COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.2185CV00238D

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,
Plaintiffs

vs.

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

Defendants

OPPOSITION OF DEFENDANTS, JON DELLI PRISCOLI, MICHAEL R. MILANOSKI, ONE HUNDRED FORTY REALTY TRUST, AND GRAFTON & UPTON RAILROAD COMPANY TO PLAINTIFFS' CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS ON THEIR VERIFIED COMPLAINT[1]

In their cross-motion for judgment on the pleadings, plaintiffs attempt to distract the Court from their obvious lack of standing to assert a claim in Count II of their Verified Complaint, by repeatedly mischaracterizing the very limited effect of the preliminary Single Justice Order in this case. Plaintiffs further attempt to obfuscate the straight-forward facts and legal issues presented in this case by also mischaracterizing the Land Court Order in the

[1] The G&U Defendants have moved for Judgment on the Pleadings on the grounds that the plaintiffs have no standing to assert claims seeking to enforce any c. 61 first refusal option rights once held by the Town.

underlying dispute between the Town and the G&U Defendants, and by interchanging claims within the three pending Counts alleged in their Verified Complaint.

The plaintiffs, a boisterous small group of eleven individuals, are not happy with the Settlement Agreement negotiated and executed by the Town's Board of Selectmen (the "Board") in the 2020 Land Court case. Their unhappiness with the resolution of the Land Court case has led them to collaterally attack its dismissal and settlement, hoping that a Superior Court judge will undo the Agreement. To accomplish their objective of nullifying a lawfully executed Settlement Agreement and a dismissal with prejudice of the Land Court case, the plaintiffs attack on three fronts: First, in Count I they allege that the Board cannot make expenditures to acquire the subject forestland on different terms than what was approved at the October 2020 Town Meeting. Second, in Count II, they allege that they have the standing and authority to reverse the Board's decision to waive and release any and all G.L. c. 61 first refusal rights that the Town may have possessed, direct and order the Board to exercise those redeemed G.L. c. 61 rights and order the Trust to transfer to the Town the subject forestland in accordance with those rights. Count II also seeks to enforce, on behalf of the Town, an eminent domain taking of certain wetlands that were not subject to G.L. c. 61. Lastly, in Count III, the plaintiffs allege that notwithstanding the fact that the record owner of title to the forestland and wetlands is and always has been the Trust, this land was somehow dedicated to and accepted by the Town to be maintained as parkland.

Count II and Count III are easily disposed of as the plaintiffs have no standing to assert these claims and judgment should enter in favor of the G&U Defendants. Assuming *arguendo*, that plaintiffs prevail on Count I (which is not conceded), that success will be limited to enjoining the Town from expending funds to acquire forestland on the terms set forth in the

Settlement Agreement. Plaintiffs' success on Count I will result in the continued ownership of the forestland by the Trust, subject to, *inter alia*, the deed restrictions agreed to by the G&U Defendants in the Settlement Agreement. *See* Single Justice Order ("I am mindful of the defendants' arguments that the settlement agreement allows the public to salvage some of the benefits of its right of first refusal, and that permanently preventing the execution of that agreement could result in the town receiving none of the forestland."). Success on Count I will not provide the plaintiffs with standing to assert claims under Count II or Count III, nor does it advance their claims under Count II or III if the Court somehow finds that these plaintiffs have standing these claims. Accordingly, not only should plaintiffs' Motion for Judgment on the Pleadings be denied in its entirety, but judgment on the pleadings should enter for the G&U Defendants on Counts II and III of the Verified Complaint.

I. Standard of Review

A plaintiff's motion for judgment on the pleadings under Mass. R. Civ. P. 12(c) should be granted only if "the movant establishes that there are no issues of material fact, and that he is entitled to judgment as a matter of law." *Provident Healthcare Partners, LLC v. Health First/Rapidcare, Inc.*, Nos. 145567, 1984CV01466-BLS1, 2020 Mass. Super. LEXIS 162, at *5 (Nov. 6, 2020), quoting *Allstate Prop. & Cas. Ins. Co. v. Squires*, 667 F.3d 388, 390 (3d Cir. 2012); *Tanner v. Board of Appeals*, 27 Mass. App. Ct. 1181, 1182 (1989) (judgment on the pleadings for plaintiff only appropriate if there is no dispute over the material facts). "If the defendant pleads by denial or by affirmative defense so as to put in question a material allegation of the complaint, judgment on the pleadings is not appropriate." *Tanner*, 27 Mass. App. at 1182, citing 5 Wright & Miller, Federal Practice & Procedure § 1368 (1969). For purposes of a motion under Rule 12(c), the nonmovant's well-pleaded factual allegations are presumed to be true and

the movant's contravening assertions are presumed to be false. *Rhea R. v. Department of Children & Families*, 96 Mass. App. Ct. 820, 823 (2020), quoting *Minaya v. Massachusetts Credit Union Share Ins. Corp.*, 392 Mass. 904, 905 (1984).

II. Plaintiffs Cannot Bring Their Flawed G.L. c. 61 Claims Under Count I, Which is Limited to a Claim for an Injunction to Restrain Municipal Expenditures.

Initially, the G&U Defendants must address the plaintiffs' impermissible attempt to bring their claim to restore the Town's purported G.L. c. 61 rights within their G.L. c. 40, § 53 claim in Count I. As pled, and as argued before this Court (Frison, J.) and the Single Justice (Meade, J.), Count I was correctly limited to seeking an injunction against the Town of Hopedale to prevent alleged illegal spending to acquire the forestland under the terms of the Settlement Agreement under G.L. c. 40, § 53. The plaintiffs never asserted that any G.L. c. 61 first refusal claim was brought under Count I because § 53 is limited to actions to restrain expenditures by municipalities, and a discretionary act by a select board to exercise or waive and release a first refusal option under another statute is clearly not an expenditure. That G.L.c. 61 claim was brought specifically only under Count II. However, plaintiffs now assert that Count I is a proper vehicle because the Town's c. 61 right of first refusal is an interest in property and that the Board's waiver of the right of first refusal equates to a "property transfer." Plaintiffs go so far as to say that "Justice Meade recognized this by enjoining the Board from the transfer of 'any property interests', including the Town's c. 61 property interests." Plaintiffs' Memorandum, p. 12. Of course, Justice Meade's decision does not order or enjoin anything[2] with respect to the Chapter 61 waiver. As the plaintiffs acknowledge at page 10, n. 6 of their Memorandum, "the

[2] On two occasions the plaintiffs juxtapose the actual language of Justice Meade's injunction Order next to their own creative interpretation of the Order as intending to refer to the waiver of G.L. c. 61 right as a "property transfer." *See also* Plaintiffs' Memorandum, p. 9.

issues of the Railroad's and the Board's violations of c. 61 and the valid exercise of the Option were not questions presented to or briefed for [the Single Justice]." Additionally, and more importantly, the Single Justice could not enjoin an act that had already occurred. The waiver of the Town's G.L. c. 61 rights was effective on the date the Settlement Agreement was executed, and could not later be enjoined.

Count I was brought specifically pursuant to G.L. c. 40, § 53[3] and relief under Section 53 is sharply limited and is "measured entirely by the statute itself," which authorizes only an injunction to prevent illegal raising or spending of money. *See Amory v. Assessors of Boston*, 310 Mass. 199, 200 (1941). The only relief available under Section 53 is an injunction enjoining the raising or spending of municipal funds. "[T]he statute normally does not authorize the undoing of completed transactions." *Spear v. Boston*, 345 Mass. 744, 746 (1963) (collecting cases). "It is too plain for discussion that the provisions of G. L. c. 40, § 53, which confer jurisdiction upon the Supreme Judicial Court and the superior court to restrain a town or city from the illegal and unconstitutional expenditure of money, cannot be invoked to support a claim of jurisdiction in these courts to enjoin a violation of an ordinance or by-law, upon petition of ten taxable inhabitants." *Kelley v. Board of Health*, 248 Mass. 165, 168-169 (1924). A ten-taxpayer petition "cannot be brought to attack collaterally the validity of an order of the proper tribunal in altering a highway or in eliminating a grade crossing, or to try the title to public office, or to compel an

[3] Count I also references G.L.c. 44, § 59 and G.L. c. 214, § 3(10). Section 59 states: The supreme judicial or superior court, by mandamus or other appropriate remedy, at law or in equity, upon the suit or petition of the attorney general or of the mayor, or of one or more taxable inhabitants of a city, town or district authorized by law to incur debt, or of any creditor to whom it is indebted to an amount not less than one thousand dollars, may compel such city, town or district, and its assessors, collectors, treasurers, commissioners of sinking funds and other proper officers, to conform to this chapter. Chapter 44 relates to municipal finance. G.L.c. 214 §3(10) provides jurisdiction to ten taxpayers, upon leave of Court, to "enforce the purpose or purposes of any gift or conveyance which has been or shall have been made to and accepted by any ... town or other subdivision of the commonwealth for a specific purpose." No gift or conveyance was made to and accepted by the Town as it relates to the forestland.

official to enforce some provision of the criminal law, or to rescind a contract on the ground of fraud imposed upon a town, or to test the reasonableness of rates charged by a town for supplying water." *Id.* at 200-201. The statute has no application if the municipality is not about to spend or raise any money. *See Clark v. Mayor of Gloucester*, 336 Mass. 631, 632 (1958). Thus, even if the Board's waiver and release of the Town's c. 61 first refusal right is the equivalent of a "property transfer" (which it is not), that claim cannot be brought under G.L.c. 40 § 53. Clearly, the plaintiffs know they have no standing under Count II so they are attempting to shoehorn their purported c. 61 claim into Count I. This, they cannot do. Count I is limited to seeking an injunction against the Town to enjoin spending to acquire the forestland under the terms of the Settlement Agreement, and goes no further.

Since it is established that Count I is limited to seeking an injunction against the Town only, the plaintiffs cannot obtain a judgment against the G&U Defendants on this claim. The G&U Defendants recognize that they may be affected by a final judgment enjoining the Town from spending money to buy the subject property, but largely defer to the Town and its anticipated arguments in opposition to plaintiffs' motion. The G&U Defendants do note, however, that the plaintiffs grossly mischaracterize the Single Justice Order as having "answered a pure question of law" as it relates to Count I (plaintiffs' Memorandum, p. 9) and where the Single Justice "agreed with Plaintiffs that the Board's actions were illegal," (*id.*, p. 3), when it did no such thing. In fact, Justice Meade wrote, "To be clear, I am not deciding this case on the merits; only that the plaintiffs have demonstrate[d] some chance of success on their claim." Single Justice Order (emphasis added). The Order explicitly acknowledged that the result on final judgment could differ from the preliminary result, and the G&U Defendants respectfully

suggest that upon full briefing and argument of Count I, the Town's land purchase pursuant to the Settlement Agreement will be deemed lawful.[4]

Regardless however of the outcome of Count I in this case, the plaintiffs' claim that the Settlement Agreement rises and falls with the land purchase is meritless. The Settlement Agreement includes both a severability clause and substantial concessions by the G&U Defendants including the dismissal of their Surface Transportation Board petition, and their agreement to significant no-build restrictions and easements, water exploration cooperation promises, and groundwater protection deed restrictions. *See* VC, Exhibit 19, ¶¶ (1)(b)(iv)-(vii), 1(c)(v)-(vii), 1(e)(iv), (6)(b), (10), & (17)(b). The Trust also agreed to donate 20+- acres of undeveloped land at 363 West Street, subject to Town Meeting approval. VC, Exhibit 19, ¶ (1)(d). None of these terms requires the payment of money by the Town, they are not subject to any of plaintiffs' claims, and they, along with the exchange of mutual releases between the parties, constitute more than sufficient consideration for the continued effectiveness of the Settlement Agreement irrespective of whether the land purchase provision survives.[5] Success on

[4] On full review of the merits, the Town's view that the October 2020 Special Town Meeting ("STM") authorized the G.L. c. 61 acquisition should prevail Article 3 of the STM authorized both the acquisition of 130 acres +- at 364 West Street and the appropriation of the sum of $1,175,000 for that acquisition. Article 3 and the Motion moving Article 3 brought the anticipated acquisition of the 364 West Street property within the confines of G.L.c. 40 § 14. G.L.c. 61 does not authorize a Town to actually purchase real property, which is demonstrated by the lack of any reference to a Town Meeting vote within the statute. Rather, G.L.c. 61 provides a Town with, *inter alia,* a right of first refusal option to acquire the property through G.L.c. 40 § 14 if the forest land is subject to a bona fide offer to purchase. It does not authorize a Town to actually purchase the property. That authorization and power to purchase comes from G.L.c. 40 §14. Indeed, by virtue of the clear language of G.L.c 40, § 14 the Legislature empowered the Board to purchase "any land" within Town subject only to the requirements that the purchase be authorized by the Town Meeting and that the monies be appropriated by a two-thirds vote. Once a town meeting authorizes the purchase and appropriates the funds with a two-thirds vote, the decision of whether to proceed with the purchase of land and the terms of the purchase rests in the discretion of the Board. *Russell,* 361 Mass. 727, 731 (1972) ("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."). Plaintiffs' claim under Count I fails because it requires a finding that a town may purchase property under G.L.c. 61, which has never been recognized before by any Land Court, Superior Court, Appeals Court or Supreme Judicial Court decision.

[5] It is important to cite again to Justice Meade's Single Justice Order acknowledging this likely outcome ("I am mindful of the defendants' arguments that the settlement agreement allows the public to salvage some of the benefits

Count I will enjoin the Town from purchasing forestland on the terms set forth in the settlement agreement. It will accomplish nothing else.

III. Plaintiffs Do Not Have Standing To Enforce the Town's G.L. c. 61 Rights, and are not Entitled to Judgment on Count II.

Count II seeks to usurp the Board's discretionary authority as it relates to exercising or waiving the Town's G.L. c. 61 right to the forestland and is the subject of the G&U Defendants' Motion for Judgment on the Pleadings. Count II is brought under three statutory theories,[6] none of which provides standing to the taxpayer plaintiffs. *See*, G&U Defendants Memorandum of Law in Support of their Motion for Judgment on the Pleadings, which is incorporated herein by reference. Further, the plaintiffs have never cited to any case in which any third-party person, entity or ten-taxpayer group successfully compelled a select board to exercise a G.L. c. 61 option right. The decision to exercise or not exercise an option right is a discretionary, executive function of the select board. See, G.L.c. 61, § 8. The select board cannot be forced to carry out a discretionary function. *See Twomey v. Town of Middleborough*, 468 Mass. 260, 269-270 (2014): ("[A] town meeting cannot exercise authority over a board of selectmen when the board is acting in furtherance of a statutory duty."); *see also Russell v. Canton*, 361 Mass. 727, 730-732 (1972) ("We hold that the town could authorize the selectmen to take real estate by eminent domain, but

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of its right of first refusal, and that permanently preventing the execution of that agreement could result in the town receiving none of the forestland.").

[6] In their Opposition to the G&U Defendants' Motion for Judgment on the Pleadings on Count II, plaintiffs chide the G&U Defendants for not addressing Plaintiffs' standing to seek relief in the nature of mandamus under G.L. c. 249, § 5." This was not addressed because plaintiffs did not plead mandamus as a theory of relief under Count II, only Count III. A mandamus claim to enforce the Town's G.L. c. 61 rights is futile because the exercise of a G.L. c. 61 right is a discretionary function of the Board (*see* p. 8 below). *See Town of Boxford v. Massachusetts Highway Dep't,* 458 Mass. 596, 606 (2010) (mandamus "not appropriate where the acts in question are discretionary rather than ministerial"); *Channel Fish Co. v. Boston Fish Mkt. Corp.*, 359 Mass. 185, 187 (1971) ("Ordering an official body to make such discretionary determinations is not a proper function of a writ of mandamus, since if the act is discretionary there is by definition no official duty to perform it."). Mandamus is similarly unavailable under Count III.

that it could not direct or command them to do so."). Ten taxpayers may not dictate how a select board exercises it discretion under G.L.c. 61, § 8. Plaintiffs have no standing to enforce a Town's c. 61 first refusal rights and thus their Motion for Judgment on the Pleadings on Count II must be dismissed and judgment should enter on Count II in favor of the G&U Defendants.

IV. Waiver and Release of Chapter 61 Right of First Refusal Does Not Equate to a Transfer of a Property Interest.

In the unlikely event the Court finds that the plaintiffs have standing to enforce a Town's G.L. c. 61 first refusal rights, plaintiffs are still not entitled to judgment on Count II. Plaintiffs recognize that the Board cannot be forced to exercise a G.L. c. 61 option, and thus, they have come up with the creative argument that the G.L. c. 61 first refusal option was already effectively exercised by the Board and that the Board had no discretion to release it or waive it absent a vote by the Town. In other words, the plaintiffs now claim that the Settlement Agreement constituted an unlawful transfer of the land back to the G&U Defendants. This argument fails because a waiver of a right of first refusal is not a property transfer, which is demonstrated by the plaintiffs' failure to cite to one case supporting this claim.

This argument also fails because it is premised upon a gross mischaracterization of the Land Court Order that issued in the dispute between the Town and the G&U Defendants.

The plaintiffs describe the Land Court proceeding as follows:

> On November 23, 2020, the Land Court denied the Town's request for a preliminary injunction in a narrow order finding expressly that the Town is entitled to a right of first refusal but that it was unclear to the Land Court on the limited record whether or when that right had triggered or ripened and that, given the Railroad's representation that no further land clearing would occur, there was no risk of harm.

(Plaintiffs' Memorandum, p. 7.) Plaintiffs would have this Court read no further, and simply take their word that the Land Court essentially sided with the Town, but for a minor technicality. They then characterize the Town's purported G.L. c. 61 option right varyingly as "ripened," (*id.*,

p. 6) "exercised," (*id.*, p. 12) and "perfected" (*id.*, p. 16). Plaintiffs argue that by waiving a "perfected, fully enforceable" option, the Town transferred a property interest.

Omitted from the plaintiffs' description of and quotation from the Land Court Order is the following language:

> "It does not appear that the Town's right of first refusal ripened into an option on July 9, 2020…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 that option expires…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."

Directly contrary to plaintiffs' repeated claims, Judge Rubin explicitly found that any option right possessed by the Town did not ripen and was not exercised. Judge Rubin further found that she could not conclude on the record before her that the Town met its burden to prove likelihood of success on the merits of its claim that it possessed a valid G.L. c. 61 right of first refusal to exercise to purchase the forestland, and denied the Town's request for a preliminary injunction in the Land Court action.

Significantly, the issue of whether the Town had properly exercised its G.L. c. 61 rights and/or whether any purported right under G.L. c. 61 was preempted by the Interstate Commerce Commission Termination Act was at the forefront of the Land Court case that was filed by the very same Board that is a defendant in this Superior Court case. *See* Board's Land Court Verified Amended Complaint, a true and accurate copy of which is attached hereto as Exhibit 1.[7] Although the Board initially voted in favor of exercising a G.L. c. 61 right of first refusal, and subsequently recorded a Notice of that vote with the Registry of Deeds, there was a dispute

[7] In considering a motion under Mass. R. Civ. P. 12(c), "a judge may take judicial notice of the court's records in a related action" without converting the pending motion to one for summary judgment. *Jarosz v. Palmer*, 436 Mass. 526, 530 (2002).

regarding the effectiveness of this action, which was raised by the G&U Defendants in Land Court and before the Surface Transportation Board. The Board exercised its discretion to compromise the claims it had brought against the G&U Defendants, including, *inter alia*, by waiving and releasing any G.L. c.61 rights the Town may have possessed, and by dismissing with prejudice the Land Court lawsuit. In Count II, the plaintiffs collaterally attack the Board's discretion to waive and release c. 61 rights and to compromise and settle the lawsuit and seek to re-litigate these very same claims in this forum. It is well established that this type of a collateral attack is not permitted. *See Harker v. Holyoke*, 390 Mass. 555, 558-559 (1983) ("The public interest in enforcing limitations on courts' subject matter jurisdiction is ordinarily served adequately by permitting direct attack on judgments"); *Barrington v. Dwyer*, 18=P-1604, 95 Mass. App. Ct. 1116 (App. Ct. 2019) (Rule 1:28 Decision) ("As the judge correctly recognized, the plaintiff's complaint constitutes an impermissible collateral attack on the judgment of the Probate and Family Court, entered upon the stipulation of dismissal, with prejudice, of the defendant's decedent's complaint for partition of certain real property."). This Court has no authority to undo the dismissal of the Land Court case and relitigate the G.L.c. 61 claim brought by the Board in that case.

To the extent Count II pertains to the wetlands, plaintiffs' claim is even weaker. The wetlands were not subject to G.L. c. 61 protection and the Town never had a right of first refusal to acquire them. VC, ¶15. The plaintiffs now make the unprecedented claim (at page 19 of their Memorandum) that "the Town validly took the 25-acre Wetlands by eminent domain." However, not even the Town has ever made this claim; the eminent domain taking was never completed and if it was, would have been subject to a vigorous defense based in part on federal preemption.

How the plaintiffs can assert in good faith that they, as individual taxpayers, are entitled to enforce an incomplete eminent domain taking on behalf of the Town is beyond comprehension.

Accordingly, plaintiffs are not entitled to judgment on the pleadings on Count II of their Verified Complaint. They have no standing to force or demand the Board to exercise G.L. c. 61 first refusal rights, or to rescind the Board's prior waiver and release of any such rights that the Town may have possessed. Further, plaintiffs are estopped from collaterally attacking the Board's lawful exercise of its discretion to waive and release G.L. c. 61 rights and the judgment that entered in the Land Court. This Court should deny plaintiffs' motion for judgment on the pleadings on Count II and enter judgment in favor of the G&U Defendants dismissing Count II.

V. Plaintiffs are Not Entitled to Judgment on Count III Because the Subject Property has Never Been Owned by the Town and Thus was Never Dedicated or Accepted by the Town as Parkland.

Very little needs to be said about Count III which seeks a declaration that the property at issue "has been dedicated to and accepted by the public as parkland and is protected under Article 97" of the Declaration of Rights.[8] Very little needs to be said about this claim because the property was never acquired by the Town. Although the Town may have intended to eventually dedicate the land as parkland after its acquisition, the acquisition never occurred. The only evidence cited by the plaintiffs for the proposition that the property was dedicated as parkland was the Town Meeting vote to appropriate funds to acquire the property. *See* Plaintiffs' Memorandum, p. 19 ("At the Town Meeting, Article 3 included that the acquisition under G.L. c. 61 would be 'made to maintain and preserve said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes.'").

[8] Initially it should be noted that Count III as pled in the Verified Complaint is solely directed against the Town. The plaintiffs argue in their Motion that Count III is also asserted against the G&U Defendants. Accordingly, the G&U Defendants will address Count III.

Unfortunately for plaintiffs, just pages earlier in their Memorandum they argued that Article 3 had no effect whatsoever on the acquisition of the forestland, other than to appropriate funds:

> The purpose of the Motion on Article 3, unlike the Motion on Article 5, was to provide the funds to the Board to exercise the Town's Option – not to otherwise authorize its taking by eminent domain or by purchase. The sole effect of the vote on Article 3 was to allow the Board to elect to exercise the c. 61 Option at its October 30 meeting and then to promptly record a deed to that effect on November 2.

Plaintiffs' Memorandum, p. 11 (emphasis added). And, while funds were appropriated at the STM for the acquisition of the forestland at 364 West Street, there is no dispute that the appropriated funds (or any sum within the amount appropriated) were never used to acquire any forestland, due in large part to the plaintiffs' success in obtaining an injunction. Because no funds were delivered to the Trust to acquire any portion of the forestland, the Trust did not convey any portion of the forestland to the Town. While it should not need to be said, the Town cannot convert land to public parklands without owning the subject land. There is no dispute that the Trust remains the record owner of the forestland, subject to, *inter alia*, the deed restrictions imposed in the settlement agreement. Plaintiffs' Motion for Judgment on the Pleadings on Count III must be denied, and judgment should enter for the G&U Defendants on Count III.

VI. Conclusion

For the reasons set forth above, plaintiffs' Cross-Motion for Judgment on the Pleadings must be denied in its entirety, and judgment should enter for the G&U Defendants on Count II and Count III of the Verified Complaint as set forth in this Opposition and in the G&U Defendants' Motion for Judgment on the Pleadings.

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

By Their Attorneys,

/s/ Donald C. Keavany, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that this document was served by email on May 17th 2021 to:

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EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

LAND COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 20 MISC 000467

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.

AMENDED VERIFIED COMPLAINT

The Town of Hopedale, by and through its Board of Selectmen, brings this civil action against the parties who now own the controlling interest to a parcel of land in Hopedale which is classified as forest land for tax purposes under Chapter 61 of the General Laws.

On July 9, 2020, the One Hundred Forty Realty Trust (the "Trust"), under control of a prior trustee, sent the Town notice of its intent to sell the Chapter 61 land with a copy of the purchase and sale agreement with a trust affiliated with the Grafton & Upton Railroad Company ("GURR"). Pursuant to M.G.L. c. 61, § 8, Hopedale has a first refusal option to meet any offer to purchase classified forest land and 120 days to exercise this option. Within this statutory time period, the prior trustee assigned 100% of the beneficial interest of the Trust to GURR, so that GURR has obtained the controlling interest in the Chapter 61 land. Even though the Trust still holds legal title to the Chapter 61 land and the Town still holds an option to purchase it, GURR has begun to convert the use of the land by clearing the forest in preparation for development.

After a duly noticed public hearing, the Hopedale Board of Selectmen voted to exercise the first refusal option on October 30, 2020.

Therefore, Hopedale now seeks equitable relief from this Court, including: (i) a declaration that the Trust and GURR are prohibited from taking any action or conducting any activities on or concerning the Chapter 61 land which would result in any alienation of it or any conversion of its current use as forest land until such time as the Town no longer holds the option to purchase; (ii) a temporary restraining order and/or a preliminary injunction preventing the Trust and/or GURR and each of their agents and representatives from alienating or converting the use of the Chapter 61 land at any time before the expiration of the statutory first refusal option period set forth in M.G.L. c. 61, § 8, and as extended by Section 9 of Chapter 53 of the Acts of 2020; (iii) entry of a memorandum *lis pendens* covering the Chapter 61 land; and (iv) entry of an order for specific performance directing the Trust to convey the Chapter 61 land to the Town.

PARTIES

1. Plaintiff Town of Hopedale ("Hopedale" or the "Town") is a Massachusetts municipality, here acting through its duly-elected Board of Selectmen, with a principal address of 78 Hopedale Street in Hopedale, Massachusetts.

2. Defendants Jon Delli Priscoli and Michael R. Milanoski are Trustees of the One Hundred Forty Realty Trust (the "Trust"), which is a nominee trust established under a declaration of trust dated September 16, 1981, and recorded in the Worcester Registry of Deeds (the "Registry") in Book 7322, Page 177. The trustees have a principal address of 7 Eda Avenue in Carver, Massachusetts. This action is brought against Mr. Delli Priscoli and Mr. Milanoski in their capacities as trustees only.

3. Defendant Grafton & Upton Railroad Company ("GURR") is a Massachusetts corporation with a principal place of business at 42 Westborough Road in North Grafton, Massachusetts. GURR owns 100% of the beneficial interest of the Trust pursuant to an Assignment of Beneficial Interest dated October 12, 2020, and recorded in the Registry in Book 63493, Page 39.

JURISDICTION

4. This court has jurisdiction over the parties and this action pursuant to M.G.L. c. 184, § 1(k), because this action involves matters cognizable under the general principles of equity jurisprudence where a right, title, or interest in land is involved, including but not limited to specific performance of a land contract.

FACTUAL BACKGROUND

5. On or around June 27, 2020, the Trust (under the control of a prior trustee and prior owner of the beneficial interest, both of whom are unaffiliated with the defendants named herein) entered into a purchase and sale agreement with Jon Mark Delli Priscoli, Trustee of the New Hopping Brook Realty Trust, for two parcels of land located in Hopedale, Massachusetts, known as 363 West Street and 364 West Street for a purchase price of $1,175,000.00 (the "P&S Agreement"). A true and accurate copy of the P&S Agreement is included in **Exhibit A** as described below.

6. At the time of execution of the P&S Agreement, the Trust owned both parcels.

7. The parcel located at 364 West Street consisted of 155.24 total acres of generally undeveloped land, 130.18 acres of which was (and continues to be) valued, assessed, and taxed as classified forest land under M.G.L. c. 61 (the "Chapter 61 Land").

8. A portion of 364 West Street has been under Chapter 61 classification as forest land since 1992.

9. The Hopedale Board of Assessors approved the most recent re-certification of the Chapter 61 classification on or around September 3, 2014, and the current Chapter 61 tax lien is recorded in the Registry in Book 52875, Page 355.

10. The 364 West Street parcel was and is generally undeveloped except for a single railroad track and a gas pipeline easement that run through the managed forested land. There are no buildings or other structures located on the parcel.

11. According to a report prepared for the Town by Environmental Partners Group, Inc. ("EPG"), the 364 West Street parcel is located hydraulically-upgradient of all of Hopedale's public water supply sources and provides an important buffer for protection of the Town's public water supply wells. A copy of the EPG's report is attached as **Exhibit B.**

12. In addition, EPG noted 364 West Street is the only optimal location for siting a new public water supply source in the Town, and ownership of the Chapter 61 Land would ensure that future land uses on the parcel are consistent with water supply protection and would not adversely impact groundwater quality.

13. The Chapter 61 Land is also located adjacent to, and contiguous with, the Hopedale Parklands, a public parkland first designated in 1899 and with trails and landscape features designed by the American landscape architect Warren H. Manning. Ownership of the Chapter 61 Land would accentuate this existing conservation land and open space and provide additional recreational opportunities for the residents of Hopedale in proximity to the Hopedale Parklands.

14. Upon information and belief, GURR owns and operates on the railroad track that runs through the 364 West Street parcel. GURR is a short line railroad that runs for 16.5 miles from Grafton to Milford. GURR is owned by Mr. Delli Priscoli and was affiliated with the buyer under the P&S Agreement.

15. On or around July 9, 2020, the prior trustee of the Trust served a Notice of Intent to Sell Forest Land Subject to Chapter 61 Tax Lien on the Hopedale Board of Selectmen and other parties as required pursuant to M.G.L. c. 61, § 8 (the "Notice of Intent"). A true and accurate copy of the Notice of Intent is attached as **Exhibit A.**

16. In the Notice of Intent, the Trust indicated its intent to sell both parcels of land, not just the Chapter 61 Land.

17. In the Notice of Intent, the Trust indicated that the proposed use of the Property was "to provide additional yard and track space in order to support the current and anticipated increase in rail traffic of GU[RR]'s transloading operations."

18. Upon information and belief, GURR has no concrete or definitive plans for its future use of the parcels.

19. M.G.L. c. 61, § 8, provides, in pertinent part: "For a period of 120 days after the day following the latest date of deposit in the United States mail of any notice which complies with this section, 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."

20. Section 9 of Chapter 53 of the Acts of 2020 provides:

> Notwithstanding section 8 of chapter 61 of the General Laws, section 14 of chapter 61A of the General Laws, section 9 of chapter 61B of the General Laws or any other general or special law, charter provision, ordinance or by-law to the contrary, during and for a period of 90 days after the termination of the governor's March 10, 2020 declaration of a state of emergency, all time periods within which

any municipality is required to act, respond, effectuate or exercise an option to purchase shall be suspended.

21. Assuming the Notice of Intent was deposited in the mail on July 9, 2020, the statutory period for Hopedale to exercise its first refusal option to purchase the Chapter 61 Land would expire on November 7, 2020, which is 120 days after July 10, the day following the date of deposit of the Notice of Intent in the mail, without including any extension pursuant to Section 9 of Chapter 53 of the Acts of 2020.

22. Upon information and belief, the P&S Agreement contained a bona fide offer to purchase the two parcels, including the Chapter 61 Land.

23. After July 9, 2020, but within the statutory option period, the Town of Hopedale made multiple statements to representatives of the Trust and of GURR that clearly and expressly indicated that the Town was considering exercising its first refusal option to purchase the Chapter 61 Land.

24. On October 7, 2020, counsel for the Trust sent a letter to Hopedale purporting to withdraw the Notice of Intent:

> [T]he Notice of Intent is hereby withdrawn in its entirety by One Hundred Forty Realty Trust, the property owner and shall be deemed of no further force and effect... Any further notice to sell or convert the land will be subject to a new Notice of Intent. To the extent that the Notice of Intent constituted an offer to sell to the Town of Hopedale, said offer is withdrawn.

A true and accurate copy of the October 7, 2020, letter is attached as **Exhibit C**.

25. On October 8, 2020, counsel for the Town of Hopedale sent a letter to the Trust and GURR stating that the purported withdrawal of the Notice of Intent was not effective because, by operation of law, the "first refusal option ripened into an irrevocable option to purchase which vested when the Town received the Notice of Intent." The letter further advised the Trust and GURR "that the Town of Hopedale will proceed to consider whether to exercise its

option to purchase the portion of the property located at 364 West Street which is classified forest land under Chapter 61 according to the terms of the offer contained in the Notice of Intent." A true and accurate copy of the October 8, 2020, letter is attached as **Exhibit D**.

26. Despite knowing that the Town of Hopedale was actively considering exercising its first refusal option, the Trust and GURR entered into a series of transactions which accomplished an end run around the P&S Agreement.

27. First, the Trust conveyed by quitclaim deed to GURR the parcel located at 363 West Street and the non-classified portion of 364 West Street (i.e., the non-Chapter 61 Land) for consideration of $1.00. This quitclaim deed is dated October 12, 2020, and is recorded in the Registry in Book 63493, Page 34.

28. Second, the owner of 100% of the beneficial interest of the Trust assigned the beneficial interest to GURR for consideration of $1,175,000.00 (the same amount as the purchase price in the P&S Agreement). The Assignment of Beneficial Interest is also dated October 12, 2020, and is recorded in the Registry in Book 63493, Page 39.

29. Third, the trustees of the Trust, Charles E. Morneau and Gregg Nagel, resigned as trustees. Their resignations are also dated October 12, 2020, and are recorded in the Registry in Book 63493, Pages 43 & 45 (respectively).

30. Fourth, the Trust appointed successor trustees—the defendants named herein—who are affiliated with GURR: Mr. Delli Priscoli (CEO of GURR) and Mr. Milanoski (President of GURR). The appointment of successor trustees to the Trust is dated October 14, 2020, and is recorded in the Registry in Book 63508, Page 8. The certificate of appointment and acceptance of appointment is also dated October 14, 2020, and is recorded in the Registry in Book 63508, Page 11.

31. As a result of these transactions, GURR now owns the controlling beneficial interest in the Trust, which holds legal title to the Chapter 61 Land.

32. On October 24, 2020, at a Special Town Meeting attended by over 400 residents, the Town of Hopedale adopted warrant articles by unanimous consent to appropriate money for the acquisition of the Chapter 61 Land and to maintain and preserve the Chapter 61 Land "and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes to be managed under the control of the Hopedale Parks Commission."

33. Upon information and belief, on or around October 27, 2020, agents and/or representatives of the Trust and/or GURR began to undertake site work activities on the Chapter 61 Land, including but not limited to flagging for wetlands delineation and tree cutting.

34. At a duly noticed public hearing held on October 30, 2020, the Hopedale Board of Selectmen voted 2-0 to exercise the first refusal option to purchase the Chapter 61 Land.

35. Hopedale recorded notice of the decision to exercise the first refusal option in the Worcester South District Registry of Deeds on November 2, 2020. A copy of the recorded Notice of Exercise is attached as **Exhibit E**.

36. On November 2, 2020, Hopedale sent the Notice of Exercise accompanied by a proposed purchase and sale agreement for the Chapter 61 Land to the Trust's prior and current trustees by certified mail, as required by M.G.L. c. 61, § 8.

COUNT I
M.G.L. c. 231A, § 1 -- DECLARATORY JUDGMENT

37. Hopedale incorporates by reference the allegations in paragraphs 1 through 36 as if fully set forth herein.

38. An actual controversy exists between the Town of Hopedale and the Trust and GURR over the statutory first refusal option contained M.G.L. c. 61, § 8.

39. The Town of Hopedale seeks a binding declaration that the Notice of Intent complied with the provisions of M.G.L. c. 61, § 8; that the offer contained in the P&S Agreement was a bona fide offer to purchase the Chapter 61 Land; that its first refusal option vested on July 10, 2020, the day following the latest date of deposit in the United States mail of the Notice of Intent; and that, as a result, the Town of Hopedale now holds an irrevocable option to purchase the Chapter 61 Land for the statutory time period.

40. The Town of Hopedale seeks a further binding declaration that, pursuant to Section 9 of Chapter 53 of the Acts of 2020, the time period within which it is required to act to exercise its option to purchase is suspended for the duration of, and for a period of 90 days after the termination of, the governor's March 10, 2020, declaration of a state of emergency; and that the statutory 120-day time period within which the Town of Hopedale may act to exercise its option to purchase will not begin to run until that suspension is lifted.

41. The Town of Hopedale seeks a further binding declaration that the Trust and GURR are prohibited from taking any action or conducting any activities on or concerning the Chapter 61 Land which would result in any alienation of the Chapter 61 Land or any conversion of its current use as forest land until such time as the Town of Hopedale no longer holds the option to purchase.

42. The Town of Hopedale seeks a further binding declaration that it is entitled to specific performance of its first refusal option to purchase the Chapter 61 Land on the same terms and conditions that the GURR-affiliated buyer offered to the Trust in the P&S Agreement.

43. The Town of Hopedale seeks a further binding declaration that the Trust's assignment of 100% of its beneficial interest to GURR was equivalent to a transfer of title to the Chapter 61 Land and therefore constituted a sale of land taxed under Chapter 61 giving rise to a separate and independent first refusal option in the Town of Hopedale.

COUNT II
TEMPORARY RESTRAINING ORDER/PRELMINARY INJUNCTIVE RELIEF

44. Hopedale incorporates by reference the allegations in paragraphs 1 through 43 as if fully set forth herein.

45. M.G.L. c. 61, § 8, provides Hopedale with a first refusal option to meet any offer to purchase land protected under Chapter 61. Hopedale has a 120-day period to exercise this option, subject to any suspension of this time period pursuant to Section 9 of Chapter 53 of the Acts of 2020.

46. Hopedale is likely to prevail on the merits of its claim to have an irrevocable option to purchase the Chapter 61 Land, such that Hopedale can meet the offer contained in the P&S Agreement and purchase the Chapter 61 Land within the statutory time period.

47. If an injunction is denied and the Trust and/or GURR are able to impair the quality of the Chapter 61 Land by conducting site work, Hopedale will suffer irreparable harm by the loss of valuable land for conservation, recreational, and water supply protection purposes. Given the unique nature of land, Hopedale's harm is not likely to be remedied by money damages.

48. In light of Hopedale's likelihood of success on the merits, the risk of irreparable harm to Hopedale far outweighs any potential harm to the Trust and/or GURR if an injunction is not issue, since the defendants have already acquired controlling interests in all the land that was the subject of the P&S Agreement, and will merely have to wait to perform site activities on the

Chapter 61 Land until such time as the Town of Hopedale no longer holds the option to purchase.

COUNT III
SPECIFIC PERFORMANCE

49. Hopedale incorporates by reference the allegations in paragraphs 1 through 48 as if fully set forth herein.

50. Pursuant to M.G.L. c. 61, § 8, Hopedale holds a first refusal option to purchase the Chapter 61 Land.

51. The Hopedale Board of Selectmen validly exercised the first refusal option to purchase the Chapter 61 Land on behalf of the Town of Hopedale.

52. Hopedale sent the Trust, which is now controlled by GURR, a proposed purchase and sale agreement for the Chapter 61 Land which contained substantially the same terms and conditions as the original P&S Agreement that the GURR-affiliated buyer had offered the Trust for the intended sale set forth in the Notice of Intent.

53. Hopedale is ready, willing, and able to meet the original bona fide offer to purchase the Chapter 61 Land.

54. Upon information and belief, the Trust, now controlled by GURR, will not agree to sell the Chapter 61 Land to the Town despite the Town's valid exercise of the first refusal option to purchase under Chapter 61.

55. Failure by the Trust, now controlled by GURR, to sell the Chapter 61 Land to the Town will result in damage to the Town's existing and future water supply if the Town is not able to acquire and conserve the Chapter 61 Land and the Trust and GURR are able to develop the land instead.

REQUESTS FOR RELIEF

WHEREFORE, based on the foregoing, Hopedale respectfully requests that the Court enter the following relief:

1. Enter a temporary restraining order and/or a preliminary injunction preventing the Trust and/or GURR and each of their agents and representatives from alienating or converting the use of the Chapter 61 Land at any time before the expiration of the statutory first refusal option period set forth in M.G.L. c. 61, § 8, and as extended by Section 9 of Chapter 53 of the Acts of 2020;

2. Enter a judgment declaring the following:

a. that the Notice of Intent complied with M.G.L. c. 61, § 8;

b. that the offer contained in the P&S Agreement was a bona fide offer to purchase the Chapter 61 Land;

c. that the Town of Hopedale's first refusal option vested on July 10, 2020;

d. that, as a result, the Town of Hopedale now holds an irrevocable option to purchase the Chapter 61 Land for the statutory time period;

e. that, pursuant to Section 9 of Chapter 53 of the Acts of 2020, the time period within which it is required to act to exercise its option to purchase is suspended for the duration of, and for a period of 90 days after the termination of, the governor's March 10, 2020, declaration of a state of emergency, and that the statutory 120-day time period within which the Town of Hopedale may act to exercise its option to purchase will not begin to run until that suspension is lifted;

f. that the Trust and GURR are prohibited from taking any action or conducting any activities on or concerning the Chapter 61 Land which would result in any

alienation of the Chapter 61 Land or any conversion of its current use as forest land until such time as the Town of Hopedale no longer holds the option to purchase;

g. that Hopedale is entitled to specific performance and conveyance of the Chapter 61 Land; and\

h. that the Trust's assignment of 100% of its beneficial interest to GURR was equivalent to a transfer of title to the Chapter 61 Land and therefore constituted a sale of land taxed under Chapter 61 giving rise to a separate and independent first refusal option in the Town of Hopedale;

3. Approve Hopedale's memorandum of *lis pendens*;

4. Enter an order for specific performance directing the Trust to convey the Chapter 61 land to the Town;

5. Enter an order permitting Hopedale and its agents or representatives to enter the Chapter 61 Land for inspection purposes at reasonable times and upon reasonable notice as permitted by M.G.L. c. 61, § 8; and

6. Enter such other relief as the Court deems just and proper.

Respectfully submitted,

TOWN OF HOPEDALE

By its attorneys,

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Dated: November 2, 2020

CERTIFICATE OF SERVICE
I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail, postage prepaid, ~~(hand-delivering a copy of same)~~ to all counsel of record on November 2, 2020

VERIFICATION

I, Brian Keyes, Chair of the Town of Hopedale Board of Selectmen, have read the above Verified Complaint and now state, under penalties of perjury, that the facts stated therein are true to the best of my personal knowledge and that no material facts have been omitted.

Brian Keyes, Chair
Hopedale Board **of Selectmen**

Dated: