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January 21, 2011

Sandra Holt, Court Operations Manager  
Washington Superior Court  
65 State Street  
Montpelier, VT 05602

Re: City of Montpelier v. Barnett, et al.  
Docket No. 145-3-10 Wncv

Dear Ms. Holt:

I enclose herewith the City of Montpelier's Post Trial Memorandum, together with its Exhibit A and a courtesy copy of the City's Supplemental Memorandum of Authorities dated as of March 25, 2010. Kindly let me know if anything further is needed. Thank you for your assistance.

Very truly yours,

MCKEE, GIULIANI & CLEVELAND, P.C.

By:   
Glenn C. Howland

GCH:sg  
[8881-1967]  
Enclosure

cc: City of Montpelier  
Richard Barnett  
Oreste Valsangiacomo, Jr., Esq.  
Keith Aten, Esq.

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 145-3-10 Wncv

CITY OF MONTPELIER

v.

RICHARD BARNETT,  
CEDRIC SANBORN and  
LESLIE SANBORN

THE CITY OF MONTPELIER'S  
POST TRIAL MEMORANDUM

This action was initiated by the City of Montpelier to protect its public water supply. The City seeks a permanent injunction to prevent further trespass at or interference with the waters of Berlin Pond. Defendants challenge the City's right to prohibit recreational activities on Berlin Pond, (Richard Barnett, testimony, hearing transcript [TR] p. 79; Cedric Sanborn, p. 241), asserting a public right to access and recreational use, and claim that the City may not prohibit such use. (RB, Tr. ppg. 60-61; CS Tr. 238, 241).

Defendants disagree with the City's prohibition of public access to Berlin Pond. They observed, understood and then ignored the numerous "No Trespassing" signs placed by the City in and around the waters of Berlin Pond, and

accessed the waters in furtherance of their own private interests. (RB, Tr. 63).

Defendants claimed that they were given permission to access the pond by Vermont Fish and Game Wardens. (D. LeCours, pps. 89, 90; S. Fowler, p. 111). However, both Wardens conceded under cross examination that their authority to police the waters of Berlin Pond did not extend to health or trespass issues. (D. LeCours, p. 93, 94-5; S. Fowler, p. 111). One testified that he was aware the Department of Fish & Wildlife had once inadvertently published a listing of Berlin Pond as a fishing site, but subsequently withdrew it from the published list, noting the Department had no intention to list a site where fishing was "traditionally prohibited." (D. LaCours, pps. 100-101; Plaintiff's Exhibit 4).

Pursuant to 10 V.S.A. §1424 the Agency of Natural Resources ("ANR") is granted authority to regulate use of public waters. In its promulgated rules, the Agency acknowledges the application of "Restrictions adopted by authorities other than the Natural Resources Board...", page A-84 and n.1, which may affect public access to State waters. The Agency also asserted its position before this

Court that concurrent jurisdiction may exist between the City and the Agency over the waters of Berlin Pond, (KA, pps. 43-45), and that it did not take issue with the actions of the City in asserting authority to prohibit access. The Fish and Wildlife Department, through which the wardens who testified are employed, is a subordinate unit of ANR and is bound by its policies. (KA, p. 46.)

**I. PERMANENT INJUNCTION: *SHERBURNE v. CARPENTER STANDARD*.**

The City seeks a permanent injunction pursuant to V.R.C.P 65(b) against Defendants and nonparties who have acted, or who may in the future act in concert with Defendants or in any manner following Defendants' example. V.R.C.P 65(d); Vermont Women's Health Center v. Operation Rescue, 159 Vt. 141, 617 A.2s 411 (1992) (order applies with equal force to nonparties who may be used to evade intent of order against parties).

Plaintiff requests that trespass on, over or in the lands and waters owned or controlled by the City which constitute Berlin Pond or its tributaries for a distance of one-half mile from their mouths, of the outlet of Berlin Pond to the Montpelier Reservoir, be specifically prohibited consistent with the letter and the intent of the

applicable 1926 State Board of Health Order (*infra*), pursuant to 18 V.S.A. §130(b)(1), 24 V.S.A. § 2121, Montpelier City Charter, Chapter 5, § 5-706, and Montpelier City Ordinance Sections 3-332 and 13-1.

The standard for an injunction when requested by a municipality is set forth in Town of Sherburne v. Carpenter, 155 Vt. 126, 582 A.2d 145 (1990). The Supreme Court held in Carpenter that "[i]f the zoning violation is substantial and involves conscious wrongdoing, the [municipality] is entitled to an injunction, including a mandatory injunction to remove an offending structure, as a matter of course." Id., 155 Vt. at 131-32, Fenwick v. City of Burlington, 167 Vt. 425, 435, 708 A.2d 561, 566-67 (1997) (stressing that *balancing of equities* is unnecessary); see In re Appeals of Phillip Letourneau, 168 Vt. 539, 726 A.2d 31 (affirming Carpenter standard for injunctive relief). The municipality need not demonstrate the risk of imminent harm to earn injunctive relief, and a defendant's showing of an absence of imminent harm is no defense.

A showing of "conscious wrongdoing" requires only evidence that a defendant made a conscious decision to go

forward in the face of a direction not to do so from the regulatory body. Carpenter, 155 Vt. at 132.

Defendants both testified that they were clearly aware that their presence on or over the waters of Berlin Pond was prohibited by the City of Montpelier. Mr. Barnett testified that, mindful of that specific prohibition, he elected to go forward with the intent to test the City's exercise of authority - a total of 18 times.

17 Q. Did you go on Berlin Pond in any other way, 68  
18 either on the ice --  
19 A. Uh-huh.  
20 Q. -- or in the water or using some other device  
21 other than a kayak?  
22 A. Uh-huh.  
23 Q. And can you tell us how many times.  
24 A. Once in a kayak; approximately 17 times ice  
25 fishing.

1 Q. Seventeen times ice fishing. 69

(Trial testimony, Mr. Barnett, Tr. Pg. 68 - 69).

Mr. Sanborn's trial testimony referred to a single episode:

241  
6 Q. That's the sign that was there when you were on  
7 the pond, sir, correct?  
8 A. Yes, sir.  
9 Q. And there were multiple signs?  
10 A. I saw that once in the water 20 feet out from  
11 the culvert.  
12 Q. Did you see that sign before you got in the  
13 water?  
14 A. Yes.  
15 Q. Okay. So you were aware that the City of  
16 Montpelier was -- was warning people and indicating  
17 that -- that they were prohibiting trespassing in that  
18 area?  
19 A. That's clearly what the sign says, but what was  
20 I trespassing on?

21 Q. So you were aware that the city had taken the  
22 position that you shouldn't be there, regardless of  
23 whether you agreed with it or not?

24 A. Yes.

25 Q. Yes. Okay.

1 A. Absolutely.

242

2 Q. And in plain language they told you no, and you  
3 went -- you went in and got on the pond anyway; is that  
4 correct?

5 A. I guess I'm not adept when I'm not recognizing  
6 the authority of Montpelier to tell me I can't use a  
7 public body of water.

8 Q. Okay. So you're aware that they said no, but  
9 you disagreed with their perspective --

10 A. Yes.

11 Q. -- and didn't think that they had the right to  
12 say no.

13 A. Correct.

(Trial Testimony, Mr. Sanborn, Tr. 241 - 242). The City's  
proof meets the Carpenter standard.

## II THE PUBLIC INTEREST IS PARAMOUNT.

Berlin Pond is the sole drinking water supply for the  
City of Montpelier, (Todd Law, Tr. pps. 115, 116) and has  
served in that capacity for well over a hundred years.  
Pursuant to the federal Clean Water Act and its  
regulations, 40 C.F.R. § 131.10(g), Berlin Pond has been  
established as Class A-2 waters (suitable for drinking  
water with filtration) in their untreated state. *Vermont  
Water Quality Standards, Section 4-08, Classification of  
the Winooski Basin; Berlin Pond*, Vt. Code R. 12 004 052  
(2008) p. 45.

The reservoir is the central component of Montpelier's water system infrastructure and its protection is the object of the City's *Drinking Water Source Protection Plan* (WSID 5272) (Plaintiff Exhibit 10). These waters have long enjoyed State and municipal protections from public recreational access. As early as 1903, the State Board of Health issued Health Orders protecting Berlin Pond from sewage contamination. In 1926, the Orders were reaffirmed, providing as follows:

**Boating, fishing and bathing in the waters of Berlin Pond, of its tributaries for a distance of one-half mile from their mouths, of the outlet of Berlin Pond to the Montpelier Reservoir, and of the Montpelier Reservoir are hereby prohibited.**

(Order, June 8<sup>th</sup>, 1926) (Plaintiff Exhibit 9).

The Berlin Pond Health Orders were twice challenged without success. State v. Morse, 84 Vt. 37 (1911) (affirming criminal conviction, violation of 1903 Health Order); State v. Quattropani, 99 Vt. 360 (1926) (affirming criminal conviction for violation of 1925 Health Order: applying public trust doctrine as inuring to benefit of City and not to competing private interests).

In 1991, the State's administrative regulation of water supplies was moved from the Department of Health to



the Agency of Natural Resources by the operation of Sec. 9(a) of No. 71 of the Acts of 1991. Under the non-repealer provisions of this Act, existing rules and actions adopted by the Department of Health and State Board of Health under Title 18 (and prior law) remain in effect unless superseded by rules adopted by the Agency. The 1926 Health Board Order has never been superseded and remains in effect<sup>1</sup>.

The City's statutory remedies set forth under 10 V.S.A. §1682 include those appearing under 18 V.S.A. § 122. Accordingly, the remedies under sections 122<sup>2</sup> and 130<sup>3</sup> are

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1

Defendants Sanborn assert that a December 2010 amendment to Rule 16.2.2 vitiates the Health Order and contradicts the Court's earlier findings with respect to the 1926 Health Order. Summary of Arguments, January 12, 2011, p.4. Whether the amendment was intended to address the 1926 Health Order cannot change that the Order itself is incorporated with specificity into the City's Source Protection Plan and, as the Court observed, "lives on" as part of the Source Protection Plan approved by the Secretary of ANR. Plaintiff Exhibit 10. Even if the amendment affected future Source Protection Plans, it does not impair the City's Plan; nor is it relevant to the court's decision that at the time of the offenses, the Order was included within the applicable regulations.

2

**18 V.S.A. § 122. Private right of action**

(a) Any person injured or damaged by a violation of this title, of a rule adopted pursuant thereto, or of a permit or order issued thereunder, or by a public health hazard may bring an action for equitable relief or damages arising from such violation or public health hazard.

(b) A judicial determination of a violation of this title, of a rule adopted pursuant thereto, or of a permit or order issued thereunder, or of a public health hazard shall be prima facie evidence of the existence of the violation or the hazard, which evidence may be rebutted by the defendant.

3

**18 V.S.A. § 130 Civil enforcement**

(a) The commissioner, or a local board of health, may bring an action in the superior court of the county in which a violation or a public health hazard or public health risk has occurred or is occurring, to enforce the provisions of this title, or the rules, permits or orders issued pursuant thereto including

applicable and the City has standing to demand them.

Finally, the City is possessed of independent, specific legislative Charter authority to regulate and protect its water supply without reference to its location. This independent authority has been extensively briefed in the City's *Supplemental Memorandum* of March 25, 2010, a courtesy copy of which is appended hereto and is adopted by reference. City Charter provisions are freestanding statutes having all of the force of any statutory provision appearing in Titles 10, 18 or 24. The City's reliance on these Charter provisions creates no conflict with any law cited by Defendants, perhaps as most clearly exemplified by

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but not limited to the terms of an assurance of discontinuance entered into under section 125 of this title.

(b) The court may grant temporary and permanent injunctive relief and may exercise all the powers available to it, including but not limited to:

(1) enjoining future activities which may contribute to a public health hazard or a public health risk;

(2) ordering remedial actions to be taken to mitigate a public health risk or to remove or destroy a public health hazard;

(3) ordering the design, construction, installation, and operation of facilities designed to mitigate a public health risk or to assure compliance with any permit issued under this chapter;

(4) fixing and ordering compensation for any public or private property destroyed or damaged;

(5) ordering reimbursement from any person who caused governmental expenditures for the investigation and mitigation of the public health risk or the investigation, abatement or removal of public health hazards;

(6) levying civil penalties not to exceed \$10,000.00 for each violation. In the case of a continuing violation, each day's continuance may be deemed a separate violation. (Added 1985, No. 267 (Adj. Sess.), § 14.)

ANR's assent to the City's proper exercise of authority in those narrow areas of its delegated primacy, as entirely consistent with the Water Resources Board rules. At hearing Mr Aten explained the position of ANR to the Court:.

6 MR. ATEN: So the state's position is these 45  
7 three limitations -- or four limitations, but also the  
8 Natural Resources Board rules provide for the possibility  
9 that other restrictions may apply. The state does not  
10 have a position on whether the City of Montpelier's  
11 restrictions are valid or not.  
12 If they are valid, that's consistent with  
13 the Natural Resources Board rules, but we have no position  
14 on whether or not they are valid.

The City Charter provisions include Act 212 of 1884, vesting in a Board of Water Commissioners (now the City Council) all administrative, managerial and regulatory authority over the water system and the waters of Berlin Pond, including the right to enter upon all adjoining property of the pond and its tributaries 'to abate unhealthful conditions' and to initiate legal proceedings and prevent persons from rendering the waters unfit for domestic use.

The provisions also include Act 329 of 1955, continuing prior authority and authorizing the power of eminent domain and regulatory police power applicable to lands *outside the City limits*, with respect to the public water supply.

The Charter provisions also include Act 126 of 1975, again continuing the previously granted authority and reaffirming that the City remains vested in all of the original authority granted to the Village and Town of Montpelier, without repeal or limitation. This is a modern reaffirmation of the City's authority to regulate in communities outside the City limits, including in the Town of Berlin, with respect to its water supply.

**III THE PUBLIC TRUST DOCTRINE FAVORS  
PERMANENT INJUNCTIVE RELIEF.**

Defendants have sought to invoke the public trust doctrine in their defense. The doctrine instead urges enforcement against them.

Vermont first recognized the public trust doctrine in 1918. Hazen v. Perkins, 92 Vt. 414 (1918). Under the doctrine, navigable rivers, lakes and ponds are held by the State in its sovereign capacity as trustee for the benefit of all the citizenry. Since that time, Vermont courts have repeatedly invoked the public trust in rejecting claims of private rights with respect to public waters. See, e.g., State v. Central Vermont Railway, Inc., 153 Vt. 337, 344 (1989). The public interest in preserving an uncontaminated

drinking water source has enjoyed legislative respect for over a century and remains protected under the doctrine.

The Supreme Court invoked the public trust doctrine to protect the Berlin Pond drinking water supply in State v. Quattropane, 99 Vt. 360 (1926). The court recognized that a showing of imminent *actual* harm is *not* a prerequisite to a prohibition on access:

As is shown by State v. Morse, *supra*, wherein we upheld an order prohibiting bathing in this same pond, it is not necessary to the validity of an order of this kind that the prohibited act must do actual harm. It is enough if, in the circumstances, it is reasonable to apprehend that the act may result, directly or indirectly, in the contamination of the water.

Id., 99 Vt. at 365. The Court's teaching is that an individual may not place his personal interests over the public interest in the protection of a community water supply. By Defendants own testimony, they did exactly that. They testified that each was fully aware that public access on the waters of Berlin Pond was prohibited by the City of Montpelier. They testified that being mindful of that prohibition, they each elected to ignore it in the service of their private interests. Brief, *supra* at p. 5.

The public trust doctrine demands an unambiguous judicial response, sufficiently vigorous to ensure that not only will Defendants be prohibited from access, but also to act as a deterrent to other persons who might otherwise be inclined to place their private interests above the public good.

**IV. THE CITY MAY AND MUST PROTECT  
THE DRINKING WATER SUPPLY.**

The City's authority and duty to protect its water supply arises under both federal and State law. The federal Environmental Protection Agency [EPA] implemented and delegated to the States, enforcement of certain water pollution control programs. 42 U.S.C. § 300g-2 (State is primary enforcer). Vermont in turn delegated this authority to its appropriate agencies, Chartered municipalities, and through the direct authority of Municipal Boards of Health. 18 V.S.A. § 126. A part of this statutory scheme involves public water systems such as Montpelier's.

In addition, the operator of a public water supply system bears the primary duty to protect the public water supply itself. 10 V.S.A. § 1675(d)(2) and *Water Supply Rule*, Ch. 21. In this instance, the City is the water

system operator and is obliged to exert control over the resource - which is Berlin Pond.

Therefore, the City acts under authority not only as the municipal legislative body in the enforcement of the 1926 Health Order, but also as the statutory Municipal Board of Health, in its enforcement of the 1926 Health Order. 18 V.S.A. § 109. It also has the authority and obligations of the water system operator under Title 10 Chapter 47, and carries independent authority pursuant to its Charter provisions, each having the full weight of statutory law. In so acting, it discharges an absolute and mandatory duty to protect the public drinking water supply from interference by Defendants.

Montpelier's Source Protection Plan protects Berlin Pond in a manner consistent with ANR's published policy. Elements of the Agency's policy<sup>4</sup> include the reasoning behind the protection itself:

Identifying Potential Sources of Contamination (PSOCs) within Public Water Source Protection Areas (SPA) is one of the more critical steps towards protecting water quality at the source. Many human activities and natural processes can contaminate

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*PROTECTING PUBLIC WATER SOURCES IN VERMONT; A Guidance Document In Reference to Section 1428 of the Federal Safe Drinking Water Act; 10 V.S.A. Chapter 56; and Vermont's Water Supply Rule, Agency of Natural Resources, Department of Environmental Conservation, Water Supply Division, February 24, 1997 ("Guidance Document"). See, Delineation of Source Protection Areas, Subsection 5: The Source Protection Plan; p.54 (emphasis added).*

water. However, not all potential sources are of equal concern in determining risk to human health.

Almost any substance can contaminate water. The primary concern for drinking water quality and the potential effects on public health, however, are those biological agents such as protozoa, bacteria, and viruses which can cause human diseases. Typically, such agents are transmitted to drinking water sources by human or animal waste. Fortunately, most of these biological agents cannot live for long periods of time without being able to reproduce inside a human or animal body. They tend to die off in the environment if they cannot reach a host. For this reason, isolation is a critical factor in protecting drinking water sources, and the reason that the Source Protection Area concept works so well.

The City's Drinking Water Source Protection plan and the Temporary Operating Permit No. WSID5272 require that the City continue its practice to prevent contamination of Berlin Pond by prohibiting recreational access. Section 3 of the Plan, *Berlin Pond Source Protection Area*, contains in its protected area description the following:

Boating, fishing and bathing in Berlin Pond and the tributaries within one-half mile of the tributary mouth is prohibited by a State Board of Health order dating back to 1926. Since recreational use is not currently allowed, it has not been defined as an existing POSC [point of source contamination]. However, it should be noted that if recreational use is permitted in the future, it will cause a significant risk to water quality.

Section 3-4, *Source Protection Plan, Berlin Pond, City of Montpelier, WSID # 5272, February 23, 2001*. (Emphasis added). Continued enforcement of the 1926 Health Order constitutes a basic premise upon which the Source Protection Plan was assembled. Erosion of a basic premise



of the plan diminishes the plan itself. By definition, an impairment of the Source Protection Plan sufficient to trigger a Title 10 violation constitutes a health hazard which independently triggers the civil enforcement provisions of 18 V.S.A. §130.

This concern was echoed by testimony on behalf of the City at hearing. (Todd Law, Tr. p. 116; LB p. 207, 208). The hazards identified include zebra mussels which can clog drains, general waste found near the water courses and the potential of terrorist contamination of the City's drinking water. (TL Tr. p. 32-35). There are also concerns that public access for recreational use would increase turbidity of the water, known to be associated with an increase in pathogens which would compromise the City's ability to maintain an uncontaminated water source. (TL, p. 117). Prohibiting public, recreational access to the Pond enhances the City's ability to control turbidity and contaminants in the waters. (TL, Tr. pps. 117 - 119). This concern is not academic, as two residences, one apartment house and the Berlin Fire Department presently access raw, or untreated pond water from the system before it reaches the treatment plant. This use is reflected in the City's

temporary operating permit and requires periodic boil water notices to be sent to the four raw water users. (TL, Tr. pps. 123, 124).

#### **V. DEFENDANTS' CITY ORDINANCE VIOLATIONS.**

The City of Montpelier promulgated ordinances applying to property owned or controlled by the City and pursuant to 24 V.S.A. § 2121, it seeks the abatement of a nuisance and an order against trespass. The City also moves pursuant to its independent Charter authority appearing in Chapter 5, § 5-706, which provides that:

In addition to the fine and other punishment above provided for any violation of a bylaw, regulation, or ordinance adopted under the authority of this subchapter, the City of Montpelier may have and maintain an action in tort founded on this statute against any person damaging or destroying any of the property of said city, or injuring or corrupting any of the water supply or water system of said city, and may recover treble damages against such person.

Two City ordinances are implicated.

#### **A. RESERVOIR PROTECTION.**

City Ordinances Chapter 3, Section 3-332

provide as follows:

No person shall throw, put or place, or cause to be thrown, put or placed, in any public reservoir, or stream connected therewith, or waters in the City, any stone, dirt, ashes, shavings, stocks, garbage, rubbish, or filth of any kind, nor shall wade or bathe or fish in, or cause or permit a dog or animal to go into or swim in the water, nor skate on the ice of a public reservoir (emphasis added).

Defendants' intentional actions were per se violations of City Ordinance Section 3-332.

**B. TRESPASSING ORDINANCE**

City of Montpelier Ordinances, Chapter 13, section 13-1 provide as follows:

It shall be unlawful for any person to trespass upon or injure public buildings, squares, commons, cemeteries, fountains, statues or any other public property or resources **owned by or under the control of** the City of Montpelier.

(emphasis added).

Defendants' intentional actions were per se violations of City Ordinance Section 13-1, in that trespass **either** on the shore lands owned by the City **or in the water** as a "resource ... under the control of" the City violated the ordinance.

**VI. INJUNCTIVE RELIEF IS CONSISTENT WITH THE CITY'S RECENT ORDINANCE ENHANCEMENT.**

The City recently promulgated and passed an enhanced ordinance to protect the waters of Berlin Pond. In passing the Ordinance, the City Council acted specifically in its legislative capacity *and* as its Municipal Board of Health. As a result this Ordinance is also a Municipal Health Order. (See Exhibit A). While the new Ordinance and Health

Order does not affect this Court's determination as to actions of Defendants having taken place prior to its enactment, The City draws it to the Court's attention as a matter of public policy. The remedy requested by the City of a permanent injunction is consistent with the terms of the newly promulgated Ordinance and Health Order.

#### **VII. CONCLUSION**

The City has elected not to pursue civil fines against Defendants in this case. Plaintiff also intends not to seek the award of attorneys' fees within its statutory entitlement to demand under 18 V.S.A. §130(5).

However, the City needs and demands the clear, unambiguous, complete and unwavering protection of this Court. An injunction must issue that no person may enter on the waters of Berlin Pond without written consent of the City of Montpelier.

Dated at the City of Montpelier Vermont this 20<sup>TH</sup> day of  
January, 2011.

For the CITY OF MONTPELIER  
McKEE GIULIANI & CLEVELAND P.C.



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GLENN C. HOWLAND

[8881-197]

cc: William B. Fraser  
Oreste Valsangiacomo Jr. Esq.  
Keith Aten, Esq.  
Richard Barnett

## ARTICLE VI. PROTECTION OF BERLIN POND

### Sec. 7-600.

Entry upon, or activity within, Zones 1 and 2 of the Berlin Pond Source Protection Area, as designated and delineated on the Source Plan, (WSID #5272) prepared by Dufresne & Associates, dated February 23, 2001, approved by the Vermont Department of Environmental Conservation, are prohibited unless directly related to, or required for, water supply testing, protection, enforcement or improvement purposes.

### Sec. 7-601.

Existing structures and improvements located within 200 feet of the shoreline of Berlin Pond or the margin of any of its tributaries may continue in their present form, use, location and condition; provided, however, that an existing structure, improvement or land condition shall be removed immediately if it's found likely to cause or contribute to any contamination or pollution of Berlin Pond or any of its tributaries.

### Sec. 7-602.

All activities, structures, improvements and land uses within Zone 3 of the Berlin Pond Source Protection Area, as designated and delineated on the above referenced Plan, involving the use, transportation, storage, generation, manufacture or disposal of hazardous materials, or any other substance, activity or product likely to affect water quality, human health or public drinking water treatment, are prohibited, except for the customary use, transportation and storage by a household. This section shall not proscribe or prevent the construction, installation and maintenance of improvements intended to abate, contain or mitigate the effects of hazardous materials, nor shall it be deemed to affect the transportation of any such substance or product in conformance with applicable state and federal standards.

### Sec. 7-603.

Existing structures and improvements and land uses within Zone 3 of the Berlin Pond Source Protection Area may continue in their present use, location and condition, and may be altered for the purpose of mitigating, correcting or removing potential sources of contamination or pollution. An existing structure or other improvement located within the Berlin Pond Source Protection Area shall be removed immediately if it is determined to be, or is likely to be, causing any condition adversely affecting water quality.

### Sec. 7-604.

The provisions of this Ordinance shall not be deemed to be a limitation of the City's jurisdiction and regulatory authority over Berlin Pond, its tributaries and the City's public water supply system, but shall serve to supplement all municipal, state and federal orders, rules, regulations and statutes presently in effect, or as may hereafter be enacted or adopted.

### Sec. 7-605.

By its adoption of this Ordinance, the City of Montpelier does not waive or relinquish any right, benefit, authority or prerogative it now possesses with respect to Berlin Pond and its tributaries.

Sec. 7-606.

This Ordinance is designated a civil ordinance under 24 V.S.A., §1971(b).

Sec. 7-607.

A true copy of this Ordinance shall be delivered to the Select Boards and the Planning Commissions of the Towns of Berlin, Williamstown and Northfield, and shall be engrossed as required by law.

Sec. 7-608.

Any person violating this Ordinance shall be subject to the monetary penalty established in Sec. 1-9 of this Code in addition to any other civil remedy available to the City to prevent, abate or enjoin such violation.

Sec. 7-609.

This Ordinance shall take effect six days from the date of publication.

A health order relating to the protection of Berlin Pond shall be made a part of the record.

Sec's. 7-610 to 7-699. Reserved.

Enacted July 28, 2010. [Entire new Article VI, Protection of Berlin Pond, added]. Date of Publication: 10/07/10. Effective Date: 10/13/10.





The general statute further authorizes the municipal corporation

to make, establish, alter, amend or repeal ordinances, regulations and bylaws relating to [public water works], and to impose penalties for the breach thereof, and enforce the same. 24 V.S.A. §3315.

Civil liability, the possibility of treble damages, and conviction of a crime await one who "shall corrupt" a public water supply or reservoir,

or make it impure, or commit any nuisance therein, or shall bathe therein, or within the limits (sic), that may be taken or prescribed by such municipal corporation. 24 V.S.A. §3307.

The Montpelier City Health Officer and the City Council constitute the City's local board of health. 18 V.S.A. §604. The board is given jurisdiction over sewage disposal, including

emergent conditions which create a risk to the public health as a result of sewage treatment and disposal, or its effect on water supply . . . . The board may act to abate nuisances affecting public health caused by the failure of a sewage disposal system to . . . prevent the pollution or contamination of drinking water supplies, groundwater and surface water. 18 V.S.A. §613.

In addition, the local health officer is required to notify the Department of Health upon discovery of "a public health risk that involves a public water system."

18 V.S.A. §602a(b). Health hazards and health risks are generally defined as

The potential harm to the public health by virtue of any condition or any biological, chemical or physical agent. 18 V.S.A. §2(8), (9).

The Legislature extended specific authority, and conferred a specific duty, upon the City to manage and control the waters of Berlin Pond through its enactment of the City's Charter as a special act. Its amendments over the years have added to and clarified the nature of this authority and duty.

#### Specific Chartered Authority

In 1870, Act No. 240 amended the original Charter of the Village of Montpelier and extended its powers. Section 1 of No. 240 of 1870 authorized the Village of Montpelier:

To purchase the right to take water from the outlet of Berlin Pond, or such other place as said corporation may desire, and convey said water in lead or iron pipes to said Village, and there distribute the same through said Village for the extinguishing of fires and sanitary purposes, and for the use and convenience of the inhabitants of said Village, and receive and collect such rents for the use of water as shall be agreed by the parties.

In 1872, the Legislature enacted Act No. 257 which generally reiterates the 1870 provisions of the Charter as they relate to waters of Berlin Pond. Section II No. 240

of the Acts of 1872. In 1884, Section 3 of Act No. 212 vests in a Board of Water Commissioners (now the City Council) virtually all of the administrative and managerial authority for the water system, including regulation of the waters of Berlin Pond. **Section 3 of the 1894 enactment gives City officials the right to enter upon all adjoining property of the pond, and its tributaries, to abate unhealthful conditions.** The Village Board of Water Commissioners was given the power

at any time [to] enter upon any land adjoining Berlin pond or adjoining the reservoir from which water is taken to the Village of Montpelier, or adjoining the stream connecting said reservoir with Berlin pond, for the purpose of ascertaining whether or not there is anything on said land, so near said reservoir, stream or pond as to render the water thereof impure or unfit for domestic use.

Sec. 3, No. 212 of the Acts of 1884. Furthermore, the Board of Water Commissioners was empowered

to commence such legal proceedings, either at law or in equity, in the name of and for the benefit of said village, or shall prevent any person or persons from adulterating the waters of said reservoir, stream or pond, or rendering the waters thereof unfit for domestic use.

Sec. 4, No. 212 of the Acts of 1884.

The Charter went through a number of revisions during the latter part of the nineteenth century and throughout the twentieth century. Each amendment to the Charter is characterized and enacted as a continuation of the

original grants of authority conferred upon the City (formerly the Village) of Montpelier.

In 1894, the Village and Town of Montpelier merged to become the City of Montpelier. No. 166 of the Acts of 1894. Among the municipal powers confirmed in the City as the successor to the Town and Village were the following:

To provide a supply of water for the protection of the City against fire and for other purposes, and to establish and maintain reservoirs, aqueducts, water pipes, hydrants or any other apparatus for such purposes.

Sec. 24, No. 166 of the Acts of 1894. The power to regulate was specifically included:

To make all regulations and ordinances for preventing the corruption and for the protection of the water supply of the said City and for the protection from injury of any dam, Reservoir, aqueduct, pipes, hydrant or source of supply of water plans now owned or hereafter acquired.

Sec. 25, No. 166 of the Acts of 1894.

The 1894 Charter is a continuation of previous Town and Village charters. That is, whatever rights, powers, prerogatives and authority previously possessed by the Town and Village devolved upon the new municipal corporation unless specifically repealed. Accordingly, between 1896 and 1912 a number of legislative enactments amended the Charter with respect to the City's waterworks and in each instance, the text of Sections 24 and 25 of the 1894 Charter referenced above was repeated verbatim. Section 24 and 25, No. 149 of the Acts of 1896; Section 36

Act No. 329 of the Acts of 1955. Among the specifically enumerated powers conferred upon the City by the 1955 Charter are the following, each of which substantially repeats the grants of authority contained in the 1929 Charter:

XXXVIII. To make and enforce all regulations and ordinances for preventing the corruption of and for the protection of the water supply of the City; and for the protection from injury of any dam, reservoir, aqueduct, pipe, hydrant or source of water supply connected with any water system now owned or hereafter acquired by the City.

XXXIX. To provide a supply of water for the protection of the City against fire and for other purposes, including the distribution and sale of water for public and private purposes to persons and corporations both within and without the City, and to regulate the use of the same; and to establish and maintain reservoirs, aqueducts, water pipes, hydrants, water purification facilities, water towers or any other apparatus and equipment necessary or useful for such purposes, upon, in, and through the lands of individuals and corporations, both within and without the City, on making compensation therefor; and to acquire such land and other property adjoining any source of supply, reservoir or other water system facility as may be necessary to control or to prevent contamination or injury to such water supply, on making compensation therefor.

XLI. In taking land or other property for any of the purposes authorized in (XXXIX), the City Council shall proceed in the same manner as Selectmen of Towns are authorized by law to proceed in taking land for highways, and the same right of appeal to County Court from the decision of the City Council in taking such land and other property and awarding damages shall be allowed. Such appeal should be taken in the manner as is provided by law for appeal from the decision of the Selectmen in such matters; provided, that such appeal, if taken from the appraisal of damages only, shall not prevent the City from

and 37, No. 134 of the Acts of 1900; Section 36 and 37, No. 293 of the Acts of 1912.

Once again, in 1900 the General Assembly confirmed that the City has the power to "construct and maintain such aqueducts and reservoirs as they (sic) may judge best. Sec. 2, No. 134 of the Acts of 1900. In the exercise of that power, the City Council

[m]ay make, alter, amend or repeal any resolutions, by-laws, regulations and ordinances which it may deem necessary and proper for carrying into execution the foregoing [enumerated powers] or for the well-being of the city.

Section 61, No. 134 of the Acts of 1900. This identical language appears in a subsequent charter amendment. Section 1, No. 201 of the Acts of 1923.

Among amendments to the City Charter in 1935, appears the authority that the City

shall have all the powers given to towns by general law...and may acquire, construct and maintain such dams, aqueducts and reservoirs as it may deem necessary for the benefit of the City.

Section 1, No. 13 of the Acts of 1935. Twenty years

later, a comprehensive revision of the City Charter gave the City the power

[t]o purchase, hold and convey any real estate and erect and keep in repair any buildings necessary or convenient for its purposes; and may acquire, construct and maintain such dams, aqueducts, reservoirs and sewage disposal facilities as it may deem necessary for the benefit of the City.

proceeding with its work as though no such appeal had been taken.

In the 1955 Charter, then, there is a legislative confirmation not only of the power of eminent domain with respect to land and property interest located outside of the City, but also of its regulatory police power as an agent of the State with respect to the public water supply.

A 1957 enactment expanded the legislative grant by authorizing the City to enter into contracts "for the purpose of obtaining a supply of water for the residents and property owners of" the Town of Berlin and its fire districts (Sec. 1, No. 317 of the Acts of 1957). This specific grant of authority presumably was made to obviate any ambiguity or inconsistency that might have existed as a result of the City's reliance on a statute that authorized municipalities in general terms to enter into water supply agreements. 24 V.S.A. §3305(a). The 1957 enactment is specific to the City of Montpelier and takes precedence over the general statute.

In a recent comprehensive revision (No. 126 of the Acts of 1975), after confirming the grant of general municipal powers, the Charter specifically authorizes the City to "acquire, construct, and maintain such dams, aqueducts, reservoirs . . ." as it may deem necessary for

the benefit of the city.

Title I, Section 2. The related grants of authority include the power

to make public improvements within said city, or upon property or rights of said city outside of its corporate limits . . . [and] make appropriation consistent with this act to accomplish such purposes.

Title I, Section 5. Again, the necessary authority to protect and maintain the water source appears as a power to

make, alter, amend, or repeal any resolution, by-law, regulation, or ordinance which it may deem necessary and proper for carrying into execution the powers granted by this act or for the well being of said city (emphasis added).

Title VII, Section 1. Finally, in the event any questions remained as to the nature of the legislative grant of exclusive authority to the City, the Charter contains the following:

[a]ll the property, rights, franchises . . . belonging or appertaining to the former town and village of Montpelier shall belong and appertain to the City of Montpelier. All rights, privileges, and franchises heretofore granted to the village of Montpelier, by any act of the legislature, or existing under any law, or by virtue of any contract relating to the water works formerly possessed by said village, are hereby confirmed under the City of Montpelier.

Title XIV, Section 6.

The City has ample authority, conferred by direct

legislative action, to own or control the waters of Berlin  
Pond in exactly the manner in which it has and will  
continue to act.

Dated at Montpelier, Vermont this 25<sup>th</sup> day of  
March, 2010.

**CITY OF MONTPELIER**  
MCKEE, GIULIANI & CLEVELAND, P.C.

BY: GLENN C. HOWLAND, ESQ. City Attorney

GCH:pw  
[8881-197]