COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

WORCESTER, SS CIVIL ACTION NO.2185CV00238D

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,)
Plaintiff)
)
vs.)
)
)
TOWN OF HOPEDALE, LOUS J.)
ARCUDE, III, BRIAN R. KEYES,)
JON DELLI PRISCOLI and MICHAEL R.)
MILANOSKI, ONE HUNDRED)
FORTY REALTY TRUST and)
GRAFTON & UPTON RAILROAD)
COMPANY,)
)
Defendants)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS, JON DELLI PRISCOLI, MICHAEL R. MILANOSKI, ONE HUNDRED FORTY REALTY TRUST, AND GRAFTON & UPTON RAILROAD COMPANY MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT II OF PLAINTIFFS' VERIFIED COMPLAINT

SUMMARY OF ARGUMENT

Count II of the Verified Complaint[1] must be dismissed because the plaintiffs, ten taxpayers of the Town of Hopedale, have no standing to seek enforcement of G.L.c. 61 rights with respect to property in the Town of Hopedale because the authority to exercise (or not exercise) Chapter 61 rights lies exclusively with the Board of Selectmen. See, G.L c. 61, § 8. Secondly, any Chapter 61 right that the Town of Hopedale may have possessed with respect to

[1] Count II is the only count of the Verified Complaint directed at the moving defendants.

the property at issue (130 acres+-at 364 West Street in Hopedale) was the subject of a prior lawsuit commenced in the Land Court in October 2020 by the Board of Selectmen against these very same defendants, Grafton & Upton Railroad Company ("G&U"), Jon Delli Priscoli, Michael Milanoski, and the One Hundred Forty Realty Trust (the "Trust") (collectively, the "G&U Defendants") in an action entitled *Town of Hopedale v. Grafton & Upton Railroad Company, et al*, 20MISC00467. See Exhibit 16 to Plaintiffs' Verified Complaint. In the Land Court case, the Town alleged it had properly exercised a right of first refusal under Chapter 61 with respect to the subject property, which the G&U Defendants contested. The Town and the G&U Defendants settled the Land Court case in January 2021, and the settlement was reduced to a written Settlement Agreement. See Exhibit 19 to Plaintiffs' Verified Complaint. As part of the Settlement Agreement, the Town specifically released any Chapter 61 rights it may have possessed with respect to the 130 acres+- at 364 West Street. The Town and the G&U Defendants thereafter filed a Stipulation of Dismissal <u>with</u> Prejudice of the Land Court case on February 10, 2021. Thus, *assuming arguendo,* that the 10 taxpayers have standing to assert or enforce Chapter 61 rights on behalf of Hopedale against the G&U Defendants and/or Hopedale's Board of Selectmen, which they do not, any such Chapter 61 rights/claims were previously asserted by the Town against the G&U Defendants in the Land Court case, and any such Chapter 61 rights/claims were specifically released by the Board of Selectmen in the Settlement Agreement and the lawsuit was dismissed <u>with</u> prejudice. The G&U Defendants[2] are entitled to Judgment on the Pleadings on Count II of the Plaintiffs' Verified Complaint.

[2] Frankly, for the same reasons the Town of Hopedale and its Board of Selectmen are entitled to Judgment on the Pleadings with respect to Count II.

INTRODUCTION

This lawsuit is an unabashed attempt to collaterally attack and undo the settlement and dismissal with prejudice of the Land Court case between the Town and the G&U Defendants. As set forth in greater deal below, the genesis of the plaintiffs' claims is their unhappiness with settlement of the Land Court case. The Land Court case was filed by the Town of Hopedale, through its Board of Selectmen days after a Special Town Meeting voted to appropriate $1,175,000 for the acquisition of 130 acres+- of land at 364 West Street owned by the Trust, classified as forestland under G.L.c. 61. The G&U Defendants, including the Trust, disputed whether the Town possessed an enforceable right of first refusal under c. 61 to acquire the forestland, which led to the Town's filing of the Land Court case and the filing by G&U of a Declaratory Petition with the Surface Transportation Board, asserting federal preemption. A settlement agreement was executed by the Board and the G&U Defendants in February 2021 after two days of mediation with former Land Court Justice, Leon Lombardi, which, *inter alia*, called for the Trust to convey 40 acres+- of forestland and 25 acres of non-forestland at 364 West Street to the Town for the sum of $587,500. The Trust also agreed to donate 20 acres+- across the street at 363 West Street to the Town. The plaintiffs were not happy with the terms of the settlement agreement, and alleged that the Special Town Meeting did not authorize the Town to expend $587,500 for 65 acres+-; it only authorized an expenditure of $1,175,000 for 130 acres+-.

The ten-taxpayer Verified Complaint alleges three causes of action: Count I is asserted against the Town and seeks to enjoin and restrain the Board from paying any amount to the Trust for land at 364 West Street that differs from the appropriation made at the October 2020 Special Town Meeting. Count II is asserted against both the Board and the G&U Defendants and seeks

to enforce c.61 rights that were dismissed in the Land Court case. Count III is against the Town asserting wrongful use of forestland and parkland for railroad purposes and causing illegal harm to the environment. While the G&U Defendants do not dispute that the plaintiffs have limited ten-taxpayer standing to challenge expenditures of municipal funds under G.L.c. 40, §53,[3] plaintiffs do not have standing in Count II to raise a broad, general challenge to the Board's authority to enter into a settlement agreement or to invalidate those provisions of the agreement that do not involve the expenditure of municipal funds, including the Board's exercise of its sole and exclusive discretion to release any Chapter 61 option rights the Town may have possessed with respect to the forest land at 364 West Street.

FACTUAL AND PROCEDURAL BACKGROUND

One Hundred Forty Realty Trust ("the Trust") owns a 155-acre parcel of industrial zoned land at 364 West Street in Hopedale. Verified Complaint ("VC"), ¶13. Of the 155 acres, 130 acres were classified as forestland under G.L.c. 61. VC, ¶14. In June 2020, Jon Delli Priscoli, as Trustee of New Hopping Brook Realty Trust entered into a Purchase and Sale Agreement with the prior Trustee of the One Hundred Forty Realty Trust to purchase the entire 155 acres for $1,175,000. VC, ¶23. On or about July 9, 2020, a Notice of Intent to Sell Forest Land Subject to Chapter 61 ("Notice") was delivered to the Board of Selectmen in accordance with G.L.c. 61 §8.

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[3] Indeed, the plaintiffs successfully petitioned a Single Justice of the Appeals Court under G.L.c. 231 §118 (1st par)to enter an injunction enjoining the Town from "issuing any bonds, making any expenditures, paying any costs, or transferring any property interests pursuant to the Settlement Agreement dated February 9, 2021, entered into with the Grafton and Upton Railroad, pending final judgement or further order of this court, or a single justice thereof, whichever is first to occur." *Reilly et al v. Town of Hopedale, et al*, Appeals Court Docket No. 2021-J-0111. While this preliminary injunction clearly enjoins the Town from making expenditures pursuant to the settlement agreement, it does not affect the valid exercise of discretion afforded to the Board to exercise, or not exercise any c.61 rights the Town may have at one time held and its discretion to dismiss with prejudice the Land Court case. *Id.* It is also important to note the the Single Justice stated: "To be clear, I am not deciding this case on the merits; only that the plaintiffs have demonstrate some chance of success on their claim." *Id.* And again, the request for injunctive relief was made under Count I only and not Count II (or Count III).

VC, ¶25. The Notice included the entire 155-acre parcel including 130 acres of forestland and 25 acres of non-forest land. VC, ¶26. The Town responded to the Notice by informing the Trust that the Town was considering exercise of its statutory first refusal option to purchase the 155 acres, but also informed the Trust that the Notice was defective because the Notice did not allocate the purchase price between the forestland and the non-forest land. VC, ¶27. In October 2020, the Trust notified the Town that it was withdrawing the Notice. VC, ¶30. The Town responded by letter dated October 8 that the first refusal option had ripened, and therefore, is irrevocable. VC, ¶31. The Town continued its process towards exercising its first refusal option to purchase the 130 acres+- of forestland. *Id.*

On October 12, 2020, the owners of the beneficial interest in the Trust assigned their beneficial interest in the Trust to G&U. VC, ¶34. On the same day, the Trustees of the Trust resigned and Jon Delli Priscoli and Michael Milanoski accepted appointment as new Trustees of the Trust. VC, ¶35. On the same day, the Trust sold to G&U the 25 acres+- of non-forest land at 364 West Street, plus 20 acres+- at 363 West Street for $1.00. VC, ¶36. On October 15, 2020, the Trust informed the Town of the transactions that had occurred on October 12, 2020. VC, ¶37. On October 21, 2020, the Town informed the Trust and G&U that the Town held an irrevocable option to purchase the forestland based on the July 9, 2020 Notice that could not be withdrawn and furthermore that the Town had a separate and independent opportunity to exercise its statutory first refusal option to the forestland based on the assignment of the 100% beneficial interest in the Trust to G&U. VC, ¶41.

On October 24, 2020, the Town held a Special Town Meeting to authorize the Town to acquire the 130 acres of forestland and appropriated $1,175,000 to acquire the 130 acres of forestland, which passed unanimously. VC, ¶¶43-46. <u>On October 30, 2020, the Board of</u>

Selectmen voted to exercise its first refusal option to acquire the forestland.[4] VC, ¶49 (emphasis supplied).

On October 28, 2020 the Board of Selectmen authorized the filing of a lawsuit against G&U and the Trust, styled *Town of Hopedale v. Jon Delli Priscoli, Trustee of One Hundred Forty Realty Trust et al.*, 20 MISC 00467 "to seek judicial order that the Notice was effective." VC, ¶50. On November 2, 2020, the Town recorded notice of the decision of the Board of Selectmen to exercise the first refusal option in the Worcester South District Registry of Deeds. VC, ¶51. The Town sent the Notice of Exercise with the purchase and sale agreement to the Trust. VC, ¶52.

On November 22, 2020, G&U filed a Petition for a Declaratory Order with the Surface Transportation Board that the Town's rights under c. 61 were preempted by federal law, the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §10101 *et seq.*, specifically, 49 U.S.C. §10501(b). VC, ¶56. On November 23, the Land Court (Rubin, J.) held a hearing on the Town's request for preliminary injunction, which she denied. VC, ¶57, Exhibit 16. Judge Rubin ordered the Town and the G&U Defendants to attend a mandatory mediation screening. VC, Exhibit 16. In January 2021, the Town and the G&U Defendants engaged in two sessions of mediation with retired Land Court Justice, Leon Lombardi, culminating in a Term Sheet that was revealed to the public at a January 25, 2021 Board of Selectmen public hearing/open meeting. VC, ¶60. The Board voted 2-1 to approve the Term Sheet. *Id.* The Term Sheet called for a Settlement Agreement to be prepared and executed no later than February 9, 2021. *Id.* On February 9, 2021 the Hopedale Water and Sewer Commissioners requested, by

[4] This allegation demonstrates the folly of the plaintiffs' claim that 10-taxpayers have standing to exercise a right of first refusal under Chapter 61, which is a clear and unambiguous exercise of executive authority of municipal government, specifically reserved to the Board of Selectmen by the language of G.L. c. 61, § 8.

letter, that the Board of Selectmen cease and desist from any further negotiations or agreement with the G&U Defendants with respect to water rights for the Town. VC, ¶61, Exhibit 17. By a letter dated February 7, 2021, the Citizen Plaintiffs expressed their strong objections to the Term Sheet, including that it was illegal because, *inter alia*, the Trust is not the rightful property owner, it is in violation of the Town's right of first refusal pursuant to G.L.c 61, is an agreement to which the Board of Selectmen has not been authorized to enter and would be in violation of Article 97. VC, ¶62, Exhibit 18.

The Board held a public hearing/meeting on February 8, 2021 to discuss the terms of the Settlement Agreement and voted 2-1 to approve the Settlement Agreement. VC, ¶63. The Settlement Agreement was executed by the Board of Selectmen and the G&U Defendants on February 9, 2021. VC, ¶64, Exhibit 19. In the Settlement Agreement, the Town agreed to pay $587,500 to the Trust in exchange for 40+- acres of forestland and 25 acres+- of non-forestland. VC, ¶66, Exhibit 19. The Settlement Agreement also requires, *inter alia,* the Trust to donate 20 acres+- of land across the street at 363 West Street to the Town. VC, Exhibit 19. The Town, *inter alia*, also released any c. 61 rights it may have possessed with respect to the forestland. VC, ¶75, Exhibit 19. The G&U Defendants agreed to limit any construction on land it was retaining at 364 West Street and, consistent with the Town's stated goal of municipal water protection and exploration, also agreed to record various groundwater deed restrictions and no-build easements. *Id.* The settlement agreement represented a significant compromise of what would have been an all-or-nothing dispute between the parties in the Land Court or the Surface Transportation Board. *Id.* The Town and the G&U Defendants exchanged mutual releases and

filed a Stipulation of Dismissal with Prejudice of the Land Court case on February 10, 2021.[5] VC, Exhibit 16, Exhibit 19.

The 10-taxpayer plaintiffs did not seek to intervene in the Land Court case before it was dismissed with prejudice on February 10, 2021, but rather filed this lawsuit on March 3, 2021. As it relates to Count II, plaintiffs claim that the Board's waiver of the Town's purported right of first refusal is invalid. Plaintiffs seek an order from this Court not only declaring the waiver invalid, but also declaring that the Town's G.L. c. 61 option to purchase the land is valid and must be exercised. This is the same underlying claim made by the Town against the G&U Defendants and preliminarily denied by the Land Court, and which the Board (on behalf of the Town) settled, dismissed with prejudice, and released.

ARGUMENT

Defendants are entitled to judgment on the pleadings dismissing Count II of the Verified Complaint because the ten-taxpayer plaintiffs do not have standing to challenge the Board's waiver of the Town's G.L. c. 61 right of first refusal. A cursory glance at Count II reveals that the plaintiffs seek to vindicate rights purportedly belonging to the Town, not to plaintiffs themselves and to re-litigate the Chapter 61 claim that was released and dismissed with prejudice in the Land Court:

> VC, ¶ 115: "An actual controversy exists between the Plaintiffs and the Town and the Railroad over the Town's statutory first refusal option."
>
> VC, ¶ 116: "The Town effectively and fully exercised its c. 61 first refusal option and can purchase the forestland subject to the July 9, 2020 Notice of Intent."

[5] G&U also dismissed the Petition for Declaratory Relief that if filed with the STB in accordance with its obligations under the Settlement Agreement. VC, Exhibit 19.

VC, ¶ 122: "Therefore, the c. 61 option deed recorded by Town can be enforced as to the 130.18 acres of Forestland."

VC, ¶ 125: "Plaintiffs request a declaratory judgment that the Town's c. 61 rights remain enforceable against the Railroad and an order transferring title of all c. 61 Forestland to the Town without any easements."

The plaintiffs, dissatisfied with the result of the Land Court litigation, collaterally attack the settlement agreement and seek to relitigate the Land Court issues in this forum, which they have no standing to do. Even if the plaintiffs had standing, which they do not, the Chapter 61 claims they raise in Count II are barred because they have been dismissed with prejudice and released. Finally, on its merits, Count II must be dismissed because only the Board of Selectmen has the discretion and authority to waive the Town's G.L. c. 61 rights.

I. Standard for Judgment on the Pleadings.

A motion for judgment on the pleadings under Mass. R. Civ. P. 12(c) is "actually a motion to dismiss . . . [that] argues that the complaint fails to state a claim upon which relief can be granted." *Jarosz v. Palmer*, 436 Mass. 526, 529, (2002) (quoting J.W. Smith & H.B. Zobel, Rules Practice §12.16 (1974)). In order to survive a Rule 12(c) motion, the factual allegations in the complaint must "plausibly suggest[ ] . . . an entitlement to relief" on each claim. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "[L]egal conclusions cast in the form of factual allegations [do not suffice]." *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000). In addition to the complaint's factual allegations, a court may consider matters of public record, orders, items appearing in the record of the case, exhibits attached to the complaint, and documents that the plaintiff had notice

of and relied upon in framing the complaint. See *Id.*; *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 224 (2011).

"A court may rule on a motion for judgment on the pleadings seeking declarations of the parties' rights if the answer admits all material allegations in the complaint such that there are no material issues of fact remaining to be determined. See Reporters' Notes to rule 12, Mass. Ann. Laws Court Rules, Rules of Civil Procedure, at 192; *Citibank, N.A. v. Morgan Stanley & Co. Int'l, PLC*, 724 F. Supp. 2d 407, 414 (S.D.N.Y. 2010), aff'd, U.S. Ct. App., Nos. 11-2592-CV(L) & 11-2806-CV(CON)." *Merriam v. Demoulas Super Mkts., Inc.*, 464 Mass. 721, 726 (2013). The question of legal standing is a jurisdictional matter. *Phone Recovery Servs., LLC* v. *Verizon of New England, Inc.*, 480 Mass. 224, 227 2018). Where a plaintiff lacks standing to bring an action, the court lacks jurisdiction of the subject matter and must therefore dismiss the case. *Rental Prop. Mgt. Servs.* v. *Hatcher*, 479 Mass. 542, 546-547 (2018).

II. Plaintiffs Lack Standing to Bring Count II.

The ten-taxpayer plaintiffs have no standing to seek to overturn a waiver of the Town's G.L. c. 61 rights, as the decision to exercise or not exercise a G.L. c. 61 is within the exclusive purview of the Board of Selectmen. Indeed, the plaintiffs acknowledge in the Reply Brief filed with the Appeals Court that "c. 61 case law is clear that the first refusal option is a contractual right that resides with the Town, to be exercised by the Board of Selectmen." (emphasis supplied). See Exhibit A, p. 3 attached hereto. "The right of first refusal and any waiver of that right can only be exercised by the mayor or board of selectmen." *Town of Brimfield v. Caron*, 18 LCR 44, 52, 2010 Mass. LCR LEXIS 14, *49 (Land Ct. Jan. 12, 2010).

There is no dispute here that the Board of Selectmen initially attempted to exercise and enforce a purported c. 61 first refusal option on behalf of the Town on October 30, 2020 (⁋ 49) and by filing the Land Court action on October 28, 2020. ⁋ 50. However, there is also no

dispute that the Board's attempt to exercise a purported c. 61 right was challenged by the G&U Defendants in Land Court as well as with the Surface Transportation Board where G&U asserted that the Town's attempt to acquire the 155 acres+- was preempted by the ICCTA. VC ¶ 56, Exhibit 16. There is also no dispute that as a result of the conflict between the Board of Selectmen and the G&U Defendants with respect to c.61 rights as it related to the 130 acres+- of forestland, the Land Court (Rubin, J.) ordered the parties to a mediation screening, and thereafter the parties agreed to settle the Land Court case and the dispute with respect to c. 61 rights. VC. ¶ 60, Exhibit 16. The Board of Selectmen held two public hearings/meetings on the terms of the settlement agreement, including its decision to exercise its discretion to waive any c. 61 rights held by the Town. VC ¶¶ 60-63. The Board of Selectmen voted to approve the settlement agreement at the conclusion of the public meetings/hearings, and by doing so, *inter alia*, exercised their discretion to release any c. 61 rights that the Town possessed with respect to the forestland at 364 West Street. VC ¶ 63, Exhibit 19. The Board also exercised its discretion to dismiss the Land Court case that it initiated with prejudice. VC, Exhibit 16. The plaintiffs disagree with the Board's discretionary decision and under Count II, seek to have this Court undo it on the Town's behalf. Plaintiffs do not have standing to assert such a claim. "Where a plaintiff lacks standing to bring an action, the court lacks jurisdiction of the subject matter and must therefore dismiss the case." *Rental Prop. Mgt. Servs.*, 479 Mass. 542, 546-547 (2018).

The Superior Court does not have general equity jurisdiction to "entertain a suit by individual taxpayers to restrain cities and towns from carrying out invalid contracts and performing other similar wrongful acts." *Hapgood v. Town of Southbridge*, 11 Mass. L. Rep. 632 (Mass. Super. Ct. June 1, 2000), quoting *Pratt v. City of Boston*, 396 Mass. 37, 42 (1985).

Accordingly, when challenged by a motion to dismiss, the plaintiffs must affirmatively demonstrate a statutory foundation for its standing to pursue its claim. *Id.*

The Verified Complaint sets forth three purported statutory bases for plaintiffs' standing to bring Count II, all of which fail to provide the standing they require: (1) G.L. c. 40, §§ 3 & 53, which addresses municipal appropriations and conveyances of property; (2) G.L. c. 214, § 3(10), related to the enforcement of certain gifts of property; and (3) G.L. c. 231A, § 1, the general declaratory judgment statute. Each statute affords only limited standing to ten-taxpayer plaintiffs under narrow circumstances that do not exist here.

A. Plaintiffs Lack Standing Under G.L. c. 40, § 53 Because the Waiver of the Town's Purported G.L. c. 61 Option to Purchase Does Not Involve Spending or Raising Funds. [6]

G.L. c. 40, § 53 is known as the "ten taxpayer statute" and permits a group of taxpayers to file suit to restrain a municipality from raising or expending money for an unlawful purpose, which the plaintiffs have asserted in Count I against the Town. Relief under Section 53 however, is sharply limited and is "measured entirely by the statute itself," which authorizes only an injunction to prevent illegal raising or spending of money. *See Amory v. Assessors of Boston*, 310 Mass. 199, 200 (1941). For example, a ten-taxpayer petition "cannot be brought to attack collaterally the validity of an order of the proper tribunal in altering a highway or in eliminating a grade crossing, or to try the title to public office, or to compel an official to enforce some provision of the criminal law, or to rescind a contract on the ground of fraud imposed upon a town, or to test the reasonableness of rates charged by a town for supplying water." *Id.* at 200-201. The statute has no application if the municipality is not about to spend or raise any money. *See Clark v. Mayor of Gloucester*, 336 Mass. 631, 632 (1958).

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[6] G.L.c. 40 §3 does not provide standing to the plaintiffs. This statute provides the authority for a town to hold and convey property. The town does not own any of the land at 364 West Street, and has never owned any of this land.

The only relief available under Section 53 is an injunction enjoining the raising or spending of municipal funds. "[T]he statute normally does not authorize the undoing of completed transactions." *Spear v. Boston*, 345 Mass. 744, 746 (1963) (collecting cases). "It is too plain for discussion that the provisions of G. L. c. 40, § 53, which confer jurisdiction upon the Supreme Judicial Court and the superior court to restrain a town or city from the illegal and unconstitutional expenditure of money, cannot be invoked to support a claim of jurisdiction in these courts to enjoin a violation of an ordinance or by-law, upon petition of ten taxable inhabitants." *Kelley v. Board of Health*, 248 Mass. 165, 168-169 (1924).

Plaintiffs lack standing to recover pursuant to Section 53 on Count II of the Complaint because Count II does not allege that the Town is about to spend or raise any funds. While *Count I* seeks to restrain the Town from spending money to purchase property from the Trust, *Count II* seeks to have this Court reinstate the Town's G.L. c. 61 option to purchase property. Section 53 does not authorize this relief and in fact has no application where the municipality is not about to spend or raise any money. *See Clark*, 336 Mass. at 632. It certainly has no application to the G&U Defendants and cannot be used to establish standing to assert Count II against the G&U Defendants (or the municipal defendants).

B. Plaintiffs Have No Standing Under G.L. c. 214, § 3(10) Because No Conveyance Was Made to the Town.

Plaintiffs also reference G.L. c. 214, § 3(10), which confers ten-taxpayer standing to enforce "the purpose or purposes of any . . . conveyance which has been . . . made to and accepted by any . . . town . . . for a specific purpose or purposes in trust or otherwise. . ." *See Pratt v. Boston*, 396 Mass. 37, 45 (1985). The Supreme Judicial Court held in *Pratt* that the focus of this statute is on the property at the time it was originally conveyed to the municipality.

The plaintiffs here do not allege that any conveyance of the forestland property was ever actually made. For example, they do not allege that the Town paid for the property; they simply allege that the Town has an existing right to acquire it. Nothing in G.L. c. 214, § 3(10) says that the statute applies to a future property transfer. The property at issue was never conveyed to the Town, by gift or otherwise.[7] Further, acquisition of property through an exercise of a first refusal option under G.L. c. 61 is not a gift and is wholly inconsistent with a gift or conveyance made for a specific purpose. Indeed, G.L. c. 61 provides a town with a first refusal option to be exercised solely by the Board of Selectmen to acquire forestland on the same terms and conditions and for the same price as the forestland owner agrees to accept from a bona fide third-party offeror. The statute simply does not provide the plaintiffs with standing to challenge the discretion exercised by the Board of Selectmen to release any c. 61 rights that the Town may have possessed with respect to the 130 acres+- of forestland.[8]

C. Plaintiffs Have No Standing to Seek a Declaratory Judgment.

G.L. c. 231A, § 1 states in relevant part that the Superior Court "may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings..." However, it is "settled that G.L.c. 231A does not provide an independent statutory basis for standing. *Enos v. Secretary of Envtl. Affairs*, 432 Mass. 132, 135 (2000), citing *Pratt*, 396 Mass. at 42-43.

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[7] To the extent that citation to and reliance on this statute arises from the potential gift of money to the Town to assist with the expense to acquire the 130 acres+- of forestland (VC, ¶¶28, 32), such reliance is misplaced as this gift was purportedly conditional, and was never made.

[8] The statute also explicitly requires leave of Court for ten taxpayers to commence an action. *See* Clark, 336 Mass. at 633. Plaintiffs have not sought or received leave of Court to commence an action under G.L. c. 214, § 3(10).

In order to have standing a particular plaintiff must allege that they have suffered a legally cognizable injury within the area of concern of the statute or regulatory scheme under which the wrongful action occurred. *See Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins.*, 373 Mass. 290, 293 (1977). It is not enough that the plaintiffs be injured by some act or omission of the defendant; the defendant must additionally have violated some duty owed to the plaintiffs. *Enos*, 432 Mass. at 135. Plaintiffs cannot claim standing simply as members of the general public, since one "zealous in the enforcement of law but without private interest" is not an aggrieved person. *Abdow v. Massachusetts Bay Transp. Authority*, 33 Mass. L. Rep. 126 (2015) (citations omitted).

Plaintiffs have no standing to assert a declaratory judgment claim because they seek only to redress purported injuries suffered by the Town, not by the plaintiffs themselves. In fact, after paragraph 1 identifying the plaintiffs as taxpaying residents and citizens of Hopedale, no individual plaintiff is named for the entirety of the 25-page complaint. It is clear that the plaintiffs have been named only for the purpose of meeting the ten-taxpayer threshold, and not because of any individual specific injury suffered by a particular plaintiff. The plaintiffs may have strong feelings about this matter, and may believe that they are doing the right thing on behalf of the Town, but that is insufficient to maintain a declaratory judgment action. G.L. c. 231A does not in and of itself provide the plaintiffs with the "standing" required to maintain this action. *Pratt*, 396 Mass. at 43.

The ten taxpayers have alleged in this lawsuit that the G&U Defendants would not have succeeded with respect to the STB Petition and further would have ultimately lost the Land Court case, but their feelings, disagreement and disappointment with the outcome of the Land Court case, including the Board of Selectmen's decision to waive any c.61 rights possessed by

the Town, are irrelevant. Standing is not measured by the intensity of the litigants' interest or the fervor of their advocacy. *Id.* at 42. As the ten taxpayers acknowledge, only the Board of Selectmen has the authority to exercise, or not exercise a c. 61 first refusal option. *See*, Exhibit A, p. 3. Ten taxpayers do not have the authority to force the Board of Selectmen to act in accordance with their demands or wishes. Ten taxpayers do not have authority to enforce a Town's c. 61 rights. The ten taxpayers have no standing to bring Count II against the G&U Defendants (and/or against the Town). The G&U Defendants (and the municipal defendants) are entitled to Judgment on the Pleadings on Count II of the Verified Complaint.

III. Count II Does Not State a Claim Upon Which Relief May be Granted Because it Was Dismissed and Released.

Assuming arguendo the plaintiffs have standing with respect to Count II, they have not stated a claim upon which relief may be granted. Count II seeks an order invalidating the Board of Selectmen's waiver of the Town's G.L. c. 61 right to purchase the property at issue in this case, and requiring the Board to exercise the option. This claim must be dismissed because it was previously dismissed with prejudice and was released by the settlement agreement. The claim cannot be revived, by the plaintiffs or anyone else.

A. The G.L. c. 61 Claim is Barred by its Earlier Dismissal.

The Town brought a claim in the Land Court seeking a declaratory judgment that it had a valid and enforceable option to purchase the forestland. VC, Exhibit 16. The G&U Defendants disputed this claim, and the parties ultimately agreed to a settlement. *Id.* Pursuant to the settlement (VC, Exhibit 19) the Town and the G&U Defendants executed and docketed a Stipulation of Dismissal which stated:

> Pursuant to Mass. R. Civ. P. 41(a)(1)(ii), the parties, by and through undersigned counsel, hereby stipulate that all claims are dismissed with prejudice and without costs to either side. Each side to bear their own attorney's fees. All rights of appeal are specifically waived.

(Emphasis in original.) VC, Exhibit 16. Once filed, a stipulation of dismissal is treated as a judgment under Mass. R. Civ. P. 58(a). *See Tuite & Sons v. Shawmut Bank, N.A.*, 43 Mass. App. Ct. 751, 755 (1997). If the stipulation is made with prejudice, it can bar subsequent litigation regarding the same claim. *Id.*, citing *Bagley v. Moxley*, 407 Mass. at 637; see also *Jarosz v. Palmer*, 436 Mass. 526, 536 (2002) (stipulation of dismissal with prejudice "constitutes a valid and final judgment for the purposes of claim preclusion").

"Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action." *Duross v. Scudder Bay Capital, LLC*, 96 Mass.App.Ct. 833, 836 (2020), quoting *Heacock v. Heacock*, 402 Mass. 21, 23 n..2 (1988). "This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies."

The plaintiffs here assert, on behalf of the Town, the same claims previously brought by the Town in the Land Court action. Because a valid and final judgment dismissed the Land Court action with prejudice, Count II is barred by the doctrine of claim preclusion and must be dismissed.

B. The G.L. c. 61 Claim Was Released.

Count II is also barred by the doctrine of release. Massachusetts law favors the enforcement of releases. *See Sharon v. City of Newton*, 437 Mass. 99, 105 (2002). The Board of Selectmen agreed to release the Town's G.L. c. 61 rights in the Settlement Agreement. VC, Exhibit 19. The Settlement Agreement includes mutual releases of all claims that could have been brought in the Land Court action. *Id.* The Town's release included specific language including "any claims with respect to ownership of real property located at 364 West Street, Hopedale, MA, including any claim asserting a right of first refusal under Chapter 61 of the

Massachusetts General Laws." *Id.* There is no question that Count II is a "claim with respect to ownership of real property located at 364 West Main Street" and a "claim asserting a right of first refusal under Chapter 61 of the Massachusetts General Laws." Therefore, Count II is squarely within the scope of claims already released by the Town.

Though plaintiffs take issue with the Board of Selectmen's decision to release the Town's G.L. c. 61 rights, they do not assert any valid basis to claim that the Board was not within its authority when it did so. Chapter 61 is explicit that the decision to exercise an option to purchase must be made by a mayor or board of selectmen. G.L. c. 61, § 8. Similarly, "any waiver of that right can only be exercised by the mayor or board of selectmen." *Town of Brimfield v. Caron*, 18 LCR 44, 52, 2010 Mass. LCR LEXIS 14, *49 (Land Ct. Jan. 12, 2010). Whether to exercise a G.L. c. 61 right is subject to the Board of Selectmen's absolute and sole discretion.

The Board of Selectmen's authority to release the G.L. c. 61 claim was even greater because they were engaged in disputed litigation over the claim. The Board of Selectmen is the exclusive entity responsible for prosecuting, defending and settling litigation. *See* Town of Hopedale Bylaw, § 32-1 ("The Selectmen shall be agents of the Town to institute, prosecute and defend any and all claims, actions and proceedings to which the Town is a party or in which the interests of the Town are or may be involved."); see further, *Northgate Constr. Corp. v. Fall River*, 12 Mass. App. Ct. 859, 860-861 (1981)(a municipality, "as part of its general power to sue and be sued, has the inherent implied power to effect a settlement by compromise in good faith of genuine claims against it... The city need not insist on litigating them with uncertain cost, difficulties, and outcome. This power existed prior to the Home Rule Amendment, art. 89 of the Amendments to the Constitution of the Commonwealth. Nothing in that amendment or in any relevant statute has been shown to preclude exercise of the implied power.").

Because the Board of Selectmen validly released and waived the Town's G.L. c. 61 rights in the Land Court case it initiated, plaintiff cannot bring a G.L. c. 61 claim on behalf of the Town. Count II must be dismissed.

IV. Conclusion

For the reasons set forth above, defendants, Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and the One Hundred Forty Realty Trust are entitled to Judgment on the Pleadings with respect to Count II of the Verified Complaint and entry of judgment in their favor and against the plaintiffs on Count II of the Verified Complaint.

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, AND MICHAEL MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST,

/s/ Donald C. Keavany, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that this document was served by email on April 16, 2021 to:

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EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS
APPEALS 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.

SINGLE JUSTICE No. 2021-J-0111
WORCESTER SUPERIOR COURT
No. 2185-cv-00238

PLAINTIFFS' REPLY IN SUPPORT OF THEIR PETITION FOR INTERLOCUTORY RELIEF PURSUANT TO M.G.L. c. 231, § 118, ¶ 1

Plaintiffs respectfully submit this brief Reply in Support of Their Petition for Interlocutory Relief to respond to issues raised by Defendants' Responses.

1. **The statutory construct of c. 61 authorizes the Town to acquire property and Defendants cite no authority for the proposition that c. 61 requires an authorization by Town Meeting pursuant to c. 40, § 14, in**

addition to an appropriation, to empower the Board of Selectmen to exercise the Town's statutory right of first refusal.

Chapter 61 (like c. 61A and c. 61B) creates a statutory option with the Town that operates outside of c. 40, § 14. It is the statutory construct of c. 61 that authorizes acquisition of c. 61 property by a vote by the Board of Selectmen to exercise the right of first refusal option. Town Meeting appropriation, however, is required to fund the acquisition lest the Board be in violation of M.G.L. c. 44, § 31. Town of Brimfield v. Caron, No. 06 MISC 331899 KCL, 2010 WL 94280, at *4 (Mass. Land Ct. Jan. 12, 2010) (Board of Selectmen voted to exercise the option of the Town in accordance with c. 61, § 8, "contingent upon a favorable vote appropriating the funds for the acquisition of the premises at the next duly called Special or Annual Town Meeting"; no vote to authorize acquisition); Meachen v. Hayden, No. MISC 240129, at *9 (Mass. Land Ct. Aug. 6, 1998) (Board vote to exercise first refusal option, along with notice and recordation of exercise provides authority to acquire and binds town to terms of the acquisition of property; separately, Town Meeting vote pursuant to G.L. c. 44, s. 31 required to appropriate funds for acquisition).

Chapter 61 does not require Town Meeting authorization, nor does it refer to c. 40, § 14. The Defendants cite to no authority whatsoever for the proposition that c. 61 requires an authorization of the acquisition by Town Meeting. In fact, under-signed counsel has not found a single instance in a review of all c. 61 and § 14 case

law which references or applies § 14 to the exercise of a c. 61 option and acquisition of property.

Rather, the c. 61 case law is clear that the first refusal option is a contractual right that resides with the Town, to be exercised by the Board of Selectmen. Town of Sudbury v. Scott, 439 Mass. 288, 297, n. 12 (2003) ("Common-law principles apply to a right of first refusal created by statute."); Kunelius v. Town of Stow, 588 F.3d 1, 12 (1st Cir. 2009) (seller and town bound to terms of P&S where town exercised ROFR but failed to secure funding; noting Massachusetts cases apply common law to statutory ROFRs), citing Scott, 439 Mass. at 297, n. 12.

Furthermore, municipal guidance[1] and actual practice confirm the principles that (1) the Town's authorization for acquisition of c. 61 property is intrinsic with the statutory construct and purely derived from the receipt of a notice of intent to sell or convert c. 61 land to non-forestland use; and (2) the only required Town Meeting action with respect to c. 61 is appropriation of funds.

Meachen v. Hayden, supra; Town of Pembroke v. Gummerus, No. MISC 311622

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[1] See, e.g., Town of Stow c. 61 advisory, https://www.stow-ma.gov/sites/g/files/vyhlif1286/f/uploads/chapter61procedure.pdf (Town Meeting role is appropriation, not authorization to acquire); Town of Wenham c. 61 ROFR advisory, https://www.wenhamma.gov/Chapter%2061%20Right%20of%20First%20Refusal%20Procedure%20-%20Adopted%2006.18.19.pdf (same); Town of Wayland ROFR advisory, https://www.wayland.ma.us/sites/g/files/vyhlif4016/f/uploads/61b_right_of_first_refusal_information.pdf (no Town Meeting authorization vote included).

(Mass. Land Ct. July 15, 2008). Pembroke is informative. There, the entire decision, which the court notes is a close one, turns solely on the Board's need for Town Meeting appropriation. Id., *9. There is no implication of any need for a Town Meeting authorization because that authorization is already with the Board by way c. 61 and its receipt of the notice of intent. In Pembroke, the Board properly exercised the Town's option with that authority and all that remained for the court to decide was whether the Board could make the exercise contingent on the appropriation. Id., 9-10. It could not add to the sell agreement terms that were not present.

Accordingly, § 14 and Russell v. Canton, which applied § 14 in the c. 79 eminent domain taking context, are simply inapposite here, and the Superior Court erred in applying them to this case.

2. To the extent a Town Meeting vote is necessary under § 14 to authorize the acquisition of c. 61 property, Defendants failed to show that the October 24, 2020 Town Meeting vote was such an authorization.

While it is plain that c. 61 statutorily authorizes the Town's acquisition of the 130 acres through the exercise of the first refusal option, even if § 14 authorization is also required, Defendants utterly fail to show that the actual vote at the October 24, 2020 Town Meeting provided such authorization. The Motion on Article 3 was clear and made carefully under the advice of counsel only to appropriate the funds.

To the extent the language of the warrant Article is relied upon to buttress the flimsy claim that there was a vote to acquire property in addition to appropriating funds for the acquisition, that authorization is expressly limited to the exercise of the c. 61 option that stood before the Board, nothing more and nothing less. In short, if the Town Meeting's square peg of a vote is forced into the round hole of § 14, the limitation as suggested by the Russell court governs in light of the language in the Article that the 130 acres were to be acquired pursuant to c. 61.

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: March 26, 2021

CERTIFICATE OF SERVICE

I, Harley C. Racer, hereby certify that on the 26th day of March, 2021, I caused a true copy of the foregoing document to be served on counsel for all parties by electronic mail, using the eFileMA.com system and by email.

I further certify this 26th day of March, 2021, that
I have served a copy of the foregoing document by causing
it to be delivered by First Class Mail to:

Civil Clerk's Office
Worcester County Superior Court
225 Main St.
Worcester, MA 01608

/s/ Harley C. Racer
Harley C. Racer

CERTIFICATE OF COMPLIANCE WITH MASS. R. A. P. 16(A)(13), 16(E), 18, 20 and 21

I, Harley C. Racer, hereby certify that the foregoing document complies with Appeals Court standing order concerning petitions to the single justice, Mass. R. A. P. 16(A)(13), 16(E), 18, 20 and 21. Compliance with Mass. R. A. P. 20 was ascertained, by using Times New Roman, 14-point font and contains a total of 954 nonexcluded words. It was typed on Microsoft Word in Office 365.

/s/ Harley C. Racer
Harley C. Racer