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

G&U DEFENDANTS' OPPOSITION TO THE TOWN OF HOPEDALE'S EMERGENCY MOTION FOR FURTHER EXTENSION OF INJUNCTION ORDER

Grafton and Upton Railroad Company ("G&U") and Jon Delli Priscoli and Michael R. Milanoski, Trustees of the One Hundred Forty Realty Trust (the "Trust") (collectively, the "G&U Defendants") oppose the Emergency Motion of the Town of Hopedale, Louis J. Arcudi, III, and Brian R. Keyes For Further Extension of Injunction Order. The G&U Defendants oppose for three reasons. First, this Court lacked jurisdiction to enter the injunction against the G& U Defendants in its November 10, 2021 Judgment under Count I and therefore lacks jurisdiction to extend it. There is no controversy between the Town and the G&U Defendants because the Town has not asserted any claim in this action. Second, because the Town has no underlying claim, it has not established (or even attempted to establish) a likelihood of success on the merits as is

necessary to obtain or extend injunctive relief. Third, the purpose of the injunction was to allow the Town time to decide whether to schedule a Town Meeting vote or to proceed in Land Court, and this purpose was fulfilled when the Town decided to proceed in Land Court. The Town filed a Motion to Vacate the Stipulation of Dismissal in the Land Court on December 30, 2021 and also sought an injunction against the G&U Defendants to enjoin these parties from "any further alteration or destruction of the 130.18 acres of forest land pending further order of the [Land] Court." However, upon learning that the Land Court would not hear the Town's motion before January 31, 2022, rather than file a request for a Temporary Restraining Order, or an Emergency Motion in that Court, the Town has decided to try for a second bite at the apple in a different forum by filing the instant "emergency" motion. Such judicial forum shopping should be rejected and this Court should deny the Town's "emergency" motion, which is a self-created emergency.

ARGUMENT

I. This Court Lacked Jurisdiction to Enter the Injunction, and Lacks Jurisdiction to Extend It.[1]

Both the entry of the injunction and any potential extension thereof present serious jurisdictional and procedural concerns. There is no claim in this case by the Town against the G&U Defendants. Indeed, the only claim brought against the G&U Defendants (by the 10-Taxpayer Plaintiffs) – Count II – was dismissed for lack of standing. At no point prior to the

[1] The injunctive relief included in the Judgment against the Trust and the Railroad under Count I continued the injunction that was entered by this Court in September 2021. The plaintiffs and this Court asserted that the G&U Defendants had read Justice Meade's April 8, 2021 Order too narrowly, but the G&U Defendants literally interpreted the April 8 Order as written, which clearly and unequivocally was an injunction entered solely against the Town and not against the G&U Defendants. This is consistent with the plaintiffs' interpretation of their original request for injunctive relief in March 2021 when plaintiffs' counsel stated to counsel for the G&U Defendants: "Regarding the hearing date [on the plaintiffs' request for injunctive relief], I am glad to discuss rescheduling but that should be a conversation between me and counsel for the Town, as the Motion is directed at the Town." [emphasis supplied]. See March 4, 2021 email from Attorney David Lurie to Attorney Donald Keavany, attached hereto as Exhibit 1. Justice Meade's April 8 Order enjoined the Town and the Town only because it was entered under Count I, which Justice Meade knew, and this Court acknowledged, was only asserted against the Town.

Town's instant emergency motion did the Town seek any relief against the G&U Defendants. This case has never included a controversy between the Town and the G&U Defendants.

The Town never asserted a cross claim against the G&U Defendants, or otherwise advocated for the nullification of the Settlement Agreement or for an injunction. The Court issued the injunction *sua sponte* without reference to an underlying cause of action supporting that relief. The G&U Defendants have been unable to identify a single case in which a Court *sua sponte* issued an injunction against one co-defendant benefitting another co-defendant who had neither asked for such relief nor asserted a cross claim against the enjoined defendant.

The Plaintiffs' claim in Count I was brought pursuant to G.L. c. 40, § 53, which authorizes only an injunction to prevent illegal raising or spending of money. See Amory v. Assessors of Boston, 310 Mass. 199, 200 (1941). "[T]he statute normally does not authorize the undoing of completed transactions," such as the Settlement Agreement. See Spear v. Boston, 345 Mass. 744, 746 (1963) (collecting cases). There is a significant distinction between an injunction restraining the expenditure of funds pursuant to one provision of the Settlement Agreement, and a judgment nullifying or invalidating the Settlement Agreement as a whole. The 10-Taxpayer Plaintiffs sought only the former; they had no standing to pursue the latter. The Town never asserted a claim in this case seeking the latter. The issue of the overall validity of the Settlement Agreement was not litigated in this case nor could it have been, unless brought by the Town or the G&U Defendants. It was error for this Court to *sua sponte* issue an injunction which went beyond what the 10-Taxpayer Plaintiffs sought or had standing to obtain by judgment.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the

matter in issue in the case before it." Caputo v. Board of Appeals, 330 Mass. 107, 111 (1953), quoting Mills v. Green, 159 U.S. 651, 653 (1895). The Court's injunction order within the Judgment on Count I did not affect the only matter that survived dismissal in this case, which was the ability of the Town to utilize its October 2020 authorization to expend funds to acquire land pursuant to the Settlement Agreement. See id.; see also Cognition Fin. Corp. v. Harding, 35 Mass. L. Rep. 217 (Super. Ct. 2018) (where there is no actual controversy, the court should not proceed to the merits). Accordingly, the injunction order should not be extended.

II. The Town Has Not Demonstrated a Likelihood of Success on the Merits.

For the same reason the Court lacked jurisdiction to enter the injunction, the Town cannot seek to extend it. Since the Town has asserted no claim against the G&U Defendants, it cannot establish any likelihood of success on the merits. See Griffin v. Boston Hous. Authority, 92 Mass. App. Ct. 1102 (2017) (stating that applications for post-judgment injunctions pending appeal are subject to the same standard as applications for preliminary injunctions, including the showing of a likelihood of success on the merits).

The Town's Motion explains why it wants an extension of the injunction, but it falls far short of establishing that it is entitled to one. Essentially, the Town argues that it should get an injunction here because the Land Court Action is dismissed, and the Town's prospects for reopening it are uncertain.[2] The Town's limited chance of succeeding in its effort to vacate a stipulated dismissal with prejudice of the Land Court Action is no substitute for a meritorious

[2] The Town also implies that if the Land Court denies its motion to vacate the dismissal in that action, the injunction should be extended to allow additional time to schedule a Town Meeting. However, if the Land Court denies the Town's Motion, the Town will be forever foreclosed from seeking to enforce an option right to purchase the forestland. The Town could then schedule a Town Meeting to seek authorization to acquire the 65 acres pursuant to the Settlement Agreement, but there would be no need to have an injunction in place prior to such vote. The G&U Defendants have not, and do not intent to, clear any of the 65 acres which would go to the Town under the Settlement Agreement. An injunction would impermissibly interfere with the Railroad Defendants' right to develop land which it would retain pursuant to the Settlement Agreement, and which the Town has no basis to acquire.

claim. The Town's failure to identify any claim upon which it is entitled to an extension of this Court's injunction – let alone that it is likely to succeed on such claim – should be sufficient for the denial of its Motion.

To the extent that the Town had a claim against the G&U Defendants, it brought and dismissed such claim in the Land Court Action. Prior to dismissal, the Land Court rejected the Town's request for a preliminary injunction and specifically noted that it could not find that the Town was likely to succeed on the merits. There is no reason to think that the Town's claims are any more likely to succeed now than they were in 2020. This is particularly true where the Town waived its Chapter 61 rights, entered into a mutual release agreement with the G&U Defendants, and stipulated to a dismissal with prejudice of its Chapter 61 claim. There has been no judgment invalidating these provisions, and they remain effective. To say the Town's present likelihood of success on the merits of its Chapter 61 claim is far-fetched is an understatement. Therefore, the Town is not entitled to further injunctive relief.

III. The Purpose of the Initial Injunction Has Been Served.

Finally, even assuming arguendo that the Court had a jurisdictional basis to enter the injunction, and the Town had made a showing that it was entitled to one, the purpose of the injunction has been served and it is no longer necessary. Judgment entered in this case two months ago - on November 10, 2021. The Court issued the injunction "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."[3] Memorandum of Decision, p. 12.

[3] Due to the limited duration of the injunction that entered under Count I, the Trust and G&U made the practical decision to not challenge the injunctive relief that entered against them when they were not parties to Count I. The Trust and G&U later agreed to have that injunctive relief under Count I briefly extended to January 31, 2022 to accommodate the Town.

The Town's Select Board issued a Statement on December 28, 2021 informing the public that it had made its decision to take the necessary first step to exercise its purported option right by seeking to vacate the dismissal of the Land Court Action. See Statement, attached hereto as Exhibit 2. The purpose of the injunction, to allow the Town time to decide, was fulfilled when the Town made its decision two weeks ago.

The Town acknowledged in its Motion to Vacate Stipulation of Dismissal in the Land Court Action that its effort to do so "may be the only" avenue for the Town to reclaim its Chapter 61 claim. Along with its Motion to Vacate, the Town requested injunctive relief. Where the explicit purpose of this Court's injunction has been fulfilled, and where the Town has acknowledged that it must proceed in Land Court, this Court should defer to the Land Court. The Land Court is the only forum in which the Town has brought a claim against the Railroad Defendants and is therefore the only appropriate forum for the Town to seek injunctive relief.[4]

CONCLUSION

For the reasons set forth above, the Town's Emergency Motion for Further Extension of Injunction Order should be denied.

[4] The Town notes that the Land Court has not yet scheduled a hearing on its December 30, 2021 Motion to Vacate Stipulation of Dismissal and may not until February 2022. The Town could have sought a Temporary Restraining Order, or filed on an emergency basis in the Land Court. The Town's scheduling concerns are not a basis for jurisdiction. In any event, undersigned counsel is working the Town's counsel in the Land Court Action to have the Town's Motion to Vacate Stipulation of Dismissal heard as soon as possible.

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

/s/ Donald C. Keavany, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that this document was served by email on January 12, 2022 to:

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EXHIBIT 1

Don Keavany

From: David E. Lurie <dlurie@luriefriedman.com>
Sent: Thursday, March 4, 2021 12:18 PM
To: Don Keavany
Cc: briley@k-plaw.com; Harley Racer
Subject: Reilly v. Hopedale

Don –

I received your voicemail. Thank you for agreeing to accept service on behalf of Messrs. Delli Priscoli, Milanoski, the Trust, and the Railroad. I will send you the summonses when I retrieve them from our process server.

Regarding the hearing date, I am glad to discuss rescheduling but that should be a conversation between me and counsel for the Town, as the Motion is directed at the Town. You indicated that Brian Riley will be representing the Town, so I have copied him on this email. Brian, if you would like to discuss rescheduling, you can either email me, call me at my office number below, or call me on my cell at [redacted]

Dave

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EXHIBIT 2

STATEMENT ON STATUS OF LITIGATION INVOLVING 364 WEST STREET

To recap the issues involving this property, in October 2020 a Special Town Meeting voted to (1) authorize the Select Board to acquire 130 acres off West Street, owned by the One Hundred Forty Realty Trust and (2) exercise eminent domain to acquire an additional 25 abutting acres. These votes also appropriated funds to pay for these acquisitions. This authorized the Select Board to exercise a Right of First Refusal option on the 130 acres pursuant to General Laws Chapter 61, which the Select Board has sole authority to exercise. After following the statutory process to exercise the option, the Select Board also authorized filing a lawsuit in Land Court against the Trust and the Grafton and Upton Railroad, in order to counter the Railroad's claims that it effectively owns the property and to enjoin the Railroad from clearing the property. Based upon the Land Court judge's recommendation and with assistance of counsel, however, in February 2021, after mediation the Select Board agreed to a Settlement Agreement with the Trust and Railroad – in summary, the Town would receive 65 acres of the 364 West Street property at issue, as well as another 20 acres that the Trust would donate pending Town Meeting authorization, along with various other provisions agreed to with the Trust and Railroad.

In March 2021, a group of Town residents filed a so-called "ten taxpayer lawsuit" in Worcester Superior Court, seeking to prevent the Land Court settlement agreement from being carried out and claiming that the Select Board had no choice but to acquire the entire 155 acres. In November, following an initial ruling in favor of the Town and a decision by the Appeals Court sending the matter back to the Superior Court for further adjudication, the Superior Court ruled that the Select Board could not use the October 2020 Town Meeting votes to carry out the Land Court settlement agreement, as the difference between the real property to be acquired under the agreement and that authorized by Town Meeting was too significant. According to the Superior Court, a new Town Meeting vote to authorize the payment and acquisition of less than the entire parcel of conservation would be required to validate the settlement agreement. The Superior Court also issued a judgment dismissing the remainder of the plaintiffs' claims and finding in favor of the Town.

In addition, however, as an alternative to seeking a new Town Meeting vote, the Superior Court stated - without explanation – that the Select Board could "take the necessary steps to proceed with its initial decision to exercise the Option for the entire Property," notwithstanding that the Land Court litigation on that issue had been dismissed by a stipulation executed by the parties and the option waived as part of the settlement agreement. The Select Board authorized Town Counsel to file a Motion for Clarification to request that the judge explain this portion of the judgment. On December 16, the Superior Court issue a response to the Town's motion. In summary, the Court stated that where the Town's acquisition of 85 acres was a fundamental part of the settlement agreement, unless the Board obtained Town Meeting's authorization to acquire this property, the agreement would not become legally "effective" and the Town could request that the Land Court reopen the Town's previously dismissed lawsuit and seek to enforce the option.

In light of the Superior Court's judgment and clarification, the Select Board has a limited number of options going forward and a Court imposed deadline of mid-February 2022. One course of action for the Select Board would be to call a new Special Town Meeting in January and put the settlement agreement's terms to the voters. Town Counsel, in reliance on the decisions of both the Superior Court and the Appeals Court, has advised that if Town Meeting did vote to authorize the terms of the Land Court settlement agreement (which would require a **2/3 vote** in favor to pass), there would be no further impediments to carrying it out. A favorable vote would allow the Town to acquire the 85 acres of this property and avoid the potential that the Town acquires **none** of the property. A second option would be to attempt to reopen the Land Court litigation and pursue the Town's original claim that it properly exercised its right of first refusal under G.L. c.61, §8. The third option, not favored by the Board, would be to take no further action and allow the status quo to remain with the Railroad in possession of the property.

After deliberation, the Select Board has decided not to call a Special Town Meeting at this time. The Board reached this decision based primarily on three factors:

1. At the October 2020 Special Town Meeting, the voters unanimously supported the acquisition of the 155 acres;
2. While it would require a new Town Meeting vote to formally document the voters' position on acquiring the 85 acres, the Board acknowledges the informal public statements of several hundred voters, through social media and petitions, in favor of instead attempting to pursue further Land Court proceedings to acquire the 155 acres, which the Superior Court has opined may be possible, and in this regard the Board has concluded that the voters at Town Meeting would likely vote against acquiring the 85 acres pursuant to the settlement agreement;
3. In addition, and perhaps most significantly, the current status of the Covid-19 pandemic, with the Delta and Omicron variants rapidly spreading throughout the Commonwealth and the country, makes it a clearly unacceptable public health risk to ask a large number of voters to attend an indoor Special Town Meeting at this time, with an outdoor Town Meeting in January impractical at best.

After further deliberations and carefully considering the options, the Select Board authorized legal counsel to file the necessary motion with the Land Court to request that Court to vacate the stipulation of dismissal and reopen the litigation, so that the Town may proceed with the original action in Land Court to seek a judgment that it is entitled to acquire the 155 acres as authorized by the October 2020 Special Town Meeting.

It must be noted that the Town's prospects in this regard are not known at this time – the Superior Court judgment has no binding effect whatsoever on what the Land Court may do with the Town's attempt to reopen the case. The Board will vigorously present the Town's case to the Land Court, however, and we trust that the Court will consider our well-reasoned position (supported by the Superior Court) and allow us to litigate the Town's rights to the property. Throughout the past 14 months, the Select Board's sole intention has been that the Town acquire as much of the property at 364 West Street as legally and practically possible, to preserve this property in its natural state and for potential public water supply purposes. We have heard the

voices of the residents, and we will continue to seek to acquire this important property as authorized by you, the voters.