

Challenges Regarding the Commercial Sale Of Water from the Loftus Well Field

Eric Treaster
22 June 2016

Introduction

Councilor Saums asked if I would be interested in researching the feasibility for the commercial sale of water, including bottled water, from the Loftus Well Field. Based on concurrence from the Water Pollution Control Authority (W.P.C.A) during its May 24th meeting, and from the Council on May 25th, as a private citizen I agreed to investigate, based on publicly available information, the Loftus Well Field and determine the challenges associated with the desired commercial use of the property. This report contains a summary of what I discovered and suggestions on how to proceed. It is prepared for Chairman Dombrowski of the Land Use/Planning/Public Works Committee and the Town Council.

History

The Loftus Well field is a rear parcel located at 480-R Shewville Road. A copy of its property card is attached.

The property is defined by two legal descriptions, both of which are part of the same warranty deed, created from farm property known as 484 Shewville Road. A copy of the deed is attached.

The "Town of Ledyard, a municipal corporation" acquired the property for \$275,000 on November 22, 1994.

The land is zoned R-60 Residential, which allows single-family dwellings and their accessory structures on 60,000' lots and two-family dwellings and their accessory structures on 80,000' lots. The zone also allows adult day care centers, age restricted housing, antenna towers, bed and breakfast establishments, cemeteries, community centers, country inns, golf courses, nursing homes, public schools, solar energy systems, and transformer substations. The zone allows farming if greater than 3-acres, and it allows utility installations provided there is no service yard or outside storage of supplies.

The Purchase Contract¹ and the Warranty Deed² were from William J. Loftus, Jr. and Dorothy Loftus (the Grantors) to the Town of Ledyard (the Grantee).

The first³ legal description creates an internal parcel of about 11.47⁴ acres, which is known as the Loftus Well Field. A drawing of the field, taken from the parcel's A2 site plan, is attached.

The second⁵ legal description is for a 20' wide access road from Shewville Road to the Loftus well field.

¹ Per Purchase Contract for \$275,000 executed April 25, 1994 with Mayor Lozier.

² Per Warranty Deed recorded 11/24/1994.

³ Schedule "A" to Purchase Contract, and Schedule "A" to Warranty Deed.

⁴ Per A2 Site Plan prepared July 8, 1994 (required by purchase contract)

⁵ Schedule "A-1" to Purchase Contract, and Schedule "A-1" to Warranty Deed.

The access road consists of a 172' leg from Shewville Road with a 113-degree corner, a 404-foot leg with a 120-degree corner, and a final 617-foot leg to the Loftus Field. A drawing of the access road, taken from the parcel's A2 site plan, is attached.

Although the A2 site plan shows the access road to be 20' in width, what exists today is mostly a 10' to 12' wide hard-dirt farm road⁶.

Using the full 20' width of the access road as shown on the site plan, the longest truck that will be able to make the corners is about 30' assuming its width is 102", which is the maximum width allowed in Connecticut.

The deed contains a restriction on the use of the 11.47 acres (Schedule "A") as follows: *"Said premises shall be used for the sole purpose of constructing and maintaining municipal water well sites and related equipment, machinery, structures, piping and utilities."*

The deed also contains a restriction on the use of the access road to the well field (Schedule "A-1") as follows: *"Said right of way shall be for the sole purpose of ingress and egress to and from the premises described in Schedule "A" and for all necessary utilities and water transmission lines."*

The deed provides that " *The Grantors and their heirs and assigns shall have the right to make use of the right of way [the access road], in common with the Grantee, in any manner which does not interfere with the purposes for which it is granted.*"

When granted, it appears to have been the intent of the parties that the access road is to be used only for infrequent access to the Loftus Field for the construction and maintenance of the well sites and their related equipment, and its use by the Town would not impact the Loftus farming operations. The deed restrictions were important to the Seller⁷.

The well field has an active diversion permit that allows 250,000 gallons per day to be continuously drawn from the two wells (combined).⁸ The diversion permit was issued on September 21, 2010 and will expire on July 14, 2020. The diversion permit cost \$1,200⁹. A copy of the diversion permit is attached.

Although there are two wells in the well field, there is currently only one submerged pump.¹⁰ This pump was in operating condition at the time the field was shutdown late in 2011.

The property is serviced with a 220V power line, which feeds two inverters that create 440V that powers the two pumps. Each inverter has the ability to power both pumps simultaneously. However, one of the inverters has demonstrated a high failure rate and is not operable. It was strongly recommended that 440V power be provided if the site is to be reactivated.¹¹

⁶ From inspection of first 175' of access road conducted on 6/17/16.

⁷ Mayor's Report - 1/26/94 Council Meeting Minutes (contract delayed to reach agreement on deed restrictions)

⁸ Consumptive Diversion Permit #DIV-200802557 to the Ledyard Water Pollution Control Authority

⁹ Unable to confirm.

¹⁰ Per 6/30/16 meeting with Ray Valentini at Groton Utilities.

¹¹ Per 6/30/16 meeting with Ray Valentini at Groton Utilities.

The Loftus Well Field was acquired using a \$300,000 grant from the “*HUD Small Cities Development Block Grant*” to “*help offset the cost of relocating the well fields in the Highlands Area.*”¹² I was unable to find long-term conditions imposed by the grant or related long-term commitments by the Town.

The development of the Loftus Well Field, support building, and its pumps and pipeline were funded as part of a \$2,585,000 bond.^{13 14} I was unable to find long-term conditions imposed by the bond issuers or related long term commitments by the Town.

Water quality tests dated 10/3/95 for PW#1 shows color, pH, iron, and manganese exceeded EPA guidelines.¹⁵ The tests for PW#2 shows coliform bacteria, color, turbidity, odor, iron, and manganese exceeded EPA guidelines. It is not unusual for raw ground water to exceed the color, pH, turbidity, iron and manganese EPA guidelines in Connecticut. Greensand was used as one of the treatment mediums. A copy of the water quality report is attached.

Multiple sources reported that the water had excellent taste and quality, presumably after treatment.

The output of the well field consists of a single 20” pipe under the access road to Shewville. There are two valves, one near its support building at the well field, and one near Shewville Road. The 20” pipe goes north on Shewville, and dead ends immediately south of the entrance to the access road.

The Loftus well field was shutdown in late October or November of 2011.¹⁶

The Challenges

A potential commercial water purchaser, such as a bottled water company, will be unlikely to expend resources to perform due diligence and engineering if the Loftus Field is unlikely to become available, and the Town will be unlikely to expend the resources required to allow the Loftus Field to be made available unless the effort will result in a reasonable revenue stream.

If enforced, the deed restrictions would likely be interpreted as limiting the use of the Loftus Field to “*the sole purpose of constructing and maintaining municipal water well sites and related equipment, machinery, structures, piping and utilities.*” In my opinion, the keywords “*sole purpose, “constructing and maintaining” and “municipal”*”, together, imply a town owned utility “*use*” of the property.

The deed restrictions for the access road, together with its two sharp corners, constrain its use.

¹² On 4/21/92, there was a public hearing on a \$300,000 bond. On 4/22/92, the Council authorized the Mayor to make application for the W.P.C.A. for \$300,000 “*to offset the cost of relocating the well field for the Highlands Water system.*”

¹³ On 1/26/94, the Council approved a resolution and authorization for “*..... and for the upgrade of the Highlands Water Supply, and authorizing the issue of bonds and notes in the same amount to defray said appropriation.*”

¹⁴ On 2/22/94, a Town meeting was held for the authorization of a \$2,585,000 bond for the Route 12 Waterline, filtration plant, and [Loftus] well field developments.

¹⁵ American Environmental Laboratories, Incorporated Report # AA68201 dated 10/3/95 – for PW-1 & PW-2 (Loftus Site).

¹⁶ October 25, 2011 Minutes of Ledyard Water Pollution Control Authority authorized \$9,000 to keep heat at 40 degrees, dispose of greensand, and to return a pump to S.B. Church. The heat is no longer being maintained.

The restrictions could also be interpreted as prohibiting the access road from being paved or improved because such improvements are unnecessary to “construct and maintain” the well field.

The question would likely become, if challenged, is if “*municipal water well sites and related equipment*” include equipment for the sale of water to commercial water buyers for on-site bottling and/or resale, and/or access to the well field by daily multiple commercial tanker trucks and/or commercial bottled water trucks?

In my opinion, the word “*municipal*” constitutes a restriction that, if challenged, would likely be interpreted as not allowing (a) the trucking of large quantities of water to users outside of Town, (b) the on-site commercial bottling of water, (c) the production of water intended for consumption by non-residents, or (d) any use that would result in heavy commercial vehicles frequently using the access road. These interpretations are consistent with the zoning regulations, which do not allow utility installations in residential districts if the installation includes a “service yard”.

Implementation Plan

Step 1. Determine the revenue expected from the Loftus Field.

Before significant time consuming, costly, and uncertain efforts are expended by the Town, a Town Representative should informally contact water companies and bottled water trade associations to confirm there is a demand for use of the Loftus Field. The Town representative should “market” the exclusive long-term use of the 11+ acre Loftus well field, with two existing high capacity wells, a valid potable water diversion permit for 250,000 gallons per day, 220V electricity, access via a well maintained Town road directly to Route 184 and I-95, with the assumption that all permits will be granted for the long term use of the property as a commercial water production, bottling, and shipping facility.

The Town should invite representatives of the water companies to field walk the Loftus Field and its access road. In addition to the Town Representative, a representative of the W.P.C.A. should be present for the field walks.

The Representative should request a “Letter of Interest” from interested water companies. The Letters of Interest should include an estimate of the amount companies are willing to pay for the exclusive use of the Loftus Field. It would be helpful if the Letters of Interest included if a water company has a preference to either purchase or lease the well field, a preference to purchase water in bulk, or a preference to lease the field with separate payments for the amount of water it uses.

Continue to Step 2 if the Town confirms there is (a) a significant demand for water from the property, and (b) the estimated income from the field will make the effort worthwhile.

If there is not a significant demand, or if the expected revenue will be too little, then the Town should determine how it wishes to dispose of the property. Choices¹⁷ include, but are not limited, to (a) demolishing the site – including plugging the wells and converting the property

¹⁷ Suggested by Ed Lynch, Chairman of the Water Pollution and Control Authority (W.P.C.A)

to open space¹⁸; (b) abandoning the property and leaving it as is; and (c) selling, trading, or gifting the property – where the intent would be for it to again be used for farming¹⁹.

Step 2. Determine if the proposed use will be acceptable to the Town.

Making the Loftus Field productive for Ledyard will be costly, uncertain, have a significant environmental impact, be controversial, and time consuming. The Town should first reach a consensus, formally on the record, with a public hearing, and perhaps even a referendum, on exactly what it wants.

The Loftus Field is a precious resource for our Town. The economics²⁰ of selling its water in bulk to a water bottling company may be compelling, especially if the full capacity of the Loftus Field can be utilized for extended periods of time. If the cost of water paid to the Town is 1¢ per bottle, then at 250,000 gallons per day, which can be packaged into about 2,000,000 bottles, the Town could, in theory, be paid \$20,000 per day or \$7,300,000 per year for water sold from the Loftus Field. (Letters of Interest from Step 1 are necessary to obtain meaningful estimates of the expected revenue from the field.)

However, revenue from the field will come with significant environmental and safety impacts, especially if the water is bottled on site and shipped by truck as expected. For example, if a water company bottles 250,000 gallons per day, it would require about 45 22-ton 18-wheel trucks to enter and exit the property per day²¹. The Town needs to determine if the benefits outweigh the noise, traffic, safety, risk, and environmental costs of operating such an intensive facility in what is essentially a rural farming district. The use will change the character of our Town.

Under §6.2.H of the Zoning Regulations, and under the Connecticut General Statutes §7-159b, the Planning and Zoning Commission is authorized to conduct a non-binding pre-application review for the purpose of discovering in advance what it will allow and to determine how to best address its concerns when a formal application is submitted.

A member of the Land Use Committee, the Economic Development Commission, or a Town official, should request, as an agenda item, a formal pre-application review by the Planning and Zoning Commission to determine if it would be willing to change the zoning of the access road and the well field at 480-R Shewville Road from its current R-60 residential designation to a proposed “I” or “Industrial” designation. The intent would be for the town to document its willingness to allow for the on-site manufacture, bottling, and trucking of bottled water and/or the use of tank trucks to transport water from the Loftus Field. Although not legally required, the pre-application review should be formal and include a public hearing.

The Commission should also create a list of the conditions of approval it might impose to protect health, safety, convenience, and property values if it grants a special permit for the proposed commercial use of the Loftus Field.

¹⁸ May require release of the deed restrictions for the property – if the field is to be used as public open space.

¹⁹ May require release of the deed restrictions for the property – if the field is to be used for farming.

²⁰ Per preliminary calculations provided by Ed Lynch – based on rough optimum-case preliminary calculations, a water company could produce 2,000,000 .5 liter bottles per day from the Loftus Field, each of which could retail for about \$2.50. If costs were 40%, this would yield a \$3,000,000 per day net income to the water company when operating at full capacity.

²¹ Per preliminary calculations provided by Ed Lynch.

To prepare its response, the Commission should consider expected increased road maintenance costs, increased truck traffic and noise, traffic safety, site parking, the queuing of tanker trucks, wetlands, present and future alternative uses of the property and surrounding properties, refuse and waste management, and conformance to the Plan of Conservation and Development. It should consider if the proposed change constitutes “spot zoning”, which is usually illegal. It may propose the imposition of conditions regarding the hours of operation, or limit truck traffic to certain days and times. The Commission may request Town staff to confirm estimates of revenue that is expected to be generated, and to provide its estimates of the expected increase in traffic and road maintenance costs.

Step 3. Determine if the deed restrictions are serious.

Properly written deed restrictions are difficult to delete or amend. If the Planning and Zoning Commission provides a determination that it will likely allow an industrial use of the Loftus Field, under reasonable conditions, then the Town should seek a legal opinion regarding the significance of the deed restrictions. This should be a straightforward task for a land-use attorney. I expect the deed restrictions will be found to be significant. (Go to Step 5 if the deed restrictions are found to be insignificant.)

If significant, the attorney will have to determine who has standing to enforce the deed restrictions. Those individuals must be willing to execute a release for the deed restrictions to effectively vanish.

The attorney will have to determine if just the owners of adjacent properties have standing, if owners of nearby properties have standing, or if everyone has standing to enforce the restrictions.

Although unlikely, it is possible the attorney will recommend ignoring the deed restrictions because of the Constitution, corresponding laws, policy, and the established precedence that the development and reasonable use of land is to be encouraged – and deed restrictions (and zoning regulations) are not enforceable if they prevent all reasonable uses of a parcel of land in perpetuity. The deed restrictions, in my opinion, might be unenforceable because they effectively prohibit all reasonable uses (except the production of municipal water) of the property in perpetuity, including farming, hiking, bird watching, and picnicking.)

Step 4. Determine if the parties with standing will be agreeable to the proposed use.

If the deed restrictions are found to be significant, and if it is found that just the owners of the adjacent properties have standing to enforce the deed restrictions, then those owners should be contacted by a town official to determine if they are agreeable to “releasing” the deed restrictions. Consideration may be necessary to reach agreement.

If there are a large number of people who have standing to enforce the deed restrictions, the desired use of the property will probably not be achievable because either the total amount of consideration will be excessive, and/or there will be a least one person who is immune to consideration.

To avoid unnecessary legal costs, it is not required to execute “release” agreements at this step. However, the willingness of those with standing to execute a release of the deed restrictions should be documented in writing.

Regarding the access road – per the property cards – a willingness to release the deed restrictions will likely be required from Amy C. Callahan, 484 Shewville Road, who owns the adjacent property north of first leg of the access road; Lester T. Freye, 476 Shewville Road, who owns the adjacent property south of the first leg of access road and west of the second leg of the access road; and Christopher and Matthew Loftus, 482 Shewville Road, who owns the adjacent property on the east side of the second leg of the access road, the northeast side of the third leg, and the southwest side of the third leg of the access road.

Regarding the well field, a willingness to release the deed restrictions to allow the proposed use will likely be necessary from Lester T. Freye, 458R Shewville Road, who owns the property south of Loftus Field; Christopher and Matthew Loftus, who owns the 482 Shewville Road property that is on the west and north of the 480-R well field property; and from Richard H. Morgan, 512 Shewville Road, who owns the land that is on the northeast and east boundaries of the property.

I was unable to determine who owns the landlocked parcel that is on the southeast side of the well field.

Step 5. Determine if the parties with standing will be agreeable to paving the access road.

Paving of the full 20’ width of the access road will be necessary for it to support heavy commercial bottled water trucks and/or 18-wheel tanker trucks. Consideration may be required to entice the parties to grant permission to pave the access road.

Step 6. Determine if adjacent property owners will allow for the widening and “rounding” of the corners in the access road.

Adjacent property owners will have to agree to allow the long-term assignable use of a few feet of additional land for widening and rounding the corners in the access road. Consideration may be required to reach such an agreement.

Contractual resolution is not required at this time for Steps 5 and 6, but it is important that there is a written commitment from the parties that they will, upon request, execute the agreements that will be necessary to allow the access road to be used.

Step 7. Change the zoning district from Residential to Industrial. Execute release of deed restrictions.

The Planning and Zoning Commission will then submit an application to itself for the required zone change from R-60 to I (Residential to Industrial). In parallel, the Town will execute a “release” of the deed restrictions from the parties with standing to enforce the restrictions. The Town will also enter into an agreement (lease or purchase) for a few feet of additional land that is necessary to widen and round the corners in the access road.

Step 8. Market the property and execute a “Letter of Intent” with a prospective user.

The Town representative will next contact the water companies who responded to the requests for “Letters of Interest” – with the goal of entering into a “Letter of Intent” that is subject to a list of conditions to be resolved.

The representative may be the Mayor, a member of the EDC, or perhaps a member of the Land Use/Planning/Public Works Committee. It may also be by a licensed real estate agent, representing the Town, who has expertise in the marketing and leasing of commercial real estate.

The Town Representative should invite representatives of the interested water companies to another field walk of the Loftus Field and its access road.²² A member or agent of the W.P.C.A should also attend the field walks.

The “Letter of Intent” will constitute a firm “pre-contract” proposal that includes proposed payments to the Town. Revenue could be structured as fixed lease payments for use of the property, lease payments plus payments based on the amount of water removed from the site, or simply payments for water that is removed from the site. I recommend the property not be sold.

The Letter of Intent should provide that the equipment ownership, facility maintenance, upgrades, repairs, replacements, security, insurance, taxes, electricity, liability, and responsibility for the equipment, building, fencing, and snow plowing of the access road – will reside with the Lessee.

The Council should approve the best “Letter of Intent” prior to Step 9.

Step 9. (Final) – The water company applies for a special permit to use 480-R Shewville Road (the Loftus Field) for the collection, treatment, testing, bottling, and transporting of water.

The proposed use is allowed in Industrial districts under the “Specialized Commercial Uses, Other” entry in Attachment A – “Schedule of Permitted Uses” to the Zoning Regulations.

The applicant water company will submit an application to the Planning and Zoning Commission for a special permit. The application will require a public hearing, and it is likely the public will strenuously object. However, if the use is allowed, if the regulations are satisfied, and if reasonable conditions are imposed to protect public health, safety, convenience, and property values, then the Commission is obligated to approve the application.

²² I recommend Ray Valentino (from Groton Utilities).

Alternative Approach

I did not investigate the alternative of off-site delivery of the Loftus Field water via its existing 20" pipeline to a "to-be-acquired" nearby staging property where it would be stored, treated, bottled, and shipped. This approach would have the benefit of removing the need to improve the dirt access road, and may mitigate the deed restriction issues associated with the access road.

However, the alternative would:

- a. Not make a difference regarding the environmental issues associated with heavy truck traffic on Shewville Road.
- b. Not mitigate the deed restriction issues associated with the non-municipal use of the Loftus Field.
- c. Require both the Loftus Field and the "to-be-acquired" staging property to be rezoned to allow industrial uses.
- d. Likely result in a large unattractive storage tank being installed on the staging property that can be viewed from Shewville Road.
- e. Require a costly extension of the pipeline south along Shewville Road.

Please do not hesitate to contact me if you wish to view my notes, if you have information that would be helpful in this matter, or how I can be of assistance.

Respectfully,

Eric Treaster