and if so, what was needed for that and if the Town was aware of any funding to help reduce associated costs. Unfortunately, the Town had no answers or pertinent information to provide to Petitioner. Heltman-Weiss Aff. ¶ 18.

20. Having to focus on the 2021 harvest, as well as planning and initiating Petitioner's first ever capital campaign to raise funds to purchase the thirty-seven acres and to build a much-needed new barn, Petitioner was unable to return to the Town regarding municipal water until early 2022. Heltman-Weiss Aff. ¶ 19.

21. On March 19, 2022, Ms. Heltman-Weiss followed up with Town Board member Conor Flynn, introducing Mr. Flynn to Isaac Frisina (formerly Placke) ("Mr. Frisina"), Petitioner's Facilities & Equipment Manager who was working on water access for the farm. She noted that "having public water access at [Petitioner] would be optimal for future programming, as well as our general need for a reliable potable water source. I am reaching out to see if you can offer introductions to folks at the OP Town Hall who can help us in this area, guidance from you or others, and perhaps even grant opportunities for making our accessing county/municipal water more affordable." Heltman-Weiss Aff., Exhibit D.

22. On May 31, 2022, Mr. Flynn responded, indicating that Respondent Town Engineer Wayne Bieler would be the "first" point of contact for the Town and that "given that this is a water access issue your first point of contact would likely be the Erie County Water Authority." Mr. Flynn promised to provide a contact with the water authority and subsequently did provide that information. Heltman-Weiss Aff., Exhibit D.

23. On June 5, 2022, Ms. Heltman-Weiss reached out to Respondent Bieler, indicating that "having public water access at [Petitioner] PFC would be optimal for future

programming, as well as our general need for a reliable potable water source.” She then asked Respondent Bieler “if you can offer insights as to future plans for [Orchard Park] to extend public water down Burton Road or provide us information as to the possibilities, process and requirements should we choose to access public water for Providence Farm Collective.” Heltman-Weiss Aff., Exhibit E.

24. On June 6, 2022, Respondent Bieler provided a non-answer with conjecture regarding an as-yet unplanned “Town Wide Water District” and the need for Drainage Districts and Sanitary Sewer Districts to be combined into large Town Wide Districts with the concomitant legal, funding and design issues to be determined. He offered that if the unknown, undetermined and undated Town Wide Districts were not approved, Petitioner could then possibly petition together with its neighbors for a Water District Extension. Heltman-Weiss Aff. ¶¶ 21, 22.

25. What was unclear at that point to Ms. Heltman-Weiss and Petitioner is that in fact there was, and still is, a different and much more economical solution. Respondent ECWA services and maintains a Town 24” water main and 10” water distribution line along Powers Road in the Town of Orchard Park. Respondent ECWA services, maintains and provides water to other Town residents in Town Water District #17 (“District #17”) from that very 24” water main and 10” water distribution line that runs along Powers Road in Orchard Park. Heltman-Weiss Aff. ¶ 24; Frisina Aff. ¶¶ 4, 6, 15.

26. Significantly, the northern portion of Petitioner’s property lies well within District #17. Heltman-Weiss Aff., Exhibit G. All Respondent Bieler had to do was to indicate that Petitioner could connect to the 10” water distribution line and run a private lateral service line to the location of a planned new barn. However, rather than forthrightly inform Petitioner of this

option, Respondent Bieler continued in 2022, and to this date, down the path of prevarication and dilatory tactics he began in his June 6, 2022, email communication. Respondent Bieler continued to maintain that the only way that Petitioner, a non-profit with limited means, could obtain access to public water was to pay approximately \$200,000.00 to build a water main down Burton Road. Heltman-Weiss Aff. ¶¶ 35-40.

27. However, while Ms. Heltman-Weiss was focused on the 2022 growing season and harvest, and just as importantly, Petitioner's fundraising campaign, Petitioner Facilities and Equipment Manager Mr. Frisina followed up with Respondent Bieler. During the Summer of 2022, Mr. Frisina reached out to Respondent Bieler indicating that it was much too costly for Petitioner to pay for and build a water main down Burton Road. In response, Respondent Bieler continued to obfuscate about the ability of Petitioner obtaining water service via the 10" water distribution line along Powers Road and Petitioner's northern property area. Frisina Aff. ¶ 3.

28. As evidence of its continued success and overwhelming local, national and international support, in December 2022, Petitioner successfully concluded its capital campaign and began to focus on purchasing the thirty-seven (37) acres and begin plans to build a new barn to house and support its farming operations. Heltman-Weiss Aff. ¶ 32.

29. During this time, Petitioner, through its architect James Bammel Architects, also sought out where to site the new 5,280 square-foot barn. Although Petitioner had wanted to place the new barn in the northern portion of its property along Powers Road, Town officials dissuaded Petitioner, with Petitioner eventually choosing to construct the new barn in the southernmost portion of its property. Frisina Aff. ¶¶ 4, 5.

30. With this in mind, Mr. Frisina reached out to Jacob Alianello, a Professional Engineer with MDA Consulting Engineers, PLLC, regarding Petitioner's on-site well and efforts

to access public water. Mr. Alianello confirmed that the northern portion of Petitioner's property was within District #17. Following up on this information, Mr. Frisina reached out to Respondent ECWA Engineer Adam Massaro who informed him that Petitioner would be able to hook up to the 10" water distribution line along Powers Road serviced and maintained by Respondent ECWA. Frisina Aff. ¶¶ 6, 7.

31. On January 24, 2023, Mr. Frisina followed up with Respondent Bieler regarding accessing public water from Respondent ECWA and sending a diagram via email indicating the proposed location of Petitioner's desired private lateral service line from a Reduced Pressure Zone ("RPZ") at Powers Road to the anticipated location of the new barn. However, Respondent Bieler was nonresponsive. Frisina Aff., Exhibit B.

32. On February 2, 2023, Mr. Frisina first called Respondent Bieler following up on his January 24, 2023, email and then resent his original email. See, Frisina Aff. ¶ 7.

33. On March 29, 2023, Respondent Bieler spoke with Mr. Frisina, and again indicated that the only way that Petitioner would be able to access public water would be the cost prohibitive route of paying for and building a new water main down Burton Road. Frisina Aff. ¶ 8.

34. Under the mistaken belief that Petitioner would not be able to access public water because the only means was the prohibitively expensive endeavor of building a water main, Petitioner planned its new barn based upon access solely to well water. Petitioner's course of action and mistaken belief was directly due to Town Respondents', and specifically Respondent Bieler's, misinformation. Heltman-Weiss Aff. ¶ 31.

35. During this same period, Petitioner began the prolonged process of seeking a permit to build a barn in an Agricultural zoned district in the Town of Orchard Park. What

should have been simply a rubber stamp permitting the building of an authorized structure within a properly zoned district turned into a months-long process resulting in significantly increased costs to Petitioner. Heltman-Weiss Aff. ¶¶ 9, 10, 13.

36. Following Town of Orchard Park Planning Board review at two meetings, on January 24, 2024, Respondent Town approved the site plan for Petitioner's new barn. Respondent Town issued the Building Permit on April 12, 2024, and amended September 4, 2024. Frisina Aff., Exhibit F.

37. Petitioner immediately retained a construction manager and general contractor to building the new barn. Heltman-Weiss Aff. ¶ 32.

38. In conjunction with the construction, Petitioner pursued the necessary requirements and approvals to use its groundwater well for the new barn, due solely to Respondent Town and Bieler's disingenuous position that Petitioner would not be able to economically access public water service. Heltman-Weiss Aff. ¶¶ 33, 34.

39. In the summer of 2024, in the midst of construction of the new barn, Petitioner learned from Erie County Department of Health that, due to the number of individual farmers who may be on-site at the same time during any given day, Petitioner would be deemed a public water source. As a public water source, Petitioner would be required to have and maintain water treatment facilities at a cost of at least \$75,000.00, build a new structure to house this equipment, retain an independent testing agency to perform monthly testing, and have its own personnel test the water daily. All of this was once again cost prohibitive. None of these requirements would pertain to Petitioner if it was allowed to access public water from Respondent ECWA. Frisina Aff. ¶ 14.

40. When the issue of being a public water source arose, Petitioner's general contractor, who for the first time was made aware of the issue, opined that Petitioner should be able to access Respondent ECWA water service since Petitioner's property was within District #17. He further mentioned, alternatively, that because the private lateral service line would run the length of the property, some of which is not in District #17, the Town Respondents could authorize a simple "out-of-district" agreement. Heltman-Weiss Aff. ¶ 35.

41. Petitioner then researched the Respondents Town and Bieler's authorizing of "out-of-district" agreements and found out that in 2005, 2014, 2018 and 2021, the latter being during the very same timeframe Petitioner was requesting access to public water, Town Respondents granted "out-of-district" agreements for the provision of water by Respondent ECWA or the Village of Orchard Park. Weiss Aff., Exhibit K & L.

42. In the prior year, in or about March 2023, Mr. Alianello, on behalf of Petitioner, had sought out Respondent Bieler as to the possibility of Petitioner obtaining such an "out-of-district" water agreement which would allow Petitioner to access the 10" water distribution line on Powers Road serviced by Respondent ECWA and run a private service lateral to Petitioner's new barn. Respondent Bieler had asserted that Petitioner would never obtain an "out-of-district" water agreement from Respondent Town because it was "politically problematic." Frisina Aff. ¶ 11.

43. Now, in 2024, Ms. Heltman-Weiss began to communicate with Town Board Member Julia Mombrea, introducing herself and requesting help for Petitioner to access public water. Ms. Mombrea was apparently receptive, in fact, informing Ms. Heltman-Weiss that the Town Board discussed the water issue for Petitioner at its June 26, 2024, work session. Upon

information and belief, Ms. Mombrea had reached out to Respondent ECWA regarding the issue. Heltman-Weiss Aff. ¶ 37.

44. On July 11, 2024, encouraged by her communications with Ms. Mombrea, Ms. Heltman-Weiss called and emailed Respondent Bieler to again request “public water access by Providence Farm Collective at its in-district property along Powers Road.” Heltman-Weiss Aff., Exhibit H. During their telephone conversation, Respondent Bieler, seemingly annoyed at further questions about Petitioner’s concern for cost-effective and timely access to water service, told Ms. Heltman-Weiss in response to her inquiry, that the only option for Petitioner to obtain water service was a new, roughly \$200,000 water main extension down Burton Road and that Ms. Heltman-Weiss, simply did not like this answer. Heltman-Weiss Aff. ¶ 36.

45. On July 16, 2024, Ms. Heltman-Weiss followed up on her July 11, 2024, telephone call with an email to Respondent Bieler to again request access to public water, but also indicated that her understanding from her telephone conversation with Respondent ECWA Chief Operating Officer, Charles Eaton, was that Respondent ECWA was amenable to and approved a connection at the 10” water distribution line. Heltman-Weiss Aff. ¶ 37.

46. On July 18, 2024, Respondent Bieler emailed Ms. Heltman-Weiss, inaccurately stating that Respondent ECWA would require a main line extension on Burton Road frontage. He again maintained that Petitioner would have to petition for a new Water District and pay for the new water main, which had now risen to a cost of \$234,000.00. He also opined, in spite of repeated notice that the public water would not be for irrigation, that a new water main on Burton Road would be “a much better supply of water for use and irrigation.” Heltman-Weiss Aff., Exhibit H.

47. Later that same day, on July 18, 2024, counsel for Petitioner transmitted correspondence to Town Respondents formally requesting that they grant an out-of-district water service agreement to Petitioner without the unnecessary condition of paying for and building out a new water district. *See* Affirmation of Paul D. Weiss, Esq., affirmed on the 9th of January 2025, Exhibit A (“Weiss Aff. ¶____”).

48. On or about July 23, 2024, Petitioner then sought out direction from Respondent ECWA on how to make a connection between the water supply line and Petitioner’s new barn. Pursuant to information from Respondent ECWA, Petitioner applied for, paid the \$3,000.00 application fee and obtained approval from Respondent ECWA to connect to public water. *Frisina Aff. ¶ 17.*

49. On September 4, 2024, Petitioner sought and obtained Respondent Town’s permission via a Plumbing Permit Application for authorization to install a RPZ and grease interceptor for the sole purpose of having a point of connection to the 10” water distribution line in District #17, and to install Petitioner’s 2” private service water lateral to its new barn. *Frisina Aff. ¶ 18.*

50. Significantly, the approved Plumbing Permit Application includes the directive to add the RPZ to the Building Permit. The Building Permit was revised by the Town of Orchard Park Building Inspector the same day, September 4, 2024, to include: “Building Permit Revised 9/4/2024-Install an RPZ, with a 2” water line, shut offs and accessory equipment, install a grease interceptor regarding the concept of future planning expansion. *Frisina Aff., Exhibit F.*

51. Since the only reason for seeking approval for and construction of a RPZ was to connect public water from Respondent ECWA to the new barn, Petitioner had its plumbing

contractor install the RPZ and trench and lay the referenced 2” water line from the RPZ approximately 1,500 linear feet to the new barn. Frisina Aff. ¶ 19.

52. On September 19, 2024, apparently consistent with Petitioner’s understanding regarding the provision of public water, Orchard Park Town Attorney Timothy Gallagher, Esq. (“Mr. Gallagher”) telephoned Petitioner’s Counsel, Paul D. Weiss, Esq. (“Mr. Weiss”), indicating that the Respondent Town was now authorizing an out-of-district water agreement with Petitioner and that he, not Respondent Bieler, would be working toward the conclusion of said agreement. Weiss Aff. ¶ 7.

53. On October 31, 2024, failing to hear back from Mr. Gallagher on the “out-of-district” water agreement and what form such an agreement would take, Mr. Weiss emailed Mr. Gallagher Petitioner’s proposed Water Agreement. Weiss Aff., Exhibit B.

54. On November 8, 2024, Mr. Gallagher forwarded a new and different “draft out-of-district” water service agreement that he indicated he would be “working off of” and would “make the necessary changes specific to [Petitioner’s] circumstances and get it over to you.” Weiss Aff., Exhibit C.

55. The Town Respondents then engaged Petitioner in a game of whack-a-mole, agreeing to authorize Petitioner’s water service but continuing to place new conditions on Petitioner that it had to comply with once the previous condition was met. These dilatory tactics have had the effect of preventing Petitioner time and time again from obtaining its lawful right to access public water service provided by Respondent ECWA to residences, businesses and farms within District #17.

56. Having heard nothing from Town Respondents, and in order that the Town Board be able to approve Petitioner’s “out-of-district” water agreement at its November 20, 2024,

meeting, Petitioner's counsel obtained signatures of Petitioner's Co-Presidents on its proposed "out-of-district" water agreement and hand-delivered duly signed originals to both Mr. Gallagher's Town Office and private office on November 19, 2024. Weiss Aff. ¶ 11.

57. Unfortunately, the Town Respondents took no action on Petitioner's proposed, signed and hand-delivered "out-of-district" water agreement at its November 20, 2024, meeting. Weiss Aff. ¶ 12.

58. In fact, after the signed "out-of-district" water agreement was hand-delivered, Town Respondents added another new condition, namely that the "out-of-district" water agreement include language referencing Respondent ECWA's Tariff Agreement and Lease-Management Agreement. Mr. Gallagher had omitted this language in his draft of November 8, 2024, however, since it had been included in Petitioner's original proposed agreement, Petitioner saw no problem reincluding mention of Respondent ECWA. Weiss Aff., Exhibit D.

59. Then, the Town Respondents subsequently added another condition. Town Respondents insisted that Petitioner agree to become part of some as of yet unplanned new Water District as a condition for Respondent Bieler to approve Petitioner receiving water from Respondent ECWA in District #17. Weiss Aff. ¶ 13.

60. Town Respondents now required that Petitioner "agree to become part of the Water District." Petitioner could not in good conscience agree to a condition with so many uncertainties and unknown economic consequences. Weiss Aff. ¶ 14.

61. Respondent Town's new condition struck Petitioner as absurd. Petitioner had requested receiving water through a RPZ on its property within existing District #17 and running a private service water lateral line to its new barn. Respondent ECWA apparently did not have any issue with that connection and approved it. Frisina Aff. ¶ 18. Respondent Town apparently

did not have any issues with that connection when it granted a permit to do so on September 4, 2024. Frisina Aff. ¶ 18.

62. But once Petitioner begins to receive water within District #17 through the promised but not yet granted “out-of-district” water agreement, there will be no need to connect to the water main in a new Water District because Petitioner will be receiving water from existing District #17. In other words, Town Respondents are requiring Petitioner to initiate and be part of a new water district, and pay for the lion’s share of it, not to obtain water from that new district, but in order to obtain water from the existing District #17.

63. In response to Mr. Gallagher’s November 20, 2024, email, Petitioner’s attorney emailed Mr. Gallagher, asking to decouple the new water district from the out of district water agreement by writing: “[S]ince we need our water immediately, we need the Out of District Water Agreement approved at the next board meeting [December 4, 2024]. In addition, since we have no idea when the new Water District will be mapped or when the Planning Board report will made or what it will entail, we think it most prudent to not further complicate the much-needed provision of water by ECWA with the new Water District issue.” Weiss Aff., Exhibit E.

64. Mr. Weiss also followed up on Mr. Gallagher’s November 20, 2024, email that “[Respondent] Wayne [Bieler] mentioned that Chris Wood is currently working on the Map and Planning Report for the expanded/New District” by contacting Chris Wood, a professional engineer with Carmina Wood Design. During the week of November 25, 2024, Mr. Weiss spoke to Mr. Wood, who indicated that he believed there were only 4 property owners in the proposed new district, but that he did not have a Map or Planning Report and that he thought that Respondent Bieler’s engineers were working on those items. Weiss Aff. ¶ 14.

65. However, it was not until the day of the Town Board meeting on December 4, 2024, that Mr. Gallagher communicated with Petitioner's counsel. This time, Mr. Gallagher indicated that the document was a "Working Document" and not even ready for Petitioner's consideration. Mr. Gallagher candidly admitted that Town Respondents did not even know costs of establishing the new district and associated water distribution line of a new Water District. Mr. Gallagher further indicated Respondent Bieler would be reaching out to Chris Wood for the design of the new Water District; something Petitioner's attorney had already determined to be inaccurate. Weiss Aff. ¶ 17.

66. Significantly, in the same email, Mr. Gallagher referenced that Respondent Bieler was adding yet another condition, New York State approval, by writing: "Also, I believe that [Respondent] Wayne [Bieler] is still waiting to hear back from New York State about Municipal Water being supplied for agriculture purposes...." Weiss Aff., Exhibit F.

67. Mr. Weiss immediately followed up with numerous questions to Mr. Gallagher, none of which were satisfactorily answered. Weiss Aff. ¶ 17.

68. At the December 4, 2024, Respondent Town Board meeting, nearly a dozen individuals spoke on behalf of Petitioner's efforts to access public water for its new barn. Respondent Bieler and members of Respondent Town Board, while apparently proclaiming support, were obstinate in their position Respondent Town would not authorize Respondent ECWA to supply water to Petitioner through District #17 absent Petitioner agreeing to the new water district, a prohibitively expensive mandate. Petitioner would bear most of the cost of a new Water District. Weiss Aff. ¶ 17.

69. In response to Town Respondents' inaction, by correspondence dated December 10, 2024, Petitioner's counsel, Mr. Weiss, once again sought to decouple the Town Respondents'

condition of having Petitioner agree to be part of a new Water District. Mr. Weiss noted that conditioning Petitioner's agreement on a new water district would complicate the proposed "out-of-district" agreement and was premature as the new Water District was yet to be determined.

Weiss Aff. ¶ 18.

70. Moreover, Petitioner's counsel wrote: "If the Board does not authorize the Water Service Agreement at the December 18, 2024, meeting without this added preemptive language regarding a new Water District 17-4, [Petitioner] will consider this refusal a denial of water service." Weiss Aff., Exhibit G.

71. Town Respondents did not act on Petitioner's request for approval of the "out-of-district" water agreement at its December 18, 2024, meeting. Weiss Aff. ¶ 19.

72. This was in spite of Petitioner having the understanding from July 2024 that Respondent ECWA representatives had all the necessary information and forms from Petitioner in order to connect water service to Petitioner. Heltman-Weiss Aff. ¶ 37.

73. Rather, Respondent Town subsequently doubled down on a new water district by accepting Respondent Bieler's recommendation that the "Engineering Department []complete a Map, Plan and Report for the creation of Burton Road Orchard Park Water District 17-4." The Town Board approved a resolution to authorize the Engineering Department to complete a Map Plan and Report for the new water District. Weiss Aff., Exhibit H.

74. This new resolution only confirmed what Petitioner's counsel had previously discovered, that no map or planning report had been requested from or contracted to Carmina Wood and that Respondents Town and Bieler were responsible for it. Compare, Weiss Aff. ¶ 14 and Weiss Aff., Exhibit H.

75. Town Respondents insistence on a new water district is especially misplaced because Petitioner's neighbors have expressed to Petitioner's staff that they are all steadfast in their opposition to a new water district. Frisina Aff. ¶ 22; Heltman-Weiss Aff. ¶ 46.

76. Since a petition for a proposed new water district normally originates with the property owners in the proposed new water district, and with none of the property owners interested in a new water district, the Town Respondents' course of action is confounding.

77. Finally, based on evidence of Town Respondents' glacial pace of past infrastructure planning and construction, Petitioner anticipates being without access to public water and the ability to fully utilize its new barn for years to come. Heltman-Weiss Aff., Exhibit I.

78. Town Respondents' actions have been arbitrary, capricious, and an abuse of discretion, and, in the alternative, Town Respondents' inaction has been a failure to perform a duty enjoined on them by law, and further that all that is needed for Petitioner to access public water is Respondent ECWA's approval of Petitioner's connection to the lines that it services.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION:

Respondent Town and Respondent Bieler's actions are Arbitrary, Capricious and an Abuse of Discretion pursuant to CPLR §7803(3) [Mandamus to Review]

79. Petitioner repeats and realleges each and every allegation contained in paragraphs 1 through 78 as if fully set forth herein.

80. Town Respondents' actions and course of conduct has been to deny Petitioner access to public water supply; each time with a new purported reason.

81. Moreover, Town Respondents now insist that Petitioner agree to be a part of a new water district with an undetermined timeline to implement the same and as yet undetermined costs to Petitioner.

82. Town Respondents' denial to Petitioner of access to public water supply is supportable neither by the facts, nor by law nor by sound and ethical practice.

83. Therefore, it is respectfully submitted that this Court should find that Town Respondents' failure to approve Petitioner's connection to Respondent ECWA supply of public water in Orchard Park Water District #17 is arbitrary, capricious and an abuse of discretion under CPLR 7803(3) and related decisional law.

SECOND CAUSE OF ACTION:

Respondent Bieler's Refusal to Approve Respondent ECWA's water service to Petitioner is a failure to Perform a Duty Enjoined upon him by Law pursuant to CPLR §7803(1) [Mandamus to Compel]

84. Petitioner repeats and realleges each and every allegation contained in paragraphs 1 through 83 as if fully set forth herein.

85. In the alternative, Petitioner maintains that Respondent Bieler's confirmation of the connection between Respondent ECWA and Petitioner via the RPZ is a purely ministerial, and not discretionary action required of him under the Lease-Management Agreement between Respondent ECWA and Respondent Town.

86. Respondent Bieler is refusing to perform his ministerial duty enjoined on him by law to confirm Respondent ECWA's water service connection to Petitioner's new barn via the RPZ within District #17 at Powers Road.

87. Therefore, it is respectfully submitted that this Court should compel Respondent Bieler to perform his duty enjoined upon him by law and approve Petitioner's water service connection from its new barn to Respondent ECWA water service via the RPZ pursuant to CPLR 7803(1) and related decisional law.

THIRD CAUSE OF ACTION

Declaratory Judgment

88. Petitioner repeats and realleges each and every allegation contained in paragraphs 1 through 87 as if fully set forth herein.

89. An actual case or controversy exists between Petitioner and Respondents regarding the claims raised herein.

90. Absent clarification from the Court, the dispute between Petitioner and the Respondents is capable of and almost certainly will be recurring.

91. Petitioner has received approval for water service from Respondent ECWA.

92. Accordingly, Petitioner respectfully maintains that it is entitled to a declaration that Petitioners are entitled to water service connection by Respondent ECWA without additional approval from Town Respondents.

PRAYER FOR RELIEF

93. WHEREFORE, Petitioner respectfully requests that this Court enter an Order:

- a. Respondent Town and Respondent Bieler's actions are Arbitrary, Capricious and an Abuse of Discretion pursuant to CPLR § 7803(3);
- b. Respondent Bieler's Refusal to Confirm Respondent ECWA's water service to Petitioner is a failure to Perform a Duty Enjoined upon him by Law pursuant to CPLR § 7803(1);
- c. A declaration pursuant to CPLR § 3001 that Petitioner is entitled to water service connection from its new barn to Respondent ECWA water service via the RPZ without prior approval from Town Respondents;
- d. Costs and attorneys' fees of this action;
- e. Such other and further relief as this Court deems just, proper and equitable.

Dated: January 10, 2025
Kenmore, New York

Respectfully submitted,

By: s/Paul D. Weiss
Paul D. Weiss, Esq.
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VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

KAREN A. PRENDERGAST, being duly sworn, deposes and says: that she is the Co-President of Providence Farm Collective Corp., Petitioner/Plaintiff named in the entitled action; that she has read the foregoing document and knows the contents thereof; and that same are true to her knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes them to be true.


KAREN A. PRENDERGAST

Sworn to before me this

9th day of January, 2025


Notary Public

BEVERLY A.R. NATALE
No. 01NA6104361
Notary Public, State of New York
Qualified in Erie County
My Commission Expires January 20, 2028

CERTIFICATION OF WORD COUNT

Pursuant to section 202.8-b of the Uniform Civil Rules, I hereby certify that the number of words in this document, excluding the caption and signature block, is 5746 words, and the document complies with the word count limit of 7,000. I have relied on the word count of the word-processing system used to prepare the document.

Date: Kenmore, New York
January 10, 2025

s/Paul D. Weiss
Paul D. Weiss