

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CSX TRANSPORTATION INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	NO. 04-5023
	:	
CITY OF PHILADELPHIA,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of January, 2005, upon consideration of the Motion of plaintiff CSX Transportation Inc. for the Issuance of a Preliminary Injunction, and the Answer and supporting Memorandum of Law of Defendant City of Philadelphia in opposition thereto, and after a hearing thereon, it is hereby ORDERED and DECREED that the Motion is DENIED.

BY THE COURT:

Bruce W. Kauffman, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CSX TRANSPORTATION INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	NO. 04-5023
	:	
CITY OF PHILADELPHIA,	:	
	:	
Defendant.	:	

**ANSWER OF DEFENDANT CITY OF PHILADELPHIA
TO MOTION OF CSX TRANSPORTATION, INC.,
FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION**

Defendant, the City of Philadelphia (the “City”), by its undersigned counsel, hereby answers plaintiff CSX Transportation, Inc.’s Motion for the Issuance of a Preliminary Injunction as follows:

1. Admitted.
2. Denied. To the contrary, the City’s authority to obtain certain parcels of land owned by the Railroad derived from its power of eminent domain and the declaration of taking filed by the City on December 6, 1979.
3. Admitted. By way of further answer, the City submits that the Construction Agreement concerned only such *temporary* “rights-of-entry.” The Construction Agreement did not extinguish or purport to extinguish any of the City’s existing property rights or rights to those streets that were then crossed by the railroad tracks in accordance with the Ordinance of July 3, 1885.
4. Admitted in part; denied in part. It is admitted only that temporary rights-of-entry were to be closed off after completion of the Schuylkill River Park. To the extent that any such

temporary rights-of-entry coincided with or were co-extensive with existing and permanent grade crossings, e.g., at Locust Street and Race Street, there was never an agreement that such crossings were to be barricaded or closed off.

5. Admitted, except that it is denied that the City is in breach of the Construction Agreement or has failed to honor its obligations thereunder. By way of further answer, the City is under no contractual obligation to close off public streets or rights-of-way that were in existence prior to the construction of the railroad's tracks.

6. Admitted only that it has so filed a Complaint. It is denied that CSXT is entitled to any relief from this Court.

7. Denied. To the extent that the public have been crossing the railroad tracks at Locust or Race Streets, they are doing so over a public rights-of-way that were in existence prior to the construction of the railroad's tracks.

8. Denied. To the extent that the public have been crossing the railroad tracks at Locust or Race Streets, such crossings are not illegal and do not amount to trespassing. Further, any railway cars that are stopped at those locations are in violation of the Philadelphia Code and the Pa. Vehicle Code.

9. Denied.

10. Denied. Inasmuch as Locust and Race Streets were in existence prior to the construction of the railroad's tracks, and that the railroad's tracks were placed only by the permission of the City via Ordinance, the public have a right of passage over such tracks to access City park property.

11. Denied.

12. The City is without information or knowledge sufficient to form a belief as to the truth of this averment and the same is therefore denied.

13. The City is without information or knowledge sufficient to form a belief as to the truth of this averment and the same is therefore denied.

14. Denied as a conclusion of law.

15. Denied as a conclusion of law.

16. Denied.

17. Denied as a conclusion of law.

18. Denied as a conclusion of law.

19. Denied as a conclusion of law.

20. Denied.

21. Admitted.

22. Denied.

WHEREFORE, defendant City of Philadelphia respectfully requests that this Court deny plaintiff CSXT's Motion for the Issuance of a Preliminary Injunction.

Respectfully submitted,

MICHAEL F. EICHERT
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CITY OF PHILADELPHIA LAW DEPARTMENT
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One Parkway Building, 17th Floor
1515 Arch Street
Philadelphia, PA 19102-1595

Dated: December 13, 2004

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CSX TRANSPORTATION INC.,	:	
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Plaintiff,	:	CIVIL ACTION
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vs.	:	NO. 04-5023
	:	
CITY OF PHILADELPHIA,	:	
	:	
Defendant.	:	

**MEMORANDUM OF LAW OF DEFENDANT
CITY OF PHILADELPHIA IN
OPPOSITION TO PLAINTIFF’S MOTION FOR THE
ISSUANCE OF A PRELIMINARY INJUNCTION**

Defendant City of Philadelphia (the “City”), submits this memorandum of law in opposition to the Motion for the Issuance of a Preliminary Injunction of Plaintiff CSX Transportation, Inc. (hereinafter referred to as “CSXT” or, in the case of its predecessors, the “Railroad”).

CSXT’s Motion should be denied because it has failed to satisfy at least two of the essential prerequisites for a preliminary injunction. CSXT can demonstrate neither a likelihood of success on the merits, nor that it will be irreparably harmed unless the injunction is granted. Moreover, CSXT is seeking a mandatory preliminary injunction, and under applicable case law, the power to issue such an injunction is to be ‘sparingly exercised,’ United States v. Spectro Foods Corp., 544 F.2d 1175, 1181 (3d Cir. 1976), and the burden on the moving party is ‘particularly heavy.’ Punnett v. Carter, 621 F.2d 578, 582 (3d Cir 1980). For the reasons set forth below, it is clear that CSXT cannot meet this burden.

CSXT has presented this case as an action to enforce one provision of an agreement between the City and the Railroad, namely, Section 5(a)(7) of the 1979 Construction Agreement.

In essence, CSXT presents the controlling law in this case as limited to a single contractual provision. This view is fundamentally flawed.

CSXT would have this Court interpret an agreement pertaining to a discrete subject – namely temporary grants by the Railroad to the City to facilitate construction of a park – as, in effect, extinguishing long-held and lasting property rights of the City, rights that existed prior to the actual construction of the Railroad itself. Whereas the Construction Agreement pertained to the granting of temporary “rights-of-entry” *to* the City by the Railroad, CSXT now contends that the Construction Agreement was much more than that – that it was effectively a relinquishment *by* the City of long-held and lasting property rights, and that the Railroad obtained, without any payment to the City, invaluable real estate by effectively appropriating to itself the roadbeds of Locust Street and Race Street crossed by its tracks.

In reality, the legal framework that defines the parties’ rights with respect to their rights to real estate underlying Locust Street and Race Street – the City’s inalienable ownership of the roadbeds and its right of access across such streets to its newly developed riverfront property and CSXT’s right to cross the City’s streets – spans a period of more than 120 years, and includes local ordinances, administrative acts, and the past conduct of the parties, riverfront commercial and industrial interests, and the citizens of Philadelphia.

I. STATEMENT OF FACTS

A. Opening of Locust and Race Streets

By affidavit dated October 20, 1883, Locust Street, from 4th Street to the Schuylkill River, and Race Street, from the Delaware River to the Schuylkill River, were legally opened on the City Plan. They constitute public rights of way over which the public has a right of passage and travel, on foot, bicycle, and vehicle. In addition, these two streets are so-called “Charter”

streets which means that the streets are owned in *fee* by the City.¹ Since the date of their opening, the portions of Locust Street, from 25th Street to the Schuylkill River, and Race Street, from 23rd Street to the Schuylkill River, have not been vacated and struck from the City Plan.

B. Construction of a Branch of Schuylkill River East Side Railroad

By Ordinance dated July 3, 1885, the Select and Common Councils of the City granted the Schuylkill River East Side Railroad Company, a predecessor to CSXT, a right of *crossing* over certain City streets on the easterly side of the Schuylkill River.² Section 1 of the ordinance provides that:

the said Schuylkill River East Side Railroad Company be, and it is, hereby authorized to enter upon and occupy, *by way of crossing only*, any and all streets, lanes and alleys, over, upon, or under which it may be necessary for its main line railroad to pass between the points shown on said plan: *Provided, however*, That nothing herein contained shall authorize the longitudinal occupation of any street by said main line other than certain portions of Twenty-fifth street and Pennsylvania avenue in the manner hereinafter provided:...

Plans and surveys indicate that the streets crossed *at grade* by the construction of the new railroad included Spruce Street, between 26th Street and the Schuylkill River, Pine Street, between Taney Street and the Schuylkill River, Locust Street, between 25th Street and the Schuylkill River, Sansom Street, between 25th Street and the Schuylkill River, Arch Street, between 23rd Street and the Schuylkill River, Cherry Street, between 23rd Street and the

¹ Typically, abutting landowners own to the centerline of streets and roads, subject to a publicly dedicated right of passage. Cf. Hinden et al. v. Samuel, 158 Pa. Super. 539. However, certain streets in Philadelphia are owned in *fee* by the City, as opposed to abutting landowners. These streets are called “Charter” streets having their origin in the charter of William Penn, the founder of the City. Cf. Penny Pot Landing, 16 Pa. 79 (1851)(Penn’s charter of 1701 laid out boundaries of the City of Philadelphia and granted the streets in fee to the City).

² A copy of this Ordinance is attached hereto as Exhibit “A”.

Schuylkill River, and Race Street, between 23rd Street and the Schuylkill River.³ Other streets, e.g., Wharton Street, South Street, Chestnut Street, and Market Street were crossed by the new railroad, but these were by undergrade crossings.

Section 13 of the ordinance provided that the consent granted by the City for the crossings “shall not be considered as a waiver or estoppel on her part of her right to recover from said railroad company any and all damages, direct or consequential, resulting to the property of the city from the location, construction, maintenance, and operation of the said railroad.” The 1885 Ordinance has not been repealed or otherwise canceled, and remains effective as against CSXT.⁴

C. The Acquisition Agreement and the Condemnation of Parcels for Schuylkill River Park

On October 9, 1979, the City and Baltimore & Ohio Railroad, yet another predecessor to CSXT, entered into an Acquisition Agreement which called for the City to file a declaration of taking in order to acquire certain parcels of land for use in the creation and development of Schuylkill River Park. The Acquisition Agreement did not specify an agreed-upon valuation of the land parcels. Attached to and made part of the Acquisition Agreement were six plans

³ Pine Street, Sansom Street, and Arch Street, in the locations noted, were all later vacated and struck from the City Plan by special ordinance.

⁴ CSXT claims throughout its papers that the its predecessors “owned the entire property between its tracks and the Schuylkill River, and that there was “no public right of access.” This is not true. First, if this was the case, what purpose was served by the 1885 Ordinance? The City streets existed and the Railroad needed permission to cross them. Moreover, plans and surveys show that the property on the west side of the tracks was not always owned by CSXT’s predecessors. At one time, Reading Company owned property adjacent to Race Street on opposite sides of the tracks. It would have had no choice but to use Race Street to access its property adjacent to the Schuylkill River. Further, a plan made in 1889 of the Cherry Street wharf at the Schuylkill River evidences commercial activity on the east bank of the Schuylkill River on the opposite side of the railroad’s tracks. Likewise, a sketch of the Locust Street dock at the Schuylkill River made in 1912 for the Department of Wharves, Docks & Ferries shows the fact of commercial activity on the east bank of the Schuylkill River on the opposite side of the railroad’s tracks.

prepared by Franklin & Lindsey, Inc. On these plans, both Locust Street and Race Street are shown as legally open and extending to the bulkhead line of the Schuylkill River.

Via the Acquisition Agreement and a declaration of taking filed December 6, 1979, the City acquired, through its power of eminent domain, nine parcels identified as parcels nos. 1 – 9 and shown on a plan dated April 11, 1977, and a plan dated May 25, 1977. The owners of the parcel nos. 1-2 and nos. 4-9 was the B&O Railroad, a successor to Schuylkill River East Side Railroad Co., and the owner of parcel 3 was Schuylkill Improvement Land Co. These parcels did not include the roadbeds of Locust Street or Race Street on the west side of the railroad tracks as those plots were already owned in fee by the City. Final compensation to the B&O Railroad and Schuylkill Improvement Land Co. was stipulated by the parties in 1984 to be \$1.2 million. This compensation was for any and all claims for compensation due the Railroad under the Eminent Domain Code.

D. The Construction Agreement

On the same date as the Acquisition Agreement was executed, the City and B&O Railroad entered into a Construction Agreement pertaining to the development and construction of the Schuylkill River Park. The recitals to the Construction Agreement contemplated the “*temporary* use of other property of the Railroad.”

Sections 1 and 2 dealt primarily with the approval process of the plans and specifications for the Schuylkill River Park. Disputes regarding the approval of the City’s plans and specifications were to be submitted to binding arbitration. Section 3 provided for *temporary* “rights-of-entry” that were “through, on, and/or over” the Railroad’s property and right of way. Locust Street and Race Street are not mentioned in section 3 or in any other section of the Construction Agreement. Section 10 acknowledges the existence of “existing unprotected grade

crossing[s].” The Construction Agreement did not grant any new permanent crossings, but neither did it purport to extinguish any of the grade crossings that had been in existence since the time the railroad was built in the 1880s.⁵

Section 4 provided that “All grants and rights-of-entry [i.e., the temporary construction crossings] herein set forth are subject to and subordinate to the safe and continued operation of the Railroad . . .” Importantly, section 4 expressly provided that: “Nothing contained in this section shall prejudice the City’s ownership of roadbeds or any other City property; the designation process herein being required for safety purposes.”⁶

Section 5 assigned responsibility for the items of work necessary or co-incident to construction of the Schuylkill River Park, all of which were to be at “Project expense.” Section 5(a)(7), upon which CSXT bases the present claim, requires the City “to construct at Project expense an effective permanent barricade or wall, between Railroad’s track and the Park Project...” The same section also provided that the City was to post and maintain adequate signs along Park premises warning all users to keep-off of the railroad tracks and right-of-way.

Attached to both the Acquisition Agreement and the Construction Agreement were plans drawn up by the Railroad: Drawing No. RE&IDD 334 dated May 14, 1975, and Engineering Drawing No. 938, dated October 26, 1976. Both of these drawings show Locust Street and Race Streets as legally open streets extending beyond the Railroad’s tracks and right of way to the Schuylkill River. This is consistent with the initial recitals in the Construction Agreement,

⁵ The attempt by CSXT to belittle these grade crossings ignores the 1885 Ordinance. What was the 1885 Ordinance, other than a right granted to the Railroad to cross certain City streets?

⁶ The “roadbeds” referred could only have meant those City streets that were then still crossed by the railroad tracks in accordance with the 1885 Ordinance and that were then still legally open on the City plan – i.e., Spruce Street, Locust Street, Cherry Street, and Race Street. This is consistent with the 1885 Ordinance that granted the railroad the initial right to a **crossing only** of City streets. The railroad was not given and has never been granted title to the streets by the City.

which recognized that plans for the Schuylkill River Park had already been drawn up and that these plans included “access roads” into the park.

E. Construction of Schuylkill River Park

Construction of the Schuylkill River Park was undertaken by the City in 2003, after plans and specifications were submitted to CSXT for its approval. These plans showed openings in the fence that was proposed by the City to satisfy section 5(a)(7) of the Construction Agreement, CSXT did not demand binding arbitration to resolve any disputes it had with the City over this approval process.

II. LEGAL ARGUMENT

A. Standard for Issuance of a Mandatory Preliminary Injunction

The Court of Appeals for the Third Circuit has succinctly stated the requirements that a plaintiff must meet in order for a preliminary injunction to be issued:

We often have recognized that injunctive relief, particularly preliminary relief, is an “extraordinary remedy . . . which should be granted only in limited circumstances.” (citation omitted). To obtain a preliminary injunction, the moving party must demonstrate: (1) the reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured if relief is not granted. Moreover, the district court also should take into account, when relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. See In re Arthur Treacher's Franchisee, 689 F.2d 1137, 1143 (3d Cir. 1982). Thus, “a failure to show a likelihood of success or a failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction.” (citation omitted)

South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 274 F.3d 771, 777 (3d Cir 2001). Furthermore, the law in this Circuit is that “a mandatory preliminary injunction is to be ‘sparingly exercised,’ United States v. Spectro Foods Corp., 544 F.2d 1175, 1181 (3d Cir. 1976), and the burden on the moving party is ‘particularly heavy.’

Punnett v. Carter, 621 F.2d 578, 582 (3d Cir 1980).” IAM Stock Ownership Investment Trust Fund v. Eastern Air Lines, Inc., 639 F.Supp. 1027, 1032 (D.Del. 1986).

B. CSX Transportation Cannot Show a Likelihood of Success on Its Breach of Contract and Promissory Estoppel Claims.

CSXT is not likely to succeed on the merits of its claims. Under the Construction Agreement, the City was obligated to construct a “permanent and effective barricade or wall.” It has already done exactly this. To succeed in its present Motion, CSXT would have this Court hold that the barricade must necessarily be continuous *and* uninterrupted. However, such an interpretation is not required by the language of the contract. Moreover, such an interpretation would directly conflict with the City’s pre-existing legal and property rights, which pre-date and control the interpretation of the contract. When Section 5(a)(7) is interpreted in light of existing law, it does not and cannot lead to the closures of Race Street and Locust Street.

1. CSXT has Waived any Claim that there is a Breach of Contract.

The weakness of CSXT’s case is apparent from the fact that it did not seek to enforce its construction of the agreement at the time and in the manner specified therein. Pursuant to the Construction Agreement, the plans and specifications for the Schuylkill River Park project were subject to the approval of CSXT. Further, CSXT was required to make a prompt review of the plans and to give its approval, comments or replies to comments within 45 days of receipt. Disputes among the parties were to be submitted to binding arbitration.

Despite the apparent foreknowledge of CSXT of the City’s plans with regard to the fencing adjacent to the Schuylkill River Park and the presence of at least two openings in the fence, prior to the release of the plans and specifications for bidding, CSXT did not submit its dispute with the City to binding arbitration. Rather, CSXT waited for many years and then chose

to pursue its dispute with the City via this litigation. Accordingly, CSXT has waived its right to challenge the City's conduct under the Construction Agreement. Therefore, this Court cannot find a breach by the City.

2. The Fence Now Erected is Both a Permanent and an Effective Barricade.

Contrary to CSX Transportation's contentions, the City has fully performed its bargained-for obligations. There can no fair question that the fence erected by the City's contractor is a *permanent* barricade. The fence now in place is not temporary; rather it is a permanent fixture. Moreover, the fencing material and construction were both approved by CSXT prior to the City's design plans being issued for bidding. CSXT cannot now complain that the fencing is not permanent when it approved the very means and methods of constructing the fence.

The fence erected by the City's contractor is also an *effective* barricade. Aside from two openings in the fence at Race Street and Locust Street, the fence is a continuous structure situated between the Schuylkill River Park and the CSXT tracks. It effectively barricades the entire length of the park project from the railroad tracks and channels users of the park to two long-standing public rights of way across the CSXT tracks – at Race Street and Locust Streets. Both of these streets have been legally opened for more than 120 years, since 1883. From that date, they have been in use by citizens, visitors, and property owners alike.

3. Locust Street and Race Street are Public Streets and Public Rights of Way Extending to the Schuylkill River – To the Extent that the Construction Agreement Mandates the Closure and Barricading of Race and Locust Streets with a Permanent Fence, it is Ultra Vires.

CSXT seeks to have the fence openings at Race Street and Locust Street permanently closed, ostensibly in accordance with the provisions of the Construction Agreement. Such a

closure would effectively close off public streets and public rights of way to the Schuylkill River Park and the Schuylkill River. This would be contrary to the rule on vacating and striking of streets. The vacating of streets cannot be permitted under a mere contract. Rather, under the City Code, a City street can be struck or vacated only by a special ordinance of City Council. See Philadelphia City Code, § 11-403.

It is beyond dispute that both of these streets have been legally open on the City's Plan since 1883. From that time forward, numerous plans and surveys consistently show these two streets as open and extending west across the CSX tracks to the Schuylkill River. Indeed, plans made by the Railroad show these two streets as opened and extending to the Schuylkill River. The disputed portions of these two streets – in the case of Locust Street, from 25th Street to the Schuylkill River and in the case of Race Street, from 23rd Street to the Schuylkill River – have never been vacated or closed by the City via special Ordinance.⁷ Because a street in Philadelphia cannot be vacated by mere contract and can be vacated only by a special ordinance of City Council, the subject of which is the vacating of the street, the Construction Agreement cannot be interpreted to call for the closure of these two streets.⁸

⁷ On the other hand, three other streets that were physically crossed by the railroad tracks and did extend to the Schuylkill River – Arch Street, Sansom Street, and Pine Street – were formally vacated and struck from the City Plan by City Ordinance. See Ordinance of March 30, 1895 (striking and vacating Arch Street from 23rd Street to the Schuylkill River), Ordinance of October 1, 1963 (striking and vacating Sansom Street from 24th Street to the Schuylkill River), and Ordinance of October 10, 1963 (striking and vacating Pine Street from Taney Street to the Schuylkill River).

⁸ Merely because the Construction Agreement may have been approved by City Council does not convert or expand the scope of the Construction Agreement into an agreement concerning the vacating and striking of legally open City streets from the City Plan. The Construction Agreement does not purport to effect such a vacating and striking and mere approval by City Council cannot effect the same.

4. The Construction Agreement was for the purpose of granting to the City temporary “rights-of-entry;” it was not intended for the City to relinquish any of its pre-existing property rights in roadbeds and other property.

The Construction Agreement is just that — an agreement defining the parties’ rights and duties during the *temporary* construction of the Park Project. It pertains to the *construction* of the park, and the granting by the Railroad to the City of *temporary* “rights-of-entry” to facilitate the City’s development and construction of the park. The temporary rights-of-entry were for the purpose of performing surveys, test hole borings, and appraisal analysis, and the like. The agreement was plainly intended to facilitate the development of the Schuylkill River Park.

Admittedly, the barricade or wall described by Section 5(a)(7) is intended to survive the construction activities. However, neither that Section, nor the Agreement as a whole, can be interpreted as permanently governing the access to the park and the use of the park by the City and the public. It bears noting that neither Race Street nor Locust Street is mentioned by name in the Construction Agreement. Further, under Section 4 of the Construction Agreement, the designation of the temporary rights-of-entry was without prejudice to the City’s ownership of roadbeds and any other property of the City. Such rights-of-entry as are specified in the Construction Agreement are uniformly described as temporary. See section 3 of the Construction Agreement.

At the time, the City’s property included, *inter alia*, the roadbeds of Locust Street and Race Street, and its right to use such streets was restricted only by the railroad’s subservient right of crossing as granted by the 1885 Ordinance. CSXT’s repeated emphasis on its “right-of-way” ignores the origin of that right of way insofar as Locust Street and Race Street are concerned — the right of way derives from a grant by the City to the Railroad. CSXT’s tracks are there by

permission of the City, not vice versa. Thus, the City's rights to Race Street and Locust Street are superior to CSXT's right of way across such streets.

To read the Construction Agreement as mandating the closure of two legally opened streets, when those streets are not mentioned by name, would be to go beyond the intent of the parties. The Construction Agreement cannot be interpreted as cutting off grade-level access to the park, and thereby effecting a serious and fundamental change in the ownership, possession, use, and control of the City's real estate interests, which are held entirely for the public good.⁹

The claim by CSXT that the fence was to be not only permanent, but also *continuous* along the entire length of the park project is betrayed by the very language of the Construction Agreement. Pursuant to the same section that calls for a barricade or wall, the City is required to post signs warning park users against trespassing on the railroad's right of way. If the fence had been intended by the parties to be permanent *and* continuous, effectively sealing the park from the railroad tracks and Race Street and Locust Street, trespassing upon the railroad tracks would have been impossible, and the requirement of the City to warn park users to stay off the railroad tracks would have been superfluous and meaningless.

5. CSXT Cannot Succeed on its Promissory Estoppel Claim.

CSXT's claim for promissory estoppel is without merit. This doctrine had no application where there is an express contract between the parties. See Carlson v. Arnot-Ogden Mem'l. Hosp., 918 F.2d 411, 416(3rd Cir. 1990)(holding promissory estoppel is unwarranted in light of court's finding that parties formed an enforceable contract); Constar, Inc. v. National Distribution

⁹ CSXT also repeatedly suggests that the public is "trespassing" upon its right of way in order to access the Schuylkill River Park. This is untrue. As noted already, it was the Railroad which received permission in 1885 to "trespass" upon the City streets. Thus, the public's right of passage across Locust Street and Race Street pre-existed the Railroad's right to lay its tracks across the City's streets. It cannot amount to trespassing to use a publicly-opened street for access from one point to another.

Ctrs., Inc., 101 F. Supp. 2d 319, 323 (E.D. Pa. 2000)(applying Pennsylvania law and dismissing promissory estoppel claim where express contract existed); Bethlehem Steel Corp. v. Litton Indus., Inc., 507 Pa. 88, 488 A.2d 581, 593 (Pa. 1985).

Moreover, there is no claim that the Railroad relied upon any oral statements of the City. Rather, CSXT's claim is merely that its predecessor railroad relied upon the interpretation of the Construction Agreement that it now urges upon the Court. Of course, that begs the question of whether its interpretation is correct. In the end, the question is whether the Construction Agreement means what CSXT claims it means. The promissory estoppel count adds nothing to the Plaintiffs case beyond what is already contained in the breach of contract claim.

C. Irreparable Harm

CSXT argues that it will suffer irreparable harm if the Race Street and Locust Street rights-of-way are not closed to the public. Essentially, CSXT claims that it faces an increase in possible liability because of personal injury claims brought by persons who are injured while crossing the railroad tracks at these locations.

There is a short and simple answer to this argument. If CSXT is not negligent in its railroad operations, it will not be held liable for injuries. CSXT can easily minimize its potential exposure by not parking its trains across Locust Street and Race Street in accordance with section 12-1105 of the Philadelphia City Code (which prohibits train parking obstructing a public street for more than five minutes) and section 3713 of the Pennsylvania Vehicle Code, 75 Pa. C. S. §3713 (which prohibits trains from being operated in such manner as to prevent vehicular use of any roadway for a period of time in excess of five minutes).

The idea that CSXT is entitled to minimize its legal exposure by altering the City's long-held property rights, in the absence of a clear agreement to the contrary, is false. Thus, the threat

of possible personal injuries is not only speculative, it is also insufficient to demonstrate irreparable harm because if CSXT exercises due care, as required by the law, it will not suffer any increase in its legal liabilities.

D. Balancing Harms and Benefits to the Parties Favor the City and the Public at Large

CSXT contends that greater harm would be caused by the Court's denial of its request for an injunction. This is untrue. Rather, CSXT's private interests in having two grade crossings eliminated, grade crossings that have existed at Locust Street and Race Street since the construction of the railroad in the 1880's, would no doubt be harmed by a denial of its request. On the other hand, the public interest in having a grade access to the Schuylkill River Park would be greatly enhanced by the Court's denial of the request for injunctive relief. CSXT conflates its private corporate interests in its cost-effective railroad operations with the interest of the public.

III. CONCLUSION

For the reasons set forth above, defendant City of Philadelphia respectfully requests that this Court deny CSXT's Motion for the Issuance of a Preliminary Injunction.

Respectfully submitted,

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Philadelphia, PA 19102-1595

Dated: December 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below the foregoing Entry of Appearance was filed electronically and is available for viewing and downloading from the Electronic Case Filing System of the U.S. District Court for the Eastern District of Pennsylvania. I hereby certify further that, in accordance with Fed. R. Civ. P. 5, service has been made upon counsel of record, Benjamin C. Dunlap, Esquire, via ECF.

Christopher I. McCabe

Date: December 13, 2004

EXHIBIT “A”

Twenty-ninth Ward; Smedley street, from Erie avenue to Venango street, Page street, from Twenty-third to Croskey streets, Fontaine street, from Twenty-third to Croskey streets, Mather street, from Tioga to Venango streets, Page street, from Nineteenth to Twentieth streets, Fontaine street, from Nineteenth to Twentieth streets, Twenty-eighth Ward; Poplar street, from Thirtieth street to Reading Railroad, between the Fifteenth and Twenty-ninth Wards; West College avenue, from Twentieth street to Corinthian avenue, Twenty-ninth Ward; Indiana avenue, from Third to Fourth streets, Twenty-fifth Ward.

Approved the second day of July, A. D. 1885.

WILLIAM B. SMITH,

Mayor of Philadelphia.

AN ORDINANCE

Relative to the construction of the railroad of the Schuylkill River East Side Railroad Company, and of a branch thereof, within the City of Philadelphia, authorizing it to enter upon and occupy certain streets in said city under certain conditions, and providing for the carrying into effect of such authority and conditions.

WHEREAS, The Schuylkill River East Side Railroad Company proposes, upon the passage of this ordinance, to locate its bridge over the river Schuylkill at a point at least fifteen hundred feet south of the Gray's Ferry bridge, and to make such changes in the location of its main line of railroad within the City of Philadelphia as will enable it to avoid the grade crossing of the Gray's Ferry road and the Philadelphia, Wilmington and Baltimore Railroad, in the Thirtieth Ward of this city;

AND WHEREAS, All the causes of dispute which have arisen between the said railroad company and the City of Philadelphia will thus be removed;

AND WHEREAS, The location of the said railroad, with said proposed changes, is shown upon the map or plan herewith presented, and in the construction of said railroad it is necessary for it to cross certain streets of the City of Philadelphia, and to occupy certain streets;

AND WHEREAS, The said Schuylkill River East Side Railroad Company has located a branch line of railroad in the First and Twenty-sixth Wards of this city, extending from the main line of its railroad at a point near Thirty-sixth and Dickinson streets to the Delaware river, therefore:—

SECTION 1. *The Select and Common Councils of the City of Philadelphia do ordain*, That the said Schuylkill River East Side Railroad Company be, and it is, hereby authorized to enter upon and occupy, by way of crossing only, any and all streets, lanes and alleys, over, upon, or under which it may be necessary for its main line of railroad to pass between the points shown on said plan: *Provided, however*, That nothing herein contained shall authorize the longitudinal occupation of any street by said main line other than certain portions of Twenty-fifth street and Pennsylvania avenue in the manner hereinafter provided: *Provided*, That at the points where the said Schuylkill River East Side Railroad crosses the lines of the streets on the east side of the Schuylkill river, the said company shall not occupy any space for its tracks further east than fifty feet east of the centre line crossing said streets.

SECT. 2. The said authority shall only be exercised subject to the following conditions:

1. That the route of said railroad shall be substantially that which is shown upon the said map or plan, and which shall, before this ordinance shall have any effect to confer the authority aforesaid upon said railroad company, be filed by it in the office of the Chief Engineer and Surveyor of the City of Philadelphia: *Provided*, That nothing herein contained shall prevent the said railroad company from making such variations in the line of its said railroad, from Thirty-first street and Schuylkill avenue to South street, between Sutherland avenue and the Port Wardens' line of the Schuylkill river, and from South street to Spruce street, between the said Port Wardens' line and the west line of Twenty-sixth street, and from Spruce street to Market street, between the said Port Wardens' line and the west line of Twenty-fourth street, and from Market street to Race street, between the said Port Wardens' line and the west line of Twenty-third street, and from Race to Vine street, between said Port Wardens' line and the west side of St. David street, and from Vine street to Callowhill street, between Twenty-fourth street and said Port Wardens' line, as may be found to be advantageous in passing through private property.

2. That the bridge over the river Schuylkill shall be constructed at the place shown upon the said plan, with two draw openings, one upon each side of the centre pier, of seventy-five feet clear waterway between the draw pier and each of the two adjoining piers.

3. That the following named streets shall be crossed in the manner particularly specified, that is to say: Wharton street, between Thirty-fourth and Thirty-fifth streets, undergrade; Thirty-fourth street, the Philadelphia, Wilmington and Baltimore Railroad, and Gray's Ferry road, by an undergrade crossing; the South street bridge, the Chestnut street bridge, and Market street bridge, by undergrade crossings. And the Board of Surveyors be, and it is, hereby authorized and directed to revise the lines and grades of all streets between Schuylkill^x avenue and Gray's Ferry road, crossed by said railroad, so as to pass said streets over or under said railroad.

4. The crossings under all the bridges named in the next preceding paragraph shall be made under the supervision of the Chief Engineer and Surveyor of the City of Philadelphia.

5. The said railroad company shall file in the office of the Solicitor of Philadelphia, an agreement to the effect that all passenger trains passing through Philadelphia shall stop to take on and let off passengers.

SECT. 3. That the Chief Commissioner of Highways be, and he is, hereby authorized and directed to notify the owners of property over and through which Twenty-fifth street, between Callowhill street and Hamilton street, and between Spring Garden street and Pennsylvania avenue, of the full width as the same is now laid down upon the confirmed plan of the said city will pass, that at the expiration of three months from the date of said notice the said street will be required for public use of the full width aforesaid, and the said railroad company be, and it is, hereby authorized to occupy longitudinally Twenty-fifth street, between Callowhill street and Pennsylvania avenue, or any portion thereof: *Provided*, That the said railroad shall pass under cover the entire distance between said points. And the Mayor of said city is hereby authorized and requested to enter security forthwith in such sum as shall be directed by the Court of Quarter Sessions of this county for the payment of any damages which may be assessed against said city by reason of such opening.

SECT. 4. That in order to permit the construction of the said railroad along and under Twenty-fifth street, as aforesaid, the Board of Surveyors be, and it is, hereby authorized to change the grade of Callowhill street, at Twenty-fifth street, by raising the same eleven feet; of Hamilton street, at Twenty-fifth street, by raising the same seven and sixty-five one hundredths feet; of Biddle street, at Twenty-fifth street, by raising the same one and forty-five one hundredths feet; and of said Twenty-fifth street, from Callowhill street to Biddle street, so as to conform to the changes of grade in the aforesaid streets crossing the same: *Provided*, That the rate of grade upon said Callowhill and Hamilton streets shall be five feet per one hundred feet; and the said railroad company shall indemnify the city from any and all loss or liability in consequence of the claims of property-owners upon Callowhill street, Hamilton street, Twenty-fifth street, and Biddle street, between the respective points where the grade of each of said streets is thus changed, from any damages which they may suffer in consequence of such change of grade.

SECT. 5. That the Department of Surveys be, and it is, hereby authorized and directed to place upon the plans of the city Pennsylvania avenue, with an increased width upon its northeast line of forty-three feet between Twenty-fifth and Twenty-eighth streets, and of an increased width upon the said northeast line of thirty-three feet from Twenty-eighth street to Poplar street, and that the said Schuylkill River East Side Railroad Company be, and it is, hereby authorized to occupy longitudinally, for railroad purposes, any portion of said street, except fifteen feet upon the said northeast side: *Provided*, That the said railroad company shall indemnify the city by giving bond, in form to be approved by the City Solicitor, with security to be approved by Councils, conditioned to pay any and all damages which may be assessed against the said city for and on account of the said widening.

SECT 6. In case the said railroad shall be located upon the southwest side of the Philadelphia and Reading Railroad, between Twenty-fifth street and Poplar street, said railroad company is hereby authorized to occupy longitudinally so much of the southwest portion of Pennsylvania avenue as may be necessary for the construction of said railroad, and also such portions of the ground within the limits of Fairmount Park, that is, the triangle at the corner of Twenty-fifth street and

Pennsylvania avenue, and the strip of ground along the southwest side of Pennsylvania avenue, between Twenty-fifth and Twenty-eighth streets, of twenty-eight feet in width, and between Twenty-eighth street and a point between Poplar street and Girard avenue, of eighteen feet in width, as is shown upon the said plan; and in order to provide therefor the Department of Surveys be, and is, hereby authorized and directed to place upon the plans of the city Pennsylvania avenue, with an increased width upon its southwestern line, of the said strip of ground, and by adding thereto the said triangle.

SECT. 7. That said Schuylkill River East Side Railroad Company, for the purpose of constructing its said branch railroad, be, and it is, hereby authorized to occupy, longitudinally, the following projected streets, as laid down on the plan of the city, in the First and Twenty-sixth Wards: Schuylkill avenue from Dickinson street to Wolf street, Wolf street from Schuylkill avenue to Twenty-third street, Twenty-third street from Wolf street to Oregon avenue, Oregon avenue from Twenty-third street to the Delaware river, and Meadow street from Oregon avenue to and across Reed street; and also to enter upon and occupy, by way of crossing only, any and all streets, lanes, and alleys over, upon, or under which it may be necessary for the said branch line of railroad to pass, by the way of its route as aforesaid, between its beginning at or near Thirty-sixth and Dickinson streets and its terminus on the Delaware river: *Provided*, That in case there shall be hereafter, by authority of the Select and Common Councils of the City of Philadelphia, and the action of the Board of Surveyors of said city, such change made in the grade of Broad street at the point where the said branch railroad crosses the same as will enable said Broad street to be carried over and above or under the said branch railroad, that it, the said Schuylkill River East Side Railroad Company, shall be at the entire cost of constructing the bridge upon the line of said Broad street over said railroad, and the approaches thereto (in case the grade of said street shall be so changed as to pass over said railroad), or of constructing a bridge to carry said railroad over said Broad street (in case the grade of said street shall be so changed as to pass under said railroad), and that it shall indemnify the city from any and all loss or liability in consequence of the claims of property owners upon said Broad street, between the points where the grade thereof is thus changed, for any damages which they may suffer in conse-

quence of such change of grade. And the Board of Surveyors be, and it is, hereby authorized to revise the grades in conformity herewith, and all expenses of such revision to be paid for by the railroad company: *Provided*, That when the growth of improvements shall require bringing the streets along which the said branch railroad may be laid to the present confirmed grades of the city, the said railroad company shall at its expense raise or depress its tracks to conform to the said grades wherever and whenever it shall be notified to do so by ordinance of City Councils.

SECT. 8. The consent of the said city is hereby given to the occupation of such portion of the properties of the Philadelphia Gas Works, between Chestnut and Filbert streets, in the Ninth Ward, and between Twenty-fourth and Twenty-fifth streets on Callowhill street, as is covered by the location of said railroad through the same, and which is shown upon the plan aforesaid.

SECT. 9. That the said Schuylkill River East Side Railroad Company shall agree to keep its railroad, and all its structures crossing or occupying in any manner any of the streets aforesaid, in good order and condition at all times, and to save the City of Philadelphia harmless, so far as the said city may be liable therefor, from any liability or responsibility whatever which may grow out of the establishment and use of the said railroad over, upon, and under the streets as aforesaid.

SECT. 10. That if the City of Philadelphia shall, at any time in the future, determine to bridge the River Schuylkill, the said railroad company will, if required by the City, make such reasonable adjustment of its tracks as will permit the construction of a bridge in a proper way.

SECT. 11. That the said railroad company shall file a bond, in the sum of twenty thousand dollars, conditioned that it will indemnify the city against any and all injury to any city bridge, now built, or hereafter built, caused by the construction, maintenance, or operation of said railroad.

SECT. 12. That the said railroad company shall file a bond, with good and sufficient security, to be approved by Councils, in the sum of fifty thousand dollars, conditioned to pay to the City of Philadelphia all damage caused to the said city by the location, construction, maintenance, and operation of the said railroad, near or through the property of the Philadelphia Gas Works.

SECT. 13. That the consent granted in this ordinance to the said railroad company to enter the City of Philadelphia shall not be considered as a waiver or estoppel on her part of her right to recover from the said railroad company any and all damages, direct or consequential, resulting to the property of the city from the location, construction, maintenance, and operation of the said railroad.

SECT. 14. That the said railroad company shall enter into a bond, in form to be approved by the City Solicitor, with security to be approved by Councils, to compensate the City of Philadelphia for all loss or damage which she may sustain by reason of the change of grade of any and all streets now opened, and for all loss or damage to said city by reason of the widening, alteration, or re-location of any and all streets now opened along the line of said roads, other than Twenty-fifth street, and for all loss or damage to the city from the alteration, removal, and re-location of gas-mains, sewers, water-pipes, and other like municipal work, which alterations, changes, widenings, and re-locations may become necessary by the construction of the road, as located in said ordinance.

SECT. 15. That the said railroad company shall at all times hereafter maintain and keep in repair all bridges constructed by it in the City of Philadelphia.

SECT. 16. That before this ordinance shall take effect, the said railroad company shall file at the Law Department its acceptance of the provisions named in said ordinance, and a covenant to perform all of the conditions and provisions therein, in such form as the City Solicitor shall approve: *Provided*, That before said ordinance shall take effect, the said railroad company shall file its plan before referred to, and shall pay into the City Treasury the sum of fifty (50) dollars to pay for printing this ordinance.

SECT. 17. That the City Solicitor is hereby directed to discontinue of record, upon payment of costs by the said railroad company, the case of the City of Philadelphia *vs.* The Schuylkill River East Side Railroad Company, in Court of Common Pleas, No. 2, of Philadelphia, March Term, 1884, No. 357.

Approved the third day of July, A. D. 1885.

WILLIAM B. SMITH,

Mayor of Philadelphia.