COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. LAND COURT DEPARTMENT OF THE TRIAL COURT

TOWN OF HOPEDALE, Plaintiff, ELIZABETH REILLY, et al., Intervenor-Plaintiffs 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)

APPENDIX IN SUPPORT OF HOPEDALE CITIZENS' OPPOSITION TO MOTION OF GRAFTON & UPTON RAILROAD COMPANY AND ONE HUNDRED REALTY TRUST TO DISMISS INTERVENORS' AMENDED VERIFIED COMPLAINT

Intervenors Elizabeth Reilly and Ten Citizens of the Town of Hopedale[1] ("Intervenors") submit this Appendix in support of the parties' opposition to the Railroad's[2] Motion to Dismiss their Amended Verified Complaint.

[1] Carol J. Hall, Hilary Smith, David Smith, Donald Hall, Megan Fleming, Stephanie A. McCallum, Shannon W. Fleming, Janice Doyle, Michelle Smith and Melissa Mercon Smith.

[2] The "Railroad" is referred to herein to include the Grafton & Upton Railroad Company and One Hundred Forty Realty Trust.

1. Attached hereto as **Exhibit 1** is a true and accurate copy of Worcester Superior Court Memorandum and Order on Motion to Preserve Status Quo (Goodwin, J.), Reilly v. Town of Hopedale, Case No. 2185-cv-00238, Dkt. 72, dated May 6, 2022.

2. Attached hereto as **Exhibit 2** is a true and accurate copy of Surface Transportation Board Order, Grafton and Upton Railroad Company – Petition for Declaratory Order, Dkt. No. FD 36518, dated November 3, 2021.

3. Attached hereto as **Exhibit 3** is a true and accurate copy of the Railroad Opposition to the Post-Remand Motion for Leave to Intervene, Reilly v. Town of Hopedale, Land Court Case No. 20-MISC-000467, August 31, 2023.

4. Attached hereto as **Exhibit 4** is a true and accurate copy of Single Justice Order (Meade, J.), Reilly v. Town of Hopedale, Case No. 2021-J-0111, dated April 8, 2021.

5. Attached hereto as **Exhibit 5** is a true and accurate copy of Worcester Superior Court Temporary Restraining Order (Goodwin, J.), Reilly v. Town of Hopedale, No. 21-CV-0238, Dkt. 34, dated September 9, 2021.

6. Attached hereto as **Exhibit 6** is a true and accurate copy of Worcester Superior Court Memorandum and Order on Motion for Preliminary Injunction (Goodwin, J.), Reilly v. Town of Hopedale, No. 21-CV-0238, Dkt. 38, dated September 24, 2021.

7. Attached hereto as **Exhibit 7** is a true and accurate copy of Worcester Superior Court Order on the Emergency Motion of Defendants Town of Hopedale and Hopedale Board of Selectman for Further Extension of Injunctive (Goodwin, J.), Reilly v. Town of Hopedale, No. 21-CV-0238, dated February 10, 2022.

8. Attached hereto as **Exhibit 8** is a true and accurate copy of the Memorandum of Decision and Order on the Benevento Defendants' Motion to Dismiss Plaintiffs' Complaint and

For Entry of Final Judgment (Yarashus, J.),Tresca Bros. Sand & Gravel, Inc. v. Eames Street, LLC and others, Middlesex Superior Court No. 2081CV00614, dated March 18, 2021.

Respectfully submitted,

INTERVENOR-PLAINTIFFS,

ELIZABETH REILLY, CAROL J. HALL, HILARY SMITH, DAVID SMITH, DONALD HALL, MEGAN FLEMING, STEPHANIE A. MCCALLUM, SHANNON W. FLEMING, JANICE DOYLE, MICHELLE SMITH and MELISSA MERCON SMITH

By their attorneys,

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Dated: February 15, 2024

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above document was served upon Donald Keavany at dkeavany@chwmlaw.com, Andrew DiCenzo at adicenzo@chwmlaw.com, David Mackey at dmackey@andersonkreiger.com and Sean Grammel at sgrammel@andersonkreiger.com on February 15, 2024.

/s/ Harley C. Racer
Harley C. Racer

Exhibit 1

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 2

51002 SERVICE DATE – NOVEMBER 3, 2021
DO

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 3

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS | LAND COURT DEPARTMENT OF THE TRIAL COURT

TOWN OF HOPEDALE Plaintiff vs. JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST and GRAFTON & UPTON RAILROAD COMPANY Defendants	)	CASE NO.20MISC 00467 (DRR)

OPPOSITION OF GRAFTON & UPTON RAILROAD COMPANY AND ONE HUNDRED FORTY REALTY TRUST TO MOTION FOR LEAVE TO INTERVENE

The Proposed Interveners specifically asked the Appeals Court to decide their Motion to Intervene on the merits, but the Appeals Court declined that request. See Reilly v. Hopedale, 102 Mass. App. Ct. 367, 383 (2023) ("Although there may be limited situations in a civil case where an appellate court may decide the merits of an issue in the first instance, this is not one of them. Both permissive intervention and intervention as a matter of right entail factual assessments that are best left to determination by the trial judge in the first instance."). Because the factual record establishes that the Proposed Interveners have no protectable interest in this case, are adequately represented by the plaintiff Town of Hopedale ("Town"), and failed to timely move to intervene, they have not met their burden under Mass. R. Civ. P. 24 to intervene in this case, which went to Judgment on February 10, 2021,[1] and their Motion to Intervene must be DENIED.

[1] There are multiple references to respecting the November 2021 Superior Court Judgment, as clarified on December 14, 2021. The G&U Parties fully agree that the Superior Court Judgment must be respected, but also note that the Land Court Judgment that entered nine months prior must also be respected.

ARGUMENT

I. The Proposed Intervenors Fail to Demonstrate Facts Entitling Them to Intervene as Matter of Right Pursuant to Mass. R. Civ. P. 24(a).

A. Legal Standard.

The Court has discretion to determine whether the Proposed Interveners demonstrate facts entitling them to intervene as a matter of right pursuant to Mass. R. Civ. P. 24(a). Galbi v. Cellco Partnership, 101 Mass. App. Ct. 260, 262 (2022); Reilly, 102 Mass. App. Ct., at 384. In order to establish entitlement to intervene pursuant to Rule 24(a)(2), the Proposed Interveners are required to "demonstrate three essential things. First, the intervener's motion must be timely… Second, the intervener must have an interest in the subject of the action such that disposition of the action would impede or impair his ability to protect that interest… Third, the putative intervener's interest must not be adequately represented by the existing parties to the litigation." Galbi, 101 Mass. App. Ct. at 263. The Proposed Interveners must "run the table and fulfill all [] of these preconditions. The failure to satisfy any one of them dooms intervention." Public Serv. Co. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998). Here, not only do the Proposed Interveners fail to "run the table," they fail to meet any of the elements required under Rule 24(a).

B. The Proposed Interveners Have No Interest to Protect in the Land Court Action.

Intervention should be denied because the Proposed Interveners do not have a protectable interest in the subject matter of this case. The Appeals Court conclusively determined that the Proposed Interveners lack a cognizable interest in 364 West Street or in the Town's purported G.L. c. 61 option. See Reilly, at 377-380. The Proposed Interveners attempt to avoid this holding by asserting an undefined and amorphous interest in enforcing the Judgment they obtained on Count I of their Superior Court complaint, but they vastly overstate the effect and meaning of that Judgment. The Proposed Interveners' interest in the Superior Court Judgment is distinct

from the Town's G.L. c. 61 claim, and intervention in the Town's long-ago dismissed G.L. c. 61 Land Court action is unnecessary to protect or enforce that Judgment. The Proposed Interveners should not be permitted to use the Superior Court Judgment to collaterally attack the Judgment of this Court to try to reinstate a claim which indisputably belonged only to the Town, and which was waived, released and dismissed by the Town over thirty (30) months ago.[2]

1. The Appeals Court Decision Establishes that the Proposed Interveners Have No Interest in 364 West Street or the Town's G.L. c. 61 Claim.

The sole subject matter of this case is the Town's attempt to assert a G.L. c. 61 right of first refusal option to acquire 364 West Street from the G&U Parties. In Reilly, the Appeals Court determined that the Proposed Interveners did not have standing to claim:

- that the Selectboard's waiver of the purported G.L c. 61 option as part of the settlement agreement was void, or,
- that the Town's G.L.c. 61 rights remain enforceable; or,
- that the subject land had to be transferred by the G&U Parties to the Town; or,
- that the G&U Parties be enjoined from alienating the subject land or converting it from its use as forestland to another use.

102 Mass. App. Ct., at 378. These determinations have preclusive effect and res judicata principles bar the Proposed Interveners from relitigating these issues in this Court. See Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 134 (1998); Heacock v. Heacock, 402

[2] Indeed, not only did the Town stipulate to the dismissal of its claims, with prejudice in February 2021, it thereafter recorded a *Release of Classified Forest-Agricultural or Horticultural Land Tax Lien*, dated June 14, 2022, "releasing all rights upon the real property" located at 364 West Street, which was recorded at the Worcester County Registry of Deeds at Book 67858 and Page 196 on July 5, 2022. See Affidavit of Donald C. Keavany, Jr. ("Keavany Aff."), Ex. 27.

Mass. 21, 23, n. 2 (1988). However, the Proposed Interveners seek to relitigate these very same issues through intervention, as they highlight at page 5 of their Memorandum:

> [T]he Citizens also seek by intervention to (a) enforce the injunction they had obtained to preserve the Forestland;[3] (b) obtain a preliminary injunction against land clearing pending disposition of their motion to vacate the dismissal; (c) obtain a declaratory judgment that any settlement between the Town and the Railroad cannot include the waiver of the Town's G. L. c. 61 rights without town meeting authorization; and (d) obtain a declaration that the Town's ultimate purchase price of the Forestland be reduced due to the Railroad's unlawful clearing of the land during the pendency of the Superior Court case and the single justice's injunction.

Each of these remedies is explicitly foreclosed by the Appeals Court's determination that the Proposed Interveners have no cognizable interest in the Town's c. 61 claim and no ability to enforce c. 61 on behalf of the Town. Reilly, at 377-380. Intervention should not be permitted where all desired remedies are unavailable to the Proposed Interveners due to lack of standing.

2. The Superior Court Judgment did not Declare the Settlement Agreement Between the G&U Parties and the Town Void or Unenforceable.

The Proposed Interveners attempt to sidestep their dispositive standing problem by claiming that they have an interest in the above remedies "as they all flow from the Superior Court Judgment which they are entitled to protect and enforce." Memorandum, pp. 5-6. There is no dispute that the Superior Court Judgment is protectable and enforceable. However, the Proposed Interveners' interpretation of the Superior Court Judgment as declaring the settlement agreement (and associated stipulation of dismissal) to be void and unenforceable, and entitling them to intervene here to vacate this Court's Judgment of dismissal, is incorrect.

The Appeals Court framed the question posed to it as "whether the [Proposed Interveners] have standing to pursue a declaration that the settlement agreement is void and

[3] As addressed below, the Proposed Interveners did not obtain an injunction "to preserve the Forestland."

unenforceable…" Reilly, at 377. The Appeals Court unequivocally determined that the Proposed Interveners do not have standing to pursue such a declaration under any theory. Id. at 377-380. Logic dictates that if—as the Appeals Court explicitly found—the Proposed Interveners did not have standing to pursue a declaration that the settlement agreement is void and unenforceable, the Superior Court did not declare it void and unenforceable (and it certainly did not declare this Court's Judgment void, unenforceable or otherwise subject to a collateral attack).[4]

This raises the question – what did the Superior Court mean when she stated in her December 2021 clarification that "the Settlement Agreement is not effective", and what effect, if any, does that statement have on whether the Proposed Interveners can establish a protectable interest to assert in the Land Court Action. The answer to the initial question regarding the meaning of "not effective" is found in multiple sources from Judge Goodwin, including the preceding paragraph of the Superior Court's Clarification on page 2 where Judge Goodwin succinctly summarized the effect of the Judgment on Count I of the Superior Court Complaint:

> The court enjoined the Town from purchasing the land unless it obtained [Town Meeting approval for the reduced land acquisition as required by G.Lc. 40 §14.]

Keavany Aff., Ex. 23. In other words, the Judgment that entered on Count I against the Town rendered the settlement agreement ineffective to bind or permit the Town to buy a portion of 364 West Street without a new Town Meeting favorable vote. That is the sole effect of the Judgment that entered on Count I.

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[4] The Proposed Interveners were the only parties to pursue a declaration that the settlement agreement between the Town and the G&U Parties was void and/or unenforceable. The Town's position throughout the Superior Court case, was that:

> "Even if, in order to carry out the Agreement, a new Town Meeting vote is required – which the Town does not concede or agree with – the Settlement Agreement itself is valid and does not exceed the Board's statutory executive authority..." Keavany Aff., Ex. 29 (emphasis supplied).

If there was any doubt as to the limits of the Superior Court Judgment on Count I, as clarified in December 2021, Judge Goodwin extinguished those doubts two months later during a February 9, 2022 hearing on the Town's Emergency Motion to Extend Injunction Order, where she rejected a statement by counsel for the Proposed Interveners that the Judgment on Count I "effectively rescinded" the settlement agreement by stating, "I don't think I rescinded the agreement, because it wasn't in front of me." See Keavany Aff., Ex. 24.

The Superior Court again described the limitations of the Superior Court Judgment in a May 3, 2022 hearing on the Proposed Intervener's Emergency Motion to Preserve Status Quo Pending Appeal:

> So I issued this decision back in November essentially finding for … the taxpayers on Count I that the town lacked authority to buy this smaller parcel of land. I found for the Defendants on Count 2 and 3.

Keavany Aff., Ex. 25. Finally, in her May 6, 2022 Memorandum of Decision and Order denying the Proposed Interveners' Emergency Motion to Preserve Status Quo Pending Appeal, Judge Goodwin again confirmed the limitations of the Judgment on Count I, as clarified in December 2021, when she stated in relevant part that she 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 [sic] voters." Id., Ex. 26. Judge Goodwin further stated that:

> the court must decide whether the [Proposed Interveners] 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."

Id. As confirmed by the Superior Court Judge herself, the Judgment on Count I in the Superior Court was not a successful "challenge to the legality of the Settlement Agreement." It merely enjoined the Town from spending money to acquire the real property described in the Settlement

Agreement absent a new appropriation authorized by Town Meeting. This is the extent of the Judgment on Count I.

3. Intervention is Not Required to Enforce the Superior Court Judgment, Which the Proposed Interveners Intend to Use to Collaterally Attack the Judgment of the Land Court.

While the Appeals Court remand makes reference to "rulings of the Superior Court case" (Reilly, at 385) and further that the Superior Court "has determined some of the substantive issues on the merits" (Id.) the Appeals Court did not identify what these "rulings" or "substantive issues" are, other than what was included in the Judgment that entered on Count I. In light of this language, however, it is apparent that this Court must consider the Judgment that entered on Count I in the Superior Court as it decides the Motion to Intervene on the merits. Indeed, it is apparent by the Proposed Interveners' Post-Remand Motion to Intervene that they rely solely on the Superior Court Judgment as their protectable interest in this case. See, pp. 5-6 of Proposed Interveners' Memorandum. However, as explained and summarized by the Superior Court Judge in December 2021, February 2022 and May 2022, it is crystalline clear that the Judgment (and any other unidentified rulings in that case) does not provide the Proposed Interveners with a protectable interest to pursue in this Land Court Action.

There is no dispute that that the actual terms of the Superior Court Judgment have been, and continue to be effectuated by the Proposed Interveners and complied with by the Town. The Town has not spent money to purchase the settlement parcel, and, in fact, has disclaimed any intention to purchase the settlement parcel. There is nothing for the Proposed Interveners to effectuate or enforce through intervention in this Court.[5]

[5] If the Proposed Interveners believed that the Superior Court and Appeals Court erred in rejecting their claims seeking to rescind, or otherwise declare the Settlement Agreement void, or

The Proposed Interveners contend that the ineffectiveness of the settlement agreement's sale provision entitles them to vacate this Court's Judgment of dismissal and effectively override the Town's decision to dismiss its c. 61 claim. They cite no authority for this proposition. Significantly, the Superior Court found the opposite, writing, "by settling the [Land Court] case, the [Town] decided to forgo its Chapter 61 option, which the statute plainly allows it to do." See Keavany Aff., Ex. 26, at p. 4 (citing G.L. c. 61). This ruling, which is entitled to respect, demonstrates that the Superior Court did not intend for her Judgment to override the dismissal of this Land Court action. This ruling was echoed by the Single Justice when he denied the Town's and Proposed Interveners' Request for Injunction Pending Appeal. See Keavany Aff., Ex. 30 (April 19, 2022 Single Justice Decision).

As set forth above, the Superior Court Judgment is entirely consistent with the stipulated dismissal entered here. Even if they were inconsistent, the Proposed Interveners' attempt to use the Superior Court Judgment to collaterally attack this Court's Judgment of dismissal is a grievous affront to the co-equal nature of the Trial Courts and is contrary to well-settled precedent against such collateral attacks. See Harker v. Holyoke, 390 Mass. 555, 558-559 (1983) ("The public interest in enforcing limitations on courts' subject matter jurisdiction is ordinarily served adequately by permitting direct attack on judgments"); Barrington v. Dyer, 18-P-1604, 95 Mass. App. Ct. 1116 (2019) (Rule 1:28 Decision) ("[T]he plaintiff's complaint constitutes an impermissible collateral attack on the judgment of the Probate and Family Court, entered upon the stipulation of dismissal, with prejudice, of the defendant's decedent's complaint…").

unenforceable, they should have sought further appellate review of the Appeals Court Decision affirming dismissal of Count II of their Superior Court Complaint. They did not.

4. The Proposed Interveners Have no Interest in Enforcing an Injunction.

The Proposed Interveners claim an interest in a supposed injunction they "had obtained to preserve the Forestland," and accuse the G&U Parties of acting with "utter disdain and disrespect for the judicial process" by working to develop the property while the Proposed Interveners' appeal was pending. Memorandum, p. 5. These improper and inflammatory accusations mischaracterize the record and should be stricken.

First, while the Proposed Interveners did obtain a preliminary injunction in April 2021, the injunction was dissolved as a result of the Judgment that entered against them on Count II in the Superior Court. Second, the Proposed Interveners fail to mention that both they and the Town sought to extend the temporary 60-day injunction imposed by the Judgment on Count I beyond the limited period authorized by the Superior Court. The requested extensions were denied not only by the Superior Court, but also by this Court and by the Single Justice of the Appeals Court. See Keavany Aff., Ex. 30 (April 19, 2022 Single Justice Decision) ("the select board was authorized to settle the matter and did so. That the town was unwilling to correctly appropriate the funds to fully recognize the benefit of that agreement does not entitle the town to relief from judgment.") It hardly is disrespectful or disdainful of the judicial process for the G&U Parties to successfully oppose injunction requests in three separate forums and then to proceed with development work once the injunctions were dissolved or denied.

The Proposed Interveners have no interest in enforcing an injunction which does not exist, as it was dissolved more than eighteen months ago. And while no one disputes that they have an interest in enforcing the Superior Court Judgment, that Judgment has always been respected, is being enforced, and has never been characterized or interpreted as being toothless. The Town has not attempted to purchase the settlement parcel since Judgment entered, nor could

it. Intervention is not necessary for the Judgment to be enforced or effectuated. Because the Proposed Interveners lack a protectable interest in the litigation before this Court and are attempting to collaterally attack this Court's Judgment, intervention should be denied.

C. The Town Adequately Represents the Citizens' Interest.

"Even if the proposed interveners asserted a protectable interest distinct from that of the town, they have not demonstrated that the town failed to adequately represent their interests." Town of Falmouth v. Zoning Bd. of Appeals of Falmouth, 94 Mass. App. Ct. 1108 (2018) (Rule 23 Decision). "To succeed under rule 24 (a) (2), the proposed interveners had 'the burden . . . of making a compelling showing of inadequate representation.'" Id., quoting Planned Parenthood League of Mass., Inc. v. Attorney Gen., 424 Mass. 586, 599 (1997). "A government 'is presumed to represent the interests of its citizens . . . when it is acting in the lawsuit as a sovereign.'" Id., quoting United States v. New York, 820 F.2d 554, 558 (2d Cir. 1987). "[I]f disagreement with an actual party over trial strategy, including over whether to challenge or appeal a court order, were sufficient basis for a proposed intervenor to claim that its interests were not adequately represented, the requirement [that a State is presumed to represent the interests of its citizens when acting as a sovereign in litigation] would be rendered meaningless." Id., quoting United States v. Yonkers Bd. of Educ., 902 F.2d 213, 218 (2d Cir. 1990).

The Proposed Interveners assert that the Town does not adequately represent their interests because the Town "abandon[ed] its appeal of this court's denial of its Motion to Vacate, over the objection of the Citizens." Memorandum, p. 7. But the Town was not obligated to pursue an appeal of this Court's discretionary decision not to vacate the dismissal, particularly after the Single Justice found that the Town was not likely to succeed on its appeal and declined to enter an injunction pending appeal. See Keavany Aff., Ex. 30 (April 19, 2022 Single Justice

Decision). The Town's decision to dismiss its appeal is not nearly sufficient to show inadequate representation for purposes of Rule 24(a). "To the contrary, a taxpayer may be well served by a government which makes strategic decisions about when to stop spending taxpayer dollars in litigation." See Town of Falmouth, at *6 ("if a citizen believes that the town government has made incorrect decisions with respect to litigation, that does not mean that the town has not adequately represented the citizen's interest such that he or she can take over that litigation.").

Indeed, the Proposed Interveners have already all but taken over this litigation on behalf of the Town. While they complain that the Town was adverse to them before, the Proposed Interveners cannot dispute that they are fully aligned with the Town now. Counsel for the Town asserted at this Court's August 21, 2023 status conference that the Town intends to pursue every available avenue to acquire 364 West Street. Indeed, the Town has voted every 30 days since August 2022 to take the 364 West Street property by eminent domain. Consistent with that intention (and unacknowledged by the Proposed Interveners in their motion), the lead Proposed Intervener, Elizabeth Reilly, is coordinating the payment of the Town's legal fees related to 364 West Street through an anonymous third-party donor (and/or from Ms. Reilly herself).[6] The clear alignment between the Proposed Interveners and the Town, coupled with the secret funding arrangement, conclusively refute any attempt by the Proposed Interveners to show that the Town's interest is "adverse" to the taxpaying residents of Hopedale or that the Town "colluded with the opposing party." Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. School Comm. of Chelsea, 409 Mass. 203, 206-207 (1991).

[6] Only after being ordered to do so by the Secretary of the Commonwealth did the Town produce as a public record a December 2022 email from the Selectboard Chairperson, Glenda Hazard, wherein Ms. Hazard forwarded to Ms. Reilly for payment outstanding legal invoices for services rendered by Special Town Counsel to the Town. Ms. Reilly responded: "…been waiting for them.. Will get them out asap. Thank you!" Keavany Aff., Ex. 28.

More broadly, the Proposed Interveners cannot show that the Town's history of "inconsistent efforts to enforce its c. 61 Option…compels the conclusion that only the [Proposed Interveners] themselves can adequately represent their interests in this matter." As discussed above, the Appeals Court determined that the Proposed Interveners have no interest in the Town's c. 61 Option and no standing to assert any claim related to that long-ago waived and challenged Option. Whatever ill-defined interest the Proposed Interveners are seeking to protect, the Town's c. 61 claim is not it, and so the consistency of the Town's c. 61 enforcement efforts is wholly irrelevant to the Rule 24(a) analysis.

D. The Proposed Interveners' Motion to Intervene Was Not Timely.

The Proposed Interveners' motion to intervene was not timely. The G&U Parties acknowledge the Appeals Court's comment that the general rule that "postjudgment motions to intervene, whether as of right or permissive, are seldom timely" has "little application on the facts of this case because the basis for intervention did not arise until the town settled and stipulated to the dismissal." Reilly, at 383, quoting Bolden v. O'Connor Cafe of Worcester, Inc. 50 Mass. App. Ct. 56, 61 (2000). However, the Appeals Court expressly deferred the factual assessment on intervention, including timeliness, to this Court. Id., at 383-384. The factual record establishes that the Proposed Interveners had obvious reasons and ample opportunity to seek intervention well before Judgment entered in February 2021, but failed to do so.

"Parties having knowledge of the pendency of litigation which may affect their interests sit idle at their peril." Narragansett Indian Tribe v. Ribo, Inc., 868 F.2d 5, 7 (1st Cir. 1989). Indeed, the length of time that a "putative intervenor knew or reasonably should have known that his interest was imperilled before he deigned to seek intervention" is "the most important factor" in determining whether intervention is timely. Galbi, 101 Mass. App. Ct. at 264, quoting In re

Efron, 746 F.3d 30, 35 (1st Cir. 2014). The undisputed events that occurred months prior to the entry of Judgment in this case on February 10, 2021 provided the Proposed Interveners with unmistakable notice that their claimed interests were imperilled because the Town was considering a settlement which would result in the Town waiving the purported c. 61 right of first refusal option and the G&U Parties retaining and developing a portion of the subject land.

The undisputed timeline of events is as follows:

- On October 24, 2020, a Town of Hopedale Special Town Meeting adopted warrant articles to appropriate money for the acquisition of the subject land pursuant to G.L.c 61. Keavany Aff., Ex. 1 (Town's Amended Complaint), ¶32.
- On October 30, 2020, at a duly noticed public hearing, the Selectboard voted to exercise the purported right of first refusal to purchase the subject land. Id., Ex. 1, ¶34.
- On November 2, 2020, the Town filed an Amended Verified Complaint alleging that the G&U's October 12, 2020 acquisition of the beneficial interest in the Trust that owned the subject land gave rise to the Town's right of first refusal claim pursuant to G.L. c. 61, and sought a preliminary injunction to enjoin the G&U Parties from clearing and developing the land during the pendency of the Land Court Action. Id., Ex. 1.
- On November 23, 2020, after a hearing, the Court denied the Town's Request for Preliminary Injunction.[7] Id., Ex 2 (Land Court Docket). During this hearing, the Court and counsel for the Parties discussed a referral to mediation screening. Id.
- On November 24, 2020, an entry was made on the Land Court Docket reflecting the Court's Order for the parties to attend mediation screening. Id.

[7] This hearing, like all Land Court hearings held throughout the case, was conducted remotely by Zoom and was attended by at least one individual of the Proposed Interveners group.

- On December 1, 2020, the parties stipulated, inter alia, "to a stay of the Land Court proceedings through January 25, 2020 [sic] so that they may engage in the mediation screening process with REBA Dispute Resolution, Inc..." Id., Ex. 3 (Stipulation of the Parties).
- Counsel for the Parties (and representatives of the Parties) attended a mediation screening with REBA Dispute Resolution, Inc. on December 17. Id., Ex. 4 (ADA Referral Form filed on December 14).
- On December 14, 2020, the Selectboard published its Agenda for its December 21 public meeting identifying "Right of First Refusal, 364 West Street." as Agenda Item 6 under "Old Business." Id., Ex. 5.
- On December 21, 2020, at a Selectboard public meeting, the Town's Special Counsel, Peter Durning, recommended going to mediation stating in part that "he feels that it is prudent for the Board to take this opportunity to explore the possibility of a negotiated solution. He feels that a negotiated solution that preserves water quality in the aquifer and secures access to future water supply, while providing some accommodation to expand rail service should be achievable on a parcel of this size." Id., Ex. 6 (emphasis supplied). The Selectboard voted 3-0 to go to mediation. Id.
- The Selectboard held a public meeting on January 4, 2021. Id., Ex. 7 (January 4, 2021 Selectboard Agenda). During the January 4, 2021 Selectboard meeting, counsel for the Town confirmed that the Town was going to mediation to discuss a settlement of its claims against the G&U Parties. Id., Ex. 8 (January 4, 2021 Selectboard Meeting minutes). This meeting was available via Zoom and was live streamed.[8]

[8] https://townhallstreams.com/stream.php?location_id=56&id=34713 (starting at 32:15).

- On January 5, 2021, the Selectboard posted an Agenda for a Special Meeting on January 8, which stated in part that the January 8 "meeting is exclusively for the purpose of mediation…" Id., Ex. 9 (January 8, 2021 Agenda)
- On January 8, 2021, the Town and the G&U Parties mediated with retired Land Court Justice, Leon Lombardi, but did not reach a resolution.
- On January 8, 2021, the Selectboard posted an Agenda for a Special Meeting on January 12, 2021. Included as an agenda item for the January 12 Selectboard Meeting was "Right of First Refusal, 364 West Street, Attorney Peter F. Durning, Special Counsel." Id., Ex. 11 (January 12, 2021 Agenda).
- On January 12, 2021, the Selectboard met in public session and Attorney Durning provided an update stating in part that "the mediation process is not yet concluded." This meeting was available via Zoom and was live streamed.[9] Attorney Durning "assured the residents that if/when there is something to be considered at a public meeting, it will be posted, and the Board will follow up on that." Id., Ex. 12 (January 12, 2021 Minutes).
- On January 15, 2021, the Selectboard posted an Agenda for a Special Meeting on January 21, which stated in part that the January 21 "meeting is exclusively for the purpose of mediation…" Id., Ex. 13 (January 21, 2021 Agenda)
- On January 21, 2021, the parties held a second mediation session with Judge Lombardi, which resulted in an agreement on settlement terms. Id., Ex. 15 and 16.
- On January 21, 2021, the Selectboard published its Agenda for the January 25, 2021 Public Meeting. Id., Ex. 15 (January 25, 2021 Agenda). In part, the Agenda identified the following items under "Old Business" to be discussed:

[9] https://townhallstreams.com/stream.php?location_id=56&id=35049 (starting at 47:35).

- "Mediation Updates; Attorney Peter F. Durning, Special Counsel";
- "Future GU RR Development; Michael R. Milanoski, President Grafton and Upton Railroad Company" (emphasis supplied);
- "Deliberate and Vote Mediation Agreement regarding 364 West Street…"

- On January 25, 2021, the Selectboard announced at an open session that the Town agreed to a Settlement with the G&U Parties, the terms of which were set forth in a Term Sheet published for the January 25 Selectboard meeting. Id., Ex. 16. This meeting was available via Zoom and was live streamed.[10]
- On February 4, 2021, the Selectboard published its Agenda for the February 8, 2021 Public Meeting. Id., Ex. 17. Included as an agenda item was "Right of First Refusal, 364 West Street, Attorney Peter F. Durning, Special Counsel." Id.
- With full knowledge that the Selectboard was meeting on February 8, 2021 to vote on the settlement agreement, the Proposed Interveners, through their counsel, emailed a 9-page single spaced letter to the Selectboard on February 7, objecting to the settlement terms and threatening legal action if the Selectboard voted to approve the settlement terms. Id., Ex. 19. In part, the Proposed Interveners stated:
  - We write to serve notice to the [Selectboard] that the Hopedale Citizens intend to sue the [Selectboard] pursuant to M.G.L. 40 53 (restraint of illegal expenditures) and c. 214 7A (prevent damage to the environment) in the event the [Selectboard] does not suspend its actions towards finalizing Settlement [of the Land Court lawsuit] pending independent review by outside counsel. Id.
- On February 8, 2021, the Selectboard went forward with its February 8 public meeting and announced at the open session that the parties had finalized settlement terms, which were discussed through a PowerPoint presentation by Attorney Durning. Id., Ex. 18. This

[10] https://townhallstreams.com/stream.php?location_id=56&id=35421 (starting at 1:00:50)

meeting was available via Zoom and was live streamed.[11] Counsel for the proposed interveners attended the meeting via Zoom and was permitted to address the Selectboard (starting at 1:23:45), acknowledging that he had been reviewing the matter for approximately one week (in other words, since approximately February 1). See id.

- On February 8, 2022, the Board voted to approve the Settlement Agreement. Id., Ex. 21, ¶63.
- On February 9, 2021 the parties executed the Settlement Agreement. Id., Ex. 21, ¶64.
- On February 10, 2021 counsel for the Town and G&U Parties filed a Stipulation of Dismissal With Prejudice. Id., Ex. 20.
- On March 3, 2021, the Proposed Interveners followed through with their February 7, 2021 Demand Letter threat and filed suit against the Town and the G&U Parties – not in Land Court – but in Superior Court. Id., Ex. 21. The only count asserted against the G&U Parties was Count II. Id. The Appeals Court accurately summarized Count I as being "brought against the board and sought to enjoin the board from expending funds under the settlement Agreement." (Reilly, at 373). The Appeals Court summarized Count II as being brought "against the board and the railroad and sought a declaration that the board's release of its G.L.c. 61 option as part of the settlement agreement was void, that the town's c. 61 rights remain enforceable, that the restructured transaction by which the railroad obtained control of the trust and its beneficial interest triggered the town's option, that all forest land held by the trust be transferred to the town with no easements, and that the railroad be prevented from alienating the forest land or converting any of it from its current use." Reilly, at 374.

[11] https://townhallstreams.com/stream.php?location_id=56&id=35797 (starting at 25:45).

- On November 10, 2021, Judgment entered in the Superior Court Action:
    - In favor of the Proposed Interveners on Count I of their Complaint, enjoining the Town from expending funds under the Settlement Agreement. Keavany Aff., Ex. 22.
    - In favor of the Town and the G&U Parties on Count II on the grounds that the Proposed Interveners had no standing to pursue the relief they sought. Id.
    - In favor of the Town on Count III of the Complaint. Id.
- On December 14, 2021, the Superior Court "clarified" the Judgment. Id., Ex. 23.

This timeline establishes that the Proposed Interveners knew of this Land Court litigation no later than November 23, 2020 when the Land Court heard the Town's Motion for Preliminary Injunction. Significantly, the Proposed Interveners knew no later than December 21, 2020 that the Selectboard voted to go to mediation to negotiate a resolution "that preserves water quality in the aquifer and secures access to future water supply, while providing some accommodation to expand rail service should be achievable on a parcel of this size." Id., Ex. 6. The Proposed Interveners took no action to intervene. Id. On January 4, 2021, it was public knowledge that the mediation was occurring on January 8, 2021. Id., Ex. 7 and 8. The Proposed Interveners took no action to intervene. On January 25, 2021, it was disclosed at a public meeting of the Selectboard that the Town and the G&U Parties had reached agreement in principle on the settlement terms (Id., Ex. 15 and 16), but the Proposed Interveners took no action to intervene. By February 1, the Proposed Interveners had obtained counsel, but rather than move to intervene, the Proposed Interveners instead had their counsel draft a 9-page single spaced letter threatening legal action if the settlement agreement was approved. Id., Ex. 19. On February 8, 2021, the Proposed Interveners learned directly from the Selectboard that it voted to approve the Settlement Agreement, which was to be signed no later than February 9. Id., Ex. 18. The Proposed

Interveners had ample opportunity to move to intervene before Judgment entered February 10, 2021, but initially sat idle and then deliberately chose a path, other than to move to intervene.

The Proposed Interveners continued their dilatory tactics post-Superior Court Judgment by waiting more than two months before they moved to intervene in Land Court. The Proposed Interveners waited more than a month after the Superior Court "clarified" the Judgment to move to intervene in Land Court. Instead, they attempted to transfer this case (to which they were nonparties) to Superior Court. The Proposed Interveners did not move to intervene until January 20, 2021. "Parties having knowledge of the pendency of litigation which may affect their interests sit idle at their peril." Narragansett Indian Tribe., 868 F.2d 5, 7 (1st Cir. 1989). The Proposed Interveners did not act timely before or after Judgment entered and thus, have failed to establish entitlement to intervene.

II. The Proposed Interveners Failed to Demonstrate Facts Entitling Them to Intervene Pursuant to Mass. R. Civ. P. 24(b)

Mass. R. Civ. P. 24(b) provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common. . .In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The court has "considerable discretion in deciding whether permissive intervention is appropriate." Fremont Inv. & Loan, 459 Mass. at 219. As set forth at pp. 12-19, supra, the Proposed Interveners did not timely seek to intervene, and furthermore, have no interest in the action. The Appeals Court has confirmed that the Proposed Interveners do not have standing to assert claims that belonged solely to the Town, including whether to waive a purported and challenged G.L.c. 61 claim, and whether the G.L c. 61 claim is enforceable. Reilly, at 377-380. The Proposed Interveners have no standing to seek vacatur of a Stipulation of Dismissal with Prejudice that the Town and the G&U Parties executed

and filed with the Court in February 2021. Additionally, contrary to the unsupported assertions by the Proposed Interveners, allowing intervention more than 30 months after Judgment entered will unduly delay and prejudice the rights of the G&U Parties.

CONCLUSION

Proposed Interveners Motion to Intervene Pursuant to Mass. R. Civ. P. 24 should be denied.

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

/s/ Andrew P. DiCenzo

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CERTIFICATE OF SERVICE

I hereby certify that this document eFiled on August 31, 2023 will be sent by separate email to all counsel of record.

/s/ Andrew P. DiCenzo

Exhibit 4

Zimbra **jennifer.witaszek@jud.state.ma.us**

Fwd: 2021-J-0111 - Notice of Docket Entry

From : Corinne L Gorman <corinne.gorman@jud.state.ma.us> Thu, Apr 08, 2021 01:04 PM
Subject : Fwd: 2021-J-0111 - Notice of Docket Entry 1 attachment
To : Jennifer M Witaszek <jennifer.witaszek@jud.state.ma.us>

And another..... thank you

----- Forwarded Message -----
From: AppealsCtClerk@appct.state.ma.us
To: "Worcester clerksoffice" <Worcester.clerksoffice@jud.state.ma.us>
Sent: Thursday, April 8, 2021 1:00:05 PM
Subject: 2021-J-0111 - Notice of Docket Entry

FILED
APR 08 2021
ATTEST: CLERK

- COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE

April 8, 2021

28

RE: No. 2021-J-0111
Lower Ct. No.: 2185CV0238

ELIZABETH REILLY & others [1]
vs.
TOWN OF HOPEDALE & others [2]

NOTICE OF DOCKET ENTRY

Please take note that on April 8, 2021, the following entry was made on the docket of the above-referenced case:

MEMORANDUM AND ORDER: This matter is before me by virtue of a petition, pursuant to G. L. c. 231, s. 118, first para., filed by the plaintiffs in Reilly, et al. v. Town of Hopedale, et al., Worcester Superior Court docket no. 2185CV0238. The plaintiffs are ten taxpayers residing in the Town of Hopedale (the town), and their suit, brought pursuant to G. L. c. 40, s. 53, seeks to enjoin the town, through its select board, from purchasing certain real property as an unauthorized expenditure for acquisition of land by purchase.

The plaintiffs sought an order from the Superior Court to enjoin the town and the defendant members of the town's select board from issuing any bonds, making any expenditures, paying any costs, including without limitation, for land or hydrogeological surveying, or transferring any property interests pursuant to a settlement agreement dated February 9, 2021, entered into with the Grafton and Upton Railroad ("the railroad") [3] pending resolution of the Superior Court action. The Superior Court judge denied the plaintiffs' motion and this petition followed. In this petition, the plaintiffs request the relief that was denied in the Superior Court. I issued a temporary stay pending resolution of the petition, and at my request, the defendants filed oppositions to the petition. The plaintiffs filed a reply to the opposition.

Background. The facts of this case are not contested. Although the legal significance of those facts is the subject of substantial dispute, a brief overview will suffice. The owner of certain forestland within the town took advantage of the advantageous tax treatment of that land offered by G. L. c. 61 thereby subjecting the property to the provisions of section 8 of that chapter. According to section 8, upon receipt of a bona fide offer to purchase forestland, the municipality wherein the land is located gains a statutory right of first refusal. In this case, the town sought to exercise that right. Whether the town effectively perfected that right and whether that right is preempted by federal law pertaining to railroads is the subject of on-going litigation in other fora.

Assuming that the town had or would effectively exercise its option to stand in place of the original purchaser, on October 24, 2020, the town meeting voted unanimously "to appropriate, the sum of One Million One Hundred Seventy-Five Thousand Dollars ($1,175,000), to pay costs of acquiring certain property, consisting of 130.18 acres, more or less, located at 364 West Street . . . , and for the payment of all other costs incidental and related thereto, and that to meet this appropriation, the Treasurer, with the approval of the Board of Selectmen, is authorized to borrow said amount under and pursuant to G.L. c. 44, s.7(1) or pursuant to any other enabling authority, and to issue bonds or notes of the Town therefor."

In the same special town meeting, the town voted "to purchase, or take by eminent domain pursuant to Chapter 79 of the General Laws, for the purpose of public park land, the land located at 364 West Street which is not classified as forestland under Chapter 61 of the General Laws, consisting of 25.06 acres, more or less, . . . and in order to fund said acquisition, borrow . . . the sum of $25,000, and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land

conservation, and further to authorize the Board of Selectmen to take any and all actions and execute any and all documents to carry out the purposes of this article."

Thereafter, in the related Land Court proceedings wherein the town was attempting to assert its statutory right of first refusal, the town and the railroad were encouraged to mediate that dispute. As a result of that mediation, on February 9, 2021, the town, through its select board, and the railroad entered into a settlement agreement. The settlement provided for the town to, among other things, purchase 64 acres for $587,000, rather than the full 155 acres of land for $1,175,000. This litigation ensued.

Discussion. A single justice of this court has the authority to enter a preliminary injunction like the one requested by the plaintiffs, and that authority "does not depend on a determination that the trial court judge, in denying relief, made incorrect rulings of law or abused his [or her] discretion." Jet-Line Servs., Inc. v. Bd. of Selectmen of Stoughton, 25 Mass. App. Ct. 645, 646 (1988); G. L. c. 40, s. 53.

In a ten taxpayer case, such as this one, I am required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public, and I must consider whether is a likelihood of statutory violations and how such statutory violations affect the public interest. See Edwards v. Boston, 408 Mass. 643, 647 (1990).

Because the Superior Court judge's decision turned on whether the plaintiffs had shown a likelihood of success in their claim that the settlement agreement was unlawful, I start with an analysis of the plaintiffs' chances. For the reasons stated herein, I conclude that the plaintiffs have shown a likelihood of success sufficient to consider the effect of an injunction on the public interest.

A town select board's general authority to acquire land is granted by statute. G.L. c. 40 s. 14. However, to exercise that general authority, the select board requires the vote of the town at town meeting. Id. The powers to purchase or take real property for public purposes set forth in section 14, though, are not the only methods by which a town may acquire real property. See G.L. c.60, s.s. 64 et seq., G.L. c.45, 14, and G.L. c.40, s.8C.

The plaintiffs argue that G. L. c. 61, s. 8 is another source of authority for a town to acquire real property outside the provisions of G. L. c. 40, s. 14. The defendants contend that completion of the purchase secured by the right of first refusal found in G. L. c. 68, s. 8 is implicitly dependent on the authority to purchase set forth in G. L. c. 40, s. 14. Neither

party has cited, nor am I aware of, any appellate cases deciding this issue. I need not and do not resolve this dispute.

Even if a town vote was necessary to authorize the board's decision to exercise the right of first refusal pursuant to G.L. c. 40, s. 14, the plaintiffs' argument that no such authorization occurred at the October 24, 2020 special town meeting is sufficiently meritorious to consider granting the requested injunction.

The motion at town meeting plainly does not contain an authorization to purchase but was merely an appropriation of funds for the purchase pursuant to G. L. c. 68, s. 8. Section 14 of chapter 40 requires both authorization and an appropriation. G.L c. 40, s. 14. The absence of an explicit authorization is particularly noteworthy where, at the same town meeting, the motion to acquire the portion of the property at issue that was not forestland contained an explicit authorization. Because there were two motions to acquire land at the special town meeting and the motions utilized different language, it would be reasonable to conclude that the voters understood there to be a material difference in what they were voting in favor of. CF Fernandes v. Attleboro Hous. Auth., 470 Mass. 117, 129 (2014) ("The omission of particular language from a statute is deemed deliberate where the Legislature included such omitted language in related or similar statutes").

Assuming, arguendo, that the defendants' position is correct, i.e. that G. L. c. 40, s. 14 authorization was required to complete the purchase pursuant to the right of first refusal, the result of the vote would have been ineffective to complete the purchase of the entirety of the forestland. Thus, it would not serve as an authorization to complete a purchase of a lesser amount thereof.

Assuming, arguendo and as the plaintiffs contend, that G.L. c. 61, s. 8 is an independent source of the select board's authority to purchase land in the absence of a town vote, the select board's authority would be limited by the language of that statute.

The plain language of that statute would not appear to authorize the select board to acquire any less than the entirety of the real property subject to the right of first refusal. "No sale of the land shall be consummated if the terms of the sale differ in any material way from the terms of the purchase and sale agreement which accompanied the bona fide offer to purchase as described in the notice of intent to sell except as provided in this section." G. L. c. 61, s. 8. Here, the significant reduction in both the acreage of land to be sold and the purchase price as set forth in the settlement agreement constitute a material change in the terms.

This interpretation of the source of the select board's authority would also distinguish this case from Russell v. Town of Canton, 361 Mass. 727 (1972), a case upon which the plaintiffs and the Superior Court judge relied. In Russell, the Supreme Judicial Court concluded that that the motion authorizing the select board to take all of an owners' land by eminent domain did not preclude selectmen from choosing and taking only part thereof. Id. at 732. In Russell, neither the town of Canton, nor the Supreme Judicial Court, were faced with the all-or-nothing nature of the right of first refusal found in G. L. c. 61, s. 8. Id. ("We express no opinion on the question whether a town's authorization for a taking may, by appropriate language, be expressly limited to or conditioned upon the taking of the entire parcel authorized to be taken, for this was not attempted in the case before us.") Consequently, while Russell may guide in this case, it is not controlling.

For these reasons, I find that the plaintiffs have demonstrated some likelihood of success in establishing that the town's purchase of the land, pursuant to the settlement agreement, would be a statutory violation. To be clear, I am not deciding this case on the merits; only that the plaintiffs have demonstrate some chance of success on their claim. See Jet-Line Servs., Inc., 25 Mass. App. Ct. at 648 (single justice "not required to, and did not, decide the case or any of its pivotal issues on the merits"). Having so concluded, I move on to the effect an injunction would have on the public interest.

The public interest in protecting the public funds from unauthorized expenditure is self-evident. "The words of [G. L. c. 40, s. 53] and our cases interpreting it demonstrate that a violation of any law designed to prevent abuse of public funds is, by itself, sufficient harm to justify an injunction." Edwards v. Boston, 408 Mass. 643, 646 (1990). Section 14 of chapter 40, with its statutory requirement of a town vote before a purchase, is a statute designed to prevent the abuse of public funds. Thus, the plaintiffs have demonstrated that the requested injunction serves the public interest.

I am mindful of the defendants' arguments that the settlement agreement allows the public to salvage some of the benefits of its right of first refusal, and that permanently preventing the execution of that agreement could result in the town receiving none of the forestland. The settlement agreement may represent sound public policy, the correct litigation strategy in the Land Court, and a general benefit to the public and the town. Nevertheless, it may well be unlawful.

Nothing in this memorandum and order should be construed as preventing the town from conducting a town vote authorizing the select board to purchase any or all of the land at issue, which would render the transaction lawful.

Conclusion. I find that the plaintiffs have demonstrated a likelihood of success in showing that, pursuant to the statutes discussed herein, the select board lacks the authority to purchase the land described in the settlement agreement without an authorization from the town at town meeting. I further find that a preliminary injunction pending a determination on the merits would serve the public interest in preventing the unauthorized expenditure of public funds. Consequently, the Hopedale Board of Selectmen is enjoined from issuing any bonds, making any expenditures, paying any costs, or transferring any property interests pursuant to the Settlement Agreement dated February 9, 2021, entered into with the Grafton and Upton Railroad, pending final judgement or further order of this court, or a single justice thereof, whichever is first to occur. (Meade, J.). *Notice/Attest/Frison, J.

Footnotes:

1. Carol J. Hall, Hillary Smith, David Smith, Megan Fleming, Stephanie A McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle.

2. Louis J. Arcudi, III, Brian R. Keyes, Grafton & Upton Railroad Company, John Delli Prisculi, Michael R. Milanoski, and One Hundred Forty Realty Trust.

3. The land is owned by the trust defendant. However, the trust is controlled by the railroad. For convenience, I refer only to the railroad but include the trust where appropriate.

REGISTRATION FOR ELECTRONIC FILING. Every attorney with an appeal pending in the Appeals Court must have an account with eFileMA.com. Registration with eFileMA.com constitutes consent to receive electronic notification from the Appeals Court and e-service of documents. Self-represented litigants are encouraged, but not required, to register for electronic filing.

ELECTRONIC FILING. Attorneys must e-file all non-impounded documents. Impounded documents and submissions by self-represented litigants may be e-filed. No paper original or copy of any e-filed document is required. Additional information is located on our Electronic Filing page: http://www.mass.gov/courts/court-info/appealscourt/efiling-appeals-faq-gen.html

FILING OF CONFIDENTIAL OR IMPOUNDED INFORMATION. Any document containing confidential or impounded material must be filed in compliance with Mass. R. App. P. 16(d), 16(m), 18(a)(1)(A)(iv), 18 (d), and 21.
Very truly yours,

The Clerk's Office

Dated: April 8, 2021

To: Harley Clarke Racer, EsquireDavid E. Lurie, EsquireBrian W. Riley, EsquireDonald C. Keavany, Jr., EsquireAndrew DiCenzo, EsquireWorcester Superior Court Dept.

If you have any questions, or wish to communicate with the Clerk's Office about this case, please contact the Clerk's Office at 617-725-8106. Thank you.

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38 KB

Exhibit 5

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION NO. 21CV0238

ELIZABETH REILLY and others,[1]

Plaintiff,

v.

TOWN OF HOPEDALE and others,[2]EMIL IOUKHNIKOV AND RUTA IOUKHNIKOV,

Defendants.

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TENMPORARY RESTRAINING ORDER

After consideration on an abbreviated record[3]of the Plaintiff's Emergency Motion to Preserve the Status Quo Until the Court's Decision on the Dispositive Motions, the defendants are hereby temporarily restrained from any further alteration or destruction of the Chapter 61 land that it is the subject of this action until the court takes further action on said motion after receipt of additional briefing to be filed by the close of business on September 13, 2021.

SO ORDERED

Karen L. Goodwin
Associate Justice, Superior Court

Dated: September 9, 2021

[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.
[3] Although the motion was not heard *ex parte,* the court is entering this order as a temporary restraining order rather than a preliminary injunction given that the motion was filed on the same day of the hearing with limited opportunity for defendants to file a written opposition.

Exhibit 6

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 FOR PRELIMINARY INJUNCTION

38

Before the court is the plaintiffs' motion to "preserve the status quo" and prevent the defendants, Grafton & Upton Railway ("Railway") and related persons and entities, from removing trees and otherwise interfering with property designated as protected forestland. Consider the motion as one for injunctive relief, the court **ALLOWS** the motion.

BACKGROUND[3]

The court briefly summarizes the factual and procedural background of this case. Approximately 30 years ago, the assessor of the Town of Hopedale ("Hopedale" or the "Town") approved the application of the owner of 130.18 acres of woodlands to designate the property as forestland (the "Forestland") under G. L. c. 61, §2 ("Chapter 61"). In return for preferential tax treatment under Chapter 61, the Forestland could not be sold for residential, industrial, or

[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.
[3] The facts are drawn form the verified complaint and exhibits as well as affidavits submitted in connection with the motion to preserve the status quo.

commercial purposes unless the Town received notice of the proposed sale and an opportunity to exercise its right of first refusal. G. L. c. 61, §8.

On July 9, 2020, Charles Morneau, as Trustee for One Hundred-Forty Realty Trust (the "Trust"), the owner of the Forestland, notified Hopedale of the Trust's intent to sell to the Railway 155.24 acres of land, which included the Forestland as well as 25.06 acres of wetlands (the "Wetlands"). On August 19, 2020, Hopedale asked the Trust to clarify its notice to specify the terms applicable specifically to the Forestland.

The Trust's response reflected a blurring of the lines between the Trust and the Railway. On October 7, 2021. that the law firm that now represents the Railway, notified the town on behalf of its client (which the firm did not identify) that rather it was withdrawing its Chapter 61 notice. Hopedale responded the following day,[4] stating that the Trust's purported withdrawal was of no effect, and that Hopedale would proceed to consider whether to exercise its right of first refusal. On October 15, 2020, the Railway notified the town that it had purchased "all of the beneficial interest" of the Trust in the Forestland. Around the same time, Railway officials replaced Morneau as Trustees of the Trust.

On October 21, 2020, Hopedale notified the Railway and the Trust that it was moving forward with its option to buy the Forestland. On October 24, 202, residents at the Hopedale town meeting voted to appropriate money $1,175,000 to acquire the Forestland under Chapter 61 and to fund the taking of the Wetlands by eminent domain. Six days later, the Board of Selectmen voted to buy the Forestland and take the Wetlands by eminent domain. On November 2, 2020, Hopedale recorded in the Worcester South District Registry of Deeds notice of its decision to exercise its right of First Refusal in the Forestland and eminent domain rights over the Wetlands.

[4] Hopedale's response was addressed to the Trust.

In the meantime, the Railway had begun to clear the Forestland. Hopedale filed a lawsuit in the Land Court seeking to stop the clearing and effectuate its acquisition of the Forestland and Wetlands. The Land Court litigation resulted in a Settlement Agreement executed on February 9, 2021, under which Hopedale would buy approximately 40 acres of the Forestland for $587,500. The plaintiffs filed the instant lawsuit on March 3, 2021, along with a motion for a preliminary injunction seeking to enjoin the Town from buying a portion of the Forestland.

On March 11, 2021, the court (Frison, J.) denied the motion for a preliminary injunction, The plaintiffs appealed and a single justice of the Appeals Court on April 8. 2021, enjoined Hopedale from making any expenditure, issuing an bonds, or transferring any property pursuant to the Settlement Agreement.

Thereafter, the parties filed cross motions for judgment on the pleadings which were heard by the court on September 9, 2021. On the day of the hearing, the plaintiffs filed an "Emergency Motion to Preserve the Status Quo." The motion and supporting affidavits stated that the Railway had resumed cutting trees on the Forestland. Following a September 9, 2021, hearing on the motions for judgment on the pleading and the motion for injunctive relief, the court entered a Temporary Restraining Order preventing any further alteration or destruction of the Forestland pending further order of the court. The court also invited the parties to supplement their filings relating to the requested injunction, which the parties did on September 13, 2021.

DISCUSSION

A court addressing a request for injunctive relief 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). "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, given the nature of this case, 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).

Before the court turns to applying that standard here, it will address the impact of the appeals court injunction on the current request to "preserve the status quo." The Railway argues that the injunction entered by the appeals court does not restrain its actions on the Forestland because the order only prevents the town from spending money to acquire a just portion of the Forestland. In the court's view, the Railway reads the injunction too narrowly. The purpose of the injunction was to temporarily prevent the town from releasing the Chapter 61 limitations on a large portion of the Section 61 Forestland owned by the Trust. By clearing the Forestland, the Railway, in essence, is treating the Forestland as though it were released from Chapter 61 constraints, a result the appeals court injunction sought to prevent.

To the extent the appeals court order is not broad enough to constrain the Railway's actions, this court believes it appropriate to extend its reach to the Trust and the Railway.[5] If the plaintiffs are successful in this lawsuit, the Forestland would remain in its natural state. The Railway's continued clearing of the Forestland would make that result impossible.

Finally, the court's own analysis of the appropriateness of injunctive relief leads it to the same conclusion. The court agrees with the Appeals Court that the plaintiffs have at least a reasonable likelihood of success on the merits and adopts its analysis here. See *Reilly v. Hopedale*, Appeals Court No. 2021-J00111 (April 8, 2021). That the plaintiffs would suffer

[5] Although the Trust still appears to be the record owner, the Railway is treating the property as its own.

irreparable harm requires little discussion. Once trees are removed, they are gone for the foreseeable future. The Railway's claimed – delays in maintaining a construction schedule – pales in comparison. The question of harm to the public interest depends to a large degree on which side of the litigation is correct. In any event, the court see no obvious risk of harm to the public interest occasioned by issuing the preliminary injunction.

ORDER

For the above reasons, it is **ORDERED THAT**:

1. The plaintiff's Motion for a Preliminary Injunction is **ALLOWED**.

2. Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and One Hundred Realty Trust are **TEMPORARILY ENJOINED** from any further alteration or destruction of the 130.18 acres of Forestland that is the subject of this lawsuit pending further order of the court.

Dated: September 24, 2021

Karen Goodwin
Associate Justice, Superior Court

Entered and Copies Mailed 9/24/21

Exhibit 7

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
C.A. NO. 2185CV00238D

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

Notices Mailed 2/10/22

2/9/22 Denied. The Court no longer has jurisdiction over this case. Final judgment having entered. A more detailed explanation of the decision was set forth during the 2/9/22 hearing. (Goodwin, J.) Attest: Deborah J. Patterson, Asst. Clerk

(5)

Exhibit 8

9

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO: 2081CV00614

TRESCA BROTHERS SAND & GRAVEL, INC.

vs.

EAMES STREET, LLC, and others[1]

MEMORANDUM OF DECISION AND ORDER ON THE BENEVENTO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND FOR ENTRY OF FINAL JUDGMENT

This case arises out of a 2003 lease between Tresca Brother Sand & Gravel, Inc. ("Tresca"), as tenant, and Glen Falls Lehigh Cement Company ("Lehigh"), as Landlord (the "Lease"), concerning use of a portion of the property located at 90-92 Eames Street, Wilmington, Massachusetts ("Premises"). The Lease, conditioned upon Tresca obtaining special permits, contemplated that Tresca would construct and operate a concrete plant at the site. The permitting process, and related litigation, has taken several years, with Special Permits only issuing in late-November 2020 after a protracted court battle between Tresca and the Town of Wilmington. In the interim, Eames Street, LLC ("Eames Street"), an entity controlled by Charles J. Benevento, the owner of a competing concrete business Benevento Concrete Corp., assumed the leased Premises as part of a larger purchase from Lehigh of the entire parcel at 90-92 Eames Street (the "Property") on June 24, 2019.

Eames Street, Benevento Concrete Corp., Benevento Family Limited Partnership, Benevento Family, LLC, and Charles J. Benevento (collectively, the "Benevento Defendants")

[1] Benevento Concrete Corp.; Benevento Family Limited Partnership; Benevento Family, LLC; Charles J. Benevento; Town of Wilmington Board of Appeals; Town of Wilmington Planning Board, and Town of Wilmington (collectively, the "Town Defendants").

move to dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(6), alleging that Tresca's claims for declaratory judgment under the Lease, breach of contract, and related business torts, are not ripe or fail to state a claim. Tresca opposes dismissal alleging that Eames Street has clearly indicated its view that Tresca may not proceed with construction of the concrete plant as planned and permitted, and requests determination of its rights under the Lease. Tresca also asserts breach of contract and business tort claims (interference, civil conspiracy), against the Benevento Defendants for their activities in alleged opposition to Tresca's efforts to construct a competing concrete plant.[2] For the below reasons, the Benevento Defendants' motion is **ALLOWED**, in part.

BACKGROUND[3]

Tresca and the Benevento Concrete Corporation ("BCC") are competitors in the regional concrete manufacturing and distribution market. BCC and Eames Street are owned or controlled by Charles J. Benevento and/or members of his family either individually or through the Benevento Family Limited Partnership and Benevento Family, LLC.

Tresca originally signed the Lease at issue here with Lehigh, another cement company, in 2003 for partial use of the Premises as a concrete manufacturing facility. The "intended use" of the Premises is defined in the Lease as "a location for a concrete batch plant and such other purposes incidental to such business, including trucking of materials." The Lease granted Tresca "all licenses, permits, and other agreements appurtenant to the premises." The Lease defined the portion of the Property to be utilized under the Lease and granted Tresca "the respective

[2] Tresca also asserts claims against the Town of Wilmington and its Planning Board that are not at issue in the pending motion.

[3] The background facts are taken from the well-pleaded allegations of the complaint, which are assumed to be true, as well as any favorable inferences that reasonably can be drawn from them. See, e.g., *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636-637 (2008). See also *Galiastro v. Mortgage Electronic Registration Systems (MERS)*, 467 Mass. 160, 164-165 (2014).

easements, appurtenances and improvements of the aforesaid premises . . . [including] . . . all rights of the Lessor to [the defined area] and any and all streets, roads, highways, alleys, driveways, easements, and rights of way appurtenant thereto." The Lease also required Tresca "make the necessary connections for mains, ducts, and conduit" to bring utilities (gas, water and electric) across the Property to the Premises," and stated that "[t]he Lessor shall cooperate to allow Lessee to share and/or tie into systems, conduits, pipes and wells . . . to allow lessee to efficiently provide services to the Leased Premises."

The Lease, at Section 1.03 states that the term of the Lease was not to commence until Tresca obtains all necessary permits, constructs a concrete plant, and commences operations. Under Section 5.01 of the Lease, Tresca is only obligated to pay rent once the term of the Lease commences. Section 8 of the Lease includes a right to "quiet enjoyment" that commences once the tenant begins paying monthly rent.

Tresca and Lehigh cooperated in getting the first round of permits for the planned concrete plant, including a Site Approval Plan ("Site Plan") and Stormwater Permit. Tresca still required Special Permits from the Town of Wilmington Planning Board to proceed with construction of the concrete batch plant. On June 24, 2016, the Town of Wilmington denied the Special Permits necessary to build the concrete plant in accordance with the Site Plan and Stormwater Permits Tresca had already received. Tresca appealed the denial of the Special Permits to this court. Following a trial reversing the Town's denial (decision dated November 6, 2018) (Leibensperger, J.), the Appeals Court affirmed the result on July 8, 2020. The Town requested further appellate review, which was denied. The Town issued the Special Permits in late-November 2020 while this motion was pending.[4]

[4] This fact was presented to the court at the hearing for this motion and affirmed by Eames Street's counsel.

On or about June 24, 2019, prior to the issuance of the needed Special Permits, Eames Street purchased the Property from Lehigh. The deed of conveyance to Eames Street states that title to the Property is subject to "all . . . prior conveyances . . . plans and notes, reservations, restrictions, conditions, easements . . . and rights of way as the same may appear in prior instruments and records." Tresca contends that includes the Lease and any permits and/or plans approved by the Town, as well as the Superior Court decision granting Tresca its Special Permits, that existed at the time of Eames Street's purchase of the Property. Eames Street does not contest at this stage of the litigation that it assumed the Lease as the new landowner.

Tresca alleges that Mr. Benevento, through his companies, actively opposed the necessary permitting from the beginning. The conduct attributed to Benevento, or his companies, by Tresca includes retaining counsel to appear in opposition to Tresca's desired permit applications throughout their pendency, "stud[ying] Tresca's Plans and Permits over the years," maintaining "direct contact" with Town officials, attending the trial appealing the Town's denial of the Special Permits, attending the appeal of the same, acquiring the Property through Eames Street while the Special Permits were pending with the intent to frustrate Tresca's competing concrete facility, and sending an October 21, 2019 letter to the Town of Wilmington concerning the Special Permits that Tresca claims misstated Tresca's rights under the Lease.

On October 21, 2019, Eames Street sent a letter to the Town of Wilmington's Director of Planning & Conservation concerning the Premises. The letter stated that "regarding a proposed concrete batch plant on the property . . . as the new owner, we do not have any legal interest in [the] permit applications." It also stated that Eames Street had "assumed an existing lease with Tresca for use of a portion of the property," and its view that Tresca's "use is limited to the portion of the property shown in blue on the attached Site Plan." The letter concluded by saying

that "[t]he remaining portions of the property, including the parking area, railroad off-loading area and existing silos, are planned to be used for purposes other than the proposed concrete batch plant." Tresca contends that Eames Street's letter to the Town demonstrates Eames Street's failure to recognize Tresca's full rights of use under the Lease, including various easements and "all licenses, permits, and other agreements appurtenant to the premises." Tresca also contends that Town utilized the letter to "disavow" any obligation to issue the Special Permits; although, this allegation may now be moot given that the Special Permits have now been issued following the conclusion of the proceedings in the appellate courts.

Tresca commenced this suit seeking declaratory judgment and damages on in early 2020. Eames Street and the Benevento Defendants filed this motion to dismiss on October 15, 2020. As of the time of filing, a request for further appellate review of the trial court's decision reversing the Town's original denial of the Special Permits was still pending. The request for further appellate review was denied sometime in the fall of 2020 and the Special Permits were issued by the Town in or about late-November 2020. Eames Street has now appealed the issuance of the Special Permits to the Land Court.[5]

DISCUSSION

I. Legal Standard

When evaluating the sufficiency of a complaint pursuant to Rule 12(b)(6), the court must accept as true the well pleaded factual allegations of the complaint, as well as any inference which can be drawn therefrom in the plaintiff's favor. *Eyal* v. *Helen Broadcasting Corp.*, 411

[5] Eames Street disclosed to this court its appeal to the Land Court at the hearing for this motion. As of the time of writing, there has been no notice filed in this matter concerning the Land Court action, or any request to stay or consolidate the matters. As such, this court will decide the pending motion before it. If the Land Court matter proceeds, the parties may wish to consider transfer, stay, or consolidation of this matter with the Land Court matter to avoid potentially conflicting decisions and/or parallel dockets.

Mass. 426, 429 (1991), and cases cited. To survive a motion to dismiss, a plaintiff is only required to present "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief." *Iannacchino*, 451 Mass. at 637.

Here, the Benevento Defendants challenge whether Tresca has alleged an "actual controversy" capable of adjudication under G. L. c. 231A. The Benevento Defendants also challenge Tresca's breach of contract and business tort claims as vague, conclusory, or factually insufficient to state a claim.

II. "Actual controversy" requirement under G. L. c. 231A

When asserting a claim for declaratory judgment a plaintiff must establish that "an actual controversy has arisen." G. L. c. 231A, § 1. An actual controversy arises under our law where there is "a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation." *School Comm. of Cambridge* v. *Superintendent of Sch. of Cambridge*, 320 Mass. 516, 518. See, e.g., *Department of Community Affairs* v. *Massachusetts State College Bldg. Auth.*, 378 Mass. 418, 423. Accordingly, declaratory relief is reserved for real controversies, and is not a vehicle for resolving abstract, hypothetical, or otherwise moot questions. *Massachusetts Ass'n of Indep. Ins. Agents & Brokers* v. *Commissioner of Ins.*, 373 Mass. 290, 292-293 (1977). Within these constraints, however, the declaratory judgment act must be "liberally construed," so as to effectuate its remedial goals of "remov[ing], and . . . afford[ing] relief from, uncertainty and insecurity with regard to rights [and] duties." G. L. c. 231A, § 9. See *Entergy Nuclear Generation Co.* v. *Department of Envt'l Protection*, 459 Mass.

319, 327-328 (2011). "An 'actual controversy,' as those words are employed in c. 231A, is not limited to instances where the rights of one party have been impaired or damaged by the act of another." *School Comm. of Cambridge*, 320 Mass. at 518. "One of the benefits of the declaratory procedure is that it does not require one to incur the risk of violating some term of a contract or of invading some right of the other, even if done in good faith, before he may have relief." *Id.* G.L. c. 231A, § 1 provides that one may seek a declaratory judgment or decree "either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen."

In its complaint, Tresca requests a judicial declaration "that the rights and obligations of the parties under the Lease and under Tresca's approved Project Plans and Permits entitle Tresca to proceed with the aforesaid concrete facility." Tresca makes this request in response to communications from Eames Street to the Town of Wilmington that indicate Eames Street, the lessor, believes the project plans as submitted by Tresca exceed Tresca's rights under the Lease. The parties informed the court at oral argument that the Special Permits have now issued.

While the Lease "term," which begins the obligation to pay rent, does not commence until the concrete facility is constructed, Tresca has identified that both it and Eames Street have a "definite interest" in the Lease. Further, Tresca has identified rights and obligations under the Lease that exist prior to the commencement of the Lease term, the satisfaction of which will require time and treasure from Tresca, and cooperation for Eames Street as the Lessor.

While Eames Street insists it has not yet taken any action to prevent Tresca from exercising it rights under the Lease, and thus the dispute is not ripe, G. L. c. 231A does not require Tresca to proceed with construction as contemplated in the Lease and related Project Plan and Special Permits where Eames Street has signaled its disagreement, through communications

with the Town, that the project can proceed as planned. See *School Comm. of Cambridge*, 320 Mass. at 518. As Tresca intends to proceed under the Project Plans, which it insists confirm with the Lease, it is appropriate grant it "relief from, uncertainty and insecurity with regard to rights [and] duties" under the Lease. See G. L. c. 231A, § 9. See *Entergy Nuclear Generation Co.*, 459 Mass. at 327-328. Accordingly, the request to dismiss Tresca's request for declaratory judgment under G. L. c. 231A is **DENIED**.

In the alternative, the Benevento Defendants argue against the merits of Tresca's claims under the Lease. This asks this court to engage in the same analysis required to deliver a judicial determination under G. L. c. 231A and is more appropriate at the summary judgment or trial phase of the dispute. This court declines to decide the ultimate question of Tresca's declaratory judgment claim at this early stage of litigation, particularly where the recently issued Special Permits, which are central to the dispute, are not yet part of the record.

III. Contract claims

In its complaint, Tresca asserts claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of the covenant of quiet enjoyment.

It is undisputed that Eames Street only acquired the Premises, and assumed the Lease, in June 2019. Tresca asserts Eames Street is "liable to Tresca for breach – and anticipatory breach – of contract[.]"

"With few exceptions, . . . 'Massachusetts has not generally recognized the doctrine of anticipatory repudiation, which permits a party to a contract to bring an action for damages prior to the time performance is due if the other party repudiates.'" *KGM Custom Homes, Inc.* v. *Prosky*, 468 Mass. 247, 253 (2014), quoting *Cavanagh* v. *Cavanagh*, 33 Mass. App. Ct. 240, 243

(1992). An exception applies where there has been "an actual breach accompanied by an anticipatory breach." *Cavanagh*, supra at 243 n.5.

"Every contract implies good faith and fair dealing between the parties to it. The implied covenant of good faith and fair dealing provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Anthony's Pier Four, Inc.* v. *HBC Assocs.*, 411 Mass. 451, 471-472 (1991).

Here, the conduct of the Benevento Defendants described in Tresca's complaint as harmful to its interests under the Lease largely took place before Eames Street acquired the Premises, with the exception of the October 21, 2019 letter Eames Street sent to the Town. There can be no breach before a party is subject to the contract at issue. It is undisputed that Eames Street did not become a party to the Lease until it purchased the Property in June 2019. Thus, no claim for breach of contract, or any implied rights, under the Lease may stand against Eames Street for conduct by it, or any other Benevento Defendants, occurring prior to the purchase of the Property. Tresca may not assert claims for breach of contract or a violation of the covenant of good faith and fair dealing for conduct prior to Eames Street's purchase of the Property.[6] Nor can Tresca assert any claim for anticipatory breach, as the limited circumstances required for such a claim are not alleged here. See *Cavanagh*, supra at 243 n.5. See also, *Petrangelo* v. *Pallard*, 356 Mass. 696, 702 (1970) (finding "repudiation" of the contract was more than a "mere anticipatory breach").

Tresca alleges that the Lease contains an obligation for the Lessor to cooperate in fulfilling the stated purpose of the Lease: to allow the permitting, construction, and operation of a concrete batch plant on the Premises. Whether Eames Street's October 2019 letter to the

[6] This court makes no determination whether evidence of conduct prior to the purchase may be introduced to prove that actions taken after Eames Street's assumption of the Lease were not done in good faith.

Town, purporting to state the bounds of Tresca's rights under the Lease, violated "the right of [Tresca] to receive the fruits of the contract," requires a factual determination of the Eames Street's intent in sending the letter and the harm suffered by Tresca, as a result.[7] See *Anthony's Pier Four, Inc.* v. *HBC Assocs.*, 411 Mass. 451, 471-472 (1991). Taking as true Tresca's allegation that the Town further delayed issuance of the Special Permits, as this court must, Tresca has plead sufficient facts to state a claim for breach of the implied covenant of good faith and fair dealing. See *id.* Accordingly, the Benevento Defendants' motion to dismiss the claim for breach of contract and breach of the implied covenant of good faith and fair dealing for alleged conduct occurring after Eames Street purchased the Property, is **DENIED**.

Concerning Tresca's claim for breach of the covenant of quiet enjoyment, as the right to quiet enjoyment under the express terms of the Lease (Section 8) does not commence until Tresca begins to pay rent, and it is not alleged that Tresca's obligation to pay rent has begun, that claim must be **DISMISSED**.

IV. Tort claims

Tresca alleges claims of interference with contractual relations (Count 3), interference with advantageous business relations (Count 4), and civil conspiracy (Count 5) against the Benevento Defendants. The court addresses each in turn:

To make out a claim for intentional interference with a contract, a plaintiff must demonstrate that "(1) [it] had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the

[7] This court notes Eames Street's argument that the October 2019 letter could not have had any effect on the Town's 2016 denial of the Special Permits, or the subsequent Superior Court decision and related appeals. However, what effect, if any, the letter had requires a factual determination whether Tresca's allegation that the Town "disavowed" its obligations after receiving the letter, harming Tresca, that is not appropriate under Mass. R. Civ. P. 12.

defendant's actions (citation omitted)." *G.S. Enterprises, Inc.* v. *Falmouth Marine, Inc.*, 410 Mass. 262, 272 (1991).

Tresca has failed to allege that any conduct by the Benevento Defendants caused a third party to break the Lease at issue. In fact, Tresca argues that the Lease is very much still in effect and binding on Eames Street. Accordingly, Tresca has failed to allege sufficient facts in support of its claim for intentional interference with contractual relations. The claim is hereby **DISMISSED**.

To make a claim for intentional interference with advantageous relations, a plaintiff must demonstrate that "[it] had an advantageous relationship with a third party (e.g., a present or prospective contract or employment relationship); (2) the defendant knowingly induced a breaking of the relationship; (3) the defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions (citation omitted)." *Blackstone* v. *Cashman*, 448 Mass. 255, 260 (2007).

As with the prior claim, Tresca has not alleged any "breaking of the relationship" with any third party that would qualify as an intentional interference claim. The relationship at issue here is the Lease between Tresca and Lehigh, which was assumed by Eames Street and, according to Tresca, remains very much still in effect. Tresca's claim for intentional interference with advantageous relations is **DISMISSED**.

To prove a claim of civil conspiracy a plaintiff "must show an underlying tortious act in which two or more persons acted in concert and in furtherance of a common design or agreement." *Bartle* v. *Berry*, 80 Mass. App. Ct. 372, 383-384 (2011).

Tresca's allegations related to this count do little more than restate the elements of the claim in conclusory fashion. There are no factual allegations explaining any concerted action by

the Benevento Defendants. Nor does the conduct complained of in opposing the Town-issued permits earlier in the complaint rise to a "tortious act," seeing as such petitioning activity enjoys special protections under Massachusetts law. Accordingly, Tresca's civil conspiracy claim is **DISMISSED**.

V. Count 6 – Specific Performance/Equitable Estoppel

Tresca claims it is entitled to the equitable remedy of specific performance of the Lease and "freedom from interference by Defendants with Plaintiffs' rights thereunder . . . and to the application of equitable estoppel as a bar to Defendants' claims and contentions to the contrary, and a basis for injunctive relief." Complaint para. 43. This court reads the claim to assert both a request for the remedy of specific performance of the Lease and a claim for equitable estoppel.

Equitable estoppel requires a plaintiff to demonstrate "a representation made to induce reliance on the part of a person to whom the representation is made," as well as an act done in reasonable reliance of the representation, and detriment as a consequence of the act done in reliance. *Sullivan* v. *Chief Justice for Admin & Mgmt. of the Trial Court*, 448 Mass. 15, 27-28 (2006). Tresca does not allege in its complaint that any of the Benevento defendants made any representation to it related to the Lease at any time. A claim for equitable estoppel cannot be maintained without an allegation that a representation was made that induced reliance by the plaintiff. See *id.* Further, Tresca offered no argument in opposition to the Benevento Defendants' request for dismissal of the equitable estoppel claim. Accordingly, any claim of "equitable estoppel" asserted against the Benevento Defendants is **DISMISSED**.

Specific performance is an injuctive remedy available in contract cases, usually where an interest in land is involved. "A judge generally has considerable discretion with respect to granting specific performance, but it is usually granted in disputes involving the conveyance of

land." *McCarthy* v. *Tobin*, 429 Mass. 84, 89 (1999). "It is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land." *Id.*, quoting *Greenfield Country Estates Tenants Ass'n, Inc.* v. *Deep*, 423 Mass. 81, 88 (1996). "Even if a commercial lease is not considered a conveyance of property, [] we see no abuse of discretion in [a] judge's implicit determination that the subject matter of the lease . . . warrant[s] specific performance." *Motsis* v. *Ming's Supermarket, Inc.*, 96 Mass. App. Ct. 371, 378 n.17 (2019).

Here, Tresca asserts rights under the Lease that likely could not be fully addressed by money damages alone. Tresca's request for specific performance is appropriate for adjudication under its claims for declaratory relief and breach of the covenant of good faith and fair dealing. Whether the request is ultimately granted will be left to the trial judge following adjudication of the underlying claims arising from the Lease. The Benevento Defendants' request to dismiss Tresca's request for specific performance is **DENIED**.

ORDER

For the reasons stated above, the Benevento Defendants' motion to dismiss is **ALLOWED**, in part. Counts 3, 4, and 5 are **DISMISSED** for failure to state a claim. Tresca's claim for breach of the covenant of quiet enjoyment is **DISMISSED** for failure to state a claim. Tresca's claim for "equitable estoppel" is **DISMISSED** for failure to state a claim. All other relief requested in the motion is **DENIED**.

DATED: March 18, 2021

Valerie A. Yarashus
Justice of the Superior Court