COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

TOWN OF HOPEDALE, Plaintiff, vs. JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, ONE HUNDRED FORTY REALTY TRUST and GRAFTON & UPTON RAILROAD COMPANY, Defendants	)	SINGLE JUSTICE No. 2022-J-0146 LAND COURT NO. 20 MISC 000467 (DRR)

DEFENDANTS' OPPOSITION TO NON-PARTY HOPEDALE CITIZENS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL, REQUEST THAT INJUNCTION BE DISSOLVED, AND REQUEST FOR SANCTIONS AND ATTORNEY'S FEES

On March 28, 2022, the non-party "Hopedale Citizens" group requested and obtained an emergency preliminary injunction pending their appeal of the Land Court's denial of their Motion to Intervene and Emergency Motion for Expedited Hearing, enjoining the Defendants from performing development work on the industrial-zoned land they own at 364 West Street in Hopedale. The Non-Party Citizens' submission to this Court omitted key parts of the trial court record, mischaracterized others, ignored applicable standards, and rested entirely on the objectively false premise that the settlement agreement between the Defendants

and the Town of Hopedale has been "ruled ineffective." Not only must the emergency injunction be dissolved forthwith, but also the Non-Party Citizens should be sanctioned for the disingenuous and frivolous nature of their submission.

SUMMARY OF OPPOSITION

- The Non-Party Citizens lack standing to appeal the Judgment below, or the denial of the Town's Mass. R. Civ. P. 60(b)(6) Motion to Vacate that Judgment, because they are not parties to the case. See Corbett v. Related Cos. Northeast, 424 Mass. 714, 718 (1997).

- The Non-Party Citizens failed to include in the record appendix their Notice of Appeal, which by its own terms limits the scope of their appeal to the Land Court's denial of their (1) Motion to Intervene and (2) Emergency Motion for Expedited Hearing on Motion to Intervene. See SRA/3.

- Rather than argue the merits of the appeal that they noticed, the Non-Party Citizens improperly attempt to take an appeal on behalf of the Town of the Land Court's denial of the Town's Mass. R. Civ. P. 60(b)(6) Motion to Vacate. In so doing, the Non-Party Citizens ignore (1) their lack of standing, (2) the standard applicable to a Motion to Vacate a Stipulation of Dismissal pursuant to Mass. R. Civ. P. 60(b)(6), (3) the standard of review of the denial of a Motion to Intervene, and (4) the standard applicable in the trial court and on appeal to an Emergency Motion for Expedited Hearing.

For the above reasons the Non-Party Citizens are unlikely to succeed on appeal and therefore are not entitled to injunctive relief.

Further, the Non-Party Citizens' Emergency Motion is sanctionable because it is based upon the false premise that the Superior Court (Goodwin, J.):

> ruled in a separate lawsuit brought by the Hopedale Citizens that the Settlement Agreement is "ineffective" due to the lack of Town Meeting authorization under M.G.L. c. 40, § 14 for purchase of less than all of the

> Forestland and enjoined the Board from purchasing the lesser portion of the Forestland without Town Meeting authorization.

See Non-Party Citizens' Memorandum, p. 2 (emphasis added). The Non-Party Citizens and their counsel have been told repeatedly by the trial courts that Judge Goodwin did not "rule the Settlement Agreement ineffective." For example, in her decision denying the Motion to Vacate, Judge Rubin of the Land Court accurately described the only effect of the Superior Court Judgment as follows:

> "The Superior Court judgment merely enjoined the Town from using the funds appropriated at the October 24, 2020 meeting to acquire the Settlement Parcel. The validity of the Settlement Agreement as a whole was not before the court." (RA/401-402), (emphasis added).

Judge Goodwin herself told counsel for the Hopedale Citizens directly and on the record, "I don't think I rescinded the agreement, because it wasn't in front of me." (SRA/043-044) (emphasis added).

The Non-Party Citizens sought and obtained an emergency injunction in this Appeals Court based upon repeated false assertions[1] that the Superior Court "ruled that the Settlement Agreement is ineffective." The Non-Party Citizens make this

[1] See Non-Party Citizens' Memorandum, p. 2 (Superior Court subsequently ruled in a separate lawsuit brought by the Hopedale Citizens that the Settlement Agreement is "ineffective"…"); p. 7 ("Superior Court's Injunction Against the Railroad and Ruling that the Settlement Agreement was Ineffective…"); p. 10 ("…the Superior Court's ruling on Count I, which no party appealed, that the Settlement Agreement was ineffective…"); pp. 12-13 ("…which, according to the Superior Court, rendered the Settlement Agreement 'ineffective'…").

claim not as argument, but as a statement of fact. The statement is false. The use of false statements by non-parties to seek and obtain emergency injunctive relief without sufficient time for the adverse party to respond should be sanctioned.

FACTUAL AND PROCEDURAL BACKGROUND

The Town of Hopedale ("Town") filed the underlying Land Court action on October 28, 2020 and sought injunctive relief against the Defendants claiming the Town possessed a statutory right to purchase 130 acres+- of industrial-zoned forestland located at 364 West Street. (RA/006). The Town claimed that its Board of Selectmen ("Board") had effectively voted to exercise a purported G.L. c. 61 right of first refusal option to acquire the 130 acres+- of forestland and further, that a Special Town Meeting in October 2020 had appropriated $1,175,000 for the purchase of this forestland. (RA/325). The Defendants denied that the Town possessed a valid or enforceable Chapter 61 right of first refusal option, and further, asserted that any such claims were preempted by federal law. Defendant, Grafton & Upton Railroad Company ("G&U"), filed a Petition for Declaratory Order before the federal Surface Transportation Board ("STB") on November 22, 2020 seeking a declaration that the Town's G.L. c. 61 claim was preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10101 *et seq*., specifically, 49 U.S.C. §10501(b). (RA/007, 325).

On November 23, 2020, the Land Court (Rubin, J.) denied the Town's request for preliminary relief[2] and ordered the parties to mediation screening. (RA/007, 325). As a result of mediation screening, the parties agreed to mediate 1) the Town's disputed claim that it possessed a valid and enforceable Chapter 61 option to acquire the 130+- acres of forestland at 364 West Street, 2) the Town's separate disputed claim to acquire by eminent domain an additional 25 acres+- of land owned by G&U at 364 West Street and 3) the Defendants' preemption defense to the Town's claim as set forth in the Petition for Declaratory Order filed with the STB. (RA/007, 325).

Retired Land Court Judge Leon Lombardi mediated the disputed claims on January 8 and January 21, 2021, and the Parties agreed in principle on settlement terms at the conclusion of the second mediation session. (RA007, 325). Relevant to this proceeding, among other things, the Town waived and released its disputed G.L. c. 61 claim to the entire forestland in exchange for an undisputed enforceable right to acquire part of the forestland (the "Settlement Parcel") for a lesser price.

[2] The Non-Party Citizens assert the denial was in a "brief, narrow order finding expressly that the Town is entitled to a right of first refusal but that it was unclear whether or when that right had triggered or ripened and that given the Railroad's representation that no further land clearing would occur, there was no risk of harm." In actuality, Judge Rubin described her rationale for declining to find the Town demonstrated a likelihood of success as follows: "Questions remained both as to whether and when the ROFR had been properly exercised and whether the Town's exercise of the ROFR was preempted by the Interstate Commerce Commission Termination Act." RA/391 (emphasis added).

(RA007). As described below by Judge Rubin, the Town also "secured conservation restrictions on the Settlement Parcel and Donation Parcel, which equals approximately 85 acres of land (by way of the Army Corps of Engineers restrictions, Exhibit 3 to the Settlement Agreement), and buffer zones on the Defendants' use of the Settlement Parcel, and gained commitments and financial contributions to safely manage the Town's water supply." (RA/399).

The Town, through its Board, discussed the settlement terms in public hearings on January 25, 2021 and February 8, 2021, attended by representatives of the Non-Party Citizens. (SRA/006-018). At a public hearing on February 8, 2021, the Board voted to execute the Settlement Agreement and dismiss the underlying action. Prior to their vote, the Board received a nine-page single-spaced letter, dated February 7, 2021, from counsel for the Non-Party Citizens. See RA/330-339. The letter specifically stated that the Non-Party Citizens intended to file suit under G.L. c. 40, § 53 to enjoin the Town from using money appropriated at the October 2020 Town Meeting for the entire property to only purchase the Settlement Parcel for a lesser sum. (RA/330-339). The Board nevertheless decided to execute the Settlement Agreement two days later. (RA/007). The Town and the Defendants stipulated to dismiss the Land Court action with prejudice and docketed the stipulation on February 10, 2021. (RA/007, 325; SRA/005). G&U filed a Motion

to Dismiss its Verified Petition for Declaratory Order with the STB on February 15, 2021, which was allowed on February 17, 2021. (RA/393).

Despite being well aware that the Town and the Defendants were mediating the Land Court and STB proceedings in an effort to reach a compromise over the disputed land since early January 2021, the Non-Party Citizens failed to move to intervene prior to the entry of judgment on February 10, 2021. The Non-Party Citizens instead filed an action in Superior Court against the Town and the Defendants on March 3, 2021. (RA/008). They brought three counts in the Superior Court, which were consistent with the threats made in the February 7, 2021 letter: Under Count I, the Non-Party Citizens alleged that the Town's October 2020 Special Town Meeting appropriation of funds to acquire all of the forestland property did not authorize the Board to spend part of those funds to acquire the Settlement Parcel, and sought to enjoin this Town expenditure pursuant to G.L.c. 40, § 53. (RA/182). Count II, against all defendants, asserted various legal theories in an attempt to compel the Town to recover and enforce its waived and released G.L.c. 61 option to purchase the entire property. Id. Count III, against the Town, alleged that somehow the Town had already acquired the entire property and dedicated it as parklands, and therefore the Town violated Article 97 of the Declaration of Rights by entering into the Settlement Agreement. Id.

On November 10, 2021, the Superior Court (Goodwin, J.) entered Judgment in favor of the Non-Party Citizens on Count I, in favor of the Defendants and the Town on Count II, and in favor of the Town on Count III. (RA/144). As a result of the Superior Court Judgment entering in favor of the Non-Party Citizens on Count I, the Town is enjoined from using funds appropriated at the October 2020 Special Town Meeting to acquire from the Defendants the property described in the Settlement Agreement. Id.

In response to the November 10, 2021 Superior Court Judgment, the Town moved in the Land Court pursuant to Mass. R. Civ. P. 60(b)(6) to vacate the February 10, 2021 stipulation of dismissal. (RA/003-017). The Non-Party Citizens waited an additional three weeks to move to intervene in Land Court after the Town's filing and sought to join the Town's Motion to Vacate. (RA/421). Indeed, rather than move to intervene in the Land Court upon the filing of the Town's Rule 60(b)(6) Motion to Vacate, the Non-Party Citizens instead petitioned the Chief Justice of the Trial Court to transfer the Land Court case to the Superior Court – even though they were not parties to the Land Court case, and moreover, even though both the Superior Court case and the Land Court case had gone to Judgment. (RA/421).[3] The Non-Party Citizens then filed an Emergency Motion

[3] The Non-Party Citizens were notified on February 1 that the Trial Court "will be taking no action on the Request for Interdepartmental Assignment. (RA/423).

for Expedited Briefing Schedule and Joinder of the Town's Rule 60(b)(6) Motion to Vacate on January 25. (RA/ 421). The Land Court (Rubin, J.), clearly frustrated by the Non-Party Citizens' dilatory conduct as it related to seeking to intervene, denied their Emergency Motion, stating in part:

> The Citizens seek to intervene … and now ask to be heard on their motion before the court decides the pending motion to vacate. After the motion to vacate was filed on December 30, 2021, the court convened a status conference on January 12, 2022, specifically for the purpose of scheduling briefing and hearing on the motion to vacate. Counsel for the Citizens attended the January 12, 2022 status conference. At that conference, the court set a briefing schedule for the motion to vacate, with a hearing on the merits of that motion set for January 24, 2022. Despite being aware of the briefing schedule (with defendants' opposition being due on January 18, 2022), the Citizens delayed filing their Motion to Intervene until January 20, 2022, just days before the hearing. Instead, they first proceeded to seek interdepartmental assignment of this Land Court case to the Superior Court by letter dated January 13, 2022. The Citizens emergency motion for expedited hearing was not filed until January 25, 2022, one day after the hearing on the motion to vacate. Without reaching the merits of the motion to intervene, the emergency motion for expedited hearing is hereby denied as untimely. SO ORDERED. (RA/422)

The Land Court heard arguments on the Town's Rule 60(b)(6) Motion to Vacate on January 24, 2022 (RA/422) and issued a decision on January 28, 2022. (RA /390-402). The Land Court denied the Town's Motion, stating that "[b]y dismissing this Land Court case, with prejudice, the parties agreed that the claims in this case were decided against the Town." (RA/400). The Land Court declined to find the existence of extraordinary circumstances warranting vacation of the

Judgment. (RA/390-402). The court found it significant that the Settlement Agreement was not incorporated into the Judgment, and therefore the Settlement Agreement was not before it on the Motion to Vacate. See RA/399 ("Although no claim to enforce or renounce the Settlement Agreement is now before me, I note that it is not at all apparent that the Settlement Agreement would be wholly unenforceable if the purchase of the Settlement Parcel did not proceed.").[4]

After denying the Town's Motion to Vacate, the Land Court denied the Non-Party Citizens' Motion to Intervene as moot. RA/422. Thereafter, on February 15, the Town applied for an injunction pending appeal in the Land Court. (RA/423). The Non-Party Citizens, despite the Land Court's denial of their Motion to Intervene and without seeking leave of Court, filed a "Joinder" of the Town's Motion on February 16, which was subject to a Motion to Strike by the Defendants. (RA /423; SRA/026). The Non-Party Citizens also filed a Notice of Appeal of the Land Court's denial of their Motion to Intervene and the Emergency Motion for Expedited Hearing on their Motion to Intervene. (SRA/003).

The Land Court heard arguments on the Town's Application for an Injunction Pending Appeal on February 23, including argument from the Non-

[4] Further, the court noted that this decision was not in conflict with the Superior Court's statement in dicta that the Settlement Agreement is not effective, stating: "I read that Clarification narrowly and in conjunction with the earlier Decision and its holding that the Town's acquisition of the Settlement Parcel could not proceed without a vote of the Town Meeting." RA/401.

Party Citizens, and denied the Town's application after finding that the Town was not likely to succeed on appeal. (RA/424). The court also "allow[ed] Defendants' Motion to Strike [the Non-Party Citizens' joinder] because this court has denied the motion to vacate such that there is no case to join and because judgment entered in this case many months ago without any intervention request by the Citizens." RA/424.

Neither the Town nor the Non-Party Citizens has made any effort to assemble the Land Court record on appeal and to comply with their obligations under Mass. R. Civ. P. 8(b)(1). (RA/415-426). Instead, the Non-Party Citizens informed the Defendants at 11:30am on March 28, 2022 that they would be seeking an injunction pending their appeal of the Land Court's denial of their Motion to Intervene and Emergency Motion for Expedited Briefing Schedule pursuant to Mass. R. P. 6(a)(1), which states "reasonable notice of the motion shall be given to all parties." (SRA/066). The Non-Party Citizens filed their application approximately an hour later at 12:40pm on March 28, 2022 and an injunction issued at approximately 5:30pm on the same day, before the Defendants had an opportunity to oppose the Non-Party Citizens' application.

ARGUMENT

I. Injunction Standard.

An application for injunction pending appeal is subject to "the familiar standard that a preliminary injunction may issue only if the moving party demonstrates (a) a likelihood of success on the merits, (b) that it faces a substantial risk of irreparable harm if the injunction is not issued, and (c) that this risk of irreparable harm outweighs any risk of irreparable harm which granting the injunction would create for the non-moving party." (RA/425), citing Garcia v. Dep't. of Hous. and Comty. Dev., 480 Mass. 736, 747 (2018); GTE Prods. Corp. v. Stewart, 414 Mass. 721, 722-23 (1993); Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 617 (1980).[5] "A preliminary injunction will not be granted if the moving party cannot demonstrate a likelihood of success on the merits." Id., citing Lieber v. President and Fellows of Harvard Coll., 488 Mass. 816, 821-22 (2022). Further, "[t]he movant's likelihood of success is the touchstone of the preliminary injunction inquiry . . . without it, the remaining factors become idle curiosity." Id., citing Foster v. Comm. of Corr., 484 Mass. 698, 712 (2020).

[5] The Non-Party Citizens incorrectly cite to Commonwealth v. Levin, 7 Mass. App. Ct. 501, 504 (1979) for the proposition that they can demonstrate likelihood of success merely by showing that they have a claim that "is worthy of presentation to a court, not one which is sure of success." Levin concerned an application for a stay of a criminal sentence, not an application for a positive grant of a preliminary injunction in a civil case.

A party's standing—or lack thereof—plays a significant role in its likelihood of success on the merits, and therefore also in the Court's inquiry into the appropriateness of an injunction. See Cognition Fin. Corp. v. Harding, 35 Mass. L. Rep. 217 (Super. Ct. 2018) (if there is no actual controversy, court should not proceed to merits); Allen v. School Comm. of Boston, 396 Mass. 582, 585 (1986) (determination that plaintiffs lacked standing was "largely dispositive of the propriety of [a] preliminary injunction").

II. The Non-Party Citizens Have No Likelihood of Success.

A. The Non-Party Citizens Have No Standing to Appeal the Judgment, and Had No Standing to Bring Claims for Injunctive Relief Below.

The Non-Party Citizens lack standing to appeal from the February 10, 2021 Judgment of dismissal, or from the denial of the Town's Motion to Vacate the Judgment. "As a general rule, only parties to a lawsuit, or those who properly become parties, may appeal from an adverse judgment." Corbett v. Related Cos. Northeast, 424 Mass. 714, 718 (1997). In Corbett, the Supreme Judicial Court considered an appeal from a non-party (the City of Boston) who objected to a settlement agreement between the plaintiffs (an injured firefighter and his wife, who alleged loss of consortium) and defendant tortfeasor. At a hearing to determine the fairness of a proposed settlement, the City appeared and objected to the allocation of damages to the wife on the grounds that it would impair the City's

right to recover from proceeds payable to the firefighter. The SJC declined to permit the City to appeal from the judgment approving the settlement, stating:

> Here, while the city participated in the hearing on the motion to approve the settlement, it never sought to intervene as a party in the proceeding, nor did it seek timely post-judgment intervention. The city may not claim the appellate rights afforded to those who have sought such intervention.

Id. at 718. The SJC then quoted the United States Supreme Court for the proposition that the "critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment"). Id., citing United Airlines, Inc. v. McDonald, 432 U.S. 385, 395-396 (1977).

This Court has applied Corbett to a case in which a party unsuccessfully moved to intervene. In Baker v. Board of Selectmen, No. 09-P-367, 2010 Mass. App. Unpub. LEXIS 961 (App. Ct. Aug. 19, 2010) a group of residents sought to intervene to challenge an agreement for judgment through which a town agreed to close a dog park. The resident group appealed. This Court considered the merits of the group's challenge to the trial court's denial of their motion to intervene. Finding the denial of the motion to intervene to be well within the trial court's discretion, the Court refused to reach the merits of the resident group's appeal of the agreement for judgment. Id. at *9 ("Because the appellants were not able to intervene and thus are not parties to the underlying case, they lack standing to appeal from the agreement for judgment entered by the Land Court.").

It is undisputed that the Non-Party Citizens are not, and have never been, parties to the underlying Land Court case. Further, it cannot be argued seriously that the Non-Party Citizens acted promptly in seeking to intervene. The Non-Party Citizens attempt to make this argument by asserting that they only could have moved to intervene between the execution of the Settlement Agreement and the dismissal of the case. This framing is misleading and incorrect. The Non-Party Citizens—who adamantly oppose any settlement between the parties—could have moved to intervene after the Land Court ordered the parties to mediation screening on November 23, 2020. They could have moved to intervene at any point during the mediation, which occurred over two sessions between January 8, 2021 and January 21, 2021. They could have moved to intervene at any point between when the parties agreed to terms for the resolution of the case at mediation on January 21, 2021 and when they finalized the Settlement Agreement on February 9, 2021. Indeed, the Non-Party Citizens had sufficient time to send a nine-page, single-spaced letter to the Chairman of the Select Board on February 7, 2021 (RA/330-339) demanding "that the BOS cease and suspend any further action towards finalizing the purported Settlement with GURR because the Settlement Term Sheet prepared in mediation between the BOS and GURR is illegal and invalid…" RA/330. It strains credulity for the Non-Party Citizens to claim they lacked

sufficient time to move to intervene in the Land Court case before Judgment entered on February 10, 2021.

The Non-Party Citizens also failed to act promptly after Judgment entered. They took no action to intervene for nearly a year after the parties stipulated to dismissal on February 10, 2021. The Town moved to vacate the Judgment on December 30, 2021. It still took three weeks for the Non-Party Citizens to move to intervene. As described by Judge Rubin, "[d]espite being aware of the briefing schedule [for the Motion to Vacate] (with defendants' opposition being due on January 18, 2022), the Citizens delayed filing their Motion to Intervene until January 20, 2022, just days before the hearing. Instead, they first proceeded to seek interdepartmental assignment of this Land Court case to the Superior Court by letter dated January 13, 2022." (RA/422). Put simply, the Non-Party Citizens had ample opportunity to seek intervention, yet failed to move to intervene until the last minute before the Land Court heard argument on the Town's Motion to Vacate. The Citizens' failure to seek to intervene timely renders them without standing to appeal from the substantive decisions of the Land Court.

The Non-Party Citizens seek to side-step the standing issue and argue the merits of the Town's Motion to Vacate by claiming that "the sole basis" of the denial of their belated Motion to Intervene was that the motion was mooted by the denial of the Motion to Vacate. Clearly, Judge Rubin's docket entry denying the

Non-Party Citizens' Motion for Expedited Hearing outlines the Land Court's view that the Motion to Intervene was untimely. In any event, the most that the Non-Party Citizens possibly could establish by this argument is that their Motion to Intervene should not have been mooted. Even assuming arguendo, the Motion to Intervene was improperly mooted, it does not follow that the Motion to Intervene should have been allowed. The Non-Party Citizens make no appellate-level argument that they were entitled to intervene. See infra, pp. 18-19. Further, the Non-Party Citizens do not and cannot establish that even if they were permitted to intervene, they (as opposed to the Town) have any rights in the subject land, or rights to seek enforcement of a purported Chapter 61 right of first refusal option which would allow them to obtain injunctive relief. Indeed, the Superior Court held that the Citizens "lack standing" to enforce the Town's purported interest in the subject land. RA/169-170.[6] That decision, which is not subject to this appeal, precludes any substantive relief to the Non-Party Citizens.

[6] Relief under G.L. c. 40, § 53 is "measured entirely by the statute itself" which authorizes only an injunction to prevent the illegal raising or spending of money. See Armory v. Assessors of Boston, 310 Mass. 199, 200 (1941). Mandamus is not available to "obtain a review of the decision of public officers who have acted and to command them to act in a new and different manner." Boston Med. Ctr. Corp. v. Secretary of Exec. Office of Health & Human Servs., 463 Mass. 447, 469-70 (2012), quoting Harding v. Commissioner of Ins., 352 Mass. 478, 480 (1967). Neither claim is available to the Non-Party Citizens to compel the Board or the Court to reopen a dismissed case, or attempt to rescind a release.

B. The Land Court Properly Denied the Non-Party Citizens' Motion to Intervene.

The Non-Party Citizens appealed only from the denial of their Motion to Intervene and the denial of their Motion for Expedited Hearing, (SRA/003) (Notice of Appeal), but they fail to advance any appellate-level argument establishing that the Land Court abused its discretion by denying these two motions. In fact, it is not until page 19 of their Memorandum that the Non-Party Citizens address the Land Court's denial of their Motion to Intervene at all (the denial of the Motion for Expedited Hearing is never addressed), but again, they offer no appellate argument establishing a likelihood of success on their appeal of the Land Court's denial of their Motion to Intervene, simply stating that they "meet the requirements for intervention under Mass. R. Civ. P. 24." The Non-Party Citizens do not even specify which subsection of Rule 24 they contend authorized their intervention. Such a failure to advance any appellate argument is grounds by itself to deny the Non-Party Citizens' motion for preliminary injunction. See Kelly v. Board of Appeals, 5 Mass. App. Ct. 821 (1977).

To the extent this Court considers the merits of the Non-Party Citizens' Motion to Intervene, the Land Court acted appropriately by denying it. The Non-Party Citizens moved to intervene in the Land Court under both Mass. R. Civ. P. 24(a)(2) and 24(b)(2). (RA/145). Rule 24(a)(2) states in relevant part:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As summarized by the Appeals Court in Bolden v. O'Connor Café of Worcester, Inc., 50 Mass. App. Ct. 56, 61 (2000), the Non-Party Citizens were required to satisfy the following four criteria with respect to their Rule 24(a)(2) motion:

> (1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the litigation in which the applicant wishes to intervene; (3) the applicant must show that, unless able to intervene, the disposition of the action may, as a practical matter, impair or impede his ability to protect the interest he has; and (4) the applicant must demonstrate that his interest in the litigation is not adequately represented by existing parties.

The Non-Party Citizens fell woefully short of meeting this burden.

First, the application to intervene was not timely. "[P]ostjudgment motions to intervene, whether as of right or permissive, are seldom timely." Bolden, at 61. Further, as stated at pp. 15-16, supra, nothing prevented the Non-Party Citizens from moving to intervene at any time between the filing of the Land Court lawsuit in October 2020 and the filing of the Stipulation of Dismissal on February 10, 2021. For example, rather than draft a 9-page single-spaced letter on February 7 (RA/330-339), the Non-Party Citizens could have prepared an application to intervene at that time. Moreover, as noted by Judge Rubin in her January 27, 2022

docket entry, rather than move to intervene immediately after the Town filed its Motion to Vacate, the Non-Party Citizens first unsuccessfully sought to transfer the case to Superior Court. RA/422.

With respect to the second and third criteria, the Non-Party Citizens do not identify any interest that they, as private citizens, have in the real property at 364 West Street, which they do not (and cannot) allege to own. They simply assert that they "have standing to seek declaratory relief in this case regarding the c. 61 land via mandamus and under the well-established line of cases involving public rights in land." Memorandum, p. 20. However, the Superior Court already considered and rejected this claim (which again, is not subject to this appeal), issuing a Judgment dismissing Count II—which sought the same relief the Non-Party Citizens now seek through intervention—for lack of standing. (RA/144); see also Rental Prop. Mgt. Servs. v. Hatcher, 479 Mass. 542, 546-547 (2018) ("where the plaintiff lacks standing to bring an action, the court lacks jurisdiction of the subject matter and must therefore dismiss the action"). The decision to proceed under Chapter 61 is a discretionary decision of the municipal executive and "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 (Land Ct. 2010). Eleven residents have no standing to over-ride the discretionary decision of the Board and the Non-Party Citizens have never cited case law to the contrary.

The fourth criterion for intervention is inapplicable because the Non-Party Citizens have no interest in this action. Even if they did, the Town moved to Vacate the Stipulation of Dismissal in Land Court in December 2021 and has appealed the decision denying its motion to vacate on February 15. (RA/423). "[W]hen the applicant for intervention and an existing party have the same interests or ultimate objectives in the litigation, the application should be denied unless a showing of inadequate representation is made." Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Sch. Comm. of Chelsea, 409 Mass. 203, 206 (1991), quoting 3B Moore's Federal Practice par. 24.07[4] (2d ed. 1987). Accordingly, the Non-Party Citizens failed to establish, as they must under Rule 24(a)(2), that their interests are not adequately protected by the Town. Indeed, the Land Court expressly found that the Non-Party Citizens' interests are "adequately represented" and "well protected" by the Town. (RA/425).

The Non-Party Citizens have failed to establish a likelihood of success on the merits of their appeal of the Land Court's decision to deny intervention as of right under Rule 24(a)(2). For the same reasons, the Non-Party Citizens cannot establish a likelihood of success with respect to permissive intervention under Rule

24(b)(2), which also requires a timely application and a compelling interest in the litigation. See Cruz Management Co. v. Thomas, 417 Mass. 782, 785 (1994).[7]

C. The Land Court Properly Denied the Town's Motion to Vacate.

It is not in dispute that the Non-Party Citizens filed a limited Notice of Appeal in the Land Court, appealing only the Land Court's decisions to deny their Motion to Intervene and their Emergency Motion for Expedited Hearing on their Motion to Intervene. (SRA/003). As set forth at pp. 18-20, supra, the Non-Party Citizens failed to establish a likelihood of success on their appeal of these two

[7] The cases cited by the Non-Party Citizens in footnote 10 on page 21 of their Memorandum do not lend support to their appeal of the Land Court's denial of their Motion to Intervene. Initially, the intervenors in the cases cited at footnote 10 all moved to intervene before Judgment entered. In Town of Wakefield v. Att'y Gen. 334 Mass. 632 (1956), contrary to here, there appears to have been no objection to the joinder of the taxpayers. The Court did not address the merits of the intervention. In Valley Green Grow, Inc. v. Town of Charlton, No. 18-MISC – 00483 (Land Ct. Nov. 8, 2018)(Foster, J.), aff'd, 99 Mass. App. Ct. 670 (2021), the Land Court allowed a motion to intervene by an individual after specifically finding that "based on the statements of town counsel …, it is uncertain whether the Town, by its Selectmen or otherwise, will actively defend the Initiative and the Proposed Bylaw, or rather will take a back seat and decide whether to place the Proposed bylaw on the May 2019 ballot based on the outcome of this case." Here, the Town has filed a Notice of Appeal of the Land Court's January 28, 2022 Decision denying its Rule 60(b)(6) Motion to Vacate. In Samuelson v. Town of Orleans Planning Bd., No. 10-MISC-433554 (Mass. Land Ct. September 23, 2010), landowners were permitted to intervene because a Planning Board decision in their favor approving a definitive subdivision plan was being appealed. In Decoulos v. City of Peabody, No. 00-MISC-261929 (Land Ct. Nov. 9, 2000), aff'd 2004 WL 1656488 (App. Ct. July 23, 2004), the landowner was specifically invited to intervene by the Land Court judge to contest a variance that had issued to an abutter.

Land Court decisions. Thus, this Court need go no further, and must deny the Non-Party Citizens' Emergency Motion to Preserve the Status Quo, and immediately dissolve the wrongfully entered injunction. However, to the extent that the Court examines the Non-Party Citizens' arguments regarding the Land Court's denial of the Town's Rule 60(b)(6) Motion to Vacate, the Non-Party Citizens failed to establish that the denial of the Town's Motion to Vacate was an abuse of the Land Court's discretion.

1. Standards Applicable to Rule 60(b)(6) Appeal.

The decision to deny a Rule 60(b)(6) motion to vacate judgment is within the discretion of the trial court. Klimas v. Mitrano, 17 Mass. App. Ct. 1004 (1984). On appeal, the denial of a Rule 60(b)(6) motion is reviewed for "clear abuse of discretion." Adoption of Yvonne, 99 Mass. App. Ct. 574, 582 (2021). This standard is one of "marked deference." Adoption of Marc, 49 Mass. App. Ct. 798, 801 (2000). "[I]t is plainly not an abuse of discretion simply because a reviewing court would have reached a different result." L.L. v. Commonwealth, 470 Mass. 169, 185 n. 27 (2014).

"Rule 60(b)(6) has an extremely meagre scope and requires the showing of compelling or extraordinary circumstances. Extraordinary circumstances may include evidence of actual fraud, a genuine lack of consent, or a newly-emergent material issue." DeMarco v. DeMarco, 89 Mass. App. Ct. 618, 621-622 (2016)

(quotations and citations omitted). Where a party seeks relief based on "newly-emergent issues," it bears the burden of showing "a significant change either in factual conditions or in law," and that the changes on which the party relies were not "actually . . . anticipated" at the time judgment entered. Bernstein v. Planning Bd. of Wayland, 100 Mass. App. Ct. 1101 (2021) (Rule 1:28 Decision), citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992).

Rule 60(b)(6) is applied with "particular stringency to consent judgments." Bernstein v. Planning Bd. of Wayland, 100 Mass. App. Ct. 1101, citing Thibbitts v. Crowley, 405 Mass. 222 (1989). "And when, as in this case, the [plaintiff] made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment, [its] burden under Rule 60(b) is perhaps even more formidable than had [it] litigated and lost." Thibbitts, 405 Mass. at 227, quoting United States Steel Corp., 601 F.2d at 1274. "Generally, a court will not modify, or relieve a party from, a stipulated judgment." Reznik v. Yelton, 2011 Mass. App. Div. LEXIS 8, *17 (App. Div. Jan. 14, 2011), citing Quaranto v. DiCarlo, 38 Mass. App. Ct. 411, 412 (1995). "If a court may not relieve parties of a consent judgment that spells out the terms of settlement, there is even less basis for relief from judgment on the basis of alleged failure to act in accordance with a collateral but extrinsic and unmentioned agreement." Quaranto, 38 Mass. App. Ct. at 412-413. A Rule 60(b)(6) motion does not confer jurisdiction on the Court to

review a collateral settlement agreement, which has its own basis for jurisdiction. Id. at 413.

2. The Land Court Acted Well Within its Discretion to Deny the Town's Rule 60(b)(6) Motion to Vacate.

Here, the Non-Party Citizens do not allege fraud and they cannot allege a newly-emergent material issue, because the grounds they assert warrant vacating the Land Court judgment (the Superior Court's entry of Judgment on Count I restraining the use of the October 2020 funds to purchase the Settlement Parcel) were actually anticipated when, in lieu of moving to intervene, the Citizens sent a nine-page letter to the parties outlining the basis for their Superior Court suit. As a last resort, the Citizens assert that the Town "lacked consent" to dismiss the case because the Superior Court "ruled" the Settlement Agreement to be "ineffective."

The "ineffective" language relied upon by the Non-Party Citizens appears in dicta in the Superior Court case. It clearly was not styled as a ruling or order, and more importantly does not appear in any judgment. See Creedon v. Haynes, 90 Mass. App. Ct. 717, 720 n.9 (2016) (Mass. R. Civ. P. 58(a) requires a judgment in a separate document, and that the separate judgment must be "self-sufficient, complete, and describe the parties and the relief to which the party is entitled."). As detailed at p. 3, supra, both the Superior Court (Goodwin, J.) and the Land Court (Rubin, J.) subsequently stated that the Settlement Agreement was never rescinded or ruled ineffective because the validity of the agreement as a whole was

not before either court. The only effect of the Superior Court judgment was to enjoin the Town from using the funds appropriated at the October 2020 Town Meeting to purchase the Settlement Parcel. Judge Rubin noted that "it is not at all apparent that the Settlement Agreement would be wholly unenforceable if the purchase of the Settlement Parcel did not proceed." (RA/399). Unless and until a party to it obtains a judgment invalidating or rescinding it, the remaining provisions of the Settlement Agreement, including the Town's release and dismissal of its G.L. c. 61 claim, are binding. See Quaranto, 38 Mass. App. at 413.[8]

In arguing lack of consent, the Non-Party Citizens conflate consent for the Board to purchase land with consent for the Board to settle and dismiss litigation or to waive a G.L. c. 61 claim. There is no dispute that the Board cannot cause the Town to purchase land absent authorization from Town Meeting. However, the Board does not need Town Meeting approval to dismiss litigation. "As a general rule, select boards empowered to act as a town's agents in litigation are likewise empowered to settle such claims." See RA/168-169 (Superior Court Decision) (collecting cases); see also Northgate Constr. Corp. v. Fall River, 12 Mass. App.

[8] Indeed, it is not at all clear that the remedy of rescission of a release is even available to the Town because its release took effect in February 2021 and was not contingent upon the purchase of the Settlement Parcel. See, e.g., Friedman v. Wang, 35 Mass. L. Rep. 385, pp. 8-9 (Super. Ct. Feb. 28, 2019) (Even where counter-party materially breached settlement agreement, non-breaching party could not rescind release which took effect upon execution of the agreement). Certainly, no such remedy is available to the Non-Party Citizens.

Ct. 859, 860-861 (municipality not required to litigate claims in the face of "uncertain cost, difficulties and outcome"). The Board also did not need approval to waive and release the Town's disputed G.L. c. 61 claim, as the power to exercise or not exercise a G.L. c. 61 option right rests in the sole and unreviewable discretion of the Board as the Town's executive authority. (RA/170) (Superior Court Decision) (citing Russell v. Canton, 361 Mass. 727, 730-732 (1972)). The role of Town Meeting as it relates to the Settlement Agreement was whether to authorize the acquisition of the Settlement Parcel and to appropriate funds for the acquisition.[9] Indeed, even if Town Meeting voted favorably to authorize the acquisition and authorize an appropriation, the Board is not obligated to follow through with this purchase. See Russell, 361 Mass. at 731 (Holding that "town could authorize the selectmen to take real estate by eminent domain, but that it could not direct or command them to do so").

The fact that the Board has the sole discretion and authority to dismiss litigation, and waive a G.L. c. 61 claim, renders this case markedly different than Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983) and the

[9] The Non-Party Citizens make much of the fact that the recent Town Meeting "failed to pass an article authorizing release and waiver of the Town's c. 61 rights under the Settlement Agreement." Memorandum, p. 11, & p. 16 n. 7. They do not inform the Court that they submitted and campaigned against this article, or that this article was introduced at Town Meeting as non-binding. The Town Meeting has zero authority to validate the Settlement Agreement or to compel the Board to pursue a G.L. c. 61 option.

other cases relied upon by the Non-Party Citizens. In Bowers, a select board docketed an agreement for judgment which effectuated a perpetual encumbrance on town-owned land. See 16 Mass. App. Ct. at 31-32. The Appeals Court (Kass, J.) held that this action was beyond the authority of the select board, which did not have the power to alienate land absent statutory authorization. However, the Court vacated only that portion of the judgment which effectuated an encumbrance on town property, and left the remaining provisions of the judgment intact. Id. at 35. Here, in contrast to Bowers, the stipulated Judgment merely dismissed the litigation. (SRA/005). The stipulated Judgment, which set forth no additional terms, did not effectuate any transfer of land, and neither did the Settlement Agreement. All the Settlement Agreement did was exchange a disputed G.L. c. 61 option right to purchase the entirety of 364 West Street for an undisputed right to acquire the Settlement Parcel. The Settlement Agreement did not purport to actually effectuate the transfer; it merely provided the Town the right to acquire the Settlement Parcel if the acquisition is approved by Town Meeting. Bowers is inapplicable and says nothing about the authority of the Board to dismiss the Land Court action with prejudice.[10]

[10] Even if Bowers applied, it would only apply to strike that portion of the Settlement Agreement pertaining to the land transfer. There is nothing in Bowers that supports a claim to vacate a dismissal of litigation or a release of claims, both of which are indisputably within the sole authority of the Select Board.

Bowers is also inapposite because here the parties filed only a stipulation of dismissal, and did not docket the Settlement Agreement as a consent judgment. Judge Rubin correctly noted this important distinction below. RA/400-401. As stated in Quaranto, another decision by Justice Kass issued subsequent to Bowers, "[i]f a court may not relieve parties of a consent judgment that spells out the terms of settlement, there is even less basis for relief from judgment on the basis of alleged failure to act in accordance with a collateral but extrinsic and unmentioned agreement." 38 Mass. App. Ct. at 412-413. Neither Bowers, nor any other case cited by the Non-Party Citizens stands for the proposition that a Stipulation of Dismissal may be vacated based upon an un-adjudicated alleged flaw with a collateral settlement agreement.[11]

The additional cases cited by the Non-Party Citizens do nothing for their lack of consent argument. These cases concern agreements for judgment executed by counsel without the authority of their client. See Salem Highland Dev. Corp. v. City of Salem, 27 Mass. App. Ct. 1423 (unpublished 1:28 memorandum) (1989) (City solicitor settled case and caused city to alienate real estate without obtaining authority from mayor and other officials as required by city bylaw); Parrell v. Keenan, 389 Mass. 809, 816 (1983) ("The trial judge found that the release and

[11] Additionally, the Settlement Agreement contains a severability clause that was negotiated by the Parties.

agreement for judgment were not executed by the plaintiff or with her authority."); Zarod v. Pierce, 26 Mass. App. Ct. 984, 985 (1988) (Trial judge's finding that it was "questionable . . . whether . . . [the] plaintiff actually wanted to dismiss her case . . . [and counsel] may not have had the authority to sign the stipulation of dismissal" was insufficient to allow Rule 60(b)(6) motion).

Obviously, if an attorney dockets a dismissal or judgment without client authority, the dismissal or judgment would be vulnerable to a Rule 60(b)(6) motion based upon lack of consent. Here, there is no allegation that Town Counsel lacked authority from the Board to docket the Stipulation of Dismissal. The Non-Party Citizens' argument is several orders of magnitude removed from that scenario. They ask the Court to infer that because the Board lacked authority to purchase the Settlement Parcel—which, as set forth above, the Settlement Agreement does not even require the Board to do—the Board lacked authority to enter into the Settlement Agreement as a whole, and therefore lacked authority to docket a stipulation of dismissal. This is an absurd comparison to a situation where an attorney dockets a dismissal without their client's knowledge or consent.

The Settlement Agreement has never been adjudicated to be invalid, ineffective, rescinded, or otherwise. Indeed, no claim to rescind the agreement has ever even been made. Astoundingly, the Non-Party Citizens assert that "it is not necessary for the Town and the Hopedale Citizens to commence a new action to

establish that the lack of authority to purchase the Forestland causes the Settlement Agreement to fail for lack of consideration." Memorandum, p. 15.[12] According to the Non-Party Citizens, it would be merely "superfluous" to require litigation and a judgment in order to eliminate the Defendants' contractual rights in the Settlement Agreement. Id., p. 16. They ask instead that this Court take their word for it and assume the Settlement Agreement is invalid. This is particularly galling because counsel for the Non-Party Citizens acknowledged in a Land Court hearing that his statements regarding the current effectiveness of the Settlement Agreement are mere argument, and that the validity of the agreement is an "open issue." (RA/490-491); see also Quaranto, 38 Mass. App. Ct. at 413 (No jurisdictional basis exists on Rule 60(b) motion for consideration of extrinsic settlement agreement).

III. The Balancing of Harms Favors the Defendants.

The Non-Party Citizens' failure to demonstrate any likelihood of success renders the additional criteria for a preliminary injunction "idle curiosity." Lieber, 488 Mass. at 821-22. Nevertheless, the balancing of harms favors the defendants.

The Non-Party Citizens have no interest in 364 West Street. Therefore, they will not suffer any harm if their motion is denied. On the other hand, the

[12] Here, again, the Non-Party Citizens intentionally conflate lack of authority to transfer land – which the Settlement Agreement did not do – with an alleged lack of authority to enter into the Settlement Agreement at all, or to dismiss the underlying case. Both of the latter actions were well within the Board's authority.

Defendants do own the land, and will therefore suffer harm if their activities on it are enjoined. The Affidavit of Michael Milanoski filed with the Defendants' Emergency Motion to Require Security provides ample support for the substantial harm that is continuing to accrue to the Defendants resulting from mobilizing and demobilizing equipment and subcontractors, and for the loss of investment-backed expectations for this property. Contrary to the unsupported responsive submission[13] by the Non-Party Citizens, the Defendants cannot simply avoid "any equipment rental costs…by returning the equipment to its lessors or using it elsewhere." The Defendants will continue to incur significant financial harm each day they are enjoined. This harm militates against continuing the emergency injunction.

IV. The Court Should Sanction the Non-Party Citizens.

When "appellate tactics . . . consist[] almost entirely of irrelevant and misleading arguments as well as outright misrepresentation, [such tactics] exceed all permissible bounds of zealous advocacy and have been repeatedly condemned." Avery v. Steele, 414 Mass. 450, 456 (1993), quoting Romala Corp. v. United States, 927 F.2d 1219, 1225 (Fed. Cir. 1991). Sanctions are available under Mass. R. App. 25; G.L. c. 211A, § 15; and G.L. c. 231, § 6F. Id.; see also Fronk v.

[13] Although less relevant for this Motion, the Defendants wish to respond to the Citizens' accusation that their "goal is to scare the Town and its residents by raising the financial stakes, knowing that the Town's financial condition is not great…" The Defendants' goal is to proceed in compliance with the agreement they reached with the Town in good faith after mediation, and nothing more.

Fowler, 456 Mass. 317, 327 (2010). These provisions allow the Court discretion to award double costs, fees, or "just damages." See Mass. R. App. 25; Sobczak v. Law Office of David J. Hoey, P.C., 94 Mass. App. Ct. 1115 (2019) (Rule 1:28 Decision).

Sanctions are appropriate for two reasons. First, the Non-Party Citizens' Emergency Motion was wholly insubstantial and frivolous. The Non-Party Citizens obscured the scope of their appeal by declining to include their notice of appeal in the record appendix. They paid mere lip service to the denial of their Motion to Intervene, and instead spent the bulk of their Memorandum attacking the Land Court's denial of the Town's Motion to Vacate, a decision which was not included in the Non-Party Citizens' Notice of Appeal and for which the Non-Party Citizens' lack standing to appeal. There is no legal theory upon which these Non-Party Citizens are entitled to any relief with respect to the subject land. Their claim to that relief was rejected by the Superior Court in a different action. It is apparent that the Non-Party Citizens submitted this motion not for its merit, but to seek delay and to pressure the Town to join the motion or seek similar relief.

Second, sanctions should be awarded because the Non-Party Citizens' Emergency Motion was totally dependent on their repeated misrepresentation that the Superior Court (Goodwin, J.) "ruled" the Settlement Agreement "ineffective." Such language is mere dicta and appears in no judgment or ruling. Before the Non-

Party Citizens filed their "Emergency Motion" in this Court, both Judge Rubin of the Land Court and Judge Goodwin of the Superior Court clarified that the Settlement Agreement was not in front of the trial court and therefore could not have been rescinded. (RA/401-402; SRA/043-044). At the most recent hearing, counsel for the Non-Party Citizens was admonished by Judge Rubin that this claim is nothing more than argument; counsel even acknowledged to Judge Rubin the effectiveness of the Settlement Agreement to be an "open issue." (RA/490-494). Yet almost immediately after making that acknowledgment in the trial court, the Citizens submitted an emergency motion to this Court asserting the opposite – that the effectiveness of the Settlement Agreement was not an "open issue," but had been "ruled" on in the manner which the Citizens believe helps their appeal.[14] It is abundantly clear that the Non-Party Citizens will continue to repeat this false claim unless sanctioned for relying on misrepresentations.

[14] The Non-Party Citizens misrepresent other rulings. They falsely assert that Superior Court "found [Defendants] to be in violation of an earlier order of the Appeals Court." Memorandum, p. 3. The referenced order applied by its terms only to the Town of Hopedale. (RA/137). The Superior Court issued a new order which applied to the Defendants, and which was never violated and was later dissolved after the Citizens' claim was dismissed. The Defendants unequivocally were never "found to be in violation" of any order in either case. Further, as discussed at note 2, supra, the Citizens portray the November 2020 Land Court denial of the Town's request for injunction as a "brief, narrow order" without acknowledging that the court noted the possibility that the Town's claims were preempted.

For these reasons, the Non-Party Citizens' conduct warrants an award of sanctions.

CONCLUSION

The Defendants request that the Court: (1) deny the Non-Party Citizens' Emergency Motion to Preserve the Status Quo, (2) Immediately dissolve the Injunction issued on March 28, 2022, and (3) Award the Defendants sanctions against the Non-Party Citizens in the form of "just damages" for being wrongly enjoined without notice, counsel fees, and double costs, and (4) Permit the Defendants to make a submission to this Court detailing and supporting their damages within fourteen days of any such sanctions award.

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

By Their Attorneys,

/s/ Andrew P. DiCenzo

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Dated: April 7, 2022

CERTIFICATE OF SERVICE

I, Andrew P. DiCenzo, hereby certify that on the 7th day of April, 2022, I caused a true copy of the foregoing document to be served on counsel for all parties, and to the non-party Hopedale Citizens, by electronic mail, and via the efileMA.com system.

/s/ Andrew P. DiCenzo