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May 17, 2021

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BY ELECTRONIC MAIL (dlurie@luriefriedman.com)
AND FIRST CLASS MAIL

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Re: Elizabeth Reilly, Carol J. Hall, Donald Hall, Hillary Smith, David Smith, Megan Fleming, Stephanie A. Mccallum, Jason A. Beard, Amy Beard, Shannon W. Flemming, and Janice Doyle v. Town of Hopedale, Louis J. Arcudi, Iii, Brian R. Keyes, Grafton & Upton Railroad Company, Jon Delli Priscoli, Michale Milanoski, and One Hundred Forty Realty Trust
Worcester Superior Court C.A. No: 2185CV00238D

Dear Mr. Lurie:

In accordance with Rule 9A, enclosed herewith please find Response of Defendants Town of Hopedale and Hopedale Board of Selectmen to Plaintiffs' Motion for Judgment on the Pleadings and Cross-Motion of Town of Hopedale and Board of Selectmen for Judgment on the Pleadings and Memorandum of Defendants Town of Hopedale and Hopedale Board of Selectmen in Response to Plaintiffs' Motion for Judgment on the Pleadings and Cross-Motion for Judgment on the Pleadings, along with a Certificate of Service.

If you have any questions, or if you require further information, please do not hesitate to contact me.

Very truly yours,

Brian W. Riley

BWR/cqm
Enc.
cc: David C. Keavany, Jr., Esq.
764068/HOPD/0145

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
C.A. NO. 2185CV00238D

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

Plaintiffs,

v.

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

Defendants.

RESPONSE OF DEFENDANTS TOWN OF HOPEDALE AND HOPEDALE BOARD OF SELECTMEN TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION OF TOWN OF HOPEDALE AND BOARD OF SELECTMEN FOR JUDGMENT ON THE PLEADINGS

The Defendants, Town of Hopedale and Board of Selectmen of the Town of Hopedale, hereby submit their Response to Plaintiffs' Motion for Judgment on the Pleadings, and Defendants further submit their Cross-Motion for Judgment on the Pleadings in this litigation. The Defendants rely upon their Memorandum filed herewith in support of their Response and their Cross-Motion.

Defendants,
TOWN OF HOPEDALE, LOUIS J. ARCUDI AND BRIAN R. KEYES,

By their attorney,

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Dated: May 17, 2021
763987/HOPD/0145

RULE 9C CERTIFICATION

On May 4, 2021, I conferred with each counsel of record and made a good faith effort to resolve or narrow the issues addressed in this motion.

Brian W. Riley

Dated: May 17, 2021

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
C.A. NO. 2185CV00238D

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

Plaintiffs,

v.

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

Defendants.

MEMORANDUM OF DEFENDANTS TOWN OF HOPEDALE AND HOPEDALE BOARD OF SELECTMEN IN RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants Town of Hopedale and Louis J. Arcudi, III and Brian R. Keyes, named in their capacity as members of the elected Hopedale Board of Selectmen (hereinafter "Town" or "Board"), hereby submit their opposition to the Plaintiffs' motion for judgment on the pleadings, and further move for judgment on the pleadings in their own favor. On October 24, 2020, a Special Town Meeting authorized the Board to acquire certain parcels of real property totaling approximately 130 acres, and further authorized the Town Treasurer, subject to the Board's approval, to issue bonds in the amount of $1,175,000 to pay for these parcels. The 130 acres were forested parcels that had been taxed pursuant to General Laws Chapter 61, giving the Town a right of first refusal if the owner (defendant One Hundred Forty Realty Trust, or "Trust") intended to sell or change the use of the property. Town Meeting also authorized acquiring an

additional 25 acres by eminent domain, and appropriated $25,000 to fund that taking. After the Special Town Meeting, the Board initiated an action in Land Court to prevent the remaining Defendants in this action (hereinafter referred to generally as "the Railroad" or "Railroad Defendants") from taking any actions regarding the property that would impact the Town's right of first refusal.

After a Land Court hearing on November 23, 2020, during which the Court (Rubin, J.) expressed skepticism as to the Town's ultimate ability to acquire the 155 acres (owned by the Trust, and effectively by the Railroad Defendants as beneficial interest holders), the Court issued a mediation screening order. Following mediation sessions before retired Land Court Justice Lombardi (who also expressed doubts as to the Town's likelihood of success against the Railroad and encouraged a settlement), the parties entered into a settlement agreement with the Railroad (hereinafter "Settlement Agreement," attached to the Verified Complaint as Exhibit 19), in which the Town would acquire approximately 64 acres of the property the Special Town Meeting authorized for acquisition, as well as an additional 20 acre parcel (Parcel D on Exhibit 1 to the Settlement Agreement) that will require a new vote of Town Meeting to authorize acceptance. The essence of the Plaintiffs' complaint, and its Motion, is that it would violate Massachusetts law for the Board to acquire less than the original 155 acres, or to spend less than $1,175,000 to acquire the entire 130 acres of property. While the Plaintiffs may oppose the Settlement Agreement in principal, there are no facts to support that the Town is illegally intending to carry out the provisions of the Settlement Agreement or unlawfully exercising its legal authority. The Town submits that it is entitled to judgment on the pleadings in its favor, and that Plaintiffs' motion for judgment on the pleadings should be denied.

FACTS AS PLED IN THE COMPLAINT

The Town accepts the following facts as true for purposes of this motion only.

1. This case involves 155 acres of undeveloped and forested property at 364 West Street, owned by the One Hundred Forty Realty Trust, 130 acres of which have been classified and taxed as forestland pursuant to G.L. c.61. Complaint, ¶14. While unstated in the Complaint, this property is zoned as an Industrial District.
2. The remaining 25 acres are not subject to Chapter 61. Complaint, ¶15.
3. In June 2020, the Trustee of the One Hundred Forty Trust negotiated a purchase and sale agreement with the Railroad Defendants to sell the 155 acres to the Railroad. The Trustee later assigned the beneficial interest in the property to the Railroad. Complaint, ¶¶ 23, 34.
4. While the Trustee provided notice of the P&S agreement to the Town, a trigger to the Town's right of first refusal for the forestland, the Board objected to the notice as defective in that it included the 25 acres that were not subject to Chapter 61, but further asserted its right of first refusal based on the assignment of the beneficial interest in the 130 acres to the Railroad. Complaint, ¶41.
5. On October 24, 2020, a Special Town Meeting took two votes relevant to this litigation. The first, on Article 3 of the warrant, was to authorize the Board to acquire the 130 acres, and further to appropriate and issue bonds in the amount of $1,175,000 to pay for the property. Complaint, ¶44 and Exhibit 12 to Complaint. Notably, the vote did not contain any qualifier that the Board must acquire the entire 130 acres, nor did it seek to require the Board to expend all of the $1.175 million appropriation authorization.

6. The second vote, on Article 5 of the warrant, authorized the Board to acquire the 25-acre parcel by eminent domain, pursuant to G.L. c.79, and appropriated $25,000 to pay for it. Complaint, ¶48 and Exhibit 12 to Complaint. Notably, the vote contained no qualifier that the Board must acquire all 25 acres.
7. As demonstrated by the Board's efforts to exercise the Town's right of first refusal and record an Order of Taking under G.L. c. 79, the Board took all steps to attempt to acquire title to the 155 acres as authorized by the Special Town Meeting. Complaint, ¶¶ 49, 51-55.
8. After the Town Meeting, for the purpose of seeking an order stopping the Railroad from clearing the forestland and to confirm its right of first refusal, the Town commenced an action in Land Court, Town of Hopedale v. Jon Delli Priscoli, Trustee of the One Hundred Forty Realty Trust, et al., 20 MISC 000467.
9. The Railroad also filed a petition with the Surface Transportation Board (STB), a federal agency that regulates matters involving railroads, particularly freight rail. The Railroad sought a declaratory order from the STB that federal law preempts the Town's authority to acquire any of the subject property, under either G.L. c.61 or G.L. c.79. Complaint, ¶56.
10. Following a November 23, 2020 hearing in Land Court on the Town's motion for preliminary injunction, which the Court denied, Judge Rubin issued an order referring the case to mediation. While Judge Rubin's decision denying the preliminary injunction does not so state, counsel for the Town understood the Court to be expressing that mediation was advisable as the Town's claims to the 155 acres may not be successful.

11. As a result of the mediation, during which Judge Lombardi also encouraged a settlement, the Town and the Railroad reached an agreement to resolve both the Land Court litigation and the STB matter. The Settlement Agreement, attached to the Complaint as Exhibit 19, speaks for itself, but in summary, the Town will acquire Parcel A (approximately 64 acres), all of which was included in the Special Town Meeting's votes on Articles 3 and 5 of the October 24, 2020 warrant. The Railroad also agreed to donate Parcel D, approximately 20 acres, but since this was not part of the Special Town Meeting vote, a vote of Town Meeting is required in accordance with G.L. c.40, §14 to accept Parcel D.

ARGUMENT

A. Plaintiffs Misconstrue the Appeals Court Injunctive Order

The Town submits that throughout their Memorandum in support of its Motion for Judgment on the Pleadings, the Plaintiffs overstate both the breadth and intent of the Appeals Court injunctive order issued by Justice Meade, presenting it as strongly supporting all three Counts of the Complaint. In fact, however, the Order found only that the Plaintiffs had "shown a likelihood of success on the merits" as to whether the Special Town Meeting vote on Article 3 authorized acquisition of the 130 acres of Chapter 61 property, or whether it only appropriated funds for the 130-acre parcel but did not authorize acquisition.[1] That is the extent of the findings, and Justice Meade was careful to qualify the limited nature of his order:

> *For these reasons, I find that the plaintiffs have demonstrated some likelihood of success in establishing that the town's purchase of the land, pursuant to the settlement agreement, would be a statutory violation. To be clear, I am not deciding this case on the merits; only that the plaintiffs have demonstrated some chance of success on their claim.*

In addition, the Plaintiffs argue that because the Town took steps to exercise the right of first refusal and take title to the Chapter 61 parcel, this is irrevocable and the Board has no option but

[1] The Town respectfully submits that the Appeals Court Order is incorrect on this issue, see *infra*.

to take title to all 130 acres and, significantly, that no new Town Meeting vote to authorize acquiring the 64 acre parcel under the terms of the Settlement Agreement would be legal or effective. In fact, Justice Meade explicitly rejected that argument even in his narrow ruling: "Nothing in this memorandum and order should be construed as preventing the town from conducting a town vote authorizing the select board to purchase any or all of the land at issue, *which would render the transaction lawful.*" (emphasis added). It is clear why the Plaintiffs are arguing so strenuously that the only conceivable outcome is the Town acquiring all 155 acres - because if there is a new Town Meeting vote pursuant to the Settlement Agreement, all of the Plaintiffs' claims in this litigation become moot, and Justice Meade took the extra step to make his view of the case clear to the parties.

B. The Town Meeting Vote on Article 3 Authorized Acquisition of the Chapter 61 Property

After the Superior Court denied their request for a preliminary injunction, the Plaintiffs sought review by a single justice in the Appeals Court, arguing (among other issues) that the October 24, 2020 Special Town Meeting vote on Article 3 did not in fact authorize the Board to acquire the 130 acre parcel pursuant to G.L. c.40, §14. Justice Meade agreed with this position, but did not decide whether the vote authorized acquisition pursuant to Chapter 61 either.[2] The Town respectfully submits that the Order is incorrect on this point. Article 3 stated in relevant part:

> To see if the Town will vote to acquire, by purchase or eminent domain, certain property, containing 130.18 acres, more or less , located at 364 West Street… and in order to fund said acquisition, raise and appropriate, transfer from available funds, or borrow pursuant to G.L. c. 44, §7, or any other enabling authority, a sum of money in the amount of One

[2] Justice Means noted that neither party provided appellate decisions regarding whether G.L. c.61,§8 provides full authority for a town acquiring real property or whether such authority resides only in G.L. c.40, §14. The reason for this is plain – Chapter 61 is silent as to authority take title by deed or to appropriate funding to do so because that authority is found exclusively in G.L c.40, §14, and placing an article pursuant to G.L c.40, §14 to seek authority and funding to acquire virtually any real property has been a legal requirement for nearly a century.

> Million One Hundred and Seventy-Five Thousand Dollars ($1,175,000.00)… said property being acquired pursuant to a right of first refusal in G.L. c. 61, §8…

When the motion on Article 3 was made, it stated in relevant part "I move that the Town vote to appropriate the sum of [$1,175,000] to pay costs of acquiring certain property, consisting of 130.18 acres, more or less, located at 364 West Street,…". (emphasis added). The Town submits that the difference between the article and the motion is one of form and not substance. The article sought an appropriation in order to acquire certain identified property, and so did the motion. Both the Plaintiffs and the Single Justice conclude that the reason for the difference was that the 400 voters at Town Meeting, who unanimously approved the motion, were aware of the legal subtleties of G.L. c.61, §8 and that the Board exercising an option is the same thing as acquiring title by deed to real property (it plainly is not), and therefore only an appropriation was required to acquire title. This argument has no legal or practical support. There is realistically only one presumption that should be made for what the 400 voters thought they were doing on October 24, 2020 – they were being asked (in Article 3) to vote to acquire the 130 acres and to appropriate $1.175 million to pay for it, and they voted to do so.

C. The Board Has Legal Authority to Acquire Less than 155 Acres

While the Plaintiffs' include numerous facts and allegations that are not relevant to or determinative of the legal issues and outcome of this case, the Complaint may be summarized as two primary claims:

a) Since Town Meeting authorized the Board to acquire approximately 155 acres, 130 acres of which has been subject to G.L. c.61, the Board cannot lawfully acquire a lesser amount of property; and

b) The Board lacked authority to waive the Chapter 61 right of first refusal in the Settlement Agreement. This claim fails to allege a violation of G.L. c.40, §53, but the Board shall address it below.

The Board submits that, prior to the Land Court's directive to participate in mediation, it fully intended to acquire all 155 acres, and it exercised (or attempted to exercise) the authority granted by the Town Meeting votes to do so. During the course of the Land Court proceedings and mediation, however, the Board determined that pursuing its Land Court case to trial, as well as having to defend the Town's position before the Surface Transportation Board, would not only be prohibitively expensive but could well result in the Town receiving **none** of the 155 acres. The Board determined, therefore, that it would be substantially more in the public interest to resolve all litigation with the Railroad via the Settlement Agreement.

(1) The Board has Legal Authority to Acquire Less than 155 Acres.

The Plaintiffs allege that because the Special Town Meeting vote had such clear support to acquire all 155 acres at issue, the Board lacked legal authority to approve the Settlement Agreement and acquire approximately 85 acres – 40 acres that was subject to Chapter 61, 25 acres that was to be acquired by eminent domain, and another 20 acres (Parcel D on the plan attached to the Settlement Agreement as Exhibit 1) that was not involved in the Special Town Meeting votes. Notwithstanding the Complaint's allegations, however, there is no legal support for this allegation and the Settlement Agreement's terms do not violate G.L. c.40, §53.

In order for a town to acquire real property, there must be a favorable vote of Town Meeting pursuant to G.L. c.40, §14 to do so – a majority vote is sufficient if there are no funds being spent, but a two-thirds vote if there is an appropriation (the Special Town Meeting vote was recorded as unanimous). *See* Harris v. Wayland, 3932 Mass. 237, 238 and n.3 (1984). As

stated expressly in the Settlement Agreement, the Town may not accept the donation of the 20 acre "Parcel D" until there is a further Town Meeting vote to authorize it. As for the other approximately 65 acres, however, these parcels were already authorized by Town Meeting vote for acquisition, and there were no limiting conditions in such votes to restrict how the Board could exercise its authority. Massachusetts case law clearly establishes that while a Board of Selectmen cannot acquire property that was not authorized by Town Meeting, Town Meeting cannot compel the Board to complete such acquisition and the Board may legally acquire less property than authorized. See Russell v. Town of Canton, 361 Mass. 727 (1972).[3]

(2) The Board's Waiver of the Right of First Refusal was Valid.

As part of the Settlement Agreement, the Board agreed to waive its right to further exercise any right of first refusal the Town has pursuant to G.L. 61, §8. The Plaintiffs argue extensively that the Board has no authority to do so and that it was required to seek a further vote of Town Meeting, claiming that "those rights cannot be waived as a matter of law and there was no approval by Town Meeting to not exercise or waive those rights." Complaint, ¶121. The Plaintiffs have consistently misrepresented or misunderstood how Chapter 61, §8 works, as well as the fact that exercising a right of first refusal (or declining it) is an executive function that only a Board of Selectmen can accomplish. Chapter 61, §8 details the procedures when an owner of forestland being taxed under the statute intends to alter the use of the property (by the owner or a prospective new owner). This includes a notice and copy of the purchase and sale agreement submitted to the Town, triggering a right of first refusal for the Town that must be exercised within 120 days or the right is lost. The Land Court proceedings included the issue of whether

[3] In denying Plaintiffs' motion for preliminary injunction, the Superior Court (Frison, J.) found that Russell governed and demonstrated the lack of a likelihood of success on the merits of the Complaint. The Appeals Court (Meade, J.) found that "while Russell may guide in this case, it is not controlling."

the original notice to the Town was valid; however, as part of the settlement, the Board agreed not to seek to enforce the right of first refusal. [4]

The actual action that a municipality must take to exercise a right of first refusal is stated in §8 as follows:

> **This option may be exercised only after a public hearing followed by written notice signed by the mayor or board of selectmen, mailed to the landowner by certified mail at such address as may be specified in the notice of intent. Notice of the public hearing shall be given in accordance with [the Open Meeting Law].**
>
> **The notice of exercise shall also be recorded at the registry of deeds and shall contain the name of the record owner of the land and description of the premises adequate for identification of it.**

It is notable, of course, that neither these paragraphs, nor anywhere in §8, is there any reference to a vote of Town Meeting. This is because such exercise is, again, an executive action whose sole authority resides with the Board of Selectmen. If, for example, a Board of Selectmen receives a valid §8 notice for conversion of forestland, it may determine on its own that the Town should not acquire the property – it may either send written notice to the owner waiving the right of first refusal or simply allow the 120 days to run without acting. There is nothing Town Meeting or anyone else can do to exercise the right of first refusal in such a case. Before the Board can actually acquire property after exercising such right, however, it must obtain a vote of Town Meeting to authorize acquisition and appropriate funds – such vote is absolutely and solely governed by G.L. c.40, §14. But the right of first refusal itself is exclusive to the Board. As such, and so the Board may waive its authority to exercise such right and acquire property, even after initially voting to exercise it, and there is no case law precedent stating otherwise. Moreover, there is no reason that a Board of Selectmen cannot decide not to complete

[4] In its November 23, 2020 order, the Land Court (Rubin, J.) expressed significant doubt that the original notice from the Trust was effective, and therefore whether the 120 day exercise period ever began is also uncertain. Exhibit 16 to Verified Complaint.

a Chapter 61 (or eminent domain) acquisition at any point prior to actually paying for it and taking the deed if it determines that to be in the public interest.

The Plaintiffs argue that Chapter 61 contains no authority for a Board to waive the exercise of the right of first refusal, and therefore (1) the Settlement Agreement is illegal and (2) the Board is compelled to purchase the 130 acres. This is contrary to Massachusetts case law. The authority relied upon by Plaintiffs to claim that the Board cannot waive exercising the right of first refusal is inapposite, and actually states that a municipality cannot be held to have waived its right against its will. *See* Smyly v. Town of Royalston, Land Court, 2007 WL 2875942:

> In the instant case, this court disagrees with Plaintiff's argument that the Town waived its right to insist on statutory compliance upon its exercise of the option. Courts have consistently held that where the language of a statute sets forth strict, unambiguous procedural requirements, the court will not construe the statute in a manner for which no provision was made. See *Town of Billerica,* 66 Mass.App.Ct. at 668. Additionally, this court previously held with regard to G.L. c. 61A, which sets forth notice requirements identical to those in G.L. c. 61 § 8, that the statute does not provide for waiver of requirements, based on the reasoning that exceptions not provided for should not be read into the statute. *Id.* This court will not construe the statute to allow for waiver as this would be wholly inconsistent with the express language provided by the legislature and the prior holdings of this court. (*emphasis added*)

This holding is unrelated to a Board of Selectmen waiving its right of first refusal and/or to acquire Chapter land of its own volition. Moreover, neither Town Meeting nor ten taxpayers can compel a Board of Selectmen to complete a real property acquisition if the Board determines it is not in the Town's best interest. *See* Russell v. Canton, 361 Mass. 727, 730-32 (1972):

> One argument made by the plaintiffs is that the town vote expressly directed the board to take all of their land, and that the board had no discretion to take less than all of it. This argument is without merit. The selectmen are public officers whose powers and duties with reference to eminent domain are fixed by statute. It is questionable whether a town meeting vote can operate to direct or command them in the discharge of their duties.... We hold that the town could authorize the selectmen to take real estate by eminent domain, but that it could not direct or command them to do so. Although G.L.c. 40, § 14, requires that before land is taken by eminent domain the taking be authorized by a vote of the town, it vests the power to make the taking in the selectmen of the town. There is nothing in § 14 which makes such an authorization binding on the selectmen, or which

> prevents them from exercising their discretion and sound judgment in deciding whether to make a taking pursuant to the authorization. If the selectmen, being authorized by the town to make a taking, do not make it, the decision is not judicially reviewable as to its wisdom.

While Russell concerns a Town Meeting vote to acquire property by eminent domain, this principal applies equally to the right of first refusal in Chapter 61, §8. If the Board determines that circumstances mitigate against completing an acquisition of real property, neither Town Meeting nor a court may compel it to do otherwise. *See* Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508, 512 (1990):

> The role of the town manager or board of selectmen in the collective bargaining process is an essentially executive function mandated by statute. We have held that, when a board of selectmen is acting in furtherance of a statutory duty, the town meeting may not command or control the board in the exercise of that duty. *See* Russell v. Canton, 361 Mass. 727 (1972); Breault v. Auburn, 303 Mass. 424 (1939); Lead Lined Iron Pipe Co. v. Wakefield, 223 Mass. 485 (1916). These decisions reflect an application of the more general principle that "[a] municipality can exercise no direction or control over one whose duties have been defined by the Legislature." Breault v. Auburn, *supra* at 428, *quoting* Daddario v. Pittsfield, 301 Mass. 552, 558 (1938).

(3) It Is Not Unlawful For The Board To Agree To Expend $587,500.

Similar to the claims addressed above, the Plaintiffs allege that it is unlawful for the Board to agree to expend $587,000 for the 64 acres it is to receive by purchase pursuant to the Settlement Agreement, because Town Meeting appropriated $1,175,000 for the entire 130 acres and the Board may not agree to spend less. The Town first submits that the Plaintiffs' reliance in the Verified Complaint on the difference between how much the Town is paying per acre under the Settlement Agreement versus what the Railroad paid is a red herring; the two amounts were not negotiated on a per acre price and involve different purposes for acquisition, and the Town Meeting appropriation vote was a bottom line figure and not per acre. Moreover, the Settlement Agreement proposes the Town acquiring 20 acres that were never a part of the Special Town Meeting votes or the Land Court. Most importantly, however, whenever Town Meeting

appropriates funds – whether to acquire property, contract for services, or fund annual department operating budgets – the Town is not obligated to spend all of the appropriation, but it spends what is needed. Regardless of how the Plaintiffs feel about the Settlement Agreement terms, it is clearly not unlawful for the Board to authorize spending $587,000 of the amount appropriated by Town Meeting for a portion of the property that Town Meeting authorized the Board to acquire, nor to issue bonds that were also authorized by Town Meeting for the purpose.

D. Plaintiffs Lack Standing to Challenge the Land Court Settlement Agreement

The Town supports and agrees with the Motion for Judgment on the Pleadings being filed by the Trust and Railroad Defendants in this matter. The Town further submits that while the basis for this litigation pursuant to G.L. c.40, §53 is at least properly before this Court, the Plaintiffs lack both standing or credible arguments to challenge the validity or legality of the Land Court Settlement Agreement itself (Exhibit 19 to Verified Complaint). The Board filed the Land Court action to assert and confirm its right of first refusal pursuant to G.L. c.61, §8 (which the Railroad Defendants and the One Hundred Forty Realty Trust challenged), and to prevent the Railroad Defendants from performing any clearing of the subject property. As detailed *supra*, the parties had a hearing and two sessions of court-ordered mediation before Land Court justices. During this process, based on input from its legal counsel and Judge Lombardi, the Board ultimately concluded that its best chance of securing at least some of this important property was to reach a settlement with the One Forty Realty Trust and Railroad Defendants. This was a duly litigated lawsuit between the only parties in interest, it was resolved via a settlement agreement and joint stipulation of dismissal with prejudice, and both parties gave up interests that they claimed for their own in resolving the case (the Plaintiffs' claim that the Agreement is a void contract because the Town received no consideration is baseless).

As such, the Plaintiffs' attempt to collaterally attack the Settlement Agreement is not permissible and these claims in Counts I and II cannot prevail. See Barrington v. Dyer, 95 Mass. App. Ct. 1116 (2019) (unpublished):

> We affirm the judgment of the Superior Court dismissing the plaintiff's complaint for fraud. ***As the judge correctly recognized, the plaintiff's complaint constitutes an impermissible collateral attack on the judgment of the Probate and Family Court, entered upon the stipulation of dismissal, with prejudice, of the defendant's decedent's complaint for partition of certain real property. See Harker v. Holyoke, 390 Mass. 555, 558, 457 N.E.2d 1115 (1983); Fishman v. Alberts, 321 Mass. 280, 282, 72 N.E.2d 513 (1947). The plaintiff's contention that the stipulation of dismissal is invalid (because it was procured by fraud) does not require a different result; any such contention must be established by means of a motion in the Probate and Family Court for relief from the judgment entered on the stipulation, and not by a separate action in the Superior Court. See Mass. R. Civ. P. 60 (b) (3), 365 Mass. 828 (1974).*** Nor does the plaintiff's invocation of the recently enacted Uniform Trust Code affect the analysis; G. L. c. 203E, § 111, largely codified prior law, and in any event it does not authorize a collateral attack on a judgment of the Probate and Family Court based on a claim that the agreement on which it was based is invalid.

The Plaintiffs are unhappy with the results of the Land Court litigation and the terms of the Settlement Agreement. This does not, however, give them standing to "undo" the Agreement, which is the heart of what the Verified Complaint hopes to achieve. Even if, in order to carry out the Agreement, a new Town Meeting vote is required – which the Town does not concede or agree with – the Settlement Agreement itself is valid and does not exceed the Board's statutory executive authority, and the Plaintiffs' attempts to pursue their claims as if the Land Court proceedings themselves were illegitimate illustrates the futility of their arguments:

> By attempting to relitigate in the Superior Court the same claim on which judgment had previously been entered in the Housing Court, the plaintiffs have challenged the Housing Court judgment collaterally. If we were to permit such an attack as a general rule, the finality of judgments would be substantially impaired. This would not be in the best interests of litigants or the public. While it is important that judgments be rendered only by courts having the right to render them, it is also important that controversies be finally terminated after there has been full and fair litigation. As we observed in *Wright Mach. Corp.* v. *Seaman-Andwall Corp.*, 364 Mass. 683, 688 (1974), quoting *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931), "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the

> result of the contest, and that matters once tried shall be considered forever settled as between the parties." The public interest in enforcing limitations on courts' subject matter jurisdiction is ordinarily served adequately by permitting direct attack on judgments. Although there may be rare circumstances in which sound policy requires that finality give way to the enforcement of limitations on a court's authority by collateral attack, this is not such a case.

Harker v. Holyoke, 390 Mass. 555, 558-559 (1983).

E. Remaining Plaintiffs' Claims Do Not Show Substantial Likelihood Success On Merits

During the pendency of this litigation, the Plaintiffs have advanced numerous and often contradictory arguments. For example, the Plaintiffs state that the Town Meeting vote on Article 3 did not authorize the acquisition of any real property – but they then argue that said vote was sufficient to vest actual or quasi-title to the property, notwithstanding that the Town has not paid for any property and holds no deeds. They even argue that the Board committed an illegal "assignment" of its Chapter 61 rights to the Trust and Railroad, despite the fact that those parties are the owners of that property. Count III has other random arguments that the Town is entitled to judgment on, summarized below.

Article 97: The Complaint suggests that the terms of the Agreement violate Article 97 of the Amendments to the Massachusetts Constitution. Article 97 protects property that is held by municipalities for certain purposes, such as conservation, open space, and water supply protection, and such land cannot be used for an inconsistent purpose unless there is a two-thirds vote of the General Court to allow it. Plaintiffs overlook the plain fact, however, that Article 97 does not apply to any of the 155 acres because, at present, the Town does not own any of it. The Property cannot be dedicated as parkland, conservation or any other purpose until the Town actually acquires it by deed. While the Board took steps to complete such acquisition via Chapter 61 and eminent domain, it has not done so for the reasons discussed above – no deeds have changed hands, no compensation has been paid to the One Hundred Forty Realty Trust, and

the Board has waived its rights to pursue its current or future Chapter 61 rights. Therefore, Article 97 is irrelevant to the issues in the litigation.

Chapter 61 Rollback Taxes: The Complaint alleges that the Town will pay the Trust's rollback taxes, as well as a survey of Parcel A and hydrogeological analysis for a potential public water supply. A hydrogeological study is not imminent, and the Town may need to seek a new appropriation if it determines such study is advisable. As for a survey of the property the Town is to acquire, a survey is commonly considered to be "costs incidental and related to" the acquisition of real property, and such costs were a part of the Special Town Meeting vote on Article 3. As to the rollback taxes pursuant to Chapter 61, Massachusetts taxation statutes do not permit a waiver of such taxes. However, the Settlement Agreement provides that the costs of the taxes will be reflected in the purchase price, but "the Defendant [Railroad] shall pay the full amount of the roll-back taxes to the Town." Therefore, neither the Town nor the Board are "paying" the rollback taxes.

Finance Committee Review: The Town bylaws do require that the Finance Committee review appropriation articles and make recommendations to Town Meeting (which Town Meeting may follow or disregard). This is exactly what the Finance Committee did at the October 24, 2020 Special Town Meeting, however, and there is no new appropriation required to carry out acquiring Parcel A.

CONCLUSION

Throughout this litigation, the Plaintiffs have advanced a myriad of theories in hopes of prevailing in their claims – that the Board is not authorized to acquire the 130 acres under G.L. c.40, §14 but is under G.L. c.61, a statute that does not explicitly authorize acquisition; that the Board of Selectmen illegally "assigned" real property to the Railroad Defendants, in spite of not

owning said property; that the Board is violating Article 97 of the Massachusetts Constitution in conveying conservation property, although again with property the Town does not own; that the Board has an irrevocable and irreversible obligation to acquire the 130 acres, notwithstanding no vote authorizing acquisition and Massachusetts case law giving the Board the ultimate executive authority to decline to acquire real property; and even that the Town already legally and/or effectively owns the 130 acres, despite no purchase and sale agreement between the parties, no exchange of funds and no deed to said property changing hands. The Plaintiffs have also made veiled but clear insinuations that the Board has either been hoodwinked by the Railroad Defendants or are corruptly in league with them, allegations that are as slanderous as they are utterly without basis. Finally, the Plaintiffs approach their motion as if they have already been proven all claims, notwithstanding that the Appeals Court Single Justice found only that the Complaint presented a "substantial likelihood of success" on a single claim, i.e., that the October 24, 2020 Town Meeting vote on Article 3 did not actually authorize the Board to acquire **any** of the 130 acres.

Sifting through the chaff of Plaintiffs' claims to the single dispositive claim properly before this honorable Court, the Town submits that there are two potential outcomes to that claim:

(a) The October 24, 2020 Town Meeting votes authorized the Board of Selectmen to acquire the entire 155 acres of property at issue: The Town submits this is the proper result, and that in accordance with the Board's executive authority, proper statutory interpretation and the Supreme Judicial Court's reasoning in Russell v. Canton, the Board therefore had authority to enter into the Settlement Agreement as best promoting the public interest; or

(b) The October 24, 2020 Town Meeting vote on Article 3 did not authorize the Board to acquire the 130 acres of Chapter 61 forestland: The Town disagrees with this argument, but acknowledges that Appeals Court Justice Meade made this preliminary finding. If this honorable Court ages with that determination, the Town requests that this Court further agree with Justice Meade that a new Town Meeting vote to authorize the Board to make the acquisitions pursuant to the Land Court Settlement Agreement would "render the transaction lawful" and resolve all outstanding issues in this litigation.

In conclusion, therefore, the Town and Board of Selectmen submit that this litigation is ripe for resolution on cross-motions for judgment on the pleadings, and that judgment should enter in favor of the Town of Hopedale and Board of Selectmen on Counts I, II and III.

Defendants,
TOWN OF HOPEDALE, LOUIS J. ARCUDI AND BRIAN R. KEYES,

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Dated: May 17, 2021
763544/HOPD/0145

CERTIFICATE OF SERVICE

I, Brian W. Riley, hereby certify that on the below date, I served a copy of the foregoing Memorandum in Response to Plaintiffs' Motion for Judgment on the Pleadings and Cross-Motion for Judgment on the Pleadings on behalf of the Defendants Town of Hopedale, Louis J. Arcudi, III and Brian R. Keyes, by first class and electronic mail, to the following:

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Dated: May 17, 2021

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