E-FILED

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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

Plaintiffs,

v.

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

Defendants.

FILED
JAN 13 2022
ATTEST: CLERK

Civil Action No. 2185-cv-00238D

557.

PLAINTIFFS' JOINDER OF TOWN OF HOPEDALE'S EMERGENCY MOTION FOR FURTHER EXTENSION OF INJUNCTIVE ORDER

Plaintiffs hereby join the Town of Hopedale and Board of Selectmen's Emergency Motion For Further Extension of Injunctive Order and further request that this Court consider transfer of the Land Court case to the Superior Court for consolidation with this action before Judge Goodwin.

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

Counsel for the Citizen Plaintiffs hereby certifies that we attempted to confer with counsel for the Railroad Defendants regarding the Town's Emergency Motion and possible joinder by Plaintiffs, by email dated January 6, 2022 to Town Counsel and counsel for the

Railroad Defendants, requesting to join any Rule 9 call. We did not receive any response from counsel for the Railroad Defendants. Town Counsel responded by email that counsel for the Railroad Defendants refused to speak to us.

1. **This Court has jurisdiction over the Railroad Defendants and it is in the interest of justice to extend the injunction to prevent the Railroad's destruction of the c. 61 Forestland, to which the Town retains a right.**

By the Citizen Plaintiffs joining the Town in its request for an extension of the injunction against the Railroad Defendants' destruction, the Emergency Motion is from the Citizen Plaintiffs as well as the Town and the argument that this Court lacks jurisdiction over the Railroad Defendants is moot. [1]

Regardless, the Railroad Defendants continue to push the fiction that they are not bound by orders of this Court or of the Appeals Court.[2] The Railroad Defendants' history of thumbing their nose at the judicial process continues through their opposition to the Town's emergency motion here. As set forth in prior papers and as recognized by this Court in issuing injunctions against the Railroad Defendants, this Court has inherent power to preserve the status quo as part of its order preventing the transfer of c. 61 rights and against all parties and even non-parties who threaten to undermine the purpose of court orders – particularly when the actions and intentions of the Railroad Defendants are to irreparably and permanently destroy the subject Forestland at dispute.

The Citizen Plaintiffs prevailed on Count I of their Complaint and there is inherent authority to preserve the status quo so that enforcement of the Town's c. 61 Option to acquire the

[1] The Citizen Plaintiffs maintain that they have standing by mandamus to seek this injunctive relief as well as under M.G.L. c. 40, § 53.

[2] The Railroad Defendants did not claim a lack of jurisdiction over them in this Court following the previous four injunctive orders against them nor did they appeal the prior injunctions on the basis of lack of jurisdiction.

130 acres of Forestland is not rendered meaningless by the wholesale destruction of the Forestland in the interim.

It is imperative that the injunction remain in place pending a decision on the Motion to Vacate. The Railroad would prefer that the injunction lapse while the parties await a hearing and decision on the Motion to Vacate, but that would be manifestly unfair and prejudicial to the Citizens Plaintiffs and the Town. The Court's original order contemplated preservation of the status quo for 60 days to allow renewal of efforts to enforce the Option. The Town has acted appropriately within that time frame, but due to circumstances beyond its control the injunction is at risk of lapsing.

2. **This Court should consider transfer of the Land Court case to the Superior Court for consolidation with this action.**

Further, it would be efficient for the parties and would conserve judicial resources for this Court to consider the transfer of the Land Court case to the Superior Court, to be consolidated with this action and for the consolidated action to be specially assigned to Judge Goodwin for the duration. This Court has familiarity with the facts and law regarding this matter in more depth than the Land Court. And this Court has made substantive rulings of law that are, in effect, the law of the case. Indeed, a similar procedure was employed in the Daly case previously adverted to by the parties and this Court. See Daly, et al. v. McCarthy, et al., 2003 WL 25332929, at 2 and n.3 (Mass.Super. Aug. 04, 2003) (copy attached hereto), *affirmed*, Daly v. McCarthy, 63 Mass. App. Ct. 1103 (2005). See also the related case Abrams v. O'Brien, 2009 WL 5724728 (Mass. Super. Apr. 17, 2009), *affirmed*, Abrams v. Bd. of Selectmen of Sudbury, 76 Mass. App. Ct. 1128, 925 N.E.2d 574 (2010), cited in this Court's Decision on the Motion for Clarification. In Daly, citizens sought in Superior Court to vacate a settlement agreement and judgment that had been entered in a Land Court case, and one judge was appointed to handle all

three related cases, two of which were Superior Court cases and one of which was a Land Court case. Similarly, here it makes sense for this Court to preside going forward on both the Land Court case and the Superior Court case. Such transfer and consolidation would promote judicial efficiency and the interests of justice and would avoid inconsistency in rulings.

The Land Court held a quickly scheduled status conference on the Town's Motion to Vacate on January 12, 2022 and the Land Court raised the question, *sua sponte*, whether the Town's Motion to Vacate and the revived action would be better heard in the Superior Court action by Judge Goodwin. The Land Court raised a concern of comity, whether issues of fact and law decided in Superior Court would be binding on the Land Court, and that the Superior Court likely has more knowledge of the dispute. Plaintiffs remotely joined the status hearing in Land Court but are not currently in a position to formally make this request for transfer in the Land Court, as they are not yet parties there.[3] However, Plaintiffs respectfully request that this Court consider raising the issue with the Chief Administrative Justice and/or the Chief Justices of the Land or Superior Courts. The Land Court set a hearing date on the Motion to Vacate as January 24, 2022 at 2:00 p.m. but did not take any action to order a new injunction against Railroad Defendants' destruction of the c. 61 land.[4] See attached docket entry. Accordingly, which court is the proper forum for issuance of an injunction, pending final decision of the Motion to Vacate, remains in doubt. At any rate, the Superior Court has concurrent jurisdiction with the Land Court to hear all c. 61 matters.

Moreover, although the Land Court has scheduled a hearing on the Motion to Vacate for January 24, 2022, the Land Court has indicated that it will not, or cannot, rule on the request for

[3] In response to a query by the Land Court, counsel for the Citizen Plaintiffs indicated that they would consider intervening in the Land Court action.

[4] Despite not having time prior to mid-February to hear the Town's Motion to Vacate, the Land Court squeezed the hearing in on an expedited briefing schedule, while recognizing that the issues are entitled to due consideration.

an extension of the injunction unless and until it has allowed the Motion to Vacate. There is no indication as to when the Land Court would rule on the Motion to Vacate, but it is not at all clear that it would be before January 31, 2022.

The Railroad Defendants, for their part, refused to agree or stipulate to not conduct further land clearing on the c. 61 Forestland in dispute after January 31, 2022. The Railroad Defendants, instead, took the opportunity to argue to the Land Court that this Court was wrong when it ruled that the Settlement Agreement is not effective without authorization at Town Meeting. Again, the Railroad Defendant made arguments which are inconsistent with this Court's rulings and which they noticeably do not raise through the appellate process.

This Court should not "defer" to the Land Court at this stage in the litigation as requested by the Railroad Defendants. Rather, this Court should coordinate with the Land Court and the Administrative Trial Judges to ensure that the appropriate court handle all related proceedings going forward. Given its immersion in this case for at least the last half of the year – including motions on the merits, for preliminary relief, and for interpretation of rulings of the Single Justice of the Massachusetts Appeals Court – the appropriate court is the Superior Court.

WHEREFORE, the Citizen Plaintiffs respectfully request that this Court extend the injunction against any and all land clearing activities in the c. 61 Forestland by the Railroad Defendants until either (1) the Land Court rules on the Town's Motion to Vacate, or (2) the Land Court Case is transferred to Superior Court, consolidated with this action and specially assigned to Judge Goodwin.

Respectfully submitted,

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

By their attorneys,

/s/ Harley C. Racer
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Dated: January 13, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above document was served upon the attorney of record for each other party by eFile on January 13, 2022.

/s/Harley C. Racer
Harley C. Racer

2003 WL 25332929 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.

Kenneth L DALY, Claire M Daly, Jerold E. Budinoff, Candida L. Budinoff, David B. Egan, Joan B Egan, Robert D. Ewing, Jennifer A. Ewing, Patrick A Maley, Kathryn M. Maley, James C. Richards, Susan M. Richards, Laura Lee Schellenberg, Eric K. Schwalm, Lynn A. Schwalm, Paul R. Trefry, and Lisa Trefry, Plaintiffs,

v.

Laura B. McCarthy, Martha J. Keighley and Dorothy M. Bartlett, Trustees of the CAS Trust, Lida L. Armstrong, Trustee of the Lida L. Armstrong Revocable Trust, Town of Sudbury, Kirsten D. Roopenian, Lawrence W. O'Brien and John C. Drobinski, Members of the Town of Sudbury Board of Selectmen, William J. Keller, Jr., Christopher Morley, Carmine L. Gentile, Maryanne D'Angelo and Elizabeth D Eggleston, Members of the Town of Sudbury Planning Board, Parker L. Coddington, Bridget Hanson, Richard O. Bell, Stephen M. Meyer, Judith H. Sheldon and Charles L. Zucker, Members of the Town of Sudbury Conservation Commission, Defendants.

No. 01-0027.
August 4, 2003.

Land Court Miscellaneous Case No. 268003

Decision on Cross-Motions for Summary Judgment

Leon J. Lombardi, Justice.

MIDDLESEX, ss.

Kenneth L. Daly, Claire M. Daly, Jerold E. Budinoff, Candida L. Budinoff, David B. Egan, Joan B. Egan, Robert D. Ewing, Jennifer A. Ewing, Patrick A. Maley, Kathryn M. Maley, James C. Richards, Susan M. Richards, Laura Lee Schellenberg, Eric K. Schwalm, Lynn A. Schwalm, Paul R. Trefry, and Lisa Trefry (collectively, plaintiffs) are abutters or near-abutters to land in Sudbury that was the subject of a previous Land Court action, *McCarthy v. Blacker*, Misc. No. 239823 (first action). In the first action, Laura B. McCarthy (McCarthy), as trustee of the CAS Trust (CAS Trust), sought a declaration that a certain Agricultural Preservation Restriction (Howe Estates APR), held by the Town of Sudbury (town) on land owned by CAS Trust, was invalid.[1] Pursuant to a settlement agreement (settlement agreement), the court (Green, J.) ordered judgment to enter on July 10, 2000 (2000 judgment), which invalidated the Howe Estates APR.[2]

Plaintiffs moved to intervene and to vacate the 2000 judgment (motion to intervene) on November 29, 2000. The court (Green, J) on January 2, 2001, denied the motion to intervene on the ground that, as non-holders of the Howe Estates APR, plaintiffs lacked standing (January 2001 order). On January 6, 2003, the Appeals Court affirmed the January 2001 order in a memorandum and order issued pursuant to Rule I 28 of the Rules of the Appeals Court. *See* *McCarthy v. Sudbury*, 57 Mass. App. Ct. 1101 (2003).

Simultaneously with bringing the motion to intervene, plaintiffs filed a verified complaint, Misc. Case No. 268003 (second action), containing three counts against McCarthy, Martha J. Keighley (Keighley), and Dorothy M. Bartlett (Bartlett), as trustees of CAS Trust; Lida L. Armstrong (Armstrong), as trustee of the Lida L. Armstrong Revocable Trust (Armstrong Trust); the town; and the members of the Sudbury Board of Selectmen (selectmen), the Sudbury Planning Board (planning board), and the Sudbury Conservation Commission (conservation commission) (collectively, defendants). Count I requests a

declaration vacating the 2000 judgment, Count II seeks a declaration that the Howe Estates APR is valid and enforceable, and Count III alleges plaintiffs, as more than ten taxpayers in the town, have the right to enforce the Howe Estates APR as a gift to the town pursuant to G. L. c. 185, § 1 (1) and G. L. c. 214, § 3 (10).

By unverified complaint filed on January 3,2002, in Middlesex Superior Court, Civil Action No. 01-0027, plaintiffs sought enforcement of a subdivision plan of land burdened by the Howe Estates APR under G. L. c. 41, § 81Y (third action).[3] The complaint in the third action names the same defendants as in the second action. Pursuant to Order of Assignment issued on November, 6, 2001, the Chief Justice for Administration and Management assigned Chief Justice Peter W. Kilborn or his designee to hear and determine the third action as a justice of the Superior Court Department. Subsequently, Chief Justice Kilborn designated me to preside over the second and third actions.

CAS Trust and the Armstrong Trust (collectively, Trust defendants) moved for summary judgment August 7, 2002 (summary judgment motion). In support of that motion, the Trust defendants filed Brief in Compliance with Land Court Rule X, a supporting memorandum, and an affidavit of McCarthy[4] On March 11, 2003, plaintiffs submitted a cross-motion for summary judgment (cross-motion), a memorandum in opposition to the summary judgment motion and in support of the cross-motion, and an affidavit of Sander A. Rikleen, one of plaintiffs' attorneys.[5] The parties argued the summary judgment motion and the cross-motion on March 18, 2003.

The following facts are not in dispute:

1 Plaintiffs are seventeen taxable inhabitants of Sudbury.

2. McCarthy, Keighley, and Bartlett are trustees of CAS Trust under a declaration of trust dated December 30, 1986, and recorded in the Middlesex Southern District Registry of Deeds in book 1812, at page 364.[6] The CAS Trust holds record title to the real property known and described as Parcel C (Parcel C) on a plan entitled "Definitive Plan of 'Howe Estates,' " drawn by Highland Surveyors, Inc. dated August 30, 1993, and recorded as plan No. 321 of 1994, in book 24441, at page 463 (Howe Estates plan). Parcel C consists of 1,150,919 square feet or approximately twenty-six and one-half acres as shown on the Howe Estates plan.

3. Armstrong serves as trustee of the Armstrong Trust under a declaration of trust dated October 15, 1999, and recorded in book 30932, at page 181. The Armstrong Trust is the record owner of the land shown as Parcel # 2 on the Howe Estates plan (Parcel 2). According to the plan, Parcel 2 measures 55,715 square feet or approximately one and three-quarters acres.

4. The town is a political subdivision of the Commonwealth of Massachusetts.

5. Kirsten D. Roopenian, Lawrence W. O'Brien, and John C. Drobinski are residents of the town and are the selectmen.

6. William J. Keller, Jr., Christopher Morley, Carmine L. Gentile, Maryanne D'Angelo, and Elizabeth D. Eggleston are residents of the town and serve as members of the planning board.

7. Parker L. Coddington, Bridget Hanson, Richard O. Bell, Stephen M. Meyer, Judith H. Sheldon, and Charles L. Zucker are residents of the town and constitute the membership of the conservation commission.

8. In a decision filed with the Sudbury Town Clerk (town clerk) on November 2, 1993 (first decision) the planning board approved, with various conditions, a plan entitled "Definitive Subdivision of Whitehall Estates Sudbury, Mass." drawn by Colburn Engineering, Inc. (Whitehall Estates plan). According to the Whitehall Estates plan, the Janet R. Howe Revocable Trust (Howe Trust) owned the land being subdivided into eleven lots and a private way named Codman Drive. The first decision is recorded at book 24440, at page 558.

9. In pertinent part, the following are conditions 5.c., 5.d., and 5.f. of the first decision:
c. A 20 foot wide access easement to the agricultural land south of this property (labeled [Howe Trust] on the Plan) shall be shown to provide access for the lessee of the agricultural field....

d. An agricultural restriction favoring the Town of Sudbury acting through its Conservation Commission or the Department

of Food and Agriculture, shall be placed on a portion of lots 6 and 7 ....

...

f. A notation shall be added to the plan stating 'This Plan approved and waivers granted subject to the endorsement by the Planning Board and filing with the Middlesex Registry of Deeds a Definitive Plan entitled Howe Estates, Subdivision of Land in Sudbury, Mass. prepared by Highland Land Surveyors and dated August 30, 1993..."

10. The Howe trust conveyed the eleven lots shown on the Whitehall Estates plan to J. Melone & Sons, Inc. (Melone) by a deed dated April 7, 1994, recorded in book 24440, at page 569.

11. By an instrument dated April 8, 1994, and recorded in book 24440, at page 573, Melone granted "an Agricultural Preservation Restriction in perpetuity, as hereinafter defined" (Whitehall APR) on portions of lots 6 and 7 on the Whitehall Estates plan (individually, lot 6 and lot 7). As granted by Melone, the Whitehall APR imposed four restrictions prohibiting certain activities on the affected areas of lots 6 and 7. The first enumerated restriction barred Melone and its successors in interest from "planting or installing of lawns or landscaping of any kind or nature" in those locations.

12. The planning board filed a decision with the town clerk on November 23, 1993 granting, with various conditions, the petition of the Howe Trust for approval of the Howe Estates plan (second decision) This decision was recorded in book 24519, at page 392. The Howe Estates plan depicts Parcel C abutting the southern boundary of Whitehall Estates and contiguous to the northwesterly boundary of Parcel 2.[7] A cul-de-sac, designated Peter's Way, provides access to Parcel 2 from Concord Road, a public way. Condition 5.c. of the second decision (condition 5.c.) provides as follows:

"A conservation or agricultural preservation restriction shall be placed on Parcel C and Parcel #2. Said restriction, favoring the Town of Sudbury acting through its Conservation Commission or another non-profit conservation organization, shall be submitted to the Planning Board for review and approval prior to endorsement of the [Howe Estates] Plan. This restriction shall prohibit: future subdivision of the parcels into additional building lots; removal of vegetation except for forestry uses; and erection of structures within the restriction area."

13 Under an instrument entitled "Agricultural Preservation Restriction" dated March 25, 1994 (Howe APR instrument), the trustees of the Howe Trust (Howe trustees) granted to the town, acting through the conservation commission, the Howe Estates APR "in perpetuity" on Parcel C and Parcel 2. The terms of the Howe Estates APR prohibited the following activities from occurring on Parcel C and Parcel 2:
"a. No construction or placing of buildings except for existing structures and those used for agricultural purposes[;]

b. No excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to adversely effect [sic] the land's overall future agricultural potential;

c. No other acts or uses detrimental to such retention of the land for agricultural use."

The last two paragraphs of the Howe APR instrument are as follows:
"The foregoing restriction is intended to conform to General Laws Chapter 184 Section 32-33 and is intended to maintain said parcels predominantly in their agricultural farming or forest use. The restriction shall be administered by the Conservation Commission of said town established under General Laws Chapter 40, Section 8.[8]

The grant of this restriction is a gift and therefore no deed and [sic] stamps are required."

In addition to the signatures of the Howe trustees, the Howe APR instrument contained signatures of the selectmen and members of the conservation commission certifying that they "approve[d] the receipt of the foregoing deed." The commissioner of the Massachusetts Department of Food and Agriculture (agriculture commissioner) did not approve the Howe Estates APR.

14. Subject to the Whitehall APR, James C. Richards and Susan M. Richards acquired title to lot 7 pursuant to a deed dated April 19, 1994, recorded in book 24467, at page 551.

15 As evidenced by a deed recorded in book 24523, at page 404, Kenneth L. Daly and Claire M. Daly purchased lot 5 on the Whitehall Estates plan on May 6, 1994.

16. According to the deed recorded in book 24615, at page 912 (Budinoff deed), Jerold E. Budinoff and Candida L. Budinoff on June 13, 1994, acquired title to lot 6.[9]

17. The Howe trustees sold Parcel 2 and Parcel C to CAS Trust as evidenced by deeds dated September 29, 1995, and recorded in book 25762, at pages 518 and 524, respectively. The stated consideration for Parcel 2 was $200,000, and the consideration for Parcel C was $50,000.

18. CAS Trust sold Parcel 2 to Michael M. Hoffman and Ruby A. Hoffman for the sum of $200,000 according to the deed recorded on November 26, 1996, in book 26857, at page 585.[10]

19. By mesne conveyances, the Armstrong Trust acquired title to Parcel 2 as evidenced by the deed dated October 26, 1999, and recorded in book 30932, at page 190.

20. At the Adjourned Annual Town Meeting held on April 22, 1996, the voters defeated Warrant Article 20 that would have authorized the selectmen and the conservation commission to release the Howe Estates APR.

21. CAS Trust commenced the first action on June 27, 1997, challenging the validity of the Howe Estates APR.

22. On July 10, 2000, judgment entered in the first action based upon the settlement agreement of the parties to that litigation.

There are no disputes of material fact in the instant action, rather the issue to decide is one of law Summary judgment is thus appropriate in these proceedings. *See Ng Bros. Constr, Inc v Cranney,* 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56 (c).

In support of the summary judgment motion, the Trust defendants raise a number of arguments. I will first discuss those arguments most relevant to the outstanding issues. For reasons that will be explained below, other arguments of the Trust defendants have little bearing on the outcome of this decision.

I. Standing

It is undisputed that the Howe trustees granted the Howe Estates APR to "the Town of Sudbury acting through its Conservation Commission." Thus, the Trust defendants maintain that only the town, not plaintiffs, have standing to enforce that APR. I agree that plaintiffs hold no enforceable interest in the Howe Estates APR. *See Prime v Zoning Bd. of Appeals of Norwell,* 42 Mass. App. Ct. 796, 803 (1997) (affirming the ruling of the trial judge that abutters have no standing to enforce APR restrictions).[11]

While they have no standing to enforce the terms of the APR directly, plaintiffs base their standing on the following two statutes. The fourth paragraph of G. L. c. 41, § 81Y, provides as follows:
"The superior court for the county in which the land affected by any of the provisions of the subdivision control law lies and the land court shall have jurisdiction in equity on petition of the planning board of a city or town, or of ten taxable inhabitants thereof, to review any action of any municipal board or officer of such city or town in disregard of the provisions of this section and to annul and enjoin such action, to enjoin the erection of a building in violation of this section, and otherwise to enforce the provisions of the subdivision control law and any rules or regulations lawfully adopted and conditions on the approval of a plan lawfully imposed thereunder, and may restrain by injunction violations thereof or make such decrees as justice and equity may require. No proceeding under this paragraph shall be instituted more than one year after the act or

failure to act upon which such petition is based."

Section 1 (1) of G. L. c 185 confers on the land court original concurrent jurisdiction with the supreme judicial court and the superior court as to actions brought pursuant to G. L. c. 214, § 3 (10), "with leave of court, by ten taxpayers to enforce the purpose or purposes of any gift or conveyance which has been ... made to and accepted by any... town ... for a specific purpose or purposes in trust or otherwise ...." I find that plaintiffs have satisfied the prerequisites of each of the above statutes.

In their memorandum filed in support of the summary judgment motion, the Trust defendants argue that they are entitled to summary judgment on Count III of the second action "because [plaintiffs] have never received leave of the Court to file their claims under G. L. c. 214, § 3 (10). It is undisputed that [plaintiffs] have neither requested nor received permission of the Court to advance their claims under G. L. c. 214, § 3 (10). Such blatant disregard for the statutory prerequisites of G. L. c. 214, § 3 (10) warrants judgment as a matter of law on Count III ...."

Simultaneously with commencing the second action on November 29, 2000, plaintiffs filed Motion for Leave to Pursue Claim Under G. L. c. 214, § 3 (10) (motion for leave). On January 19,2001, the court (Green, J.) allowed the motion for leave after oral argument and after the Trust defendants submitted an eight page opposition to that motion.

Where the Trust defendants actively opposed the motion for leave, this court cannot discern any credible basis for the Trust defendants now insisting plaintiffs failed to request or receive such leave. If claiming plaintiffs had to obtain leave prior to filing the complaint, the Trust defendants have failed to articulate such an argument. Furthermore, I am unaware of any authority standing for the proposition that pre-filing approval is required under G. L. c. 214, § 3 (10).

Judgment in the first action entered July 10, 2000. Plaintiffs commenced the third action on January 3, 2001, which satisfied the one year limitation period of G. L. c. 41, § 81Y.

II. Invalidity of the APR; Gift to Town; Planning Board Condition

The Trust defendants argue that the Howe Estates APR was "invalid on its face as it was never approved by the Commissioner of Food and Agriculture" as required by G. L. c. 184, § 32.[12] The first sentence of the penultimate paragraph of G. L. c. 184, § 32, however, provides that "[t]his section shall not be construed to imply that any restriction, easement, covenant or condition which does not have the benefit of this section shall, on account of any provisions hereof, be unenforceable." More to the point, the invalidity argument ignores the jurisdictional basis for the third count in the second action. The Howe APR instrument states that the "grant of this restriction is a gift and therefore no deed and [sic] stamps are required." Therefore, I find and rule that plaintiffs may enforce its "purpose or purposes" pursuant to G. L. c. 214, § 3 (10). Those purposes include "maintain[ing] said parcels predominantly in their agricultural farming or forest use" and preventing "construction or placing of buildings."

Additionally, plaintiffs contend in the third action that they, as ten taxpayers, have the right under G. L. c. 41, § 81Y, to enforce conditions lawfully imposed in the second decision approving the Howe Estates plan. I agree. Condition 5.c. states clearly that "a conservation or agricultural preservation restriction shall be placed on Parcel C and Parcel #2," and that condition is an integral part of the second decision. The record is devoid of any evidence that the planning board has taken action under G. L. c. 41, § 81W, to modify, amend, or rescind condition 5.c., and I do not find that the settlement agreement in the first action had such an effect or otherwise relieved the the Trust defendants from the duty to comply with the condition.

III. Unclean Hands

The Trust defendants contend that "Neighbor Richards is in blatant violation of the Whitehall APR restricting the use of his property." According to the Trust defendants, Mr. Richards "manicures portions of [lot 7] that the Whitehall APR specifically prohibits from use as lawn." On that basis, the Trust defendants argue that all plaintiffs should be precluded from receiving equitable relief due to the unclean hands of Mr. Richards.

Even if Mr. Richards is in violation of the Whitehall APR (a ruling I do not need to make), the right to enforce the Whitehall APR lies with the town, as noted previously by the Trust defendants. Furthermore, the Trust defendants have offered no authority for their suggestion that the unclean hands of one plaintiff soil the hands of all other plaintiffs.[11]

IV. Condition of the Plan and the Purpose of the APR were Met

According to the Trust defendants, condition 5.c. was satisfied when the Howe APR instrument "was placed in the Town's hands and approved by the Town." Additionally, the Trust defendants maintain that "the purpose of the conveyance to the Town has been met in that the land has been used predominantly for agricultural purposes for over eight years." The Trust defendants argue that the planning board did not require the Howe Estates APR to be valid for any specific length of time, nor that it be granted in perpetuity. The planning board, according to the Trust defendants, did not require any continuing obligation after the initial tender of the Howe Estates APR to the town.

The Trust defendants are correct in stating that the second decision does not explicitly require the Howe Estates APR to be permanent. The Howe APR instrument recites, however, that it is "intended to conform to General Laws Chapter 184 Section 32-33," and that section incorporates the definition of G. L. c. 184, § 31, par. 3, of an APR as being effective "in perpetuity except as released under the provisions of section thirty-two." The Howe APR instrument also states that the Howe trustees grant the APR to the town "in perpetuity...." The Howe Trust tendered the Howe APR instrument to the town, and the town accepted its terms - including its perpetual duration - as a fulfillment of condition 5.c. Absent the planning board acting pursuant to G. L. c. 41, § 81W, condition 5. c. remains in full force and effect.

V. Authority of Town to Settle First Action

Based upon the rulings above, the argument of the Trust defendants that the town had authority to settle the first action is irrelevant. Independent of the first action, plaintiffs have standing to prosecute the second and third actions.

VI. Conclusion

Based upon the foregoing, I deny the summary judgment motion and grant the cross-motion. Within thirty days from the date hereof, the Trust defendants, the selectmen, and the conservation commission shall execute an Agricultural Preservation Restriction (new APR) identical in form to the Howe APR instrument dated March 25, 1994, and recorded in book 24441, at page 597, except for substituting the Trust defendants as grantors in place of the Howe Trust. Once the Trust defendants, the selectmen, and the conservation commission have executed the new APR, the town shall tender the new APR to the agriculture commissioner for approval and signature. Upon any party's receipt of the new APR bearing the agriculture commissioner's signature of approval, such party shall notify the other parties of the receipt and shall undertake the responsibility to deliver and record the new APR at the Middlesex Southern District Registry of Deeds within one week of receipt and to file with the land court a certified copy of the new APR as recorded.

Judgment to enter accordingly.

Leon J. Lombardi Justice

Dated: August 4, 2003

Footnotes

1 The complaint in the first action named McCarthy as the only trustee of CAS Trust

2 The 2000 judgment recited that the selectmen, after consultation with and approval by the planning board and the conservation commission, agreed to the entry of a judgment declaring the Howe Estates APR invalid "in exchange for certain conveyances and other undertakings" by McCarthy.

3 The complaint in the third action, brought pursuant to G. L. c. 41, § 81Y, had been filed in Superior Court as then required by that statute. Pursuant to St. 2002, c. 393, § 5, effective January 1, 2003, the Land Court now has concurrent jurisdiction over such actions.

4 Although the summary judgment motion was filed in the name of CAS Trust alone, the Trust defendants submitted other summary judgment materials. Consequently, I am treating the summary judgment motion to have been submitted by the Trust defendants jointly.

5 Pursuant to G. L. c. 41, § 8 BB, plaintiffs commenced an action on August 7, 2002, Misc. No. 282858, appealing another decision of the planning board approving, with conditions, the subdivision of Peter's Way Extension. Plaintiffs allege this decision implicates the land subject to Howe Estates APR.

6 Unless otherwise noted, all recording references are to this particular Registry of Deeds.

7 Parcel C on the Howe Estates plan shares a common boundary with lots 6 and 7 and a portion of lot 5 on the Whitehall Estates plan.

8 Whereas G. L. c. 40, § 8, pertains to the enforcement of laws relating to civil service, the correct statutory reference appears to be G. L. c. 40, § 8C.

9 While making reference to planning board covenants, restrictions, and easements of record, the Budinoff deed made no explicit reference to the Whitehall APR.

10 The deed to Michael M. Hoffman and Ruby A. Hoffman bears an execution date of January 2, 1996.

11 Having ruled that plaintiffs cannot enforce the Howe Estates *APR per se*, I need not discuss the additional argument of the Trust defendants based upon res judicata.

12 Similarly, the agriculture commissioner never approved the Whitehall APR.

13 In the context of zoning, jurisdiction attaches upon a showing of standing by at least one plaintiff *See, Cohen v. Zoning Bd. of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 620 (1993); *Murray v Board of Appeals of Barnstable*, 22 Mass. App. Ct. 473, 476 n.7 (1986).

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From:	Jennifer E Noonan
To:	Don Keavany; Peter F. Durning
Cc:	Andrew DiCenzo; Peter M. Vetere; Harley Racer; David E. Lurie
Subject:	RE: Town of Hopedale v. Jon Delli Priscoli, Trustee of the One Hundred Forty Realty Trust, Land Court Civ. Action No. 20 MISC 000467 [DRR]
Date:	Thursday, January 13, 2022 9:45:44 AM

Good morning, counsel.

Please be advised that the following language was added to our docket:

January 12, 2022. "Status conference held via videoconference. Attorneys Peter Durning and Peter Vetere appeared on behalf of the plaintiff and Attorneys Andrew DiCenzo and Donald Keavany appeared on behalf of the defendants. Attorneys David Lurie and Harley Racer also attended, as counsel for the citizens of Hopedale in the related Superior Court case. Court notes that a Motion to Vacate Stipulation of Dismissal was filed December 30, 2021, with no opposition filed, but that this status conference pertains only to scheduling issues and not to the merits of the motion. Counsel provided some background on the related Superior Court case (Case No. 2185CV00238), particularly that there is an injunction in place prohibiting the railroad from clearing trees or performing site work, but the injunction is set to expire on January 31, 2022. Attorney Durning advised that counsel for the Town has filed an emergency motion for an extension of the injunction, which is currently pending in Superior Court. Plaintiff's counsel to notify the court as to any decision on that emergency motion. Court encouraged the parties to attempt to reach a new settlement, given the time, expense, and risk involved in litigating this matter in the event that the motion to vacate is allowed. In light of the request by the parties that the motion to vacate be resolved expeditiously, and if possible before the January 31, 2022 expiration of the injunction, Defendants to file any oppositions to the motion to vacate by January 18, 2022, with hearing scheduled for January 24, 2022 at 2:00 P.M." (Rubin, J.)

Thank you.

Jennifer Noonan
Sessions Clerk to the Hon. Diane R. Rubin
Land Court
3 Pemberton Square
Room 507
Boston, MA 02108
Phone: 617-788-7513

From: Don Keavany <dkeavany@chwmlaw.com>
Sent: Wednesday, January 12, 2022 1:23 PM
To: Peter F. Durning <pdurning@mackieshea.com>; Jennifer E Noonan <jennifer.noonan@jud.state.ma.us>
Cc: Andrew DiCenzo <adicenzo@chwmlaw.com>; Peter M. Vetere <pvetere@mackieshea.com>
Subject: RE: Town of Hopedale v. Jon Delli Priscoli, Trustee of the One Hundred Forty Realty Trust, Land Court Civ. Action No. 20 MISC 000467 [DRR]

Defendants will connect at 215 as well. See you then. We shouldn't be more than 10-15m. And, thank you again for efforts to get the parties this status conference. It really is appreciated by both