

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

LAND COURT DEPARTMENT
OF THE TRIAL COURT

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)
TOWN OF HOPEDALE,
)
)

Plaintiff,
)
)

v.
)
)

JON DELLI PRISCOLI and MICHAEL R.
)
MILANOKSI, as Trustees of the ONE
)
HUNDRED FORTY REALTY TRUST, and
)
GRAFTON & UPTON RAILROAD
)
COMPANY,
)
)

Defendants.
)

CASE No. 20 MISC 000467 (DRR)

**HOPEDALE CITIZENS' EMERGENCY MOTION FOR EXPEDITED HEARING ON
THEIR MOTION TO INTERVENE AND
JOINER OF TOWN OF HOPEDALE'S
MOTION TO VACATE THE STIPULATION OF DISMISSAL**

Elizabeth Reilly and Ten Citizens of the Town of Hopedale¹ (“Hopedale Citizens”) respectfully request that this Court schedule an **expedited briefing and hearing** on the Hopedale Citizens’ Motion to Intervene to be heard **before** the Court decides the Town of Hopedale’s (the “Town”) Motion to Vacate the Stipulation of Dismissal (the “Motion to Vacate”). The Hopedale Citizens further request joinder with the Motion to Vacate and the Town’s request for a preliminary injunction against any land-clearing activity by the Railroad Defendants² pending decision on this request.

¹ 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.

² Railroad Defendants include Jon Delli Priscoli and Michael Milanoski as the Trustees of the One Forty Realty Trust, and the Grafton & Upton Railroad Company.

The Hopedale Citizens are entitled to be heard on this matter because the Hopedale Citizens: (1) also seek vacating the dismissal and entry of an injunction through Counts I and II of their Intervenor-Complaint; (2) have a strong interest in the matter; and (3) have helpful argument for the Court to consider. It would be patently unfair for the Court to decide the merits of the Motion to Vacate before deciding whether the Hopedale Citizens are allowed to participate. For the reasons set forth below, it is imperative that the Hopedale Citizens be heard on their Motion to Intervene before the Court decides the Motion to Vacate.

1. Because the Board of Selectmen's lack of authority is established, judgment must be vacated.

The Board of Selectmen lacked the authority to enter into the Settlement Agreement that led to the Stipulation of Dismissal. The Court needs to go no further to vacate the judgment because it is reversible error for a Court to decline to vacate a judgment that was unauthorized. See, e.g., Salem Highland Dev. Corp. v. City of Salem, 27 Mass. App. Ct. 1423 (unpublished 1:28 memorandum) (1989) (vacating judgment under Rule 60(b)(6) where City Solicitor entered into an agreement to convey property to a developer without authorization by the City Council or Mayor, resulting in reconveyance of the locus to the city); *discussed favorably in E. Sav. Bank v. City of Salem*, 33 Mass. App. Ct. 140, 142 (1992).³

In Salem the Appeals Court ordered that the Rule 70 judgment “was to be vacated because the city council of Salem had neither voted to approve the transfer of land (see G.L. c. 39, § 1, and c. 40, § 3), nor had the mayor, president of the city council, and the chairman of the

³ While it is clear that the entire Settlement Agreement is a nullity because the material provision – the Town’s payment for and acquisition of a portion of the Forestland – was unauthorized, the Court need not consider the Settlement Agreement to allow the Motion to Vacate. The Railroad Defendants’ arguments that the severability provision remains in effect or that there is other consideration are merely defenses to be pled in response to the Town’s claims brought in its Complaint, wherein the Town seeks an order that it effectively exercised its Option and can enforce the same. The Railroad Defendants’ arguments as to the Settlement Agreement are not, however, bars to vacating the unauthorized judgment.

finance committee, as they were empowered to do under a city ordinance, approved the settlement which underlay the rule 70 judgment.” E. Sav. Bank, 33 Mass. App. Ct. at 142 (1992), *citing* Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983).

In Bowers, a perpetual encumbrance imposed upon six lots by a board of selectmen in an agreement for judgment was vacated because the agreement, that the Town would cease to use the lots as a public parking area in exchange for the property owner's abandonment of a challenge to the site plan approval for a sewage pumping station, was beyond the authority of the selectmen because it had not been approved by Town Meeting. Bowers, 16 Mass. App. Ct. at 32-34; *see also* Daly v. McCarthy, 2003 WL 25332929 (Mass. Land Ct. Aug. 04, 2003) (Lombardi, J.) (in a ten taxpayer suit to enforce the purpose of an agricultural preservation restriction (“APR”), court orders APR deed to be recorded despite settlement agreement entered into by board of selectmen and private trust where the board purported to release the APR without town meeting approval), *affirmed*, Daly v. McCarthy, 63 Mass. App. Ct. 1103 (2005).

This case is no different. The Board was unauthorized to enter into the Settlement Agreement and the judgment that was entered here, without Court review, must be vacated. If a Court is required to vacate an unauthorized agreement for judgment, where the Court considers and approves the underlying agreement, it follows, *a fortiori*, that the denial to vacate an unauthorized judgment entered by stipulation of dismissal, without Court review, is an error of law. It would be reversible error to allow the dismissal to stand, that is, an unauthorized dismissal based on an unauthorized Settlement Agreement that the Superior Court has already ruled is not effective.

2. The Board is not required to return to Town Meeting before enforcing the Town's c.61 Option.

The Board is not required to go through the motions, cost and time to schedule and hold a Special Town Meeting to seek authorization under the Settlement Agreement. The Settlement Agreement was not conditioned on obtaining such approval and the Superior Court has held that it is for the Board to choose whether to return to Town Meeting or to enforce the Town's Option.

Moreover, the Railroad Defendants are now estopped from making the argument that the Town, via Town Meeting, is the decision maker as to the terms of the Settlement Agreement. The Railroad successfully argued to the Superior Court that the Board has the sole discretion in deciding whether and how to exercise and enforce the Town's Option. The Superior Court expressly held that it is in the Board's sole discretion. It is now law of the case and the Railroad is not permitted to argue to this Court that the decision lies with Town Meeting or that the Board is required to return to Town Meeting to attempt to seek authorization.

3. Justice requires that the Hopedale Citizens be heard on their Motion to Intervene and on the Town's Motion to Vacate, as each seek vacatur of the dismissal and preliminary injunction.

The Hopedale Citizens, without a doubt, have standing pursuant to G.L. c. 40, § 53 to enjoin the execution of the Settlement Agreement and that is exactly the relief that they obtained by judgment of the Superior Court. The Single Justice of the Appeals Court also held that the Hopedale Citizens have standing to enjoin the execution of the Settlement Agreement when it reversed the Superior Court's denial of the Hopedale Citizens' request for an injunction. The Hopedale Citizens also have standing via mandamus. The Railroad Defendants, on the other hand, were unsuccessful in their appeal to the Single Justice arguing that the Hopedale Citizens lacked standing to obtain an injunction against them.

Nothing has occurred to dissolve the Hopedale Citizens' standing and their right to protect against the execution or enforcement of the unlawful Settlement Agreement, which is exactly what would occur if the Motion to Vacate were denied. The Hopedale Citizens have standing to vacate the dismissal because retention of the Settlement Agreement, with another court saying it is not effective, leaves unclear the protection of the public's right in the Forestland and whether the Town has effectively waived its rights notwithstanding the Superior Court's rulings, protection of which was the entire basis of the Superior Court Action. If the Motion to Vacate is denied, the injunction entered preliminarily by the Single Justice and permanently by the Superior Court would be effectively reversed by this Court, an unjust result that that would be, itself, subject to reversal.

Likewise, without a preliminary injunction against the Railroad Defendants pending disposition of this dispute, the public's interest in the Forestland that the Hopedale Citizens' have successfully protected would be unjustly lost. It is not enough to rely on the Railroad Defendants' good graces, especially given their track record of unlawfully clearing the Forestland. For these reasons alone, the Hopedale Citizens must be heard **before** the Court decides the Town's Motion to Vacate on the merits.

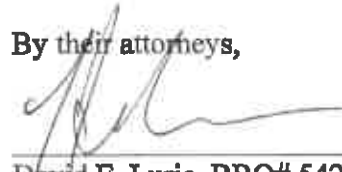
WHEREFORE, the Hopedale Citizens respectfully request that this Court (1) order expedited briefing and hearing on their Motion to Intervene; (2) allow the Hopedale Citizens to join the Town's Motion to Vacate; (3) not decide the Town's Motion to Vacate until the Hopedale Citizens' Intervention decided; and (4) preliminarily enjoin all land-clearing activity pending decision on all of these.

INTERVENOR-PLAINTIFFS,

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,

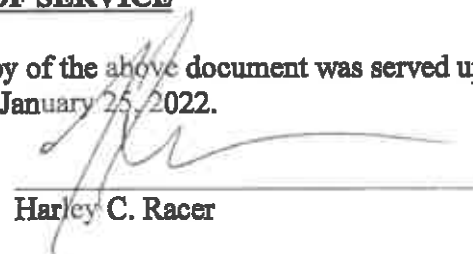


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Dated: January 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above document was served upon the attorney of record for each other party by email on January 25, 2022.



Harley C. Racer