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Friday, August 07, 2020

City of Demorest 546 Georgia Street

Demorest, GA 30535

Rick Austin, Mayor

City of Demorest 546 Georgia Street

Demorest, GA 30535

Sean Moore, Councilman

City of Demorest 546 Georgia Street

Demorest, GA 30535

Nathan Davis, Councilman

City of Demorest 546 Georgia Street

Demorest, GA 30535

John Hendrix, Councilman

City of Demorest 546 Georgia Street

Demorest, GA 30535

Joely Mixon, City Treasurer

City of Demorest 546 Georgia Street

Demorest, GA 30535

VIA OVERNIGHT

DELIVERY

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Kim Simonds, City Clerk City of Demorest 546 Georgia Street Demorest, GA 30535

VIA OVERNIGHT DELIVERY

Joey Homans, City Attorney City of Demorest 546 Georgia Street Demorest, GA 30535

VIA OVERNIGHT DELIVERY

RE: Claims by Piedmont College against the City of Demorest and City Officials

Dear Mayor, Members of the City Council, and City Officials of the City of Demorest:

Please accept this letter as formal notice of the legal claims of Piedmont College against the City of Demorest and certain of its officials. We are providing you with this notice to allow the City and its officials an opportunity to resolve these claims without incurring the time and expense of litigation. However, if the College is unable to resolve these claims to its satisfaction within thirty days of your receipt of this letter, we reluctantly will pursue whatever legal remedies are available. We are providing you with this notice in the hope that resort to our legal remedies will not be necessary.

As a result of the illegal actions of the City, the College has identified at least five causes of action against it and its officials.<sup>2</sup> Among these causes of action are 1) Deprivation of Equal Protection, 2) Fraud, 3) Violation of the Racketeering Influenced Corrupt Organizations Act, 4) Conflicts of Interest, and 5) Breach of Contract. We provide the details of these claims below.

### I. Deprivation of Equal Protection

Mayor Austin and the City of Demorest have violated the Equal Protection Clause of the Fourteenth Amendment by pursuing a targeted scheme resulting in the unreasonable hike in water and sewage rates against the College. This scheme violates a federally protected right, is the proximate cause of the College's injuries, and is actionable pursuant to 42 U.S.C. §1983. The City's 2019 water and sewage rate scheme singled out Piedmont College with the intention to override the College's tax-exempt status, therefore unlawfully discriminating against it.

The 2019 water and sewage rate scheme serves no rational basis. The City's ordinance must serve a *legitimate* state interest to have a rational basis. The intent of the rate hike was punitive; that is, to punish the College for utilizing its tax-exempt status. Punishing the College for exercising a legal right is not a legitimate state interest.

circumstances and context may require.

<sup>&</sup>lt;sup>1</sup> The claims asserted herein are not covered by the ante litem notice provision of O.C.G.A. §36-33-5. See, e.g., City of Atlanta v. Benator, 310 Ga. App. 597 (2011), overruled on other grounds, FDIC v. Loudermilk, 305 Ga. 558, n. 7 (2019). However, to the extent that the ante litem statute may apply, this letter satisfies its requirements.

<sup>2</sup> As used hereinafter the term "City" shall include its officials in their personal or official capacities as the

The United States Supreme Court held such a "class of one" scheme to punish an individual for exercising a legal right is a violation of Equal Protection in the case of Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam). In Olech the village's demand for an easement as a condition of connecting the plaintiff's property to the municipal water supply was irrational, wholly arbitrary, and motivated by ill will resulting from the Olechs' previous filing of an unrelated, successful lawsuit against the village. As such, the village's action singling out the Olechs for discriminatory treatment violated the Olechs' right to Equal Protection. This clearly established federal law pursuant to a binding decision of the United States Supreme Court overrides any claim of City Officials for qualified immunity and subjects them to personal liability for damages.

Beginning in the fall of 2018, the City of Demorest—including, in particular, Mayor Austin, Treasurer Mixon, and Clerk Simonds—revised water and sewage rates to be implemented in 2019. The new rate structure included for the first time categories to distinguish between institutional private and public, inside the City and out. Piedmont College is the sole private institution inside the City limits. The new water rates amount to an effort to bypass the tax-exempt status of the College by imposing a surcharge on water rates to make up for lost taxes. Mayor Austin and Treasurer Mixon are on record attacking the College for not paying property taxes despite "much benefits" [sic] the College receives. Their water and sewage rate scheme comes after previous attempts by Mayor Austin and City Attorney Homans to attack the College: In 2016, Mayor Austin stated publicly that City Attorney Homans informed him that the City could not levy a business/occupational tax on the College, and that the City Attorney would look for other fees the City could impose on the College to overcome its tax exemption. City Council Meeting, November 8, 2016.

Mayor Austin and Treasurer Mixon have a history of bias against the College, evidenced most notably by their outward condemnation of the College's tax-exempt status. Mayor Austin often resorts to outbursts when questioned concerning his governance and at times requests that police remove his dissenters from public meetings, including former City Manager and current Piedmont College employee Kristi Williams. Mayor Austin also has condemned any inquiry into his practices, publicly berating Piedmont College for its Georgia Open Records Requests.

http://accesswdun.com/article/2017/2/506644/demorest-leaders-will-request-meeting-with-College-trustees.

'"It's no surprise that Piedmont College is very important to the City of Demorest, but Piedmont College is also the largest landowner in the City of Demorest and they pay no City taxes, and yet receive much City benefits," said Austin. "Because the College doesn't pay taxes on such a large amount of property in the City, Demorest leaders are left to make up the difference from the remaining property owners, with that source supplemented by water revenue;" "Asphalt is very expensive... I don't think it's any surprise to anyone that some of that [road] failure is due to the amount of traffic of large construction vehicles and also large buses for travel for athletics." <a href="http://accesswdun.com/article/2017/2/506644/demorest-leaders-will-request-meeting-with-College-trustees">http://accesswdun.com/article/2017/2/506644/demorest-leaders-will-request-meeting-with-College-trustees</a>; Treasurer Mixon notes that in previous years the City has not had the funds to meet the needs of its water system and its 470 miles of pipe in the ground, 2019 being a step toward the right direction.

<a href="https://www.thenortheastgeorgian.com/local-news/demorest-mayor-defends-salary-council-passes-budget">https://www.thenortheastgeorgian.com/local-news/demorest-mayor-defends-salary-council-passes-budget</a>; Mixon states "Demorest is a unique City because there is not much property tax revenue."

<a href="https://www.thenortheastgeorgian.com/local-news/demorest-faces-questions-about-junk-bond-rating">https://www.thenortheastgeorgian.com/local-news/demorest-faces-questions-about-junk-bond-rating</a>.

https://www.thenortheastgeorgian.com/local-news/williams-confronts-mayor-previous-comments.
 https://www.thenortheastgeorgian.com/local-news/demorest-mayor-speaks-against-citizens-concerns.

Acting upon his bias, Mayor Austin implemented a scheme that discriminates against the College. The scheme began by Mayor Austin working with the City Engineer to create a recommendation for raised water rates, including usage and disputed maintenance fees. Mayor Austin falsely stated in a City Council meeting that the increased fees were on the basis of City Manager Kristi Williams' recommendation. After Mayor Austin introduced the recommendation, the Council moved to split the institutional category into two parts: institutional private (inside and outside City limits) and institutional public (inside and outside City limits).

Mayor Austin and Clerk Simonds recommended a base water increase, from 0-2000 gallons, of 10% for institutional public inside the City and institutional public outside the City, a 50% increase for institutional private inside the City, and a 50% increase institutional private outside of the City. Mayor Austin stated on record his understanding that only Piedmont will be affected by the private rates, leaving no question as to his intentions to target the College. It is illogical to believe the actual cost of water service for an institution inside the City limits would be equal to or greater than any entity at all outside the City. Piedmont College is located in the heart of the City, whereas some of the City's water clients are over 10 miles beyond City limits, including Lee Arrendale State Prison, see City Council Meeting, March 27, 2018.

Mayor Austin and Clerk Simonds recommended an increase of 25% in each water rate category for the College exceeding 2000 gallons. The College is the only party receiving such an increase. Prior to the 2019 rate structure, the City worked out an independent agreement with Tallulah Falls School, an institutional private user *outside* of the City, for a much lower rate increase of 5% for water between 1m and 1.2m gallons, 10% for water between 1.2m and 1.5m gallons, and 20% for all water above 1.5m gallons, whereas Piedmont College, an institution *inside* the City, received an increase of 25% across the board for all categories exceeding 2000 gallons. See City Council Meeting, September 6, 2017.

Mayor Austin and Clerk Simonds also recommended a base sewage increase of 33% for the College—all other categories remained the same, except commercial inside the City which actually decreased. The City publicly has stated the decrease would promote commercial development within City limits. The City does not address the adverse impact this decision has on private institutions in the City. See City Council Meeting, November 28, 2017. (The Council and Habersham Partnership for Growth have worked together for some time to create business growth; the Council has shown no similar efforts for the City's other industries.)

These actions taken by Mayor Austin, Treasurer Mixon, Clerk Simonds, City Attorney Homans, and the City resulted in direct harm to Piedmont College. From 2018 to 2019, Piedmont College experienced a 23.2% increase in water and sewer expense. The rate increase resulted in a \$46,133 change, from \$198,860 in 2018 to \$244,993 in 2019. These rate increases and their discriminatory impact continue to the present.

<sup>&</sup>lt;sup>7</sup> See Turnipseed letter, referencing the cost to maintain the College's water and sewage lines. There is no evidence to support these claims. For example, in the two years of Ms. Williams' time on the Council, the City only did a few projects for the College and the College paid for all supplies for those projects while the City supplied man power.

<sup>8</sup> Ms. Williams was not present at the meeting and maintains she made no such recommendations at any other time.

#### II. Fraud

Mayor Austin and the City of Demorest also have engaged in fraud against the College in violation of O.C.G.A. § 51-6-1. Mayor Austin and the City Council claimed in a meeting on December 18, 2018, that Piedmont College made up the majority of the maintenance costs of the City's water and sewage fees and, in order to make up for the College's tax exempt status it was necessary to raise the College's water and sewer rates. The Mayor and City Council knew these representations to be false and made them with the intention and purpose of deceiving the public and the College. Further, Piedmont College reasonably relied on such misrepresentations which proximately resulted in loss and damage to the College in the form of higher water and sewer expense.

Mayor Austin and the City Council made representations on multiple occasions to the public and the College regarding the basis for the 2019 water and sewage rate increase, most notably during the December 11 and 18, 2018, City Council Meetings. The primary misrepresentations relate to the overly burdensome cost to the City to maintain the College's water and sewage system. The Mayor and City Council were aware that its representations to the College regarding maintenance were false. The Council and its members were fully aware of the cost of the College to the City's water and sewer maintenance budget. Contrary to his representations to the public and the College, Mayor Austin was aware during these meetings that 90-95% of the City's maintenance expense accrues from work outside of the City.

Mayor Austin and Treasurer Mixon also stated publicly that the increase in rates were necessary to offset the costs the College imposed on the City. Mayor Austin and Treasurer Mixon would have known at the time of the statements that the College does not pose unequal maintenance costs to the City. In fact the City's efforts to overcharge the College seeks to make up for its horrible track record with water and sewage finances by shifting that burden onto the College. From 2009 to 2013, \$600,000 of City water funds went missing and, following an FBI and GBI investigation, were never located. See City Council Meeting, August 1, 2017. Treasurer Mixon stated that the City took a loss on its water revenue for 2016, the City's biggest money maker which it uses to fund all other public works and public safety. See City Council Meeting, December 12, 2016; see City Council Meeting, May 6, 2017.

The City is in fact charging the College more than the rates that it actually passed in the meeting on December 18, 2018. Mayor Austin recommended the Institutional Private Inside water rate for over 100,000 gallons to be \$7. The City Council passed the ordinance based on the recommended \$7 amount. However, the City's published ordinance and the rate at which the College is actually charged for consumption over 100,000 gallons differs from what was passed at the public hearing. Piedmont is charged \$8.75 rather than the passed rate of \$7 per gallon over 100,000. The City's intentional overcharging of the College is yet another fraudulent act in violation of Georgia law.

# III. Racketeering Influenced Corrupt Organizations Act

Mayor Austin and the City are not only guilty of Fraud and Equal Protection violations against Piedmont College, but these claims are part of a larger conspiracy by the City and its officials against the College which constitutes racketeering through a government enterprise in violation of the Racketeering Influenced Corrupt Organizations (RICO) Act. Piedmont College has a RICO claim against the Mayor and City under 18 U.S.C. § 1962(c) & (d).

Mayor Austin and the City of Demorest are guilty of engaging in a corrupt enterprise against Piedmont College in violation of the law. Mayor Austin, Treasurer Mixon, City Attorney Homans, Clerk (now City Manager) Kim Simonds, and Chief of Police worked in unison to commit multiple illegal acts against Piedmont College. These predicate acts include (1) Mail Fraud, 18 U.S.C. § 1341, (2) Wire Fraud, 18 U.S.C. § 1343, (3) conspiracy to commit mail fraud and wire fraud, 18. U.S.C. § 371, and (4) three counts of Extortion, O.C.G.A. § 16-8-16.

- (1) The City and its officials used the United States Postal Service and/or private carrier to carry out their water and sewage scheme against Piedmont College. The City sent bills and communications relating to the scheme to obtain money or property under false pretenses. See City Council Meeting, August 2, 2016 (City enters into an agreement with Infosend for mail-rates at 9.1 cents per parcel). The City and its officials did so with the intention to defraud the College.
- (2) The City and its officials used phone lines and/or electronic communications to carry out their water and sewage scheme against Piedmont College. The City communicated with the College regarding bills and negotiations via wire relating to their scheme to obtain money or property under false pretenses. See City Council Meeting, June 26, 2018 (Simonds added to UCB Electronic Banking Agreement). The City and its officials did so with the intention to defraud the College.
- (3) The City and its officials knowingly joined the conspiracy in which wire fraud or mail fraud was a foreseeable act in furtherance of the conspiracy.
- (4) The City and its officials extorted money and property, or conspired to extort money and property, from Piedmont College on three separate occasions, violating O.C.G.A 16-8-16(4). These extortion efforts are as follows.

#### Massachusetts Boulevard

In June of 2019, the City and the College entered into discussions regarding options for Massachusetts Boulevard, a public road that had been closed for roughly 8 months and that abutted the College on one side and a City park on the other. The options included keeping the road open, which would require substantial maintenance before further use, or closing the road to expand the City Park. The road is of vital importance to the College since, among other things, it was expected to provide access to the College's new conservatory. On the other hand, an expanded City Park would add only minimal amenities for the public.

<sup>&</sup>lt;sup>9</sup> "(a) A person commits the offense of theft by extortion when he unlawfully obtains property of or from another person by threatening to: . . . (4) Take or withhold action as a public official or cause an official to take or withhold action." O.C.G.A. § 16-8-16.

Following multiple public hearings in which citizens voiced their disapproval of a potential road closure, Mayor Austin attempted to manipulate public support in favor of the park expansion plan through an unfounded Facebook post on his private page on June 26. Mayor Austin falsely claimed that persons opposed to expanding the park cited "gang activity [and] decreased safety," rather than the logistical detriments to the College and public. 10

The City and College reached an agreement the following month to keep the road open after increasing pressure by the City for closure and the necessity for the College to keep the road open for its new conservatory. The agreement provided that the College would pay the entire bill of \$132,000 to maintain the public road, the City would take 0.2 acres of private property from the College, and the City would use College's parking spots during public events.

Despite the agreement, Mayor Austin issued a stop work order on further road construction on August 5, 2019, ostensibly for drainage issues, until a new agreement could be met. Mayor Austin voiced his displeasure with continuing construction stating that the public should bear no cost, despite the College shouldering the entire cost of construction on the public street up to that point. Within a month of the stop work order, the City and College reached a new agreement to split the cost caused by the drainage issues, resulting in more than \$19,500 additional cost to the College to keep the public road open. This entire scheme was orchestrated by the City and its officials to extort money and property from the College.

## Piedmont College Police Department

Beginning in 2018, City Chief of Police, Robin Krockum, harassed and threatened Piedmont College police officers, under the direction of Mayor Austin and the City. The City and its officials asserted that the College's officers did not have authority to act—Chief Krockum's instructions were to confront the College's officers on this claim. Chief Krockum threatened that non-compliant officers would be arrested for impersonating a police officer.

The City's threat was an effort to force Piedmont to disband its campus police force in favor of contracting with City Police for its security needs, a fact made known to Piedmont Vice President Tom Estes. At the time, the City enjoyed a similar private security contract with the local hospital. The City's harassment of the College and its officers was an attempt to obtain property rights of the College in the form of tickets, fines, and contractual fees. Chief Krockum and the City were forced to abandon their attempted extortion of the College following confirmation from the Georgia Bureau of Investigation that the College was duly authorized to operate a campus police department.<sup>11</sup>

Mayor Austin Facebook post, June 26, 2019, "The City of Demorest had a public hearing tonight to explore closing a small portion of Mass Blvd (That has been closed for construction for 8 months) in order to expand our park, increase public parking from 10 to 19+ spaces, increase handicap parking and accessibility, and potentially construct a splash pad, fountain, and stage. Multiple individuals opposed this potential expansion of the park citing that it will lead to gang activity, decreased safety, and decrease parking in our town. As with any decision, there are multiple sides to an issue. I'd love to know your thoughts and opinions. Should providing more accessibility and amenities in our park be a priority? Good government works best when it is transparent and listens to the public. Weigh in. Your thoughts matter. Thanks."

<sup>&</sup>lt;sup>11</sup> See Email chain dated September 12, 2018. Krockum has since been let go for negative comments made about the City, but subsequently rehired. <a href="https://www.thenortheastgeorgian.com/local-news/demorest-limbo-after-firing-police-chief-questioned">https://www.thenortheastgeorgian.com/local-news/demorest-limbo-after-firing-police-chief-questioned</a>.

#### Water and Sewer Rates

The City and its officials also extorted money from Piedmont College by devising a targeted, fraudulent water and sewage rate scheme that violates the College's constitutional rights and Georgia law. These violations have been detailed above and will not be reiterated here, though they are part of the scheme devised by the City and its officials against the College.

The damages suffered by the College as a result of the City's RICO violations are extensive. The direct monetary damage to the College from the actions stated above exceeds \$250,000, plus the value of the real property taken without compensation, and attorneys' fees. These damages continue to increase. RICO provides for the recovery of triple damages and attorneys' fees.

#### IV. Conflict of Interest

Rick Austin is in conflicting positions as Mayor of Demorest and Professor of Biology at Piedmont College. Rick Austin took office as Mayor of Demorest in January of 2014. Rick Austin also has been employed by the College as a full-time employee since 1997. As Mayor, Rick Austin has introduced and voted on countless measures that directly deal with the College. Many of those matters have been detailed above. Mayor Austin's public record discloses a strong personal bias against the College that he has used his public position to avenge.

The Charter of the City of Demorest expressly prohibits Mayor Austin's actions. The Charter provides:

No elected official . . . shall knowingly: (1) Engage in any business transaction or have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of that person's official duties or which would tend to impair the independence of that person's judgment or action in the performance of that person's official duties;" Charter Section 2.15(b) (1).

The Charter is also clear concerning the appropriate sanction for such actions:

Any City officer... who... knowingly violates any of the requirements of this section shall be guilty of malfeasance in office or position and shall be deemed to have forfeited that person's office or position." Charter Section 2.15(h) (1).

It is thus the responsibility of the City Council to remove Mayor Austin from office for maintaining personal interests which are incompatible with the proper discharge of his duties and which impair the independence of his judgment.

#### V. Breach of Contract

Additionally, Piedmont College is entitled to a declaratory judgment that Mayor Austin has engaged in conflicting interest transactions in violation of his employment contract with the College as Professor of Biology. According to his contract, Mayor Austin must abide by all College policies, including § 3.18 Conflict of Interest. This policy expressly provides:

Employees are expected to avoid actual or apparent conflict of interests between their College obligations and outside activities. Participation in activities of governmental entities, professional associations, industrial organizations, and other private institutions may serve the academic interest of the College.

As detailed above, Mayor Austin's conduct shows a regular pattern of negative bias towards the College and thus interferes with his obligations as a College employee. Mayor Austin's behavior falls within the College policy § 4.16 Termination of Faculty Employment.

This policy provides that a tenured faculty member may be terminated when the faculty member's conduct is found to be "seriously prejudicial to the College." Because Mayor Austin has been allowed by the City and the City Council to use his position in a manner that directly violates the City Charter to the significant detriment of the College, the College will seek resolution of Mayor Austin's contract with the College as a part of any litigation with the City.

I look forward to hearing from you.

cc:

James F. Mellichamp, President Piedmont College

Gus Arrendale, Chairman of the Board Piedmont College