

DANIEL M. HERRIGAN
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SUMMIT COUNTY
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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO, ex rel)
RICHARD CORDRAY, ATTY GENERAL)

CASE NOS. CV 2007 07 4993
CV 2000 07 3102

Plaintiff)

JUDGE GIPPIN

-vs-

ORDER

JOEL HELMS, dba COUNTRYVIEW SOUTH)
APARTMENTS, et al.)

(Resolving Motion
for Stay)

Defendants)

- - -

Defendants Motion to Stay filed April 9, 2009, and amended on April 15, 2009, will be denied.

The evidence did not demonstrate that the wetlands will suffer material harm if the effluent flow from the Waste Water Treatment Plant ("WWTP") is eliminated. Any such harm can moreover potentially be prevented by reasonable means. There was no showing made that a delay in restoration of the wetlands is necessary, quite the contrary. Finally, if a balance of the public interests involved had to be made between elimination of the effluent outflow and preservation of the wetlands, the appropriate choice would be for elimination of the outflow.

No present justification was established to extend the sewer connection related abatement provisions of the Court's Judgments of December 9, 2008 and April 13, 2009.

I. PROCEDURAL STATUS

The Judgment of December 9, 2008, included an injunction requiring the Defendants to abandon their present WWTP and to connect to the available public sewer system within 120 days. They were further ordered to decommission their present sewage disposal system, perform a clean up, cease discharging sewage into the wetlands, submit a wetlands restoration plan and then implement the plan upon its approval.

The December 9 Judgment also imposed civil penalties on the Defendants that could be abated if they complied with the injunction. The Defendants did not comply with the injunction. The April 13 Judgment imposed further civil penalties for non-compliance with the Court's Consent Decree in Case No. CV 2000 07 3102 and provided for their abatement if the Defendants complied with the December 9 injunction within a further 30 days.

On April 9, 2009, the Defendants filed a Motion for Stay of the injunction to connect to the public sewer system and to begin a wetlands restoration process. They contended that compliance with both orders was impossible, since they said that the elimination of the effluent flow from the WWTP would destroy the wetlands. An evidentiary hearing was conducted on the Motion on April 15, 2009. At that time, the Defendants were granted oral leave to amend the Motion to seek an extension of the abatement provisions of the December 9 and April 13 Judgments.¹

During the April 15 hearing, an agreement was reached between the parties for the Defendants to connect to the public sewer system and eliminate the WWTP as soon as

¹ The Motion by its terms thus did not include a stay of all of the provisions of the December 9 injunction. The Defendants did not seek an extension of the Motion to cover other parts of the injunction when they moved to amend it on April 15. But since the injunction has the requirement to connect to the public sewer system at its core, the Court will consider the Motion to extend to every aspect of the injunction.

possible. The State agreed to subordinate its judgment lien as necessary to facilitate the Defendants' obtaining financing to pay for the work.

However, the agreement was conditioned on whether or not the Court would grant the Motion for Stay. The Court took the Motion under advisement, but stated that it expected to be able to rule promptly. The Defendants then agreed to begin implementation of the agreement immediately, with the understanding that they would cease if the Court granted the stay.

II. FINDINGS OF FACT

The Defendants presented their own testimony and that of two experts, Barbara Hussey Costello (wetlands) and Ira David Sasowsky (geology and hydrology). The State presented the testimony of its expert, Mick Micacchion (wetlands, geology and hydrology). Four exhibits from the Defendants were admitted into evidence: a preliminary soil report as to which there was no testimony; Ms. Costello's report; Dr. Sasowsky's report; and a federal soil resources report for the area in question. The Court has also considered the evidence presented during the trial as it pertains to this issue.

Ms. Costello and Dr. Sasowsky were only engaged by the Defendants during the weekend prior to the hearing. They thus had only limited time in which to perform their work. Ms. Costello estimated that she spent 25-30 hours altogether. Dr. Sasowsky provided no estimate of his time, but the description of his activities did not appear to have required more time than Ms. Costello spent. The consultants engaged in some limited field inspections and testing, received historical information from the Defendants, consulted some public sources and some of the earlier trial testimony and exhibits, including an earlier soil

report. They also relied on the preliminary soil report done on April 14, 2009, by another consultant, who did not testify.

Notwithstanding these limitations, both consultants expressed the opinion that the wetlands would cease to exist if the effluent flow from the WWTP were eliminated. The main basis for their opinions was the conclusion both reached that the natural hydrology would not sustain the wetlands. Dr. Sasowsky expressed his opinion that there is no connection to the groundwater. Both experts further supported their opinions by the conclusions they drew, from historic aerial photographs and what they had been told by the Defendants, that the wetlands had not existed before the CVS complex was built and the WWTP began to expel effluent.

Mr. Micacchion re-stated the opinion he had given at trial, even taking into account the testimony of the Defendants' new experts, that the wetlands in approximately their present boundaries were natural and had existed since at least 1938. He explained his disagreement with the defense experts' conclusions, based on the data he had collected and the other available sources of information, including the aerial photographs.

He stated his belief that the two types of soils that are present will both support wetlands, the one being hydric and the other probably having the hydric components sometimes found in such soil. The presence of soil moisture to a depth of at least 30" supported his view that there is a connection to groundwater. The age and types of the vegetation that are present were said to support his conclusion as to the age of the wetlands.

In his view, the presence of well-established native vegetation in "Cell 2" of the wetlands, the part to the north that is shielded from the effluent flow by a berm, demonstrates that the wetlands pre-exist the complex. He contrasted that vegetation with the younger,

invasive character of the vegetation in "Cell 1," into which the effluent discharges directly. Finally, he repeated his conclusion from the historic aerial photographs that the wetlands were there long before the CVS complex.

It was therefore Mr. Micacchion's opinion that elimination of the WWTP effluent will not cause a material reduction in the size of the wetlands. He further expressed the opinion that the elimination of the effluent flow will improve the quality of the wetlands in "Cell 1," since he believes that the natural vegetation has been replaced by more pollution-tolerant invasive vegetation. A restoration plan, involving some planting of the native vegetation now found in the more pristine "Cell 2," will in his view further enhance the quality of wetlands in the area of the discharge pipe.

The limited amount of last-minute work done by the Defendants' consultants necessarily reduces the weight to be given to their conclusions. It was dependent on the unverified work of others and on Defendants' version of the history (which the Court has already found not to be credible.) Further, Dr. Sasowsky's qualifications to express an opinion concerning the age and prospective survival of wetlands (as opposed simply to the character of the geology and hydrology of the area) were minimal, although the Court allowed the testimony. Finally, the evidence as a whole put the conclusions of both experts in great doubt.

Dr. Sasowsky did not disagree that the soils were consistent with the presence of wetlands. He conducted no independent soil testing and did not dispute that all of the soil was either hydric or partially hydric. The soil is so described the federal report. He did not explain why he apparently discounted the data showing well-developed hydric soils to 30 inches. Mr. Micacchion's far more extensive investigation and data base gives his testimony

concerning the soils definitive credibility in contrast to that of Dr. Sasowsky, notwithstanding the latter's superior professional geology credentials.

Ms. Costello's testimony concerning the aerial photographs greatly damaged the credibility of her opinion, which already stood on unsteady footing for the reasons stated above. She was confronted on cross-examination with the fact that the historic photos show likely wetlands in almost all of the area she had marked as the present wetlands boundary, excepting only small portions where farmland had been created. In response, she stated that she must have erred in drawing the boundary. But Mr. Micacchion confirmed that the boundary she had used was essentially accurate, as is borne out by the trial exhibits.

Ms. Costello also came to agree under cross-examination that the vegetation in Cell 2 is consistent with older, natural wetlands. Taking her testimony as a whole, her opinion that the wetlands will be destroyed if the effluent is eliminated is entitled to little weight. By contrast, Mr. Micacchion's opinion to the contrary was credible and well-supported. The Court accepts his opinion and finds that the wetlands are not likely to be affected adversely to any material extent if the injunction to stop the effluent flow from the WWTP is implemented.

The evidence further disclosed that loss of the wetlands because of deprivation of the effluent could be averted, if necessary, by the substitution of another water source. There is no reason for the Court to address that issue now, but the record shows the potential availability of such water from the existing wells.² If the Court is wrong in its conclusion

² The Court understands from the testimony that the existing wells are intended to continue being used to provide non-potable water for such things as fire extinguishment and potable water to locations outside the scope of these proceedings.

concerning the effect of shutting off the effluent, in other words, the result will not necessarily be the loss of the wetlands.

There was no evidence presented to support there being any negative consequences from delaying the wetlands restoration or other aspects of the injunction.

The Defendants presented evidence that the cost of implementing the injunction to connect to the public sewer system and eliminate the WWTP will be approximately \$180,000.00. They testified that they will require financing to pay for the work, for which they have made inquiries, but that no lender will provide the funds, because of the State's judgment lien (now \$500,000.00). The Defendants believe that they can comply with the injunction within the 30-day abatement deadline of the April 13 Judgment, if the State's lien is promptly subordinated to the lender's mortgage.

III. ANALYSIS

The evidence does not support a stay of the injunction. The claimed conflict between connecting to the public sewer and restoring the wetlands has not been established. Stopping the effluent flow is likely to enhance the wetlands, not harm them. Further, even if that were to prove incorrect, the damage could potentially be averted by establishing another water supply to the wetlands, most obviously by using the existing wells. Most important, the potential loss of the wetlands is far outweighed by the public health and safety benefit of halting the discharge.

An extension of the abatement schedule in the April 13 Judgment is not yet necessary, since the work can apparently be done within the schedule. Should an extension appear necessary, the Defendants may apply to the Court for that purpose. The undersigned would

be inclined to grant such an extension if the work appeared to be proceeding in good faith, presumably his successor will be inclined to do likewise.

There is no present basis upon which to give the Defendants relief from the civil penalties imposed in the December 9 Judgment. The 120-day abatement schedule in that Judgment should have been ample to accomplish compliance with the injunction, or else to seek an extension before the expiration of the abatement period, based on an effort to comply that could not be completed in time.

IV. CONCLUSION

The Court is very gratified that an agreement now appears to have been reached under which the Defendants will comply with the remaining part of the December 9 injunction, at least so long as the Court's Judgments remain undisturbed on appeal. This will halt further effluent discharge to the wetlands and will bring about remediation of the effects of the discharge. Taken together with the implementation of the drinking water injunction, the parties are to be congratulated for bringing about what will hopefully be a final resolution of this long controversy.³

Defendants' Motion for Stay, including their request of an extension of the abatement schedules, is **DENIED**.

IT IS SO ORDERED.

April 17, 2009



JUDGE ROBERT M. GIPPIN

³ The Court reiterates its hope that the parties will also proceed without delay to reach a global settlement to end the litigation altogether. The Defendants' compliance with the injunctions accomplishes by far the most important objectives of the State's Complaints in these two proceedings.

cc: Messrs. Joel and James Helms
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