(13)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. **SUPERIOR COURT**
CIV. NO. 24-0150

HOUSATONIC WATER WORKS COMPANY

Plaintiff

v.

TOWN OF GREAT BARRINGTON, TOWN OF GREAT BARRINGTON BOARD OF HEALTH, MICHAEL LANOUE, DR. RUBY CHANG, and PETER STANTON, AS MEMBERS OF THE BOARD OF HEALTH, and REBECCA JURCZYK as GREAT BARRINGTON HEALTH AGENT.

Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This litigation is based on a dispute between the Housatonic Water Works Company (Housatonic) and the Board of Health of the Town of Great Barrington (Board). Housatonic is a privately-owned public water supplier to approximately 750 customers in the towns of Great Barrington and West Stockbridge. On September 17, 2024, the Board issued a Modified Order requiring Housatonic to comply with its terms or face fines. Housatonic has filed this *Certiorari* action to vacate this order.

BACKGROUND

The relevant facts are as follows.[1] For the purpose of this motion, this dispute originated in the summer of 2019 with discoloration of the drinking water provided to the

[1]The manner the Order was established puts the Court at a disadvantage with respect to the facts. There was no evidentiary hearing with witnesses testifying under oath or specific findings of facts by the Board. Most importantly, there is no administrative record; a body of information that is typically required for administrative hearings. It appears that the Order was initially drafted in a closed meeting and presented to Housatonic in essentially final form. Accordingly, I have taken the facts from the verified complaint and the affidavits that were submitted for this motion. See *P.J. Keating Company v. Town of Acushnet*, 104 Mass. App. Ct. 65,67 (2024)(board of health conducted evidentiary hearing with experts witnesses to resolve nuisance issues from odors emanating from asphalt plant).Under these circumstances, it would be appropriate to remand the matter back to the Board for an evidentiary hearing and findings of facts. However, since Housatonic has asserted that the Board lacks jurisdiction to hear the matter due to preemption, this issue is properly before the Court.

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customers.[2] Cornwell Engineering Group was retained by Housatonic to investigate the problem and the infiltration of manganese was determined to be the cause. Northeast Water Solutions (NWS), Inc. was engaged to address the situation. Although it appears that this problem is not uncommon, there was no information justifying the five-year delay to address the situation.

Stepping back, the Federal Safe Drinking Water Act, 42 U.S.C. § 300f et seq. (SDWA) is the exclusive authority for establishing and maintaining the standards for clean water in the United States. As authorized by the federal authorities, the Massachusetts Department of Environmental Protection (DEP) oversees the requirements of the Act within the Commonwealth. See 310 Mass. Code Regs. 22.00 et seq. With respect to private-owned water providers, the Massachusetts Department of Public Utilities (DPU) is also responsible for the quality of water being dispensed to the public. See G. L. c. 164, § 93. Pursuant to this statute, the DPU will investigate the quality of water for a community under the following circumstances.

> "On written complaint of the attorney general, of the mayor of a city or the selectmen of a town where a...company is operated, or of twenty customers thereof" to the DPU or by the DPU on its own motion, after notice and hearing, the DPU may order "an improvement in the quality thereof."
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> Id.

In our situation, at DEP's request, a year-long pilot study was conducted confirming that seasonal manganese was the cause of the water discoloration. NWS proposed a "green sand filtration system" to correct the problem. Essentially, green sand filters use a specially formulated filter made from glauconite greensand. The greensand filter has a special coating of manganese oxide, which oxidizes iron, manganese and iron in the water upon contact with the filter. See *Journal of Water Process Engineering*, Volume 39, February 2021. DEP approved the installation of a green sand filtration system to correct the problem. The system is presently under design and is expected to be operational for the summer of 2025.

Io July 23, 2024, the Board of Health held a meeting to review the drinking water situation.[3] Although members of the Board indicated that the green sand filtration system was a "good fix," there were discussions regarding the current situation. A subsequent meeting of the Board on July 31was held in executive session, leading to a meeting on August 8, to "review [a] proposed Order to Correct (Order), citing Housatonic Water Works Company under the authority of M.G. L. c. 111, secs 122 & 123." After this meeting the Board issued a draft Order to Correct directly to Housatonic.

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[2]The discoloration of the water would appear during the warm months (summer) but not consistently. It occurred in 2019, 2021, 2022 and 2024. There is little information regarding the nature and extent of the contamination outside of the summer.

[3] Minutes of meetings were not provided to the Court adding to the uncertainty of the Board's actions.

The next Board meeting occurred on August 15 and involved discussion with representatives of Housatonic. Essentially the plaintiff argued that the Board did not have the authority to issue such an order. The Board met again on August 22 and served Housatonic with a final version of the Order on August 28. Housatonic appealed the decision to issue the Order and a hearing was held on September 5, 2024. This hearing was continued to September 10, when the Board modified the Order and made it effective upon service on Housatonic which occurred on September 17.

The Order outlines the current situation and possible health concerns to the public. It also addresses ongoing testing of the water by an independent party. Finally, the Order issues a series of directives that imposes obligations on Housatonic, failing which, penalties would be imposed. Specifically, the Modified Order states, in part,

> "It is **FURTHER ORDERED** that the Respondent provide each household within the Town of Great Barrington that is a water service customer of the Respondent, and which so desires, with an alternative supply of safe, potable water, through the distribution and supply of bottled water in containers which larger than 'single use containers' yet of such size as can be safely handled by the end user taking physical condition and ability of said end user into account, on a daily basis, and an adequate means of dispensing of said water, within 7 days of the **ORDER** and at the expense of the Respondent, until further order of the Board. Such distribution shall consist of a supply of water equal to or greater than 1.5 gallons per day, per inhabitant in each such household. The distribution shall be accomplished in such a way as to allow easy access to the supply by each such household with a minimum of inconvenience." (emphasis in original)[4]

Housatonic has raised a series of objections to this Modified Order, including preemption by federal and state law, the Order was arbitrary and capricious and unsupported by substantial evidence.

[4]Substantively, the paragraph is challenging to interpret. For example, it is difficult to identifying the recipient of the water as the language references, at different points, "each household," "water service customer" and "inhabitant in each such household." Each of these would direct the water to different individuals. The language used to identify the size container that must be used ("can be safely handled by the end user taking physical condition and ability of said end user into account") appears unintelligible in this context. The phrase, "[t]he distribution shall be accomplished in such a way as to allow easy access to the supply by each such household with a minimum of inconvenience," is equally vague. However, the gist of the paragraph is clear; as drafted, Housatonic would be responsible for providing, every day, an unknown quantity of bottled water to potentially every household, to customers based on their physical ability, in sizes that are undetermined, for an unknown period of time, irrespective of whether the water is contaminated at that time. The failure to satisfy these conditions would result in a $1,000 fine for each violation.

DISCUSSION

A. Motion for Injunctive Relief

It is well-established that a party seeking a preliminary injunction must demonstrate: (1) that it has a likelihood of success on the merits, (2) that it will suffer irreparable harm if the injunction is not granted and that (3) the harm, without the injunction, outweighs any harm to the defendant from being enjoined. *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 617 (1980). "What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." Id.

An injunction is an "extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To the contrary, "the significant remedy of a preliminary injunction should not be granted unless the plaintiffs had made a clear showing of entitlement thereto." *Student No. 9 v. Board of Educ.*, 440 Mass. 752, 762 (2004). "Trial judges have broad discretion to grant or deny injunctive relief." *Lightlab Imaging, Inc. v. Axsun Technologies, Inc.*, 469 Mass. 181, 194 (2014). In appropriate cases, the court may also consider the risk of harm to the public interest. *GTE Prods. Corp.* v. *Stewart*, 414 Mass. 721, 723 (1993).[5]

1. Success on the Merits

As noted above, Housatonic has raised several objections to the imposition of the Order by the Board of Health. From the court's perspective the decisive issue is whether the Board had authority to engaged in water quality issues. Housatonic asserts that such issues are within the exclusive domain of federal and state authorities and any action by a local board of health is preempted by law.

The doctrine of preemption originates from the supremacy clause of the United States Constitution, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ...." U.S. Const., art. VI, cl. 2. See *Chadwick v. Board of Registration in Dentistry*, 461 Mass. 77, 84 (2011). "A Federal statute may preempt State law when it explicitly or by implication defines such an intent, or when a State statute actually conflicts with Federal law or stands as an obstacle to the accomplishment of Federal objectives." *Boston v. Commonwealth Employment Relations Bd.*, 453 Mass. 389, 396 (2009).

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[5] Economic harm, compensable in money, is traditionally not considered irreparable and the few exceptions found involve cases in which the plaintiff was in danger of going out of business due to the economic damage. "Economic harm alone ... will not suffice as irreparable harm unless 'the loss threatens the very existence of the movant's business,'" *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 227-228 (2001), quoting from *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 399 Mass. 640, 643 (1987).

State preemption analysis is similar to Federal preemption in that the court determine whether the Legislature intended to preclude local action, recognizing that "[t]he legislative intent to preclude local action must be clear". *Wendell v. Attorney Gen.*, 394 Mass. 518, 523 (1985). Legislative intent may be "express or inferred," that is, "local action is precluded either where the 'Legislature has made an explicit indication of its intention in this respect,' or where 'the purpose of State legislation would be frustrated [by a local enactment] so as to warrant an inference that the Legislature intended to preempt the field.' " *St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield,* 462 Mass. 120, 126 (2012), quoting *Wendell*, supra at 524. "[A] local regulation will not be invalidated unless the court finds a 'sharp conflict' between the local and State provisions." *Doe v. Lynn*, 472 Mass. 521, 526 (2015), quoting *Easthampton Sav. Bank v. Springfield*, 470 Mass. 284, 289 (2014).

Housatonic contends that the Board is preempted from adjudicating public drinking water issues under both federal and state law. Specifically, the Safe Drinking Water Act, 42 U.S.C. sec. 300f (SWDA) and DEP regulations. "The purpose of the [SDWA] is to assure that water supply systems serving the public meet minimum national standards for protection of public health." *City of Evansville, Inc. v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1016 n. 25 (7th Cir.1979). The responsibility for complying with the Act in Massachusetts is delegated to the DEP. As such, a series of regulations have been promulgated by DEP consistent with the federal requirements. See 310 Mass. Code Regs. 22, et seq. Although Housatonic asserts that both the federal statute and state law preempt the Board's activities in the field, the Court is confining its analysis to the state preemption.[6]

With respect to the engagement of boards of health in public safety, the seminal case is *Town of Wendell v. Attorney General*, 394 Mass. 518 (1985). *Wendell* involved preemption by the Massachusetts Pesticide Control Act (PCA) of a pesticide regulation by the Town of Wendell's Board of Health. The Legislature had established a pesticide board and promulgated a comprehensive plan governing the distribution and registration of pesticides and the certification and licensing of pesticide users. Wendell passed a regulation which required the board of health to hold a public hearing on any proposed pesticide use in the Town. Under the regulation, the board was to determine whether the applicant had complied with all the requirements of the State statute and also that the application of the pesticide was not a danger to the health, environment or safety of the town residents.

As in this case, the PCA has no language either authorizing or forbidding local regulation of pesticides. Thus, the question before the court was whether the local enactment would clearly frustrate a statutory purpose. The SJC noted that under the PCA, before a pesticide can be registered with the State, a State committee must determine that

[6]The SDWA contains a savings clause regarding the availability of other relief: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief." 42 U.S.C. § 300j-8(e).

use of the pesticide will not cause unreasonable adverse effects on the environment. The court also found that the Town of Wendell regulation clearly authorized the Town board of health to impose greater restrictions on the use of pesticides than those imposed in the State statute.

From these findings, the SJC concluded:

> "The legislature has placed in the subcommittee the responsibility of determining on a statewide basis, pesticide by pesticide, whether its use will cause unreasonable adverse effects to the environment.... An additional layer of regulation at the local level, in effect second-guessing the subcommittee, would prevent the achievement of the identifiable statutory purpose of having a centralized, statewide determination of the reasonableness of the use of a specific pesticide in particular circumstances."
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> Id. at 529.

The SJC held that the local ordinance frustrated a purpose of the statute and therefore was preempted by the statute. See *St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield*, 462 Mass. 120, 126 (2012)(where the purpose of State legislation would be frustrated by a local enactment it would warrant an inference that the Legislature intended to preempt the field). Furthermore, "[w]hen legislation on a subject is so comprehensive [] an inference would be justified that the Legislature intended to preempt the field, a municipal law cannot stand." *Easthampton Savings Bank v. Springfield*, 470 Mass. at 288-289. Analogous to the federal preemption, a municipal order is also preempted if it interferes with the methods by which the state statute was designed to reach this goal. See *Michigan Canners & Freezers Assn. v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 477 (1984).

In addition to examining the comprehensive nature of the regulations to assess legislative intent, courts have also looked to whether the Commonwealth intended to create uniform standards across the state. *St. George Greek Orthodox Cathedral*, 462 Mass. at 126 (State Building Code expressly intended to ensure "[u]niform standards and requirements for construction and construction materials"). It is clear that uniform standards are essential in providing safe water to citizens of the Commonwealth. The concept that each community should be able to set its own water quality standards and testing requirements for drinking water is inconsistent with the regulatory process established by the Legislature.

As reflected in the numerous regulations promulgated by the DEP, it is evident that a comprehensive and standardized approach to the production and distribution of safe water is necessary.[7] Having each community establish its own testing regiment and

[7] As noted in the regulations, "310 CMR 22.00 is intended to promote the public health and general welfare by preventing the pollution and securing the sanitary protection of all such waters used as sources of water supply and ensuring that public water systems in Massachusetts provide to the users thereof water that is safe, fit and pure to drink."

quality control assessment would wreak havoc, particularly if it conflicted with DEP regulations. This delegation to the DEP indicates that Commonwealth intended to give and did give exclusive power to the Department to oversee the distribution of safe water.

Finally, the Order has the potential to upset the timing of the DEP solution (green sand filtration) to the manganese problem[8] and would frustrate the state regulations' stated purpose of providing a statewide and uniform regulatory process. See *Wendell*, 394 Mass. at 528. DEP has been assigned the responsibility to address water issues. Allowing a local agency to exercise an additional layer of regulatory review would allow the municipality improperly to second guess DEP's decisions.

The Board also must navigate around the authority vested in the Department of Public Utilities (DPU) by G.L. c. 164 and c. 165. Chapter 165 gives the DPU the responsibility over the sale, delivery and quality of water from private water companies. Pursuant to section 2 of Chapter 164, the DPU may order "an improvement in the quality" of water but only "[o]n the written complaint of the attorney general, of the mayor of a city or the selectmen of a town where a...company is operated, or of twenty customer thereof" to the DPU or by the DPU on its own motion. After notice and hearing, the DPU may order "an improvement in the quality thereof."

This clear language demonstrates a legislative intent for DPU to occupy the field at the state level in the regulation of water quality. The statute permits certain designated parties the opportunity to seek relief from the DPU for water quality issues. Given this limitation, it would be contradictory to permit a local board of heath to independently address public water quality issues. Together, the DPU and the DEP have exclusive jurisdiction in this realm.

After reviewing the legislation as a whole, if communities were allowed to impose separate standards, the inevitable result would be a serious interference with the purposes and objectives of legislation. I do not believe the Legislature intended to undermine these statutes by permitting municipalities to circumvent the process.

Accordingly, the Board is preempted from issuing its Order. I conclude that Housatonic has satisfied the success on the merits test.

2. Irreparable Harm

With respect to the second factor, Housatonic asserts that the pecuniary implications of the Order may result in financial insolvency. If so, this could result in disruption of the instillation of the green sand filtrations system for the 2025 summer

[8]Housatonic has raised the specter that the Order would place it "at significant risk of financial insolvency within a short period---a matter of months, at most---and would leave insufficient funds leftover to cover routine operational costs and critical infrastructure improvements, particularly those necessary to complete installation of the green sand filtration system, which is required to permanently remediate increased manganese levels." The accuracy of this admonition cannot be determined as there was no evidentiary hearing and no determination as to the financial impact of the Order on Housatonic.

season. As it was incumbent on the Board to address this issue and make specific findings, I accept these representations for the purpose of this motion. It is evident that the financial costs the Board seeks to impose on Housatonic would be substantial and on-going for an undetermined period of time.

The potential for a disruption in solving this problem is legitimate and would constitute irreparable harm. This harm would outweigh any potential harm to the defendants. The second and third factor, accordingly, favors the plaintiff.

3. Public Interest

With regard to the public interest factor, it is self-evident that the timely resolution of this situation is paramount. Given the disruption and inconvenience suffered by the customers since 2019, a further delay in the remedy would be inappropriate. Any impediment or distraction in achieving this goal would not be in the public's interest.

The Court therefore finds that granting this preliminary injunction advances the public interest. The fourth factor favors the plaintiff.[9]

For all of the above reasons, the plaintiff has made a clear showing of entitlement and its motion for a preliminary injunction is granted.

IT IS ORDERED

A. That Housatonic Water Works Company shall be awarded a preliminary injunction.

B. During the pendency of this action, the defendants, together with their agents, successors and assigns, are enjoined and restrained from enforcing the Board's modified Order to Correct, dated September 13, 2024 (Modified Order), requiring Housatonic Water Works Company to take any action pursuant to the Modified Order or issuing any penalty to Housatonic Water Works Company by the Modified Order.

C. As the plaintiff's motion was limited to a preliminary injunction, the parties shall confer and determine whether any further action should be taken prior to the issuance of a final judgment and permanent injunction. Accordingly, a status conference is scheduled for Thursday November 14, 2024, at 2:00 p.m., by way of ZOOM. A final judgment would permit immediate appeal of this Order.

[9]In this matter the customers of Housatonic are from two communities, Great Barrington and West Stockbridge. Clearly, the Board's authority does not extend to West Stockbridge homes, making its Order applicable to only some customers and not others. Such inconsistencies would be avoided by state-wide jurisdiction.

__10/21/24____
Date

___/s/ John A. Agostini_____
John A. Agostini
Associate Justice, Superior Court

ENTERED
THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT

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