

1
2
3
4
5
6
7
8
9
10
11
12
13

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LLOYD ANDERSON, PAIGE CRAFORD,
and MILLARD CHRISTNER,

Plaintiffs,

v.

CITY OF PORTLAND, an Oregon Municipal
Corporation,

Defendant.

Case No. 1112-15957

**PLAINTIFFS’ MOTION FOR LEAVE
TO FILE SUPPLEMENTAL
COMPLAINT**

**Oral Argument and Official Court
Reporting Services Requested**

UTCR 5.010 CONFERRAL STATEMENT

Pursuant to UTCR 5.010, the undersigned certifies that counsel for plaintiffs conferred in good faith with counsel for defendant on the issues addressed in this motion, but the parties were unable to resolve the issues presented herein.

ORAL ARGUMENT REQUESTED

Pursuant to UTCR 5.050, plaintiffs request oral argument on their Motion for Leave to File Supplemental Complaint. Plaintiffs estimate that 10 minutes will be required for oral argument. Official court reporting services are requested.

MOTION

Pursuant to ORCP 23 E, plaintiffs Lloyd Anderson, Paige Craford and Millard Christner (collectively “plaintiffs”) move for an order allowing the filing and service of the supplemental complaint attached hereto as **Exhibit A**, because the events stated therein have happened since the date of plaintiffs’ Second Amended Complaint, and it is in the interest of justice that all

1 issues between plaintiffs and defendant be litigated in this action. This motion is supported by
2 the Court's file in this matter.

3 POINTS AND AUTHORITIES

4 Plaintiffs' Second Amended Complaint, which requests declaratory relief, an accounting,
5 and injunctive relief based upon alleged improper use of restricted water and sewer funds, was
6 filed and served on June 11, 2012. Defendant City of Portland has not yet filed an answer,
7 though the parties have filed (and the Court has decided) a number of summary judgment
8 motions as to certain specific categories of challenged expenditures from the water and sewer
9 funds. Trial in this action is currently scheduled to begin on December 5, 2016.

10 ORCP 23 E allows, "upon reasonable notice and upon such terms as are just," for a party
11 to serve a supplemental pleading "setting forth transactions or occurrences or events which have
12 happened since the date of the pleading sought to be supplemented." *See also Hughes v.*
13 *Honeyman*, 186 Or 616, 623 (1949) ("The purpose of the supplemental pleading is to bring into
14 the record new facts, which will enlarge or change the kind of relief to which the plaintiff is
15 entitled, and hence any supplemental facts which further develop the original right of action, or
16 extend or vary the relief, are available by way of supplemental complaint, even though they of
17 themselves constitute a right of action." (citation omitted)). Allowing a supplemental complaint
18 is within the discretion of the trial court. *See Vogl v. Dep't of Rev.*, 327 Or 193, 211 (1998).

19 Plaintiffs seek leave to file and serve a supplemental complaint setting forth transactions
20 or occurrences that have happened in 2014 through 2016, culminating in the August 10, 2016
21 resolution adopted by the Portland City Council. As described more completely in **Exhibit A**, the
22 supplemental complaint seeks to enlarge plaintiffs' recovery by seeking relief related the City of
23 Portland's plan to utilize restricted sewer funds for purposes of a homeless shelter—a use which
24 is not reasonably related to the sewer services provided by the City.

25 Granting leave to file plaintiffs' supplemental complaint will not prejudice the City or
26 burden the Court. There can be little factual dispute regarding ordinances and resolutions

1 adopted by the City, and any underlying factual questions can readily be addressed in the parties’
2 ongoing discovery. Defendant has not yet answered plaintiffs’ Second Amended Complaint, and
3 there is ample time to prepare for the inclusion of one additional specification at trial. *Cf. State*
4 *ex rel McAmis Indus. of Oregon, Inc. v. M. Cutter Co.*, 161 Or App 631, 636 (1999) (affirming
5 allowance of supplemental answer where there was no prejudice to plaintiff).

6 Moreover, plaintiffs are uniquely situated to seek relief for the alleged additional misuses
7 of dedicated funds *in this action*. In this lawsuit, which has already been pending for over four
8 years, the Court has already determined the standard of review and questions related to plaintiffs’
9 standing, and has reached the merits as to a number of challenged expenditures. Plaintiffs,
10 defendant and the Court are intimately familiar with the Charter provisions at issue, the law of
11 the case, and the application of the law of the case to different factual scenarios. Requiring these
12 plaintiffs—or other ratepayers—to litigate the new occurrences in a separate matter does not
13 facilitate the interest of justice or judicial efficiency. A new lawsuit, if assigned to a different
14 circuit court judge, could potentially lead to inconsistent results regarding the interpretation and
15 application of the very same Charter provisions to which this Court has previously devoted
16 significant time and attention.

17 ///
18 ///
19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///

1 Plaintiffs therefore respectfully request an order allowing them to file and serve the
2 supplemental complaint attached as **Exhibit A**.

3

4 DATED this 22nd day of August, 2016.

5

DAVIS WRIGHT TREMAINE LLP

6

7

By: s/ John A. DiLorenzo, Jr.

8

John DiLorenzo, Jr., OSB # 802040

johndilorenzo@dwt.com

9

Aaron Stuckey, OSB # 954322

aaronstuckey@dwt.com

10

Chris Swift, OSB # 154291

chrisswift@dwt.com

11

Tim Cunningham, OSB # 100906

timcunningham@dwt.com

12

Telephone: (503) 241-2300

13

Facsimile: (503) 778-5299

14

Of Attorneys for Plaintiffs

15

16

17

18

19

20

21

22

23

24

25

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LLOYD ANDERSON, PAIGE CRAFORD,
and MILLARD CHRISTNER,

Plaintiffs,

v.

CITY OF PORTLAND, an Oregon Municipal
Corporation,

Defendant.

Case No. 1112-15957

SUPPLEMENTAL COMPLAINT

1.

Plaintiffs Lloyd Anderson, Paige Craford and Millard Christner (collectively “plaintiffs”) refer to their Second Amended Complaint, filed on June 11, 2012, and incorporate it by this reference as if every allegation were stated herein.

2.

In February 2004, the Bureau of Environmental Services (“BES”) acquired property located at 2400 NW Front Avenue (“Terminal 1”) for the purposes of staging construction for the Combined Sewage Overflow project, commonly known as the “Big Pipe.”

3.

Terminal 1 was acquired for approximately \$6.325 million dollars from the dedicated Sewer Fund.

4.

By 2014, construction of the Big Pipe was completed, and BES determined that the property no longer served any beneficial use. BES thus initiated the process for designating

1 Terminal 1 as surplus property.

2 5.

3 The City of Portland designated the property as surplus by and through Ordinance
4 number 186777, passed on August 27, 2014. The ordinance recites that “[t]he property is no
5 longer required for City use,” that “[n]o interest in current or future use for this property was
6 expressed by other City Bureaus” or governmental bodies, and that therefore, BES was “hereby
7 instructed to dispose of [Terminal 1] through the sale of the property for the best price.” The
8 ordinance further directed that “the net proceeds from the sale of the property will be returned to
9 the Sewer System Construction Fund” (a subaccount of the dedicated Sewer Fund).

10 6.

11 The Fiscal Impact Statement associated with Ordinance 186777 stated that the costs to
12 the City associated with the sale would include “surveying, appraisals, realtor commissions,
13 advertising, escrow and closing. Said costs will be covered from the proceeds of the sale.”

14 7.

15 After August 27, 2014, BES pursued marketing Terminal 1 to the public.

16 8.

17 Due to the unique nature of the industrial property and the scarcity of industrial land in
18 Portland, as of June 2016, BES expected the sale of the property to bring more than \$10 million
19 dollars into the Sewer Fund. The net proceeds from the sale would allow BES to delay future
20 bond sales and reduce amounts otherwise to be charged to sewer ratepayers.

21 9.

22 Six bids for the purchase of Terminal 1 from BES were received by the BES on August
23 15, 2016. They varied between \$8 million to \$10 million for outright purchase of the property.

24 10.

25 In addition, the Real Estate Broker retained by the BES to market the property has
26 estimated that a real market rental rate would amount to \$1,196,328.00 per year (\$99,694.00 per

1 month).

2 11.

3 Despite the pending sale of property that had already been designated surplus because it
4 served no use to BES (or any other City bureau), a slim majority of the City Council reversed
5 course on August 10, 2016, and is now attempting to force BES to lease Terminal 1 to the
6 Portland Housing Bureau for use as a temporary housing shelter, a use that bears no reasonable
7 relation to the provision and sewer service to the public.

8 12.

9 On August 10, 2016, the City Council passed Resolution 37225, which recites that the
10 “Council desires to transfer control of Terminal 1 to the Portland Housing Bureau (“PHB”) for
11 the purposes of implementing the Temporary Shelter pursuant to an interagency lease.” The
12 “Interagency Lease” attached to Resolution 37225 provides that PHB will pay BES “an amount
13 sufficient to cover BES’s expenses arising in connection with the Premises, but in no case less
14 than \$10,000 per month.” The transaction does not anticipate “expenses” in excess of that
15 amount.

16 13.

17 The Council declined to pass amendments put forth by Commissioner Nick Fish, head of
18 BES, which would have required PHB to pay BES fair market value for the lease, and which
19 would have required reimbursement from the general fund to the Sewer Fund of all past, current,
20 and future expenses incurred by BES for the marketing of Terminal 1 for sale, and the oversight
21 of Terminal 1 in its capacity as a temporary shelter.

22 14.

23 Portland City Charter Sections 11-301 and 11-302 require that all expenditures from the
24 Sewer Fund must be reasonably related to sewer purposes. Assets purchased with expenditures
25 from the Sewer Fund must be reasonably related to sewer purposes, and cannot be used for or to
26 subsidize City purposes unrelated to the provision of sewer services.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

15.

In contravention of the Portland City Charter, the City has:

- a. used Sewer Fund monies for purposes not reasonably related to sewer services, including, but not limited to preparing and marketing Terminal 1 for use as a homeless shelter;
- b. precluded BES from receiving fair market value (either for sale or lease) for the Terminal 1 property acquired and maintained with Sewer Funds, even after the property has ceased serving any purpose reasonably related to the sewer system, and after BES had marketed the property in an effort to return money to the Sewer Fund;
- c. required ratepayers to subsidize services not reasonably related to the sewer system by forcing BES to enter into a lease of the Terminal 1 property for an amount far below market rent.

16.

Due at least in part to the activities referenced in paragraph 15, above, BES will be deprived at least \$10 million that it could have returned to the Sewer Fund, which will require BES to incur additional bonded indebtedness and raise (or forego reducing) sewer rates.

**First Claim for Relief
(Declaratory Relief)**

17.

Plaintiffs reallege paragraphs 1 through 16 as if fully set forth herein.

18.

An actual controversy exists over whether the City has improperly expended sewer fees received from plaintiffs and other ratepayers on Terminal 1, whether the City has improperly precluded BES and the Sewer Fund from receiving fair market value for Terminal 1, and whether the City has improperly required ratepayers to subsidize services unrelated to the sewer system.

19.

Plaintiffs are entitled to a declaration that the City has improperly expended money from

1 the Sewer Fund, precluded BES and the Sewer Fund from receiving fair market value for
2 Terminal 1, and required ratepayers to subsidize non-sewer services, and that any such future
3 actions by the City are not authorized under the Portland City Charter.

4 **Second Claim for Relief**
5 **(Equitable Accounting)**

6 20.

7 Plaintiffs allege paragraphs 1 through 19 as if fully set forth herein.

8 21.

9 The City receives and holds sewer fees for the benefit of plaintiffs and other ratepayers.
10 The City has diverted and expended sewer fees paid by plaintiffs and other ratepayers for
11 unauthorized purposes not related to the provision of sewer services, refused to return an asset to
12 the use of the Sewer Fund, and forced ratepayers to subsidize non-sewer services. The City
13 should be required to provide an accounting as to all monies expended from dedicated Sewer
14 Fund, and all monies foregone by forcing BES to hold the property previously deemed surplus
15 (Terminal 1) and lease it to PHB at below market rates, but has failed and refused to provide that
16 same despite demand.

17 22.

18 Plaintiffs have no adequate remedy at law. The accounts maintained by the City are
19 particularly complex, and the amounts held, improperly expended, and forgone by the City were
20 supposed to be held in dedicated funds and used exclusively for the benefit of ratepayers and in
21 furtherance of the provision of sewer services.

22 23.

23 The Court should require that the City provide an accounting of all monies expended
24 from the dedicated Sewer Funds on Terminal 1 from August 2014 to present. The Court should
25 also appoint an independent auditor and/or referee to determine the amounts that the Sewer Fund
26 has been deprived as a result of the City precluding BES from selling Terminal 1 and instead

1 requiring BES to lease Terminal 1 to PHB at below market rates.

2 24.

3 Plaintiffs seek to preserve and recover amounts previously paid to the City by not only
4 plaintiffs, but also by all other sewer ratepayers. Plaintiffs are therefore also entitled to an award
5 against the City of all attorney fees and costs incurred herein under the common fund (and any
6 related) doctrine.

7 **Third Claim for Relief**
8 **(Ancillary Equitable Relief)**

9 25.

10 Plaintiffs reallege paragraphs 1-24 as if fully set forth herein.

11 26.

12 ORS 28.080 provides that further relief based on a declaratory judgment ay be granted
13 whenever necessary or proper.

14 27.

15 If plaintiffs prevail on their first claim for relief, a declaratory judgment entered in
16 accordance therewith would be inadequate in the absence of further and additional relief. Such
17 declaratory relief, without more, would leave the plaintiffs, and those on behalf of whom this
18 lawsuit is filed, without complete relief.

19 28.

20 Plaintiffs are entitled to an injunction, ancillary to the claim for declaratory relief,
21 preventing the City from requiring BES to lease Terminal 1 to PHB at below market rates.

22 29.

23 Plaintiffs are further entitled to an accounting and other forms of relief as referenced in
24 paragraphs 21-25 herein.

25 30.

26 Because plaintiffs also seek to preserve and recover amounts previously paid to the City

1 by not only plaintiffs, but by all water and sewer ratepayers, plaintiffs are also entitled to an
2 award against the City of all attorneys' fees and costs incurred herein under the common fund
3 (and any related) doctrine.

4 WHEREFORE, plaintiffs pray for order and judgment as follows:

- 5 1. Declaring that the City's expenditures of money from the dedicated Sewer Fund
6 for the use of Terminal 1 for non-sewer purposes, the City's actions to preclude
7 BES and the Sewer Fund from receiving fair market value for Terminal 1, and the
8 City's requirement that the Sewer Fund be used to subsidize non-sewer services,
9 are improper and unauthorized under the Portland City Charter;
- 10 2. Requiring that the City provide an accounting of all monies spent from the Sewer
11 Funds from August 2014 to the present on Terminal 1, and appointing an
12 independent auditor and/or referee (at the City's expense) to determine the
13 amounts that the Sewer Fund has been deprived as a result of the City precluding
14 BES from selling Terminal 1 and instead requiring BES to lease Terminal 1 to
15 PHB at below market rates;
- 16 3. Requiring the City to reimburse and pay into the Sewer Funds all monies
17 wrongfully expended or foregone on Terminal 1;
- 18 4. Awarding plaintiffs their reasonable attorney fees, costs and disbursements
19 incurred herein; and

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

1 **CERTIFICATE OF SERVICE**

2 I certify that I served a copy of the foregoing **SUPPLEMENTAL COMPLAINT** on:

3 Tracy Reeve, OSB # 891123
4 City Attorney
5 Karen L. Moynahan, OSB #954924
6 Deputy City Attorney
7 Portland Office of City Attorney
8 1221 SW 4th Ave, Ste. 430
9 Portland, OR 97204
10 tracy.reeve@portlandoregon.gov
11 karen.moynahan@portlandoregon.gov

12 Of Attorneys for Defendant

13 by using electronic transmission of a notice of filing by the electronic filing
14 system provided by the Oregon Judicial Department, Odyssey File and Serve.

15 Dated this ____ day of August 2016.

16 DAVIS WRIGHT TREMAINE LLP

17 By: _____
18 John A. DiLorenzo, Jr., OSB #802040
19 Aaron Stuckey, OSB # 954322
20 Chris Swift, OSB #154291
21 Tim Cunningham, OSB # 100906

22 Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I certify that I served a copy of the foregoing **PLAINTIFFS' MOTION FOR LEAVE**
3 **TO FILE SUPPLEMENTAL COMPLAINT** on:

4 Tracy Reeve, OSB # 891123
5 City Attorney
6 Karen L. Moynahan, OSB #954924
7 Deputy City Attorney
8 Portland Office of City Attorney
9 1221 SW 4th Ave, Ste. 430
10 Portland, OR 97204
11 tracy.reeve@portlandoregon.gov
12 karen.moynahan@portlandoregon.gov

13 Of Attorneys for Defendant

14 by using electronic transmission of a notice of filing by the electronic filing
15 system provided by the Oregon Judicial Department, Odyssey File and Serve.

16 Dated this 22nd day of August, 2016

17 **DAVIS WRIGHT TREMAINE LLP**

18 By: s/ John A. DiLorenzo, Jr.

19 John A. DiLorenzo, Jr., OSB #802040

20 Aaron Stuckey, OSB # 954322

21 Chris Swift, OSB #154291

22 Tim Cunningham, OSB # 100906

23 Attorneys for Plaintiffs
24
25
26