

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD)
COMPANY, JON DELLI PRISCOLI AND)
MICHAEL R. MILANOSKI, AS TRUSTEES)
OF ONE HUNDRED FORTY REALTY)
TRUST,)
 Plaintiffs,)
 v.)
TOWN OF HOPEDALE, THE HOPEDALE)
SELECT BOARD, BY AND THROUGH ITS)
MEMBERS, GLENDA HAZARD, BERNARD)
STOCK, AND BRIAN KEYES, AND THE)
HOPEDALE CONSERVATION)
COMMISSION, BY AND THROUGH ITS)
MEMBERS, BECCA SOLOMON, MARCIA)
MATTHEWS, AND DAVID GUGLIELMI,)
 Defendants.)

Civil Action No. 4:22-cv-40080-ADB

**TOWN OF HOPEDALE’S OPPOSITION TO GRAFTON & UPTON
RAILROAD COMPANY’S MOTION FOR CLARIFICATION**

The defendants, the Town of Hopedale *et al.* (collectively “the “Town”), submit this opposition to the Grafton & Upton Railroad Company’s (“GURR’s”) Motion for Clarification.

This is a Motion for Clarification in name only. What GURR actually seeks is unilateral relief from the Court’s August 10, 2022 request to both GURR and the Town that it “would like status quo to be maintained” while the Court resolves the pending motions. (ECF #48).

Following that request, both parties submitted proposed orders, and GURR’s own submission proposed that it be enjoined from “engaging in any further development” on the forestland. ECF #49, ¶ 5. Since that time, the Town has fully abided by the Court’s request that it maintain the status quo, and it has not exercised its municipal authority under G.L. c. 79 to file the Order of Taking for the forestland. But GURR, contrary to its own proposed order and without providing

any legitimate rationale, now seeks to proceed with “further development” by drilling a water exploration well through bedrock on the site - - a well which GURR acknowledges will remain on the site even after its exploration work is complete. Motion for Clarification ¶ 27. GURR’s motion hardly seeks “clarification.” It simply reflects that GURR is no longer willing to abide the status quo while the Court resolves the pending motions. The Motion for Clarification should be denied.

First, GURR’s Motion for Clarification should be treated for what it is: a motion for *modification*, not *clarification*, of the Court’s request to maintain the status quo. As such, it should be governed by the standard applicable to requests to modify a preliminary injunction. “In the First Circuit, a district court may modify a preliminary injunction pursuant to Fed. R. Civ. P. 60(b)(5) where ‘it is no longer equitable that the judgment should have prospective application’ and there is a ‘significant ... change in operative fact.’” *Southern New England Telephone Co. v. Global Naps, Inc.*, 620 F. Supp. 2d 152, 154 (D. Mass. 2009) (ellipsis in original), quoting *Concilio de Salud Integral de Loiza, Inc. v. Perez-Perdomo*, 551 F.3d 10, 16 (1st Cir. 2008). GURR has not even referenced, much less attempted to satisfy, that standard.

Second, GURR suggests that there was something improper about the Court’s request that both parties maintain the status quo, even though the Town itself did not move for injunctive relief. Motion for Clarification at ¶¶ 16, 22. This suggestion is legally incorrect. Even if GURR had met the prerequisites for injunctive relief - - and the Town maintains that it did not come close - - the Court could have entered the injunction GURR sought, but imposed on GURR whatever conditions the Court deemed just and appropriate. As the Supreme Court has held, “[i]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all ... whose interests the injunction may effect.” *Brotherhood of Locomotive Engineers*

v. Missouri-Kansas-Texas R. Co., 363 U.S. 528, 531-532 (1960), quoting *Inland Steel v. United States*, 306 U.S. 153, 157 (1939). There was nothing improper about this Court’s request that both parties, including GURR which sought injunctive relief and the Town which opposed it, maintain the status quo.

Third, GURR provides no legitimate reason why it cannot wait to begin its drilling activity until the Court resolves the pending motions. GURR claims it plans to add “90+ railcars” to its operation, and that it therefore needs “additional track,” Motion for Clarification at ¶ 23, but how the immediate drilling of a water exploration well will address that need is unclear. GURR also asserts that “winter and colder temperatures are fast approaching,” *id.* at ¶ 24, but provides no reason (and there is none) why drilling a well through bedrock cannot occur in the winter months. In this respect, GURR’s Motion for Clarification mirrors the flaws in its request for a preliminary injunction against Hopedale’s taking of the forestland. Much like GURR failed to show that its business opportunities would irreparably disappear if it were forced to challenge the validity of the taking in state court under G.L. c. 79, GURR has made no effort here to show that it would suffer irreparable harm if its drilling through bedrock cannot commence immediately.

Fourth, GURR baselessly asserts that its “proposed new water source exploration work is consistent with the Town’s alleged public purpose for the eminent domain taking and with the Town’s representations to the Court (and other courts) that the Town views the subject land as a probable future water source.” Motion for Clarification ¶ 25. In fact, GURR’s proposed efforts “to identify a new water source” on the subject land are directly *inconsistent* with the public purpose behind the eminent domain taking.

Hopedale has submitted affidavits from the Chair of its Board of Water & Sewer Commissioners, as well as the Chair of Hopedale’s Conservation Committee, attesting to the devastating effects that GURR’s proposed development would have on the Town’s water supply. Affidavit of Edward J. Burt ¶¶ 4, 11-18 (Dkt. 32-3) (“Burt. Aff.”); Affidavit of Becca Solomon ¶¶ 2, 7-19 (Dkt. 32-2) (“Solomon Aff.”). These affidavits, which are not contested by GURR, fully describe “the Town’s water crisis,” how the site is the “only viable option for increasing the Town’s water supply,” and how “the Town needed to acquire the Forestland in order to secure the future of Hopedale’s water supply.” Burt Aff. pp. 2-3, ¶ 11; Solomon Aff. ¶ 2 (GURR’s development “will adversely affect the watershed,” and “prevent the Town from securing a potential new water supply to support future new growth in the Town.”). GURR’s argument that securing the water supply for its own industrial use is somehow “consistent with the Town’s alleged public purpose for the eminent domain taking” is inexplicable.¹

¹ It is also worth note that two of the bases for GURR’s Motion for Clarification, the import of the Stipulation of Dismissal filed in the Massachusetts Land Court litigation brought by the Town seeking to enforce the Town’s G.L. c. 61 option rights to purchase the forestland, Motion for Clarification at ¶ 3, and the status of the Settlement Agreement involving the claims in that litigation, Third Affidavit of Michael R. Milanoski in Support of Motion for Clarification ¶ 7, are currently the subject of litigation in the Massachusetts Appeals Court. *See Reilly et al. v. Town of Hopedale et al.*, No. 2022-P-0314 (Mass. Appeals Court) and *Town of Hopedale v. Trustees of 140 Realty Trust*, No. 2022-P-0433 (Mass. Appeals Court). These cases are both fully briefed and were argued on November 15, 2022.

For the foregoing reasons, Hopedale requests that the Court deny GURR's Motion for Clarification.

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By their attorneys,

/s/ David S. Mackey

David S. Mackey (BBO #542277)
dmackey@andersonkreiger.com
Mina S. Makarious (BBO #675779)
mmakarious@andersonkreiger.com
Sean Grammel (BBO #688388)
sgrammel@andersonkreiger.com
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
617.621.6523

Dated: November 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 22nd day of November, 2022.

/s/ David S. Mackey

David S. Mackey