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)

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") hereby oppose the Railroad's[2] Motion to Dismiss their Amended Verified Complaint. The Intervenors obtained a Judgment in Superior Court that included both declaratory and injunctive relief. But here, the Railroad fastidiously avoids any discussion of the Intervenors' enforcement of their Judgment pursuant to G.L. c. 231A, § 5, which provides this Court with subject matter

[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.

jurisdiction to provide further relief regarding the favorable Judgment obtained by the Intervenors. The Intervenors hold a favorable Judgment, have standing to enforce and protect that Judgment, and bring claims to enforce and protect that Judgment in all three counts of the Amended Verified Complaint. The Railroad's avoidance of this right is the fatal defect of its Motion to Dismiss.

The Railroad also continues to ignore the plain language and governing law of the Appeals Court Decision[3] and its confirmation of the Judgment the Intervenors obtained. The Intervenors' Judgment, clarified upon the request of the Town and the Railroad, was not appealed and remains intact. As the Appeals Court Decision makes clear, the Judgment, as clarified, includes the declaration that the Settlement Agreement is not effective, and that the Town may renew its efforts to enforce the c. 61 Option. The Appeals Court acknowledged that the Intervenors' rights to enforce and protect this Judgment are independent of the Town, that the relief sought and obtained is not coextensive with the Town, and that lest the Judgment be rendered toothless, the Land Court must respect the Judgment of its sister court on remand. The Appeals Court made clear that the Land Court must keep this in mind when considering Intervenors' Joinder of the Town's Motion to Vacate, which remains pending with this Court.

The Intervenors further have standing as more than ten taxpaying citizens of the Town of Hopedale to bring the cause of action in Count III under G.L. c. 40, § 53, to prevent unauthorized municipal expenditures. The Motion to Dismiss must be denied as to all Counts.

Statement of Issues Presented

1. Whether the Superior Court Judgment, as clarified by request of the Town and the Railroad, and confirmed by the Appeals Court, that the Settlement Agreement is not effective

[3] The Decision is Reilly v. Town of Hopedale, 102 Mass. App. Ct. 367 (2023).

and the Town may renew its effort to exercise its c. 61 Option to acquire the Forestland, establishes standing for the Intervenors to bring claims to enforce and protect that Judgment, under c. 231A, §§1 and 5, through vacatur of the Stipulation of Dismissal (Count I) and an injunction against further harm to the Forestland until the Town is permitted to exercise its c. 61 Option (Count II).

2. Whether the Superior Court Judgment, as clarified by request of the Town and the Railroad, and confirmed by the Appeals Court, that the Settlement Agreement is not effective and the Town may renew its effort to exercise its c. 61 Option to acquire the Forestland, establishes standing for the Intervenors to bring claims to enforce and protect that Judgment, under c. 231A, §§ 1 and 5, by seeking restoration of the Forestland or reduction of the Town's purchase price of the c. 61 Forestland where the Railroad caused damage to the Forestland after Intervenors obtained their favorable Judgment, and where the damage if not accounted for would render the Judgment toothless (Count III).

3. Whether the Intervenors have standing under c. 40, § 53 to seek an injunction against payment of the Option purchase price for the Forestland unless it is reduced to compensate the Town for the damage caused by the Railroad's destruction and alteration of the Forestland after the Town attempted to exercise the Option (Count III).

4. Whether any of the Intervenors' claims are barred by claim preclusion where the Intervenors brought none of these claims, much less obtained final judgment, in the Intervenors' Superior Court action.

Statement of the Elements

A claim for declaratory judgment under G.L. c. 231A, § 1 is sufficient when (1) an actual controversy exists; (2) the party has legal standing to sue; and (3) that all necessary parties have

been joined. See G.L. c. 231A, § 1; Buffalo-Water 1, LLC v. Fidelity Real Estate Co., LLC, 481 Mass. 13, 18 (2018).

Under G.L. c. 231A, § 5, further relief based on a declaratory judgment or decree may be granted whenever necessary and proper by a court having jurisdiction, upon reasonable notice to the party affected. G.L. c. 231A, § 5; Goldberg v. Goldberg, 7 Mass. App. Ct. 831, 836 (1979).

A motion to dismiss a claim brought under G.L. c. 40, § 53 must be denied if the claim is (1) an equitable action; (2) brought by ten taxpayers; (3) challenging the lawfulness of expenditures or obligations; (4) about to be incurred by a municipality. See G.L. c. 40 § 53; Oliver v. Town of Mattapoisett, 17 Mass. App. Ct. 286, 287-88 (1983).

Factual and Procedural Background

This Court is familiar with the history. On June 27, 2020, the Railroad entered into a purchase and sale agreement with the One Hundred Forty Realty Trust (the "Trust"), the owner of a 130-acre parcel at 364 West Street in Hopedale designated as forestland under G.L. c. 61 (the "Forestland"), triggering the Town's statutory right of first refusal under c. 61, § 8 (the "Option") to purchase the Forestland for $1,175,000. AVC, ¶¶ 20, 21. After receiving notice of the intent to sell or convert the Forestland, the Town, through the Select Board, exercised its Option: On October 24, 2020, a Special Town Meeting voted unanimously to appropriate funds to exercise the Option; the Select Board then voted to exercise the Option; the Select Board recorded the notice of the exercise of the Option at the Registry of Deeds; and the Select Board sent notice of the exercise of the Option to the Trust and the Railroad together with the proposed purchase and sale agreement. Id., ¶¶ 22, 43, 46, 48, 49.

The Railroad, after receiving notice that the Town would be exercising its Option, refused to honor the Town's exercise of its Option. AVC, ¶¶ 27, 51. Instead, the Railroad

purported to purchase the 100% beneficial interest in the Forestland and Railroad Defendants Delli Priscoli and Milanoski were appointed trustees of the Trust. Id., ¶ 31. The Railroad also began clearing the Forestland for development. Id., ¶ 47. These acts were later recognized by the Superior Court as a "flagrant violation of c. 61." Intervenor Appendix ("Int. App."), Ex. 1; Reilly, 102 Mass. App. Ct. at 371 ("apparently wishing to prevent the town from exercising the option to which it was entitled, the railroad restructured the transaction" and "[i]t should be noted that, irrespective of any sale, G. L. c. 61, § 8, thirteenth par., prohibits the conversion of forest land to residential, industrial, or commercial use without first offering the municipality the right to purchase it.").

The Railroad's flagrant violations and acts of aggression caused the Town to bring this action in Land Court to enforce its c. 61 Option.[4] AVC, ¶ 47. Following mediation, on February 9, 2021, the Select Board entered into a settlement agreement and agreed to pay only $587,500 to purchase 40 acres of the 130-acre Forestland from the Railroad ("Settlement Agreement") in exchange for filing a Stipulation of Dismissal with prejudice of this Land Court action. Id., ¶¶ 55, 59, 78-79.

The Intervenors brought claims against the Select Board and the Railroad in the Superior Court Action, *inter alia*, to enjoin the Select Board from making unauthorized expenditures and agreeing to binding obligations under the Settlement Agreement; obtain a declaratory judgment that the Town's c. 61 waiver was invalid; and obtain a declaratory order that the Town's Option remains fully enforceable. Def. App., Ex. 1 at pp. 18-21. On September 9, 2021, the Superior

[4] The Railroad filed a Petition for Declaratory Order with the Surface Transportation Board ("STB") claiming federal railroad preemption of the Town's statutory property rights under G.L. c. 61. The Town's c. 61 claims are not preempted. See STB Order dated November 3, 2021, Int. App., Ex. 2, p. 3 and n. 4 (declining to decide preemption because "a court is typically the more appropriate forum for interpreting contracts and resolving state property law disputes" noting because there is a confluence of state property law and preemption, that the "the state court may decide to address all of the issues together itself").

Court (Goodwin, J.) entered a Temporary Restraining Order against the Railroad Defendants and on September 24, 2021 entered a Preliminary Injunction against the Railroad Defendants from any further land-clearing. AVC, ¶83, Ex. 19. In issuing the Preliminary Injunction, the Superior Court noted that the Intervenors would suffer irreparable harm without the injunction because "[o]nce trees are removed, they are gone for the foreseeable future" and the Railroad Defendants' claim that delay would cause them harm "pales in comparison." Id. at pp. 4-5. Judgment entered for the Intervenors on Count I of their Superior Court action on November 4, 2021, enjoining the Town from acquiring the smaller portion of the c. 61 Forestland described in in the Settlement Agreement because the Selectboard lacked Town Meeting authorization. AVC, ¶ 84, Ex. 20. Judge Goodwin also extended the injunction against the Railroad Defendants' land-clearing activities for sixty (60) days to give the Town time to decide whether to seek Town Meeting authorization of the Settlement Agreement or seek to enforce the Town's full c. 61 rights. Id., ¶ 85, Ex. 20. The Superior Court, in its Judgment, made findings of fact and law that are now law of the case including that "it is undisputed that the Town attempted to carry out the steps necessary to exercise its Option"; that the "Railroad Defendants attempt[ed] to circumvent Chapter 61, § 8, process by purporting to acquire only the 'beneficial interest' in the forest land while undertaking commercial operations"; that the "court cannot ignore Railroad Defendants' initiation of land clearing operations after the Town issued a notice of intent"; and that the Town could either "seek the Town Meeting authorization necessary to validate the Settlement Agreement or [] take the necessary steps to proceed with its initial decision to exercise the Option to the entire Property". AVC, ¶ 86, Ex. 20.

The Town and the Railroad – i.e., the parties to the Settlement Agreement – requested that the Superior Court clarify the Judgment's legal effect because both parties recognized that it

affected their respective property interests. AVC, ¶¶ 87, 88. The Superior Court granted the Town's assented-to request to extend the injunction to January 31, 2022 while the Town filed a Motion for Clarification of the Judgment, which the Railroad joined. Id., ¶87.

On December 14, 2021, the Superior Court issued its Judgment Clarification Order, as requested by the Town and the Railroad, that "the agreement is not effective, and the Town may (but is not required to) attempt to enforce the Option." AVC, ¶ 89, Ex. 21. The clarified Judgment includes that the Settlement Agreement "provided that in exchange for the Railroad voluntarily selling a portion of the forest lands to the Town, the Town would cease efforts to enforce G.L. c. 61, § 8 Option" and that, accordingly, "the Settlement Agreement would fail to take effect" if the Board does not obtain authorization at Town Meeting and the Town would retain "the right to continue attempting to enforce the Option". AVC, Ex. 21. The Judgment includes the declarations that "the Settlement Agreement is not effective" (id. at 2) and the Railroad cannot get all of the benefits of the agreement and give nothing up in exchange, a result that "would be unjust, to say the least." Id. at n. 3.

The Town, followed and joined by the Intervenors, returned to Land Court to seek vacatur of the Stipulation of Dismissal. As described by the Appeals Court, "[t]he citizens' motion sought to effectuate the favorable judgment they had obtained on count I of their complaint in the Superior Court, including – but not limited to – the injunction the citizens had obtained to preserve the forest land." Reilly, 102 Mass. App. Ct. at 381 (emphasis added). The Intervenors also sought a preliminary injunction against land clearing and a declaration that that the Town's ultimate purchase price of the Forestland be reduced due to the Railroad's unlawful clearing of the land during the litigation. Id. The Land Court denied the Intervenors' motion to intervene and to vacate the Stipulation of Dismissal, not reaching any of the other relief sought.

The Railroad then destroyed the Forestland. By August 2022, the Railroad had illegally cleared over 100 acres of the Forestland. See series of photos of the destruction, AVC, ¶99, Ex. 22. (Ex. 22.1 shows how the Forestland appeared on September 10, 2020 after the Railroad Defendants agreed to stop work pending this litigation; Ex. 22.2 shows the Forestland as it appeared on June 12, 2022, after the Land Court denied the injunction pending appeal and after the Railroad Defendants cut down the trees; Ex. 22.3 shows how the Forestland appeared on July 13, 2022, after the Railroad Defendants harvested and removed much of the felled timber and Ex. 22.4 shows how the Forestland appeared on November 2, 2022 after the Railroad Defendants constructed roads and altered the grade.). The Railroad also sold the downed ("harvested") trees as timber at a significant gain. Id., ¶ 102. The Railroad further constructed roads into and across the Forestland, including the removal of rocks and stones, creating new grading and drainage patterns and significantly changed the landscape. Id., ¶ 100, Ex. 22.4. The Railroad also conducted investigations, including the drilling of test wells, in and around the wetlands on site and in the Forestland to explore the viability of a private water well but found no such source. Id., ¶ 103.

Neither the Railroad nor the Town appealed the Judgment and on March 7, 2023, the Appeals Court confirmed the Judgment, as clarified. Reilly, 102 Mass. App. Ct. at 374. The Appeals Court restated that the Intervenors' Judgment includes that without "town meeting approval, the town retained its right to attempt to enforce its option." Id. at 380.[5] The Appeals Court vacated the denial of the Intervenors' Motion to Intervene and remanded the action for this Court to decide the Motion to Intervene and the Motion to Vacate. This Court allowed

[5] Town Meeting rejected approval of the Settlement Agreement as well as acquisition of the lesser portion of the Forestland. AVC, ¶ 95.

intervention on October 13, 2023. The Intervenors' and the Town's Motions to Vacate the Stipulation of Dismissal remain pending.

The Intervenors now bring claims similar to those they previously sought to bring to enforce and effectuate their favorable Judgment, pursuant to c. 231A, §§ 1 and 5, to (Count I) vacate the Stipulation of Dismissal to allow the Town to renew its effort to enforce the exercise its Option; (Count II) protect against further land destruction pending the Town's enforcement; and (Count III) to obtain an order that the Railroad restore the Forestland it destroyed following, and in harm to, the Intervenors' Judgment or that the purchase price be reduced to reflect the cost of reforestation.[6]

The Intervenors also bring Count III pursuant to c. 40, § 53 to reduce the Town's purchase price, authorized by Town Meeting, to account for the Railroad's major damage to the Forestland and the Town's costs to restore it.

ARGUMENT

I. Standard of Review

a. Mass. R. Civ. P. 12(b)(1) Standard.

For a motion to dismiss under Mass. R. Civ. P. 12(b)(1) challenging standing, the court accepts the factual allegations in the plaintiff's complaint as true, as well as any favorable inferences that may be reasonably drawn therefrom. Janocha v. Kazanjian, No. PS-349602(HMG), 2008 WL 2190068, at *1 (Mass. Land Ct. May 27, 2008), judgment entered sub nom. Ames v. Kazanjian, No. PS-349602 (HMG), 2008 WL 2174255 (Mass. Land Ct. May 27,

[6] The Intervenors have amended their Verified Complaint to assist the Court by updating the Complaint with facts that have occurred since its original filing, including the Appeals Court Decision, the Town Meeting vote against authorizing the acquisition in the Settlement Agreement, and the Railroad's utter destruction of the Forestland through its clearcut harvesting of 100 acres of trees and other damaging activities. The amendment also eliminated those claims for relief inconsistent with the Appeals Court Decision and adds a clarified Count III regarding a reduction of the purchase price and/or restoration of the Forestland in light of the destruction wrought by the Railroad as a harm to the Intervenors' Judgment.

2008), citing Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998)) ("In reviewing a dismissal under rule 12(b)(1) or (6), we accept the factual allegations of the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them, as true.").

Here, because the Railroad's Rule 12(b)(1) motion "is unsupported by affidavit [it] presents a 'facial attack' based solely on the allegations of the complaint, taken as true for purposes of resolving the complaint." Hiles v. Episcopal Diocese of Massachusetts, 437 Mass. 505, 516, n. 13 (2002), quoting Holt v. United States, 46 F.3d 1000, 1002 (10th Cir.1995).

The Railroad fails to meet its burden to show a lack of standing or a lack of subject matter jurisdiction and its R. 12(b)(1) Motion to Dismiss must be denied.

b. Mass. R. Civ. P. 12(b)(6) Standard.

For a Mass. R. Civ. P. 12(b)(6) motion to dismiss, the burden is on the Railroad to show that the Intervenors fail to state a claim upon which relief can be granted. The allegations set forth in the Amended Verified Complaint and reasonable inferences therefrom must be taken as true. Lanier v. President and Fellows of Harvard College, 490 Mass. 37, 43 (2022). The Motion to Dismiss must be denied if the Amended Verified Complaint sets forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief…" Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)).

Because the Railroad cannot meet its burden for the reasons stated below, its R. 12(b)(6) Motion to Dismiss must be denied.

II. The Intervenors Obtained Injunctive And Declaratory Relief Through Their Judgment And Have Standing To Enforce And Protect That Judgment And This Court Has Subject Matter Jurisdiction Under c. 213A, §§ 1 And 5.

The Railroad continues to misconstrue or misunderstand the claims that the Intervenors bring and the relief that the Intervenors seek. Contrary to the Railroad's assertion, the

Intervenors do not seek in their Amended Verified Complaint "a declaration that the entirety of the settlement agreement is 'ineffective'". Memo in Support of Motion to Dismiss ("MTD") at 7. The Intervenors no longer need to seek that. The Intervenors already obtained a Judgment to that effect. Neither the Railroad, nor this Court, nor the Intervenors for that matter, can change that Judgment now.

The Railroad also continues to ignore the plain language and binding law of the Appeals Court Decision. The Appeals Court Decision is clear, the Intervenors obtained a Judgment in Superior Court that includes both declaratory and injunctive relief, including a declaration that the Settlement Agreement is not effective and that the Town may renew its efforts to enforce the c. 61 Option, and the Intervenors have a right to enforce and protect this Judgment independent of the Town.[7] The Intervenors alone hold this interest and have standing to protect it irrespective of whether they initially had standing for the relief sought under any alternative theories in their initial Superior Court action.[8]

While the Appeals Court did not expressly address the Intervenors' standing, it implicitly, and clearly did.[9] "Reopening the standing question would violate the doctrine of the 'law of the

[7] The Railroad wrongly claims that it is an "incomplete premise" that the Judgment is that the Town may renew its efforts to enforce the Option (MTD, p.9) and that there was no declaratory judgment issued by the Superior Court (id., p. 16). The Land Court is bound by the Appeals Court Decision with respect to the scope of the Judgment on remand, and the Appeals Court could not be clearer that the Judgment includes a declaratory judgment within the meaning of c. 231A.

[8] Whether Intervenors had standing to obtain the other relief on alternative grounds in the Superior Court action is irrelevant to the plain fact, as indicated by the Appeals Court, that the Intervenors have standing to enforce and protect the Judgment they obtained.

[9] The Appeals Court repeatedly referenced the Intervenors' ability to protect and enforce the Judgment, expressly recognizing "the Citizens' right to enforce the Superior Court judgment they had obtained." 102 Mass. App. Ct. at 382. "[T]he Citizens' right to protect the Superior Court judgment was independent of the town." Id. "The citizens' entitlement to enforce that favorable judgment did not depend on whether the town had authority to stipulate to the dismissal of its own claims in Land Court." Id. The Citizens' motion was not moot "to the extent that the Citizens sought to intervene in the Land Court suit to effectuate the Superior Court judgment by having the Land Court stipulation of dismissal vacated…" Id. at 382-383. The Land Court has been directed to "ensure that

case.' Trial court judges are required to order entry of a judgment that conforms to prior adjudication by the appellate court hearing the case." Hoffman v. Cambridge Zoning Bd. of Appeals, No. 04 MISC 303805 GHP, 2012 WL 2014271, at *18 (Mass. Land Ct. June 5, 2012) (Piper, J.). This Court must, as the Land Court did in Hoffman, carefully follow the Appeals Court: "[o]rdinarily the lack of subject matter jurisdiction is an open question, raisable at any time, even on appeal. However, given the procedural posture of this case, the prior review of it by the Appeals Court, and the declination of the Supreme Judicial Court to weigh in further, I conclude that the question of [plaintiff's] standing has been determined, in her favor, in a way which as a trial court judge I cannot revisit." Id.

This Court has already properly found that the Intervenors have an interest to protect in this action. With their Judgment, the Intervenors have standing to bring their claims to protect and enforce it and this Court has jurisdiction under c. 231A, §§ 1 and 5 to provide such further relief. See, e.g., Essex Co. v. Goldman, 357 Mass. 427, 434 (1970) (final decree in declaratory judgment action should determine the whole controversy between the parties; Land Court had jurisdiction to order payment of rent as further relief flowing from declaratory judgment); Greenberg v. Barros, 97 Mass. App. Ct. 1009, at *2 (Rule 1:28 decision) (Mass. App. Ct. 2020) (affirming judgment and further relief under c. 231A, § 5; trial court did not err in declaring ownership of LLC member interests or in also ordering amendment of operating agreement to reflect those interests).[10] See also 28 U.S.C.A. § 2202; Hartke v. WIPT, Inc., No. 18-CV-976 (NEB/BRT), 2019 WL 13219553, at *2 (D. Minn. Oct. 1, 2019) (court properly granted other

events and decisions in the Land Court case not make toothless the judgment and rulings of the Superior Court case…" Id. at 385 (emphasis added throughout).

[10] Notably, the Railroad does not even mention the Intervenors' claims under c. 231A, § 5 in its standing/subject-matter jurisdiction section of its Motion to Dismiss.

and further injunctive relief that was logical consequence of judgment declaring mortgages invalid; further relief included discharges of lis pendens on plaintiffs' properties and declaration that underlying notes, security interests, and assignments are void). The Railroad concedes that the Intervenors hold a right to enforce their Judgment: "there is no dispute that the Superior Court Judgment is protectable and enforceable." Railroad Opposition to the Post-Remand Motion to Intervene, Int. App., Ex. 3. And here, the Railroad has not articulated an adequate theory as to why the Intervenors would lose standing to enforce the Judgment they obtained. See Moir v. Ozeruga, 313 Or. App. 9, 17 (2021) ("the post-judgment order arose from plaintiffs' motion to enforce a judgment to which they are parties, not from a new statutory action to enforce an easement, and defendants have not fully articulated a theory as to why a party to a judgment would lose standing to enforce it under the particular circumstances here").

As the party who obtained the favorable Judgment, the Intervenors, and the Intervenors alone, have standing to enforce and protect it. See Wildlands Tr. of Se. Massachusetts, Inc. v. Cedar Hill Retreat Ctr., Inc., No. 1684CV01432BLS2, 2018 WL 3446708, at *3 (Mass. Super. June 1, 2018) ("the party that was granted rights under the Restriction, has standing to enforce the Restriction. Nothing more is needed to state a claim for declaratory relief."). See also Labette Cnty. Comm'rs v. United States, 112 U.S. 217, 224 (1884) (enforcement of judgments is supposed to be effective, not nugatory or abortive).

And this Land Court has the power to enforce the Intervenors' Judgment, indeed, "[i]t is axiomatic that courts have the power to enforce final judgments." Furnas v. Cirone, 102 Mass. App. Ct. 97, 104, review granted, 492 Mass. 1101 (2023), and aff'd, 493 Mass. 57, 221 N.E.3d 772 (2023) (court denied motion to dismiss for lack of standing to enforce judgment) (internal citation omitted). Accordingly, the Intervenors have standing to bring these claims to enforce

their Judgment and this Court has subject matter jurisdiction under c. 231A, §§ 1 and 5 to grant such further relief.

a. The Intervenors have standing to bring Count I to enforce and protect the Judgment to obtain vacatur of the Stipulation of Dismissal.

In Count I of the Intervenors' Amended Verified Complaint, the Intervenors seek to enforce their Judgment that the Town may seek to enforce its c. 61 Option through vacatur of the Stipulation of Dismissal entered as part of the ineffective Settlement Agreement.[11] The Stipulation of Dismissal cannot stand because it is incompatible with and affects the Intervenors' Judgment by impeding the Town's ability to proceed with respect to its c. 61 rights, as provided by the Judgment. Vacatur is the necessary logical consequence of an ineffective Settlement Agreement and the Town being able to renew its efforts to enforce the Option as it has indicated it intends to do. Without vacatur, the Judgment is toothless. Only by lifting the dismissal can the Town renew pursuit of the Option. Seeking vacatur of the dismissal on the grounds that it is required pursuant to the Intervenors' Judgment is relief that the Intervenors, and only the Intervenors can seek. See Restatement (Second) of Judgments, § 64 (relief from judgment may be sought from someone that "has an interest affected by the judgment"); § 76 (a person not bound by a judgment under the rules of res judicata may obtain a determination that the judgment is ineffective through an action for a declaration that the judgment is not effective when the judgment jeopardizes a protectable interest and the interest warrants relief forthwith).

The Appeals Court left no doubt that the Intervenors' interest – their Judgment – is affected by the Stipulation of Dismissal, and that the Intervenors have standing to enforce,

[11] Count I is seeks the same relief as sought in the Intervenors' pending Joinder of the Town's Motion to Vacate.

effectuate, and protect the Judgment by obtaining vacatur of the Stipulation of Dismissal, as set forth above.

b. The Intervenors have standing to bring Count II to enforce and protect the Judgment through an injunction to protect the Forestland pending the Town's renewed exercise of its Option.

Intervenors have standing in equity to enforce that aspect of their Judgment that directed preservation of the status quo pending renewal of the Town's enforcement of its Option, that is, preservation of the Forestland, through injunctive relief. The Intervenors have pled plausible facts that injunctive relief is needed to enforce and protect the Judgment, i.e., to prevent further damage to the Forestland pending the Town's enforcement of its Option.

The Intervenors first obtained injunctive relief in this matter from the Single Justice of the Appeals Court (Meade, J.), who on March 25, 2021 reversed the trial court's denial of an injunction and entered an order that enjoined the Town "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 the Settlement Agreement". Single Justice Order, Int. App., Ex. 4. The Railroad refused to acknowledge that the Single Justice's injunction applied to land clearing activities. However, the Superior Court (Goodwin, J.), on September 9, 2021, removed any doubt and enjoined the Railroad, through a Temporary Restraining Order, "from any further alteration or destruction of the Chapter 61 land". Int. App., Ex. 5. Later that month, the Superior Court issued a preliminary injunction against the Railroad's destruction and corrected the Railroad's erroneous reading of the Single Justice's order: "[t]he purpose of the injunction was to temporarily prevent the town from releasing the Chapter 61 limitations on a large portion of the [Chapter] 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 sought to prevent." Int. App., Ex.

6. The injunction that entered was tied to the Intervenors' likelihood of success on Count I of its Superior Court Complaint. The Intervenors did succeed on Count I and the Superior Court extended the injunction to allow the Town to decide whether and how to enforce the Option. The Intervenors had standing then to obtain injunctive relief to protect against destruction of the Forestland.

The Intervenors continue have standing now to protect against further destruction to enforce and protect their favorable Judgment unless and until the Stipulation of Dismissal is vacated, the Town can enforce its Option, and the purchase price is appropriately established.[12,13] See, e.g., Vermont Structural Slate Co. v. Tatko Bros. Slate Co., 253 F.2d 29, 29 (2d Cir. 1958) (plaintiff entitled to injunctive relief against parties and privies from threatening litigation relating to judgment affirmed as final); Rincon Band of Mission Indians v. Harris, 618 F.2d 569, 575 (9th Cir. 1980) (affirming and recognizing that the summary judgment relief granted is declaratory only, and that the obligation imposed on the defendants "is not as explicit as it might be [but] [i]f further relief becomes necessary at a later point, however, both the inherent power of

[12] The Railroad argues that injunctive relief is not a cause of action, citing Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 353 (1st Cir. 2013) for support. However, the Railroad neglects to cite footnote 3, where the court makes clear that notwithstanding that the plaintiffs pled "injunctive relief" as a "cause of action", the court would proceed to review the underlying claim. Regardless, the Intervenors' causes of action include the enforcement and protection of a Judgment and injunctive relief is a form of further relief, available under G.L. c. 231A, § 5, related to those claims. The Railroad's other cases are likewise inapposite because they lack the inclusion of a related cause of action. Mullins v. Corcoran, 488 Mass. 275, 286 (2021) (plaintiff sought injunctive relief and damages for breaches of contract and breaches of fiduciary duty, "because the plaintiff's underlying claims for breach were precluded, his request for injunctive relief also is precluded."); Baystate Fin. Servs., LLC v. Pinto, No. 2084CV02507, 2021 WL 1222229, at *8 (Mass. Super. Feb. 18, 2021) (dismissing injunctive relief claim because court also dismissed the related breach of contract count and intentional interference count).

[13] The Railroad may argue that the Superior Court's denials of the Intervenors' requests for further injunctive relief on February 9, 2022 and May 6, 2022 reflect a lack of standing, but the Railroad would be wrong. The February 9, 2022 denial was because the Superior Court determined that it "no longer has jurisdiction over this case Final Judgment having entered." Int. App., Ex. 7. By that point, the Town and the Intervenors had sought to vacate the Stipulation of Dismissal in the Land Court. The May 6, 2022 denial of injunctive relief was based on the Superior Court's finding that the Intervenors lacked a likelihood of success on their appeal of Count II of their Superior Court Complaint, not because of a lack of standing to enforce the Judgment they obtained on Count I. Int. App., Ex.1. Indeed, the Superior Court characterized the Railroad's actions as a "flagrant violation of Chapter 61" and that the Railroad's actions "were wrong" but stated that that issue was not before the Superior Court. Id., pp. 4-5.

the court to give effect to its own judgment . . .and the Declaratory Judgment Act. . . would empower the district court to grant supplemental relief, including injunctive relief."); Hartke v. WIPT, Inc., *supra*.

c. The Intervenors have standing to bring Count III to enforce and protect the Judgment by obtaining an order that the Railroad must restore the Forestland.

As discussed above, protection and enforcement of the Intervenors' Judgment includes obtaining injunctive relief to preserve the Forestland pending the Town's renewal of the exercise of its Option. The Intervenors previously sought injunctive relief pursuant to their Judgment in this Court but were denied such relief. Thereafter, while these issues were pending on appeal, the Railroad utterly, carelessly and unnecessarily destroyed the Forestland. The Railroad clearcut over 100 acres of c. 61 Forestland, causing direct and immediate harm to the Intervenor's unique interest that they had obtained through their Judgment.

The Intervenors have standing to obtain, and this Court has jurisdiction under c. 231A, §§ 1 and 5 to grant, relief from that damage to its interest in the form of a declaration that the Forestland must be restored by the Railroad, either through reforestation or compensation to the Town for the cost of reforestation. Indeed, this Court has general equity power to restore the parties to the status quo *ante* now that the Appeals Court has confirmed that the Settlement Agreement is ineffective and that the Town may renew its efforts to enforce the Option, and has reversed and remanded the denial of intervention by the Intervenors to vacate the Stipulation of Dismissal. See Cox v. Cox, 56 Mass. App. Ct. 864, 869 (2002) (on remand after Appeals Court decision reversing Probate Court order, Probate Court had power to order restitution in order to restore the status quo *ante*). Because the Settlement Agreement has been declared ineffective, restoration of the parties to the status quo *ante* is an appropriate remedy. Greater Bos. Legal Servs. v. Haddad, No. 935961, 2000 WL 1474516, at *40 (Mass. Super. June 28, 2000) (where

court vacated stipulation of dismissal under Rule 60(b)(6), "this will return the parties to the status quo prior to the execution of the settlement documents"); Ann & Hope, Inc. v. Muratore, 42 Mass. App. Ct. 223, 230 (1997) (where contract is rescinded, whenever possible, the result should be to return the parties to the status quo *ante*).

Here, this requires that the Railroad restore the trees that it destroyed while the Appeals Court case was pending and which would not have been destroyed had the Railroad respected the Superior Court Judgment. The Intervenors have standing to seek restoration of the status quo *ante* because it is appropriate further relief in light of the Judgment that they obtained and the Railroad's actions in the face of that Judgment. It is also necessary so that the Town may acquire the Forestland as it existed at the time the Judgment entered.

While the Town can, should, and has expressed that it intends to seek a reduction in the purchase price, the Intervenors' interest in restoration of the Forestland is unique to the Intervenors and not coterminous with the Town's. The Intervenors have standing to obtain further relief for their declaratory Judgment and have standing to challenge the actions taken by the Railroad while the Intervenors were obtaining the Judgment and after the entry of the Judgment that changed the status quo. Because the Settlement Agreement is ineffective, actions taken pursuant to it, by the Railroad before the Town could renew enforcement of the Option, such as destruction of trees must be restored to their status quo *ante*. See Abrams v. Bd. of Selectmen of Sudbury, 76 Mass. App. Ct. 1128 (2010) (Rule 1:28 Decision) (where settlement agreement failed due to an ineffective release of an agricultural preservation restriction, trial court properly ordered reconveyance of property that had been conveyed to town under the settlement agreement).

III. The Intervenors Also Have Standing Pursuant To c. 40, § 53 To Bring Count III To Ensure That The Town Receives The Full Value Of The Undisturbed c. 61 Forestland As Authorized By Town Meeting.

The Intervenors, eleven taxpaying citizens of Hopedale, have independent standing pursuant to c. 40, § 53 to bring Count III of their Amended Verified Complaint. Count III seeks a declaration that the Town's purchase price must be reduced to account for the Railroad's destruction of the Forestland through various clearcutting, land clearing and pre-development activities. The cost of the Forestland, as set forth in the purchase and sale agreement triggering the Town's Option and as authorized by Town Meeting, $1,175,000, is no longer the putative value of the property as forestland. Whether the Town enters into a negotiated purchase or exercises its c. 61 Option, the imminent expenditure must include compensation to the Town by the Railroad for the harm it has caused to the Forestland. The Intervenors have standing to bring this claim.

The Railroad's only arguments regarding the Intervenors' § 53 claims are weak and internally inconsistent. Rather than argue that it is too late to bring this claim, they argue here that it is too early to bring it, that it is premature. The § 53 claim is not premature, though, because the Town has stated that it intends to enforce the Option and acquire the entire property and Town Meeting has authorized payment of the money. Here, the expenditure of public money is impending and not merely anticipatory. See Burt v. Mun. Council of Taunton, 272 Mass. 130, 132 (1930) ("The vote of the municipal council of June 11, 1929, was a vote to expend money."). The issue of the purchase price is certainly ripe and if the Intervenors did not bring it now, the Railroad would true to form argue that the claim is too late should the

Intervenors seek to bring it later in the renewed litigation.[14] Kapinos v. City of Chicopee, 334 Mass. 196, 199 (1956) (Section 53 is not retroactive, if not brought proactively, denied as too late).

At any rate, c. 40, § 53 provides a further basis for standing to seek relief because it allows injunctive relief for expenditures of money or incurring obligations beyond a town's corporate power. The Appeals Court affirmed that § 53 provided standing for the Intervenors in the first place to challenge the payment provision of the Settlement Agreement. Likewise, the Intervenors may now invoke it to challenge payment of the c. 61 Option purchase price without reduction for harm caused by the Railroad because full payment would amount to an unauthorized gratuity. See, e.g., Bell v. Treasurer of Cambridge, 310 Mass. 484, 491 (1941) (taxpayer suit brought under § 53, city not authorized to continue to pay salary to officer after resignation because it would be a gratuity). Precedent of this Land Court recognizes that such reductions are appropriate. Town of Brimfield v. Caron, 2010 WL 94280, *10-11 (Mass. Land Ct. Jan. 12, 2010), after trial, 2015 WL 5008125, at * 4-8 (Mass. Land Ct. Aug. 21, 2015) (ordering that Town has right to purchase forestland at a price adjusted for value of mineral removed from forestland by putative buyer prior to issuance of preliminary injunction).

The Intervenors have the ability to bring this claim in Superior Court but they bring it here to obtain complete relief of matters relating to this action in one place and the Land Court has ancillary jurisdiction to consider this claim. See Ritter v. Bergmann, 72 Mass. App. Ct. 296, 301 (2008) (affirming award of damages for restoration of removed trees and trebling due to

[14] The Railroad previously argued that the Intervenors should not have been permitted to intervene because they did not seek intervention earlier in the initial Land Court action to enjoin unlawful Town spending and made this timeliness argument to the Appeals Court. The Appeals Court rejected the Railroad's argument. The Railroad made the same argument to the Land Court on remand when opposing intervention. The Land Court also rejected it.

willfulness: "Because the Land Court could properly entertain the requests for equitable and declaratory relief, it also had jurisdiction to award damages in this case."); Perry v. Lauria, 2014 WL 7237876, at *6 (Mass. Land Ct. Dec. 19, 2014) (Sands, II, J.), aff'd, 91 Mass. App. Ct. 1130, 86 N.E.3d 513 (2017) (in issuing a judicial declaration with respect to parties' equitable interests in property, the court must take into account the parties' alleged financial actions and payments, "to the extent that issuing such a declaration could be construed as imposing 'damages' as against either party, the court concludes that awarding same would be 'ancillary' to a resolution of the parties' real property dispute."); G.L. c. 231A, §5. The Railroad does not challenge that jurisdiction in its Motion to Dismiss.

In terms of judicial economy it simply does not make sense to prevent the Intervenors – who are now properly a party to this action – from advancing their § 53 claim only to require the Intervenors to bring another action in another court at a later date or seek to re-intervene here once the Town moves towards final resolution of the exercise of its Option to purchase the Forestland.[15]

IV. The Intervenors' Claims Are Sufficiently Pled And The Railroad's Rule 12(b)(6) Motion to Dismiss Must Be Denied.

The Railroad primarily argues that the Intervenors' claims should be dismissed under Rule 12(b)(6) because the Intervenors lack standing and therefore, fail to state a claim upon which relief can be granted. For the reasons set forth above, dismissal under Rule 12(b)(6) based on standing must also be denied.

The Railroad further seems to argue, although not clearly, that the Amended Verified Complaint should be dismissed because it asserts remedies only and no stand-alone causes of

[15] It is worth noting that the Town has not moved to dismiss this claim and the Railroad lacks standing to assert the Town's rights in this regard.

action. The Railroad misunderstands. The Intervenors, as detailed above, seek enforcement and protection of the Judgment as a "cause of action" as to all counts. Thus, the only issue is whether the Intervenors' claims are plausible measures to protect and enforce the Judgment.

Vacating the stipulation of dismissal (Count I) is certainly a plausible measure to protect and enforce the Judgment, for without it, the Judgment would be "toothless."

As to Count II, while the Town renews the enforcement of Option, the Intervenors are entitled to continue to protect the Forestland that is the subject of that enforcement. A preliminary injunction to protect the Forestland protects the Judgment. The cases cited by the Railroad for the proposition that a preliminary injunction is a remedy and not a claim ignore this context and are inapposite because where a claim exists, so too does a preliminary injunction as a remedy for that claim. See, supra, n. 13. See also Benevento decision, Int. App. Ex. 8 (allowing specific performance claim to remain as separate count as remedy for breach of contract).

Although the Railroad does not even address it in its Count III argument, the same is true that enforcement and protection of the Judgment includes restoration of the status quo *ante* and the Forestland destroyed by the Railroad following the Judgment. Moreover, the claim under c. 40, § 53 to prevent unlawful expenditures is indisputably a cause of action and, as set forth above, the Intervenors have pled facts to plausibly prevail.

V. The Claims Brought In The Amended Intervenor Complaint Are Not Barred By Claim Preclusion, As They Have Not Been Previously Brought Or Adjudicated By The Intervenors Against the Railroad.

The Railroad's claim preclusion argument as to all counts is utterly without any merit.[16] Claim preclusion applies only in the presence of all three elements of (1) identity or privity of the

[16] As an initial matter, the Railroad, by failing to make any argument as to Count I, concedes that Count I of the Amended Verified Complaint is not subject to its claim preclusion argument and, thus, survives. Regardless, Count I, enforcement of the Judgment, was not brought in the Superior Court action and therefore is not precluded.

parties; (2) identity of the cause of action; and (3) prior final judgment on the merits. Gloucester Marine Rys. Corp. v. Charles Parisi, Inc., 36 Mass. App. Ct. 386, 391 (1994). See also Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565, 571-72 (2013).

The Railroad was a named party defendant, along with the Town, in Count II of the Intervenors' Superior Court Complaint and the Railroad is a party defendant in the Intervenors' Amended Verified Complaint but that is as far as the Railroad gets. The Railroad's argument fails at factors (2) and (3) because Counts II and III of the Amended Verified Complaint are different causes of action based on different facts, including the illegal land clearing actions taken by the Railroad *after* the Superior Court Judgment and could not have been adjudicated in the prior action because the land had not yet been damaged. Moreover, Counts II and III are based on the enforcement of the Intervenors' Judgment.

The Railroad is misleading when it argues that the Intervenors seek to "enforce c. 61 against the G&U Parties on behalf of the Town" and that "[t]his is the same relief sought" by the Intervenors in the Superior Court in Count II. Count II of the Superior Court action sought a declaration that the Town had effectively and fully exercised its c. 61 Option and an order enforcing that exercise. The Appeals Court affirmed that the Intervenors lack standing to obtain that relief and the Intervenors do not seek that relief now. As made clear above, Count II of the Amended Verified Complaint does not seek to enforce the Town's c. 61 rights, rather, it seeks to enforce and protect the Judgment that the Intervenors obtained – that the Settlement Agreement is not effective and the *Town* can pursue its c. 61 rights – by protecting against further land destruction until the Town is able to exercise its option free from the stricture of the Stipulation of Dismissal entered pursuant to the ineffective Settlement Agreement.

The Judgment for the Citizens on Count I of the Superior Court action gives the Intervenors standing to enforce that Judgment, including the right to prevent further destruction and the right to seek restoration of the Forestland. The Railroad caused damage to the Forestland and harmed the Intervenors' Judgment by clear-cutting 100 acres of Forestland, selling the downed trees for financial gain, constructing roads, boring test wells, and performing grading activities. Count II of the Amended Complaint responds to this illegal land-clearing and development activity by the Railroad, by asking for injunctive relief to prevent further destruction. Similarly, Count III seeks to restore the Forestland destroyed by the Railroad after the Intervenors obtained their Judgment. These claims were not and could not have been made in the Superior Court action, much less was final judgment rendered on them.

Count III of the Amended Verified Complaint also seeks relief in the alternative under c. 40, § 53 to reduce the purchase price of the Town's acquisition of the Forestland to account for the reduction in value caused by the Railroad's destruction. This claim was not brought in Count I or II of the Superior Court action. The Railroad's devastation of the Forestland has severely reduced the value of the land and the final purchase price, as approved by Town Meeting, and the Forestland purchase price must be proportionally reduced. Count III also seeks to require the Railroad to restore or pay the Town to restore the Forestland to its previous condition, a remedy that was not and could not have been sought in the Superior Court action because the Railroad had not commenced its destructive actions on the Forestland. The Railroad's claim preclusion arguments therefore fail because these causes of action were not brought in a prior action and were never adjudicated.

CONCLUSION

For these reasons, the Court should DENY in full the Railroad's Motion to Dismiss the Amended Verified Complaint of the Intervenors.

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

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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
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