

Hearing on Preliminary Injunction and Lis Pendens scheduled on: 11/23/2020 10:00 AM

Initial Case Management Conference held via zoom.

Attorney Durning, Attorney Vetere, Attorney Keavany, Attorney DiCenzo, and Attorney Austin appeared. Before the court are Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction; Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction; Affidavit of David Sarkisian; Plaintiff's Motion for Endorsement of a Memorandum of Lis Pendens; Defendants' Opposition to Plaintiff's Motion for Temporary Restraining Order, Motion for Preliminary Injunction and Request for Issuance of Memorandum of Lis Pendens and Request that the Court take No Action Pending the Issuance of a Declaratory Order by the Surface Transportation Board; Affidavit of Michael R. Milanoski; and Reply Memorandum in Response to Defendants' Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction and Motion for Endorsement of a Memorandum of Lis Pendens. On the morning of the hearing, Defendants also filed for the court's information the Verified Petition for Declaratory Order of Grafton and Upton Railroad Company and Verified Statement of Michael R. Milanoski. At issue is a 155 acre parcel of land located at 634 West Street in Hopedale, which was valued, taxed and assessed as forest land under G.L. c. 61 (the "Forest Land"). The Town hopes to maintain the parcel as forest land, while the Defendants hope to use the parcel in connection with operation of the Grafton & Upton Railroad. The Town seeks a declaration that Defendants are prohibited from converting the Forest Land which is protected under G.L. c. 61 while the Town holds an option, an injunction to prevent the Defendants from converting the Forest Land to railroad use before expiration of a right of first refusal option period provided by Section 8 of Chapter 61 and ultimately specific performance of its right to purchase the Forest Land.

A preliminary injunction may issue only if the moving party demonstrates (a) a likelihood of success on the merits, (b) that it faces a substantial risk of irreparable harm if the injunction is not issued, and (c) that this risk of irreparable harm outweighs any risk of irreparable harm which granting the injunction would create for the defendant. *Garcia v. Dep't. of Housing and Comty. Dev.*, 480 Mass. 736, 747 (2018); *GTE Prods. Corp. v. Stewart*, 414 Mass. 721, 722-724 (1993); *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). In cases involving government action, the moving party must also demonstrate that the requested order promotes the public interest or will not adversely affect the public. *Garcia, supra*, 480 Mass. at 747; *Loyal Order of Moose, Inc., Yarmouth Lodge #2270 v. Brd. Of Health of Yarmouth*, 439 Mass. 597, 601 (2003); *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984). At this juncture, for the reasons set forth below and as articulated on the record, Plaintiff's motion for injunctive relief is DENIED. On the record before the court, I cannot conclude that the Town has met its burden to prove a likelihood of success on the merits. The Town contends that the Grafton & Upton Railroad Company (the "Railroad") did not control the trust (which held title to the Forest Land) when the Town's Chapter 61 option to purchase vested. Specifically, when the time the Town received a Notice of Intent dated July 9, 2020 ("NOI"). Defendants disagree and further contend that the Town's exercise of the Chapter 61 option is preempted by the Interstate Commerce Commission Termination Act. While the Town is entitled to a right of first refusal under Chapter

61, it is not clear whether an option period has been triggered and if so, when that occurred. The July 9, 2020 NOI appears to be defective because it encompassed both Chapter 61 forest land and another parcel of land without Chapter 61 protections, but did not include segregated valuations for each parcel. The NOI was defective because it did not provide adequate statutory notice to the Town of the cost to purchase the Chapter 61 land as required and therefore did not constitute a bona fide offer. *Town of Brimfield v. Caron*, 18 LCR 44, 50-51 (2010) (Long, J.). As such, it does not appear that the Town's right of first refusal ripened into an option on July 9, 2020. Strict compliance is required for options under Chapter 61. *Town of Sudbury v. Scott*, 439 Mass. 288, 297 (2003); *Town of Billerica v. Card*, 66 Mass. App. Ct. 664, 668 (2006); *Smyly v. Town of Royalston*, 15 LCR 502, 504-05 (2007) (Trombly, J.). What is less clear is whether the course of dealings by and between the parties after July 9, 2020, gave rise to a valid option right and when the right to exercise the option expires. That course of conduct included, for instance, the assignment of the Trust's beneficial interest to the Trust, designation of the Railroad's officers as successor trustees of the Trust, and the October 15, 2020 letter from the Railroad to the Town, as well as the Town's notice of a defective NOI and withdrawal of the NOI. Without a clear trigger date for the Town's exercise of its option, I cannot determine whether the Interstate Commerce Commission Termination Act preempts the Town's right to purchase land which the Defendants contend is land intended for use as transportation by rail. Defendants have requested an opportunity to refer the issue of preemption to the Surface Transportation Board ("STB"); as of the date of the hearing, Defendants had filed a petition with the STB.

As to irreparable harm, the parties have agreed to work cooperatively together to prepare a stipulation to maintain the status quo while the STB proceedings and this Land Court case are pending. That stipulation is to address Defendants' commitments to maintain the Forest Land consistent with the Forest Management Plan now in effect and not to alienate the Forest Land while this STB petition and this Land Court case are pending. That Stipulation to be filed with the court by December 1, 2020, for court endorsement. Also by December 1, 2020, the parties shall advise: (1) whether the Stipulation is sufficient to address the Town's request for endorsement of a memorandum of lis pendens or whether the Town renews its motion for lis pendens; and (2) whether the Land Court should stay these proceedings while mediation and the STB proceedings are underway. Court inquired into the possibility of Alternative Dispute Resolution ("ADR") and counsel agreed to participate in a mediation screening. Following colloquy, court to issue a Mediation Screening Order. By January 22, 2021 parties to complete mediation screening. By the January 25, 2021 parties to submit written joint report to the court as to outcome of the mediation screening, whether parties are willing to attend mediation, and if so, naming mediation provider, identity of neutral, and date of session.

Hon. Diane R Rubin, Presiding

Notice of docket entry sent to counsel via email.