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' POST-REMAND REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO VACATE STIPULATION OF DISMISSAL

Intervenor-Plaintiffs Elizabeth Reilly and Ten Citizens of the Town of Hopedale[1] ("Citizens") submit this Reply in Support of their Motion to Vacate the Stipulation of Dismissal on remand.

The Railroad[2], yet again, asks this Court to ignore the Appeals Court Remand Decision ("Decision")[3] and Rescript to the Land Court. The scope of the Superior Court Judgment has

[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 and One Hundred Forty Realty Trust.

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

been fully and finally resolved by the Decision. The Citizens' Judgment includes, explicitly, that the Town is entitled to pursue its Chapter 61 Option.[4] See Reilly, 102 Mass. App. Ct. at 385. And the only way that the Town can pursue its c. 61 Option is through the vacatur of the stipulation of dismissal entered as part of the ineffective Settlement Agreement.

The scope of the Judgment is not up for debate or reinterpretation and cannot be relitigated. The Decision is clear: the Citizens have an interest in the Judgment they obtained and standing to enforce that Judgment by obtaining vacatur. Without vacatur, the Citizens' Judgment would be rendered "toothless", a result admonished by the Appeals Court.

1. **The Binding Law of the Case Requires That the Citizens' Motion to Vacate be Allowed as Enforcement of the Judgment They Obtained.**

The Railroad's Opposition does not – and cannot – alter the binding rulings of law entered into by the Appeals Court.[5] Com. v. Aboulaz, 44 Mass. App. Ct. 144, 148 (1998) (the written opinion of the Appeals Court, styled as a decision or even a rescript, is a binding decision

[4] The Judgment was clarified on December 14, 2021 upon a clarification motion brought by the Town, and supported by the Railroad because the parameters of the Judgment affected their property interests. The Railroad made the intentional choice to not appeal the Judgment or the clarification of the Judgment. That clarification is part of the Judgment and has been affirmed by the Appeals Court.

[5] The Railroad continues to push this argument, rejected at least five times now, including by the Appeals Court, the Supreme Judicial Court and this Land Court when it allowed the Citizens' intervention. The Railroad's obsessive arguments to reinterpret the Judgment are irrelevant because the binding law of the case is clear, but the Railroad's arguments are also vastly misleading and wrenched out of context. For example, at the February 9, 2022 hearing on the Citizens' motion for an injunction pending appeal, the Superior Court merely corrected that the Judgment did not "rescind" the Settlement Agreement; the Judgment ruled the Settlement Agreement was not effective, i.e. it never took legal effect. During the May 3, 2022 hearing, the Superior Court was posing questions to the Railroad to understand the Railroad's position on the status of the parties following the Land Court's denial of the motion for injunction pending appeal. The Superior Court then asked the Citizens, hypothetically, "[w]hat's going to happen if the appeal is unsuccessful?" The Citizens answered the hypothetical that they would then seek to void the Settlement Agreement, but the Citizens were successful in their appeal. The Appeals Court affirmed that the Settlement Agreement is not effective, the Town can pursue enforcement of its c. 61 rights, and the Citizens are entitled to enforce their Judgment through vacatur. Lastly, the Superior Court wrote in its May 5, 2022 written order denying the injunction pending appeal, that the Citizens did not establish a likelihood of succeeding on the challenge of the legality of the Settlement Agreement on the theories advanced and appealed under Count II. To state the obvious, again, the Decision puts to bed with absolute finality that the Settlement Agreement is not effective and that the Town may renew enforcement of its c. 61 Option.

as matter of law when the document embodying the order contained within that writing is transmitted to the lower court). See Com. v. Dube, 59 Mass. App. Ct. 476, 485 (2003) (lower courts have "no power to alter, overrule or decline to follow the holding of cases" of higher courts); City Coal Co. of Springfield v. Noonan, 434 Mass. 709, 712 (2001) ("remand instructions became the governing 'law of the case' and should not have been reconsidered by the remand judge"). Law of the case requires respect to the Judgment, as affirmed by the Appeals Court, and it is binding law on this Court.

The Citizens' Intervention was necessary, and allowed by this Court, on the basis that the Citizens are entitled to obtain the full benefit of their Judgment through vacatur of the Stipulation of Dismissal entered pursuant to an unauthorized and ineffective Settlement Agreement. This Court properly recognized the binding effect of the Decision when it allowed the Citizens to intervene, ruling that the Appeals Court "instructed this court to further consider the Citizens' motion to intervene in light of that decision, as well as the town's motion to vacate the stipulation of dismissal." Land Court Order dated October 17, 2023 ("Intervention Order"). This Court also observed that it must ensure that its "rulings are not inconsistent or unfair" in light of the Judgment and that "[t]hese considerations will come into special play when deciding the citizens' motion to vacate the stipulation of dismissal." Intervention Order, quoting Reilly, 102 Mass. App. Ct. at 384-85 (emphasis added). This Court also rightfully noted that "the agreement is not effective, and the town may (but is not required to) attempt to enforce the option." Id. This Court concluded that "unless the Citizens are able to intervene and advance the motion to vacate", the Town may not be able to advance its claim to enforce its c. 61 Option, which would render the Judgment "toothless". Id. (emphasis added). The Land Court is correct in that the Citizens' Motion to Vacate must advance and they must be allowed to enforce the

Judgment they obtained. The Stipulation of Dismissal cannot stand because it is in direct violation of the Citizens' Judgment and would impede the Town's ability to choose how to, or whether, to proceed with respect to its c. 61 rights, as provided by the Judgment.

Despite the Railroad's effort muddy the water, the Decision is not ambiguous, confusing or inconsistent.[6] On appeal, the Citizens sought final judicial resolution to the ongoing disagreement as to the legal effect of the Judgment that entered on Count I in the Superior Court. The Citizens have taken the consistent position throughout that the Judgment meant what was clearly explained in the Superior Court's Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings: "the sole impediment to execution of the Settlement Agreement is that the Board failed to obtain prior authorization from Town Meeting as required by G.L. c. 40, § 14." November 4, 2021 Order, Keavany Aff., Ex. 4 at p. 9. The Settlement Agreement was not effective because the key provision was not authorized. The Superior Court, therefore, enjoined the Railroad from destroying the Forestland for 60 days "to allow the Town to decide whether to seek the Town Meeting authorization necessary to validate the Settlement Agreement or to take the necessary steps to proceed with its initial decision to exercise the Option for the entire Property." Id. at 12 (emphasis added). The legal effect of the Judgment on Count I is that the Settlement Agreement is not effective, not validated, not executable.

[6] The Citizens regret that they must burden the Court with another recitation of the history of the Judgment in response to the Railroad's same rejected argument again and again. But the Railroad keeps making it. The Railroad strains to read confusion and inconsistency into the Appeals Court Decision where there is none. The Citizens appealed Count II of the Superior Court Judgment because (1) the Railroad challenged the scope of the judgment on Count I and the Citizens sought appellate review to make clear the legal effect of Count I was that the Settlement Agreement is a nullity, which the Appeals Court did confirm; and (2) the Citizens had independent grounds to challenge the Settlement Agreement substantively (e.g. that it was an illegal assignment that the Citizens pursued as alternative relief). The Decision says that while the Citizens do not have standing to obtain the relief sought under the alternative theories, the Judgment as clarified is that the Settlement Agreement is ineffective, the Town may renew its enforcement of the Option, and the Citizens may enforce that Judgment.

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 they rightfully recognized that it affected the parties' respective property interests. The Judgment was clear from the Citizens' perspective. The Superior Court nevertheless clarified the Judgment, as requested by the Town and the Railroad: "the agreement is not effective, and the Town may (but is not required to) attempt to enforce the Option." Judgment Clarification Order, dated December 14, 2021, Keavany Aff., Ex. 5 at 2.

To clarify the Railroad's continued misunderstanding, the Decision did not expand or alter the Judgment on Count I, and the Citizens do not make that argument. Rather, there was, from the moment it entered, a disagreement as to the legal effect of the Judgment – one that the Railroad continues to have trouble accepting – that was finally put to bed in the published Appeals Court Decision. The Railroad, to this day, refuses to accept the consequences of its own decisions. The simple truth is that all of the parties to the Settlement Agreement – the Town and the Railroad – together sought clarification of the Judgment on Count I, specifically the legal effect of Count I on the viability of the Settlement Agreement and its remaining terms, including the Town's c. 61 Option. The Superior Court clarified the legal effect of the Judgment. The Railroad did not like the Judgment and disagreed with the Judgment, but the Railroad made the choice to not appeal any part of the Judgment.[7] The Appeals Court affirmed that the Railroad is stuck with the Judgment.

[7] At oral argument, in discussing Count II, the Appeals Court asked the Railroad if "the question of what is the legal consequence of Count I with respect to the legal viability of the settlement agreement is a question of law?" Transcript, 2022-P-0314, November 15, 2022, p.36, attached hereto as **Exhibit A**. The Appeals Court later noted that the Railroad did not appeal the legal clarification of that Judgment, which it had requested, posing the pointed question "since you didn't appeal, aren't you stuck with Judge Goodwin's ruling?" Id. at p. 42. In the Decision, the Appeals Court answered those questions in the affirmative.

This Court – and the Railroad – must accept the Appeals Court Decision and Rescript, which clearly and finally resolve that the scope of the Judgment includes the Citizens' right to enforce its Judgment through vacatur, lest the Judgment that the Town can renew its claim to enforce the c. 61 Option be rendered toothless.

2. The Citizens Have An Interest and Standing to Enforce Their Judgment Through Vacatur.

The Citizens need not show at this stage that they have standing to seek additional or independent claims. The Citizens have already been allowed by this Court to intervene because they have shown an interest in this litigation – the enforcement of their Judgment through vacatur of the dismissal. Moreover, the Citizens initially moved to intervene on January 20, 2022 and join the Town's then-pending Motion to Vacate. The Citizens should have been permitted to intervene then and participate in the Motion to Vacate. And the Citizens must be permitted now to participate in the litigation as they should have been if intervention had been allowed originally. See, e.g., Frostar Corp. v. Malloy, 77 Mass. App. Ct. 705, 714 (2010) (ordering new trial after reversing denial of intervention made on second day of trial because "direct participation in the trial would be the only meaningful way for [intervenors] to protect their interests"). Then, participation did not require an independent cause of action and one is not required now. The parties, including the Intervenors and the Town, are back to where they were when the Citizens initially filed their Motion to Intervene on January 20, 2022.

Regardless, the Appeals Court Decision makes clear that the Citizens have standing to enforce, effectuate, and protect the Judgment by obtaining vacatur of the Stipulation of Dismissal. The Decision repeatedly refers to "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 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). In sum, the Appeals Court left no doubt that the Citizens have standing to enforce their Judgment by vacating the Stipulation of Dismissal.[8]

The Appeals Court's rulings regarding the Citizens' standing to obtain relief on alternative grounds through Count II do not undermine or in any way affect the Citizens' ability to enforce the Judgment that they obtained. The Citizens advanced multiple alternative theories and grounds under Court II to invalidate the Settlement Agreement as a whole and certain key provisions of the Settlement Agreement, such as a declaration that the waiver of the Option was an illegal assignment and an order transferring title back to the Town. The Appeals Court affirmed that the Citizens lacked standing to obtain the relief requested on those grounds but that has no bearing whatsoever on the relief and Judgment that the Citizens did obtain in Count I –

[8] The Citizens have notified the Court that they will amend their Complaint to conform with the Decision. The Citizens will keep the primary claim to enforce their Superior Court Judgment through vacatur of the stipulation of dismissal as well as the claim that the Town's purchase price must be reduced to account for the damage caused by the Railroad's clearcutting of 100-plus acres of Forestland. Following amendment, if the Railroad still seeks to dismiss any of the remaining claims on standing grounds, the Citizens will address any other counts and the standing to bring the same through an opposition. All that is at issue here is the Motion to Vacate brought independently by the Intervenors and by the Town, which the Intervenors have joined. The Land Court has jurisdiction under c. 231A, § 5 to provide other and further relief enforcing the declaratory judgment that the Citizens obtained. See, e.g., Essex Co. v. Goldman, 357 Mass. 427, 434 (1970) (the Land Court has jurisdiction of all matters of equity cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved); Greenberg v. Barros, 2020 WL 1651699, at *3 (Rule 1:28 decision) (Mass. App. Ct. 2020) (affirming judgment and further relief under c. 231A, § 5). 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 and further injunctive relief that was logical consequence of judgment declaring mortgages invalid).

that the Settlement Agreement is not effective and that the Town retains the right to continue to enforce its Option. And the Citizens are entitled to enforce that Judgment in this action through vacatur.

Here, the logical consequence of the ineffective Settlement Agreement is vacating dismissal. It is only in this way that the Town can renew its efforts to enforce Option, as ordered by the Superior Court and affirmed by the Appeals Court.

3. <u>These Circumstances Are Extraordinary and Bowers Controls</u>.

The Decision—being a published decision of the Appeals Court in this same case—is obviously new, binding law on the Land Court and falls well within extraordinary circumstances standard of Massachusetts case law. <u>See</u>, <u>e.g.</u>, <u>Parrell v. Keenan,</u> 389 Mass. 809, 813-816 (1983) (consent judgment vacated where it was entered into without the authority of a party); <u>Zarod v. Pierce</u>, 26 Mass. App. Ct. 984, 985 (1988) (court may vacate stipulation of dismissal in extraordinary circumstances such as a lack of authority to enter into stipulation); <u>Bowers v. Board of Appeals of Marshfield</u>, 16 Mass. App. Ct. 29, 33 (1983) (vacating agreement for judgment imposing perpetual encumbrance on municipal property without authorization by Town Meeting); <u>Salem Highland Dev. Corp. v. City of Salem</u>, 27 Mass. App. Ct. 1423, at 5 (Rule 1:28 decision) (Oct. 30, 1989) (vacating agreement for judgment where city board of appeal agreed to convey municipal property to a developer without authorization by the City Council; "Therefore, as the board could not agree to transfer the land to the plaintiff, Salem's motion for relief from judgment should have been allowed.") *discussed favorably in* <u>E. Sav. Bank v. City of Salem</u>, 33 Mass. App. Ct. 140, 142 (1992). <u>See</u> <u>also</u> <u>Abrams v. O'Brien</u>, No. 08-1718, 2009 WL 5724727 (Mass. Super. Mar. 26, 2009) ("the failure of consideration [of a settlement agreement with a Town] brought about by the neighbors' action . . . is the sort of

extraordinary circumstance that would warrant relief in an independent action."), *affirmed* Abrams v. Bd. of Selectmen of Sudbury, 76 Mass. App. Ct. 1128 (2010) (Rule 1:28 decision).

From the Railroad's perspective, the Decision, is such an extraordinary circumstance that it sought Further Appellate Review from the Supreme Judicial Court, declaring that "[i]f not corrected, this [D]ecision would profoundly change Massachusetts common law by establishing as precedent for the first time that statements in a trial court's memorandum of decision (that are not included as part of the Judgment) constitute an 'aspect of judgment' which bind all parties to a case." FAR at 6. The Railroad remains apoplectic as to this new legal reality. It is hard to envision a ruling that would be more extraordinary from the Railroad's and, frankly, the Town's vantage point. And given the number of times the Railroad has breathlessly insisted that the Appeals Court Decision is confusing or wrong and the number of times that argument has rejected (at least five times now and at every level of state court), it fully appreciates how extraordinary it is. However, the Railroad now argues that all parties had advanced knowledge of the potential legal effect of entering into the unauthorized Settlement Agreement and that the Judgment and Decision are not, therefore, extraordinary or newly emergent. It argues this while simultaneously continuing to claim that the Decision is wrong and not binding on the Land Court. This is not a serious claim.[9]

The Judgment marked a seismic change in the Land Court litigation, particularly with respect to the Settlement Agreement and its required stipulation of dismissal. The Judgment, including the legal effect of Count I's injunction on the entire Settlement Agreement, was the basis for the Town's initial Motion to Vacate, which the Citizens joined and the basis for the

[9] The Land Court must make clear that it will not permit the Railroad to continue these frivolous arguments attempting to relitigate the scope of the Judgment and the Decision, which are binding, final law.

Citizens' intervention. It was, as the Railroad's incessant sturm and drang confirms, the epitome of an extraordinary, unexpected event justifying Rule 60(b)(6) vacatur. And the Decision affirming that Judgment beyond any further good faith alternative interpretation is a subsequent extraordinary circumstance requiring vacatur now.

The Decision and this Court previously noted the similarity of Bowers and Bowers controls here. That the Settlement Agreement was not filed with the Land Court does not distinguish Bowers as the Appeals Court has already emphasized that the Land Court's error lay in not respecting the Judgment of the Superior Court, its sister court, as clarified.[10] At any rate, stipulations of dismissal with prejudice are judgments that may be vacated under Rule 60(b). Tuite & Sons, Inc. v. Shawmut Bank, N.A., 43 Mass. App. Ct. 751, 755 (1997). The only other basis for this Court's prior denial of the Motion to Vacate was that the Town could still seek to authorize the Settlement Agreement acquisition provision at Town Meeting. Since then, the Board did pose the question to Town Meeting and it was soundly rejected. See Reilly, 102 Mass. App. Ct. at 374.

The Town's claim to renew its right to enforce its c. 61 Option is meritorious because the waiver within the ineffective Settlement Agreement is likewise ineffective and the Town's Option remains enforceable, as recognized by the Appeals Court. Moreover, under the terms of c. 61 § 8, the Railroad violated the statute by selling the land before the Option expired and by clearing it: "[n]o sale or conversion of the land shall be consummated until the option period has expired." The Option therefore remains available. See, e.g., Town of Brimfield v. Caron, 2010

[10] It is also irrelevant that Bowers did not vacate that portion of the consent judgment that had already been performed. Indeed, it could not have because the facility originally objected to had already been built. Rather, it suggested the town of Marshfield consider that in deciding its next steps. Here, there has been no portion of the Settlement Agreement that has been performed in such a way that it would be inequitable to allow the Town to renew its efforts to enforce the Option, as the Appeals Court expressly affirmed its right to do.

WL 94280, at *10-11 (Mass. Land Ct. Jan. 12, 2010) (Town's right of first refusal pursuant to G.L. c. 61, §8 not yet ripe due to failure to strictly comply with notice requirements, all subsequent acts were "a nullity"); Smyly v. Town of Royalston, 2007 WL 2875942, at *5 (Mass. Land Ct. Oct. 4, 2007) ("statute demands strict compliance with the notice requirements", tolling ripening of Town's first refusal option due to defective notice, Town cannot waive provisions of statute), *judgment entered*, 2007 WL 2875941 (Mass. Land Ct. Oct. 4, 2007); Town of Franklin v. Wyllie, 443 Mass. 187, 196 (2005) ("it is basic, of course, that an option may be exercised only in strict compliance with its terms") (internal citation omitted).

4. The Railroad Has Not Shown That It Would be Prejudiced by Vacatur but the Citizens and Town Remain Prejudiced Without Vacatur.

The Railroad makes no real effort to claim that it would be prejudiced by vacatur because it will not be. There has been no reasonable, prejudicial reliance by the Railroad on the stipulated dismissal. This case has been hotly litigated from the moment the terms of the unauthorized Settlement Agreement were made public. The Railroad's payment of rollback taxes does not amount to reasonable reliance such that it would render the judgment of dismissal binding or vacatur prejudicial, or prevent the Town's enforcement effort. Indeed, if and when the Town is successful, the Town could simply remit those taxes, or the Court could include those by order as a component of the final Purchase Price. Likewise, the Town's release of tax liens only refers to back taxes, not the Town's c. 61 Option rights. Moreover, that the Town pursued eminent domain as an alternative remedy, including to obtain injunctive relief, which was successful, does not mean that it waived its c. 61 claim.

However, unless and until the unauthorized stipulation of dismissal is vacated, the Citizens' Judgment will remain toothless, and the Town will not be able to attempt to enforce its Option. This is prejudicial to both the Citizens and the Town and has already caused extensive

harm because the Railroad has clearcut over 100 acres since the Judgment entered. The Town and the Citizens will be further harmed if the dismissal is not vacated and the Town and the Citizens are not permitted to protect the c. 61 property while the Town pursues enforcement of its Option.

5. Town's Motion to Vacate Is Proper and Should be Allowed.

The Town's renewed Motion to Vacate is proper and should also be allowed. While the Town did dismiss the appeal of the denial of its Motion to Vacate previously, that was done after the Citizens' intervention was wrongfully denied. Had the Citizens been properly recognized as intervenors prior to the Town seeking to dismiss its appeal, the Citizens would have been heard in opposition and the dismissal of the appeal could not have entered as a stipulated motion.[11]

Moreover, the Town's Motion to Vacate must be heard anew now that intervention has been allowed. See Frostar Corp., 77 Mass. App. Ct. at 710. Finally, the Appeals Court Decision is a significant change in the law of the case. Previously there may have been a marginally colorable argument as to the effect of the Judgment but that is no longer true. The Town can now seek vacatur based on this marked legal change.

The Railroad cites Reznik v. Yelton, 2011 WL 1346934, at *1 (Mass. App. Div. 1. Jan. 14, 2011), aff'd sub nom. Reznik v. Garaffo, 81 Mass. App. Ct. 1106 (2011), for the proposition

[11] The Town filed a notice of appeal on February 15, 2022 and the Citizens did so on February 16. On April 20, the Land Court issued a notice of assembly of the record for the appeals. And on April 27, the Town filed a motion for voluntary dismissal of the appeal. The Railroad joined the motion the same day. The Citizens emailed the Court the same day, April 27, asking to be heard in opposition to the motion. Despite that email, on May 2, 2022, the Court treated the motion as a stipulation, and dismissed the appeal. Dkt. entry May 2, 2022. However, had the Citizens been treated as parties, as they should have been, Mass. R. App. P. 29(a) requires that the stipulation be signed by all parties. Without all signatures, the stipulation was not effective and the request for dismissal of the appeal was required to be done by motion under Mass. R. App. P. 29(a). It also should have been treated as a motion under the Land Court rules. In fact, it was styled as a motion not as a stipulation. Under Land Court rule 5, it was required to be marked for a hearing on at least 7 days' notice, which it was not. Under Land Court rule 6, the Citizens should have been given the opportunity to be heard before the Court ruled on the motion. Since the Citizens were entitled to intervene, dismissal of the appeal by stipulation violated both Mass. R. App. P. 29 and Land Court Rules 5 and 6. Accordingly the Town's dismissal of its appeal is a nullity and does not have any res judicata effect.

that it reviewed the denial of a Rule 60(b)(6) motion to vacate a voluntary dismissal. That is incorrect. In Reznik, the plaintiffs were denied relief that the judgment was void under a Rule 60(b)(4) motion and appealed denial under Rule 60(b)(4). Id. In any case, the Appellate Division's footnote 15 quoted from (but not referenced as such by the Railroad) does not support denial of the Town's Motion to Vacate, as the Town is not merely having "settler's remorse". Rather, the Town is acting now based on a change in law. The Decision now requires the Land Court to review anew the Citizens' joinder of the Town's motion, which requires consideration of this Court's action on the Town's Motion itself. Unlike the situation in Reznik, the Appeals Court made clear that the Court's prior action on the Town's Motion to Vacate was based on an improperly narrow reading of the Superior Court Judgment.[12] Moreover, the Town's dismissal of the appeal was a nullity for the reasons set forth above at n.11, which did not occur in Reznik.

At any rate, there is no "settlor's remorse" on the part of the Town. The Town did not get what it had bargained for, the Settlement Agreement is not effective and binding the Town to its dismissal would be "unjust, to say the least". Keavany Aff., Ex. 5, n. 3.

CONCLUSION

For these reasons, the Court should ALLOW the Citizens' and the Town's Motions to Vacate the Stipulation of Dismissal.

[12] Reznik also involved a history of bad faith litigation by the plaintiff that the court did not favor and no such conduct is involved here.

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: December 14, 2023

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 December 14, 2023.

/s/ Harley C. Racer
Harley C. Racer

Exhibit A

APPEALS COURT

Full Court Panel Case

Case Docket

AMY BEARD & others

vs

LOUIS J. ARCUDI, III & others

2022-P-0314

November 15, 2022

ATTORNEYS PRESENT:

For the Plaintiffs:
By: David E. Lurie, Esquire

For the Town of Hopedale, Bernie Stock & Brian Keyes
By: Sean Grammal, Esquire

For Grafton & Upton Railroad Company & One Hundred Forty Realty Trust
By: Donald C. Keavany, Jr., Esquire

P R O C E E D I N G S

(Audio begins.)

JUDGE NO. 1: All right. Welcome back.

This is case 2022-P0-314, Amy Beard vs. Louis Arcudi and others. I hope I have the right case of these two cases.

MR. LURIE: You do, your Honor.

JUDGE NO. 1: And is it Lurie --

MR. LURIE: Yes.

JUDGE NO. 1: Attorney Lurie, your -- as I understand it, we've got -- you are just arguing for all of the plaintiffs collectively, correct?

MR. LURIE: Yes.

JUDGE NO. 1: All right. So we are ready whenever you are ready, or as ready as we'll ever be.

MR. LURIE: May it please the Court.

Good morning, your Honors.

My name is David Lurie. I represent the plaintiff/appellant Hopeland -- Hopedale citizens.

With me today is my colleague Harley Racer.

The settlement agreement that was entered

into by the Hopedale board of selectmen with the Grafton Upton Railroad was unauthorized, in effective, and void as a matter of law, and the citizens have standing under Chapter 40, Section 53 to obtain a declaration to that effect and on other grounds.

It was void because at the special Town meeting the -- the Town residents authorized and appropriated monies to acquire all 130 acres of forestland under Chapter 61, Section 8.

They did not authorize acquisition of only 40 acres under Chapter 40, Section 14, which is what the settlement agreement provided for.

That acquisition has been found unlawful by the Superior Court by Judge Goodwin, and she also found that that indicated that (indiscernible) --

JUDGE NO. 1: Well, she didn't say that the settlement agreement was unlawful.

MR. LURIE: No.

She actually said it was legal. She said it was unauthorized.

JUDGE NO. 1: Exactly.

MR. LURIE: They did not have the power to enter into that settlement agreement.

JUDGE NO. 1: Well, at least one portion of it.

MR. LURIE: Yes.

JUDGE NO. 2: So I -- I read her decision -- and taking all the decisions together -- as saying that the settlement agreement is ineffective until and unless Town meeting funds it, but that if Town meeting were to go to fund it that it is effective and legal, am I reading it wrong?

I know -- and then I'm going to ask you whether you think she's wrong about that but...

MR. LURIE: No, I agree with that reading; and, in fact, Town meeting declined to ratify it when it was asked to do that after the fact.

JUDGE NO. 2: Do you disagree with her view that even if Town meeting, after the agreement signed, funded it that it's ineffective and unlawful?

MR. LURIE: We do in -- in that it constituted an illegal assignment, which is our second argument; but, in my view, you don't need to reach that issue because the agreement itself is void.

The acquisition provision --

JUDGE NO. 2: Well, so an agreement that is -- put aside the assignment thing for a second.

An agreement that is legal if someone subsequently ratifies it isn't void.

If it's void, then it wouldn't matter whether someone subsequently wrote it to fund it; it would just be void and unlawful.

MR. LURIE: It's void -- it's void for lack of authority.

If you don't -- if the board of selectmen didn't have authority in the instance, in the first instance to enter into it.

I would cite for that proposition, your Honor, *Brentwood vs. Springfield*, a case that's 100 years old involving --

JUDGE NO. 2: So (indiscernible), it's --

MR. LURIE: -- Chapter 40, Section 14.

JUDGE NO. 2: -- it's your view that even if Town meeting had voted to fund it it still would have been void, unlawful, and effective, if they --

MR. LURIE: Because they constituted legal assignment.

JUDGE NO. 2: -- if they did that -- so that's different.

Let's -- putting aside the assignment thing --

MR. LURIE: Yes.

JUDGE NO. 2: -- so what I want to know is we have this agreement -- let's just say the assignment thing is not -- forget the assignment thing.

We have this agreement. Town meeting hasn't authorized it yet.

And then you go to Town meeting, and you ask them whether they'll fund it.

Now, the question is before we found out what Town meeting does, is the agreement void?

MR. LURIE: Yes.

JUDGE NO. 2: Okay. And so even --

MR. LURIE: (Indiscernible) authority.

JUDGE NO. 2: And so even if Town meeting had funded it, it would still be void and ineffective because they weren't authorized to do it at the time they assigned it; is that what your argument is, your view?

MR. LURIE: No. If -- if Town meeting had -- had authorized it --

JUDGE NO. 2: After the fact.

MR. LURIE: After the fact.

JUDGE NO. 2: Afterwards.

MR. LURIE: Under Chapter 40, Section 14, which means actually voting to take -- to authorize the board of selectmen to take the property, to acquire the property, it would have been -- they would have had the necessary legal authority to do that, and they could have acquired it if you put -- if you considered it not to have been an illegal assignment.

JUDGE NO. 2: Yeah, so I don't understand, if something's void how can a later vote at Town meeting unvoid it?

MR. LURIE: The *Brentwood vs. Springfield* case says exactly that, a purported taking under Chapter 40, Section 14 where it has not been authorized by Town meeting is void.

JUDGE NO. 1: But that wasn't a contract.

MR. LURIE: That was not a contract, but I would submit that a contract for an acquisition --

JUDGE NO. 1: Do you have any cases that deal with a Town entering into a -- what is, in essence, a private contract that has not been

authorized and whether that voids the contract or does something else?

So eminent domain taking seems to me a little bit different because it's a unilateral action.

Contract feels to me like it's different situation.

MR. LURIE: Well, there is the *Bowers vs. Marshfield* case, which we cited in our land court case, which says that such contracts are beyond the powers of the selectmen to enter into.

The Lunenberg case, which we did not cite in our brief but which is of record, indicates that *Lunenberg vs. Gallagher-Alleva*, 72 Mass. Appellate Court 113 says that *Bowers* holds that a contract entered into by officers or agents of a governmental authority, like the board of selectmen, that is outside the scope of their authority is void.

JUDGE NO. 1: Right.

So why -- so this takes us back to Judge Ditkoff's questions, which is do you read that to mean that regardless of whether the -- there was a subsequent, let's call it ratification, if the -- if the agreement was void of an issue what

difference does it make that someone later said they would fund it.

MR. LURIE: Well, it's not just funding.

You have to have authorization to acquire under Chapter 40, Section 14.

And I believe your Honor is trying to get at the distinction between a contract that's illegal because it's ultravirus contrary to a statute, like a procurement statute, versus one that's unauthorized.

But if it's unauthorized at the outset, it's void.

It can be -- the authorization can be given after the fact; it can be ratified, and then it becomes no longer void.

JUDGE NO. 1: Okay. So can we -- do you mind focusing -- it would be helpful for me if we could parse count 2 of your complaint because that's what I -- right, as I understand it that's really the only (indiscernible) here in this appeal.

MR. LURIE: Yes.

JUDGE NO. 1: Okay. So I -- in your view, what is the relief that Count 2 seeks?

MR. LURIE: We sought multiple kinds of

relief in Count 2.

JUDGE NO. 1: Yeah. There's a lot. It's complicated.

I'm looking -- I have it pulled up here.

So it's helpful to me if we can really look at the count as it was actually pled.

So the first is -- some of these seem to me to be seeking declarations concerning the legal effect of the settlement agreement such as -- such as the Town's Chapter 61 Right of First Refusal remained intact even if the option was not effective.

MR. LURIE: And has not been waived.

JUDGE NO. 1: And that it was exercised, and that it wasn't waived, right.

So let's just take that subset of -- of what you're looking for in this.

How do you have standing to pursue that relief?

MR. LURIE: The waiver here occurred only in the context of an agreement, a settlement agreement. It did not occur outside it.

We admit that if the board had not entered into a settlement agreement but had just said, Um, we change our mind, we waive the

option, they could do that; but they did it in the context of an agreement that called for the expenditure of money.

So under Chapter 40, Section 53 we can challenge that expenditure of money in the acquisition of land. The Superior Court agreed with us and -- and she said we can do that.

What she didn't do is go take the next step and say the settlement agreement is void.

She said it's ineffective.

She said it doesn't -- the board of selectmen didn't have power enter into it.

JUDGE NO. 1: Right.

MR. LURIE: But part of the relief we sought in the complaint and in multiple times during our briefing -- and I can cite all those instances for you -- is for specifically a declaration that the settlement agreement was void, including the waiver.

JUDGE NO. 1: Right.

So with all due respect my question was something else, which is where -- from what authority do you derive standing to pursue the relief that you sought in Count 2?

Is it just Section 53?

MR. LURIE: No.

We believe we have standing --

JUDGE NO. 1: Because Section 53 gave you standing for Count 1, because it allows you to challenge, you know, the expenditure of funds.

But here, for example, the validity of the -- of the Chapter 61 option, and whether it was waived, that doesn't seem to me to be -- involve the expenditure of funds.

That's, like, two steps down the road, which is if the settlement agreement is void, what remains?

MR. LURIE: Well, the -- the only way the waiver was -- was executed was in the context of a settlement agreement.

Chapter 40, Section 53 allows us to challenge the expenditure of funds under that settlement agreement and under the *Oliver vs. Mattapoisett* case, once you have expenditure of funds incurring of obligations that can be challenged under Chapter 40, Section 53, you can go ahead and -- and challenge the related aspects of that transaction.

In *Oliver* the court -- Judge Cass -- ruled on the validity of easements that were part

and parcel an agreement by which funds were to be expended.

Having found that the Superior Court found that -- that enough obligations were being incurred to -- to provide standing under Chapter 40, Section 53, he went on and ruled on the validity of the easements.

That's our same case. You ought to be able to, and the case law provides, you can challenge a transaction, including a waiver of a right that was executed only in exchange for an illegal, unauthorized void agreement to acquire land.

And, after all, that was the essence of the settlement agreement.

It was a trade of the Chapter 61 --

JUDGE NO. 1: Okay. So your standing for Count 2 depends on a legal conclusion that the settlement agreement is void?

Because if the settlement agreement was lawful, not void, it simply needed authorization, then how do you -- then how do you get to where -- then how do you get standing to challenge the rest of it?

MR. LURIE: We can -- under Chapter 40,

Section 53, you can challenge expenditures and related agreements that are beyond the power of -- of -- of a municipality.

And here --

JUDGE NO. 1: But you would agree that the settlement agreement was within the power, in the abstract, of the -- of the Town; it's just that they didn't receive authorization ahead of time for it.

MR. LURIE: And -- and, your Honor, because it was an illegal assignment, which you can challenge under Chapter 40, Section 53 as well as mandamus, as well as by a declaratory judgment.

The settlement agreement was not only unauthorized; it was illegal because it violated Chapter -- Section 61H prohibition on assignments to developers who are not -- nonprofit entities.

JUDGE NO. 1: Chapter 53, let's look at the language you're relying on -- I mean, Section 53.

Why don't you point to me for the -- the language in there that you think gives you standing for -- to challenge an assignment of Chapter 61 rights.

MR. LURIE: It provides that ten taxpayers may -- where a Town has the legal and constitutional right and power to raise or expend money, or incur obligations, the Superior Court may, upon a petition, not less than ten taxable inhabitants of the Town, which we have here, determine the same inequity; that is, whether or not they have unlawfully exercised or abused such corporate power.

It allows for both declaratory relief and injunctive relief.

And that's what happened --

JUDGE NO. 1: But that doesn't relate back to the expend money language?

MR. LURIE: No.

I mean, look at -- look at *Oliver.*

Oliver, the relief granted by the court was a determination of whether or not the easements required a majority of vote of Town meeting, whether or not they were authorized or required a two-thirds vote.

That's our issue here. The -- the settlement agreement required authorization by Town meeting, and the board of selectmen didn't get it.

And the waiver that the board of selectmen gave for it is part and parcel of that acquisition power.

If they don't have the acquisition power, the waiver is ineffective as the settlement agreement, in its entirety, is ineffective.

The whole point of the settlement agreement was to divvy up ownership of these parcel.

The language of the settlement agreement I would point your Honors to is (indiscernible) one.

JUDGE NO. 1: May I ask you another question about Section 53?

MR. LURIE: Yes.

JUDGE NO. 1: And I realize your time is up.

Does -- does Section 53 give standing vis-à-vis a claim against a private entity as opposed to the municipality?

MR. LURIE: It does --

JUDGE NO. 1: Any case --

MR. LURIE: -- (inaudible) standing to obtain rescission of contracts between municipality and a third party.

JUDGE NO. 1: So what's the best case for that?

MR. LURIE: That -- the best case for that, your Honor, is *Fordyce vs. Town of Hanover*, 457 Mass. 248, an SJC case where the taxpayers sued pursuant to Chapter 40, Section 53 challenging a competitive bid issue.

And the SJC went ahead and decided the merits of the case without even addressing the issue of standing.

JUDGE NO. 1: Okay. And that was only against a private defendant?

MR. LURIE: I believe they sought rescission of the agreement.

JUDGE NO. 1: But was the -- was it private as opposed to municipality a defendant?

MR. LURIE: If you give me one moment, your Honor, I will check the footnote to see if the party to the contract was -- yes, Callihan, Inc., whose motion to intervene was allowed in the Superior Court, was a defendant.

JUDGE NO. 1: Okay. All right.

Let me see if there are any further questions?

No, I think -- I think we have your

argument.

I appreciate it.

MR. LURIE: Thank you.

MR. GRAMMAL: Good morning, your Honor.

As it may please the Court, my name is Sean Grammal.

I'm from the firm Anderson & Kreiger. And I represent the appellee, Town of Hopedale and two of its select board members, Bernie Stock and Brian Keyes.

The Town asked this Court to affirm dismissal of Count 2 events to citizens for lack of ripeness.

In that count, the citizens are asking for a declaratory judgment about how the settlement agreement, and specifically a waiver provision in that agreement, affects the rights and obligations of the parties under Chapter 61.

But the Superior Court was repeatedly -- was clear repeatedly that the settlement agreement is not yet effective, and it could become effective if the select board called a Town meeting.

JUDGE NO. 2: All right. So you had a Town meeting, and they voted it down.

You could hold another Town meeting, and they vote it down.

How many Town meetings have to vote it down before it's ripe.

MR. GRAMMAL: I'm not sure it would ever become ripe, your Honor.

If the settlement agreement is never effective, there's no live dispute about how that agreement would affect the rights of the Town and the railroad.

There has to be -- Count 2 -- and, again, looking at the allegations pled, I'm looking at paragraphs --

JUDGE NO. 2: Well, the -- your friend there is going to come up and say that the settlement agreement completely binds the Town on everything but the purchase; and your friends on the other side say it doesn't do that, and you're telling me that no one can ever determine that because some day Town meeting might suddenly decide to -- to endorse it.

That's a tough position.

MR. GRAMMAL: If Town meeting does one day -- well, I think there's a chain of steps that has to occur.

The select board has to call Town meeting.

It has to be put before the voters.

It has to be enough votes.

And then the select board has to execute the settlement agreement.

If each of those things happen, then the citizens would have a live claim in Count 2, because it's not just about the Chapter 61 rights.

It's about the conjunction of the chapter --

JUDGE NO. 2: But why don't we have a live claim now as to what the effect of a nonapproved settlement agreement is?

MR. GRAMMAL: I'm sorry, say that again, your Honor.

JUDGE NO. 2: Right now we have a settlement agreement that has not been approved by Town meeting and the lawyers (indiscernible) are telling me that it has different affects.

Why isn't that live right now?

MR. GRAMMAL: So because it -- the allegations in the complaint are about the settlement agreement; how it could effect those

rights.

But if there's some ineffective agreement that might come into existence at some point, that's an interesting question.

It's certainly an interesting legal question for this court to -- to answer, but I'm not sure it's a ripe one.

JUDGE NO. 1: I have to say I'm really puzzled by this argument from a strategic point of view.

Why does the Town find this argument to its advantage?

And I'm thinking here because I -- let's say we agree with you.

We dismiss the appeal; that's not a dismissal on the merits.

You've got an adjudication that presumably would be -- have some collateral -- collateral effect in the future left standing, which is that the agreement is not authorized.

How -- how does that help?

Is that -- I mean, why is that left -- what would be left to adjudicate in the future?

You basically chose -- the Town chooses not to adjudicate it now by claiming that it's

premature.

How does that help you?

MR. GRAMMAL: Well, your Honor, we're just trying to look at Judge Goodwin's decision and her reasoning and adhere to that.

We're an appellee in this court defending her decision.

We think the logical outflow from her opinion is that Count 2 just simply isn't ripe yet.

Now --

JUDGE NO. 2: Was it ripe -- was it ripe when she ruled on it?

MR. GRAMMAL: I think her -- her decision on Count 1 --

JUDGE NO. 2: No, I know; but on Count 2 was it ripe when she ruled on Count 2?

MR. GRAMMAL: I think her decision on Count 1 made Count 2 unripe.

JUDGE NO. 2: So we should vacate her ruling on Count 2 because she shouldn't have ruled on it; she should have dismissed it as not ripe, right?

MR. GRAMMAL: I'm not sure if it would be vacating or affirming on an alternative ground.

JUDGE NO. 2: Well, how could we affirm her -- she makes all kinds of --

JUDGE NO. 1: (Indiscernible.)

MR. GRAMMAL: Yeah.

JUDGE NO. 2: -- she makes all kinds of statements about it; if it's ripeness then she was (indiscernible) about that.

MR. GRAMMAL: Yeah, I think that your Honors could vacate the decision on Count 2 then, because a predicate step for Count 2 is that there is actually a settlement agreement.

Paragraphs 121, 123, 125 of the citizens's complaint show that it's -- it's the interplay between the Chapter 61 rights and the settlement agreement that forms the basis of that count.

JUDGE NO. 2: In which case her ruling that the Town retains its money and ripe to continue to attempting to force the option is gone.

MR. GRAMMAL: I'm sorry, your Honor?

JUDGE NO. 2: If we vacate her rulings on Count 2 and her ruling that the Town has the right to continue attempting to force the option is gone.

MR. GRAMMAL: I think that that -- that decision on the clarification might be gone, but I think that -- that would still be true, though.

I see that my time is up, your Honors.

JUDGE NO. 1: No, you should continue.

So what is the Town's position on whether the settlement agreement is void?

MR. GRAMMAL: The Town's position -- we agree with Judge Goodwin that the settlement agreement could become effective.

So it's not invalid or legal as a matter of law.

It just that it has not gone to Town meeting yet.

But if Town meeting were --

JUDGE NO. 1: Well, it went to Town meeting and was not approved.

MR. GRAMMAL: Correct.

But we could bring it back to Town meeting.

And if they did approve it then, then it would become an effective contract.

JUDGE NO. 1: So the position of the Town is that it is a -- an effective contract that simply hasn't been authorized yet?

MR. GRAMMAL: Yes.

The terms (indiscernible); the Town could enter into them, but we need authorization.

JUDGE NO. 1: Okay. So one of the -- one component -- so did any of the provisions of the agreement become effective?

MR. GRAMMAL: Not yet, your Honor.

JUDGE NO. 1: None?

MR. GRAMMAL: Not yet, your Honor.

JUDGE NO. 1: So on what basis was the land court case dismissed?

MR. GRAMMAL: Well, the land court was dismissed because the Town, at the time, thought it was an effective settlement agreement.

JUDGE NO. 1: All right. So if a party who has no authorization -- which I suppose is what you're saying?

MR. GRAMMAL: Yes.

JUDGE NO. 1: Can a party with no authorization stipulate to the dismissal of a claim?

MR. GRAMMAL: Pursuant to the settlement agreement, I mean, that's what happened here, and that's why the Town tried to go back.

JUDGE NO. 1: I'm talking as a matter of

law.

MR. GRAMMAL: Okay.

JUDGE NO. 1: I'm trying to understand the Town's position with respect to the effectiveness of the agreement.

It had multiple provisions; one of which was also that the Town agreed to dismiss to file a stipulation -- sign a stipulation of dismissal and seek to have the land court case dismissed; is that effective?

MR. GRAMMAL: Well, the Town would say --

JUDGE NO. 1: Did you need to wait for Town authorization for that?

MR. GRAMMAL: No, your Honor.

JUDGE NO. 1: No?

MR. GRAMMAL: No.

JUDGE NO. 1: Okay. So how are we supposed to figure this out?

I mean, what -- what provisions become effective and -- or -- and -- and which provisions did not?

And -- and what's the authority for saying that some of it became effective and some of it didn't.

MR. GRAMMAL: Well, your Honor, I think

the -- the requirement that the Town had to dismiss the land court case came from the settlement agreement.

That was part of an agreement that's not yet effective.

I'm not sure that the Town was required to do that; it's just we did it before the -- the validity of the settlement agreement was adjudicated.

JUDGE NO. 2: So one --

MR. GRAMMAL: The Town did try to go back and vacate that.

JUDGE NO. 1: I know.

MR. GRAMMAL: And it did not go.

JUDGE NO. 1: But I'm trying to find out now your position before us I take is it that even the -- even the signing the stipulation was ineffective, or are you taking the position -- Town is taking the position that -- that the stipulation -- it -- it could -- it was authorized to -- I'm having a hard time understanding your position with respect to the settlement agreement.

It's -- I'm -- it seems to me that everyone wants to take little pieces of the

settlement agreement as though you looked at everything divorced from an agreement as a whole, including the Town. Some parts are effective, some parts aren't effective.

I'm trying to figure out whether you're taking the position that the settlement agreement ever came into legal being despite its lack of authorization.

MR. GRAMMAL: I don't think it ever came into legal being.

JUDGE NO. 1: Okay. So what is the consequence -- if that -- if that -- if we were to accept that what is the consequence with respect to the signing of the stipulation of dismissal?

MR. GRAMMAL: Well, the Town would say that we should have been able to vacate that, but that is obviously a separate appeal that the Town is no longer a part of.

JUDGE NO. 1: You haven't appealed that?

MR. GRAMMAL: Correct, your Honor.

JUDGE NO. 1: So how could you take that position?

MR. GRAMMAL: How -- which --

JUDGE NO. 1: You haven't appealed the

denial of the motion to vacate?

MR. GRAMMAL: Yes, your Honor.

JUDGE NO. 1: So how can you argue to us now that it should have been vacated?

MR. GRAMMAL: Well, what I was saying that's why the Town did that, because the Town -- we got the decision from Judge Goodwin -- went to land court and said that dismissal that we signed was part of the settlement agreement, that's no longer effective.

And so I think the competing --

JUDGE NO. 1: And you lost, and then you didn't appeal.

MR. GRAMMAL: Right.

But I think that the Town held consistent positions, including with the land court saying that we dismiss this as part of a settlement agreement that we didn't think is effective yet.

And so I don't think that those two things stand in contrast.

JUDGE NO. 2: One thing in the agreement is that the railroad company agrees not to build certain things.

So Town view is right now the railroad company can build that stuff because at agreement

doesn't bind them.

MR. GRAMMAL: Not yet -- not -- well, right now, because the settlement agreement could come into effective, but right now, yeah, there's not an effective settlement agreement.

JUDGE NO. 2: So they can build -- these restrictions on building don't -- don't apply to them.

MR. GRAMMAL: That's what the Town would say. The railroad disagrees with that.

They think the settlement agreement is --

JUDGE NO. 2: I understand that.

MR. GRAMMAL: But --

JUDGE NO. 2: But the Town's view.

MR. GRAMMAL: Correct.

JUDGE NO. 2: All right.

JUDGE NO. 1: And the proceeding before the SDB would be revived?

MR. GRAMMAL: That would be -- yeah, that would be up to the railroad.

But they -- I know they had filed that right after the land court case.

JUDGE NO. 1: All right. Let me see if there -- any questions?

JUDGE NO. 2: Is the Town a party to the

federal lawsuit?

MR. GRAMMAL: Yes, we're the defendant.

JUDGE NO. 2: So what -- what is the status of that?

I looked at the docket, and all I know is that Judge Burroughs ordered that the status quo be maintained, but I don't know what that means.

MR. GRAMMAL: So there's two pending motions for preliminary injunction.

There's a pending motion to dismiss the status quo.

And, my Brother can correct me if I'm wrong, the Town was not allowed to take the land and the railroad was not allowed to develop the land any further.

So it had to say status quo as of early August.

JUDGE NO. 2: So status quo includes the development too?

MR. GRAMMAL: Yes, your Honor.

JUDGE NO. 1: Anything else?

JUDGE NO. 2: No.

JUDGE NO. 1: I don't think so.

Okay. I see no more questions.

Thank you very much.

MR. GRAMMAL: Thank you, your Honor.

MR. KEAVANY: Good afternoon.

May it please the Court, Donald Keavany for the G&U defendants, Grafton Upton Railroad Company, and the realty trust.

The only matter that's not ripe for review is the settlement agreement.

This Count 2 is absolutely ripe for review.

Three counts were asserted by the citizens, the taxpayers.

Count 1 was purely under Section 53 and clearly the Town never -- that was never against the G&U defendants; but the Town never contested standing under Section 53 under Count 1, railroad never contested a standing under Section 53 under Count 1.

Count 2 is a different animal, and that solely seeks to get a declaratory judgment that a Chapter 61 right of first refusal, that the Town had already dismissed, is -- remains valid and enforceable.

JUDGE NO. 2: Well, that's not -- that's not the only thing Count 2 asks for.

That is one thing that it asks for, but

there's a ton of things buried in Count 2.

JUDGE NO. 1: Yeah.

MR. KEAVANY: Well, no, Count 2 relates to the right of first refusal and -- and also alleges that the assign -- that the waiver and release of the Chapter 61 right of first refusal is an assignment, but it all relates to the Chapter 61 right of first refusal.

JUDGE NO. 2: But everything in this case relates to the Chapter 61 right of refusal, including Count 1.

I mean, that's not going to get us very far.

MR. KEAVANY: No, but it gets us far with respect to standing.

They have standing under Section 53 to join the spending of -- of municipal funds.

Section 53 does not provide them standing to get a declaratory judgment that a right of first refusal that clearly under Section 61, Section 8 can only be exercised by the board of selectmen.

And the board of selectmen did exercise that.

And the board of selectmen has absolute

discretion to exercise it, not exercise it; exercise it and not take the property and they've sited no case that gives them standing to step into the shoes of the board of selectmen --

JUDGE NO. 2: But they're not --

MR. KEAVANY: -- to force the selectmen.

JUDGE NO. 2: -- they're not asking for any of that on appeal.

What they're asking for is a declaration that the settlement agreement is void. That's what they want.

They're not asking anything about the option that it may or may not ultimately effect what you think about the option, but that's -- that's what they're asking for.

MR. KEAVANY: Well, no, your Honor, respectfully, they absolutely ask for a declaratory judgment in this -- for this Court to declare that the right of first refusal still exists; the Town still has it. The ten taxpayers don't have it.

They absolutely request a declaration that the Town still maintains a right to acquire the property under Chapter 61.

JUDGE NO. 2: Well, your Brother -- your

friend got up and he told us that what he wanted was a declaration; that the settlement agreement is void.

He didn't say anything about what you're saying.

MR. KEAVANY: Well, I've read his brief and I -- and I participated in the briefing at trial court. And that's absolutely what they asked for.

But even -- even if now they're asking for this Court to declare the settlement agreement invalid, it is not invalid.

The settlement agreement resolved --

JUDGE NO. 1: Before you -- before you get to that question.

I see -- to my mind at least, it seems that -- that what's really being sought in Count 2 is a declaration -- are declarations about what might occur if the settlement agreement is void.

They're looking not only to have the settlement agreement declared void, but also then to have declarations entered regarding the consequences of that, such as your right of first refusal still remains, you know, blah, blah,

blah.

Do you think that's a fair way to read that?

MR. KEAVANY: A fair way to read their arguments?

JUDGE NO. 1: Their -- their claim.

MR. KEAVANY: I think what they're trying to do is use what occurred with respect to Count 1 to eliminate or void the entire settlement agreement.

And, again, I don't think they have --

JUDGE NO. 1: Okay. So that seems to me a different thing.

So do you think that's a legal conclusion -- like that's a legal conclusion?

If -- if Count 1 -- if the -- do you think that the question of what is the legal consequence of Count 1 with respect to the legal viability of the settlement agreement is a question of law?

MR. KEAVANY: It would be a question of law absolutely, your Honor.

JUDGE NO. 1: Okay. So how is that not open to de novo review by us?

MR. KEAVANY: Because they didn't ask for

it down below, but I'll assume that they --

JUDGE NO. 1: But they did -- okay, they did ask for -- their position, as far as I can tell, and I may be oversimplifying, is the settlement agreement is void. Throw it all out.

That's basically what I understand them to have been saying.

The judge agreed with them that there was no authorization for the settlement agreement.

But the judge did two things, I think.

The first is to say, but I think that the agreement was nonetheless lawful and the -- and the defect could be cured by a subsequent action.

And, secondly, seems to it that somehow you can, I'll just call it save the agreement provision by provision.

I have a little bit of intellectual difficulty with both piece of that.

Do you want to take them in turn?

MR. KEAVANY: Sure.

JUDGE NO. 1: Okay.

MR. KEAVANY: Yeah, the first one first.

I don't think -- I think the superior court judge was incorrect in going beyond -- or -- or tying the Count 1 and joining the funds

to acquire the settlement parcel to having any effect on the overall validity of the settlement agreement.

The settlement agreement arose because the Town asserted in land court that it had a right to buy the 130 acres.

It was disputed.

They had every right to file a lawsuit to assert those Chapter 61 rights, which they did.

They also had the authority to settle that claim.

What the superior court found was one provision in that settlement agreement where there was -- where the Town agreed to give up a contested right to buy 130 acres for an uncontested right to buy 40 acres -- a promise for a promise.

That is what is carved out of what she found that the settlement agreement could not effectuate.

That could not be effective because the Town meeting vote that occurred in October envisioned a larger parcel for a larger --

JUDGE NO. 1: It was too far distant --

MR. KEAVANY: Too far.

JUDGE NO. 1: -- from what had been -- yeah.

MR. KEAVANY: But that is the extent of Section 1.

It just simply says --

JUDGE NO. 1: So how does that invalidate the entire agreement?

Is it because you're relying on the severability clause or something else?

Because, you know, a failure of -- I'll just tell you, it looks to me it's a meaningful piece of the -- of the agreement -- of the settlement agreement -- from both parties standpoint.

I mean, it's a meaningful provision and a lot of land; it's a lot of money.

And if that fails for lack of authorization, on what basis then was the judge correct in determining that -- that -- that the entire settlement agreement was -- was not -- whether you call it void or unauthorized, how do you just look at one piece and say, Oh, that can be fixed.

MR. KEAVANY: Because I think that was the deal that the parties made.

And there is -- yes, there is a severability clause, and absolutely we do rely on that; but there's also other significant consideration that Judge Ditkoff had referenced in a question to my Brother about the concessions that the railroad had made with respect to what it can do on that property.

What -- you know, there are Army Corps of Engineers -- Army Corps of Engineer easements that we agreed.

So there's substantive consideration in that agreement.

And I am not discounting and I'm not saying that the transfer of land was an immaterial piece.

It's certainly part of the settlement agreement, but it's part of an overall settlement agreement that --

JUDGE NO. 1: What would happen if the Town meeting had only approved pieces and it went back and they -- I mean, here they've rejected the whole thing; but what if they had only approved pieces, such as the pieces that bound the railroad to do something, what would happen?

MR. KEAVANY: Well, I also think, your

Honor, that gets to kind of a disconnect with respect to what Town meeting does and what Town meeting doesn't do.

Town meeting does not authorize settlement agreements that are entered into by the board of selectmen.

JUDGE NO. 1: Yeah.

MR. KEAVANY: What Town meeting does with respect to Chapter 40, Section 14, if there's going to be land involved, you need a Town meeting vote to acquire the land and appropriate money for the land.

That is it. That's the sole -- that was before the -- the Town meeting back in October of 2020. And there is no obligation -- they've cited no cases that says that a settlement agreement -- an entire settlement agreement has to go back to Town meeting to get approved.

It just doesn't exist.

The -- the select board -- as Judge Desmond found out the select -- found out -- as Judge -- Judge Desmond stated the select board was absolutely empowered to settle the case on the terms it felt were sufficient.

And the fact that the board stated on the

record the reasons why they wanted to get this resolution because of the cost of the land court case, the costs to defend the STB case, and the uncertainty that Judge Rubin expressed and Judge Lombardi expressed, that's consideration alone --

JUDGE NO. 2: Except --

MR. KEAVANY: -- (indiscernible) --

JUDGE NO. 2: -- except that Judge Goodwin stated that if a settlement agreement wasn't approved by Town meeting, it fails to take effect, and the Town retains the right to continue attempting to enforce the option, which seems like the opposite of what you're saying.

MR. KEAVANY: Judge Goodwin is, unfortunately, 100 percent wrong with respect to Town --

JUDGE NO. 2: That's -- that would be interesting if you had appealed.

But, since you didn't appeal, aren't you stuck with Judge Goodwin's ruling.

MR. KEAVANY: I'm stuck with Judge Goodwin's judgment on Count 1 that enjoined the Town from spending money that was appropriated in October of 2020 to buy the property described in the settlement agreement.

That's the extent of the judgment that entered on Count 1.

That's the judgment that has been appealed.

We --

JUDGE NO. 2: No. No.

MR. KEAVANY: -- (indiscernible) --

JUDGE NO. 2: No one -- no one appealed the judgment in Count 1.

MR. KEAVANY: Correct.

JUDGE NO. 2: No one appealed that.

MR. KEAVANY: I wish the Town had, but they didn't.

JUDGE NO. 2: No one appealed that.

MR. KEAVANY: Correct.

The only count --

JUDGE NO. 2: Count 2 is what's been appealed.

MR. KEAVANY: Absolutely.

JUDGE NO. 2: And not by you.

MR. KEAVANY: The judgment entered on Count 2 in our favor.

There was nothing to appeal.

JUDGE NO. 2: You could appeal the statement that the Town has the right to continue

enforcing the option, but you didn't.

MR. KEAVANY: That was not part of the judgment, your Honor.

That was part of a memorandum of decision and order supporting the judgment. That was not an order.

All that -- if you look at the memo --

JUDGE NO. 2: It was a clarification of the earlier order.

MR. KEAVANY: It was a clarification, but it wasn't -- no one sought to amend the judgment to ask for the relief they were asking for.

And -- and the judgment was not amended to reflect her thought process on that.

We would not appeal that.

JUDGE NO. 2: You can't appeal clarification of a judgment?

MR. KEAVANY: I could appeal an amended judgment, your Honor, but the judgment was -- was entered on the docket.

The judgment did not declare the settlement agreement invalid.

There was nothing to -- she entered judgment in favor of G&U.

I could not appeal a favorable judgment

on our behalf.

And it was -- it was -- and I would represent that her comments along those lines are purely dicta --

JUDGE NO. 2: Her comments are dicta; when she clarifies the judgment, why isn't that holding?

MR. KEAVANY: What she clarified was that the Town could not use the money in October 2020 that envisioned a larger parcel for a larger amount of money; they couldn't use that to buy what was described in the settlement agreement.

JUDGE NO. 2: And what she clarified was that the Town still has the right to attempt to continue enforcing the option.

I am reading what she wrote.

JUDGE NO. 1: Did you move for reconsideration?

MR. KEAVANY: I did not move for reconsideration.

The Town moved for reconsideration.

I joined that -- that motion for reconsideration but we did not seek --

JUDGE NO. 1: On the clarification?

MR. KEAVANY: -- on the clarification.

JUDGE NO. 1: Yeah.

MR. KEAVANY: Because the judgment in our eyes -- on our mind -- in our mind was relatively straightforward and -- and, in essence, said under Count 1, which was the count, not against us, that they couldn't use that money to buy the property described in the settlement agreement, that was it.

That's the extent of Count 1.

And ten taxers --

JUDGE NO. 1: Except that when we -- except it doesn't look like the way the judge understood it, her ruling.

The judge appears to have understood her ruling to mean that if it doesn't get approved, then everyone's back to what existed before.

MR. KEAVANY: I respectfully disagree because I think in May of 2022 when she issued her decision on the request for injunctive relief pending appeal, I think her last comment was that she believes there are grounds to rescind the agreement that the Town can take, but they didn't take it.

Judge Goodwin was offering opportunities for the Town to -- to take the next step to do

something with respect to the settlement agreement.

They never did.

What they did do was file that federal lawsuit back in July, but -- but they never sought to rescind the settlement agreement and that's --

JUDGE NO. 2: But I thought you filed the federal lawsuit?

MR. KEAVANY: I'm sorry?

JUDGE NO. 2: I thought you filed the federal lawsuit?

MR. KEAVANY: I did not file. I was going to correct my Brother.

The Town filed -- I'm sorry. Strike that. I'm sorry.

They sought to take our property by eminent domain, so we moved to enjoin that.

I apologize.

We are the plaintiff in that case, absolutely.

JUDGE NO. 2: All right.

JUDGE NO. 1: Would it be possible for you to file with us a supplemental appendix consisting of the materials that were filed with

the SDB -- STB, the surface transportation board --

MR. KEAVANY: Sure.

JUDGE NO. 1: -- surface transportation board, that would be helpful I think.

Can you do that within a week let's say.

MR. KEAVANY: Yes.

And I did ask -- we did have a motion pending on the supplemental record appendix that we included Judge Goodwin's transcript.

I mean, I know it had been referred to the panel.

JUDGE NO. 1: Yeah.

MR. KEAVANY: I mean, we certainly submitted it.

JUDGE NO. 1: Yeah.

MR. KEAVANY: I don't -- it hasn't been acted on.

JUDGE NO. 1: I think you can assume we'll -- we'll allow that.

All right. Very interesting case to say the least.

We've been really helped by your arguments and your briefing.

And so that case is submitted.

And we're going to move to the companion case.

(Audio ends.)

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