UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT RAILWAY, INC., Plaintiff,	)	
v.	)	Civil Action No. 2:16-cv-16
TOWN OF SHELBURNE and JOE COLANGELO in his capacity as Town Manager and Zoning Enforcement Officer, Defendants.	)	

ANSWER

NOW COMES Town of Shelburne ("the Town"), by and through its attorneys, Monaghan Safar Ducham PLLC, and hereby answers Vermont Railway Inc.'s Complaint as follows:

PARTIES

1. Defendant lacks sufficient knowledge or information with regard to the allegations contained in Paragraph 1 of Plaintiff's Complaint and therefore denies the same.

2. Defendant admits the allegations contained in Paragraph 2 of the Plaintiff's Complaint.

3. Defendant admits that Joe Colangelo is the Town's Town Manager and is responsible for the day-to-day administration of town government and further is vested with the responsibility of enforcing the Town's zoning regulations.

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JURISDICTION AND VENUE

4. Paragraph 4 of the Plaintiff's Complaint states a legal conclusion to which no response is required.

5. Paragraph 5 of the Plaintiff's Complaint states a legal conclusion to which no response is required.

GENERAL ALLEGATIONS

6. Defendant lacks sufficient knowledge or information with regard to the allegations contained in Paragraph 6 of the Plaintiff's Complaint and therefore denies the same.

7. Defendant lacks sufficient knowledge or information with regard to the allegations contained in Paragraph 7 of Plaintiff's Complaint and therefore denies the same.

8. Defendant lacks sufficient knowledge or information with regard to the allegations contained in Paragraph 8 of Plaintiff's Complaint and therefore denies the same.

9. Defendant lacks sufficient knowledge or information with regard to the allegations contained in Paragraph 9 of Plaintiff's Complaint and therefore denies the same.

10. Defendant admits in part and denies in part certain allegations contained in Paragraph 10 of the Plaintiff's Complaint. Defendant admits that the Railroad owns a parcel of land located in the Town of Shelburne. Defendant lacks sufficient knowledge or information as to the Railroad's determinations of fitness of the site and therefore denies the same. The Defendant specifically denies that the

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parcel for the proposed project is the "best location for a new salt shed/intermodal facility in Chittenden County."

11. Defendant denies the allegations contained in Paragraph 11 in so far as what the facility will "require." Defendant lacks sufficient knowledge or information as to the remainder of the allegations contained in Paragraph 11 of the Plaintiff's Complaint and, therefore, denies the same. In further answer, the Defendant states that the Town has not had sufficient information regarding the plans for this site.

12. Defendant lacks sufficient knowledge or information with regard to the allegations contained in Paragraph 12 of Plaintiff's Complaint and therefore denies the same.

13. Paragraph 13 contains a legal conclusion and therefore no response is required. To the extent that a response is required, Defendant denies the same. In further answer, Defendant denies that "[a]ll of these planned facilities [are] exempt from State and local regulation." Furthermore, Defendant asserts that several various private contractual provisions with multiple parties also impact Plaintiff's ability to develop the current project.

14. Defendant denies in part the allegations contained in Paragraph 14 of the Plaintiff's Complaint. Specifically, Defendant denies that Vermont Railway has worked cooperatively with the Defendant, Town of Shelburne, in accommodating concerns of local impacts. With respect to the remainder of the allegations contained in Paragraph 14 of the Plaintiff's Complaint, Defendant lacks sufficient knowledge or information with regard to the allegations contained therein and, therefore, denies the same.

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15. Defendant denies the allegations contained in Paragraph 15 of the Plaintiff's Complaint.

16. Defendant denies the allegations contained in Paragraph 16 of the Plaintiff's Complaint.

17. Defendant admits that Mr. Colangelo issued a Notice of Violation (hereinafter NOV) with respect to Plaintiff's project on January 20, 2016. Defendant denies the remainder of the allegations contained in Paragraph 17 of the Plaintiff's Complaint.

18. Defendant admits that the NOV was issued to Vermont Railways System and the content of the NOV speaks for itself. Defendant denies any remaining allegations contained in Paragraph 18 of the Plaintiff's Complaint.

19. Defendant admits that the Notice of Violation demands that Railway "discontinue this violation, take appropriate remedial action by either removing the illegal use from the . . . property or applying for a zoning permit for the use, and comply with the Zoning Bylaw[,]" and informs Railway of the Town's entitlement to seek injunctive relief and fines in court proceedings. The Notice speaks for itself. The remainder of the allegations contained in Paragraph 19 of the Plaintiff's Complaint are denied.

20. Defendant admits that the Town posted copies of its Complaint and Motion for Preliminary Injunction, filed on January 25, 2016 in the Vermont Superior Court, Environmental Division, at Town Hall. In further answer, the Defendant states that the time of the filing of their Complaint, Plaintiffs had already been contacted regarding the filing with the Court and it had been requested that they accept service.

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21. The allegations in Paragraph 21 of Plaintiff's Complaint are admitted in part and denied in part. The Defendant was under the belief that a revised NOV had been mailed, but this belief may have been mistaken, as the Defendant is unable to locate a proof of certified mailing. Defendant sent a revised NOV on February 11, 2016.

22. Defendant denies the allegations contained in Paragraph 22 of the Plaintiff's Complaint.

23. The allegations contained in Paragraph 23 of Plaintiff's Complaint state a legal conclusion to which no response is required. To the extent a response is required, the allegations contained therein are denied.

24. The allegations contained in Paragraph 24 state a legal conclusion to which no response is required. To the extent a response is required, the allegations contained therein are denied.

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

25. The Town hereby incorporates by reference its answers to Paragraphs 1–24 above.

26. The allegations contained in Paragraph 26 of the Plaintiff's Complaint are admitted in part and denied in part. Defendant admits that the Town has asserted that Railway is in violation of the Town's zoning regulations. The remainder of the allegations contained in Paragraph 26 are denied.

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27. Defendant admits that Vermont Railway is a rail carrier. The remainder of the allegation in Paragraph 27 contains a legal conclusion to which no response is required.

28. The statutes speak for themselves. The allegations contained in Paragraph 28 states a legal conclusion to which no responsive pleading is required.

29. The statutes speak for themselves. The allegations contained in Paragraph 29 states a legal conclusion to which no responsive pleading is required.

30. The statutes speak for themselves. The allegations contained in Paragraph 30 states a legal conclusion to which no responsive pleading is required.

31. The Defendant denies the allegations contained in Paragraph 31 of the Plaintiff's Complaint.

32. The Defendant lacks sufficient information to form a belief as to the "[f]urther" activities of the Plaintiff and Defendants deny the remainder of the allegations contained in Paragraph 32 of the Plaintiff's Complaint.

33. Defendant denies the allegations contained in Paragraph 33 of the Plaintiff's Complaint.

34. Defendant denies the allegations contained in Paragraph 34 of the Plaintiff's Complaint.

35. Paragraph 35 contains a prayer for relief, to which no response is required. To the extent that a response is required, Defendant denies the allegations contained in Paragraph 35 of the Plaintiff's Complaint.

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COUNT II
REQUEST FOR INJUNCTIVE RELIEF

36. The Town hereby incorporates by reference its answers to Paragraphs 1–36 of the Plaintiff's Complaint above.

37. Paragraph 37 of the Plaintiff's Complaint states a legal conclusion to which no response is required; however, to the extent that a response is required, the Defendant denies the same.

38. Paragraph 38 of the Plaintiff's Complaint states a legal conclusion to which no response is required; however, to the extent that a response is required, the Defendant denies the same.

39. Paragraph 39 of the Plaintiff's Complaint states a legal conclusion to which no response is required; however, to the extent that a response is required, the Defendant denies the same.

40. Paragraph 40 of the Plaintiff's Complaint states a legal conclusion to which no response is required; however, to the extent that a response is required, the Defendant denies the same.

41. Paragraph 41 of the Plaintiff's Complaint contains a prayer for relief to which no response is required; however, to the extent that a response is required, the Defendant denies the same.

AFFIRMATIVE DEFENSES

1. Interstate Commerce Commission Termination Act 1995 (ICCTA) does not preempt all state/local law.
2. Failure to prove irreparable harm.
3. Failure to prove substantial likelihood of success on the merits.

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4. Unclean hands.

5. Lack of damages.

6. Municipal/Sovereign Immunity.

7. Qualified Immunity.

8. Waiver of preemption.

9. Failure to state a claim upon which relief can be granted.

10. Laches.

11. Estoppel.

JURY DEMAND

The Defendant hereby demands a trial by jury on all issues in the above captioned matter so triable.

COUNTERCLAIM

THE PARTIES, FACTS AND JURISDICTION

1. The Town hereby incorporates by reference Paragraphs 1–19, 21–24 of its Amended Complaint, filed in Vermont Superior Court, Environmental Division and removed to this court as Civil Action No. 1:16-cv-20 ("Amended Complaint").

2. In September 1990, Railway entered into a lease with the State of Vermont for, among other things, the use of the existing railroad tracks in the Town. *See* Lease (attached hereto as Ex. 1).

3. The lease has been renewed three times, each for ten-year terms, and is set to expire on January 5, 2024. *See* Letter from Brian R. Searles, Vermont Secretary of Transportation, to David W. Wulfson, President of Vermont Railway, Inc. (Dec. 10, 2013) (attached hereto as Ex. 2).

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4. Section 5.1 of the lease provides: "Railway covenants and agrees that, except as limited herein, it will maintain and operate said line or lines of railroad in compliance with Federal, State and Local laws and administrative regulations relating to the operation and maintenance thereof." Lease at ¶ 5.1.

5. Upon information and belief, Barrett Trucking will be moving operations to the Property. *See* Molly Walsh, Plans for a Railroad's Freight Facility Outrage Shelburne, Seven Days, Feb. 3, 2016 (attached hereto as Ex. 3).

6. Upon information and belief, the proposed railroad spur to be constructed in the Town will exclusively benefit Barrett Trucking and/or Railway in the distribution of salt. No plans have currently been submitted to the Town that would support the allegation that this spur will be used by any other business.

7. Upon information and belief, the railroad spur will only be used to transfer (1) salt from railcars to salt sheds and (2) fuel from railcars to fuel containment areas, which will be either distributed by Barrett's or used for fleet fueling.

8. While Railway President, David Wulfson, has publicly commented that he "hopes trains will bring other cargo too," *see* Plan's for a Railroad's Freight Facility, there are, to the best of the Town's knowledge, no current plans or evidence of agreements to use the spur to offload commodities other than salt or fuel.

COUNTERCLAIM – COUNT I
DECLARATORY JUDGMENT RE ICCTA PREEMPTION

9. The Town repeats and realleges the allegations contained in and incorporated in Paragraphs 1–8 above.

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10. The Town hereby incorporates by reference Paragraphs 25–27 of its Amended Complaint. Florida East Coast Railway Company v. City of West Palm Beach, 266 F.3d 1324, 1330-31 (11th Cir. 2001) (holding that Congress narrowly tailored ICCTA preemption such that municipal laws, such as zoning ordinances, are not expressly preempted and should be closely examined).

11. Furthermore, while the Railway has identified the proposed track that will be constructed as a "railroad spur" it appears, from the information that has been provided to the Town, that the railroad segment will only be used to transport salt and fuel from railcars to storage facilities for use and distribution by Barrett Trucking.

12. This is not transportation by an entity "providing common carrier railroad transportation for compensation . . . " 49 U.S.C. § 10102(5); *see also* N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 250-51 (3d Cir. 2007) (some modifications in original) (citations omitted) ("We have held that '[t]he distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant.' . . . A private carrier, on the other hand, offers services to limited customers under limited circumstances and assumes no obligation to serve the public at large."), because Railway is providing limited services over the proposed track at issue in this case to Barrett Trucking for the limited purposes of hauling salt and fuel. Railway will not be operating as a common carrier over this portion of the track.

13. The proposed railroad segment at issue in this case is more akin to a "private track," for which there is no preemption under the ICCTA because the Surface Transportation Board is not vested with jurisdiction. *See* 49 U.S.C.

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§§ 10501(a)(1), 10901, 10906; *see also* B. Willis, C.P.A., Inc. v. Surface Transp. Bd., 51 Fed App'x 321 (D.C. Cir. 2002) (per curiam) (The Surface Transportation Board has determined that it does not have jurisdiction over private tracks). A private track is a track "typically built and maintained by a shipper (or its contractors) to serve only that shipper, moving the shipper's own goods, so that there is no 'holding out' to serve other shippers for compensation." *Saratoga and North Creek Railway, LLC-Operation Exemption- Tahawus Line*, S.T.B. Docket No. FD_35631_0 (Surface Transportation Board, 2012) (attached hereto).

COUNTERCLAIM – COUNT II
DECLARATORY JUDGMENT RE EXERCISE OF MUNICIPAL POLICE POWERS

14. The Town repeats and realleges the allegations contained in and incorporated in Paragraphs 1–13 above.

15. The Town hereby incorporates by reference Paragraphs 28–33 of its Amended Complaint.

16. Declare that the Town retains its municipal police powers pursuant to 24 V.S.A. § 2291 and that the Plaintiff's proposed project must comply with any and all regulations born of those police powers, specifically those relating to health, safety, welfare, convenience and traffic safety. In re Appeal of Vt. Ry., 769 A.2d 648, 654-55, 171 Vt. 496, 504 (Vt. 2000).

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COUNTERCLAIM – COUNT III
NUISANCE

17. The Town repeats and realleges the allegations contained in and incorporated in Paragraphs 1–16 above.

18. The Town hereby incorporates by reference Paragraphs 34–37 of Amended Complaint.

COUNTERCLAIM – COUNT IV
UNLAWFUL INTERFERENCE WITH EASEMENT RIGHTS

19. The Town repeats and realleges the allegations contained in and incorporated in Paragraphs 1–18 above.

20. The Town hereby incorporates by reference Paragraphs 38–43 of Amended Complaint.

COUNTERCLAIM – COUNT V
BREACH OF LEASE

21. The Town repeats and realleges the allegations contained in and incorporated in Paragraphs 1–20 above.

22. Per the terms of the lease, the Railway is required to comply with "Federal, State and Local laws and administrative regulations" in operating the leased land. *See* Lease ¶ 5.1.

23. In September 1990, both the State of Vermont and Plaintiff were sophisticated business entities, and there is no indication that Congress intended to preempt contract disputes between such parties. *See* Plasser Am. Corp. v. Burlington N. & Santa Fe Ry. Co., 2007 WL 4410682, *4 (E.D. Ark. Dec. 14, 2007) (appended hereto); *see also* Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).

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24. Per the terms of the lease, and for good and valuable consideration, Plaintiff agreed to, among other things, abide by local law.

25. Plaintiff has breached the lease by not submitting to applying for local and state land use permitting prior to commencing construction.

26. The Town is a third-party beneficiary to the lease entered into by the State of Vermont and Railway because it is an intended beneficiary of the lease.

27. Local laws exist, in part, to provide a benefit to the locality. *See generally* City of New Rochelle v. Town of Mamaroneck, 111 F. Supp. 2d 353, 361–62 (S.D.N.Y. 2000).

28. Accordingly, the intent of language in a lease requiring compliance with local law is, in part, to benefit and protect the locality.

WHEREFORE, the Town respectfully requests that the Court:

A. Dismiss Railway's claims in the instant case;

B. Find for the Town on the above Counterclaim Counts I–V and any claims asserted in the Town's Complaint filed in the Vermont Superior Court, Environmental Division;

C. Temporarily and permanently enjoin Railway from engaging in construction activities on the Property without submitting to applicable municipal and state review;

D. Permanently enjoin Railway from engaging in tree clearing, grading and land development in such a way that interferes with the Town's easement rights; and

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

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Dated at Burlington, Vermont this 16th day of February, 2016.

Respectfully Submitted,
TOWN OF SHELBURNE
By and through its counsel,

/s/Claudine C. Safar, Esq.
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