

July 7, 2020

**VIA EMAIL:** [middsuper@catskill.net](mailto:middsuper@catskill.net)

Carl P. Davis  
Supervisor  
Town of Middletown  
P.O. Box 577  
Margaretville, New York 12455

Re: Eminent Domain Public Hearing

Dear Mr. Davis:

We represent the Watershed Agricultural Council of the New York City Watersheds, Inc. (“WAC”) in connection with the Town of Middletown’s proposed acquisition of a 21.7-acre portion of Tax Map No. 241.-1-1.1, a permanent easement “over the remaining portion” of said parcel, and the termination of WAC’s Conservation Easement. Please accept this letter as part of the record for the “public hearing” scheduled to take place via Zoom on July 8, 2020 at 6:00 p.m.

As you know, WAC is a not-for-profit conservation organization, and the Conservation Easement over the subject property is a conservation easement under Environmental Conservation Law (“ECL”) §49-0305. *Argyle Farm & Props., LLC v Watershed Agric. Council of the N.Y. City Watersheds, Inc.*, 135 A.D.3d 1262 (3d Dept. 2016). Under ECL § 49-0307, the Conservation Easement can only be extinguished: (a) as provided in the Deed of Conservation Easement; (b) in a proceeding pursuant to RPAPL § 1951; or (c) upon the exercise of the power of eminent domain.<sup>1</sup> Neither (a) nor (b), above, is applicable here. Thus, under the circumstances presented, the only way to extinguish WAC’s Conservation Easement is via eminent domain.

To do so, the substantive and procedural requirements of the Eminent Domain Procedure Law (“EDPL”) must be complied with.

Under EDPL § 201, prior to any acquisition, the condemnor must conduct a “public hearing.” On March 13, 2020, Governor Cuomo issued Executive Order (“EO”) No. 202.1, which included certain provisions regarding the “Suspension of law allowing the attendance of meetings telephonically or other similar service.” Specifically, EO 202.1 suspended Article 7 of the Public Officers Law (also known as the Open Meetings Law) “to the extent necessary to permit any public

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<sup>1</sup> The Town has asserted, in its notice of hearing, that WAC’s decision to reject its request to agree to a subdivision of the subject property is what has prompted the condemnation. However, even if consent to subdivision had been granted, the subdivided parcel would have remained subject to WAC’s Conservation Easement.

body to meet and take such actions authorized by law without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.” EO 202.1 does not specifically reference public “hearings.”

Thereafter, on April 9, 2020, Governor Cuomo issued EO 202.15, which, in relevant part, provided that local officials could hold public hearings remotely through the use of telephone conference, video conference, and/or other similar service. On June 7, 2020, EO 202.39 continued the “suspensions and modifications of law” made by EO 202.15 “until July 7, 2020.” Thus, there is some question regarding the validity of a remote “public hearing” on July 8, 2020.

EDPL § 202 describes the notice requirements for the public hearing. Preliminarily, WAC requests that the Town confirm that it complied with the publication requirements of EDPL § 202(A) or (B).

EDPL § 202(C) also requires notice to affected property owners. WAC received a copy of the notice of public hearing (dated June 10, 2020) on June 30, 2020. The cover letter accompanying the notice was dated June 24, 2020. WAC would note that, under the terms of its Deed of Conservation Easement, in the event that all or part of the subject property is condemned, its Conservation Easement “may be terminated through condemnation proceedings with notice to” WAC, the property owner, the Attorney General and the City of New York. It is not clear that either the Attorney General or the City was put on notice of the public hearing.

Among other things, the notice of the public hearing must set forth “any proposed alternate locations.”<sup>2</sup> The Town’s notice does not include any information regarding alternate locations—a topic which must also be addressed at the hearing (EDPL § 203). WAC would question this omission, both procedurally and substantively. It is our understanding that other locations were considered, but were rejected—not for reasons related to their viability, but for extrinsic reasons (i.e., the owner’s willingness to sell and/or the involvement of other municipal entities). Given that condemnation is necessary, WAC would submit that all alternatives should be disclosed and considered, particularly in light of the fact that WAC’s Conservation Easement constitutes a “prior public use.”

Under the doctrine of prior public use, land already devoted to a public use may not be condemned absent legislative authority for the particular acquisition at issue, unless the new use would not materially interfere with the current public use. *City of New York v Yonkers Indus. Dev. Agency*, 170 A.D.3d 1003 (2d Dept. 2019). The proposed use will clearly interfere with WAC’s Conservation Easement; in fact, it would terminate the easement. Accordingly, WAC is duty-bound to object to the taking in the absence of legislative approval at the State level.

In addition to the foregoing, WAC notes that EDPL § 302 requires that “Real property to be acquired by the exercise of the power of eminent domain shall be appraised on behalf of the condemnor by an appraiser.” Has the Town secured a professional appraisal of the property and property rights being taken, as well as the resulting indirect damages?

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<sup>2</sup> In a related vein, as part of the SEQRA process, if an Environmental Impact Statement was prepared, did that EIS set forth “alternatives to the proposed action, as required by ECL § 8-0109(2)(d)?

Finally, WAC also believes that the Town should be aware—and the Moriarty's (the property owners) should be aware—that WAC intends to enforce its right, as outlined in the Deed of Conservation Easement, to 48% of the gross sales proceeds or condemnation award.

Very truly yours,

HINMAN, HOWARD & KATTELL, LLP

By: /s/ **Paul T. Sheppard**  
Paul T. Sheppard