

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION

Docket No. \_\_\_\_\_ Vtec

TOWN OF SHELBURNE )  
 Plaintiff, )  
 )  
 v. )  
 )  
 VERMONT RAILWAY, INC. )  
 Defendant. )

**MOTION FOR PRELIMINARY INJUNCTION**

NOW COMES Plaintiff, the Town of Shelburne (“the Town”), by and through its attorneys, Monaghan Safar Ducham PLLC, and moves this court for a preliminary injunction, pursuant to V.R.C.P. 65 and V.R.E.C.P. 4(a), ordering Defendant, Vermont Railway, Inc., to cease work on property located at 2087 Shelburne Road. In support thereof, the Town incorporates by reference its concurrently filed Complaint and the following memorandum of law.

**MEMORANDUM OF LAW**

The Environmental Court (“the Court”) has jurisdiction over this matter. *See* V.R.E.C.P. 3(6), 3(10). While Defendant may argue that federal law preempts state and local law, that argument should not prevent the Court from ruling on this motion. “[T]here is a presumption that ‘state and local regulation of health and safety matters can constitutionally coexist with federal regulation.’” *In re Vt. Ry.*, 171 Vt. 496, 499–500 (2000) (citing *Hillsborough County, Fla v. Automated Med. Labs., Inc.* 471 U.S. 707, 716 (1985)); *see also In re Appeal of Vt. Ry., Inc.*, Nos. 6-1-98 Vtec, 126-7-98 Vtec, 1999 WL 34792328 (Vt. Env’tl. Ct. May 26, 1999) (Wright, J.), *aff’d*, 171 Vt. 496 (“The



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mere ownership of a business enterprise by a railroad does not exempt that enterprise from all state or local regulation. The federal law preempts only state and local regulation related to the rail transportation aspects of the business . . .”). Further, the party seeking to overcome this presumption—here, Defendant—“bears a heavy burden.” In re Vt. Ry., 171 Vt. at 500 (citing De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997)). Even if the case is resolved on a preemption argument, the Court can make that ruling. *See, e.g., id.* at 497 (“The [environmental] court determined that the majority of the permitting conditions imposed on a facility . . . are not preempted by federal legislation. . . . We . . . affirm the decision of the environmental court.”).

In ruling on a motion for a preliminary injunction, a key concern is whether the movant will suffer irreparable harm. The Vermont Supreme Court has stated, in dicta, that courts must consider the following when ruling on a motion for preliminary injunction: “(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest.” In re J.G., 160 Vt. 250, 255 n.2 (1993). The Second Circuit has relied on a different framework, which involves a showing of “(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits make them fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief.” Cacchillo v. Insmed, Inc., 638 F.3d 401, 405–06 (2d Cir. 2011).

Defendant has not been completely forthcoming with its plans for the property in question, so the Town’s Complaint is based on what it has observed and been told in passing and at meetings. The Town has already observed several activities, such as tree-



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cutting and excavation, *see* Complaint ¶ 13, that are already changing the state of the property in a permanent and irreparable way such that there is a significant threat of irreparable harm to the Town and its residents if Defendant is allowed to continue with this unbridled construction. Some of the clearing and excavating is even suspected to be within an easement held by the Town. *See id.*, ¶ 39. Full-grown trees cannot be put back in the ground, and large-scale excavation of the kind currently in progress cannot be reversed.

The Town also has reason to believe that the completed project will alter the traffic patterns of the area and lead to a significant increase in peak trips per day. *See id.* ¶¶ 8–9. This raises concerns regarding the health and safety of residents of the Town and other individuals who travel through the Town and whether or not the project is a nuisance, both of which provide a basis for the Town exercising its municipal police powers. *See generally id.* ¶¶ 28–37. It is also reasonably likely—especially given the property’s location in close proximity to the LaPlatte River, and the presence of wetlands and historic artifacts—that there will be significant and irreparable impacts from construction without the proper review. *See id.* ¶¶ 4–6, 10–11.

Most importantly, Defendant is not amenable to temporarily delaying construction so as to give the Town and its residents the opportunity to engage in a dialogue as to the scope and impact of the project as envisioned by Defendant. *See id.* ¶¶ 14–15. There is a threat of irreparable harm that will forever change the municipal landscape of the Town and the public at large has an interest in the outcome of this litigation.

Further, it is likely that the Town will succeed on the merits and some level of review will be required. While the Interstate Commerce Commission Termination Act



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(ICCTA) or other federal railroad acts may preempt some state and local ordinances, there is a strong likelihood that the Town will be allowed, as a matter of law, review over the aspects of the project dealing with health/safety, and those portions of the project which are not related to “transportation by rail carriers.” See 49 U.S.C. § 10501. Any consideration of the preemption argument will require more facts than what is presently available to the Town. See Vill. of Ridgfield Park v. N.Y. Susquehanna & W. Ry. 750 A.2d 57, 63 (N.J. 2000).

WHEREFORE, the Town respectfully requests that the Court schedule a hearing on this motion at the earliest possible convenience.

Dated at Burlington, Vermont this 25th day of January, 2016.

TOWN OF SHELBURNE

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