

DOCKET NO. MMX CV 13 6009466S	:	SUPERIOR COURT
DOCKET NO. CV-12-6008330-S	:	
	:	
WATER POLLUTION CONTROL	:	JUDICIAL DISTRICT
COMMISSION OF THE TOWN OF CLINTON	:	OF MIDDLETOWN
	:	AT MIDDLESEX
v.	:	
	:	
JOSEPH W. SCHREMPF	:	June 11, 2013

**PROPOSED ORDER REGARDING APPLICATION  
FOR ORDER AUTHORIZING INSPECTION AND TESTING OF PROPERTY**

This motion came before the Court as two applications by the Plaintiff Water Pollution Control Commission of the Town of Clinton (the "Commission") pursuant to § 48-13 of the Connecticut General Statutes to test Defendant's property for suitability as a location of a sub-surface sewage disposal system in the above referenced matters. The above referenced matters were consolidated at the show cause hearing on June 3, 2013 by consent of the parties.

**WHEREAS**, the Commission is a condemning authority with the authority to lay out and construct sewerage systems as provided in General Statutes §§ 7-245 *et seq.*

**WHEREAS**, Defendant Joseph W. Schrempp owns two properties:

- 1) **Pleasant Valley Road in Clinton.** Designated on Clinton Assessor's Map 74, Block 52, Lot 4A and consisting generally of approximately 43+ acres of undeveloped land in the Town of Clinton (the "Property" or the "Pleasant Valley Road parcel").
- 2) **Cow Hill Road in Clinton.** Designated on Clinton Assessor's Map 31, Block 6, Lot 45A and consisting generally of approximately 47± acres of undeveloped land in the Town of Clinton (the "Cow Hill Road parcel").

**WHEREAS**, the Court finds the following facts in support of this application:

The above-captioned action comes before the Court after years of efforts by the Commission to test defendant's property for suitability as a location of a sub-surface sewage disposal system. The same parties were party to prior litigation involving the same issues involving the Cow Hill Road parcel. At the show cause hearing, the parties stipulated that the Pleasant Valley Road parcel involved the same issues as the Cow Hill Road parcel.

The Commission entered into a Consent Order with the Department of Energy and Environmental Protection on July 22, 1997 requiring it to investigate and implement an off-site waste water treatment and disposal system. As a result, the Commission has determined that it is necessary to construct, maintain, and operate a sewerage system serving portions of the Town of Clinton to dispose of waste water and sewage. The Commission has conducted a thorough study to locate and investigate properties desirable and necessary for use in connection with such a system. Two of the properties under consideration by the Commission are the Cow Hill Road parcel and the Pleasant Valley Road parcel.

At its public meetings, the Commission has evaluated the suitability of the Property for sewerage system use and determined that it merits on-site inspection and testing and if found acceptable to negotiate for its acquisition and proceed by eminent domain or condemnation if necessary. As a result, by letter on May 2, 2012, the Commission requested permission from defendant to enter upon and into the Property for the purpose of inspection, survey, borings, and other related tests to determine the suitability of the Property for the proposed public use. Defendant ignored the letter and refused to authorize or otherwise permit testing of the Property.

On April 8, 2013, the Commission filed an Application for Order Authorizing Inspection and Testing of Property seeking permission to undertake both an initial testing program of the Property, as well as a secondary testing program *if* the results of the initial assessment program

justified continued investigation, including (1) installation of soil borings and 2-inch or 4-inch monitoring wells via track- or truck-mounted drilling machine; (2) soil logging; (3) soil and groundwater sampling; (4) in-situ hydraulic conductivity testing; (5) surveying of well locations and elevations; (6) pump testing and groundwater level monitoring; and (7) surveying of wetlands. The activities would require the use of a drilling machine and limited clearing of brush and trees as required for access of that machinery. No trees greater than 4 inches in diameter at breast height will be removed. The Commission stated in its Application that the parcels would be restored to their initial condition upon completion.

On April 29, 2013, defendant objected to the Commission's Application, primarily on the grounds that the secondary testing program proposed by the Commission constitutes a taking under the Fifth Amendment and exceeds the bounds of General Statutes § 48-13. On May 23, 2013, the parties submitted a Stipulation to the Court which permits the Commission to access the Property for purposes of a site walk and limited inspection, to be conducted prior to the hearing on the Commission's Application.

The Court conducted a show cause hearing on June 3, 2013. At the hearing, Mr. Schrempp testified that he has had monitoring wells on the Pleasant Valley Road parcel previously and at the times that they existed they did not impact his property or cause economic loss. With regard to the Pleasant Valley Road parcel the location of the monitoring wells would be very remote from his house and from the area containing his Christmas Tree farm. An aerial photograph showed that the location of the house and Christmas Tree farm are on the far opposite side of the 43+ acre parcel from the area of the proposed monitoring wells. Exh. 6. Mr. Schrempp agreed that the vast majority of his Christmas tree farm business occurs between the day after Thanksgiving and Christmas Day. He testified that the only potential loss of value to

his business would be (1) potential liability if someone were to trip over one of the proposed monitoring wells and (2) damage to Christmas trees by the machinery conducting the borings and installing the monitoring wells.

The Commission's proposed inspection and testing is carefully designed to minimize disturbances and restore the site to its original condition after the testing is complete. At the show cause hearing, the Commission narrowed the required testing based on the results of its site walks to require only 2-4 inch borings, monitoring wells and the associated activities and the installation of a single, approximately six inch diameter well to pump water to test changes in the water levels in nearby watercourses and a nearby pond (and discharge the same water on site to infiltrate back into the ground). The Court finds that if conducted pursuant to the Court's order, the proposed inspection and testing does not constitute a taking.

General Statutes § 48-13, provides:

Upon filing a notice of condemnation of a condemning authority, either before or after the institution of a condemnation proceeding and after reasonable notice to the property owner or owners affected, the Superior Court or any judge thereof may authorize such condemning authority to enter upon and into land and buildings sought or proposed for public uses for the purpose of inspection, survey, borings and other tests. Such condemning authority shall be responsible to the owner or owners of such property for any damage or injury caused by such entrance and use, and such court or judge may require the filing of a bond or deposit of surety to indemnify the owner or owners of property for such damage. This section shall not limit or modify rights of entry upon private property otherwise provided for by law.

This Court previously upheld the constitutionality of § 48-13 in *Town of Clinton v. Schrempp*, 2005 WL 407716 at \*5 (Jan. 14, 2005) (copy attached).<sup>1</sup>

In *Town of Darien v. Estate of D'Addario*, 1999 WL 1293360 at \*2 (Dec. 22, 1999) (copy attached), the Superior Court evaluated the constitutionality of § 48-13, and after reviewing substantial case law and treatises on the subject matter, and also held that the statute is constitutional.

An overwhelming majority of courts have held that authorizing an inspection and tests on land does not deprive the owner of his private use and possession, especially when the owner receives compensation for damages. See *Melvindale v. Trenton Co.*, 506 N.W.2d 540, 541 (Mich. App. 1993); *Root v. Kamo Electric Co-op, Inc.*, 699 P.2d 1083, 1090-91 (Okla. 1985); *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890-91 (Ga. 1984), see also P. Guthrie Annotation, Eminent Domain; Right to Enter Land for Preliminary Survey or Examination, 29 A.L.R.3d 1104, 1115-17; 9 Nichols on Eminent Domain (3rd. Ed. Rev. 1999) § 32.06.

The *D'Addario* court also noted not all entry on to land constitutes a taking:

Additionally, inspecting land for the purposes of condemnation fails to cause the landowner irreparable harm. See *Trumbull v. Ehram*, 148 Conn. 47, 53, 166 A.2d 844 (1961) ("When public improvements are contemplated in a particular community, there may be some inconvenience or hardship imposed upon a landowner because of an uncertainty as to whether his land may be taken to promote the improvement, but this inconvenience attends all such proceedings and is incident to the ownership of property"). With respect to General Statutes § 48-13, the statute only authorizes a condemning authority to inspect, not take the land. Furthermore, General Statutes § 48-13 specifically provides "[s]uch condemning authority shall be responsible to the owner or owners of such property for any damage or injury caused by such entrance or use . . .". Accordingly, the Court holds that General Statutes § 48-13 is constitutional.

*Id.*

**WHEREAS**, for the reasons set forth above, the proposed entry upon and secondary testing of the Property does not constitute a taking under the U.S. and Connecticut Constitutions.

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<sup>1</sup> Historically, Connecticut courts have held that initial testing pursuant to § 48-13, the type of testing stipulated to by the parties in this case, does not constitute a taking in violation of the U.S. and Connecticut Constitutions. See *Town of Clinton v. Schrempp*, 2005 WL 407716 at \*5 (Jan. 14, 2005).

General Statutes § 48-13 contemplates this sort of examination and testing of the Property, and does not seriously compromise or impair the rights of the defendant to use and enjoy the Property.

**ORDERED**, that with regard to the types of testing proposed in the Commission's secondary testing, the Commission may conduct the following activities during the times provided and with the precautions provided:

**1. Installation of soil borings and 2-inch or 4-inch monitoring wells via track- or truck-mounted drilling machine:**

**Pleasant Valley Road parcel (Map 74/Block 52/Lot 4A)**: Install up to eight borings with monitoring wells at the Pleasant Valley Road parcel. All of the borings and the wells will be installed in the area circled in red on Plaintiff's Exhibit 6. Installation of all the borings and wells shall be conducted over a period of 6 to 10 consecutive working days, depending on conditions encountered. Installation will be conducted on consecutive working days with 1 or 2 drill rigs to minimize the number of days on site. This work is anticipated to be conducted in late August or early September 2013. The WPCC shall provide Mr. Schrempp with written notice of the date on which the installation shall begin and when it is complete. Limited clearing of underbrush may be required, but the existing farm road and clearings on the property will be used to the extent possible. Mature trees will not be disturbed.

**Cow Hill Road parcel (Map 31/Block 6/Lot 45A)**: Install up to six borings with monitoring wells at the Cow Hill Road parcel. All of the borings and the wells will be installed in the area circled in red and labeled "TEST" on Plaintiff's Exhibit 7. Installation of all the borings and wells shall be conducted over a period of 6 to 10 consecutive working days, depending on conditions encountered. Installation will be conducted on consecutive working days with 1 or 2 drill rigs to minimize the number of days on site. This work is anticipated to be conducted in late

August or early September 2013. The WPCC shall provide Mr. Schrempp with written notice of the date on which the installation shall begin and when it is complete. The Wells will be located along cleared areas and on-site roads or pathways in such a way to avoid damaging Christmas trees growing on the site. If any trees are damaged as a result of the installation, the WPCC shall compensate Mr. Schrempp for the value of the trees.

**Both Parcels:** The monitoring wells will be deep enough to reliably detect the seasonal high ground water level and obtain information on consistency of the geologic conditions throughout the aquifer (approximately 40 to 70 feet deep at Pleasant Valley and 20 to 30 feet deep at Cow Hill Road). The well pipes at the Pleasant Valley Road site will be finished as protective steel standpipes, 8" to 12" diameter, 2-3' above grade. The well pipes at the Cow Hill Road parcel will be installed to be either (1) flush with ground level or (2) slightly below ground level and covered with crushed stone to reach ground level. All wells will be covered by a cap that is capable of being locked.

The WPCC shall hold Mr. Schrempp harmless for any liability created by the borings and monitoring wells that occurs prior to the date that the WPCC restores the site to its initial condition.

**2. Soil logging**

Soil conditions will be evaluated and logged during the borings and installation of monitoring wells as described under Item 1 above.

**3. Soil and groundwater sampling**

Soil samples will be taken from the boring cuttings as described under Item 1 above and jarred; samples will be sent to a laboratory for sieve analysis. Groundwater samples may also be taken from the monitoring wells and sent to a laboratory for analysis.

**4. In-situ hydraulic conductivity testing (Slug In and Slug Out Testing)**

Hydraulic conductivity testing will be conducted within each well after the well is completed and developed. A piece of capped pipe is dropped into the well to rapidly displace a known volume of water, and the response of the aquifer is measured. It is noted that the slug is retrieved from each well at the conclusion of the test. Well development and slug testing is anticipated to take no more than 4 consecutive working days at each site and may overlap with the last day of drilling under Item 1.

**5. Surveying of well locations and elevations, and wetland flagging**

Wetlands on the property may need to be delineated; this is anticipated to take no more than 2 days. The survey to field locate and determine the locations and elevations of the wells will also document the location of the wetlands. The survey will be completed within 3 working days and will be conducted following wetland flagging. The wetland flags will be removed after the survey if requested by Mr. Schrempp.

**6. Groundwater level monitoring**

After the wells are installed, the commission or its consultant will visit during the autumn high ground water season (approximately September 1 through December 31) as determined by the WPCC in consultation with the DEEP. During that time period, the WPCC or its consultant shall visit the site up to three times per week to measure the ground water levels (typically 1 time per week plus an additional visit after any significant storm events). Other than a passenger vehicle driving along existing cleared paths, heavy equipment will not be required at the site for monitoring activities. After the wells are installed but prior to the first visit during monitoring period, the WPCC or its consultant shall provide Mr. Schrempp with a schedule of its visits for



the autumn season. The WPCC will not access the Cow Hill Road parcel between November 29, 2013 and December 26, 2013.

The WPCC anticipates that it may get sufficient data for the autumn high ground water season, however, if the data for the autumn season is not deemed sufficient by the WPCC's consultant and DEEP, the WPCC and its consultant shall repeat the monitoring process and notice to Mr. Schrempp during the spring high groundwater season (February 1 through May 31, 2014).

Within 12 weeks of the end of the spring monitoring season or by August 30, 2014, the WPCC will restore the property to its initial condition and close off any of the monitoring wells.

**7. Pumping Test (Pleasant Valley Road parcel only)**

If the results from Items 1 through 6 are suitable, a pumping test will be conducted at the Pleasant Valley Road site. This test will require installation and development of one approximately 6-inch diameter well (sized in consultation with DEEP) for pumping, to approximately 40-60 feet below ground surface. The time associated with this task would be expected to range from a minimum of two days to a maximum of four days.

Mobilization, testing and demobilization operations for the pumping test will take from five to seven days. Temporary markers will be used to measure the level of the water in the watercourses during the pump test days; the markers will be placed in nearby watercourses running through the subject property and in Chapman's Pond to detect any changes in surrounding water levels during the pumping test. The gauges will be installed manually without any heavy equipment and will be removed at the conclusion of the test.

**8. No additional testing or activities without Court approval**

If the conditions encountered in the field for Items 1 through 7 above require any additional or alternative activities than those permitted by this order or the data collected at that time is still not adequate to reasonably determine the suitability of the land, through no fault of the WPCC, the WPCC must seek additional approval of the Court before conducting any additional activities.

IT IS SO ORDERED.

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Dated

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Judge/Clerk of the Court