COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, ss.

MISCELLANEOUS CASE
No. 20 MISC 000467 (DRR)

TOWN OF HOPEDALE,

Plaintiff,

v.

JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST, and GRAFTON & UPTON RAILROAD COMPANY,

Defendants.

DECISION ON PLAINTIFF'S MOTION TO VACATE

Plaintiff Town of Hopedale, by and through its Board of Selectmen (the "Town") has filed a Motion to Vacate Stipulation of Dismissal pursuant to Mass. R. Civ. P. 60(b)(5) and (6). That Stipulation of Dismissal with prejudice was filed by the parties on February 10, 2021 (the "Stipulation"). The Town contends that conditions have changed since the parties filed the Stipulation, giving rise to compelling and extraordinary circumstances which justify reinstating this action so that the Town can seek to enforce an option to purchase certain forest land protected under Chapter 61. Those changed conditions arise from a decision issued by the Worcester Superior Court in a related case, wherein ten-taxpayers sought to block implementation of a settlement agreement entered between the parties to this Land Court case.

Defendants disagree that exceptional circumstances exist. Instead, they argue that the ten-taxpayer lawsuit was foreseeable at the time the Town entered into the settlement agreement and the parties filed the Stipulation. In addition, they contend that it would be inequitable to deny them the benefit of their negotiated settlement agreement. For the reasons set forth below, I decline to vacate the judgment in this case.

BACKGROUND

The Land Court Proceedings. The Town commenced this action on October 28, 2020, seeking a declaration that Defendants were prohibited from converting 130.18 acres of land located at 364 West Street to railroad use. That land had been classified, valued, and taxed as forest land under G.L. c. 61 (the "Forest Land"). The Town sought an injunction to prevent the Defendants from converting the Forest Land to railroad use so that it could exercise its right of first refusal option under Section 8 of Chapter 61 ("ROFR") and seek specific performance of its right to purchase the Forest Land. A hearing was held on November 23, 2020. As reflected in the docket entry for that day, I was unable to conclude at that early point in the proceedings that the Town had met its burden to prove a likelihood of success on the merits of its claim. Questions remained both as to whether and when the ROFR had been properly exercised and whether the Town's exercise of the ROFR was preempted by the Interstate Commerce Commission Termination Act. Defendants requested an opportunity to refer the issue of preemption to the Surface Transportation Board ("STB"), where they had filed a petition.[1] Also at that hearing, the

[1] The docket reads in pertinent part: "On the record before the court, I cannot conclude that the Town has met its burden to prove a likelihood of success on the merits. The Town contends that the Grafton & Upton Railroad Company (the "Railroad") did not control the trust (which held title to the Forest Land) when the Town's Chapter 61 option to purchase vested. Specifically, when . . . the Town received a Notice of Intent dated July 9, 2020 ("NOI"). Defendants disagree and further contend that the Town's exercise of the Chapter 61 option is preempted by the Interstate Commerce Commission Termination Act. While the Town is entitled to a right of first refusal under Chapter 61, it is not clear whether an option period has been triggered and if so, when that occurred. The July 9, 2020, NOI appears to be defective because it encompassed both Chapter 61 forest land and another parcel of land without Chapter 61 protections, but did not include segregated valuations for each parcel. The NOI was defective

parties agreed to work together cooperatively to prepare a stipulation to maintain the status quo while the STB proceedings and the Land Court case were pending. In addition, following colloquy, the parties agreed to participate in a mediation screening and the court issued a Mediation Screening Order. Thereafter, the parties agreed to mediate their dispute with the assistance of retired Land Court Judge Lombardi. Following mediation, the parties filed the Stipulation on February 10, 2021.

The Settlement and the Citizens Suit. Additional background is derived from the parties' recent filings in this case[2] and the Decision issued by Judge Goodwin in the Worcester Superior Court Case, *Elizabeth Reilly* v. *Town of Hopedale*, Civil Action No. 2185CV00238 (the "Superior Court Case"). On February 8, 2021, the parties to this Land Court case entered into a Settlement Agreement and Mutual Release (the "Settlement Agreement"). By the terms of the Settlement Agreement, among other things, the Town would purchase 40 acres of the Forest Land and 25 acres of adjacent wetlands for $587,500 (the "Settlement Parcel") and the Defendants would donate to the Town a nearby separate parcel of 20 acres ("Donation Parcel"). In return, the Town agreed, inter alia, to waive its ROFR to the remaining 90 acres of Forest

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because it did not provide adequate statutory notice to the Town of the cost to purchase the Chapter 61 land as required and therefore did not constitute a bona fide offer. *Town of Brimfield* v. *Caron*, 18 LCR 44, 50-51 (2010) (Long, J.). As such, it does not appear that the Town's right of first refusal ripened into an option on July 9, 2020. Strict compliance is required for options under Chapter 61. *Town of Sudbury* v. *Scott*, 439 Mass. 288, 297 (2003); *Town of Billerica* v. *Card*, 66 Mass. App. Ct. 664, 668 (2006); *Smyly* v. *Town of Royalston*, 15 LCR 502, 504-05 (2007) (Trombly, J.). What is less clear is whether the course of dealings by and between the parties after July 9, 2020, gave rise to a valid option right and when the right to exercise the option expires. That course of conduct included, for instance, the assignment of the Trust's beneficial interest to the Trust, designation of the Railroad's officers as successor trustees of the Trust, and the October 15, 2020 letter from the Railroad to the Town, as well as the Town's notice of a defective NOI and withdrawal of the NOI. Without a clear trigger date for the Town's exercise of its option, I cannot determine whether the Interstate Commerce Commission Termination Act preempts the Town's right to purchase land which the Defendants contend is land intended for use as transportation by rail. Defendants have requested an opportunity to refer the issue of preemption to the Surface Transportation Board ("STB"); as of the date of the hearing, Defendants had filed a petition with the STB."

[2] The Town's Motion to Vacate Stipulation of Dismissal and exhibits thereto; Defendants' Opposition to Plaintiff's Motion to Vacate Stipulation of Dismissal with Prejudice, Affidavit of Donald C. Keavany, Jr., Esq., Affidavit of Michael R. Milanoski, Reply Brief in Support of Plaintiff's Motion to Vacate Stipulation of Dismissal; and Defendants' Sur-Reply to Plaintiff's Motion to Vacate Stipulation of Dismissal with Prejudice.

Land.

Just three days before the Settlement Agreement was executed, on February 7, 2021, the Town received a letter from counsel for a number of local citizens providing notice that those citizens were prepared to file suit against the Town pursuant to Chapter 40, § 53, "in the event the [Board of Selectmen] does not suspend its actions toward finalizing the Settlement." The parties nonetheless proceeded to file the Stipulation. On February 15, 2021, in accordance with the terms of the Settlement Agreement, the Railroad filed a Motion to Dismiss its Verified Petition for Declaratory Order with the Surface Transportation Board ("STB"). On February 17, 2022, the STB allowed that motion.

On March 3, 2021, eleven citizens of the Town of Hopedale (the "Citizens") initiated the Superior Court Case by filing a Verified Complaint against the parties to the Land Court case.[3] Therein, the Citizens claimed that the Board exceeded its authority when it approved the Settlement Agreement. They sought, inter alia, an injunction preventing the Board from purchasing the Forest Land (Count I), a declaration of the Town's rights under Chapter 61, § 8 and an order enforcing those rights against the Railroad and the Trust (Count II), and a declaration that the Forest Land was protected parkland under Article 97 of the Amendments to the Massachusetts Constitution (Count III). On March 11, 2021, the Superior Court (Frison, J.) denied the Citizens' motion for preliminary injunction. They appealed. On April 8, 2021, a Single Justice of the Appeals Court (Meade, J.) issued an order allowing the Citizens' motion for preliminary injunction.

[3] The Plaintiffs included Elizabeth Reilly, 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. The Defendants were the Town and two of the members of its Board of Selectmen, as well as Grafton & Upton Railroad Company (the "Railroad"), and Jon Delli Priscoli, Michael Milanoski, and One Hundred Forth Realty Trust (collectively, the "Trust").

On November 10, 2021, Judge Goodwin issued a Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings in the Superior Court Case. Therein, she allowed the Citizens' motion for judgment on the pleadings as to Count I. Judge Goodwin reasoned that the Town's agreement to purchase the Settlement Parcel was "a substantial deviation from the acquisition authorized by the Town Meeting" at an earlier meeting, such that the Town lacked authorization from Town Meeting to acquire that parcel and expend funds under M.G.L. c. 40, § 14.[4] Town Meeting had voted on October 24, 2020 to authorize the Town to expend $1,175,000 to purchase the entire 130.18 acres of Forest Land, just prior to the filing of this Land Court case. The Superior Court Decision also denied the relief requested in Count II of the Citizens' complaint, concluding that the Citizens lacked standing to request a declaration that that Town validly exercised the Option (and also denied relief under Count III), and enjoined the Railroad and Trust from carrying out any clearing or other site work on the Forest Land for a period of 60 days following the issuance of the decision.

On December 14, 2021, the Superior Court (Goodwin, J.) issued a Memorandum of Decision on Hopedale's Motion for Clarification. Therein, the Superior Court clarified that the Town had not lost its statutory option to buy the entire parcel of Forest Land. Rather:

> [A]lthough the terms of the Settlement Agreement are legal (including the Board's agreement to waive the Option), the Board exceeded its authority when it unilaterally entered into that agreement without Town Meeting approval of the reduced acquisition. Therefore the Settlement Agreement is not effective. The Board might not hold the required Town Meeting or might fail to obtain enough votes to approve the acquisition. In either case, the Settlement Agreement would fail to take effect meaning that the Railroad would retain the land and the Town would retain its money and the right to continue attempting to enforce the Options.

[4] Chapter 40, § 14 allows the "selectmen of a town . . . [to] purchase . . . any land, easement or right therein without 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 . . ."

The Superior Court also extended the injunction through January 31, 2022.

DISCUSSION

The Town seeks relief from judgment under Massachusetts Rules of Civil Procedure 60(b)(6).[5] Whether to authorize relief from a final judgment under Rule 60(b)(6) is a question "addressed to the discretion of the judge." *Owens* v. *Mukendi*, 448 Mass. 66, 72 (2006) (quoting *Parrell* v. *Keenan*, 389 Mass. 809, 815 (1983)).

Rule 60(b)(6) is a residual clause for those unique circumstances which do not fall within Rule 60(b)(1)-(5). It permits a court to set aside a final judgment for "any other reason justifying relief from the operation of the judgment." Mass. R. Civ. P. 60(b)(6). Relief under Rule 60(b)(6) "requires a showing of 'extraordinary' circumstances." *Bowers* v. *Bd. of Appeals of Marshfield*, 16 Mass. App. Ct. 29, 33 (1983) (quoting *Ackermann* v. *United States*, 340 U.S. 193, 202 (1950)). "If cases are to have finality, the operation of rule 60(b) must receive 'extremely meagre scope.'" *Id.* (quoting *Rinieri* v. *News Syndicate Co.*, 385 F.2d 818, 822 (2d Cir. 1967)). When a consent judgment is at issue, Rule 60(b)(6) is applied "with particular stringency." *Bernstein* v. *Planning Bd. of Wayland*, 100 Mass. App. Ct. 1101 (2021) (citing *Thibbitts* v. *Crowley*, 405 Mass. 222, 227 (1989), quoting *United States Steel Corp.* v. *Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269, 1274 (3d Cir. 1979)) ("And when, as in this case, the [litigant] made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment, [his] burden under Rule 60 (b) is perhaps even more formidable

[5] The Town's initial motion also requested relief from judgment under Rule 60(b)(5). As acknowledged by the Town at the hearing on January 24, 2022, and after briefing, I conclude Rule 60(b)(5) is not applicable in the current circumstances. Rule 60(b)(5) permits a court to set aside a final judgment if "it is no longer equitable that the judgment should have prospective application." Mass. R. Civ. P. 60(b)(5). This clause of Rule 60(b)(5) "only applies to judgments having prospective effect, as for example, an injunction, or a declaratory judgment." See 1973 Reporter's Notes to Mass. R. Civ. P. 60(b). "Specifically, the clause allows relief from judgment which was valid and equitable when rendered but whose prospective application has because of the changed circumstances, become inequitable." *Id.* Here, in light of the Stipulation, there is no prospective application of the judgment.

than had [he] litigated and lost"). As noted in *Bernstein*, "[a] court is powerless to enlarge or contract the dimensions of a true consent decree except upon (i) the parties' further agreement or (ii) litigation of newly-emergent issues." *Id.* (quoting *Thibbits,* 405 Mass. at 227). A party seeking relief based on "newly-emergent issues," bears the burden of showing "a significant change either in factual conditions or in law," and that the changes on which the party relies were not "actually . . . anticipated" at the time judgment entered. *Id.* (quoting *Rufo* v. *Inmates of Suffolk Cnty Jail,* 502 U.S. 367, 384-385 (1992) (interpreting Federal rule)).

Bowers, 16 Mass. App. Ct. 29, cited by both parties, is instructive. In that case, several abutters challenged a proposed sewage pumping system in the town of Marshfield, pursuant to Chapter 40A, § 17. The board of selectmen intervened and the parties entered into a settlement agreement whereby the town would cease using six lots adjoining the site of the proposed sewage pumping system as a public parking area. An agreement for judgment documented the agreed upon terms and the court entered judgment in accordance with the agreement. That settlement was not popular among the townsfolk. As Judge Kass noted: "Few events so stir the civic consciousness as the removal of convenient parking." *Id.* at 31. Several years later, when a newly constituted board of selectmen was elected, they moved to vacate the judgment as void under Rule 60(b)(4), arguing the judgment was beyond the power of the court to enter under Chapter 40A, § 17, or because the court lacked jurisdiction to impose restrictions on the six lots adjoining the site for the pumping station. The court denied the motion and the successor board appealed.

The Appeals Court affirmed the lower court's decision denying relief as to that portion of the judgment which dealt with the parties agreement to proceed with the construction of the sewage pumping system, but vacated the portion of the judgment which prohibited parking on

the six adjoining lots.[6] As to the former, the court concluded that jurisdiction existed under G. L. c. 40A, § 17, to consider the site plan challenge, such that there was no cause to disturb that portion of the judgment. The portion of the judgment encumbering the parking lots was more problematic, however, because "the perpetual encumbrance imposed upon the six lots by the selectmen was an action which they were powerless to take. The power to alienate and dispose of real estate lies with the inhabitants of the town acting at town meeting . . . ." *Id.* at 32 (citing G. L. c. 40, § 3); See *Ballantine* v. *Falmouth*, 363 Mass. 760, 766 (1973); *Dennis* v. *Lighthouse Inn, Inc.*, 6 Mass. App. Ct. 970 (1979). The Appeals Court nonetheless concluded that although the judgment required the board to do something for which they lacked authority, that error did not compel the conclusion that the judgment was void.[7] "An erroneous judgment is not a void judgment." *Bowers*, 16 Mass. App. Ct. at 32.

The Appeals Court then turned to Rule 60(b)(6) to vacate the portion of the judgment involving the six parking spaces, concluding that extraordinary circumstances existed. As Judge Kass explained:

> What makes the instant case exceptional is that a public authority, the selectmen, offered as their part of an agreement for judgment a restriction that they lacked the power to impose. We do not deprecate consent judgments. They are a useful device to resolve disputes and are as much of an adjudication for purposes of applying the principle of judgment preclusion as any other final judgment. . . . There is in an agreement for judgment, however, an element of contract. Accordingly, it is in order to apply to a consent judgment made with governmental authority the familiar principle that those who contract with the officers or agents of a governmental agency must, at their peril, "see to it that those officers or agents are acting within the scope of their authority." Were it otherwise public officials could bind their governmental agencies to unlawful conduct by ready acquiescence in an agreement for judgment and, thus, circumvent the restrictions

[6] A judgment is void if the court from which it issues lacked jurisdiction over the parties, jurisdiction over the subject matter, or failed to provide due process of law. *Bowers*, 16 Mass. App. Ct. at 32.

[7] "Had any party raised as an issue the power of the selectmen under G. L. c. 40, § 3, to restrict the lots, the subject would have been appropriate for the court to consider. It is not the category of case involved, but the relief granted, which is in error; a judgment flawed in that manner is not susceptible to attack as void." *Bowers*, 16 Mass. App. Ct. at 33.

> on their powers. The same officials, or as is the case here, their successors, face the dilemma of acting in excess of their powers or exposing themselves to a judgment of contempt. In those unusual circumstances, resort may be had to rule 60(b)(6).

Id. at 33-34 (internal citations omitted).

At first look, the Hopedale circumstances are akin to the exceptional circumstances in *Bowers*. In both cases, the town entered into an agreement without a vote of town meeting under Chapter 40, § 3 to authorize an expenditure of funds. The Hopedale circumstances, however, differ in at least two respects. The parties to this case did not file an agreement for judgment with the court, but rather chose to file with the court a stipulation of dismissal with prejudice and enter into a separate Settlement Agreement. In addition, in *Bowers*, at least four years had passed since the date of filing of the agreement for judgment, whereas in this case the Settlement Agreement could still timely be presented to Town Meeting for their consideration and vote. I conclude that these differences are material and militate against vacating the judgment in this case.

The decision to file a stipulation of dismissal with prejudice instead of an agreement for judgment changes the balance of the equities and the effect on the parties' deal. Because the Town is solely responsible for litigation related to the Chapter 61 ROFR, the dismissal with prejudice was well within its authority, as noted in the Superior Court Decision. The Town chose to proceed in this fashion and to enter into a separate and comprehensive agreement, which never came before this court, detailing exchanges whereby each of the Town and the Defendants gained benefit while also compromising some of their desired outcomes.

Aside from the provision of the Settlement Agreement calling for the Town to pay $587,500 for the Settlement Parcel, the terms of the Settlement Agreement were otherwise well within in the authority of the Town, also as noted by the Superior Court. By the terms of the Settlement Agreement, in addition to ending litigation before both the Land Court and the STB,

the Town obtained the opportunity to receive the Donation Parcel (subject to Town Vote), secured conservation restrictions on the Settlement Parcel and Donation Parcel, which equals approximately 85 acres of land (by way of the Army Corps of Engineers restrictions, Exhibit 3 to the Settlement Agreement), and buffer zones on the Defendants' use of the Settlement Parcel, and gained commitments and financial contributions to safely manage the Town's water supply. It was within the authority of the Town to agree to all of those terms. Thus, even if the Town was unable to secure a vote of Town Meeting to authorize the purchase of the 60 acres, there may have been ample consideration for the deal, as Defendants argue. The Defendants further contend that the severability provision was deliberately added to the Settlement Agreement at the last minute, after the Town received notice of a potential citizens' lawsuit, just for such an eventuality. Although no claim to enforce or renounce the Settlement Agreement is now before me, I note that it is not at all apparent that the Settlement Agreement would be wholly unenforceable if the purchase of the Settlement Parcel did not proceed.

Plaintiffs argue that *Abrams* v. *Bd. of Selectmen of Sudbury*, 76 Mass. App. Ct. 1128 (2010), is instructive here. I disagree. That case considered whether a settlement agreement involving an agricultural preservation restriction had been rescinded for failure of consideration. Here the only question before the court is whether exceptional circumstances exist to vacate the Stipulation. The continuing validity or enforceability of the Settlement Agreement is not before this court, and has not been fully adjudicated by the Superior Court. No claim in the original Land Court complaint concerned the Settlement Agreement, because as a practical matter no settlement existed. This case ended by the filing of a stipulation of dismissal which served as an adjudication of whether the ROFR was properly exercised and/or preempted and no further.

Here, because the parties filed a stipulation of dismissal with prejudice and entered into a separate, private Settlement Agreement, this court is not called upon to modify the terms of the judgment. It would be error to do so. By dismissing this Land Court case, with prejudice, the parties agreed that the claims in this case were decided against the Town. See *Boyd v. Jamaica Plain Co-op. Bank*, 7 Mass. App. Ct. 153, n.9 (1979) ("A dismissal 'with prejudice' constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial."). In this case, the Town sought a declaration that Defendants were prohibited from converting 130.18 acres of land located at 364 West Street to railroad use and specific performance of its right to purchase the Forest Land under Chapter 61. By dismissing the case, in other words, the Town agreed in binding fashion that it had no right to proceed with the ROFR. To vacate the judgment would be to deny the parties the benefit of their bargain. *Thibbitts*, 405 Mass. at 227 ("Altering the material terms of such an agreement at the behest of one party, without the consent of the other, does violence to the second party's expectations and to the very concept of judgment by consent.").

I conclude that extraordinary circumstances do not exist to vacate the judgment in this case. This conclusion is consistent with *Quaranto* v. *DiCarlo*, 38 Mass. App. Ct. 411 (1995), another Appeals Court decision authored by Judge Kass. Therein, the Appeals Court concluded that relief from judgment under Rule 60(b)(6) was improper where the grounds for relief related to a settlement agreement that was not contained in or referred to in the agreement for judgment. That case considered a long-running title dispute that was settled with the filing of an agreement for judgment, which simply stated in its entirety: "Now come the parties and hereby stipulate and agree that judgment be entered on all counts in favor of the defendants, with prejudice and without costs." Approximately one month later, the plaintiffs filed a motion for relief from

judgment under Rule 60(b)(6) with reference to a written agreement of the parties that had been signed by parties' counsel approximately one month before the agreement for judgment was filed with the court. When a judge of the Land Court allowed the motion for relief from judgment, the Appeals Court reversed, explaining "[w]e think relief from judgment based on understandings not contained in or referred to — even inferentially — in the agreement for judgment was improvidently granted." *Id.* at 412. Further, "[t]here is no evidence suggesting that either the fact or content of a collateral agreement between the parties was called to the attention of a trial judge when the agreement for judgment was filed. Within the text of that agreement there is no reference to any external understanding incorporated in or related to the agreement." *Id.* The policy reasons for declining to vacate the judgment were further explained as follows:

> This is so for the simplest of reasons: the extrinsic agreement is not part of the judgment which anyone examining the docket or documents in the case would find. The point is not a mechanical one, as the instant case illustrates. In their complaint, the Quarantos had questioned the validity of the DiCarlos' record title to the locus. The filing of the judgment in favor of the defendants had the effect of adjudicating the title question. Parties to the litigation and third persons who rely on the outcome of the litigation are entitled to think of the issues in controversy as closed (the time for appealing from the judgment had lapsed) and to act accordingly.

Id. at 413.

The second difference from *Bowers* is that the Town has ample opportunity to present the Settlement Agreement to Town Meeting. As noted by in the Superior Court's Memorandum of Decision on Hopedale's Motion for Clarification, the Town may seek Town Meeting approval for the purchase of the Settlement Parcel (and acceptance of the Donation Parcel).[8] Those decisions lie with the Town through Town Meeting. The Superior Court judgment merely

[8] I note that the Superior Court made statements in the Clarification that might be read in conflict with this Decision. For instance: "Therefore the Settlement Agreement is not effective." I see no conflict in these statements by the Superior Court, however, because I read that Clarification narrowly and in conjunction with the earlier Decision and its holding that the Town's acquisition of the Settlement Parcel could not proceed without a vote of Town Meeting.

enjoined the Town from using the funds appropriated at the October 24, 2020 meeting to acquire the Settlement Parcel. The validity of the Settlement Agreement as a whole was not before the court. In fact, Judge Goodwin confirmed in her Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings that a vote authorizing the purchase would render the transaction lawful, as that is the sole impediment to the Settlement Agreement. The Town claims that it would be futile to hold an additional Town meeting, and that funds for the purchase of the Settlement Parcel would never be approved. This may well be true, but at this point it would be speculative for this court to so conclude.

CONCLUSION

The Town of Hopedale's Motion to Vacate Stipulation of Dismissal is denied.

SO ORDERED

By the Court (Rubin, J.)

/s/ Diane R. Rubin

Attest:

/s/ Deborah J. Patterson

Deborah J. Patterson,
Recorder

Dated: January 28, 2022