UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB

HOPEDALE CITIZENS' MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF THE TOWN OF HOPEDALE'S OPPOSITION TO GRAFTON & UPTON RAILROAD COMPANY'S MOTIONS FOR PRELIMINARY INJUNCTION

The Hopedale Citizens[1] respectfully request that this Court grant them leave to file an amicus brief in support of the Town of Hopedale's Opposition to the Grafton & Upton Railroad Company's Motions for Preliminary Injunction. In support thereof, the Hopedale Citizens state as follows:

[1] The Hopedale Citizens are residents of Hopedale, the named Plaintiffs in Reilly v. Town of Hopedale, No. 2185-cv-00238 (Mass. Sup. Ct.) (the "Superior Court Action") and the named Intervenors in Town of Hopedale v. Delli Priscoli, No. 20 Misc 0467 (Mass. Land Ct.) (the "Land Court Action"): Elizabeth Reilly, Carol J. Hall, Hilary Smith, David Smith, Donald Hall, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle.

1. This case presents an issue of significant public interest to the citizens and residents of the Town of Hopedale in the continued conservation of the disputed property at 364 West St. (the "Property") as forestland and as significant to the Town's public water supply, as it had been pursuant to M.G.L. c. 61 for more than three decades.

2. For nearly two years, the Hopedale Citizens have been involved, and remain involved, in two state court litigations relating to the Railroad's purported acquisition of the Property in October 2020 which occurred, in the words of the Massachusetts Superior Court, in "flagrant violation" of c. 61. The litigations involve the Town's exercise of its statutory right of first refusal to acquire the Property to c. 61 and the Settlement Agreement entered into between the Town of Hopedale's Select Board and the Railroad, which, through the Hopedale Citizens' Superior Court Action, was found to be ineffective by the Superior Court and consummation of which was permanently enjoined.

3. The Hopedale Citizens are Appellants in the appeals of the Superior Court Action and Land Court Action, each of which is fully briefed and pending with the Massachusetts Appeals Court. Actual title to the Property remains hotly in dispute in each of the pending appeals.

4. The Hopedale Citizens are uniquely situated to bring to the Court's attention (1) the significant public importance of the forestland; (2) the critical context relating to the state property law interests in the Property and the Railroad's actions, in violation of state law, that purportedly wrested away from the Town its statutory right to acquire the Property; and (3) the irreparable harm that has been caused and will further be caused by the Railroad if the Preliminary Injunction is issued.

WHEREFORE, for the reasons set forth above, proposed amicus curiae, the Hopedale Citizens, respectfully request that this Court grant the instant motion for leave to file the attached amicus curiae brief.

Respectfully submitted,

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

By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 5th day of August, 2022.

/s/ Harley C. Racer
Harley C. Racer

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB

HOPEDALE CITIZENS' AMICUS BRIEF IN SUPPORT OF THE TOWN OF HOPEDALE'S OPPOSITION TO GRAFTON & UPTON RAILROAD COMPANY'S MOTIONS FOR PRELIMINARY INJUNCTION

Preliminary Statement and Interest of Amicus Curiae

The Hopedale Citizens[1] are uniquely situated to bring to the Court's attention and for its benefit (1) the critical context relating to the state property law interests in the property at 364

[1] The Hopedale Citizens are residents of Hopedale, the named Plaintiffs in Reilly v. Town of Hopedale, No. 2185-cv-00238 (Mass. Sup. Ct.) (the "Superior Court Action") and the named Intervenors in Town of Hopedale v. Delli Priscoli, No. 20 Misc 0467 (Mass. Land Ct.) (the "Land Court Action"): Elizabeth Reilly, Carol J. Hall, Hilary Smith, David Smith, Donald Hall, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle.

West St. in Hopedale (the "Property") and the Railroad's[2] actions, in violation of state law, that purportedly wrested away from the Town its statutory right to acquire the property and that the question of title remains in live dispute on appeal; and (2) the significant public importance of the forestland Property and the irreparable harm that has been caused and will further be caused by the Railroad if a Preliminary Injunction is entered.[3]

The recent history of the Property is critical. The Railroad only became the nominal beneficial owner less than two years ago and since that time, title to the property has remained hotly in dispute, with two state cases now pending on appeal. It is only in the last few months that the Railroad has not been enjoined from destroying the forestland or otherwise under a Court facilitated agreement not to destroy the forestland. And it is in that very brief window of time that the Railroad has devastated the property, clearing some one hundred acres of forestland. The Railroad's rushed destruction was transparently designed to change the facts on the ground and to now use those changed facts to argue federal railroad preemption where it does not apply.

For the last year and a half, the Hopedale Citizens have consistently and singularly sought to protect the property from illegal transfers of title, prevent its wholesale destruction, defend against unlawful and unauthorized actions by the prior iteration of the Select Board and preserve the Town's rights to ultimately and rightfully take title to the property. As representatives of the residents of Hopedale, the Hopedale Citizens have been successful in some

[2] "Railroad" means, collectively, plaintiffs in this action, Grafton & Upton Railroad Company, Jon Delli Priscoli and Michael Milanoski, as Trustees of One Hundred Forty Realty Trust.

[3] Amicus states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the Amicus or their counsel contributed money that was intended to fund preparing or submitting this brief.

of these efforts but have also been stymied along the way. The Railroad's filing in federal court must be considered within the context that only the Hopedale Citizens are positioned to provide.

The Hopedale Citizens join and support the Town in opposition to the Railroad's Motions for Preliminary Injunction on the grounds that this Court lacks jurisdiction over the Railroad's claims – all of which can and should be resolved in state court – and because the balance of equities weighs vastly in favor of the public's significant interest to stop the ongoing irreparable harm to the Property against the Railroad's purported harm, which is speculative and can be fully remedied under state law.

1. **Because title to the Property remains in dispute through two pending Massachusetts Appeals Court cases and because this Court lacks jurisdiction over the Railroad's claims, the Motion for Preliminary Injunctions should be denied.**

The Railroad only recently, in October 2020, became the nominal holder of beneficial interests in the 130 acres of the forested property at 364 West St. ("Property" or "Forestland") and only through a process that the Superior Court dubbed a "flagrant violation" of state law. See Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings (November 4, 2021) attached hereto as **Exhibit 1**; Memorandum of Decision on Defendant Town of Hopedale's Motion for Clarification (December 14, 2021) attached as **Exhibit 2**; and Memorandum and Order on Motion to Preserve Status Quo (May 5, 2022) attached as **Exhibit 3**. Title remains hotly disputed in the two pending Massachusetts Appeals Court cases.[4]

Since 1992, 130.18 acres of the Property have been classified as "forestland" pursuant to M.G.L. c. 61 and are contiguous with the Town-owned Hopedale Parklands, a 279-acre

[4] The two pending Massachusetts Appeals Court cases are Reilly v. Arcudi, 2022-P-0314 (Mass. App. Ct.) and Town of Hopedale v. Trustees of 140 Realty Trust, 2022-P-0433 (Mass. App. Ct.).

recreational and conservation park.[5] Ex. 1 at 2. Chapter 61 provides the municipality in which the forestland is located a statutory right of first refusal upon any sale of the forestland or transfer in use from forestland. Id. at 5-6. A notice from the Railroad and the Trust title holder in July 2020 of their entry into a Purchase and Sale Agreement for the forestland triggered the Town's right of first refusal (the "Option"). Id. at 2. In November 2020, the Town took all steps necessary to fully exercise and record its Option to purchase the c. 61 Forestland. Id. at 5-6. This included the Select Board obtaining authority, through a unanimous vote at a Special Town Meeting in September 2020, for the Town to exercise the Option. Id. The Railroad refused to recognize the Town's rights under c. 61. Id. at 3 and 11 ("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.")

Instead, the Railroad purported to purchase the beneficial interest to the Property, in a "flagrant violation" of c. 61 and began clearing the Property forestland, also in violation of c. 61. Ex. 3 at 4. The Town sued in Land Court to enforce its statutory right and to enjoin the clearing (the "Land Court Action"). The Railroad filed a petition with the STB that federal railroad preemption prevented the Town from exercising its statutory right. Ex. 1 at 3. The Land Court did not enjoin the clearing and referred the parties to mediation, and the STB never ruled on the Railroad's petition. Following mediation, in February 2021, the Select Board and the Railroad entered into a Settlement Agreement whereby the Railroad would get approximately 2/3^{rds} of the Forestland and the Town would get 1/3rd if the Town paid $587,500. Ex. 1 at 6. The Settlement Agreement also required the Town to waive its c. 61 rights and dismiss its Land Court Action.

[5] The 130.18 acres of Forestland surrounds a 25-acre Wetland that is excluded from c. 61.

The Hopedale Citizens brought their action styled Reilly v. Town of Hopedale, No. 2185-cv-00238 (Mass. Sup. Ct.) (the "Superior Court Action"), to enjoin the Settlement Agreement because the Select Board lacked authority to (1) agree to payment for and acquisition of anything less than the entire Forestland pursuant to the Option; and (2) waive the Town's c. 61 Option after its proper exercise. The Hopedale Citizens also sought an order to have title transferred back to the Town, the rightful holder. Ex. 1 at 9. The Hopedale Citizens prevailed in enjoining the Town's partial acquisition under the Settlement Agreement. Id. at 8-9. The Superior Court noted, multiple times, that because the Select Board lacked authority for the partial purchase of the Property under the Settlement Agreement, the Settlement Agreement was not effective and that it lacked consideration. See, e.g., Ex. 1 at 9 ("[t]he 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"); Ex. 2 at 2 ("the Settlement Agreement is not effective"; "Until the reduced acquisition is approved by Town Meeting, the agreement is not effective"); Ex. 3 ("In the court's view, the actions of the Railroad were wrong. . . there appears to be grounds to rescind the Settlement Agreement"). The Superior Court ruled against the Hopedale Citizens on the requests to declare the Settlement Agreement void and invalid and to order the transfer of title because, it found, they lacked standing. Ex. 1 at 9-10. Those issues are pending on appeal, fully briefed, with the Massachusetts Appeals Court, styled Reilly v. Arcudi, 2022-P-0314.

After judgment entered in the Superior Court for the Hopedale Citizens, the Select Board moved to vacate the stipulation of dismissal in the Land Court Action because it was not authorized to enter into the Settlement Agreement that gave rise to the dismissal, and it intended to enforce the exercise of the Option. Ex. 3 at 3. The Hopedale Citizens moved to intervene and

join the Select Board in the Land Court Action. Each of those motions was denied. Id. The Hopedale Citizens have appealed these, and other, Land Court rulings. Those issues are pending on appeal, fully briefed, with the Massachusetts Appeals Court, styled Town of Hopedale v. Trustees of 140 Realty Trust, 2022-P-0433.

Title remains at issue in the two pending appeals. Notwithstanding these live issues of title, the Railroad, after the Land Court's order a few months ago, began its large-scale deforestation of the Forestland. See Ex. 3 at 3 ("The Railroad has continued to clear trees."). If the Hopedale Citizens win on appeal, the Town will not be bound by waiver of the Option and will be free to enforce it and acquire all of the Forestland via M.G.L. c. 61.

This is relevant to the Preliminary Injunction motions for two reasons. First, the Railroad's claim of preemption is hollow, as it has only owned the beneficial interest in the land for less than two years, and only by, as the Superior Court said, "flagrant violation" of state law. The Railroad has been enjoined for much of that time, so its claim to have massive development invested in the Property is on poor footing for as-applied preemption.

Second, title is being litigated in state court, and it is appropriate for any challenge to the taking under c. 79 to also be litigated in state court. Under binding First Circuit precedent, this Court lacks jurisdiction when the only claim is as-applied preemption. Fayard v. Northeast Vehicle Services, Inc., 533 F.3d 42, 49 (1st Cir. 2008) (rejecting federal jurisdiction for railroad claim for preemption over state nuisance claim); see also Board of the Selectmen of the Town of Grafton v. Grafton & Upton Railroad Co., 2013 WL 2285913, at *9-11 (D. Mass. 2013) (relying on Fayard precedent, rejecting jurisdiction for preemption claim). In the Grafton case, this Court is clear, there is only complete preemption, and thereby federal court jurisdiction, when "federal law provides a corresponding or supervening *cause of action,* not whether it merely provides a

remedy." Id. at *9 (emphasis in original). Like in Grafton, the Railroad here has not provided a single provision under the ICCTA or any federal statute that creates a cause of action to enjoin a taking under M.G.L. c. 79.

And while the STB may have jurisdiction over the issue of as-applied preemption, it has concurrent jurisdiction with Massachusetts state courts to determine that question. See STB Decision, Docket No. FD 36518, Grafton And Upton Railroad Company – Petition for Declaratory Order (November 3, 2021), attached hereto as **Exhibit 4** (STB declining to decide preemption because state court is the appropriate forum to decide state property law disputes and issues involving preemption can be decided either by the STB or the state courts because they have concurrent jurisdiction to determine preemption), accord First American Realty et al v. Grafton & Upton Railroad et al., No. 2185-cv-00784B (Mass. Sup. Ct. Nov. 5, 2021) attached hereto as **Exhibit 5** (Superior Court denying Railroad motion to stay state court trespass action in light of STB's ruling: "this court is the proper forum for the claims pled here"). There, the STB stayed the Railroad's petition and any decision on as-applied preemption because the dispute "appears to be contingent upon the interpretation of an easement" across the Railroad's right of way. Ex. 4 at 3. So here, even if the Court had jurisdiction, which it does not, it should decline to exercise that jurisdiction and instead allow the state court to decide the unresolved title issues and then, if necessary, decide as-applied preemption as well.

Moreover, the STB lacks jurisdiction over all state property law claims, including property rights under M.G.L. c. 61 and any challenge to an eminent domain taking under M.G.L. c. 79, which provides a cause of action and remedy in state court. Because the pending litigations on appeal and the eminent domain taking are governed by state property rights law, the state court should decide these issues and the state court can also then decide the question of

federal railroad preemption. The Motions for Preliminary Injunction should be denied because this case belongs in state court where the Railroad, the Town and the Citizens all have full access to available remedies.

2. The Motions for Preliminary Injunction should be denied in order to maintain the status quo and prevent further destruction of the Forestland, conservation of which is of significant public importance to the people of Hopedale both as conservation land and to protect public water supply sources.

Preservation of the Forestland until title is fully and finally decided is of critical public importance. Unfortunately, the Railroad's brazen clearcutting of a hundred acres of Forestland – while title remains in dispute – has already caused irreparable harm to that public interest. The deforestation was calculated to give the Court the impression that the Property has been in use for railway transportation. It has not. The Railroad attempts here to argue that the rushed land clearing over the last few months prevents the Town's effort to preserve the Property through a valid eminent domain taking, after the Railroad violated state law to acquire the Property in the first instance. This is not a Railroad transportation operation, and the Railroad is using its flawed preemption theory as a buzzsaw in an attempt to make the land undesirable to the people of Hopedale.

The Property is now largely denuded but the public still has as a vital public interest in its protection. The Property directly abuts the Town-owned 279-acre Hopedale Parklands on one side and the Upton State Forest on the other. The contiguous open space creates a wildlife corridor and as the largest open space in Hopedale is of crucial public interest. The public interest is not only in ensuring no further deforestation and land moving operations but also protection of the Town's public water supply. See Affidavits of Edward Burt, Chair of the Hopedale Water and Sewer Commissioners and Becca Solomon, Chair of the Hopedale Conservation Commission filed in support of the Town's Opposition. The Affidavits describe in

detail the significant public importance of the Property and its preservation to the Town as open space and the need to protect the surrounding environment, local water supply and the neighboring environment. The only way to maintain the status quo of the subject Property and prevent further destruction is to deny the preliminary injunction and allow the Town to rightfully record its order of taking.

Once the Town takes title to the Property, the Railroad can seek all remedies in state court, including orders regarding title to the property and as-applied preemption. A preliminary injunction will continue to erode, in a literal sense, the public's interest in land preservation and protection of the Town's water supply.

CONCLUSION

For the foregoing reasons, the Hopedale Citizens support the Town of Hopedale's Opposition to the Railroad's Motions for Preliminary Injunction and requests this Court deny those motions.

Respectfully submitted,

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

By their attorneys,

__/s/ Harley C. Racer_____

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 5th day of August, 2022.

*/s/ Harley C. Racer*_____
Harley C. Racer

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

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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

Entered and Copies Mailed 11/10/21

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

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. 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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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

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION NO. 21CV00238

ELIZABETH REILLY and others,[1]

Plaintiff,

v.

TOWN OF HOPEDALE and others,[2]

Defendants.

MEMORANDUM AND ORDER ON MOTION TO PRESERVE STATUS QUO

Before the court is the plaintiffs' motion to "preserve the status quo" and prevent the defendants, Grafton & Upton Railroad ("Railroad") and related persons and entities from removing trees and otherwise altering property designated as protected forestland. Considering the motion as one for injunctive relief pending appeal under Mass. R. Civ. P. 629(c), the court reluctantly **DENIES** the motion.

BACKGROUND

The court briefly summarizes the factual and procedural background of this dispute about 130.18 acres of protected forestland. At some point before the events giving rise to this lawsuit, the City of Hopedale ("Hopedale" or "City") designated and taxed 130.18 acres owned by One Hundred-Forty Realty Trust ("Trust") as forestland ("Forestland") under G. L. c. 61 ("Chapter 61"). Chapter 61 provides a tax benefit to an owner of forest land. In return for the benefit, the

[1] Carol J. Hall, Donald D. Hall, Hilary Smith, David Smith, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Shannon W. Fleming, and Janice Doyle.
[2] Louis J. Arcudi, III, Brian Keyes, Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and One Hundred Realty Trust.

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owner must offer the municipality in which the land is located the right of first refusal before selling the land for residential, industrial, or commercial purposes. G. L. c. 61, § 8. The municipality's right of first refusal may only be assigned to a non-profit entity that agrees to maintain at least 70 percent of the land as forestland. *Id.*

On July 9, 2020, the Trust notified Hopedale it intended to sell to the Railroad 155.24 acres of land, which included the Forestland as well as 25.06 acres of wetlands.[3] On October 21, 2020, Hopedale notified the Railroad and the Trust that it was moving forward with its option to buy the Forestland. Three days later, Hopedale convened a town meeting, and residents voted to appropriate the money necessary to exercise the option. On November 2, 2020, Hopedale recorded in the county's land records notice of its decision to exercise its right of first refusal and buy the Forestland.

In the meantime, the Railroad purported to buy the Trust's "beneficial interest" in the Forestland and began clearing trees. Hopedale sued the Railroad in Land Court, seeking to stop the clearing and effectuate its acquisition of the Forestland. In February 2021, Hopedale and the Railroad settled the Land Court litigation with an agreement for Hopedale to buy approximately 40 acres of the Forestland for $587,500 and waive its Chapter 61 rights. On March 3, 2021, the plaintiffs, more than ten taxpaying citizens of Hopedale ("Taxpayers"), challenged the settlement in the instant lawsuit. The Taxpayers also sought a preliminary injunction to stop the Railroad from clearing trees, which the court allowed.

On November 4, 2021, the court decided cross-motions for judgment on the pleadings. The court decided the first count in favor of the Taxpayers, holding that Hopedale lacked authority to buy the smaller piece of land because the purchase was not approved by City voters.

[3] The wetlands portion of the property is not relevant to this decision.

The court decided in favor of the Railroad and Hopedale on the second count, concluding that the Taxpayers did not have standing to compel Hopedale to exercise its Chapter 61 rights. The court also found for Hopedale on the request in the third count for a declaratory judgment that the Forestland was protected parkland. The court enjoined further clearing by the Railroad for 60 days to give Hopedale time to decide whether it would (1) seek town meeting approval to acquire the smaller parcel; or (2) take further steps to exercise its purchase option for the entire parcel. The Taxpayers appealed the court's decision. The appeal is pending.

The following relevant actions have taken place between November 4, 2021, and today:

- Voters at town meeting rejected the City's proposal to buy the smaller piece of land.
- The Land Court denied the City's motion to reopen the judgment of dismissal filed after the parties settled the case. The Land Court also denied the City's motion to enjoin further clearing and rejected the Taxpayer's effort to intervene in the case.
- The City appealed the Land Court decision and asked the Court of Appeals to enjoin the Railroad from cutting down trees. The Court of Appeals denied the City's motion. The City has withdrawn its appeal of the Land Court decision.[4]
- The Railroad has continued to clear trees.

DISCUSSION

A court addressing a request for injunctive relief pending appeal must balance the risk of irreparable harm to the parties in light of each party's likelihood of success on the merits. See *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 710 (1990). See also *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 606, 616–17 (1980).

[4]The Taxpayers have said they plan to appeal the Land Court's denial of their motion to intervene.

See also *Spence v. Reeder*, 382 Mass. 398, 422 (1981) (in emergency eviction procedure, "the issuance or denial of a stay of execution pending appeal ... is a discretionary one for the judge"). "Since the goal is to minimize the risk of irreparable harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction." *Packaging Industries*, 380 Mass. at 617, n.12. In addition, in certain cases such as this one, the court must also consider "the risk of harm to the public interest." *Brookline v. Goldstein*, 388 Mass. 443, 447, 447 N.E.2d 641 (1983).

The court begins its discussion with the Railroad's acquisition of a "beneficial interest" in the Forestland. In this court's view, this action by the Railroad was a flagrant violation of Chapter 61. However, the Taxpayers' lawsuit does not put that issue before the court. Rather, the court must decide whether the Taxpayers have a likelihood of succeeding in their challenge to the legality of the Settlement Agreement. Unfortunately, the court's answer to that question is "no."

First, while G. L. c. 40, § 53 gives the Taxpayer's standing to sue to prevent the illegal expenditure of money,[5] it does not give them the right to compel the town to exercise its option to buy the Forestland. Second, the court is not persuaded that the Taxpayers have a likelihood of proving that the Settlement Agreement was an illegal assignment of the City's Chapter 61 rights. Rather, by settling the case, the City decided to forgo its Chapter 61 option, which the statute plainly allows it to do. G. L. c. 61, § 8. Cf. *Russell v. Town of Canton*, 361 Mass. 727, 731 (1972) (a town meeting vote cannot compel a municipality to take property by eminent domain). Since the City is not required to exercise the option, even though authorized to do so, a mandamus action cannot succeed.

[5] Indeed, the Taxpayers were successful in that effort in Count 1 of their complaint.

It is true that a lesser showing of likelihood of success is required when, as here, the irreparable harm is great. See *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (court conducts "sliding scale analysis" where "the predicted harm and the likelihood of success on the merits [are] juxtaposed and weighed in tandem"). However, there must be some likelihood of success on the merits. The court cannot in good conscience find that likelihood of success here.

In the court's view, the actions of the Railroad were wrong. In addition, there appears to be grounds to rescind the Settlement Agreement. This case, however, does not present an opportunity for this court to address those issues.

ORDER

For the above reasons, it is **ORDERED THAT** the plaintiff's Motion for a Preliminary Injunction is **DENIED**.

Dated: May 5, 2022

Karen Goodwin
Associate Justice, Superior Court

Exhibit 4

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SERVICE DATE – NOVEMBER 3, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36518

GRAFTON AND UPTON RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Decided: November 3, 2021

On May 13, 2021, Grafton and Upton Railroad Company (Grafton & Upton), a Class III rail carrier, filed a petition for declaratory order asking the Board to find any state or local law that would prevent Grafton & Upton from closing two private grade crossings (the Crossings) across its line in the Town of Hopedale, Mass. (the Line), to be preempted pursuant to 49 U.S.C. § 10501. (Pet. 2.)

Grafton & Upton states that it removed the Crossings in connection with certain upgrades it made to its track on either side of a railroad bridge near its yard in Hopedale. (Id. at 5.) It argues that restoration of the Crossings would unreasonably interfere with its "existing and future rail operations" and raise safety concerns.[1] (Id. at 2.) Therefore, Grafton & Upton submits that any effort by Hopedale Properties, LLC (Hopedale Properties), whose property is bisected by Grafton & Upton's line, to rely on state and local laws to prevent Grafton & Upton from closing the Crossings should be preempted pursuant to 49 U.S.C. § 10501. (Pet. 2.)

Hopedale Properties replied on July 16, 2021, arguing that it holds an easement over Grafton & Upton's right-of-way that gives it the right to maintain the Crossings that Grafton &

[1] Grafton & Upton states that it maintains and operates the Hopedale yard and is improving it to handle an increased volume of rail business resulting from a recent lease agreement with CSX Transportation, Inc. (CSXT), pursuant to which Grafton & Upton will operate an 8.4-mile section of CSXT's line. (Pet. 3-4); see also Grafton & Upton R.R.—Acquis. & Operation Exemption—CSX Transp., Inc., FD 36444 (Oct. 14, 2020). Further, Grafton & Upton states that, as part of these improvements, it has focused on improving the Line on either side of the railroad bridge that crosses the Mill River. (Pet. 4.) It represents that it will no longer be possible to keep the Crossings open because of the engineering standards required for track within 100 feet of a railroad bridge. (Id. at 5.) Grafton & Upton also states that closing the Crossings will reduce the risk of injury to pedestrians, (id. at 6), eliminate the need to provide flagging protection, (id. at 5), and allow Grafton & Upton to perform brake tests on its trains without having to separate the trains into different sections. (Id.) Because of these operational and safety concerns that Grafton & Upton alleges would result from restoring the Crossings in their previous locations, Grafton & Upton argues that any state action that would require it to restore the Crossings should be preempted by 49 U.S.C. § 10501.

Upton removed. (Hopedale Props. Reply 4.) Hopedale Properties represents that the right-of-way was conveyed to Grafton & Upton by a predecessor to Hopedale Properties subject to the easement. (Id. at 2, 4.) Hopedale Properties alleges that, by removing the Crossings, Grafton & Upton violated Hopedale Properties' rights pursuant to that easement.[2] (Id. at 5.) Hopedale Properties argues that the Board should deny the Petition and allow the parties to resolve their property dispute in a related state court proceeding, (see id. at 1-2, 8) in which Hopedale Properties and two other entities filed a complaint in Massachusetts Superior Court, Worcester County, seeking, among other things, the restoration of the Crossings. (See id., Ex. A.) In that complaint, Hopedale Properties presented to the court its argument that Grafton & Upton violated Hopedale Properties' rights pursuant to the easement when it removed the Crossings and by refusing to restore them. (Id., Ex. A, at 16-17.)

On July 28, 2021, Grafton & Upton filed a response to Hopedale Properties' Reply, asserting that it was unaware of the easement cited by Hopedale Properties but arguing that, regardless of the easement, the record makes clear that restoration of the Crossings would create an unreasonable burden on rail transportation and, therefore, any state action that would require Grafton & Upton to restore the Crossings should be preempted. (Grafton & Upton Reply 6-7.)

Hopedale Properties filed a sur-reply on September 7, 2021,[3] arguing that Grafton & Upton's knowledge of the easement is immaterial to the dispute. (Hopedale Props. Sur-Reply 1-2.) Moreover, Hopedale Properties maintains that Grafton & Upton "has failed to show that it has suffered any interference, let alone substantial impediments, to its operations." (Id. at 3.) Hopedale Properties reiterates its request that the Board deny the Petition and allow the state court to decide the parties' dispute in the related state court action.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, this proceeding will be held in abeyance pending resolution of the ongoing state court litigation.

Grafton & Upton seeks a declaration from the Board that any state or local law that would prevent Grafton & Upton from permanently closing the Crossings are preempted by

[2] According to Hopedale, "the only direct way to access" several of the parcels of its property is by use of the private grade crossing northwest of the Mill River. (Hopedale Props. Reply 3.) And the "only way to access" two other parcels from the rest of the Property is by using the private grade crossing just east of the Mill River. (Id.)

[3] Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted; however, in the interest of a complete record, Grafton & Upton's reply and Hopedale Properties' sur-reply will be accepted into the record. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply "[i]n the interest of compiling a full record").

49 U.S.C. § 10501(b). However, resolution of this dispute appears to be contingent upon the interpretation of an easement that Hopedale Properties allegedly has over Grafton & Upton's right-of-way. As the Board has explained, a court is typically the more appropriate forum for interpreting contracts and resolving state property law disputes. See, e.g., V&S Ry.—Pet. for Declaratory Ord.—R.R. Operations in Hutchinson, Kan., FD 35459 (STB served July 12, 2012) (question about property rights should be decided by the district court applying state property and contract law); Allegheny Valley R.R.—Pet. for Declaratory Ord.—William Fiore, FD 35388 (STB served Apr. 25, 2011) (questions concerning size, location, and nature of property rights are best addressed by a state court). Here, what rights Hopedale Properties has, if any, with regard to the Crossings pursuant to the claimed easement is before the Superior Court of the Commonwealth of Massachusetts, Worcester County. (Hopedale Props. Reply 1.) And the court is the more appropriate forum to decide that issue.

While Hopedale Properties has asked that Grafton & Upton's petition for declaratory order be denied, the proceeding instead will be held in abeyance. Abeyance is appropriate where it would promote efficiency and not be fundamentally unfair to any party. E.g., N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3 (STB served Mar. 31, 2017). Abeyance would promote efficiency here because resolution by the state court of the parties' rights under the easement could moot the need for the declaratory order, or, at the least, would inform the preemption analysis.[4]

Abeyance would not be fundamentally unfair to any party here because obtaining answers to the state property law issues and contractual questions would allow a more complete and accurate adjudication of the preemption dispute between the parties. Accordingly, this proceeding will be held in abeyance pending a decision from the state court. To ensure that the Board remains informed regarding the progress of the state court litigation, the parties will be directed to submit any decision by the court regarding the merits of any of the claims in the case (or any other decision relevant to this proceeding) within 5 days of its issuance.

It is ordered:

1. Grafton & Upton's reply and Hopedale Properties' sur-reply are accepted into the record.

2. The proceeding is held in abeyance pending further Board order.

3. The parties are directed to submit any merits decision or any other relevant decision by the court within 5 days of its issuance.

[4] Furthermore, issues involving federal preemption under § 10501(b) can be decided either by the Board or the courts in the first instance as "both the Board and the courts have concurrent jurisdiction to determine preemption." Brookhaven Rail Terminal—Pet. For Declaratory Ord., FD 35819, slip op. at 4 (STB served Aug. 28, 2014). Given the confluence of issues here—state property law, safety standards, and preemption—the state court may decide to address all of the issues together itself or refer the preemption issue back to the Board.

4. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Exhibit 5

E-FILED

11/4

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS. CIVIL ACTION NO. 2185-CV00784 B

FIRST AMERICAN REALTY, INC., HOPEDALE PROPERTIES, LLC and HOPEDALE INDUSTRIAL CENTER, LLC

Plaintiffs

Vs

GRAFTON & UPTON RAILROAD COMPANY, FIRST COLONY DEVELOPMENT AND RAIL HOLDING COMPANY and JON DELLI PRISCOLI,

Defendants

FILED
SEP 20 2021
ATTEST: CLERK

Notices Mailed 11/5/21

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DEFENDANTS' MOTION TO STAY STATE COURT PROCEEDINGS WHILE SURFACE TRANSPORTATION BOARD ADJUDICATES PREVIOULSY FILED PETITION FOR DECLARATORY RELIEF

Defendants, Grafton & Upton Railroad Company ("G&U"), First Colony Development and Rail Holding Company and Jon Delli Priscoli, move for an Order to issue staying this state court proceeding to allow the Surface Transportation Board ("STB") to rule on the May 13, 2021 Petition for Declaratory Order, filed by G&U 8 weeks prior to the commencement of this lawsuit. Through its previously filed STB Petition, G&U has requested the STB to issue a declaratory order that state and local statutes and regulations are preempted pursuant to 49 U.S.C. § 10501 in connection with the efforts of the plaintiffs to rely on state and local law to attempt to require G&U to reopen two private grade railroad crossings in the Town of Hopedale, Massachusetts that were closed in 2021. In support of its motion, Defendants assert that the STB

After hearing, DENIED. The undersigned concurs that this court is the proper forum for adjudication of the claims pled here. The parties may seek amendment of current tracking orders as necessary to accommodate renewed discovery and motion practice.

11/5/21