COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL 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.	Civil Action No. 2185-cv-00238D

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO RAILROAD DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

A Single Justice of the Appeals Court has issued an injunction in plaintiff taxpayers' favor in this matter pursuant to M.G.L. c. 231, § 118, para. 1, stating:

> Conclusion. I find that the plaintiffs have demonstrated a likelihood of success in showing that, pursuant to the statutes discussed herein, the select board lacks the authority to purchase the land described in the settlement agreement without an authorization from the town at town meeting. I further find that a preliminary injunction pending a determination on the merits would serve the public interest in preventing the unauthorized expenditure of public funds. Consequently, the Hopedale Board of Selectmen is enjoined 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 ["Railroad"], pending final judgment or further order of this court, or a single justice thereof, whichever is first to occur. (Meade, J.).

No. 2021-J-0111 (April 8, 2021) (emphasis added).

Despite this implicit appellate finding of Plaintiffs' standing, the Railroad nevertheless now contends that the Settlement Agreement--in particular the Hopedale Board of Selectmen's ("Board") purported release of its statutory, perfected option ("Option") to acquire 130 acres of Forestland that the Railroad purchased from the seller and intends to convert to railroad use--is immune from judicial scrutiny in this action. The Railroad would have this Court overlook that the Single Justice has already enjoined transfer of any Town property interest, including the Town's Option under M.G.L. c. 61, pursuant to the Settlement Agreement. At bottom, the deal agreed to by the Board--release of the recorded Option, in exchange for obtaining only 40 acres of the 130 acres of the c. 61 Forestland and 25 acres of wetlands it already has taken by eminent domain--was beyond its authority under c. 61 and any authorization at Town meeting. The Railroad snookered the Board into abandoning litigation to enforce the Option, based on a chimerical claim that the Option was defective and preempted by federal law favoring railroad operations. Regardless of the merits of the settlement, the Board lacked authority to enter into it, as the Appeals Court has already determined, and the Town's c. 61 rights remain.

Plaintiffs have standing to seek review by this Court of the Town's c. 61 rights under three statutes and doctrines. First, as already implicitly found by the Single Justice, Plaintiffs are taxpayers who have standing under M.G.L. c. 40, § 53 to challenge the Town's transfer of its c. 61 rights to the Railroad. Under the Settlement Agreement, this transfer is inextricably linked to the unauthorized expenditure of funds to purchase only 40 of the 130 acres of Forestland, and therefore may be challenged under established caselaw. Plaintiffs have served a Cross-Motion for Judgment on the Pleadings that shows that the purported transfer of the Town's c. 61 rights is

unauthorized in multiple respects. It constitutes an assignment of an exercised option to a for-profit entity, which is inconsistent with the plain language of c. 61, § 8. Further, c. 61, § 8 does not allow the Board to reverse its decision to exercise the c. 61 Option. In addition, the Town's exercised Option is an interest in real property that cannot be transferred to the Railroad without Town Meeting authorization under M.G.L. c. 40, § 3, which also never occurred. Finally, the purported transfer of the c. 61 rights is void because the Town did not receive anything of value in exchange for it; the Railroad's claims that the Town's Option was defective and subject to federal preemption were utterly groundless, so transfer of the Option to the Railroad was an unauthorized gift. For all of these reasons, the Town's c. 61 Option remains enforceable under c. 40, § 53.

Plaintiff taxpayers also have standing to enforce the Town's c. 61 rights under M.G.L. c. 214, § 3(10), which allows taxpayer citizens to enforce the purpose of any conveyance or gift to the Town. The Town's exercise and recordation of its c. 61 Option constitutes a conveyance of an interest in real property that is squarely within the plain language of c. 214, § 3(10). The Railroad cannot deprive the plaintiff taxpayers of such standing by claiming that the fee interest in the 130 acres was never conveyed, when it was the Railroad itself which illegally prevented the closing of purchase of the property pursuant to the Option.

Plaintiff taxpayers also have standing to seek relief in the nature of mandamus under M.G.L. c. 249, § 5 in order to enforce the Town's c. 61 Option. The Board violated its statutory duties under c. 61 in giving away 90 of the 130 acres of Forestland to the Railroad. Under the public rights doctrine, Plaintiffs are entitled to seek a determination of the merits of this matter and an order enforcing the Town's c. 61 Option.

The Railroad may not escape this judicial review by claiming that Plaintiffs' claims are barred by the Settlement Agreement or the dismissal of the Land Court action between the Board

and the Railroad. Plaintiffs were not parties to the Settlement Agreement and did not have the opportunity to intervene in the Land Court action. The Settlement Agreement and dismissal are therefore not binding on them. In any event, the Settlement Agreement and dismissal are irrelevant because they did not address the issues of the Board's lack of authority to transfer the Town's c. 61 Option to the Railroad. Under controlling appellate case law, the Board's lack of authority remains and the transfer of c. 61 rights to the Railroad is a nullity.

For these reasons, the Court should reject the Railroad's strenuous efforts to avoid judicial scrutiny of the Settlement Agreement and its illegal plan to appropriate and develop 90 of the 130 acres of Forestland, all of which rightfully belong to the Town.

FACTUAL BACKGROUND

On July 9, 2020, the Railroad entered into a Purchase and Sale Agreement with the nominee realty trust owner of 130 acres of land in the Town of Hopedale classified as Forestland under c. 61 and provided the Town with a Notice of Intent, as required under c. 61, to sell the property for $1,175,000. Verified Complaint ("VC"), Ex. 3.[1] This created an irrevocable first refusal option to the Town to purchase the Forestland for $1,175,000, pursuant to c. 61, § 8. The Town took all necessary steps to exercise the Option within the statutory 120 days. The Town intended to preserve the Property, which is contiguous with the 279-acre Town-owned Hopedale Parklands, as parkland for conservation and recreation and as a potential location for a much-needed municipal water supply. The Railroad, on the other hand, intended to raze the Forestland and construct an industrial railyard on the Property.[2] VC ¶¶ 20, 44, 49.

[1] An additional 25 acres of the property are wetlands that run through a portion of the Forestland (the "Wetlands") and are excluded from c. 61 classification, together the "Property". See map of Property, VC, Ex. 1.

[2] The Railroad made several attempts to acquire the Property to avoid triggering the Town's c. 61 first refusal option. The Railroad first tried to acquire the Property through an eminent domain taking at the Department of Public Utilities and then some portion of it through a public-private partnership with the Town. Each effort failed.

On October 22, 2020, environmental consultants for the Water and Sewer Commissioners reported that the Property is critical to the protection of the Town's watershed and potential water supply expansion but that development of a new well would require the Town's control and conservation of the Property. VC, Ex. 2. The Town's Finance Committee reported reported favorably on acquisition of all 130 acres of Forestland via c. 61. VC, Ex. 8.

The Town informed the Property owner and the Railroad that it was considering exercise of its Option and on October 24, 2020, a Special Town Meeting was attended in person by over 400 citizens of Hopedale to appropriate funds to exercise the Option.

Article 3 of the Town Meeting Warrant presented the following question:

> To see if the Town will vote to acquire, by purchase or eminent domain, certain property, **containing 130.18 acres**, more or less . . . and in order to fund said acquisition, raise and appropriate, transfer from available funds, or borrow pursuant to G.L. c. 44, §7, or any other enabling authority, a sum of money **in the amount of One Million One Hundred and Seventy-Five Thousand Dollars ($1,175,000.00)**, and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land conservation, said property **being acquired pursuant to a right of first refusal in G.L. c. 61, §8**, which right is subject to exercise by a vote of the Board of Selectmen, **such acquisition to be made to maintain and preserve said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes** . . . VC, Ex. 12 (emphasis added).

Residents of the Town spoke overwhelmingly in favor of acquiring the 130.18 acres of Forestland for use by the public for conservation and recreation. The Finance Committee recommended approval of Article 3 and informed the Town Meeting of a gift offer of $750,000 from the Hopedale Foundation to assist in the exercise of the Option. Chairs of the Conservation Commission and Water and Sewer Commissions spoke in favor of exercising the Option. By a unanimous vote, Town Meeting approved a motion on Article 3 "to appropriate . . . $1,175,000,

less amounts received by gift, to pay costs of acquiring certain property, containing 130.18-acres". VC, Ex. 12. [3]

On October 30, 2020, the Board unanimously voted to exercise the Town's Option to acquire the 130-acre Forestland, consistent with the Town Meeting vote. The Board confirmed that the vote "is for the acquisition of the land [ ] for public conservation and is consistent with Article 97 [. . .] [and] that once this land is moved into Article 97, the town would need a 2/3rds vote from Massachusetts Legislature to change this." VC ¶ 49, Ex. 13. On November 2, 2020, the Town recorded notice of the exercise of its Option and the taking of the Wetlands in the Worcester South District Registry of Deeds. VC, Ex. 14.

Meanwhile, the Railroad was making a series of illegal maneuvers to seize control of the Property and strip the Town of its c. 61 rights. The Railroad first purported to withdraw the July 9, 2020 Notice of Intent on October 7, 2020.[4] On October 12, 2020, the entire beneficial interest of the Forestland was assigned to the Railroad for $1,175,000; the prior trustees of the Trust Property owner resigned and named Railroad defendants Jon Delli Priscoli and Michael Milanoski as the new trustees; and the prior trustees sold to the Railroad the Property's 25.06 Wetlands that are surrounded by the Forestland plus an additional 20-acre parcel on the opposite side of West Street for one dollar ($1.00). VC ¶¶ 35-37. Thereafter, the Railroad began land clearing activities on the Property.

On October 28, 2020, the Town sued the Railroad in Land Court in the action styled Town of Hopedale v. Jon Delli Priscoli Trustee of the One Hundred Forty Realty Trust, et al., 20

[3] Town Meeting also approved Article 5, to take by eminent domain the 25-acre Wetlands. The Board voted to do the same and recorded that taking as well. VC, Exs. 12, 13, 14.

[4] The Town informed the Railroad, which drafted and signed the Notice for the Property owner, that the Notice was defective because it included non-Forestland in the purchase price and sought clarification from the Railroad. The Town also informed the Railroad that the Town's c. 61 Option, once triggered, cannot be withdrawn.

MISC 000467. The Town sought a judicial order that the Notice could not be withdrawn and that even if the July 9, 2020 Notice was defective, the Railroad's purchase of the beneficial interest in the Property was an independent trigger of the Town's first refusal Option, which the Town validly exercised by the unanimous Town Meeting vote, the unanimous Board vote, and recording of the Notice of Exercise. The Town also moved to enjoin the Railroad's Forestland clearing. VC ¶ 50. On November 23, 2020, the Land Court denied the Town's request for a preliminary injunction 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. VC ¶ 57.

Thereafter, the Board and the Railroad engaged in mediation. Despite vigorous community opposition, the Board entered into a Settlement Agreement with the Railroad that is irreconcilable with Town Meeting authority and purpose and would expend funds that were not authorized by Town Meeting.[5] The Settlement Agreement provides that the Board will release the Town's c. 61 rights in their entirety and instead will purchase 40 of the 130 acres of Forestland along with the 25 acre Wetlands for $587,500. VC, Ex. 19. The Board agreed to provide various easements on the 40 acres to the Railroad. The Board also agreed to pay the rollback taxes owed by the Railroad on the 130 acres as well as half the costs of surveying the properties and conducting hydrogeological investigations. The Board also agreed that the remaining 90 acres of Forestland could be developed by the Railroad. VC, Ex. 19, ¶¶ 1-3, 5b, 5f.

[5] The Board agreed to a Term Sheet that was presented to the public on January 25, 2021 that called for execution of a settlement agreement no later than February 9, 2021 and a closing within 60 days. VC ¶ 60. By letter dated February 7, 2021, Plaintiffs explained that the Board's proposed actions were unauthorized and inconsistent with c. 61. VC ¶ 61, Ex. 18. At a meeting the next day, February 8, 2021, the Board published a draft Settlement Agreement and promptly voted 2-1 to execute it. On February 9, 2021, the Board and the Railroad signed the Settlement Agreement and on February 10, 2021, they filed a Stipulation of Dismissal with Prejudice of the Land Court Action. VC ¶ 64, Ex. 19.

These terms directly contradict the Town Meeting unanimous vote to appropriate $1,175,000 for acquisition of all 130 acres pursuant to c. 61 and to preserve all of that acreage as parklands for conservation.

Having no opportunity to intervene before dismissal of the Land Court action, Plaintiffs promptly filed this action challenging the Settlement Agreement and seeking to enforce the Town's c. 61 Option. On March 11, 2021, the Superior Court (Frison, J.) denied Plaintiffs' Motion for a Preliminary Injunction in a one paragraph docket order.

On April 8, 2021, a Single Justice of the Appeals Court (Meade, J.) issued an injunction pursuant to M.G.L. c. 231, § 118, para. 1, barring the Board from expending money, incurring obligations, or transferring property interests pursuant to the Settlement Agreement.

On April 16, 2021, the Railroad served its Motion for Judgment on the Pleadings on Count II of the Verified Complaint, which seeks a declaration that the Town's c. 61 Option remains intact and enforcement of the Option by an order compelling transfer of all 130 acres to the Town in exchange for the $1,175,000 as appropriated at Town Meeting and as originally approved by the Board.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE BOARD'S PURPORTED RELEASE OF THE TOWN'S CHAPTER 61 OPTION AND TO ENFORCE THE OPTION

A. Plaintiffs Have Standing Under M.G.L. c. 40, § 53 to Challenge Not Only Expenditure of Funds But Also Transfers of Property Interests Under the Settlement Agreement, Which Were Enjoined by the Single Justice

The Railroad argues that Plaintiffs lack standing under c. 40, § 53 because the Board's purported "waiver" or release of the Town's c. 61 Option (after exercising it) does not involve spending or raising funds. For the reasons set forth below, the Railroad cannot escape judicial

review of the Town's c. 61 Option, [6] and its Motion must be denied. This argument fails because the Settlement Agreement containing the purported release of the Town's c. 61 Option does indeed contain multiple provisions involving spending or raising funds, and Plaintiffs are entitled to challenge the entire Settlement Agreement under c. 40, § 53 because the unauthorized expenditures and financial obligations are inextricably bound up with the release of the c. 61 Option under the Agreement.[7]

The Settlement Agreement purports to obligate the Town to spend $587,500 to acquire 40 of the 130 acres of Forestland along with the 25 acres of Wetlands; to pay the rollback taxes owed by the Railroad under c. 61 as an addition to the purchase price; and to pay half the costs of hydrogeological investigations of the properties being acquired and half the costs of surveying all of the properties involved in the transaction. These are undisputedly expenditures and financial obligations that are actionable under § 53.[8]

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[6] As a threshold matter, the Railroad cannot challenge Plaintiffs' standing to bring claims that go to the Board's authority to spend money or transfer property interests under the Settlement Agreement, and that are not directed at the Railroad. To the extent the Railroad is now attempting to bring arguments on the Board's behalf, having coopted the Board into an unholy alliance, the Court must disregard those arguments. Daigle v. Daigle, 85 Mass. App. Ct. 1105 (2014).

[7] The Railroad's argument that "Count II does not allege that the Town is about to spend or raise any funds", MJP at 13, is facile. Count II of the Verified Complaint incorporates by reference Count I as well as all preceding factual allegations, which amply allege that the Town is doing exactly that. The Railroad also argues that Count III does not seek relief against it. This too is wrong. To the extent the Railroad seeks to change the use of the 130 acres from Town-approved parklands and conservation land, Plaintiffs seek under Count III to enjoin such change in use as a violation of Article 97 of the Massachusetts Constitution.

[8] Neither the Board nor the Railroad has challenged Plaintiffs' standing under c. 40, § 53 to enjoin the improper use by the Board of funds appropriated at Town meeting, that is, diversion of funds intended to preserve 130 acres of Forestland as conservation/parkland for the substantially different purpose of acquiring only 40 acres, leaving the remainder for Railroad development. There is no question that Plaintiffs have standing under § 53 to challenge these illegal expenditures and financial obligations. City Council of Boston v. City of Boston, 386 Mass. 171, 181 (1982) (court affirmed ten taxpayer request for an injunction where the subject transfers were a "substantial change in appropriations" that had to be approved by two thirds of the council); Iacobucci v. Amesbury Municipal Council, 2005 WL 6380128 (Mass. Super. Ct. July 28, 2005) (in § 53 taxpayer suit, summary judgment finding that vote to appropriate funds for the purpose of repairing and expanding the Town library was subject to a referendum process pursuant to Town Charter); Town Adm'r Screening Comm. of Town of Webster v. Bd. of Selectmen of Town of Webster, 2005 WL 2864795, at *2 (Mass. Super. Ct. Oct. 7, 2005) (Board enjoined from entering into a three-year contract with a new Town Administrator, in violation of Town Charter requirements, because it would incur obligations for purposes of c. 40, § 53).

Importantly, these expenditures and financial obligations are inextricably linked under the Settlement Agreement to the Board's purported release of the Town's exercised Option under c. 61 and granting of easement interests to the Railroad on the 40 acres being acquired. The putative consideration for the Railroad's agreement to grant a deed to those 40 acres includes (1) the payment of $587,500, rollback taxes, and engineering/survey costs; (2) the release of the Town's c. 61 rights to all 130 acres; and (3) granting by the Town of easements to the Railroad in the 40 acres. These elements of the Settlement Agreement all can be challenged because they are integrally related to, and depend upon, expenditures and financial obligations that are clearly within the scope of c. 40, § 53. Oliver v. Town of Mattapoisett, 17 Mass. App. Ct. 286, 287-88 (1983); Taxpayer Grp. v. City of Fall River Redevelopment Auth., 2010 WL 5573723 *3 (Mass. Super. Oct. 28, 2010); Carter v. Town of Douglas, 2000 WL 1473571 *2-3 (Mass. Super. Ct. Jan. 9, 2001).

In Oliver, the Appeals Court affirmed standing under c. 40, § 53 for ten taxpayers to challenge a town meeting vote to grant an easement in Town land to a private party. The Superior Court judge had made a finding that the Town incurred financial obligations as part of its dealings with the private party, including contemplated construction of a cul-de-sac that would require Town expenditures. While cautioning that "[a]nticipated conduct of a municipality does not support a § 53 action," the Appeals Court left undisturbed the Superior Court's finding of future obligations and legal conclusion that the plaintiff taxpayers had standing to challenge the grant of an easement. Here, there can be no dispute that the Settlement Agreement imposes putative financial obligations on the Town that are linked to its release of the Town's property rights under c. 61. Accordingly, under Oliver, the taxpayer Plaintiffs in this

case have standing to challenge the Board's purported release of its c. 61 property interests and grant of easements, which were not authorized by Town meeting. [9]

Similarly, in Fall River, the plaintiff ten taxpayer group was allowed to challenge successfully under c. 40, § 53 a proposed transfer of land from the municipality to a private party. The proposed Purchase and Sale Agreement that contained the transfer also contained obligations for repurchase of the premises at the election of the buyer in the event certain contingencies were not met. 2010 WL 5573723, at *2. No question was raised that the plaintiff taxpayers lacked standing to enjoin the land transfer. Here too the Plaintiffs have standing to enjoin the transfer of municipal property interests that are wrapped up with expenditures and financial obligations of the Town.

In Carter, ten taxpayers brought an action under c. 40, § 53 to restrain the use of funds appropriated for exercise of a c. 61 option on the grounds that the possibility of using unexpended funds to purchase the property was not contained in the warrant for the special town meeting. The Superior Court rejected the Town's challenge to the plaintiffs' standing, citing Oliver, and went on to find that the vote was within the scope of the warrant article and was lawful. Id. at *2-4. Here, as in Carter, Plaintiffs have standing under c. 40, § 53 to challenge the

[9] Under c. 40, § 3, a majority vote of a town is necessary to grant an easement or convey any other interest in land. Oliver, 17 Mass. App. Ct. at 288. As an option to purchase real property, the Town's c. 61 rights exercised by the Board and recorded at the Registry of Deeds created "an equitable property interest" in the Forestland. Fall River, 2010 WL 5573723, at *3. See infra at 14. As shown in Plaintiffs' Cross-Motion for Judgment on the Pleadings, release of these rights without Town meeting approval was illegal for multiple reasons, including lack of authority under c. 40, § 3 as well as c. 61 itself. See Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 32 (1983) (settlement by a board of selectmen providing easements was beyond the authority of the selectmen and in violation of c. 40, § 3 because it had not been approved by Town Meeting); Daly v McCarthy, 63 Mass. App. Ct. 1103 *2 (2005) (release of agricultural preservation restriction in settlement agreement was ineffective absent town meeting approval, citing Bowers).

scope of legal authority claimed by the Board in connection with exercise of an option to acquire forestland under c. 61.[10]

A Single Justice of the Appeals Court has already recognized this standing by issuing an order enjoining the BOS "from issuing any bonds, making any expenditures, paying any costs, or transferring any property interests pursuant to the Settlement Agreement ...." (emphasis added). The Single Justice's Order was expressly issued pursuant to c. 40, § 53. If Plaintiffs did not have standing to seek to enjoin the Board from transferring property interests, the Single Justice would not have included this language in the Order.[11]

It would be an absurd result if the Plaintiff taxpayers have standing to challenge only the Town's expenditures and financial obligations under the Settlement Agreement but not its transfer of property interests including its release of the Town's c. 61 Option. The release of the Town's c. 61 Option was the purported *quid pro quo* for the Railroad's commitment to sell 40 acres of the Forestland which it claimed to own. The transaction cannot be parsed to allow standing to challenge some but not all of it. Were Plaintiffs barred from challenging the release of the c. 61 Option, it would create tremendous uncertainty as to the enforceability of the remainder of the Settlement Agreement even after a final determination of the illegality of the expenditures and financial obligations. As set forth in Plaintiffs' Cross-Motion for Judgment on

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[10] The Railroad hints but does not argue that Plaintiffs' claims under c. 40, § 53 are moot or untimely, citing Spear v. Boston, 345 Mass. 744, 746 (1963). However, Spear is inapposite because this matter is not a completed transaction, given that the closing provided for under the Settlement Agreement has not yet occurred. Andrews v. City of Springfield, 75 Mass. App. Ct. 678, 682 (2009) (complaint was timely filed for purpose of conferring standing on taxpayers where it was filed while construction was ongoing, well before city was required to "expend money" under the lease at issue). Plaintiffs could not have filed suit earlier here because the Settlement Agreement was signed and the Land Court action was dismissed immediately after the Board made the draft Settlement Agreement public. See n. 5 supra.

[11] Indeed, under the Railroad's theory, the Single Justice would have lacked jurisdiction under c. 40, § 53 to make the finding that authorization to acquire less than all of the 130 acres was lacking under M.G.L. c. 40, § 14, because the lack of authorization to acquire the property was separate from and independent of the appropriation that was approved at Town Meeting. Such an argument is preposterous. In the same way that lack of authority to acquire property interests is justiciable in this case under c. 40, § 53, so too is the lack of authority to transfer property interests in connection with the same transaction.

the Pleadings, the entire Settlement Agreement is unauthorized, void, and illegal. While the Railroad would like to have the Board's actions including release of the c. 61 Option remain unexamined by any court, Plaintiffs have the right to seek judicial review under c. 40, § 53 of the release as part and parcel of the expenditures, financial obligations and transfer of property interests which the Single Justice has already determined to be likely illegal and void.

B. Plaintiffs Have Standing Under M.G.L. c. 214, § 3(10) to Enforce the Purpose of the Chapter 61 Option Which Was Exercised by the Board

The Railroad next argues that Plaintiffs lack standing under M.G.L. c. 214, § 3(10) because title to the Forestland was never actually conveyed to the Town. In other words, the Railroad's position is that because it was able to frustrate the completion of the acquisition of the Forestland--notwithstanding the Board's perfected Option under c. 61--it can also frustrate and prevent the citizens of Hopedale from challenging the actions of the Board and the Railroad. The Railroad is estopped from relying upon its own illegal actions as a basis to block Plaintiffs from challenging those actions. Renovator's Supply, Inc. v. Sovereign Bank, 72 Mass. App. Ct. 419, 426 (2008). "In Massachusetts the principle of equitable estoppel functions 'to prevent one from benefiting from his own wrongdoing and to avoid injustice.'" Id., quoting Harrington v. Fall River Hous. Authy., 27 Mass. App. Ct. 301, 307 (1989).

In any event, the Railroad's argument fails because the perfected exercise of the c. 61 Option, recorded at the Registry of Deeds as a "Notice of Exercise of First Refusal Option Pursuant to M.G.L. c. 61, § 8" signed by the Board, constitutes a "conveyance" under c. 214, § 3(10), the purpose of which[12] Plaintiffs have standing to enforce.

[12] The purpose of the c. 61 acquisition was to conserve the 130 acres for recreation as they abut the existing Town Parklands, protect the Town's water supply, and preserve open space. See Warrant Article 3, VC Ex. 12 ("such acquisition to be made to maintain and preserve said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes"); Environmental Partners Report, VC Ex. 2; and minutes of the Board's 10/30/20 meeting (vote "is for the acquisition of the land [ ] for public

It is not necessary for the Town to have received legal title to the 130 acres for this action to be maintained under § 3(10). The Board's exercise of the Option and recording of Notice of Exercise signed by the Board, which is required by c. 61, § 8, are sufficient to constitute a "conveyance" under § 3(10). The Town's option to purchase real property creates "an equitable property interest" in the Forestland. Fall River, 2010 WL 5573723, at *3. A "conveyance" is defined by legal treatises and caselaw to include any transfer of an interest in real property, not just fee title. Black's Law Dictionary (11th ed. 2019) ("The transfer of an interest in real property from one living person to another, by means of an instrument such as a deed."); 357 Circuit Avenue LLC v. Abbott, 2011 WL 2586087 *3 (Mass. Land Ct. June 28, 2011) (same); Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs., 609 F.Supp.2d 135, 140 (D. Mass. 2009) (same), *rev'd on other grounds* 608 F.3d 110 (1st Cir. 2010). Here, the Board's exercise of the Town's Option transferred an interest in the Forestland as a matter of law under c. 61, § 8, and the recording of the Notice of Exercise, like a deed, was effected as required by statute in order to put the world on notice of the Town's interest in the real property.[13]

Treating the Option exercise as a "conveyance" under § 3(10) promotes the purpose of c. 61 which is to facilitate acquisition of forestland for municipal use and to provide municipalities the opportunity to prevent conversion of the property to non-Forestland uses. Option exercises by municipalities under c. 61A (preservation of agricultural land) and 61B (preservation of recreational land) are similar conveyances that should fall within the statute. The courts have already held that the statute is available to enforce the purpose of an agricultural

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conservation and is consistent with Article 97"). The Railroad does not dispute the purpose of the Town's exercise of its c. 61 Option.

[13] To the extent that "conveyance" may be interpreted to include an "encumbrance" on real property, the Town's Notice of Exercise certainly qualifies as such. See Lamson & Co. v. Abrams, 305 Mass. 238, 244 (1940 (defining term "conveyance" within meaning of M.G.L. c. 183, § 4 to include "encumbrances"); Blackstone Smithfield Corp. v. Town of Blackstone, 2009 WL 9051760 *4 (Mass. Super. Ct. May 13, 2009).

preservation restriction ("APR"). Daly v McCarthy, 63 Mass. App. Ct. 1103 *3 (2005). There is no good reason why a recorded notice of exercise of an option to acquire forestland under c. 61 should be treated differently than an APR.

Daly is instructive. There, one of the defendant trusts ("Trusts") had deeded an APR to the Town of Sudbury in connection with an approved subdivision plan. Another of the Trusts sued in Land Court to invalidate the APR. A settlement of that lawsuit included an agreement by the selectmen, conservation commission, and planning board to set aside the APR in consideration of a land swap involving a cemetery. A town meeting vote failed that would have authorized release of the APR. Ten taxpayers moved unsuccessfully to intervene to challenge the settlement agreement. An Agreement for Judgment was entered pursuant to the settlement agreement declaring the APR invalid. The denial of intervention was upheld on appeal. McCarthy v. Sudbury, 57 Mass. App. Ct. 1101 (2003). The Appeals Court noted that the proposed intervenors did not cite c. 214, § 3(10) as a basis for intervention. Id. See also Daly, 63 Mass. App. Ct. 1103 n. 7.

Close in time to the unsuccessful intervention motion, the proposed intervenors/taxpayers filed another lawsuit under c. 214, § 3(10) to enforce the APR. The Land Court allowed a motion under the statute for leave to pursue the claim. Daly v. McCarthy, 2003 WL 25332929 (Mass. Land Ct. Aug. 4, 2003).[14] The Land Court ruled that the APR was valid and that the settlement agreement did not relieve the Trusts from complying with the APR because town meeting had never authorized its release. The Land Court held that it was irrelevant whether the

[14] The Railroad incorrectly states at note 8 that § 3(10) requires leave of court to commence an action. There is no requirement that leave be sought prior to filing. Id. By letter dated February 7, 2021, Plaintiffs provided notice to the Attorney General of the planned commencement of this action but no response was received. Accordingly, Plaintiffs respectfully now request leave of this Court to continue to pursue the action under § 3(10). See Daly, 2003 WL 25332929 (granting leave after filing).

town had authority to enter into the settlement agreement, as the taxpayers had standing independent of the original action to enforce the APR under c. 214, § 3(10).

The Appeals Court affirmed. With respect to standing under c. 214, § 3(10), the Appeals Court held that the grant of the APR was a gift to the Town. Because the power to alienate and dispose of real estate belongs to town meeting, and because town meeting had declined to authorize release of the APR, the APR stood as a gift within the scope of the statute. 63 Mass. App. Ct. 1103 *3. The Court noted that even if the APR were only a gift in part, because the grantors received some consideration for it, it would still be enforceable as a conveyance under the statute. Id. n. 16.

This case stands on all fours with Daly. Like the APR signed by Sudbury town officials, the c. 61 Option exercised by the Hopedale Board is an interest in real property; the Notice of Exercise of the option was recorded at the Registry of Deeds as required by statute; and the interest in real property reflected in the Option was not released by Town meeting. The exercised Option stands as a conveyance of an interest in real property enforceable by Plaintiffs under c. 214, § 3(10).

C. Plaintiffs Have Standing To Enforce The Public's Rights In The C. 61 Forestland By Mandamus

The Railroad argues that Plaintiffs lack standing under the declaratory judgment statute, M.G.L. c. 231. However, the Railroad does not address Plaintiffs' standing to seek relief in the nature of mandamus under M.G.L. c. 249, § 5. Mandamus is available under the "public right" doctrine which allows citizen taxpayers to compel the performance by public officials of duties required by law. Cape Cod S.S. Co. v. Selectmen of Provincetown, 295 Mass. 65, 69-70 (1936) ("This petition is properly brought by private parties who are legitimately concerned in the performance by public officers of a public duty"; mandamus issued commanding selectmen to

maintain wharf and public land for public use by all, notwithstanding purported lease for exclusive commercial use by one company); Nickols v. Commissioners of Middlesex County, 341 Mass. 13 (1960) (in suit by taxpayer citizens, mandamus properly issued, because of deeds, their acceptance, and relevant statutes, commanding county commissioners to preserve Walden Pond as closely as practicable in its state of natural beauty); Gould v. Greylock Reservation Commission, 350 Mass. 410 (1966) (in suit by citizens, mandamus issued commanding state agencies to cancel lease and management agreement for Mount Greylock tramway which were beyond statutory authority). See Pratt v. City of Boston, 396 Mass. 37, 48-49 (1985) (Wilkins, J., concurring) (had they argued it, taxpayer plaintiffs would have had standing to obtain relief in the nature of mandamus to enforce mandatory duty to make Boston Common available to all and to prohibit its closure for extended periods for commercially sponsored concerts for which admission fee is charged); Nickolas v. City of Marlborough, 32 Mass. L. Rptr. 125 *2-3 (Mass. Super. Ct. May 9, 2014) (residents have standing to seek relief in the nature of mandamus that the city must comply with alleged legal duties concerning public park before constructing a proposed senior center). Where town officials purport to act beyond their legal authority regarding the transfer of town property rights to third parties, mandamus and declaratory relief are available to town residents. Harris v. Town of Wayland, 392 Mass. 237 (1984) (residents sought mandamus and declaratory relief regarding sale of town land for purpose of constructing elderly and low income housing; court held that purported authorization by majority vote of the town for sale was invalid).

In the case at bar, mandamus and declaratory relief are both available to prevent the unauthorized transfer of the Town's c. 61 rights to the Railroad and to enforce compliance with the Board's duties under c. 61 in light of the actions at the October 24, 2020 Town Meeting. As shown in Plaintiffs' Cross-Motion, once the Board exercised the c. 61 Option and recorded the

Notice of Exercise, the Board had a mandatory duty to proceed to acquire all 130 acres of Forestland under the purchase and sale agreement attached to the Notice of Exercise, and to not assign or release its Option. Its decision to abandon 90 of those acres to the Railroad--for development rather than conservation under the authority of the Parks Commission (see Warrant Article 3, VC Ex. 12), and instead acquire only 40 acres--was unauthorized by Town Meeting. The Board's purported release of the Town's c. 61 Option was an effective assignment to a profit-making third party that is not allowed by the statute. The Board also breached its duties by purporting to rescind exercise of the Option, in violation of the statute. The Settlement Agreement was beyond its authority not only for its illegal expenditures and financial obligations, but also for its purported transfer of the Town's property rights. Under the well-established case law cited above, Plaintiffs have standing to enforce the Board's duties under c. 61 and to obtain injunctive and declaratory relief so that the Town may acquire all 130 acres for conservation purposes, as provided by c. 61 and the Town meeting vote on October 24, 2020.

II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE SETTLEMENT AGREEMENT OR DISMISSAL OF THE LAND COURT CASE

Contrary to the Railroad's assertion, Plaintiffs' claims are not barred by the Settlement Agreement or Dismissal of the Land Court case. The Board lacked authority to release the Town's c. 61 Option irrespective of the Settlement Agreement, so even if the Settlement Agreement were valid the c. 61 Option remains. In this regard, the Settlement Agreement is irrelevant to Plaintiffs claims. See Daly v. McCarthy, 2003 WL 25332929, Section V ("[T]he argument of the Trust defendants that the town had authority to settle the first action is irrelevant. Independent of the first action, [the taxpayer] plaintiffs have standing to prosecute the second and third actions [seeking enforcement of the APR]").

To the extent the Settlement Agreement is relevant to Plaintiffs' claims, it does not pose a legal bar. Plaintiffs are not parties to the Settlement Agreement and are not bound by its release provisions. In any event, the release was illegal. The Board lacked statutory authority to release or assign the Town's c. 61 Option and therefore the release is unenforceable. See Bowers, 16 Mass. App. Ct. at 32-34, where the Appeals Court held that a perpetual encumbrance imposed upon six lots by a board of selectmen in an agreement for judgment, to the effect 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 sewage pumping station, was beyond the authority of the selectmen, because it had not been approved by town meeting. As stated by the Appeals Court:

> [T]he perpetual encumbrance imposed upon the six lots by the selectmen was an action which they were powerless to take. The power to alienate and dispose of real estate lies with the inhabitants of the town acting at town meeting . . .
> . . .
> [T]he selectmen, offered as their part of the agreement for judgment a restriction that they lacked power to impose.
> . . .
> [If the restriction could not be challenged,] public officials could bind their governmental agencies to unlawful conduct by ready acquiescence in an agreement for judgment and, thus, circumvent the restrictions on their powers.

Id. (emphasis added). See also Stevens v. Zoning Bd. of Appeals of Bourne, 97 Mass. App. Ct. 713, 716 (2020) (property owner's abutter was not bound by settlement agreement reached in Land Court action brought by town against owner, and to which abutter was not a party; town selectmen had no authority to adjust zoning bylaw or determine its proper enforcement against owner, any order of the building inspector pursuant to agreement was subject to statutory notice

and hearing requirements, and abutter had no opportunity in Land Court to protect his interests).[15]

The fact that the Settlement Agreement was followed the next day by a Stipulation of Dismissal of the case—with no examination by the Land Court of the authority of the Board to transfer the Town's c. 61 rights to the Railroad, with no final determination of the merits of the Town's c. 61 claims, and with no opportunity for Plaintiffs to intervene—also does not give rise to any bar to claims of Plaintiffs who were not parties to the Stipulation. Daly, 63 Mass. App. Ct. 1103, n. 14 (selectmen's agreement for judgment with property owner not a bar to later taxpayer suit because taxpayers were not parties to the first suit and the issues raised by them were not subject to being adjudicated in the first suit); Bowers, 16 Mass. App. Ct. at 33-34 (selectmen's agreement for judgment with property owner not a bar to later action by Town); Stevens, 97 Mass. App. Ct. at 716 (selectmen's stipulation of dismissal not a bar to later action by abutter).[16]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that this Court deny the Railroad's Motion for Judgment on the Pleadings on Count II of the Verified Complaint.

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[15] The Railroad's claim that only the Board can "waive" a Town's c. 61 Option, citing Town of Brimfield v. Caron, 18 LCR 44, 52 (2010), is misleading and inapposite. The "waiver" discussed in that case was the role of the selectmen in initially deciding whether or not to exercise a town's c. 61 rights. The court did not address the enforceability of a settlement where the selectmen purport to relinquish those rights by transferring them to a for-profit third party after having exercised them and recorded a Notice of Exercise.

[16] The Settlement Agreement and Stipulation of Dismissal also are not bars to this action because they were agreed to in response to claims by the Railroad that were utterly groundless. See Memo. in Support of Cross-Motion at n. 8. As such, they are legally ineffective. Connor v. Morse, 303 Mass. 42, 46 (1939) (agreement for payment by city to architect was not a good faith compromise of a disputed claim but rather was a gift that city council lacked power to make); 15 A.L.R.2d 1359 § 7 ("a municipality cannot, under the guise of a compromise, surrender valuable rights or interests in claims over which there can be no substantial controversy").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Harley C. Racer, hereby certify that on the 4th day of May, 2021, I caused a true copy of the foregoing document to be served on counsel for all parties by electronic mail.

/s/ Harley C. Racer
Harley C. Racer