MASSACHUSETTS Lawyers Weekly

Judge nixes reworked deal over forest land

Ch. 61 right of first refusal confirmed as 'all or nothing'

By: Kris Olson November 24, 2021

Plaintiffs' attorney

ɪe authority that Town Meeting voters granted their Board of Selectmen under G.L.c. 61 to match a private party's offer to purchase 130 acres of forest land did not encompass permission to deviate substantially from the deal when settling related litigation, a Superior Court judge has determined.

After the town and the private party entered into a settlement agreement to resolve the disputes between them, 11 taxpayers filed suit in Superior Court to block the agreement from taking effect.

In ruling on cross motions for judgment on the pleadings, Judge Karen L. Goodwin sided with the plaintiffs on the key question of the scope of the selectmen's settlement authority.

The selectmen argued that Town Meeting's appropriation of funds to purchase the entire acreage represented an "upper limit" on their spending. For that proposition, they relied on the Supreme Judicial Court's 1972 decision *Russell v. Town of Canton.*

In *Russell,* Canton Town Meeting voted unanimously to take "approximately 18 acres" for $36,000, and the Canton Board of Selectmen then took only 15.25 acres and spent only $30,500, eschewing the opportunity to acquire the leftover 1.5-acre lot that "was all rock."

"This case is different," Goodwin wrote.

Unlike the warrant and vote in *Russell,* the area to be taken in the present case was precisely defined, using the exact recorded acreage of the property.

"In addition, unlike in *Russell,* the Board's actions here represent a substantial departure from the original Town Meeting authorizations," Goodwin said, noting that the board had settled for less than half of the property.

The judge added that the Chapter 61 option referenced in the Town Meeting article could not be materially altered but could only be exercised "according to the terms of the triggering purchase and sale agreement."

"Once the Board elected to exercise the Option and obtained a precisely worded authorization to acquire specific land pursuant to specific rights, it was bound by the terms of that authorization," she concluded.

The 13-page decision in *Reilly, et al. v. Town of Hopedale, et al.* is Lawyers Weekly No. 12-051-21.

Fixed parameters

The parcel at issue in *Reilly* is, by far, the biggest piece of remaining undeveloped land in Hopedale, and the acquisition "really matters" to the 400 residents who voted unanimously to acquire it a year ago, said the plaintiffs' attorney, David E. Lurie of Boston.

Lurie said he believes Goodwin was correct when she ruled that *Russell* did not support what the town was trying to do.

hen it comes to cities' and towns' rights of first refusal under the "unique statutory scheme" of Chapter 61, which relates to proposed conversions of forest land, "courts have interpreted that as an all-or-nothing thing: You can either exercise and get all of it or not exercise and get none of it," Lurie said.

Especially once the town recorded the option Town Meeting had approved at the Registry of Deeds, that "fixed the parameters of what was possible," Lurie said.

Boston local government attorney George A. Hall Jr. agreed that the takeaway is that after a legislative body votes to authorize and fund the purchase of land in these circumstances, the only power that it has going forward is withholding its consent to a settlement that involves acceptance of something other than what it originally authorized.

"Otherwise, all the powers here belong to the executive," Hall said.

While he agreed that Goodwin used sound reasoning to reach the result she did, Hall said he found it disappointing that the judge did not deal more forcefully with the private party's attempt to neutralize the town's right of first refusal under Chapter 61 by purchasing only the "beneficial interest" in the Massachusetts nominee trust in which the land was held.

"The transfer seems to me like it was a pretty flagrant violation of the statute," Hall said.

A second lesson from *Reilly*, Lurie said, is that when an attorney is settling a case involving a municipality and a statutory regime, he must pay close attention to whether the municipality has the authority to execute the settlement, even when the settlement was reached in the context of a court-ordered mediation and under the supervision of a very experienced judge, as was done here.

One of the town's attorneys, Brian W. Riley of Boston, declined to comment, citing the motion to clarify judgment he had served on the plaintiffs on Nov. 22. He indicated that the town believes the decision created some ambiguity over the Chapter 61 rights the town still has.

Of the town's three options that Goodwin laid out, the best one is clear, Lurie suggested: Exercise the option to acquire all the forest land and finalize the related acquisition of the 25 acres of wetlands via eminent domain.

If the town tries to convene a special Town Meeting to approve the settlement agreement, Lurie predicted that option will fail as he believes it will be hard to muster the necessary two-thirds vote

What happens now?

Superior Court Judge Karen L. Goodwin stressed that there was nothing necessarily wrong with the town settling the Land Court case with G&U; it just needed to get Town Meeting's approval first.

She suggested that the town now has three options: seek Town Meeting approval of the settlement agreement; renew its attempts to enforce the option; "or to do neither."

Goodwin instituted a 60-day temporary injunction barring G&U from conducting clearing or other site work on the property, time she

under G.L.c. 40, §14, to obtain only a fraction of the land, when the previous vote had been unanimous to acquire all of it.

If the town chooses door No. 3 and simply allows the injunction to expire and the railroad to resume tearing up the land, Lurie said his clients are prepared to appeal the adverse aspects of Goodwin's ruling.

Particularly ripe for challenge is the judge's determination that his clients lack standing to seek a declaration that the town validly exercised the option and an order that the entire property be sold to the town, he said.

Instead, he views the recording of a Chapter 61 option as "indeed a conveyance," which 10 citizens of the commonwealth can enforce.

But Lurie said his clients hope it will not get to that point and that instead the town will do the right thing.

"We hope that the board will follow the will of the town and [acquire] all the forest land and preserve it," he said.

intended for the selectmen to use to plot their next move.

The Board of Selectmen met in executive session on Nov. 19 with its attorneys, Brian W. Riley and Peter F. Durning. At the board's open meeting on Nov. 22, Chairman Brian R. Keyes informed the town of the decision to first seek clarification of Goodwin's decision before deciding how to proceed.

Keyes reported that Riley would also be filing an emergency motion to toll the running of the 60-day time limit on the injunction until the board receives the requested clarification.

Far from settled

One Hundred Forty Realty Trust owns slightly more than 155 acres at 364 West St. in Hopedale, of which 130.18 acres are classified as forest land under G.L.c. 61 and 25.06 acres are classified as wetlands.

Next to the property is Hopedale Parklands, a town-owned 279-acre recreational and conservation park.

On June 27, 2020, the trust and Grafton & Upton Railroad Co. entered into a purchase-and-sale agreement, and G&U sent the town the required notice under G.L.c. 61, §8, which included the $1.175 million purchase price.

The town promptly informed the trust and G&U that it intended to exercise its statutory right of first refusal to buy the property on the same terms, a plan that voters endorsed at Town Meeting on Oct. 24, 2020.

The Board of Selectmen then voted to exercise the option and recorded notice of its decision at the Registry of Deeds.

Around the same time, the lawyer now representing the railroad defendants notified the town that the trust was withdrawing its notice of intent. G&U then purchased the "beneficial interest" in the 130.18 acres of forest land for the same price as contemplated in the purchase-and-sale agreement, a workaround that it believed absolved it of the need to give the town any notice of intent under G.L.c. 61, §8.

On Oct. 28, 2020, the town sued the railroad defendants in Land Court, seeking a declaratory judgment that the town's option remained valid and an injunction against any further land clearing by G&U.

Accepting the railroad defendants' representations that they would not continue to clear the land while the case was still pending, the Land Court denied the town's motion for a preliminary injunction and ordered the parties to engage in mediation.

Meanwhile, G&U filed a declaratory petition with the Surface Transportation Board, seeking federal preemption of the town's option to purchase the forest land and its statutory right to acquire the wetlands by eminent domain.

In February, the town and railroad defendants entered into the settlement agreement, resolving the Land Court action and G&U's STB petition. The railroad defendants agreed to sell the town 40 of the 130.18 acres of forest land and the full 25.06 acres of wetlands for $587,500. They also agreed to donate to the town a separate 20-acre parcel, subject to Town Meeting approval.

In return, the town agreed to waive its option with respect to the remaining 90 acres of forest land.

On March 3, 11 Hopedale taxpayers filed suit in Worcester Superior Court and sought a preliminary injunction preventing the town from making any expenditures pursuant to the settlement agreement.

Judge Shannon Frison initially denied the plaintiffs' motion for a preliminary injunction, but a single justice of the Appeals Court, Judge William J. Meade, reversed that decision.

Despite the injunction, G&U resumed cutting trees, prompting the plaintiffs to seek an injunction preventing alteration of the forest land. Goodwin granted that motion on Sept. 24, and a single justice of the Appeals Court declined to hear G&U's appeal.

The parties then cross-moved for judgment on the pleadings.

Reilly, et al. v. Town of Hopedale, et al.

THE ISSUE: When Town Meeting voters granted their Board of Selectmen under G.L.c. 61 authority to match a private party's offer to purchase forest land, did that set the "upper limits" on what the board could spend and acquire?

DECISION: No, the board cannot "substantially depart" from Town Meeting's authorization (Superior Court)

LAWYERS: David E. Lurie of Lurie Friedman, Boston (plaintiffs) Brian W. Riley of KP Law, Boston; Peter F. Durning of Mackie, Shea, Durning, Boston (town defendants)

'The cart before the horse'

While G.L.c. 40, §53, gives any 10 taxpayers a right of action to prevent a municipality from illegally spending or raising funds, it does not follow that they have a right of action to compel the town to spend funds, Goodwin wrote, explaining her rationale for finding that the plaintiffs lacked standing to seek the relief requested in Count II of their complaint.

She added that seeking to compel the town to "carry out a conveyance in the first instance" was also "plainly beyond the scope" of G.L.c. 214, §3(10).

Goodwin agreed with the town that under G.L.c. 61, §8, the power to exercise the option rests solely with the Board of Selectmen and not with Town Meeting.

Goodwin also rejected the plaintiffs' request for a declaration that the forest land within the property already enjoys the status of protected parkland under art. 97 of the Amendments to the Massachusetts Constitution by virtue of the Town Meeting article specifying that the town would be making the acquisition to "maintain and preserve said property ... for the use of the public for conservation and recreation purposes."

The plaintiffs' argument, she said, "puts the cart before the horse."

While the Town Meeting article authorized the expenditure of funds, that authorization did not by itself complete the acquisition, Goodwin noted.

The plaintiffs' position, if correct, would effectively eliminate the town's requirement under G.L.c. 61, §8, to include a proposed purchase-and-sale contract to be executed within 90 days with its notice of its intention to exercise its statutory right of first refusal. That had never happened here because G&U challenged whether the town had validly exercised its option, Goodwin wrote.

Meanwhile, the notice of exercise of the option recorded at the Registry of Deeds had been signed only by the selectmen on behalf of the town but not the trust.

"Accordingly, the Town never acquired the 130 acres of forest land in the first instance, much less dedicated it as parkland pursuant to art. 97," Goodwin concluded.

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