

GREENE TOWNSHIP BOARD OF SUPERVISORS

Plaintiff

v.

PENN-MAR ETHANOL, LLC

Defendant

: IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, PENNSYLVANIA

: NO. 2006-1791

: CIVIL ACTION Judge: Richard J. Walsh

: JURY TRIAL DEMANDED

**NOTICE TO DEFEND**

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

**NOTICA**

USTED HA SIDO DEMANDADO/A EN CORTE. Si usted desea defenderse de las demandas que se presentan mas adelante en las siguientes paginas, debe tomar accion dentro de los proximos veinte (20) dias despues de la notificacion de esta Demanda y Aviso radicando personalmente o por medio de un abogado una comparecencia escrita y radicando en la Corte por escrito sus defensas de, y objecciones a, las demandas presentadas aqui en contra suya. Se le advierte de que si usted falla de tomar accion como se describe anteriormente, el caso puede proceder sin usted y un fallo por cualquier suma de dinero reclamada en la demanda o cualquier otra reclamacion or remedio solicitado por el demandante puede ser dictado en contra suya por la Corte sin mas aviso adicional. Usted puede perder dinero o propiedad u otros derechos importantes para usted.

USTED DEBE LLEVAR ESTE DOCUMENTO A SU ABOGADO INMEDIATAMENTE. SI USTED NO TIENE UN ABOGADO O NO PUEDE PAGARLE A UNO, LLAME O VAYA A LA SIGUIENTE OFICINA PARA AVERIGUAR DONDE PUEDE ENCONTRAR ASISTENCIA LEGAL.

Pennsylvania Lawyer Referral Service  
Pennsylvania Bar Association  
100 South St.  
P.O. Box 186  
Harrisburg, PA 17108  
(800) 692-7375

DEPUTY  
LINDA L. REARD  
PROTHONOTARY  
*[Signature]*

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PROTHONOTARY  
FRANKLIN COUNTY PA

GREENE TOWNSHIP BOARD OF  
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### **COMPLAINT**

AND NOW, comes the Plaintiff, Greene Township Board of Supervisors, by and through its special counsel, G. Bryan Salzmans, Esquire of the law firm of Salzmans Hughes, P.C., and its Solicitor, Welton J. Fischer, Esquire, and respectfully avers as follows:

1. Plaintiff, the Greene Township Board of Supervisors, is the governing board for the municipal body of Greene Township, Franklin County, Pennsylvania, having an address of 1145 Garver Lane, Scotland, PA 17254 (hereinafter "Plaintiff").

2. Defendant, Penn-Mar Ethanol, LLC, is a Pennsylvania Limited Liability Corporation having an address of 140 Roosevelt Avenue, York, PA 17404 (hereinafter "Defendant").

3. On or about March 25, 2005, Defendant submitted a copy of the Erosion Control Reports and NPDES permit application, including supporting plans and maps for review, to the Franklin County Conservation District with a copy to Plaintiff for a proposed ethanol production plant in the Cumberland Valley Business Park, Greene Township, Franklin County, Pennsylvania (hereinafter "Ethanol Plant").

4. On or about May 27, 2005, Defendant submitted Land Development Plans for the Ethanol Plant (the information submitted referenced in Paragraph 3 and the Land Development

Plans are hereinafter collectively referred to as “the Plans”) to Plaintiff for review. (A copy of the cover letter for the Plans is attached hereto as Exhibit “A” and is incorporated herein by reference.)

5. The Plans were reviewed by the Plaintiff’s engineer, Nassaux-Hemsley, Inc., to determine compliance with applicable regulations and laws, including but not limited to the Municipalities Planning Code, 53 P.S. §10101, et seq. (“MPC”) and the Greene Township Subdivision and Land Development Ordinance Code, Sections 85-1, et seq.

6. The Plans were also reviewed by an environmental engineer, ENSR International, for compliance with air quality standards, performance standards, environmental standards, and in conjunction with the protection of the Township’s residents concerning public health, safety and welfare on behalf of Greene Township.

7. Pursuant to Section 503 of the MPC and Greene Township Code Section 85-15, Plaintiff may charge review fees billed by ENSR International and Nassaux-Hemsley, Inc. on the Ethanol Plant project to Defendant. (A copy of the Greene Township Code Section 85-15 is attached hereto as Exhibit “B” and is incorporated herein by reference).

8. 53 P.S. §10503(1) states:

The subdivision and land development ordinance may include, but need not be limited to:

(1) Provisions for the submittal and processing of plats, including the charging of review fees, and specifications for such plats, including certification as to the accuracy of plats and provisions for preliminary and final approval and for processing of final approval by stages or sections of development. Such plats and surveys shall be prepared in accordance with the act of May 23, 1945 (P.L. 913, No. 367), known as the "Engineer, Land Surveyor and Geologist Registration Law," except that this requirement shall not preclude the preparation of a plat in accordance with the act of January 24,

1966 (1965 P.L. 1527, No. 535), known as the "Landscape Architects' Registration Law," when it is appropriate to prepare the plat using professional services as set forth in the definition of the "practice of landscape architecture" under section 2 of that act. Review fees may include reasonable and necessary charges by the municipality's professional consultants for review and report thereon to the municipality. Such review fees shall be based upon a schedule established by ordinance or resolution. Such review fees shall be reasonable and in accordance with the ordinary and customary charges for similar service in the community, but in no event shall the fees exceed the rate or cost charged by the professional consultant for comparable services to the municipality for services which are not reimbursed or otherwise imposed on applicants. Fees charged to the municipality relating to any appeal of a decision on an application shall not be considered review fees and may not be charged to an applicant.

9. 53 P.S. § 10503(1)(i) and (ii) states:

(i) The governing body shall submit to the applicant an itemized bill showing work performed, identifying the person performing the services and the time and date spent for each task. Nothing in this subparagraph shall prohibit interim itemized billing or municipal escrow or other security requirements. In the event the applicant disputes the amount of any such review fees, the applicant shall, no later than 45 days after the date of transmittal of the bill to the applicant, notify the municipality and the municipality's professional consultant that such fees are disputed and shall explain the basis of their objections to the fees charged, in which case the municipality shall not delay or disapprove a subdivision or land development application due to the applicant's dispute over fees. Failure of the applicant to dispute a bill within 45 days shall be a waiver of the applicant's right to arbitration of that bill under section 510(g).

(ii) In the event that the municipality's professional consultant and the applicant cannot agree on the amount of review fees which are reasonable and necessary, then the applicant and the municipality shall follow the procedure for dispute resolution set forth in section 510(g), provided that the arbitrator resolving such dispute shall be of the same profession or discipline as the professional consultant whose fees are being disputed.

10. Plaintiff incurred review fees for the review of the Plans by Nassaux-Hemsley, Inc. in the amount of Twenty-three Thousand Three Hundred Ninety One and 07/100 (\$23,391.07) Dollars. (A copy of the invoices is attached hereto as Exhibit "C" and is incorporated herein).

11. The review fees charged by Nassaux-Hemsley, Inc. were reasonable and necessary charges in accordance with the ordinary and customary charges for similar services in the Franklin County area.

12. Plaintiff incurred review fees for the review of the Plans by ENSR International in the amount of Twenty-one Thousand Four Hundred Ninety and 64/100 (\$21,490.64) Dollars. (A copy of the invoices is attached hereto as Exhibit "D" and is incorporated herein by reference).

13. The review fees charged by ENSR International were reasonable and necessary charges in accordance with the ordinary and customary charges for similar services in the Franklin County area.

14. On or about February 22, 2006, Plaintiff transmitted an invoice (the "Invoice") in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars representing the total amount of professional consultant fees incurred in review of the Plans. (A copy of the Invoice and Affidavit of Gina Griffith, secretary for Greene Township, is attached hereto as Exhibit "E" and is incorporated herein by reference).

15. On or about March 13, 2006, Plaintiff received a telephone call from Scott Welsh, a manager for Defendant on the Ethanol Plant project, during which he acknowledged receipt of the Invoice. (A copy of the Affidavit of Diann Weller is attached hereto as Exhibit "F" and is incorporated herein).

16. Pursuant to Section 503 of the MPC, Defendant was required to dispute the amount of any review fees by giving notice to both Plaintiff and Plaintiff's professional consultants within forty-five (45) days of the date of transmittal of the Invoice.

17. To date, ENSR International has not received notice from Defendant that it disputed the review fees charged by ENSR International. (A copy of the Affidavit of Frederick T. Pope, III of ENSR International is attached hereto as Exhibit "G" and is incorporated herein by reference).

18. To date, Nassaux-Hemsley, Inc. has not received notice from Defendant that it disputed the review fees charged by Nassaux-Hemsley, Inc. (A copy of the Affidavit of John Szajna of Nassaux-Hemsley, Inc., is attached hereto as Exhibit "H" and is incorporated herein by reference).

19. Pursuant to Section 503 of the MPC, failure to dispute the professional consultant's review fees within forty-five (45) days of transmittal is a waiver of the right to arbitrate the review fees under Section 510(g) of the MPC.

20. Defendant failed to notify the professional consultants of Defendant's dispute over the review fees, thereby waiving any right to arbitration under Section 510(g) of the MPC.

21. Defendant failed to make payment to Plaintiff of the amount due and owing for review fees incurred by Plaintiff in review of the Plans.

22. Despite Plaintiff's reasonable and repeated demands for payment, Defendant has failed, refused and continues to refuse to pay the balance due and owing as a result of the services performed by Plaintiff.

23. Plaintiff has performed any and all conditions precedent to the bringing of this action.

24. As a result of Defendant's failure to pay the required fees, Plaintiff has been damaged in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars.

**COUNT I**  
**DECLARATORY JUDGMENT**

25. Paragraphs 1 through 24 of the Complaint are hereby incorporated herein by reference.

26. This is an action for declaratory judgment pursuant to 42 Pa.C.S.A. §1531, et seq., for the purpose of determining a question of actual controversy between the parties.

27. Jurisdiction is conferred upon this Court pursuant to the provisions of the Declaratory Judgment Act, 42 Pa.C.S.A. §7532.

28. In accordance with the provisions for relief provided in Section 503 (1) and Section 510 (g) of the MPC, Defendant has waived its right to arbitrate and/or otherwise dispute the professional consultant fees of Nassaux-Hemsley, Inc., and the professional consultant fees of ENSR International, incurred as part of Plaintiff's review of the Defendant's Plans.

29. Plaintiff therefore is entitled to payment for professional consulting fees in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars.

30. There does exist an actual controversy between Plaintiff and Defendant within the jurisdiction of this Court and involving the rights and liabilities and interpretation of Sections 503 and 510 of the MPC and Greene Township Code Section 85-15, which controversy may be determined by judgment of this Court without other suits.

31. Plaintiff requests that this Honorable Court declare the rights and other legal relations of the parties under Sections 503 and 510 of the MPC and Greene Township Code Section 85-15 and indicate the scope and extent of fees owed by Defendant to Plaintiff.

WHEREFORE, Plaintiff request this Honorable Court for relief in the following manner:

- a. That this Court determine and adjudicate the rights and liabilities of the parties herein with respect to Sections 503 and 510 of the MPC and Greene Township Code Section 85-15;
- b. Enter a declaratory judgment declaring the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars, plus attorney fees, interest and cost of action due and payable to Plaintiff; and
- c. Grant such other and further relief as may be proper.

**COUNT II**  
**BREACH OF CONTRACT**

32. The averments of paragraphs 1 through 31 are hereby incorporated by reference.

33. By Defendant submitting its Land Development Plans, Plaintiff was required to and did perform the required reviews and services placed upon it by the MPC, the Greene Township Ordinance, and the citizens of Greene Township.

34. Pursuant to Section 503 of the MPC and Greene Township's Code Section 85-15, the Defendant is obligated and agreed to pay the professional consulting fees assessed and incurred for the review of Defendant's plans, in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars.

35. Defendant has breached this agreement and understanding by failing to pay for the professional consulting fees as required by Section 503 of the MPC and Greene Township's Code, Section 85-15.

36. Because of Defendant's breach of the agreement and understanding, Plaintiff has been damaged in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars, plus costs, attorney fees and interest.

**WHEREFORE**, Plaintiff respectfully requests this Honorable Court to enter judgment in favor of Plaintiff and against Defendant in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars, plus interest, attorney fees, the costs of this action, and such other relief as the Court deems just and proper.

**COUNT III**  
**QUANTUM MERUIT**

37. Paragraphs 1 through 36 are incorporated herein by reference as if set forth in their entirety.

38. Plaintiff conferred a benefit in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars upon Defendant in reviewing Defendant's Plans.

39. By submitting its Plans, Defendant misled Plaintiff with its assurances and representations that it would pay the agreed upon for the services performed on its behalf pursuant to Section 503 of the MPC and Greene Township's Code, Section 85-15.

40. Relying upon the representations and assurances of Defendant, Plaintiff performed the required review. Said services remaining unpaid were in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars.

41. Defendant accepted and retained the benefits provided by Plaintiff but failed to make the required payment and, as a result, Defendant has been unjustly enriched in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars.

42. The aforesaid amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars is the fair and reasonable value of the services provided to Defendant by Plaintiff.

43. Despite Plaintiff's ongoing demands for payment, Defendant has failed, refused and continues to refuse to pay the fair and reasonable value of the services rendered to Defendant plus any accrued interest, costs, and expenses, all to the damage of Plaintiff.

**WHEREFORE**, Plaintiff respectfully requests this Honorable Court to enter judgment in favor of Plaintiff and against Defendants in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars plus interest, attorney fees, the costs of this action, and such other relief as the Court deems just and proper.

**COUNT IV**  
**UNJUST ENRICHMENT**

44. Paragraphs 1 through 43 are incorporated herein by reference.

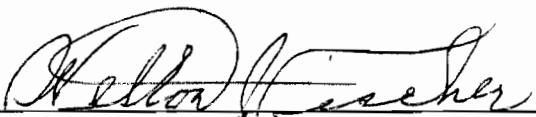
45. Defendant would be unjustly enriched if it were permitted to benefit from the services provided by Plaintiff without paying the monies owed to Plaintiff.

46. The aforesaid services provided by Plaintiff and accepted by Defendant have enriched Defendant in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars.

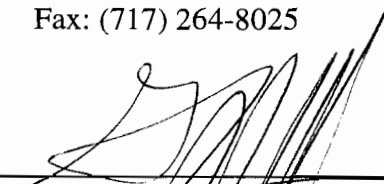
47. Said enrichment would be unjust if Defendant was not required to pay the monies owed to Plaintiff, and said Defendant accordingly is obligated to Plaintiff for said amount.

**WHEREFORE**, Plaintiff respectfully requests this Honorable Court to enter judgment in favor of Plaintiff and against Defendants in the amount of Forty-four Thousand Eight Hundred Eighty-one and 71/100 (\$44,881.71) Dollars, plus interest, attorney fees, the costs of this action, and such other relief as the Court deems just and proper.

Respectfully submitted,

By: 

Welton Fischer, Esquire  
Solicitor for Greene Township  
Attorney ID # 16734  
550 Cleveland Ave.  
Chambersburg, PA 17201  
Tel: (717) 264-8020  
Fax: (717) 264-8025

By: 

G. Bryan Salzmann, Esquire  
Attorney ID # 61935  
E. Ralph Godfrey, Esquire  
Attorney ID # 77052  
Special Counsel for Greene Township  
455 Phoenix Drive, Suite A  
Chambersburg, PA 17201  
Tel: (717) 263-2121  
Fax: (717) 263-0663

Date: June 7, 2006

**VERIFICATION**

I verify that all the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief and that any false statements made are subject to the penalties of 18 Pa.C.S. Section 4904 relating to unsworn falsification to authorities.

Date: 6/7/06

GREENE TOWNSHIP BOARD OF SUPERVISORS

By: 

Its: Chairman  
Title