

January 26, 2016

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United States District Court, District of Vermont  
Room 506  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Re: Vermont Railway, Inc. v. Town of Shelburne, et al.  
Civil Action No. \_\_\_\_\_

To Whom it May Concern:

Enclosed for filing in the above matter please find a Civil Cover Sheet, Complaint and a check in the amount of \$400.00 to cover the cost of filing. If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Eric Poehlmann

EAP/ibw  
Enclosures

16038139.1

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

### I. (a) PLAINTIFFS

Vermont Railway, Inc.

(b) County of Residence of First Listed Plaintiff Chittenden  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Downs Rachlin Martin PLLC, 199 Main Street, 6th Floor, Burlington, VT 05401, (802) 863-2375

### DEFENDANTS

Town of Shelburne  
Joe Colangelo, Town Manager/Zoning Enforcement Officer

County of Residence of First Listed Defendant Chittenden  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)  
Claudia C. Sarar, Esq., Monaghan Safar Ducharm PLLC, 156 Battery Street, Burlington, VT 05401, (802) 660-4735

### II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

### III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

### IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other  <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act  <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))  <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input checked="" type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

### V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

### VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. Section 2201

Brief description of cause:  
Declaratory judgment action relating to ICCTA preemption

### VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ N/A

CHECK YES only if demanded in complaint:  
JURY DEMAND:  Yes  No

### VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

DATE

1/26/16

SIGNATURE OF ATTORNEY OF RECORD

*Eric Sachs*

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

VERMONT RAILWAY, INC. )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action No. \_\_\_\_\_  
 )  
TOWN OF SHELBURNE and JOE )  
COLANGELO in his capacity as Town )  
Manager and Zoning Enforcement )  
Officer, )  
 )  
Defendants. )

**COMPLAINT FOR INJUNCTIVE AND  
DECLARATORY RELIEF**

Plaintiff Vermont Railway, Inc. (“Vermont Railway” or the “Railroad”), through its attorneys Downs Rachlin Martin PLLC, alleges as follows:

**NATURE OF ACTION**

This Complaint arises out of the Town of Shelburne’s attempt to require the Railroad to submit to a preclearance zoning regime in direct violation of the ICC Termination Act of 1995 (“ICCTA”), to which the Railroad is subject. In enacting the ICCTA, Congress expressly preempted state and local regulation that conflicts with the ICCTA, a comprehensive statute under which railroads are regulated by the federal Surface Transportation Board (“STB”). State and local regulations and ordinances, such as those that the Town of Shelburne (“Shelburne” or the “Town”) seeks to impose are “preempted for two reasons: (i) [they] unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely.” Green Mountain R.R. Corp. v. Vermont,

Downs  
Rachlin  
Martin PLLC

404 F.3d 638, 643 (2d Cir. 2005) (citations and quotation marks omitted). A copy of this decision is attached hereto as Exhibit A. The Railroad owns approximately 19 acres of industrial land in Shelburne upon which it plans to construct an intermodal rail facility, including a rail spur, two salt sheds, vehicle sheds, and attendant buildings, in order to serve its rail customers and improve the functioning of its interstate rail system. The Town of Shelburne is attempting to delay and/or prohibit the Railroad from constructing this intermodal facility by claiming that its local zoning regulations and ordinances prohibit the Railroad's construction of the facility. The Railroad is therefore compelled to ask this Court to enjoin the Town of Shelburne and its Town Manager/Zoning Enforcement Officer from seeking to apply or enforce its zoning regulations and to render a declaratory judgment affirming that the Railroad's planned construction of the intermodal rail facility is preempted by federal law and not subject to the Town's zoning regulations or ordinances.

#### PARTIES

1. Plaintiff Vermont Railway, Inc. is a Class III railroad incorporated in the State of Vermont with a principal place of business in Burlington, Vermont.
2. Defendant Town of Shelburne is a municipal corporation organized under the laws of the State of Vermont.
3. Defendant Joe Colangelo is the duly authorized Town Manager and Zoning Enforcement Officer for the Town of Shelburne and is responsible for the administration of town government and the application and enforcement of the Town's zoning regulations.

#### JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §1331, as this action involves questions arising under federal law. Because this action arises

under an Act of Congress regulating commerce (49 U.S.C. §10501 et seq.), subject matter jurisdiction also exists pursuant to 28 U.S.C. §1337.

5. Venue is proper in this District under 28 U.S.C. §1391(a)(1) and (2), as the Defendants are present in this District and because a substantial part of the events giving rise to Plaintiff's claims occurred in this District.

#### GENERAL ALLEGATIONS

6. Plaintiff Vermont Railway, Inc. is a Class III carrier operating 128 miles of rail line extending between Hoosick Falls, New York, on the south and Burlington, Vermont, on the north pursuant to authority granted by the Interstate Commerce Commission ("ICC") in Finance Docket No. 22830, State of VT and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 330 (1963), and various supplemental decisions therein.

7. Given Vermont's winter climate, one of the Railroad's primary sources of business involves transportation of bulk road salt to its rail facilities where the salt is then loaded onto trucks for further distribution and spreading onto roads and highways.

8. At present, the Railroad's principal salt shed/intermodal facility is located in Burlington, Vermont, is outdated, inefficient, and too small to accommodate the increased needs of the State of Vermont, one hundred and one (101) municipalities, hospitals and various localities for road salt.

9. Because of the inadequacy of the current Burlington salt shed/intermodal facility, it is necessary for the Railroad to begin construction of a new salt shed/intermodal facility in order to maintain its shipping business and perform its lawful rail operations as well as provide road salt for use by the State of Vermont and more than half of the State's municipalities on their roadways during winter storms.

10. The Railroad owns a parcel of land located in the Town of Shelburne, Vermont, along its main rail line, which runs through the Town. The Railroad has determined that approximately 19 acres of this parcel of land is the best location for a new salt shed/intermodal facility in Chittenden County.

11. It is anticipated that this new intermodal facility will require construction of an access road, a spur track, two salt storage sheds, a fleet fueling island, an office building and parking, and other attendant structures.

12. All of these facilities will be owned by Vermont Railway and are directly related to Vermont Railway's rail transportation business.

13. All of these planned facilities are thus squarely governed by, and subject to, the ICCTA and therefore exempt from State and local regulation.

14. Vermont Railway has long endeavored to work cooperatively with municipalities and related authorities in order to accommodate local concerns regarding community impacts of rail operations and development within the overarching framework of the ICCTA and federal preemption.

15. In the instant matter, on or about June 23, 2015, in a meeting with the Town of Shelburne's Town Manager and the Zoning Administrator, Vermont Railway proactively informed and advised the Town of Shelburne of the Railroad's development plans for the facility and sought to respond, within the confines of the ICCTA, to any questions or concerns that the Town expressed about the project.

16. For example, when the Town voiced concerns about the potential traffic and noise impacts that it believed might be a by-product of the project, Vermont Railway voluntarily

provided information to the Town evidencing the fact that the project would not negatively impact traffic or noise in the Town.

17. Despite the Railroad's attempts to cooperate and share information with the Town within the confines of the ICCTA, on January 20, 2016, the Town Manager/Zoning Enforcement Officer issued a Notice of Violation with respect to the Railroad's project. A copy of this Notice, received January 22, 2016, is attached hereto as Exhibit B.

18. The Notice, which was incorrectly issued to "Vermont Railways System," states that the Town's Zoning Bylaws "prohibit land development . . . without first obtaining a zoning permit" and claims that the site work at the Railroad's property conducted in preparation for construction of the intermodal facility constitutes a violation of the Town's zoning regulations.

19. The Notice demands that the Railroad cease all such work related to construction of its planned intermodal facility or face substantial financial penalties and further legal action.

20. On or about January 26, 2016, the Town posted a copy of a Complaint and Motion for Preliminary Injunction that the Town apparently filed on January 25, 2016, in the Vermont Superior Court, Environmental Division. A copy of these filings is attached hereto as Exhibit B. The Town has not served the Railroad with the Complaint.

21. The Complaint alleges that the Town's Manager/Zoning Enforcement Officer issued a revised Notice of Violation which correctly identified the Railroad as the owner and developer of the project in question on January 25, 2016. The Railroad has not received a revised Notice of Violation, nor is any such revised Notice available through the Town's website.

22. Based on public statements made by the Town's officials, and based on the language contained in the Town's Complaint and Motion for Preliminary Injunction, it is evident

that the Town's fundamental goal in issuing the Notice of Violation and in filing papers in State Superior Court is to delay the Railroad's construction of its planned intermodal facility.

23. This is precisely the sort of preclearance permitting scheme that is flatly prohibited by the ICCTA and which was absolutely rejected by the Second Circuit Court of Appeals in Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005).

24. Indeed, the Town of Shelburne's effort to subject the Railroad to the Town's own, particular form of preclearance regime – not so much for the sake of any particular health or safety concern but rather out of a desire to simply delay the Railroad's project and make its own decision about whether the railroad facility should be located in Shelburne – is the very type of obstruction that the Second Circuit's Green Mountain decision addresses, and prohibits.

COUNT I  
REQUEST FOR DECLARATORY JUDGMENT  
PURSUANT TO 28 U.S.C. §2201

25. Plaintiff hereby repeats and realleges Paragraphs 1-24, above, as if fully set forth herein.

26. In the present case, the Town of Shelburne, through its Town Manager/Zoning Enforcement Officer, has asserted that Vermont Railway is in violation of the Town's zoning regulations and has asserted that Vermont Railway must submit to prior permitting approval under the Town's zoning regulations for construction of the contemplated intermodal facility.

27. Vermont Railway is a "rail carrier" as defined by 49 U.S.C. §10102(5).

28. According to the ICCTA, 49 U.S.C. §10101 et seq., and 49 U.S.C. §10501(b) in particular, the STB has exclusive jurisdiction over: "(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction,

acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.”

29. The ICCTA defines “transportation” as including: “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. §10102(9)(A).

30. The ICCTA further provides that “the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. §10501(b).

31. The activities which Vermont Railway has undertaken and intends on undertaking in the Town, including the construction of a rail spur and intermodal facility, and the use of that rail spur and intermodal facility in connection with the shipment of commodities, all fall squarely within the scope of the ICCTA.

32. Further, the activities and facilities which Vermont Railway has undertaken or constructed, or intends to undertake or construct, in the Town, and which the Town asserts violate its zoning regulations, all bear directly on Vermont Railway’s railway operations.

33. Requiring the Railroad to submit to the Town of Shelburne’s zoning regulations in connection with its planned project would seriously impinge upon the Railroad’s lawful railway operations and would impair the goals of the ICCTA.

34. Accordingly, the Defendants’ attempt to enforce its allegedly applicable zoning regulations against the Railroad is preempted by the ICCTA.

35. Pursuant to 28 U.S.C. §2201, Plaintiff Vermont Railways hereby requests this Court to declare the rights and legal relations of Plaintiff Vermont Railways and the Defendants. In particular,

Vermont Railway seeks a declaration that: (1) the Town of Shelburne's attempt to require a zoning permit under its zoning regulations is preempted by the ICCTA, and therefore (2) neither the Town Manager/Zoning Enforcement Officer nor the Town has jurisdiction or the right to attempt to enforce the zoning regulations purportedly applicable to Vermont Railway, nor do they have jurisdiction or the right to attempt to require Vermont Railway to submit its planned construction to the Town of Shelburne's preclearance, zoning regulation review.

COUNT II  
REQUEST FOR INJUNCTIVE RELIEF

36. Plaintiff hereby repeats and realleges Paragraphs 1-35, above, as if fully set forth herein.

37. As stated above, the attempts by the Town of Shelburne and its Town Manager/Zoning Enforcement Officer to enforce the zoning regulations allegedly applicable to the Railroad, and any attempt by the Town of Shelburne and its Town Manager/Zoning Enforcement Officer to apply the zoning regulations to the Railroad's planned construction, is preempted by the ICCTA. Accordingly, neither the Town of Shelburne nor its Town Manager/Zoning Enforcement Officer has jurisdiction or the right to attempt to enforce the zoning regulations purportedly applicable to the Railroad, nor do they have jurisdiction or the right to attempt to impose zoning regulations and/or conditions on the Railroad's planned construction.

38. If the Town of Shelburne and its Town Manager/Zoning Enforcement Officer are not enjoined from the activities described above, the Railroad will suffer irreparable harm. Further, the activities of the Defendants threaten to usurp the statutory power and exclusive jurisdiction of the STB and seriously jeopardize the regulatory purposes of the ICCTA.

39. Vermont Railway is likely to succeed on the merits of this action.

40. Alternatively, and in addition to the above, Vermont Railway has demonstrated sufficiently serious questions going to the merits to make such questions a fair ground for litigation. Vermont Railway has further shown that a balance of hardships tips decidedly in its favor.

41. Pursuant to Fed. R. Civ. P. 65 and for the reasons stated above, Vermont Railway therefore requests this Court to enjoin the Town of Shelburne and its Town Manager/Zoning Enforcement Officer from pursuing their threatened enforcement of the zoning regulations allegedly applicable to Vermont Railway, and to enjoin any attempt by the Town of Shelburne and its Town Manager/Zoning Enforcement Officer to apply the zoning regulations to Vermont Railway's planned construction.

WHEREFORE, Plaintiff Vermont Railway, Inc. respectfully requests that this Court enter a Judgment and Decree:

- A. Declaring that: (1) any attempt by the Defendants to enforce the zoning regulations allegedly applicable to Vermont Railway, and any attempt by the Defendants to apply the zoning regulations to Vermont Railway's planned construction, is preempted by the ICCTA, and (2) the Defendants lack jurisdiction or the right to attempt to enforce the zoning regulations purportedly applicable to Vermont Railway, nor do they have jurisdiction or the right to attempt to impose the zoning regulations on Vermont Railway's planned construction, nor do they have jurisdiction or the right to require Vermont Railway to submit to the Town's preclearance zoning process.
- B. Enjoining the Defendants from pursuing enforcement of the zoning regulations allegedly applicable to Vermont Railways, and enjoining any attempt by the Defendants to apply the zoning regulations to Vermont Railway's planned construction.
- C. Granting such other relief as the Court deems just and equitable.

Dated at Burlington, Vermont this 26<sup>th</sup> day of January, 2016.

DOWNS RACHLIN MARTIN PLLC



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## Green Mt. R.R. Corp. v. Vermont

United States Court of Appeals for the Second Circuit

December 6, 2004, Argued ; April 14, 2005, Decided

Docket No. 04-0366-cv

### Reporter

404 F.3d 638; 2005 U.S. App. LEXIS 6164; 35 ELR 20081

GREEN MOUNTAIN RAILROAD CORPORATION, Plaintiff-Appellee, v. STATE OF VERMONT, VERMONT AGENCY OF NATURAL RESOURCES and WILLIAM H. SORRELL, as Attorney General of the State of Vermont, Defendants-Appellants.

**Subsequent History:** US Supreme Court certiorari denied by *Vt. v. Green Mt. R.R. Corp.*, 2005 U.S. LEXIS 7869 (U.S., Oct. 31, 2005)

**Prior History:** [\*\*1] The State of Vermont, its Agency of Natural Resources and the State Attorney General appeal from a judgment entered in the United States District Court for the District of Vermont (Murtha, J.), holding that Vermont's environmental land use statute cannot impose pre-construction permit requirements on proposed railroad transloading facilities, on the ground that the Vermont statute is preempted by the Interstate Commerce Commission Termination Act of 1995, *49 U.S.C. § 10101 et seq.* We affirm.

*Green Mt. R.R. Corp. v. Vermont*, 2003 U.S. Dist. LEXIS 23774 (D. Vt., Dec. 15, 2003)

### Core Terms

preempted, Transportation, regulation, preemption, railroad, environmental, facilities, district court, operations, carrier, storage, shed, permitting process, police power, state law, Commerce, facial, salt, permit application, permit requirement, state regulation, federal law, pre-construction, transloading, conditions, buffer, mining, tracks, trucks

### Case Summary

#### Procedural Posture

Defendants, the State of Vermont, its natural resources agency and its attorney general, sought review of a summary judgment from the United States District Court for the District of Vermont entered in favor of plaintiff rail carrier

in its action seeking a declaration that *Vt. Stat. Ann. tit. 10, § 6001 et seq.*, an environmental land use statute, was preempted by the Interstate Commerce Commission Termination Act, *49 U.S.C.S. § 10101 et seq.*

### Overview

The rail carrier sought to build transloading facilities on its property in Vermont. Defendants argued that construction of the facilities was subject to the environmental land use statute (Act 250), which mandated preconstruction permits for land development. The court agreed that the Termination Act preempted Act 250 with respect to the underlying permit controversy. The plain language of *49 U.S.C.S. § 10501(b)* granted the Surface Transportation Board wide authority over the transloading and storage facilities undertaken by the rail carrier. The court found that Act 250's pre-construction permit requirement was preempted for two reasons: (1) it unduly interfered with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operation; and (2) it could be time-consuming, allowing a local body to delay construction railroad facilities almost indefinitely. The court found defendants' facial/as-applied distinction irrelevant because Act 250's permitting process was in direct conflict with the Termination Act. The court also rejected defendants' claim that Act 250 was an environmental, rather than economic, regulation.

### Outcome

The court affirmed the judgment.

### LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

**HN1** The appellate court reviews a district court's grant of summary judgment de novo. In so doing, the appellate court construes the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in its favor.

Administrative Law > Judicial Review > Reviewability > Standing

Environmental Law > Air Quality > Preconstruction Permits

Business & Corporate Compliance > ... > Environmental Law > Land Use & Zoning > Comprehensive & General Plans

Environmental Law > Land Use & Zoning > Judicial Review

Real Property Law > Zoning > Historic Preservation

**HN2** Under Vermont's environmental land use statute, *Vt. Stat. Ann. tit. 10, § 6001 et seq.*, permit applications are filed with one of nine district commissions that evaluate environmental impact using 10 criteria, including undue water or air pollution, *Vt. Stat. Ann. tit. 10, § 6086(a)(1)*, and undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas, *Vt. Stat. Ann. tit. 10, § 6086(a)(8)*. The district commission's decisions are appealable to Vermont's Environmental Board; decisions of the Environmental Board are appealable directly to the Vermont Supreme Court. *Vt. Stat. Ann. tit. 10, § 6089(a), (b)*.

Constitutional Law > Supremacy Clause > General Overview

Governments > Legislation > Interpretation

**HN3** State law is preempted by federal law when: (1) the preemptive intent is explicitly stated in a federal statute's language or implicitly contained in its structure and purpose; (2) state law actually conflicts with federal law; or (3) federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it. The ultimate touch-stone of preemption analysis is congressional intent: Congress's intent primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it.

Transportation Law > Interstate Commerce > Federal Preemption

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation

**HN4** See *49 U.S.C.S. § 10501(b)*.

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Surface Transportation Board

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Abandonment of Lines

Transportation Law > Rail Transportation > Lands & Rights of Way

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Routes & Services

**HN5** The Interstate Commerce Commission Termination Act of 1995, *49 U.S.C.S. § 10501 et seq.*, vests the Surface Transportation Board with exclusive jurisdiction over transportation by rail carriers and the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state. *49 U.S.C.S. § 10501(b)*. "Transportation" is expansively defined to include a locomotive, car, vehicle, vessel, warehouse, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail. *49 U.S.C.S. § 10102(9)*.

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Utility Companies > General Overview

Environmental Law > Federal Versus State Law > Federal Preemption

Transportation Law > Interstate Commerce > Federal Preemption

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Surface Transportation Board

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation

**HN6** Federal courts recognize that the Interstate Commerce Commission Termination Act of 1995 (Termination Act), *49 U.S.C.S. § 10501 et seq.*, preempts most pre-construction permit requirements imposed by states and localities. For example, the United States Court of Appeals for the Ninth Circuit concluded, in affirming a Surface Transportation

Board decision, that the Termination Act preempted state and local environmental regulations requiring a railway to submit to a permitting process before making repairs and improvements on its track line. The Surface Transportation Board has likewise ruled that state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce.

Environmental Law > Federal Versus State Law > Federal Preemption

Environmental Law > Land Use & Zoning > Equitable & Statutory Limits

Transportation Law > Interstate Commerce > Federal Preemption

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation

**HN7** The pre-construction permit requirement of Vermont's environmental land use statute, *Vt. Stat. Ann. tit. 10, § 6001 et seq.*, is preempted by the Interstate Commerce Commission Termination Act of 1995, *49 U.S.C.S. § 10501 et seq.*, for two reasons: (i) it unduly interferes with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely.

Environmental Law > Federal Versus State Law > Federal Preemption

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

Governments > Police Powers

Transportation Law > Interstate Commerce > General Overview

Transportation Law > Interstate Commerce > Federal Preemption

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Surface Transportation Board

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > State & Local Regulation

**HN8** Not all state and local regulations are preempted the Interstate Commerce Commission Termination Act of 1995 (Termination Act), *49 U.S.C.S. § 10501 et seq.*; local bodies retain certain police powers which protect public health and safety. States and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. The Surface Transportation Board's position is that: (1) while state and local government entities retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce; and (2) railroads are exempt from the traditional permitting process but not from most other generally applicable laws. The legislative history of the Termination Act supports this approach.

Constitutional Law > Supremacy Clause > General Overview

**HN9** A facial/as-applied distinction is relevant only if the court might find some applications of a statute preempted and others not. Where a state statute is in direct conflict with a federal statute or one of its processes, the focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation.

**Counsel:** JEANNE ELIAS, Assistant Attorney General for the State of Vermont, (Rebecca M. Ellis, Bridget Asay, Assistant Attorneys General, on the brief) Montpelier, VT, for Defendants-Appellants.

ROBERT B. LUCE, (Eric A. Poehlmann, on the brief) Downs Rachlin Martin PLLC, Burlington, VT, for Plaintiff-Appellee.

EVELYN G. KITAY (Ellen D. Hanson, General Counsel, on the brief) Washington, D.C. for Amicus Curiae Surface Transportation Board.

Robert M. Jenkins III, David M. Gossett, Mayer Brown Rowe & Maw LLP, Washington D.C.; Louis P. Warchot, Dennis J. Starks, Association of American Railroads, Washington, D.C.; George A. Aspatore, Sarah J. Bailiff, Paul Guthrie, [\*\*2] Thomas J. Healey, Paul R. Hitchcock, Theodore K. Kalick, Robert T. Opal, Louise Anne Rinn, Peter J. Shudtz, Sidney L. Strickland, Jr., of Counsel, on submission, for Amicus Curiae Association of American Railroads.

**Judges:** Before: CARDAMONE, JACOBS, CABRANES, Circuit Judges.

**Opinion by:** Dennis G. Jacobs

## Opinion

[\*639] DENNIS JACOBS, *Circuit Judge*:

Green Mountain Railroad Corporation ("Green Mountain") proposed to build transloading facilities on its property in Vermont, and brings this action seeking a declaration that Vermont's environmental land use statute, Act 250, *Vt. Stat. Ann. Tit. 10, § 6001 et seq.*, is for that purpose preempted by the Interstate Commerce Commission Termination Act of 1995, *49 U.S.C. § 10101 et seq.* (the "Termination Act"). The State of Vermont, its Agency of Natural Resources and the State Attorney General appeal from a judgment entered in the United States District Court for the District of Vermont (Murtha, J.), granting Green Mountain's motion for summary judgment on the preemption ground. *Green Mountain R.R. Corp. v. Vermont*, No. 01-CV-181, 2003 U.S. Dist. LEXIS 23774, at \*2-3 (D. Vt. Dec. 15, 2003). [\*\*3]

The Termination Act expressly preempts "remedies provided under Federal or State law" and vests with the Surface Transportation Board (the "Transportation Board"), a federal agency, exclusive jurisdiction over "transportation by rail carriers" and "the construction . . . of . . . facilities . . ." *49 U.S.C. § 10501(b)*. The term "transportation" includes a "warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." *49 U.S.C. § 10102*.

*HNI* "We review a district court's grant of summary judgment *de novo*." See *Young v. County of Fulton*, 160 F.3d 899, 902 (2d Cir. 1998). In so doing, we construe the evidence in the light most favorable to the State as the non-moving party, and draw all reasonable inferences in its favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 [\*640] (1986). For the reasons that follow, we affirm.

### I

Green Mountain is a "rail carrier" as defined by the Termination Act, *49 U.S.C. § 10102(5)*, with 52 miles of

track between Rutland, [\*\*4] Vermont and Cold River, New Hampshire. The line serves transshipping industries, *i.e.*, industries that rely on trucks to transport goods from the rail site for processing elsewhere. Along its rail line in Rockingham, Vermont, Green Mountain owns a 66-acre tract known as "Riverside," bounded by the Connecticut River on the east. Portions of Riverside are wetlands unusable for development.

Green Mountain proposed to build facilities at Riverside to serve the following operations: (1) unloading bulk salt arriving by rail for local distribution by truck or for temporary storage in a shed pending distribution; (2) temporary storage and transport of "non-bulk goods, such as steel pipe[s]"; and (3) unloading bulk cement arriving by rail for storage in silos and eventual transport by truck. Some of these operations are conducted within a 100-foot strip alongside the Green Mountain tracks and the Connecticut River.

Vermont argues that construction of the transloading facilities is subject to Act 250, an environmental land use statute that mandates preconstruction permits for land development. *HN2* Permit applications are filed with one of nine District Commissions that evaluate environmental [\*\*5] impact using ten criteria, including: "undue water or air pollution," *Vt. Stat. Ann. Tit. 10, § 6086(a)(1)*, and "undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas," *Vt. Stat. Ann. Tit. 10, § 6086(a)(8)*. The District Commission's decisions are appealable to Vermont's Environmental Board; decisions of the Environmental Board are appealable directly to the Vermont Supreme Court. *Vt. Stat. Ann. Tit. 10, § 6089(a) & (b)*. Most permit decisions under Act 250 are issued within 60 days from the filing of an application.<sup>1</sup>

[\*\*6] In 1997, PMI Lumber leased part of Riverside and applied for an Act 250 construction permit. PMI Lumber proposed to satisfy environmental criteria by a 75-foot buffer zone along the river. The Vermont Agency of Natural Resources recommended that the buffer be increased to 100 feet.

A local permitting agency subsequently issued Land Use Permit # 2W0038-2 (the "dash-2 permit") in the names of PMI Lumber and Green Mountain. Condition 14 required maintenance of a 100-foot buffer zone. When PMI Lumber

<sup>1</sup> Green Mountain contends that this expedited schedule (as cited by the State) applies only to "minor" amendments to existing permits, whereas its proposal is likely to be treated as a "major" application. State statistics collected from January 1998 through December 2002 indicate that the average timetable for "major" permit applications was 303.39 days. More than half of landowner appeals of District Commission decisions to the Vermont Environmental board took more than nine months in 2001.

ceased operations at the site, Green Mountain used it for its transloading activities. Green Mountain encroached on the buffer zone with a settling pond, storage of materials, and vehicles.

In Spring 1998, Green Mountain sought to amend the dash-2 permit to allow construction of a 100-foot by 275-foot salt storage shed. In January 1999, the State granted Land Use Permit # 2W0038-3 (the "dash-3 permit"), which stipulated conditions, including that the shed be rectangular, and either brown or dark green. Several months later, in October 1999, Green Mountain applied for another permit [\*641] amendment (the "dash-3B permit" application) to modify the size, color and location of the salt shed. [\*\*7] Although no such permit issued, Green Mountain started construction of its modified salt shed in November 1999.

In January 2000, the State issued a notice of violation of the dash-2 permit, citing (among other things) storage of materials within the 100-foot buffer zone. The State issued a second notice of violation in February 2000, alleging construction of the salt shed without the dash-3B permit.

In Spring 2000, the State conducted hearings on Green Mountain's dash-3B salt shed permit application. Green Mountain objected orally and in writing that the State Environmental Commission lacked jurisdiction to adjudicate the pending permit application because the Termination Act, which expressly preempts "remedies provided under Federal or State law" and vests with the Transportation Board, a federal agency, exclusive jurisdiction over "transportation by rail carriers," 49 U.S.C. § 10501, preempts Act 250.

Faced with the threatened enforcement of Act 250, Green Mountain filed this suit in June 2001, seeking a declaration that the Termination Act preempts Act 250. Simultaneously, Green Mountain requested a declaratory order to the same effect from the Transportation [\*\*8] Board.

The Transportation Board denied the declaratory relief in May 2002, deferring to the district court. In the meantime, the State moved to dismiss the district court action. While that motion was pending, the State issued the dash-3B permit in August 2001. A month later, the district court granted the State's motion to dismiss Green Mountain's facial challenge to the applicability of Act 250, but ordered "further development of the record" to determine whether the State's "effort to enforce one or more conditions of the [dash-2] Permit violates the [Termination Act] in this particular case." Green Mountain R.R., No. 1: 01CV181, 2003 U.S. Dist. LEXIS 23774, at \*2 (quoting an earlier ruling) (internal quotation marks omitted).

Following discovery, the parties cross-moved for summary judgment. On December 15, 2003, the court granted Green Mountain's motion (and denied the State's motion) on the ground that "the state's efforts to enforce Act 250 in this case are preempted under the [Termination Act]." *Id.*

## II

The question presented is whether the Termination Act preempts Vermont's Act 250 with respect to the underlying permit controversy. *HN3* State [\*\*9] law is preempted by federal law when: (1) the preemptive intent is "explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose"; (2) state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977), and Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982)). The "ultimate touch-stone" of preemption analysis is congressional intent: "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (internal quotation marks omitted).

The Termination Act contains an express preemption clause:

*HN4* Except as otherwise provided in this part, the remedies provided under this [\*642] part with respect [\*\*10] to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). *HN5* The Termination Act Section 10501 vests the Transportation Board with exclusive jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). "Transportation" is expansively defined to include: "a locomotive, car, vehicle, vessel, warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9). Certainly, the plain language grants the Transportation Board wide authority over the transloading and storage facilities undertaken by Green

Mountain. See *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998); see also *R.R. Ventures, Inc. v. STB*, 299 F.3d 523, 530 (6th Cir. 2002) [\*\*11] ("If a railroad line falls within its jurisdiction, the [Transportation Board's] authority over abandonment is both exclusive and plenary.").

**HN6** Other federal courts recognize that the Termination Act preempts most pre-construction permit requirements imposed by states and localities. See, e.g., *City of Auburn*, 154 F.3d at 1030-31 (affirming the Transportation Board's finding that the Termination Act preempted a local environmental permitting requirement); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1101 (D. Minn. 1998) ("The Court concludes that the City's demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings . . . that are related to the movement of property by rail is expressly preempted by the [Termination Act]."); *CSX Transp., Inc. v. Georgia PSC*, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996) (finding state regulation of railroad agency closing preempted by the Termination Act).

For example, the Ninth Circuit concluded, in affirming a Transportation Board decision, that the Termination Act preempted state and local environmental regulations [\*\*12] requiring a railway to submit to a permitting process before making repairs and improvements on its track line. *City of Auburn*, 154 F.3d at 1027-28, 1030-31. "Congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the *Commerce Clause*." *Id.* at 1031; see also *CSX Transp. v. Georgia PSC*, 944 F. Supp. 1573 at 1580-82.

The Transportation Board has likewise ruled that "state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce." *Joint Petition for and Declaratory Order -- Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No. 33971, 2001 WL 458685, at \*5 (S.T.B. Apr. 30, 2001), *aff'd*, *Boston & Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257 (D. Mass. 2002) (affirming the Transportation Board's determination that town's pre-construction permit requirement was preempted by the Termination Act); see also *Green Mountain R.R. Corp.*, Petition for Declaratory Order, STB Finance Docket No. 34052, 2002 WL 1058001 [\*\*13] (S.T.B. May 24, 2002). As the agency authorized by Congress to administer the Termination Act, the

Transportation Board is "uniquely qualified to determine whether state law . . . should be preempted" by the Termination Act. <sup>2</sup> *Georgia PSC*, 944 F. Supp. at 1584 (quoting *Medtronic*, 518 U.S. at 496).

Like the regulations and ordinances consistently struck down by federal courts and by the Transportation Board, Act 250 mandates a pre-construction permit. **HN7** Act 250's pre-construction permit requirement is preempted for two reasons: (i) it "unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations," *Town of Ayer*, STB Finance Docket No. 33971, 2001 WL 458685, [\*\*14] at \*5; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely. *Green Mountain R.R. Corp.*, 2003 U.S. Dist. LEXIS 23774, at \*13.

Nevertheless, as the district court observed, **HN8** "not all state and local regulations are preempted [by the Termination Act]; local bodies retain certain police powers which protect public health and safety." *Id.* It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption. *Cf. Vill. of Ridgefield Park v. New York, Susquehanna & W. Ry. Corp.*, 163 N.J. 446, 750 A.2d 57, 64 (N.J. 2000) [\*\*15] (noting the Transportation Board's position that: (1) "while state and local government entities . . . retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce"; and (2) "railroads are exempt from the traditional permitting process but not . . . from most other generally applicable laws").

The legislative history of the Termination Act supports this approach: "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and

<sup>2</sup> Whether the Transportation Board is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) is not material to the Court's decision. We therefore decline to reach the issue.

encompass all such regulation and to be completely exclusive." See H.R. Rep. No. 104-311, at 96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808. We need not draw a line that divides local regulations between those that are preempted and those that are not, because in this case preemption is clear: the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation [\*\*16] that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency.

### III

The State's primary appellate argument is that Act 250 cannot be preempted on its face unless there is "no possible set of conditions that [the permitting authority] could place on its permit that would not conflict with federal law." See Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580, 94 L. Ed. 2d 577, 107 S. Ct. 1419 (1987) (applying facial challenge standard in a statutory preemption case). We disagree. [\*644] No doubt, there could be permit applications affecting railroad facilities that could be promptly approved without the slightest imposition on rail operations. However, what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases. Cf. Chamber of Commerce v. Lockyer, 364 F.3d 1154, 1169 (9th Cir. 2004) (noting that in certain situations federal law preempts "the act of regulation itself, not the effect of the state regulation in a specific factual situation"). California Coastal Commission is easily distinguished [\*\*17] on that basis, as well as on the absence of a preemption provision.<sup>3</sup>

<sup>3</sup> In California Coastal Commission, a mining company sought to enjoin a state agency from requiring the company to obtain a permit to mine on federal land. The Supreme Court ruled that in the federal mining statutes, "Congress specifically disclaimed any intention to pre-empt pre-existing state authority" and that the federal mining statute "does not automatically pre-empt all state regulation of activities on federal lands." 480 U.S. at 593. The federal mining statutes required that land-use plans of the federal agency charged with administering the federal mining statutes "provide for compliance with" existing state and federal environmental laws. Id. at 587 (internal quotation marks omitted). Because the mining company sought injunctive relief "before discovering what conditions the Coastal Commission would have placed on the permit," the Court concluded that the mining company's "case must stand or fall on the question whether any possible set of conditions attached to the Coastal Commission's permit requirement would be pre-empted." Id. at 588.

Vermont failed to raise explicitly this facial preemption argument with the district court. As a result, the district court's opinion does not discuss California Coastal Commission. Generally, we do not consider an issue raised for the first time on appeal. See Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 103 (2d Cir. 1998). However, Vermont points out that, although it never cited to California Coastal Commission in its submissions to the district court, it preserved this issue for appellate review by arguing, in its August 2001 reply to Green Mountain's opposition to its motion to dismiss, that to succeed on its facial preemption claim, Green Mountain was obligated to show "that there are no circumstances under which Act 250 could be found constitutional," and did not press the argument thereafter because it believed that the district court adopted the State's position on facial preemption when it stated, granting in part the State's motion to dismiss: "to the extent the [State] ask[s] the Court to dismiss Green Mountain's claim that the [Termination Act] preempts Act 250 under all circumstances, the motion is granted."

[\*\*18] *HN9* "The facial/as-applied distinction would be relevant only if we might find some applications of the statute preempted and others not. . . . Where a state statute is in direct conflict" with a federal statute "or one of its processes," the "focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation." Lockyer, 364 F.3d at 1169.

### IV

The State argues that Act 250 withstands preemption because it is an environmental, rather than economic, regulation. The distinction is not useful. "If local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." City of Auburn, 154 F.3d at 1031. Green Mountain serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction over "rail transportation." Notwithstanding [\*\*19] the environmental goals of the legislation, Act 250's permitting process "necessarily interfere[s]" with Green Mountain's "ability to construct facilities and conduct economic activities." Green Mountain R.R. Corp., 2003 U.S. Dist. LEXIS 23774, at \*13.

### V

The State argues that Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir. 1999), compels a different conclusion. In Ace Auto Body, this Court held that

the section of the Termination Act relating to motor carrier operations (*49 U.S.C. § 14501*) did not preempt New York's police power to suppress the practice of "chasing," whereby tow trucks compete for business by racing ("often recklessly") to accidents broadcast on police radio frequencies. *Ace Auto Body*, *171 F.3d at 769, 779*. The State's reliance on *Ace Auto Body* is misplaced. The federal preemption language at issue in that case provides that a state or municipality "may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Id. at 770* (quoting *49 U.S.C. § 14501* [\*\*20] (c)(1)). The Court held that the "related to" phrase focused the preemption on economic regulations and reflected congressional intent to leave the state's historic police powers undisturbed where "only incidental economic burdens can be discerned." *Id. at 774*. We concluded that the chasing regulations were "sufficiently safety-oriented" while having no more than an incidental economic effect on the industry. *Id.*

In contrast to the federal statute at issue in *Ace Auto Body*, the plain language of *Section 10501* reflects clear congressional intent to preempt state and local regulation of integral rail facilities. "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Georgia PSC*, *944 F. Supp. at 1581* (holding that the Termination Act preempted state regulation of railroad agency closing). We therefore need not conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain; based on the facts before the Court, the State's effort to regulate rail transportation through the Act 250 pre-permitting process is necessarily [\*\*21] preempted by the Termination Act.

#### CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.





# Town of Shelburne, Vermont

CHARTERED 1763

P.O. BOX 88 5420 SHELBURNE ROAD SHELBURNE, VT 05482

Clerk/Treasurer  
(802) 985-5116

Town Manager  
(802) 985-5110

Zoning & Planning  
(802) 985-5118

Assessor  
(802) 985-5115

Recreation  
(802) 985-9551

FAX Number  
(802) 985-9550

## NOTICE OF VIOLATION

Certified Mail # 7608 1830 0003 0190 1175  
Duplicate sent First Class

January 20, 2016

Vermont Railways System  
One Railway Lane  
Burlington, Vermont 05401

Re: Notice of Violation, 2087 Shelburne Road, Parcel Id #6-1-13

Dear Vermont Railways System:

The purpose of this letter is to provide you with official notice pursuant to 24 V.S.A. § 4451 that a violation of the Town of Shelburne Zoning Bylaws exists at your property located (according to pre-E911 addressing) at 2087 Shelburne Road. The property in question is also identified under the Town's map-block-and-lot numbering system as parcel 6-1-13. It has a Span number of 582-183-11857.

Shelburne's Zoning Bylaws (§ 2010.1) prohibit land development—including any change in the use of any building or structure, or land, or extension of use of land—without first obtaining a zoning permit. Shelburne's Zoning Bylaws (at §1160 and §1900) also require site plan approval for the change of use, or addition of a use, to the above-referenced property.

Please be advised that based on information available to the Town, you have commenced land development without a permit, in violation of §2010.1 of Shelburne's Zoning Bylaws. These violations are more specifically enumerated below:

- 1) Commenced a change of use (to forestry) without a permit.
- 2) Commenced a use (forestry) that is not an allowed use in the Commerce and Industry District.
- 3) Commenced a use (forestry) that is preempted from local regulation only when performed in accordance with accepted silvicultural practices, as those practices are defined by the Commissioner of Forests, Parks, and Recreation under Subsection 1021(f) and 1259(f) of Title 10 and Section 4810 of Title 6.
- 4) Commenced use of land in a manner violating zoning bylaw performance standards set forth in Section 1950 and as specifically governed by Section 1950.4.

You have seven (7) days from the date of this letter to discontinue this violation, take appropriate remedial action by either removing the illegal use from the above-referenced property or applying for a zoning permit for the use, and comply with the Zoning Bylaws.

If you do not submit documentation within seven (7) days of the date of this letter and demonstrate that the violation has been cured, the Town may pursue this matter in court. In such court proceeding, the Town will be entitled to seek appropriate injunctive relief and fines of up to \$200.00 per day for each day your violation continues beyond the seven (7) day period provided in this letter.

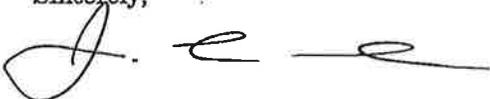
In accordance with 24 V.S.A. § 4451(a), if the violation described in this letter occurs again within twelve (12) months of the date of this letter, you will not be entitled to receive a further Notice of Violation from the Town before the Town pursues further enforcement proceedings.

You may appeal this Notice of Violation to the Development Review Board by filing a written notice of appeal and the appeal fee of \$200.00 plus a \$10.00 recording fee within fifteen (15) days of the date of this letter with the Clerk of the Development Review Board at the following address:

Clerk, Development Review Board  
c/o Dean Pierce, Director of Planning & Zoning  
P.O. Box 88  
Shelburne, VT 05482

Failure to file an appeal within the above period of time will render this Notice of Violation the final decision on the violation(s) addressed in the Notice. Also enclosed is information on the appeal process. I can be reached by phone at (802-985-5111) if you have any questions.

Sincerely,



Joe Colangelo  
Town Manager & Zoning Enforcement Officer

*Enclosure:* Appeal information as noted

cc: Monaghan, Safar, Ducham, Shelburne Town Attorney  
Shelburne Planning & Zoning  
File

## **Administrative Decision Appeal Summary\***

**\*NOTE:** The information below summarizes certain portions of Title 24, §4464 - §4468 and was developed for the convenience of the public. This summary omits portions of statute and is not intended for use without reading the statute and corresponding sections of the Town's Zoning bylaw.

*Appeals of decisions or actions of the Administrative Officer, including permits, are subject to the following:*

1. Compliance with Title 24, Section 4465(a), Appeals of decisions of the administrative officer, which requires that a notice of **appeal must be filed within 15 days of the date of administrative officer's decision or act, and a copy of the notice of appeal shall be filed with the administrative office.**
2. Compliance with Title 24, Section 4466, Notice of appeal, which requires that a notice of **appeal shall be writing and shall include:**
  - The name and address of the appellant;
  - Brief description of the property with respect to which the appeal is taken;
  - Reference to the regulatory provisions applicable to that appeal;
  - The relief requested by the appellant; and,
  - The alleged grounds why such requested relief is believed proper under the circumstances.
3. Compliance with Title 24, Section 4464(a)(1)(c), which requires that **written notification be provided to owners of all properties adjoining the property** subject to development or appeal, including the owners of properties which would be contiguous to the property subject to development or appeal "but for the interposition of a highway or other public right-of-way." This notice must be provided no fewer than 15 days prior the hearing on the appeal conducted by the Development Review Board. Furthermore, pursuant to the Shelburne Zoning bylaws (2080.1(C), which is adopted pursuant to Title 24, Section 4464(a)(3) ),
  - **Stamped and addressed envelopes for each owner of record shall be provided to the Town by the applicant/appellant.** The Town will mail notices using the envelopes provided. Appellants are encouraged to provide these envelopes at the time of filing an appeal.
4. Payment of \$200 appeal fee, plus a \$10.00 recording fee, payable to the Town of Shelburne.
5. Compliance with Title 24, Section 4468, Hearing on appeal. The Development Review Board will set a date and place for a public hearing of an appeal that shall be within 60 days of the filing of the notice of appeal. Any person or body empowered by statute to take an appeal with respect to that property at issue may appear and be heard in person or be represented by an agent or attorney at the hearing.



STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION

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

TOWN OF SHELBURNE )  
Plaintiff, )

v. )

VERMONT RAILWAY, INC. )  
Defendant. )

**COMPLAINT**

NOW COMES the TOWN OF SHELBURNE and complains against the Defendant, VERMONT RAILWAY, INC. as follows:

*The Parties*

1. Vermont Railway, Inc. (hereinafter also "Railway") is a Vermont Corporation registered with the Vermont Secretary of State, having a principal place of business at One Railway Land, Burlington, Vermont, 05401.
2. Railway is the owner of a parcel of land located at 2087 Shelburne Road, Shelburne, Vermont, (hereinafter also the "Property") acquired on December 28, 2015 from Northern Vermont Financial Corporation (NVFC).
3. The Town of Shelburne (hereinafter also the "Town") is a municipal corporation located in Shelburne, Vermont.

*Facts*

4. The Property is in close proximity to the LaPlatte River and contains wetlands.
5. The Property contains known Native American artifacts.
6. The Property is known to be both culturally and ecologically sensitive.



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7. Railway met with the Town of Shelburne Select Board on or about January 8, 2016 to present an informal description of the project, whereby they presented the Town with a preliminary plan set. These plans included the construction of a railroad spur, two 47,000 square foot salt sheds, landings for fuel tanks, a parking lot and accessory buildings.

8. Upon information and belief, bulk salt and fuel delivery and transportation will occur from this site and will be operated by Barrett Trucking Co., Inc., (hereinafter "Barrett") a Vermont corporation having a principal place of business located at 16 Austin Drive, Burlington, Vermont, 05401.

9. The number of truck and vehicle trip ends has not been definitively provided to the Town. The nature of the relationship between Barrett and the Defendant has also not been disclosed.

10. There could be significant impacts from construction related to stormwater, wildlife, ecology and the preservation of historic sites.

11. Without proper review, the impacts of development on the Property could be severe and irreparable.

12. Railway has never submitted any applications for permitting review to the Town, upon information and belief, on the grounds that they contend their development of the site is not subject to municipal permitting due to federal preemption by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 *et seq.*

13. On or about January 11, 2016, the Railway commenced tree clearing and site preparation for a project located on the Property.



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14. On or about January 20, 2016, the Town of Shelburne issued a Notice of Violation to Vermont Railways System for violation of the Town of Shelburne Zoning Bylaws, specifically Sections 2010.1, 1160 and 1900 for commencing land development without a permit and for failing to obtain site plan approval relative to the change of use of the Property.<sup>1</sup>

15. Upon information and belief, the Railway has not ceased land development.

16. On or about January 26, 1971, the Railway conveyed to the Town, by way of a Warranty Deed recorded at the Town of Shelburne Town Clerk's Office on February 11, 1971, at Volume 46 Page 32-33, a parcel of land of approximately 23 acres along the LaPlatte River for the purposes of a greenbelt.

17. This 1971 deed also contained a fifteen (15) foot right of way across contiguous land of the Railway to access the 23 acre parcel. The location of that right of way was to be decided upon by the Railway and the Town.

18. On or about February 9, 1995, the Northern Vermont Financial Corporation (successor in title to the Railway) conveyed to the Town an easement for the purposes of a recreation path (hereinafter "Rec Easement"). A corrective easement was issued on April 26, 1995, and recorded at the Shelburne Town Clerk's office at Volume 183, Pages 367-370 on May 2, 1995.

19. The Rec Easement contained language that the Grantor would not place any "structures, landscaping or other improvements within said easement and right-of-way which shall prevent or interfere with the within Grantee's ability to use said easement and right-of-way. . . . In the event Grantor's planned use would interfere or cause an unsafe

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<sup>1</sup> This NOV was sent to Vermont Railways System, upon information and belief, a former trade name of Vermont Railway, Inc. The NOV was reissued to Vermont Railway Inc. on January 25, 2016.



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condition with respect to Grantee's use, the Grantor and Grantee shall work together to move, adjust, and change the easement or construction to mitigate the problem to a mutually acceptable level. Expense of such mitigation shall be borne solely by the Grantor."

#### *Jurisdiction*

20. The Environmental Court has jurisdiction over this action pursuant V.R.E.C.P. 3(6), 3(10).

V.R.E.C.P. 3(6) grants jurisdiction for "[a]ctions by municipal administrative officers to prevent, restrain, correct, or abate violations of bylaws enacted under 24 V.S.A., Chapter 117, as provided in 24 V.S.A. §4452."

V.R.E.C.P. 3(10) grants jurisdiction for "[a]ny other original action concerning a subject matter within the jurisdiction of the Environment Court in which the relief sought is not available under other provisions of these rules or by action pursuant to paragraphs (1) to (9) of this rule."

21. This matter concerns an action by the Town and its Zoning Enforcement Officer to prevent and abate a violation of the Town's bylaws and to exercise its municipal police powers.

22. There is a presumption that state and local regulation of health and safety matters constitutionally coexist with federal regulation. See In re Vt. Ry., 171 Vt. 496, 499-500 (2000).

23. There is a strong likelihood that the project as planned will alter traffic patterns in the Town and create significant environmental and safety concerns (due to the nature of



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the items being stored on site and the proximity to the LaPlatte River) the regulation of which is integral to the health and safety of the Town's residents.

24. The Interstate Commerce Commission Termination Act (ICCTA) only governs "transportation by rail carriers," *see* 49 U.S.C. § 10501, and does not apply to the entire portion of the instant project.

*COUNT I. Declaratory Judgment re ICCTA Preemption*

25. Plaintiff repeats and realleges the allegations contained in paragraphs 1-24 above.

26. Plaintiffs are entitled to declaratory relief pursuant to 12 V.S.A. §4711 that the entirety of Defendant's project is not preempted by the ICCTA.

27. Defendant's land development on the Property is, in part, subject to permitting review and construction of the project without permitting review is in violation of the Town of Shelburne's regulations for which the Town is entitled to injunctive relief and damages as requested below.

*COUNT II. Declaratory Judgment re Exercise of Municipal Police Powers*

28. Plaintiff repeats and realleges the allegations contained in paragraphs 1-27 above.

29. Municipalities in Vermont are granted police powers pursuant to 24 V.S.A., Chapter 61.

30. Municipalities are tasked with certain of these police powers, in part, "[f]or the purposes of promoting the public health, safety, welfare, and convenience . . ." 24 V.S.A. § 2291.



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31. Specifically, 24 V.S.A § 2291(4), (5) allow the Town to regulate issues concerning traffic.

32. The Vermont Supreme Court has stated that issues concerning traffic routing, number of trucks entering and exiting a facility, the hours within which trucking can occur, parking and curbing designs are all within the “province of municipalities by virtue of the state’s delegation of its traditional police powers” as they “do not interfere with *railway* operations.” *In re Vt. Ry.*, 171 Vt. at 504 (emphasis in original).

33. Defendant has not disclosed full project details to Plaintiff but, due to the nature of the items being stored on site and the proximity to the LaPlatte River, there is the possibility that the health and safety of residents of the Town will be impacted in ways unrelated to traffic.

### *COUNT III. Nuisance*

34. Plaintiff repeats and realleges the allegations contained in paragraphs 1-33 above.

35. Within the grant of police powers, municipalities are specifically authorized to “prefer complaint for relief by injunction for the abatement of public nuisances.” 24 V.S.A. § 2121.

36. Municipalities are also authorized to “define what constitutes a public nuisance, and to provide procedures and take action for its abatement or removal as the public health, safety, or welfare may require.” 24 V.S.A. § 2291(14).

37. Defendant’s project, to the best of Plaintiff’s understanding based upon the plans that have been shared with the Town, constitutes a public nuisance and should be abated.



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*COUNT IV. Unlawful Interference With Easement Rights*

38. Plaintiff repeats and realleges the allegations contained in paragraphs 1-37 above.

39. Defendant's tree clearing, grading and planned land development project has and will continue to interfere with the Plaintiff's easement rights as conveyed in the 1971 and 1995 deeds described in paragraphs 16-19 above by locating certain portions of the project within the Plaintiff's easement area.

40. Plaintiff's use of the easement will be severely interfered with by Defendant's proposed truck traffic, noise and congestion of the area.

41. Defendant has not disclosed full project details to the Plaintiff nor tried to work with Plaintiff to remedy or resolve the interference with the Plaintiff's easement rights.

42. Accordingly, Defendants have unlawfully interfered with Plaintiff's easement rights as described in the 1971 and 1995 easement deeds to the Town.

43. Plaintiff is entitled to an order that Defendant ceases interfering with its easement rights contained in the 1971 and 1995 easement deeds.

WHEREFORE, the Town respectfully requests that the Court:

- A. Find for Plaintiff on the above Counts;
- B. Temporarily and permanently enjoin Defendant from engaging in construction activities on the property without submitting to municipal review without permit approval from Plaintiff;
- C. Permanently enjoin Defendant from engaging in tree clearing, grading and land development in such a way that interferes with Plaintiff's easement rights; and



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D. Grant any further and additional relief that the Court deems equitable and just.

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

TOWN OF SHELBURNE

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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. Envtl. 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. Insmid, 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 irremediable 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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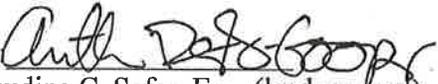
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(ICCTA) or other federal railroad acts may preempt some state and local ordinances, there is a strong likelihood that the Town will be allowed, as a matter of law, review over the aspects of the project dealing with health/safety, and those portions 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

By   
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