

Hopedale Citizens' Motion to Intervene issued on February 1, 2022. The Railroad Defendants² must be enjoined from taking any action or conducting any activities on or concerning the c. 61 Forestland which would result in any alienation of the c. 61 Forestland or any alteration or conversion of its current use as forestland pending resolution of Intervenor-Plaintiffs' and the Town of Hopedale's appeal on the following grounds.

1. The Hopedale Citizens' Motion to Intervene is proper. On December 30, 2021, following the orders from the Superior Court, the Town filed in the Land Court, its Motion to Vacate the Stipulation of Dismissal. On January 20, 2022, the Hopedale Citizens filed its Motion for Leave to Intervene in the Land Court Action, seeking to bring three claims: (1) vacatur of the Stipulation of Dismissal; (2) preliminary injunctive relief against the Railroad Defendants from any land-clearing activities until final disposition; and (3) declaratory judgment that (A) the Town's exercised and recorded c. 61 Option cannot be waived, transferred or released without Town Meeting authorization and (B) that the Town's purchase price of the c. 61 Forestland must be reduced due to the damage caused by the Railroad Defendants' clearing of the Forestland.

2. The Hopedale Citizens have standing to intervene. It is well established that ten taxpayers have standing under M.G.L. c. 40, § 53 to obtain declarations that municipal contracts involving expenditures of money entered into without requisite authority are invalid and void. Andrews v. City of Springfield, 75 Mass. App. Ct. 678, 681-82 (2009) (ten taxpayers have standing under c. 40, § 53 to obtain judgment declaring that City's contracts are void due to failure to comply with competitive bidding requirements); Ten Taxpayer Group v. City of Fall

² Railroad Defendants include Jon Delli Priscoli and Michael Milanoski as the Trustees of the One Forty Realty Trust, and the Grafton & Upton Railroad Company.

River Redevelopment Auth., 27 Mass. L. Rptr. 536, 2010 WL 5573723 at *5 (Mass. Super. Oct. 28, 2010) (enjoining city in ten taxpayer action from entering into any agreement transferring real estate where challenged transaction would be contrary to the intent and language of the governing statute).

3. The Hopedale Citizens acted timely. The Hopedale Citizens filed their Motion for Leave to Intervene four days before the Court's scheduled hearing on the Town's Motion to Vacate. Three days before the hearing, the Land Court indicated to the Hopedale Citizens that the Court would set a briefing schedule for the Hopedale Citizens' Motion to Intervene but that the Hopedale Citizens would not be heard on its or the Town's Motion at the January 24, 2022 hearing. At the January 24, 2022 hearing, counsel for Hopedale Citizens, in response to the question from the Land Court, informed the Court that in the event it denied the Town's Motion to Vacate the Stipulation of Dismissal, it would not moot the Hopedale Citizens' Motion to Intervene. As soon as it was apparent that the Land Court was not going to permit the Hopedale Citizens to be heard on the substance of its Motion and that the Court would not even set a briefing schedule unless and until the Town's Motion to Vacate, seeking some of the same relief, was allowed, the Hopedale Citizens moved for an expedited hearing on its Motion and joined the Town's Motion. The Land Court's denial of the Motion to be heard as "untimely" was in error.

4. The Town and the Hopedale Citizens are likely to succeed on appeal. The Board of Selectmen lacked the authority to enter into the Settlement Agreement that led to the Stipulation of Dismissal. The Court needs to go no further to vacate the judgment because it is reversible error for a Court to decline to vacate a judgment that was unauthorized. See, e.g., Salem Highland Dev. Corp. v. City of Salem, 27 Mass. App. Ct. 1423 (unpublished 1:28 memorandum) (1989) (vacating judgment under Rule 60(b)(6) where City Solicitor entered into

an agreement to convey property to a developer without authorization by the City Council or Mayor, resulting in reconveyance of the locus to the city); *discussed favorably in E. Sav. Bank v. City of Salem*, 33 Mass. App. Ct. 140, 142 (1992).³ The Salem 1:28 Order is attached hereto as **Exhibit 1**.

5. **Bowers controls and requires vacating the judgment.** In *Bowers v. Board of Appeals of Marshfield*, 16 Mass. App. Ct. 29 (1983), a perpetual encumbrance imposed upon six lots by a board of selectmen in an agreement for judgment was vacated because the agreement, that the Town would cease to use the lots as a public parking area in exchange for the property owner's abandonment of a challenge to the site plan approval for a sewage pumping station, was beyond the authority of the selectmen because it had not been approved by Town Meeting. *Bowers*, 16 Mass. App. Ct. at 32-34; see also *Daly v. McCarthy*, 2003 WL 25332929 (Mass. Land Ct. Aug. 04, 2003) (Lombardi, J.) (in a ten taxpayer suit to enforce the purpose of an agricultural preservation restriction ("APR"), court orders APR deed to be recorded despite settlement agreement entered into by board of selectmen and private trust where the board purported to release the APR without town meeting approval), *affirmed, Daly v. McCarthy*, 63 Mass. App. Ct. 1103 (2005).

6. **The Select Board need not return to Town Meeting to obtain vacatur of the Stipulation of Dismissal.** The Settlement Agreement was not conditioned on obtaining such approval and the Superior Court has held that it is for the Board to choose whether to return to Town Meeting or to enforce the Town's Option

³ While it is clear that the entire Settlement Agreement is a nullity because the material provision – the Town's payment for and acquisition of a portion of the Forestland – was unauthorized, the Court need not consider the Settlement Agreement to allow the Motion to Vacate. The Railroad Defendants' arguments that the severability provision remains in effect or that there is other consideration are merely defenses to be pled in response to the Town's claims brought in its Complaint, wherein the Town seeks an order that it effectively exercised its Option and can enforce the same. The Railroad Defendants' arguments as to the Settlement Agreement are not, however, bars to vacating the unauthorized judgment.

7. The Railroad has already destroyed much of the Forestland and only the injunctive orders from the Appeals Court and Superior Court have preserved the remainder of the Forestland thus far. On March 25, 2021, the Single Justice of the Appeals Court (Meade, J.) enjoined the Town from paying any funds or transferring any property interests under the Settlement Agreement, reversing the Superior Court's (Frison, J.) initial denial of that request. While the Appeals Court order remained in force, the Railroad Defendants again began clearing the Forestland. Video of the substantial destruction caused to the Forestland by the Railroad's land-clearing while the Appeals Court injunction remained in effect can be viewed at: https://www.dropbox.com/sh/vnr9dherkr6io1c/AAApX9viCmH1vW77qQRbN7X5a/MP4?dl=0&preview=DJI_0236.MP4&subfolder_nav_tracking=1

8. On September 9, 2021, the Superior Court (Goodwin, J.) entered a Temporary Restraining Order against the Railroad Defendants and on September 24, 2021 entered a Preliminary Injunction against the Railroad Defendants from any further land clearing. On November 4, 2021, the Superior Court (Goodwin, J.) issued its decision on the parties' cross-motions for judgment on the pleadings, entering judgment for the Citizen Plaintiffs on Count I, permanently enjoining the acquisition of the parcel under the Settlement Agreement without Town Meeting authorization and entering judgment against the Citizen Plaintiffs on Counts II and III for lack of standing. Judge Goodwin also extended the injunction against the Railroad Defendants for sixty (60) days to give the Town time to decide whether to seek Town Meeting authorization of the Settlement Agreement or seek to enforce the Town's full c. 61 rights.

9. Irreparable harm to public land will occur without an injunction pending appeal. The Railroad has indicated it will renew its land-clearing activities as early as February 21, 2022.

Any alteration of the Forestland would be irreparable and would leave the Town less than it is entitled to if successful on appeal.

10. Justice and fairness require that the Forestland be preserved pending resolution of these issues. The legal and procedural posture of this action and the related Superior Court action is untenable and must be resolved through appellate review. Currently, there is an inconsistency between orders of the Land Court and Superior Court and each are now subject to appeal. Whether and to what extent the terms of the Settlement Agreement remain in effect and enforceable remains in judicial limbo. Until that question is finally reconciled, the status quo must be maintained.

REQUEST FOR HEARING

Intervenor-Plaintiffs request leave to be heard on this motion with the Town.

Respectfully submitted,

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By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above document was served upon the attorney of record for each other party by email on February 16, 2022.

/s/ Harley C. Racer
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