COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

PERMIT SESSION CASE
No. 21 MISC 000193 (HPS)

IGOR LYBARSKY, TRUSTEE of the BARSKY ESTATE REALTY TRUST and 31 HUNTING LANE, LLC,

Plaintiffs,

v.

TOWN OF SHERBORN,

Defendant.

ORDER ON APPLICATIONS FOR PRELIMINARY INJUNCTION

Igor Lybarsky, as Trustee of the Barsky Estate Realty Trust, owns two parcels of land in Sherborn (collectively, "31 Hunting Lane") that are the subject of a dispute with the Town of Sherborn concerning the interplay between efforts by Mr. Lybarsky to develop and obtain approval for a development project to consist of 28 units of housing, with an affordable housing component pursuant to G. L. c. 40B, and the Town's claimed rights to exercise an option to purchase some or all of the land pursuant to G. L. c. 61B.

Mr. Lybarsky filed a verified complaint seeking declaratory and injunctive relief on April 6, 2021. Mr. Lybarsky seeks a preliminary injunction enjoining the Town from pursuing its purported exercise of its option to purchase the land, arguing that the Town is not entitled to exercise a purchase option pursuant to G. L. c. 61B, § 9. The Town filed an opposition to the request for preliminary injunctive relief, and an answer and counterclaim seeking a declaration

that it is properly pursuing a G. L. c. 61B option to purchase. The Town also requests a preliminary injunction seeking to enjoin any further hearings before the Sherborn Zoning Board of Appeals on Mr. Lybarsky's application for approval of an affordable housing development pursuant to G. L. c. 40B, §§ 21-23.

I held a hearing by videoconference on the competing applications for preliminary injunctive relief on April 12, 2021. Upon consideration of the verified complaint, the affidavits, exhibits and memoranda filed by the plaintiffs and by the defendant, and the arguments of counsel, and for the reasons stated below, both applications for preliminary injunctive relief are DENIED, except as provided below.

FACTS

The following facts appear in the record and are credited by the court for the purposes of consideration of the pending requests for preliminary injunctive relief:[1]

Mr. Lybarsky, as Trustee of the Barsky Estate Realty Trust, owns a 16.93 acre parcel of land at 31 Hunting Lane in Sherborn. This property, also known as Parcel 3C, is improved by a single-family home serviced by a septic system also on the property, a tennis court and landscaped gardens, all occupying approximately two acres of Parcel 3C, with the remainder of the property consisting of undeveloped, wooded land. Mr. Lybarsky also owns, in the same trust, a contiguous parcel of undeveloped land containing wetlands, of approximately 8 acres in size, known as and referred to herein as Parcel 3B.

Parcel 3B and Parcel 3C, except for the two-acre portion of Parcel 3C improved by the house and related grounds, have been classified until recently as recreational property and

[1] The court makes only preliminary findings based on "an abbreviated presentation of the facts and the law," *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616 (1980), and does not purport to make the detailed, and final, findings and rulings of law that will follow a dispositive motion or a trial on the merits pursuant to Rule 52, Mass. R. Civ. P.

therefore taxed at a lower tax rate than the usual rate for residential property, since the former owner's application for such treatment was accepted by the Town in September, 2014. In February 2020, Mr. Lybarsky submitted to the Town, an application to withdraw both parcels from Chapter 61B classification; this application was accepted by the Town the following month. Accordingly, both parcels reverted to taxation at the usual residential tax rate as of fiscal year 2021, commencing July 1, 2020.

In November, 2019, Mr. Barsky applied to the Massachusetts Housing Financing Agency ("MassHousing") for a site eligibility approval letter asking that Parcels 3B and 3C be approved for site eligibility for 28 units of housing to be proposed under G. L. c. 40B (27 new units plus the existing single-family house located on Parcel 3C). In January, 2020, Mr. Lybarsky revised the proposal to indicate that all 28 units would be located on Parcel 3C, and that Parcel 3B would only be used for underground utility easements for the project and another G. L. c. 40B project proposed by Mr. Lybarsky on nearby land.

Also in November, 2019, Mr. Lybarsky sent the Town a letter of intent to sell, purporting to be pursuant to G. L. c. 61B, § 9, Parcels 3B and 3C for $3,000,000.00 to 31 Hunting Lane, LLC, a limited liability company of which Mr. Lybarsky is the manager. Ownership by 31 Hunting Lane, LLC was apparently planned by Mr. Lybarsky at least in part to meet the limited dividend ownership requirements of G. L. c. 40B. The Town responded that it did not consider the letter of intent to be compliant with G. L. c. 60B, § 9 for reasons including, among others, the Town's belief that the purchase and sale agreement between the trust and 31 Hunting Lane, LLC, did not represent a bona fide transaction within the meaning of G. L. c. 61B, § 9. The Town took the position that it was not required to decide whether to exercise its statutory right of first

refusal until Mr. Lybarsky submitted a statutorily conforming notice of intent to sell. Mr. Barsky did not respond to the Town's response or send a new letter of intent to sell.

The Town opposed Mr. Lybarsky's application for a site eligibility approval letter from MassHousing for reasons including the Town's position that it had a statutory right to purchase the site pursuant to G. L. c. 60B, § 9, and that therefore Mr. Lybarsky could not demonstrate the requisite site control.

On April 30, 2020, MassHousing issued a site approval letter to Mr. Lybarsky, generally approving the site for a Chapter 40B project pursuant to 760 CMR 56.04(1) and (4) but noting that issues remained to be resolved. Those issues included: "[t]he Applicant should be prepared to discuss the Site's encumbrance under M.G.L. c. 61B and all associated requirements for removal of the land from the tax classification."

On October 5, 2020, Mr. Lybarsky filed an application with the Sherborn Zoning Board of Appeals for a comprehensive permit pursuant to G. L. c. 40B, §§ 21-23. The application sought approval for 28 units of housing (including the existing single-family house) on Parcel 3C, with utilities for water and sewer to run underground on Parcel 3B for the project and for a related Chapter 40B project on other land controlled by Mr. Lybarsky.

On October 22, 2020, the Town Select Board voted to seek an impartial appraisal of the 31 Hunting Lane property for the purpose of exercising the Town's statutory right to purchase the property, with the appraisal to be delivered to the property owner at a date to be determined. On October 27, 2020, the Select Board sent a letter to the Zoning Board of Appeals informing it of the October 22 vote and asking the Board to reject Mr. Lybarsky's application on the ground that the Town intended to exercise its right to purchase the property.

By a letter dated March 3, 2021, the Town delivered an appraisal to Mr. Lybarsky valuing Parcel 3B and portions of Parcel 3C at $950,000.00. The letter informed Mr. Lybarsky of his right, pursuant to G. L. c. 61B, § 9, to submit a second appraisal within thirty days, and that the parties would be obligated thereafter to share the cost of a third appraisal if they could not agree on a price by which the Town would exercise its right to purchase the property.

This litigation followed.

DISCUSSION

STANDARD FOR ISSUANCE OF PRELIMINARY INJUNCTION

The familiar standard for consideration of a request for preliminary injunctive relief is as follows: "[w]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. 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." *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). Where, as here, "a public entity is a party, a judge may weigh the risk of harm to the public interest when deciding a preliminary injunction motion." *Bank of New England, N.A. v. Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 246 (1991).

Further, "[a] preliminary injunction ordinarily is issued to preserve the status quo pending the outcome of litigation." *Doe v. Superintendent of Schools of Weston*, 461 Mass. 159, 164

(2011). "It is proper, indeed desirable, to issue an injunction if its issuance is the only way to preserve the status quo and it promotes the public interest to do so, even though it grants the ultimate relief sought." *Petricca Const. Co. v. Com.*, 37 Mass. App. Ct. 392, 400 (1994).

LIKELIHOOD OF SUCCESS ON THE MERITS

The plaintiffs argue that the Town does not have a right to exercise a statutory right to purchase either Parcel 3C or Parcel 3B because: (1) Mr. Lybarsky has not sent the Town the required notice of intent to convert the use of the subject parcels from recreational use to residential use, and has in fact not formed the intent to do so; (2) even if the parcels are subject to constructive notice of such an intent to convert, there is no basis for exercising that right with respect to Parcel 3B because it is not part of the proposed Chapter 40B development, and the purported exercise of rights with respect to Parcel 3C included land that had not been subject to Chapter 61B; and (3) the Town is subject to the Covid-19 Tolling Statute, St. 2020, c. 53, § 9, which, according to plaintiffs, mandates a suspension of a municipality's obligations to act, respond, effectuate or exercise its obligations until 90 days after the conclusion of the State of Emergency.

G. L. c. 61B, § 9 provides that land taxed under the provisions of the chapter "shall not be sold for, or converted to, residential, industrial or commercial use while so taxed or within 1 year after that time unless the city or town in which the land is located has been notified of the intent to sell for, or to convert to, that other use." The giving of a notice of intent to sell triggers a right of first refusal of the municipality to match a bona fide offer to purchase the land, while a notice of intent or determination to convert the land without a sale triggers an appraisal process to set the fair market price by which the municipality may purchase the property.

The plaintiffs' argument that where there is no sale the Town's rights under Section 9 can only be triggered by a notice of intent delivered by the owner to the Town, is not supported by the plain language of the statute or by the cases. The statute provides that the municipality shall have an option to purchase the land at full and fair market value "[i]n the case of intended *or determined* conversions not involving sale…" (emphasis added) There would be no reason for adding the language "or determined" if the only mechanism for triggering the municipality's rights were a letter of intent sent by the owner. The additional language "or determined," if it is to have any meaning, must mean that a municipality, in the first instance, and a court, in the second instance, in the absence of the required notice provided by the owner, can determine, from objective evidence, that the owner has taken steps demonstrating an intent to convert the use of the land from recreational use to residential, commercial or industrial use. *Town of Sudbury v. Scott*, 439 Mass. 288, 298-299 (2003); see also *Town of Petersham v. Peck Realty, LLP*, 11 LCR 177, 180 (Mass. Land Ct. 2003) (Piper, C.J.). Such constructive notice of intent to convert is necessary to prevent an owner from defeating the intent of the statute by simply refusing to give a notice of intent to convert until after the municipality's rights have expired one year after the property has been withdrawn from the benefits of Chapter 61B. The Supreme Judicial Court has recognized that a sale could occur in a manner intended to conceal the intent to convert land from one use to another to avoid Chapter 61B obligations. "In most cases, if not disclosed before sale, that intent [to convert the use of the land] will become evident soon after sale when the new owner begins a process of conversion. However, there may be instances where the new owner will continue the agricultural use for a brief period after sale to conceal his true purpose, with the intent to defeat the town's right of first refusal. A town that can establish such intent as of the date of the sale, and a failure to give notice, is entitled to specific

performance of its option to purchase." *Town of Sudbury v. Scott,* supra, 439 Mass. at 299. The court thus provided that in the absence of the required statutory notice, the sale of the property, even where the intent to change the use is attempted to be concealed, can serve as constructive notice of an intent to convert, triggering the municipality's rights. The court's reasoning in *Scott* applies equally where there is no sale, but there is other objective evidence of an intent to convert the use of the land, including where the owner, even in the absence of a sale, "begins a process of conversion." *Id.* at 299. The municipality need not wait, as the plaintiffs argue, for an actual change of use to determine whether there is an intent to change the use. "[u]nder the statute, the town's option to purchase is triggered by notice, not by an actual change of use, and notice must precede the sale or change of use." *Id.* at 298. If the landowner fails to give the required notice of intent, the municipality may act on the basis of "constructive notice." *Hingham Land, LLC v. Town of Rockland,* 13 LCR 620, 627-628 (Mass. Land Ct. 2005) (Long, J.). When a municipality must act on the basis of constructive notice, instead of actual notice, it must do so "within a reasonable period of time" rather than within the strict deadlines set by the statute. *Town of Sudbury v. Scott,* supra, 439 Mass. at 298.

Applying these principles to the facts of the present case, the Town has established at least a likelihood of succeeding on its claim that it was entitled to act on the basis of constructive notice upon the filing by Mr. Lybarsky of his comprehensive permit application with the Zoning Board of Appeals. The plaintiffs' argument that their filing of a site approval request with MassHousing several months earlier should have triggered the Town's constructive notice obligations is less than convincing because plaintiff also argues, in a somewhat contradictory fashion, that the filing of the comprehensive permit application was itself insufficient to show plaintiffs' intent to convert the use of the property. The Town has further established a likelihood

of success of proving that it exercised its rights within a reasonable time, holding a hearing on October 22, 2020, less than three weeks after the filing of the comprehensive permit application on October 5, 2020, and presenting the plaintiffs with an appraisal on March 3, 2021.[2]

The plaintiffs also argue that even if the Town was entitled to act on constructive notice upon the filing of the plaintiffs' comprehensive permit application relevant to Parcel 3C, nothing in the application triggered constructive notice of any intent to convert the use of Parcel 3B, given that only the placement of underground water and sewer pipes is proposed for Parcel 3B, to service the proposed Chapter 40B projects on two separate parcels, Parcel 3C and one other that is not the subject of the present action. On the limited record before the court, I am not willing or able to conclude that the inclusion of utilities to be run underground on Parcel 3B does not constitute a change of use so as to trigger the Town's rights and obligations under G. L. c. 61B, § 9. While the plaintiffs have stated that they anticipate little disturbance to Parcel 3B, and indicate that they intend to utilize horizontal drilling to accomplish their goal of minimizing disturbance, it is certainly not clear at this point that the extent of actual disturbance and the extent of use of the parcel will not constitute a change of use. Comprehensive permit applications necessarily involve the presentation of only schematic plans, and in the absence of engineered plans showing otherwise, it was not unreasonable for the Town to conclude that the placement of

[2] Of course, by the time the application for a comprehensive permit was submitted in October, 2020, the tolling provisions of St. 2020, c. 53 were already in effect, relieving the Town of its statutory obligation to provide an appraisal within thirty days, even if the plaintiffs had given the statutory notice of intent to convert. Plaintiffs' argument that the Town violated the Covid-19 tolling provisions is also without merit. St. 2020, c. 53, § 9 states: in relevant part: "[n]otwithstanding… section 9 of chapter 61B of the General Laws… during and for a period of 90 days after the termination of the governor's March 10, 2020 declaration of a state of emergency, all time periods within which any municipality is required to act, respond, effectuate or exercise an option to purchase shall be suspended." This would permit the Town to respond to a notice of intent to sell or convert under G. L. c. 61B § 9 after the COVID-19 tolling is lifted, but does not prohibit the Town from exercising its option to purchase within a "reasonable time" during the COVID-19 pandemic, once it had constructive notice of the plaintiffs' intent to convert the land to residential use.

water and sewer utilities for two Chapter 40B projects would constitute a change of use, and therefore a conversion of land under G.L. c. 61B.

IRREPARABLE HARM

As I have concluded that the Town has established a sufficient likelihood of success on the merits, it remains to assess the balance of irreparable harm to be suffered by each party if injunctive relief is granted or withheld. The Town argues convincingly that if it is enjoined from exercising its claimed rights under G. L. c. 61B, § 9, it will lose those rights forever after June 30, 2021, which is one year after the subject properties were withdrawn from their G. L. c. 61B tax classification status. This is said with the caveat that it cannot be known when the tolling provisions of St. 2020, c. 53 § 9 relative to the COVID-19 pandemic will be permitted to expire. The plaintiffs, on the other hand, will suffer no irreparable harm by letting the Chapter 61B process go forward, subject to a trial on the merits to be held prior to any actual sale of the property.

Similarly, the Town has made no convincing argument that it will suffer any irreparable harm in the absence of injunctive relief prohibiting the completion of the pending comprehensive permit hearing before the Zoning Board of Appeals. The present action concerns the Town's claimed right to purchase the property, and if this case establishes that right, then perhaps the completion of the hearings will have been unnecessary, but if the Town is not successful, the plaintiffs will have been deprived of their right to pursue the comprehensive permit in a timely fashion.

CONCLUSION

For the reasons described above, I conclude that the risk of irreparable harm to the Town if preliminary injunctive relief is granted, in light of its chances of success on the merits of its

claim, outweighs the plaintiffs' probable irreparable harm if such relief is not granted, with respect to the exercise of the Town's rights under G. L. c. 61B, § 9. In fact, I have concluded that the plaintiffs will suffer no irreparable harm as a result of the denial of preliminary injunctive relief. See *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88 (1984). With respect to the Town's request for injunctive relief to enjoin the hearings before the Zoning Board of Appeals, I conclude that the risk of irreparable harm to the plaintiffs if injunctive relief is granted outweighs the risk of irreparable harm to the Town if relief is not granted.

Accordingly, it is **ORDERED** that the plaintiffs' application for preliminary injunction is DENIED, provided that the plaintiffs are to have sixty days from the date of this decision to present the plaintiffs' counter-appraisal concerning the value of the subject land, and the plaintiffs and the Town are **ORDERED** to consider in any future appraisals and discussions, the parcels or feasible portions thereof that constitute the subject property, and the value of such property that is to be included in the Town's option to purchase. It is further

ORDERED that the Town's application for preliminary injunction is DENIED.

So Ordered.

By the Court. (Speicher, J.)

/s/ Howard P. Speicher

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson
Recorder

Dated: April 13, 2021.