COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2185CV00238

ELIZABETH REILLY and others[1]

vs.

TOWN OF HOPEDALE and others[2]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

45

The plaintiffs, eleven taxpayers residing in the Town of Hopedale ("Town"), have sued the Town and two members of its Board of Selectmen ("Board") (collectively "Town") as well as John Delli Priscoli, Michael Milanosky, One Hundred Forty Realty Trust ("Trust"), and Grafton & Upton Railroad Company ("G&U") (collectively, "Railroad Defendants"). The plaintiffs allege that the Board exceeded its authority when it approved a Settlement Agreement with the Railroad Defendants involving forestland protected under G. L. c. 61. The plaintiffs seek an injunction preventing the Board from purchasing land as set forth in the Settlement Agreement (Count I); a declaration of Town's rights pursuant under G. L. c. 61, § 8 and an order enforcing those rights against the Railroad Defendants (Count II); and a declaration that certain property at issue in the Settlement Agreement is protected parkland under to art. 97 of the Amendments to the Massachusetts Constitution (Count III).

The Railroad Defendants now move for judgment on the pleadings as to Count II (the only count against them), and the plaintiffs and the Town Defendants both move for judgment on

[1] Carol J. Hall, Donald Hall, Hilary Smith, David Smith, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle

[2] Louis J. Arcude III, Brian R. Keyes, Jon Delli Priscoli, and Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company

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the pleadings. After a hearing and review of the parties' submissions, the plaintiffs' motion is **ALLOWED** as to Court I and **DENIED** as to Counts II and III. The Railroad Defendants' motion is **ALLOWED** as to Count II, the only count against them. The Town Defendants' motion is **DENIED** as to Count I and **ALLOWED** as to Counts II and III. In addition, as set forth below, the court enters a Preliminary Injunction preventing the Railroad Defendants from carrying out any work on the contested forest land for a period of 60 days from the date of this order.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the allegations of the Complaint and the exhibits attached thereto, with some facts reserved for later discussion. The Trust owns slightly more than 155 acres of property at 364 West Street in Hopedale ("Property") of which 130.18 acres are classified as forest land under to G.L. c. 61 and 25.06 acres are classified as wetlands. The Property is contiguous with the Hopedale Parklands, a 279-acre recreational and conservation park owned by the Town.

On June 27, 2020, the Trust and G&U entered into a purchase and sale agreement for the Property. On July 9, G&U (on behalf of the Trust) sent the Town a Notice of Intent to purchase the Property for $1,175,000, as required by G.L. c. 61, § 8.[3] The Town promptly informed the Trust and G&U of its intent to exercise its statutory right of first refusal ("Option") to buy the Property on the same terms as the proposed sale to G&U. October 24, 2020, residents voted at a timely held Town Meeting to appropriate the necessary funds to exercise the Option. The Board then voted to exercise the Option, recorded notice of its exercise at the Registry of Deeds, and

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sent the Trust and G&U notice that it had exercised the Option along with a proposed purchase and sale agreement.

On October 7, 2020, the lawyer now representing the Railroad Defendants notified the Town that the Trust was withdrawing its Notice of Intent. Around the same time, G&U purchased the "beneficial interest" in the 130.18 acres of forest land for the same price as contemplated in the purchase and sale agreement without giving the Town any Notice of Intent under G. L. c. 61, § 8.[4] G&U President Jon Delli Priscoli and G&U chief executive officer Michael Mr. Milanosky were appointed as the new trustees of the Trust. G&U then began clearing the Property of trees.

On October 28, 2020, the Town sued the Railroad Defendants in Massachusetts Land Court,[5] seeking (1) a declaratory judgment that the Town's Option remained valid, and (2) an injunction against further land clearing by G&U. The Land Court denied the Town's motion for a preliminary injunction, finding that on the limited facts before it the court could not conclude that the Option had ripened. The Land Court accepted the Railroad Defendants' representation that they would not continue to clear the land during the pendency of the case and ordered the Town and the Railroad Defendants to engage in mediation. In the meantime, G&U filed a declaratory petition with the Surface Transportation Board ("STB"), seeking federal preemption of the Town's Option to purchase the forest land and its statutory right to acquire the wetlands by eminent domain.

In February 2021, the Town and the Railroad Defendants entered into the Settlement Agreement ("Agreement") resolving Land Court action and G&U's STB petition. The Railroad Defendants agreed to sell the Town 40 acres of the Property's 130.18 acres of forest land and the

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[5] *Town of Hopedale* v. *John Delli Priscoli, Trustee of the One Hundred Forty Realty Trust*, 20-MISC-0467

full 25.06 acres of wetlands for $587,500. The Railroad Defendants also agreed to donate to the Town a separate parcel of 20 acres located at 363 West Street in Hopedale. The donation was subject to Town Meeting approval. In return, the Town agreed to waive its Option with respect to the remaining 90 acres of forest land. On February 10, 2021, the Town and the Railroad Defendants filed a Stipulation of Dismissal in the Land Court action.

On March 3, 2021, the plaintiffs filed the Verified Complaint in this action and sought a preliminary injunction preventing the Town from making any expenditures pursuant to the Settlement Agreement. On March 11, the court (Frison, J.) denied the plaintiffs' motion for preliminary injunction. The plaintiffs appealed. On April 8, the Single Justice of the Appeals Court (Meade, J.) issued an order allowing the plaintiffs' motion for preliminary injunction. Despite the injunction, G&U apparently resumed cutting trees on the forest land, prompting the plaintiffs to seeks an injunction preventing alteration of the forest land. By order dated September 24, 2021, the court enjoined the Railway Defendants from any "further alteration or destruction of the 130.18 acres of forest land" pending further order of the court. The Railway Defendants appealed that order to a single justice of the Massachusetts Court of Appeals, who has justice declined to intervene.

DISCUSSION

"A defendant's rule 12(c) motion [for judgment on the pleadings] is 'actually a motion to dismiss . . . [that] argues that the complaint fails to state a claim upon which relief can be granted.'" *Jarosz* v. *Palmer*, 436 Mass. 526, 529 (2002), quoting J.W. Smith & H.B. Zobel, Rules Practice § 12.16 (1974). "In deciding a rule 12(c) motion, all facts pleaded by the nonmoving party must be accepted as true." *Id.* at 529-30. The court "draws [its] facts from the well pleaded allegations of the complaint and the admissions or failures of denial presented by

the answer." *Ridgeley Mgmt. Corp.* v. *Planning Bd. of Gosnold*, 82 Mass. App. Ct. 793, 797 (2012). Judgment on the pleadings is appropriate when, as here, "there are no material facts in dispute on the face of the pleadings." *Clarke* v. *Metro. Dist. Comm'n*, 11 Mass. App. Ct. 955, 956 (1981).

A. Scope of the Board's Settlement Authority (Count I)

General Laws c. 61, § 8, provides that "[l]and taxed under this chapter shall not be sold for, or converted to, residential, industrial or commercial use . . . 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." Once notice is provided, "the city or town shall have, in the case of intended sale, a first refusal option to meet a bona fide offer to purchase the land." G.L. c. 61, § 8. In order to exercise this option, the Town must hold a public hearing, mail notice to the landowner (including a proposed purchase and sale agreement), and record the exercise of the option in the registry of deeds.

Separately, G.L. c. 40, § 14, allows the "selectmen of a town . . . [to] purchase . . . any land, easement or right therein within the city or town . . . ." However, "no land, easement or right therein shall be taken or purchased under this section unless the taking or purchase thereof has previously been authorized . . . by vote of the town . . . ." G.L. c. 40, § 14.

In this case, it is undisputed that the Town attempted to carry out the steps necessary to exercise its Option with respect to the 130.18 acres of forest land pursuant to Chapter 61. To that end, it held a Town Meeting on October 24, 2020, at which it placed before town residents several Articles for a vote. Article 3 stated in pertinent part:

> "To see if the Town will vote to acquire, by purchase or eminent domain, certain property, containing 130.18 acres, more or less, located at 364 West Street . . . and in order to fund such acquisition, raise and appropriate . . . [$1,175,000] . . . said property being acquired pursuant to a right of first refusal in G.L. c. 61, § 8."

The motion carried with a unanimous vote. Article 5 stated in pertinent part: "To see if the Town will vote to take by eminent domain . . . the land located at 364 West Street which is not classified as forest land under Chapter 61 of the General Laws, consisting of 25.06 acres, more or less" and to borrow up to $25,000 to fund the acquisition. That motion also carried unanimously.

The Town Defendants concede that G.L. c. 40, § 14, provides the sole basis for the Board's authority to acquire virtually any real property and to appropriate funding for such acquisition. They argue, however, that the Town Meeting's appropriation of funds represents an upper limit on spending: that is, that the Board had discretionary authority to acquire any portion of the Property up to the full 155 acres, for any price up to $1,175,000 for the 130.18 acres of forest land and up to $25,000 for the 25.06 acres of wetlands.

For this proposition, the Town Defendants rely on *Russell* v. *Town of Canton*, 361 Mass. 727 (1972). There, the town meeting was presented with an article pursuant to G.L. c. 40, § 14, to take by eminent domain "20 acres, more or less" of property owned by the plaintiff landowners. *Id.* at 728. The town meeting voted unanimously to take "approximately 18 acres" and to appropriate $36,000 for that purpose. The Canton board of selectmen ultimately took only 15.25 acres, paying the plaintiff landowners $30,500 and leaving them with a 1.5 acre lot. In setting forth the factual background if its decision, the court highlighted the town superintendent's testimony that the leftover 1.5-acre lot "was all rock," which "rose rapidly as solid ledge . . . to a point about 80 feet from the street, and some twenty feet higher than the street, and then sloped off to the rear of the property" and that creating roadway access across the lot to the rest of the property "would require the removal of 1,000 cubic yards of ledge," presumably at significant cost to the town. *Id.* at 729.

The court rejected the plaintiffs' argument that the town meeting authorized only the taking of their whole 16.75 acres, not the 15.25-acre subset, explaining: "[neither] the warrant or the vote of the town . . . expressly limits the power of the board to a taking of the entire parcel owned by the plaintiffs. Rather, each purports to estimate the area authorized to be taken, the warrant by the words '20 acres, more or less,' and the vote by the words 'approximately 18 acres.' Both estimates exceeded the area which the plaintiffs actually owned at the time, viz. 16.75 acres." *Id.* at 732. Because "the 15.25 acres covered by the board's taking [were] admittedly included in and a part of the parcel described by more general language in the warrant and the town vote," the board had discretion to take only that lesser portion. *Id.*

This case is different. Unlike the warrant and vote in *Russell*, here the area to be taken was precisely defined. Although the documents used the term of art "more or less," both set forth precise acreage: "130.18 acres more or less of forest land: and "25.06 acres, more or less" of other property. Together those portions constitute the exact recorded acreage of the Property. In addition, unlike in *Russell*, the Board's actions here represent a substantial departure from the original Town Meeting authorizations. In *Russell*, the Canton board of selectmen took nearly all of the land authorized by the town meeting. In contrast, here the Board settled for less half of the Property, which was a substantial deviation from the acquisition authorized by the Town Meeting.[6]

[6] Although the Town Defendants point out that they are acquiring 85 acres under the Settlement Agreement (slightly less than half the area of the Property) for $587,500 (half the contemplated purchase price for the 130-acre forest land area), only 65 acres of that is part of the Property and only 40 of those 64 acres are forest land. The remaining 20 acres was to be donated by the Railroad Defendants from a separate parcel – which donation, notably, the Settlement Agreement itself states is subject to Town Meeting approval because it represents an acquisition of land not previously authorized pursuant to G.L. c. 40, § 14. Correspondence about the original sale by the Trust to G&U reflects that G&U was to pay $1,175,000 for the entire 155 acres of the Property; under the terms of Article 3 and Article 5, the Town would have paid slightly more - $1.2 million in total ($1,175,000 for the forest land and $25,000 for the wetlands).

Moreover, the Chapter 71 Option referenced in Article 3 can only be exercised according to the terms of the triggering purchase and sale agreement between the Trust and G&U. The Town may not materially alter those terms by exercising the Option only as to part of the land. See *Town of Franklin* v. *Wylie*, 443 Mass. 187, 195-196 (2005) ("to meet the purchasers' bona fide offer, the town was required to purchase the land on substantially the same terms and conditions as presented in [that] agreement"). In contrast, *Russell* addressed a general taking under eminent domain. These distinctions preclude analogy to *Russell*'s narrow holding, in which the court took care to state that "*on the limited facts of this case*, we hold that the board's taking was authorized by the town vote and was in all respects valid" (emphasis added). *Russell*, 361 Mass. at 732.

In sum, while the Town Defendants are correct that the G.L. c. 61, § 8, does not permit the plaintiffs to force the Board to exercise the Town's Option in the first instance, the statute does not allow the Board to acquire land without Town Meeting approval. Once the Board elected to exercise the Option and obtained a precisely worded authorization to acquire specific land pursuant to specific rights, it was bound by the terms of that authorization. Therefore, the Board exceeded its authority when it entered into the Settlement Agreement without Town Meeting authorization.

This is not, however, to suggest that settlement of the Land Court case could never be proper. As a general rule, select boards empowered to act as a town's agents in litigation are likewise empowered to settle such claims. See *George A. Fuller Co.* v. *Com.*, 303 Mass. 216, 222 (1939), citing *Jones* v. *Inhabitants of Natick*, 267 Mass. 567, 569 (1929) ("It is in the power of towns to settle claims which may be made upon them arising out of their administration of their municipal affairs"); *Campbell* v. *Inhabitants of Upton*, 113 Mass. 67, 70 (1873) (municipal

capacity to sue or be sued includes "consequently [the capacity] to submit to arbitration"). Nothing in the language of G.L. c. 61, § 8, or related case law bars a town from settling a claim simply because that claim arises out of the town's attempt to invoke a first refusal option. Indeed, as Justice Meade pointed out in granting the plaintiffs' motion for a preliminary injunction in this very case, "a town vote authorizing the select board to purchase any or all of the land at issue . . . would render the transaction lawful." The sole impediment to execution of the Settlement Agreement is that the Board failed to obtain prior authorization from the Town Meeting as required by G.L. c. 40, § 14.

For these reasons, the plaintiffs' motion for judgment on the pleadings is allowed as to Count I and the Town Defendants' cross-motion is denied as to Count I.

B. Enforcement of the G.L. c. 61, § 8, Option (Count II)

In Count II, the plaintiffs go further by requesting a declaration that the Town validly exercised the Option. They ask the court to order the Railroad Defendants to sell the Property to the Town according to the terms of the Town's October 2020 proposed purchase and sale agreement. The plaintiffs lack standing to seek this relief. Although G.L. c. 40, § 53, gives any ten taxpayers a right of action to prevent a municipality from illegally spending or raising funds, as in Count I, it does not follow that they have a right of action to compel the Town to spend funds. Similarly, G.L. c. 214, § 3(10), creates a ten-taxpayer right of action to "enforce the purpose or purposes of any . . . conveyance which has been . . . made to and accepted by any . . . town . . . for a specific purpose or purposes." At issue here, however, is not whether the Town illegally altered the use of property conveyed to it for a specific purpose; rather the plaintiffs seek to compel the Town to carry out a conveyance in the first instance. This is plainly beyond the scope of § 3(10).

Moreover, as the Town Defendants correctly note, the power to exercise the Option rests solely with the Board and not with the Town Meeting. See G.L. c. 61, § 8. "Although G.L. c. 40, § 14, requires that . . . [a] taking be authorized by a vote of the town, it vests the power to make the taking in the selectmen of the town. ... If the selectmen, being authorized by the town to make a taking, do not make it, the decision is not judicially reviewable as to its wisdom." *Russell*, 361 Mass. at 731. Therefore, it lies within the Board's sole discretion to determine whether to seek Town Meeting approval for the Settlement Agreement, to renew its attempts to enforce the Option, or to do neither. For all of the foregoing reasons, the plaintiffs' motion for judgment on the pleadings is denied as to Count II; the Town Defendants' cross-motion for judgment on the pleadings is allowed as to Count II; and the Railroad Defendants' motion for judgment on the pleadings as to Count II is allowed.

C. Statutory Environmental Protections (Count III)

Finally, the plaintiffs seek a declaration that the 130.18 acres of forest land within the Property are protected parkland under art. 97 of the Amendments to the Massachusetts Constitution. Art. 97 provides that land dedicated as parkland "shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court." See *Smith* v. *City of Westfield*, 478 Mass. 49, 55 (2017). The basis for this declaration, the plaintiffs contend, is the language in Article 3 specifying that the Town would acquire the 130 acres, pursuant to the Option, for the purpose of "maintain[ing] and preserv[ing] said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes."

This argument, however, puts the cart before the horse: while Article 3 *authorized* the Town to expend funds to acquire the forest land for a particular purpose, that authorization did

not by itself complete the acquisition of the property at issue. Were it otherwise, G.L. c. 61, § 8, would not need to specify that a town exercising its statutory first refusal option must include with its notice of exercise "a proposed purchase and sale contract or other agreement between the city or town and the landowner" to be executed within 90 days. No such purchase and sale contract was executed in this case because the Railroad Defendants challenged whether the Town had validly exercised the Option. The notice of exercise of the Option recorded in the Registry of Deeds was signed only by the Board of Selectmen, on behalf of the Town, and not by the Trust. Accordingly, the Town never acquired the 130 acres of forest land in the first instance, much less dedicated it as parkland pursuant to art. 97. The plaintiffs' motion for judgment on the pleadings is therefore denied as to Count III and the Town Defendants' cross-motion is allowed as to Count III.

D. Injunction

The court acknowledges that there has been substantial litigation before the Land Court, this court, and the Appeals Court over whether the Railroad Defendants may continue clearing and other site work during the pendency of litigation related to the Property. Although this judgment on the pleadings, effectively ends this litigation, the court is mindful of the Railroad Defendants' attempt to circumvent the Chapter 61, § 8, process by purporting to acquire only the "beneficial interest" in the forest land while undertaking the same commercial operations that Chapter 61 allows municipalities to preclude. See *Goodwill Enters., Inc. v. Garland*, 2017 WL 4801104 at *8 (Mass. Land Ct., Oct. 20, 2017) (contractual right of first refusal triggered by alienation of beneficial interest in property). Moreover, the court cannot ignore (1) the Railroad Defendants' initiation of clearing operations after the Town issued a notice of intent but before it

could hold a Town Meeting to appropriate funds to exercise the Option; and (2) its resumption of clearing operations while the Appeals Court's injunction remained in place.

Therefore, the court finds it appropriate to issue continue the temporary injunction barring the Railroad Defendants from conducting clearing or other site work on the Property for a limited period of time sufficient to allow the Town to decide whether to seek the Town Meeting authorization necessary to validate the Settlement Agreement or to take the necessary steps to proceed with its initial decision to exercise the Option for the entire Property. While G.L. c. 40, § 14, does not provide any particular time period in which a town must hold a town meeting to authorize the acquisition of land, the Legislature has expressed a view on the appropriate time frame for such matters in G.L. c. 61, §8, which gives a town 120 days to exercise its first refusal option. Because the decision now before the Town is more limited in scope, however, a shorter period of 60 days is appropriate for this temporary injunction.

Therefore, the Railroad Defendants are enjoined from carrying out any clearing or other site work on the Property for a period of 60 days following the issuance of this decision.

ORDER

For the foregoing reasons:

1) Defendants, Jon Delli Priscoli, Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company Motion for Judgment on the Pleadings as to Count II of Plaintiffs' Verified Complaint is **ALLOWED.**

2) Plaintiffs' Motion for Judgment on the Pleadings is **ALLOWED** as to Count I and **DENIED** as to Counts II and III.

3) The Town of Hopedale and Hopedale Board of Selectmen's Cross-Motion for Judgment on the Pleadings is **DENIED** as to Count I and **ALLOWED** as to Counts II and III.

4) It is further **ORDERED** that Jon Delli Priscoli, Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company are enjoined from

carrying out any clearing or other site work on the Property for a period of 60 days following the issuance of this decision.

Karen L. Goodwin
Justice of the Superior Court

DATED: November 4, 2021

LURIE FRIEDMAN LLP

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BOSTON, MA 02109

DAVID E. LURIE

617-367-1970
dlurie@luriefriedman.com

November 12, 2021

BY EMAIL

Brian Riley

Re: Reilly, et al. v. Town of Hopedale, et al. Worcester Superior Court Civil Action No. 2185CV238D

Dear Brian:

I write on behalf of my clients in the above-referenced case regarding the Court's Decision entered on November 10, 2021. I have attached a copy of the Decision as Exhibit A to this letter. The Court makes clear that the Select Board now has the ability to proceed to acquire all 130 acres of Forestland as already authorized unanimously at Town Meeting and pursuant to the Option already exercised by the Select Board and recorded at the Registry of Deeds. See Decision at p. 10 ("[I]t lies within the Board's sole discretion to determine whether to … renew its attempts to enforce the Option…") and p. 12 (enjoining Railroad from clearing Forestland for an additional 60 days to give the Town sufficient time to decide whether to "take the necessary steps to proceed with its initial decision to exercise the Option for the entire property.").

We strongly urge the Board to proceed to acquire all of the Forestland for the reasons set forth below.

(1) Acquiring all of the Forestland will preserve it as conservation land for open space and passive recreation for generations. The Select Board once again has the opportunity – and the responsibility – to do the right thing and preserve all of the land, which is essential to the Town's future wellbeing. The Hopedale Foundation has already committed to fund much of the acquisition, but only if the Town obtains the entire 130 acre Forestland. The Town has already appropriated the remainder. The Town has already expressed its will that this must happen. The Select Board would violate their duties to the public if they do not act in accordance with the unanimous expressed direction of Town residents.

(2) There is no risk of losing the 25 acre wetlands as a potential water supply. The Town has already recorded a taking of the property, approved by Town meeting, under G.L. c. 79. Any attempt by the Railroad to claim preemption of the taking will fail. The Railroad has no use for the land; it is wetlands and is unconnected to the Railroad's right of way or 18 acre parcel. We recently defeated a similar attempt by the Railroad to seek a preemption ruling by the Surface Transportation Board regarding a property dispute in downtown Hopedale. See STB decision, copy attached as Exhibit B. We would be willing to represent the Town at no cost to the Town defending any such preemption claim by the Railroad.

(3) There is no question that the Option is fully enforceable. The Court has made that clear in its decision. Again, we would be willing to represent the Town at no cost to the Town in seeking enforcement of the Option. There is no downside for the Select Board to pursue enforcement.

(4) Any attempt to obtain approval of the Settlement Agreement at a special town meeting will be defeated. The claim that getting 40 out of the 130 acres of Forestland is the best that can be done, leaving 90 acres to be industrially developed by the Railroad, is simply wrong. As this litigation has shown, the Railroad's bluster should not detract the Select Board from its mission to preserve all of the Forestland.

(5) The claim that revenue from Railroad development of the 90 acres of Forestland is important for the Town's financial wellbeing is hollow. The Finance Committee has already approved acquisition of all 130 acres and has voiced no concerns about loss of potential tax revenues from Railroad development. Any tax revenues are entirely speculative and in any event pale in comparison to the very real destruction of the Forestland that would occur under the Settlement Agreement. Here is a link to a drone video showing the devastation already wrought by the Railroad's cutting of trees for an access road across the Forestland. https://www.dropbox.com/sh/ynr9dherkr6io1c/AAApx9viCmH1vW77qQRbN7X5a/MP4?dl=0&preview=DJI_0236.MP4&subfolder_nav_tracking=1 The Court has enjoined this destruction for an additional 60 days, giving the Select Board another opportunity to do the right thing for the Town. Please do not waste it.

(6) Town Meeting approval of the Settlement Agreement would not end this litigation. If the Board does not proceed to acquire all of the Forestland, my clients intend to continue to seek an injunction against any further land clearing as well as an appeal of the portion of the Decision that wrongly denies them standing to seek enforcement of the Option. At the end of the day, we anticipate obtaining a court ruling consistent with the expressed will of the Town that all of the Forestland shall and must be preserved.

For all of these reasons, once again we urge the Select Board to act in accordance with the unanimous Town Meeting vote and acquire all of the Forestland. It is the right thing to do. Please forward this letter to the Select Board. We would be glad to discuss this matter further by Zoom, in person, and/or at a public meeting.

Very truly yours,

/s/ David E. Lurie
David E. Lurie

Enclosures
cc: Harley C. Racer, Esq.
Clients
Hopedale Conservation Commission
Hopedale Water and Sewer Commission
Hopedale Finance Committee
Diana Schindler

EXHIBIT A

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In February 2021, the Town and the Railroad Defendants entered into the Settlement Agreement ("Agreement") resolving Land Court action and G&U's STB petition. The Railroad Defendants agreed to sell the Town 40 acres of the Property's 130.18 acres of forest land and the

[4] G&U also purchased the 25-acre wetlands for $1.00

[5] *Town of Hopedale* v. *John Delli Priscoli, Trustee of the One Hundred Forty Realty Trust*, 20-MISC-0467

full 25.06 acres of wetlands for $587,500. The Railroad Defendants also agreed to donate to the Town a separate parcel of 20 acres located at 363 West Street in Hopedale. The donation was subject to Town Meeting approval. In return, the Town agreed to waive its Option with respect to the remaining 90 acres of forest land. On February 10, 2021, the Town and the Railroad Defendants filed a Stipulation of Dismissal in the Land Court action.

On March 3, 2021, the plaintiffs filed the Verified Complaint in this action and sought a preliminary injunction preventing the Town from making any expenditures pursuant to the Settlement Agreement. On March 11, the court (Frison, J.) denied the plaintiffs' motion for preliminary injunction. The plaintiffs appealed. On April 8, the Single Justice of the Appeals Court (Meade, J.) issued an order allowing the plaintiffs' motion for preliminary injunction. Despite the injunction, G&U apparently resumed cutting trees on the forest land, prompting the plaintiffs to seeks an injunction preventing alteration of the forest land. By order dated September 24, 2021, the court enjoined the Railway Defendants from any "further alteration or destruction of the 130.18 acres of forest land" pending further order of the court. The Railway Defendants appealed that order to a single justice of the Massachusetts Court of Appeals, who has justice declined to intervene.

DISCUSSION

"A defendant's rule 12(c) motion [for judgment on the pleadings] is 'actually a motion to dismiss . . . [that] argues that the complaint fails to state a claim upon which relief can be granted.'" *Jarosz* v. *Palmer*, 436 Mass. 526, 529 (2002), quoting J.W. Smith & H.B. Zobel, Rules Practice § 12.16 (1974). "In deciding a rule 12(c) motion, all facts pleaded by the nonmoving party must be accepted as true." *Id.* at 529-30. The court "draws [its] facts from the well pleaded allegations of the complaint and the admissions or failures of denial presented by

the answer." *Ridgeley Mgmt. Corp.* v. *Planning Bd. of Gosnold*, 82 Mass. App. Ct. 793, 797 (2012). Judgment on the pleadings is appropriate when, as here, "there are no material facts in dispute on the face of the pleadings." *Clarke* v. *Metro. Dist. Comm'n*, 11 Mass. App. Ct. 955, 956 (1981).

A. Scope of the Board's Settlement Authority (Count I)

General Laws c. 61, § 8, provides that "[l]and taxed under this chapter shall not be sold for, or converted to, residential, industrial or commercial use . . . 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." Once notice is provided, "the city or town shall have, in the case of intended sale, a first refusal option to meet a bona fide offer to purchase the land." G.L. c. 61, § 8. In order to exercise this option, the Town must hold a public hearing, mail notice to the landowner (including a proposed purchase and sale agreement), and record the exercise of the option in the registry of deeds.

Separately, G.L. c. 40, § 14, allows the "selectmen of a town . . . [to] purchase . . . any land, easement or right therein within the city or town . . . ." However, "no land, easement or right therein shall be taken or purchased under this section unless the taking or purchase thereof has previously been authorized . . . by vote of the town . . . ." G.L. c. 40, § 14.

In this case, it is undisputed that the Town attempted to carry out the steps necessary to exercise its Option with respect to the 130.18 acres of forest land pursuant to Chapter 61. To that end, it held a Town Meeting on October 24, 2020, at which it placed before town residents several Articles for a vote. Article 3 stated in pertinent part:

> "To see if the Town will vote to acquire, by purchase or eminent domain, certain property, containing 130.18 acres, more or less, located at 364 West Street . . . and in order to fund such acquisition, raise and appropriate . . . [$1,175,000] . . . said property being acquired pursuant to a right of first refusal in G.L. c. 61, § 8."

The motion carried with a unanimous vote. Article 5 stated in pertinent part: "To see if the Town will vote to take by eminent domain . . . the land located at 364 West Street which is not classified as forest land under Chapter 61 of the General Laws, consisting of 25.06 acres, more or less" and to borrow up to $25,000 to fund the acquisition. That motion also carried unanimously.

The Town Defendants concede that G.L. c. 40, § 14, provides the sole basis for the Board's authority to acquire virtually any real property and to appropriate funding for such acquisition. They argue, however, that the Town Meeting's appropriation of funds represents an upper limit on spending: that is, that the Board had discretionary authority to acquire any portion of the Property up to the full 155 acres, for any price up to $1,175,000 for the 130.18 acres of forest land and up to $25,000 for the 25.06 acres of wetlands.

For this proposition, the Town Defendants rely on *Russell* v. *Town of Canton*, 361 Mass. 727 (1972). There, the town meeting was presented with an article pursuant to G.L. c. 40, § 14, to take by eminent domain "20 acres, more or less" of property owned by the plaintiff landowners. *Id.* at 728. The town meeting voted unanimously to take "approximately 18 acres" and to appropriate $36,000 for that purpose. The Canton board of selectmen ultimately took only 15.25 acres, paying the plaintiff landowners $30,500 and leaving them with a 1.5 acre lot. In setting forth the factual background if its decision, the court highlighted the town superintendent's testimony that the leftover 1.5-acre lot "was all rock," which "rose rapidly as solid ledge . . . to a point about 80 feet from the street, and some twenty feet higher than the street, and then sloped off to the rear of the property" and that creating roadway access across the lot to the rest of the property "would require the removal of 1,000 cubic yards of ledge," presumably at significant cost to the town. *Id.* at 729.

The court rejected the plaintiffs' argument that the town meeting authorized only the taking of their whole 16.75 acres, not the 15.25-acre subset, explaining: "[neither] the warrant or the vote of the town . . . expressly limits the power of the board to a taking of the entire parcel owned by the plaintiffs. Rather, each purports to estimate the area authorized to be taken, the warrant by the words '20 acres, more or less,' and the vote by the words 'approximately 18 acres.' Both estimates exceeded the area which the plaintiffs actually owned at the time, viz. 16.75 acres." *Id.* at 732. Because "the 15.25 acres covered by the board's taking [were] admittedly included in and a part of the parcel described by more general language in the warrant and the town vote," the board had discretion to take only that lesser portion. *Id.*

This case is different. Unlike the warrant and vote in *Russell*, here the area to be taken was precisely defined. Although the documents used the term of art "more or less," both set forth precise acreage: "130.18 acres more or less of forest land: and "25.06 acres, more or less" of other property. Together those portions constitute the exact recorded acreage of the Property. In addition, unlike in *Russell*, the Board's actions here represent a substantial departure from the original Town Meeting authorizations. In *Russell*, the Canton board of selectmen took nearly all of the land authorized by the town meeting. In contrast, here the Board settled for less half of the Property, which was a substantial deviation from the acquisition authorized by the Town Meeting.[6]

[6] Although the Town Defendants point out that they are acquiring 85 acres under the Settlement Agreement (slightly less than half the area of the Property) for $587,500 (half the contemplated purchase price for the 130-acre forest land area), only 65 acres of that is part of the Property and only 40 of those 64 acres are forest land. The remaining 20 acres was to be donated by the Railroad Defendants from a separate parcel – which donation, notably, the Settlement Agreement itself states is subject to Town Meeting approval because it represents an acquisition of land not previously authorized pursuant to G.L. c. 40, § 14. Correspondence about the original sale by the Trust to G&U reflects that G&U was to pay $1,175,000 for the entire 155 acres of the Property; under the terms of Article 3 and Article 5, the Town would have paid slightly more - $1.2 million in total ($1,175,000 for the forest land and $25,000 for the wetlands).

Moreover, the Chapter 71 Option referenced in Article 3 can only be exercised according to the terms of the triggering purchase and sale agreement between the Trust and G&U. The Town may not materially alter those terms by exercising the Option only as to part of the land. See *Town of Franklin* v. *Wylie*, 443 Mass. 187, 195-196 (2005) ("to meet the purchasers' bona fide offer, the town was required to purchase the land on substantially the same terms and conditions as presented in [that] agreement"). In contrast, *Russell* addressed a general taking under eminent domain. These distinctions preclude analogy to *Russell*'s narrow holding, in which the court took care to state that "*on the limited facts of this case*, we hold that the board's taking was authorized by the town vote and was in all respects valid" (emphasis added). *Russell*, 361 Mass. at 732.

In sum, while the Town Defendants are correct that the G.L. c. 61, § 8, does not permit the plaintiffs to force the Board to exercise the Town's Option in the first instance, the statute does not allow the Board to acquire land without Town Meeting approval. Once the Board elected to exercise the Option and obtained a precisely worded authorization to acquire specific land pursuant to specific rights, it was bound by the terms of that authorization. Therefore, the Board exceeded its authority when it entered into the Settlement Agreement without Town Meeting authorization.

This is not, however, to suggest that settlement of the Land Court case could never be proper. As a general rule, select boards empowered to act as a town's agents in litigation are likewise empowered to settle such claims. See *George A. Fuller Co.* v. *Com.*, 303 Mass. 216, 222 (1939), citing *Jones* v. *Inhabitants of Natick*, 267 Mass. 567, 569 (1929) ("It is in the power of towns to settle claims which may be made upon them arising out of their administration of their municipal affairs"); *Campbell* v. *Inhabitants of Upton*, 113 Mass. 67, 70 (1873) (municipal

capacity to sue or be sued includes "consequently [the capacity] to submit to arbitration"). Nothing in the language of G.L. c. 61, § 8, or related case law bars a town from settling a claim simply because that claim arises out of the town's attempt to invoke a first refusal option. Indeed, as Justice Meade pointed out in granting the plaintiffs' motion for a preliminary injunction in this very case, "a town vote authorizing the select board to purchase any or all of the land at issue . . . would render the transaction lawful." The sole impediment to execution of the Settlement Agreement is that the Board failed to obtain prior authorization from the Town Meeting as required by G.L. c. 40, § 14.

For these reasons, the plaintiffs' motion for judgment on the pleadings is allowed as to Count I and the Town Defendants' cross-motion is denied as to Count I.

B. Enforcement of the G.L. c. 61, § 8, Option (Count II)

In Count II, the plaintiffs go further by requesting a declaration that the Town validly exercised the Option. They ask the court to order the Railroad Defendants to sell the Property to the Town according to the terms of the Town's October 2020 proposed purchase and sale agreement. The plaintiffs lack standing to seek this relief. Although G.L. c. 40, § 53, gives any ten taxpayers a right of action to prevent a municipality from illegally spending or raising funds, as in Count I, it does not follow that they have a right of action to compel the Town to spend funds. Similarly, G.L. c. 214, § 3(10), creates a ten-taxpayer right of action to "enforce the purpose or purposes of any . . . conveyance which has been . . . made to and accepted by any . . . town . . . for a specific purpose or purposes." At issue here, however, is not whether the Town illegally altered the use of property conveyed to it for a specific purpose; rather the plaintiffs seek to compel the Town to carry out a conveyance in the first instance. This is plainly beyond the scope of § 3(10).

Moreover, as the Town Defendants correctly note, the power to exercise the Option rests solely with the Board and not with the Town Meeting. See G.L. c. 61, § 8. "Although G.L. c. 40, § 14, requires that . . . [a] taking be authorized by a vote of the town, it vests the power to make the taking in the selectmen of the town. ... If the selectmen, being authorized by the town to make a taking, do not make it, the decision is not judicially reviewable as to its wisdom." *Russell*, 361 Mass. at 731. Therefore, it lies within the Board's sole discretion to determine whether to seek Town Meeting approval for the Settlement Agreement, to renew its attempts to enforce the Option, or to do neither. For all of the foregoing reasons, the plaintiffs' motion for judgment on the pleadings is denied as to Count II; the Town Defendants' cross-motion for judgment on the pleadings is allowed as to Count II; and the Railroad Defendants' motion for judgment on the pleadings as to Count II is allowed.

C. Statutory Environmental Protections (Count III)

Finally, the plaintiffs seek a declaration that the 130.18 acres of forest land within the Property are protected parkland under art. 97 of the Amendments to the Massachusetts Constitution. Art. 97 provides that land dedicated as parkland "shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court." See *Smith* v. *City of Westfield*, 478 Mass. 49, 55 (2017). The basis for this declaration, the plaintiffs contend, is the language in Article 3 specifying that the Town would acquire the 130 acres, pursuant to the Option, for the purpose of "maintain[ing] and preserv[ing] said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes."

This argument, however, puts the cart before the horse: while Article 3 *authorized* the Town to expend funds to acquire the forest land for a particular purpose, that authorization did

not by itself complete the acquisition of the property at issue. Were it otherwise, G.L. c. 61, § 8, would not need to specify that a town exercising its statutory first refusal option must include with its notice of exercise "a proposed purchase and sale contract or other agreement between the city or town and the landowner" to be executed within 90 days. No such purchase and sale contract was executed in this case because the Railroad Defendants challenged whether the Town had validly exercised the Option. The notice of exercise of the Option recorded in the Registry of Deeds was signed only by the Board of Selectmen, on behalf of the Town, and not by the Trust. Accordingly, the Town never acquired the 130 acres of forest land in the first instance, much less dedicated it as parkland pursuant to art. 97. The plaintiffs' motion for judgment on the pleadings is therefore denied as to Count III and the Town Defendants' cross-motion is allowed as to Count III.

D. Injunction

The court acknowledges that there has been substantial litigation before the Land Court, this court, and the Appeals Court over whether the Railroad Defendants may continue clearing and other site work during the pendency of litigation related to the Property. Although this judgment on the pleadings, effectively ends this litigation, the court is mindful of the Railroad Defendants' attempt to circumvent the Chapter 61, § 8, process by purporting to acquire only the "beneficial interest" in the forest land while undertaking the same commercial operations that Chapter 61 allows municipalities to preclude. See *Goodwill Enters., Inc. v. Garland*, 2017 WL 4801104 at *8 (Mass. Land Ct., Oct. 20, 2017) (contractual right of first refusal triggered by alienation of beneficial interest in property). Moreover, the court cannot ignore (1) the Railroad Defendants' initiation of clearing operations after the Town issued a notice of intent but before it

could hold a Town Meeting to appropriate funds to exercise the Option; and (2) its resumption of clearing operations while the Appeals Court's injunction remained in place.

Therefore, the court finds it appropriate to issue continue the temporary injunction barring the Railroad Defendants from conducting clearing or other site work on the Property for a limited period of time sufficient to allow the Town to decide whether to seek the Town Meeting authorization necessary to validate the Settlement Agreement or to take the necessary steps to proceed with its initial decision to exercise the Option for the entire Property. While G.L. c. 40, § 14, does not provide any particular time period in which a town must hold a town meeting to authorize the acquisition of land, the Legislature has expressed a view on the appropriate time frame for such matters in G.L. c. 61, §8, which gives a town 120 days to exercise its first refusal option. Because the decision now before the Town is more limited in scope, however, a shorter period of 60 days is appropriate for this temporary injunction.

Therefore, the Railroad Defendants are enjoined from carrying out any clearing or other site work on the Property for a period of 60 days following the issuance of this decision.

ORDER

For the foregoing reasons:

1) Defendants, Jon Delli Priscoli, Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company Motion for Judgment on the Pleadings as to Count II of Plaintiffs' Verified Complaint is **ALLOWED.**

2) Plaintiffs' Motion for Judgment on the Pleadings is **ALLOWED** as to Count I and **DENIED** as to Counts II and III.

3) The Town of Hopedale and Hopedale Board of Selectmen's Cross-Motion for Judgment on the Pleadings is **DENIED** as to Count I and **ALLOWED** as to Counts II and III.

4) It is further **ORDERED** that Jon Delli Priscoli, Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company are enjoined from

carrying out any clearing or other site work on the Property for a period of 60 days following the issuance of this decision.

Karen L. Goodwin
Justice of the Superior Court

DATED: November 4, 2021

EXHIBIT B

51002 SERVICE DATE – NOVEMBER 3, 2021
DO

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36518

GRAFTON AND UPTON RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Decided: November 3, 2021

On May 13, 2021, Grafton and Upton Railroad Company (Grafton & Upton), a Class III rail carrier, filed a petition for declaratory order asking the Board to find any state or local law that would prevent Grafton & Upton from closing two private grade crossings (the Crossings) across its line in the Town of Hopedale, Mass. (the Line), to be preempted pursuant to 49 U.S.C. § 10501. (Pet. 2.)

Grafton & Upton states that it removed the Crossings in connection with certain upgrades it made to its track on either side of a railroad bridge near its yard in Hopedale. (Id. at 5.) It argues that restoration of the Crossings would unreasonably interfere with its "existing and future rail operations" and raise safety concerns.[1] (Id. at 2.) Therefore, Grafton & Upton submits that any effort by Hopedale Properties, LLC (Hopedale Properties), whose property is bisected by Grafton & Upton's line, to rely on state and local laws to prevent Grafton & Upton from closing the Crossings should be preempted pursuant to 49 U.S.C. § 10501. (Pet. 2.)

Hopedale Properties replied on July 16, 2021, arguing that it holds an easement over Grafton & Upton's right-of-way that gives it the right to maintain the Crossings that Grafton &

[1] Grafton & Upton states that it maintains and operates the Hopedale yard and is improving it to handle an increased volume of rail business resulting from a recent lease agreement with CSX Transportation, Inc. (CSXT), pursuant to which Grafton & Upton will operate an 8.4-mile section of CSXT's line. (Pet. 3-4); see also Grafton & Upton R.R.—Acquis. & Operation Exemption—CSX Transp., Inc., FD 36444 (Oct. 14, 2020). Further, Grafton & Upton states that, as part of these improvements, it has focused on improving the Line on either side of the railroad bridge that crosses the Mill River. (Pet. 4.) It represents that it will no longer be possible to keep the Crossings open because of the engineering standards required for track within 100 feet of a railroad bridge. (Id. at 5.) Grafton & Upton also states that closing the Crossings will reduce the risk of injury to pedestrians, (id. at 6), eliminate the need to provide flagging protection, (id. at 5), and allow Grafton & Upton to perform brake tests on its trains without having to separate the trains into different sections. (Id.) Because of these operational and safety concerns that Grafton & Upton alleges would result from restoring the Crossings in their previous locations, Grafton & Upton argues that any state action that would require it to restore the Crossings should be preempted by 49 U.S.C. § 10501.

Upton removed. (Hopedale Props. Reply 4.) Hopedale Properties represents that the right-of-way was conveyed to Grafton & Upton by a predecessor to Hopedale Properties subject to the easement. (Id. at 2, 4.) Hopedale Properties alleges that, by removing the Crossings, Grafton & Upton violated Hopedale Properties' rights pursuant to that easement.[2] (Id. at 5.) Hopedale Properties argues that the Board should deny the Petition and allow the parties to resolve their property dispute in a related state court proceeding, (see id. at 1-2, 8) in which Hopedale Properties and two other entities filed a complaint in Massachusetts Superior Court, Worcester County, seeking, among other things, the restoration of the Crossings. (See id., Ex. A.) In that complaint, Hopedale Properties presented to the court its argument that Grafton & Upton violated Hopedale Properties' rights pursuant to the easement when it removed the Crossings and by refusing to restore them. (Id., Ex. A, at 16-17.)

On July 28, 2021, Grafton & Upton filed a response to Hopedale Properties' Reply, asserting that it was unaware of the easement cited by Hopedale Properties but arguing that, regardless of the easement, the record makes clear that restoration of the Crossings would create an unreasonable burden on rail transportation and, therefore, any state action that would require Grafton & Upton to restore the Crossings should be preempted. (Grafton & Upton Reply 6-7.)

Hopedale Properties filed a sur-reply on September 7, 2021,[3] arguing that Grafton & Upton's knowledge of the easement is immaterial to the dispute. (Hopedale Props. Sur-Reply 1-2.) Moreover, Hopedale Properties maintains that Grafton & Upton "has failed to show that it has suffered any interference, let alone substantial impediments, to its operations." (Id. at 3.) Hopedale Properties reiterates its request that the Board deny the Petition and allow the state court to decide the parties' dispute in the related state court action.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, this proceeding will be held in abeyance pending resolution of the ongoing state court litigation.

Grafton & Upton seeks a declaration from the Board that any state or local law that would prevent Grafton & Upton from permanently closing the Crossings are preempted by

[2] According to Hopedale, "the only direct way to access" several of the parcels of its property is by use of the private grade crossing northwest of the Mill River. (Hopedale Props. Reply 3.) And the "only way to access" two other parcels from the rest of the Property is by using the private grade crossing just east of the Mill River. (Id.)

[3] Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted; however, in the interest of a complete record, Grafton & Upton's reply and Hopedale Properties' sur-reply will be accepted into the record. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply "[i]n the interest of compiling a full record").

49 U.S.C. § 10501(b). However, resolution of this dispute appears to be contingent upon the interpretation of an easement that Hopedale Properties allegedly has over Grafton & Upton's right-of-way. As the Board has explained, a court is typically the more appropriate forum for interpreting contracts and resolving state property law disputes. See, e.g., V&S Ry.—Pet. for Declaratory Ord.—R.R. Operations in Hutchinson, Kan., FD 35459 (STB served July 12, 2012) (question about property rights should be decided by the district court applying state property and contract law); Allegheny Valley R.R.—Pet. for Declaratory Ord.—William Fiore, FD 35388 (STB served Apr. 25, 2011) (questions concerning size, location, and nature of property rights are best addressed by a state court). Here, what rights Hopedale Properties has, if any, with regard to the Crossings pursuant to the claimed easement is before the Superior Court of the Commonwealth of Massachusetts, Worcester County. (Hopedale Props. Reply 1.) And the court is the more appropriate forum to decide that issue.

While Hopedale Properties has asked that Grafton & Upton's petition for declaratory order be denied, the proceeding instead will be held in abeyance. Abeyance is appropriate where it would promote efficiency and not be fundamentally unfair to any party. E.g., N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3 (STB served Mar. 31, 2017). Abeyance would promote efficiency here because resolution by the state court of the parties' rights under the easement could moot the need for the declaratory order, or, at the least, would inform the preemption analysis.[4]

Abeyance would not be fundamentally unfair to any party here because obtaining answers to the state property law issues and contractual questions would allow a more complete and accurate adjudication of the preemption dispute between the parties. Accordingly, this proceeding will be held in abeyance pending a decision from the state court. To ensure that the Board remains informed regarding the progress of the state court litigation, the parties will be directed to submit any decision by the court regarding the merits of any of the claims in the case (or any other decision relevant to this proceeding) within 5 days of its issuance.

It is ordered:

1. Grafton & Upton's reply and Hopedale Properties' sur-reply are accepted into the record.

2. The proceeding is held in abeyance pending further Board order.

3. The parties are directed to submit any merits decision or any other relevant decision by the court within 5 days of its issuance.

[4] Furthermore, issues involving federal preemption under § 10501(b) can be decided either by the Board or the courts in the first instance as "both the Board and the courts have concurrent jurisdiction to determine preemption." Brookhaven Rail Terminal—Pet. For Declaratory Ord., FD 35819, slip op. at 4 (STB served Aug. 28, 2014). Given the confluence of issues here—state property law, safety standards, and preemption—the state court may decide to address all of the issues together itself or refer the preemption issue back to the Board.

4. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Christopher, Hays, Wojcik & Mavricos, LLP

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November 15, 2021

VIA EMAIL ONLY
Brian Riley, Esq.
KP Law
101 Arch Street, 12th Floor
Boston, MA 02110

RE: Elizabeth Reilly et al
VS: Town of Hopedale, et al
WOCV 2085CV00238D

Dear Brian:

I received a copy of a letter dated November 12, 2021 from Attorney Lurie to you regarding the Superior Court's November 10, 2021 decision in the above-captioned case. As you no doubt recognized, Attorney Lurie's letter is fraught with his typical gross mischaracterizations and baseless threats.

Only Attorney Lurie and his clients could interpret last week's decision and judgment as anything other than an overwhelming defeat. There is no dispute that the Superior Court categorically rejected the plaintiffs' claims on Counts II and Count III of the Complaint. All that is left standing is Count I which enjoins the Town of Hopedale from spending money to acquire the property that is described in the Settlement Agreement that was negotiated in the Land Court case, which was dismissed with prejudice in February 2021. As we have been saying since April, Count I goes no further than that. While we disagree with the Superior Court decision as it relates to Count I – let there be no mistake about what flows from the decision on Count I - the only option available to the Town of Hopedale is to do what Justice Meade hinted at in April – and that is for the Town of Hopedale to schedule a Special Town Meeting to appropriate a sum of money to acquire the property described in the Settlement Agreement.

As you know, Attorney Lurie's letter continues his habit of consistently and purposefully publishing misleading "interpretations" of decisions issued in this case, starting with the whopper that the Single Justice's April 2021 Decision ended the case in favor of the plaintiffs on all counts. As demonstrated by the trial court decision last week – Attorney Lurie was flat-out wrong in that regard. Attorney Lurie claimed that the subject property was forestland, even though it had never been owned by the Town. He was wrong about that. I understand his clients have engaged in this practice over the weekend, claiming victory in spite of the trial court's outright rejection of Counts

II and III of their Complaint, and the clear limitations of the judgment in Count I. This is very unfortunate as such unfounded and intentionally misleading proclamations as to the effect of the judgment that entered are likely to confuse town residents, which may have very grave consequences. It is incredible that these 10 taxpayers are telling residents they won the case, when in reality, their attempts to dictate how a Select Board governs were unquestionably rejected. The only fact they seem prepared to acknowledge is that the case is over.

With respect to Count II, Attorney Lurie claims that the Board "would violate their duties to the public" if it does not attempt to acquire all of the subject land. This is absolutely false, as Judge Goodwin decided (and Attorney Lurie had to begrudgingly acknowledge) that the decision to exercise a G.l. c. 61 option is within the sole discretion of the Board (and the Board has previously released and waived any such rights). It is also false for Attorney Lurie to claim that the Court "ma[de] clear that the Select Board now has the ability to proceed to acquire all 130 acres of Forestland…". There is no ability of the Select Board to initiate steps to exercise a c. 61 right of first refusal that was dismissed with prejudice, waived, and released seven months ago. Attorneys Lurie knows that, and I expect he has advised his clients of that undisputed fact and reality.

Let me re-emphasize the last point in the preceding paragraph. The Town has no lawful means to take any step, or steps to acquire any land beyond the land described in the Settlement Agreement. Chapter 61 does not provide a legal basis, the October 2020 Special Town Meeting does not provide a legal basis, and Judge Goodwin's decision does not provide a legal basis. Again, as last week's decision and judgment make clear – the only party that could have brought such a claim was the Select Board and the Select Board did just that in October 2020 by filing a lawsuit in the Land Court, asserting these very same c. 61 rights. The lawsuit was defended, mediated, settled by vote of the Select Board, and dismissed with prejudice in February 2021. Whatever c. 61 rights the Select Board believed it possessed with respect to the land at issue in this case were waived and released in a fully enforceable Settlement Agreement that was negotiated with the assistance of former Land Court Justice Leon Lombardi in January 2021.

I try not to over-react to Attorney Lurie's bluster, but his offer to represent the Town in future proceedings against the Railroad (after suing the Town in this action and in the 2018 lawsuit involving the Draper Mill URP), coupled with his threat to defeat any attempt by the Town to authorize acquisition of the portion of land subject to the Settlement Agreement, is troubling. Here Attorney Lurie seeks to impose his own will (or that of some of his clients) on the Select Board and the Town of Hopedale as a whole, and does so by attempting to force the Town into an all or nothing choice. Obviously, acquisition of significant acreage of the land in addition to other valuable consideration provided by the defendants is much better for the Town than acquisition of none of the land. But Attorney Lurie seeks to take that option off the table from the outset. How would that be effective, zealous representation of the Town? It clearly would not be. The misguided litigation brought by the ten taxpayers against the Town and my clients was doomed from the start due to lack of standing and had absolutely no chance of success. Unless, of course, success is defined not by prevailing in litigation but by requiring the Town to divert resources needed for education and public safety to defending such meritless claims.

Attorney Lurie threatens the Town with further litigation in the form of an appeal if his clients' unrealistic, baseless and fanciful demands are not met. Attorney Lurie knows that the only Count that would be subject to any serious review on appeal would be Count I. I expect that if the plaintiffs were duped into filing an appeal of the judgment that entered on Counts II and III, the Town would be forced into cross-appealing the judgment that entered on Count I. A further appeal does not benefit the Town, or its residents.

In the unlikely event that these ten taxpayers and their supporters advocate against the approval of an Article (or Articles) at a Special Town Meeting to appropriate money to acquire the land (and accept donated land) described in the Settlement Agreement, and they are successful in that endeavor, as Justice Meade stated in his April 8 Decision, the Town will unfortunately end up with nothing – it will end up with no land. I hope and expect that the ten-taxpayers and their supporters understand and appreciate this undisputed reality. That is not an outcome that my clients want. It is time for the posturing, bullying and chest-pounding to end. As I am sure your clients have informed you, the settlement agreement that was executed in February was subject to intense negotiations and hard-bargaining by both sides. After the first mediation session concluded on January 8, it appeared unlikely that there would be a resolution. With the assistance of Judge Lombardi, the parties were able to get a deal done. No one got everything they wanted in that settlement agreement, but the agreement is fair and reasonable to both sides, and more importantly, it is fully enforceable. G&U and the Trust continue to act consistent with their obligations under the Settlement Agreement, and they look forward to the Special Town Meeting vote to authorize (or not authorize) an appropriation allowing the Town to acquire the property described therein.

Please share this letter with the Select Board. If you have any questions, please do not hesitate to contact me. Thank you.

Very truly yours

/s/ Donald C. Keavany, Jr.

Donald C. Keavany, Jr.

cc:

Ms. Diana Schindler, Hopedale Town Administrator (via email only)
Hopedale Conservation Commission
Hopedale Water and Sewer Commission
Hopedale Finance Committee
Clients