COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS LAND COURT DEPARTMENT OF THE TRIAL COURT

TOWN OF HOPEDALE	)	
	)	
Plaintiff	)	
	)	
ELIZABETH REILLY, ET AL	)	CASE NO.20MISC 00467 (DRR)
	)	
Intervener-Plaintiffs	)	
vs.	)	
	)	
	)	
JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST and GRAFTON & UPTON RAILROAD COMPANY	)	
	)	
Defendants	)	

SUR REPLY OF GRAFTON & UPTON RAILROAD COMPANY AND ONE HUNDRED FORTY REALTY TRUST IN OPPOSITION TO THE TOWN OF HOPEDALE'S MOTION TO VACATE STIPULATION OF DISMISSAL

The G&U Parties submit this sur reply in further opposition to the Town of Hopedale's Renewed Mass. R. Civ. P. 60(b)(6) Motion to Vacate the Stipulation of Dismissal, and to briefly address the following issues raised (or not raised) by the Town in its reply brief.

I. The Town's Argument Regarding the Effect of its Dismissed Appeal Lacks Merit.

In December 2021, after the Superior Court judgment entered, the Town filed a Rule 60(b)(6) motion asserting that the judgment that entered on Count I constituted an extraordinary circumstance warranting vacatur of the dismissal of this case. In January 2022, this Court denied the Town's initial motion, and the Town appealed. After being denied injunctive relief pending appeal, the Town dismissed its appeal. The Town now moves again, on the same grounds it moved before, requesting the same relief. As set forth in the G&U Parties' Opposition, the Town's dismissal of its appeal of the denial of its initial motion precludes any relief under its current

renewed motion. See Bromfield v. Commonwealth, 400 Mass. 265 (1987) and Reznik v. Yelton, Case No. 10-ADMS-10018, 2011 Mass. App. Div. 1 (2011).

The Town attempts to distinguish these cases because they:

> concern legal error, which is not a basis for vacatur under Rule 60(b)(6), and which is not the basis on which Hopedale moves here. Hopedale seeks vacatur because of an extraordinary circumstance that arose after the joint stipulation of dismissal…

Reply, p. 11. The Town misses the key point. The principle identified in Bromfield and Reznik is not limited to cases involving legal error, but rather applies where "the aggrieved party could have sought the same relief by means of appeal." Bromfield, 400 Mass. at 257; see also Jones v. Boykan, 464 Mass. 285, 291 (2013) (Spina, J., dissenting) (Rule 60(b) "is not a substitute for the normal appellate process"); Gordon v. Monoson, 239 F. App'x 710, 714 (3d Cir. 2007) ("a District Court need not consider anew the same arguments raised in successive motions merely because those motions seek relief under Rule 60(b)(4)"). The Town has brought the same motion, on the same grounds, seeking the same relief it sought in December 2021, and asks for a different result this time. Rule 60(b)(6) is not a vehicle for the Town to seek the same relief it could have sought in a direct appeal. The place for the Town to make this argument was on appeal of the prior denial, not in a second motion to vacate. The Town's renewed motion should be denied for this reason alone.

II. The Town Fails to Assert that the Purported Extraordinary Circumstance Compelling Vacatur is "Newly Emergent."

The Town asserts that "Extraordinary circumstances should result in vacatur of the dismissal," (Reply, p. 6), and appears to argue that the Superior Court judgment on Count I and Appeals Court decision in Reilly v. Hopedale, 102 Mass. App. Ct. 367 (2023) constitute a "material issue." See DeMarco v. DeMarco, 89 Mass. App. Ct. 618, 621 (2016). However, the Town does not argue—and cannot plausibly argue—that the purported "material issue" is "newly emergent" as required by DeMarco. See 89 Mass. App. Ct. at 621-622. The Superior Court judgment from

2021 does not represent an extraordinary circumstance, and it certainly was not newly emergent in 2023. It logically follows that the Appeals Court decision in Reilly affirming the Superior Court judgment does not represent a newly emergent material issue either. Reilly affirmed the only issue on appeal from the Superior Court: the dismissal of Count II on the grounds that 10-taxpayers lack standing to assert claims under G.L.c. 61 or to invalidate a contract under G.L. c. 40, § 53. Plainly stated, nothing new emerged from the Reilly decision with respect to the judgment that entered in the Superior Court. The Town's renewed motion to vacate should be denied.

III. The Appeals Court's Rescript in *Reilly* Does Not Require Vacatur.

The thrust of the Town's reply is that the "Appeals Court's decision has become the governing law of the case, and a trial judge is bound to follow the rescript." Reply, p. 2 (quotations omitted). The G&U Parties have never argued that this Court is free to disregard the rescript. Rather, the G&U Parties have always maintained that the rescript is limited to the one issue that was subject to remand: consideration of the Interveners' motion to intervene. The rescript goes no further, and it certainly does not command this Court to vacate the judgment of dismissal that entered almost three years ago. The rescript does not go there because vacatur was not before the Appeals Court because the Town dismissed its appeal of this Court's January 2022 Decision.

However, the Appeals Court did unambiguously find that the Interveners lack standing to pursue a declaration that the settlement between the G&U Parties and the Town—and, in particular, the Town's waiver of its G.L. c. 61 claim—was void or unenforceable, or "to challenge a town's entering into a contract or settlement." Reilly, 102 Mass. App. Ct. at 37. The Court also acknowledged the strict limits of G.L. c. 40, § 53 – the only statutory provision under which the Interveners obtained relief – by stating that "[e]quitable principles do not confer on taxpayers the

right to sue 'to restrain cities and towns from carrying out invalid contracts, and performing other similar wrongful acts.'" Id.

The G&U Parties' Opposition put forth the only logical reading of Reilly, and the underlying Superior Court decision: (1) the Town's Selectboard exceeded its authority by agreeing to purchase land under the terms of the settlement agreement, which were different than the authorization voted on at the October 2020 Special Town Meeting, (2) the settlement agreement is ineffective to require or authorize the Selectboard to finalize the land acquisition, and (3) the Town was given the opportunity to attempt to enforce its option by returning to this Court and seeking vacatur, but relinquished that opportunity when it dismissed its appeal of this Court's January 2022 decision. This reading harmonizes the "ineffective" language both with the Interveners' lack of standing to void, rescind, invalidate or otherwise make ineffective the Town's waiver and with the strict limitations of Section 53.

The Town makes no attempt to harmonize the Superior Court judgment on Count I, the Appeals Court analysis of the Superior Court judgment on Count II, and the Appeals Court's remand of the Interveners' motion to intervene. Indeed, the Town makes no attempt at all to grapple with obvious question imposed by the limitations of Section 53: if the statute does not confer on taxpayers standing to assert a claim to restrain a town from carrying out an allegedly invalid contract (which the Town and Taxpayers claim the Settlement Agreement is), how can a judgment issued pursuant to Section 53 render the entire settlement agreement ineffective? Rather than answer this crucial and dispositive question, the Town instead limits its analysis to the "ineffective" language, and argues that this language in the rescript requires vacatur, even though vacatur was not an issue that was before the Appeals Court. The Town's argument relies on an impermissible expansion of the scope of the Reilly rescript and should be rejected.

IV. Superior Court Judge Goodwin Stated, *in Writing*, that she did not Disturb the Entire Settlement Agreement.

As the Town repeatedly stresses, the judgment obtained by the Interveners on Count I of their Superior Court complaint was not appealed. Because Count I was not appealed, it was not before the Appeals Court. Accordingly, the G&U Parties focused their opposition to the Town's renewed motion on the repeated and consistent explanations given by Superior Court Judge Goodwin of what the judgment on Count I did—and did not—mean. In its reply, the Town requests that this Court ignore Judge Goodwin's clear and unambiguous explanations as "cherry pick[ed] stray comments" not set forth in written decisions. Reply, p. 5. The Town misstates the record, because Judge Goodwin in fact provided these explanations in written decisions of the Superior Court.

The Town writes that "GURR next cites a comment that 'Hopedale lacked authority to buy the smaller piece of land," but claims that this "comment does not support GURR's contradictory reading of [Judge Goodwin's] written decisions." Reply, p. 6 (emphases added). But this was not a mere "comment" – the quoted language comes directly from Judge Goodwin's written May 5, 2022 Memorandum and Order on Motion to Preserve Status Quo (attached as Exhibit 9 to the November 17, 2023 Affidavit of Donald C. Keavany, Jr.). So too does Judge Goodwin's determination that the Interveners had no "likelihood of succeeding in their challenge to the legality of the Settlement Agreement" – also incorrectly diminished by the Town as a "comment" to be disregarded by this Court. These written statements (along with Judge Goodwin's statements during hearings on February 9, 2022 and May 3, 2022) not only support G&U's reading of the judgment that entered on Count I in the Superior Court, but conclusively establish the accuracy of that reading.

Additional excerpts from Judge Goodwin's written May 5, 2022 Memorandum and Order further confirm that the G&U Parties' interpretation of the judgment on Count I is correct. Judge Goodwin wrote, "Rather, by settling [the Land Court case], the [Town] decided to forgo its Chapter 61 option, which the statute plainly allows it to do." Judge Goodwin further wrote that "while G.L. c. 40, § 53 gives the [Interveners] standing to sue to prevent the illegal expenditure of money, it does not give them the right to compel the town to exercise its option to buy the Forestland." [emphasis supplied]. This statement by Judge Goodwin is fully consistent with the Appeals Court's acknowledgment of long-standing precedent with respect to the limitations of Section 53 (Reilly, 102 Mass. App. at 377-378), and with the G&U Parties' interpretation of the Judgment on Count I; it is wholly inconsistent with the Town's current position that the un-appealed Judgment on Count I of the Superior Court requires vacatur of the judgment of dismissal that entered in this Court ten months prior.

V. The Town Continues to Misconstrue *Bowers*.

At pages 6-9 of its Reply, the Town again attempts to apply to this case the reasoning of Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983), but the Town again fails to appreciate the two key differences between this case and Bowers.

First, the court in Bowers partially vacated the consent judgment at issue in that case to the extent that the municipal board lacked authority to impose a land restriction as part of the judgment. The difference here is that it is beyond dispute that the Town's Selectboard had full authority to enter the judgment at issue in this case. The Selectboard's authority to dismiss this case was inherent; it did not derive from the settlement agreement, Town Meeting, or otherwise. The Town has never cited to a case, statute, or anything else to support any claim by it that its Selectboard lacked authority to execute and docket a stipulation of dismissal. In fact, at oral

argument in Reilly, Town Counsel twice confirmed that no Town authorization was necessary for the Selectboard to "sign a stipulation of dismissal and seek to have the land court case dismissed." See Transcript (Exhibit A to Interveners' Reply), p. 1-26.[1]

Second, as the G&U Parties argued in their Opposition, the court in Bowers vacated only that portion of the judgment which was beyond the municipal board's authority. In response to this point, the Town argues:

> But the Appeals Court [in Bowers] then found that Rule 60(b)(6) could provide relief to the town, even though the town's prior agreement had "induced a change of position on the part of the plaintiffs," and the sewage treatment station had been built. This proved no obstacle to vacatur though. The Appeals Court in Bowers simply stayed the order to allow the select board, if it wished, to return to town meeting to receive the necessary authorization.

Reply, p. 8 (citations omitted). The Town again misses the point. The Bowers court vacated only that portion of the judgment which resulted in an unauthorized encumbrance on municipally owned land; it refused the request by a "newly constituted board of selectmen" to vacate that portion of the judgment upholding the grant of a special permit allowing construction of a wastewater treatment plant. Id. at 31, 35. Bowers would be applicable to this case if the settlement agreement was docketed as a consent judgment, which it was not. Under that hypothetical scenario, in this case, Bowers would support a motion to vacate only those portions of the (hypothetical) judgment concerning the sale of the settlement parcel, and nothing more. Nothing in the Bowers opinion

[1] The question of whether the Selectboard would have agreed to dismiss the case if it could not complete the land purchase is starkly different from the question of whether the Selectboard had authority to take that action. In any event, the Town has provided no evidence to support its argument that the Selectboard only decided to dismiss this case as part of the settlement agreement, as opposed to in response to the denial of its motion for preliminary injunction, its concerns that it would not prevail on the merits and/or the expected significant costs associated with litigating in the Land Court and before the federal Surface Transportation Board.

supports the newly constituted Selectboard's request to vacate a stipulation of dismissal entered into under the clear authority of a previous board.[2]

VI. The Town Asks this Court to Cede its Inherent Power to the Superior Court.

It bears repeating that the judgment on Count I of the Superior Court complaint was not appealed by any party and thus, that judgment was not altered by the Appeals Court.[3] Thus, the Town's renewed motion pits (its view) of the Superior Court judgment against the judgment that entered in February 2021 in this Court, and argues that the Superior Court judgment compels this Court to vacate its own judgment of dismissal. Not only that; the Town goes a step further and essentially argues that the Superior Court already decided the underlying claim in this Court. See Reply, p. 14 ("The Superior Court found that GURR engaged in a 'flagrant violation' of [G.L. c. 61]."") Of course, the Superior Court did not decide the merits of any G.L. c. 61 claim, as emphasized in the following sentence from the Superior Court decision where Judge Goodwin states that "[h]owever, the [Interveners]' lawsuit does not put that issue before the court." Keavany Aff., Ex. 9, p. 4.[4]

Whatever rights the Town had under c. 61 in 2020 were asserted in this lawsuit only. Moreover, any such rights were waivable under c. 61, and the Town indisputably waived them when it stipulated to the dismissal of its lawsuit. The Town never challenged its waiver of any c. 61 rights in the Appeals Court, and the Appeals Court held that the Interveners had no standing to

[2] Indeed, the Superior Court noted that the Town acted within its authority under G.L. c. 61 by settling this case and forgoing its c. 61 claim. Keavany Aff., Ex. 9, p. 4.

[3] The Town did not pursue an appeal of any issue, ruling or judgment of the Superior Court or the Land Court.

[4] Judge Goodwin specifically asked at the May 3, 2022 hearing whether the c. 61 issue was ever before her and counsel for both the Town and the G&U Parties confirmed that the c. 61 issue was not before her, as that precise issue was front and center in the Land Court case. Keavany Aff., Ex. 8, pp. 11-12, 16-18. Counsel for the Interveners did not contest those statements.

challenge the Town's waiver. Neither an un-appealed judgment of the Superior Court, nor dicta from that Court's May 6, 2022 Memorandum of Decision Denying Motion to Preserve Status Quo, are sufficient grounds to vacate a judgment of dismissal entered in this co-equal trial court. The Town's argument to the contrary is an impermissible collateral attack on this Court's judgment. See Harker v. Holyoke, 390 Mass. 555, 558 (1983) ("The public interest in enforcing limitations on courts' subject matter jurisdiction is ordinarily served adequately by permitting direct attack on judgments").

Despite the Town's claims, denying vacatur would not be inconsistent with the Superior Court judgment and it would not render the Superior Court judgment toothless. The judgment as described by Judge Goodwin held "that Hopedale lacked authority to buy the smaller piece of land because the purchase was not approved by [Town] voters." Keavany Aff., Ex. 9, pp. 2-3. The Town has not purchased the land, and continues to be enjoined by the Superior Court judgment on Count I from purchasing the land absent future Town Meeting approval. Should the Town inexplicably attempt to purchase the subject land (or another portion of land) without Town Meeting approval, the Interveners would appropriately seek to effectuate and enforce their Superior Court Judgment on Count I to enjoin that purchase. Because no such purchase is being considered, threatened or contemplated, nothing additional or different is required from this Court for the Superior Court judgment to continue to be effective and effectuated.

VII. Conclusion.

The Town's renewed Rule 60(b)(6) motion to vacate the judgment should be denied.

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

/s/ Andrew P. DiCenzo

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CERTIFICATE OF SERVICE

I hereby certify that this document eFiled on January 5, 2024 will be sent by separate email to all counsel of record.

/s/ Andrew P. DiCenzo