COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
C.A. NO. 2185CV00238D

ELIZABETH REILLY, CAROL J. HALL, DONALD HALL, HILLARY SMITH, DAVID SMITH, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMMING, and JANICE DOYLE,

Plaintiffs,

v.

TOWN OF HOPEDALE, LOUIS J. ARCUDI, III, BRIAN R. KEYES, GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, MICHAEL MILANOSKI, and ONE HUNDRED FORTY REALTY TRUST,

Defendants.

EMERGENCY MOTION OF DEFENDANTS TOWN OF HOPEDALE AND HOPEDALE BOARD OF SELECTMEN FOR FURTHER EXTENSION OF INJUNCTIVE ORDER

The defendants Town of Hopedale and Louis J. Arcudi, III and Brian R. Keyes, named in their capacity as members of the elected Hopedale Board of Selectmen (hereinafter "Town" or "Board"), hereby submit an Emergency Motion requesting a further amendment to an injunctive provision of the November 10, 2021 Judgment ("Judgment") and the Court's Order entered in the above captioned matter.

Superior Court Rule 9A (d) (1) Certification

The Town certifies that Town Counsel contacted counsel for all other parties to relate the nature of this motion, and also spoke to counsel for all parties by telephone. The Town submits that the Plaintiffs have assented to this Emergency Motion, but that counsel for co-defendants Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and One Hundred

Forty Realty Trust (hereinafter "Railroad Defendants") stated that he will be filing an opposition to this motion as soon as possible after he is served.

ARGUMENT

In support of this motion, the Town submits that by decision dated November 4, 2021 (entered November 10), this Court entered judgment on the three counts in the Plaintiffs' "ten taxpayer" complaint. The Memorandum of Decision also enjoined the Railroad Defendants from performing any clearing or other site work on the subject property for a period of 60 days. The parties filed an assented to motion to continue that injunctive order through January 31, 2022, to allow additional time for the Town to file a Motion for Clarification of the Judgment and for the Board of Selectmen to consider its options in light of the judgment. By decision dated December 14, 2021, this Court entered a Memorandum of Decision on the Town's Motion for Clarification. True copies of the two Memoranda are attached hereto as Exhibits 1 and 2 for reference.

In the attached Memoranda, the Court posited one option for the Town would be to return to the Land Court and seek an order rescinding the Stipulation of Dismissal in Case No. 20-MISC-000467, on the grounds that the Settlement Agreement in that case has failed and is ineffective due to the Board of Selectmen agreeing to settlement terms that were too divergent from the authority granted by Town Meeting in October 2020. After due consideration, the Board of Selectmen approved this course of action and authorized counsel to file a Motion to Vacate Stipulation of Dismissal with the Land Court.[1]

[1] The Board considered calling a new Special Town Meeting but did not do so. In light of this Court's reference to the ineffective status of the Settlement Agreement, the Board has received extensive public input in favor of seeking to enforce the Town's Chapter 61 and eminent domain rights, and it is exceedingly unlikely that a two-thirds vote of Town Meeting to ratify the Settlement Agreement could be obtained. In addition and more significant, however, a heavily attended indoor Special Town Meeting in January with the current trends in highly infectious Covid-19 cases in the Commonwealth clearly poses an unacceptable risk to public health.

The Motion to Vacate was filed with the Land Court on December 30, 2021 and the parties await a hearing on it. It includes a request for extension of injunctive relief. A true copy of the online docket for Land Court Case No. 20- MISC-000467 is attached hereto as Exhibit 3. At present, however, the Land Court clerk's office has advised that Judge Rubin may not be able to provide a hearing on the Town's motion until late February 2022. This could result in at least one month, and potentially much longer, where there is no injunctive order prohibiting the Railroad Defendants from clearing or otherwise permanently altering the forestland, notwithstanding the provisions of Chapter 61 protecting said property. This Court will recall the prior actions of the Railroad Defendants in initiating significant land clearing last September that led the Court to first issue a Temporary Restraining Order on September 9, 2021, followed by a Preliminary Injunction on September 24 and then the 60-day order in the November 4 Memorandum of Decision.[2]

The Town acknowledges that it may be more efficient to ask the Land Court to issue an injunction against the Railroad Defendants rather than this Court. At least at present, however, Land Court Case No. 20-MISC-000467 stands as dismissed, and it is unknown when the Land Court may rule on the Town's Motion to Vacate Stipulation of Dismissal. If the Land Court grants the Motion to Vacate, any site clearing that the Railroad Defendants may perform prior to such approval would permanently destroy the protected forestland before that Court may confirm the Town's Chapter 61 rights. In addition, if the Land Court denies the Town's Motion to Vacate, the Town would need at least a few weeks in order to call a Special Town Meeting and seek the voters' approval of the terms of the Settlement Agreement if that becomes the last best

[2] The Town also sought an injunction against the Railroad Defendants when it filed its Complaint in the Land Court, as the Railroad had commenced site clearing even as Town Meeting was authorizing acquisition of the subject property via the Town's Chapter 61 option and eminent domain.

option. In either case, there is a substantial risk that the Railroad Defendants may perform site clearing after January 31, 2022 if there is no injunctive order in place at that time.

WHEREFORE, the Town respectfully requests that the Court issue an order to extend the current injunctive order, prohibiting the Railroad Defendants from performing any clearing or other site work on the subject property, until May 1, 2022 or until the Land Court issues its own injunctive order, whichever occurs first.

Defendants,
TOWN OF HOPEDALE, LOUIS J. ARCUDI AND BRIAN R. KEYES,

By their attorney,

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briley@k-plaw.com

Dated: January 11, 2022
794930/HOPD/0145

CERTIFICATE OF SERVICE

I, Brian W. Riley, hereby certify that on the below date, I served a copy of the foregoing Emergency Motion of Defendants Town of Hopedale and Hopedale Board of Selectmen for Further Extension of Injunctive Order, by first class mail and electronic mail, to the following counsel of record:

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Brian W. Riley

Dated: January 11, 2022

Exhibit 1

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

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

[3] As described in more detail below, municipalities have the right of first refusal when an owner of forest land protected under Chapter 61 plans to sell the land for residential, commercial, or industrial use.

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

[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

JUDGMENT ON THE PLEADINGS	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 2185CV00238	Dennis P. McManus, Clerk of Courts
CASE NAME Reilly, Elizabeth et al vs. Town of Hopedale et al	COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608

This action came before the Court, Hon. Karen Goodwin, presiding, upon a motion for judgment on the pleadings,

After hearing or consideration thereof;

46

It is **ORDERED AND ADJUDGED:**

Judgment to enter for the Plaintiffs on Count I, enjoining the Board of Selectmen and The Town of Hopedale from purchasing land as set forth in the Settlement Agreement and the Railroad Defendants are enjoined for 60 days from the date of this Judgment from carrying out any work on the contested forest land. Counts II and III are hereby dismissed.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
11/10/2021	X

Date/Time Printed: 11-10-2021 11:20:54

SCV117: 07/2016

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Exhibit 2

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 ON DEFENDANT TOWN OF HOPEDALE'S MOTION FOR CLARIFICATION

Eleven taxpayers residing in the Town of Hopedale ("Town") sued to challenge a Settlement Agreement between the Town and Grafton & Upton Railroad Company ("Railroad"), concerning disputed forest lands. In pertinent part, the Settlement Agreement provided that in exchange for the Railroad voluntarily selling a portion of the forest lands to the Town, the Town would cease efforts to enforce its G.L. c. 61, § 8 Option to purchase the entirety of the forest lands from the original seller. The plaintiffs sought an injunction preventing the Board from purchasing the forest lands under the terms of the Settlement Agreement (Count I); a declaration of the Town's G.L. c. 61, § 8 rights (Count II); and a declaration that the lands were protected parkland pursuant to art. 97 (Count III).

On November 4, 2021, the court allowed the Town's motion for judgment on the pleadings on Count II because the plaintiffs lacked standing to assert the Town's rights. The court also entered judgment in favor of the Town on Count III because the allegations did not plausibly suggest that the lands met the requirements for art. 97 protection. As to Count I,

[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. Arcudi III, Brian R. Keyes, Jon Delli Priscoli, and Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company

Entered and Copies Mailed 12/16/21

however, the court determined that the execution of the Settlement Agreement was procedurally defective because the Board failed to obtain Town Meeting approval for the reduced land acquisition as required by G.L. c. 40, § 14. The court enjoined the Town from purchasing the land unless it obtained such approval. .

The Town has requested amendment or clarification of the decision to state that the Town has lost its statutory Option to buy the entire parcel. However, that is not what the court decided. As previously explained, although 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 Option.[3] Until the reduced acquisition is approved by Town Meeting, the agreement is not effective, and the Town may (but is not required to) attempt to enforce the Option.

[3] In its Response, the Railroad argues that because the Settlement Agreement contains a severability clause, a failed Town Meeting vote would mean the Railroad need not sell any land, but the Town is still bound to its the waiver of the Option; in other words, the Railroad gets all the benefits of the agreement and gives up nothing in exchange. This would be unjust, to say the least. See *Carrig* v. *Gilbert-Varker Corp.*, 314 Mass. 351, 357 (1943) (contract only severable where it "consists of several and distinct items to be furnished or performed by one party" and "consideration [is] apportioned to each item [separately]"). In a similar case, a panel of the Appeals Court held that where a particular term was the "essence and foundation of [a Land Court] settlement agreement . . . the failure of that consideration [due to a judgment in a subsequent ten-taxpayer action] warranted rescission of the settlement agreement . . . ." *Abrams* v. *Bd. of Selectmen of Sudbury*, 76 Mass. App. Ct. 1128, 2010 WL 175045 at *2 (2010) (Rule 1:28 decision). For this reason, the Railroad's claim preclusion argument misses the mark: while claim preclusion might bar the Town from filing a *new* suit to enforce the Option, the Town could seek rescission of the Settlement Agreement. *Id.* at *2. Moreover, as to *this* suit, claim preclusion would not apply because the plaintiff taxpayers were not parties to the Land Court litigation.

Therefore, the court **DENIES** the Town's motion to the extent it seeks to amend the decision and **ALLOWS** the request for clarification as set forth above.

Karen L. Goodwin
Justice of the Superior Court

DATED: December 14 , 2021

Exhibit 3

20 MISC 000467 Town of Hopedale v. Jon Delli Priscoli Trustee of the One Hundred Forty Realty Trust , et al. RUBIN

- Case Type:
- Miscellaneous
- Case Status:
- Closed
- File Date
- 10/28/2020
- DCM Track:
- Initiating Action:
- EQA - Equitable Action Involving Any Right, Title or Interest in Land, G.L. Chapter 185, § 1 (k)
- Status Date:
- 02/10/2021
- Case Judge:
- Rubin, Hon. Diane R.
- Next Event:

Property Information

384 West Street
Hopedale

All Information | Party | Event | Docket | Financial | Receipt | Disposition

Docket Information

Docket Date	Docket Text	Amount Owed	Image Avail.
10/28/2020	Complaint filed.		Image
10/28/2020	Uniform Counsel Certificate for Civil Cases filed by Plaintiff.		Image
10/28/2020	Case assigned to the Average Track per Land Court Standing Order 1:04.		
10/28/2020	Land Court miscellaneous filing fee Receipt: 418886 Date: 10/28/2020	$240.00	
10/28/2020	Land Court surcharge Receipt: 418886 Date: 10/28/2020	$15.00	
10/28/2020	Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, filed.		Image
10/28/2020	Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, filed.		Image
10/28/2020	Affidavit of David Sarkisian, filed.		Image
10/28/2020	Plaintiff's Motion for Endorsement of a Memorandum of Lis Pendens, filed.		Image
10/28/2020	Emergency Motion for Short Order of Notice, filed.		Image
10/28/2020	Motion for Appointment of a Special Process Server, filed and ALLOWED. (Rubin, J.) Judge: Rubin, Hon. Diane R		Image
10/28/2020	Summons and Hearing Notice issued on Application for Preliminary Injunction and Lis Pendens. Judge: Rubin, Hon. Diane R Event: Hearing on Preliminary Injunction and Lis Pendens Date: 11/04/2020 Time: 10:00 AM		
11/02/2020	Amended Verified Complaint filed.		Image
11/02/2020	Summons returned to Court with service on Grafton & Upton Railroad Company filed. Served in hand to Brenda Johnson, Sr. V.P., and authorized to accept service of process on October 29, 2020.		Image
11/03/2020	Appearance of Donald C Keavany, Jr., Esq., Andrew P DiCenzo, Esq. for Jon Delli Priscoli Trustee of the One Hundred Forty Realty Trust, Michael R. Milanoski Trustee of the One Hundred Forty Realty Trust, Grafton & Upton Railroad Company, filed		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
11/03/2020	Event Resulted: Hearing on Preliminary Injunction and Lis Pendens scheduled on: 11/04/2020 10:00 AM Has been: Rescheduled to November 23, 2020 at 10:00 am. Counsel requested this continuance in order for them to connect with the Defendants counsel who was only recently engaged for this matter and has previously scheduled obligations. Based on certain representations from Defendants counsel giving the Town of Hopedale assurances that the defendants will not perform any tree removal at the subject property and will not take any steps to alienate ownership of the parcel prior to the hearing, Plaintiffs counsel agreed to a continuance. Hon. Diane R Rubin, Presiding		
11/03/2020	Summons and Hearing Notice issued on Application for Preliminary Injunction and Lis Pendens. Judge: Rubin, Hon. Diane R Event: Hearing on Preliminary Injunction and Lis Pendens Date: 11/23/2020 Time: 10:00 AM Counsel notified via email.		
11/16/2020	Defendants' Opposition to Plaintiff's Motion for Temporary Restraining Order, Motion for Preliminary Injunction and Request for Issuance of Memorandum of Lis Pendens and Request that the Court take No Action Pending the Issuance of a Declaratory Order by the Surface Transportation Board, filed.		Image
11/16/2020	Affidavit of Michael R. Milanoski, filed.		Image
11/19/2020	Reply Memorandum in Response to Defendants' Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction and Motion for Endorsement of a Memorandum of Lis Pendens, filed.		Image
11/23/2020	Copies of a Verified Petition for Declaratory Order of Grafton & Upton Railroad Company along with a Verified Statement of President, Michael Milanoski, filed with the Surface Transportation Board filed via email with the court.		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
11/23/2020	Event Resulted: Hearing on Preliminary Injunction and Lis Pendens scheduled on: 11/23/2020 10:00 AM Has been: Hearing on Preliminary Injunction and Temporary Restraining Order held via Zoom. Attorney Durning, Attorney Vetere, Attorney Keavany, Attorney DiCenzo, and Attorney Austin appeared. Before the court are Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction; Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction; Affidavit of David Sarkisian; Plaintiff's Motion for Endorsement of a Memorandum of Lis Pendens; Defendants' Opposition to Plaintiff's Motion for Temporary Restraining Order, Motion for Preliminary Injunction and Request for Issuance of Memorandum of Lis Pendens and Request that the Court take No Action Pending the Issuance of a Declaratory Order by the Surface Transportation Board; Affidavit of Michael R. Milanoski; and Reply Memorandum in Response to Defendants' Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction and Motion for Endorsement of a Memorandum of Lis Pendens. On the morning of the hearing, Defendants also filed for the court's information the Verified Petition for Declaratory Order of Grafton and Upton Railroad Company and Verified Statement of Michael R. Milanoski. At issue is a 155 acre parcel of land located at 634 West Street in Hopedale, which was valued, taxed and assessed as forest land under G.L. c. 61 (the "Forest Land"). The Town hopes to maintain the parcel as forest land, while the Defendants hope to use the parcel in connection with operation of the Grafton & Upton Railroad. The Town seeks a declaration that Defendants are prohibited from converting the Forest Land which is protected under G.L. c. 61 while the Town holds an option, an injunction to prevent the Defendants from converting the Forest Land to railroad use before expiration of a right of first refusal option period provided by Section 8 of Chapter 61 and ultimately specific performance of its right to purchase the Forest Land. A preliminary injunction may issue only if the moving party demonstrates (a) a likelihood of success on the merits, (b) that it faces a substantial risk of irreparable harm if the injunction is not issued, and (c) that this risk of irreparable harm outweighs any risk of irreparable harm which granting the injunction would create for the defendant. Garcia v. Dep't. of Housing and Comty. Dev., 480 Mass. 736, 747 (2018); GTE Prods. Corp. v. Stewart, 414 Mass. 721, 722-724 (1993); Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). In cases involving government action, the moving party must also demonstrate that the requested order promotes the public interest or will not adversely affect the public. Garcia, supra, 480 Mass. at 747; Loyal Order of Moose, Inc., Yarmouth Lodge #2270 v. Brd. Of Health of Yarmouth, 439 Mass. 597, 601 (2003); Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984). At this juncture, for the reasons set forth below and as articulated on the record, Plaintiff's motion for injunctive relief is DENIED. 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 time 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 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. As to irreparable harm, the parties have agreed to work cooperatively together to prepare a stipulation to maintain the status quo while the STB proceedings and this Land Court case are pending. That stipulation is to address Defendants' commitments to maintain the Forest Land consistent with the Forest Management Plan now in effect and not to alienate the Forest Land while this STB petition and this Land Court case are pending. That Stipulation to be filed with the court by December 1, 2020, for court endorsement. Also by December 1, 2020, the parties shall advise: (1) whether the Stipulation is sufficient to address the Town's request for endorsement of a memorandum of lis pendens or whether the Town renews its motion for lis pendens; and (2) whether the Land Court should stay these proceedings while mediation and the STB proceedings are underway. Court inquired into the possibility of Alternative Dispute Resolution ("ADR") and counsel agreed to participate in a mediation screening. Following colloquy, court to issue a Mediation Screening Order. By January 22, 2021 parties to complete mediation screening. By the January 25, 2021 parties to submit written joint report to the court as to outcome of the mediation screening, whether parties are willing to attend mediation, and if so, naming mediation provider, identity of neutral, and date of session. Hon. Diane R Rubin, Presiding Notice of docket entry sent to counsel via email.		

Docket Date	Docket Text	Amount Owed	Image Avail.
11/23/2020	Alternative Dispute Resolution - Early Intervention Event held.		
	Judge: Rubin, Hon. Diane R		
11/23/2020	ADR referral to REBA Dispute Resolution, Inc. issued.		
	Judge: Rubin, Hon. Diane R		
11/24/2020	Order Referring Case to Dispute Resolution Screening Session, issued. (Copies emailed to Attorneys Dan Kelleany, Peter F. Durning, Andrew DiCenzo, Sandra Austin, and Peter M. Veiera)		Image
	Judge: Rubin, Hon. Diane R		
11/30/2020	Event Scheduled Judge: Rubin, Hon. Diane R Event: Case Management Conference Date: 02/17/2021 Time: 02:30 PM		
	Notice of hearing mailed to counsel.		
12/01/2020	Stipulation of the Parties filed and ALLOWED. The Court hereby adopts the terms of the Stipulation.		Image
	Counsel notified via email.		
	Judge: Rubin, Hon. Diane R		
12/14/2020	ADR Report of REBA: Parties have a Mediation Screening on December 17, 2020.		Image
01/25/2021	ADR Report of REBA: Parties Mediated with the Hon. Leon J. Lombardi (ret.) on Friday, January 8, 2021 and Thursday, January 21, 2021 and this case settled.		Image
01/25/2021	Counsel emailed the court requesting a thirty day stay of this case to February 24, 2021 following mediation and settlement of this case. The court allowed this request, Counsel is to also file a joint status report on that date as well.		
	Judge: Rubin, Hon. Diane R		
02/10/2021	Event Resulted: Case Management Conference scheduled on: 02/17/2021 02:30 PM Has been: Canceled For the following reason: Case Reported Settled. Counsel will be filing a Stipulation of Dismissal. Hon. Diane R Rubin, Presiding		
02/10/2021	Stipulation of Dismissal - Mass.R.Civ.P. 41(a)(1)(ii)		Image
12/30/2021	Motion to Vacate Stipulation of Dismissal, filed.		Image