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BY EMAIL

Brian Riley, Esq.
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Re: Appeals Court Order Enjoining Settlement between Town of Hopedale and Grafton & Upton Railroad – Appeals Court No. 2021-J-0111

Dear Brian:

I write on behalf of the plaintiff Hopedale residents in the above-referenced lawsuit. As you know, Justice Meade of the Appeals Court has issued a preliminary injunction enjoining the Hopedale Board of Selectmen (“BOS”) from paying any money or transferring any property interests pursuant to the February 9, 2021 Settlement Agreement with the Grafton & Upton Railroad. The text of the Order’s conclusion is:

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, pending final judgement or further order of this court, or a single justice thereof, whichever is first to occur. (emphasis added)

While technically this ruling is not a final decision on the merits of the case, it clearly previews that the Settlement Agreement will be found invalid, and that in the meanwhile the BOS is prohibited from paying money or transferring any property interests under it.

Given this decision, the BOS is at a crucial juncture in this case. It has to decide whether to continue to frustrate the will of Town residents, or instead join them in enforcing the Town’s rights to the 130 acres of forestland and 25 acres of wetlands that were the subject of the October 24, 2020 Special Town Meeting. For the reasons set forth below, we strongly urge the BOS to avoid further violations of law and instead act now to do what Town Meeting clearly intended, that is, proceed to obtain and protect all 155 acres for conservation as parkland, with no Railroad development on any of the acres.

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The BOS should not now go back to Town Meeting and seek legal authority for the Settlement. The BOS may be tempted now to ask the Town for legal authority to acquire only 40 of the 90 acres of Forestland. It should not do so for several reasons. First, given the Town's unanimous instruction to acquire all 130 acres and conserve it as parkland, any effort to get Town approval for acquiring only 40 acres and leaving the remaining 90 acres to be developed by the Railroad is doomed to failure. Second, any such effort will only cause additional unnecessary legal fees to be incurred by the Town, as well as fractious division within the Town at a time when unity and healing are clearly needed. Third, any vote to authorize acquisition of only 40 acres will not rescue the illegal Settlement Agreement, under which the BOS purported to transfer to the Railroad the Town's rights under c. 61 to obtain 130 acres of forestland; indeed, Justice Meade made clear that the Town is enjoined from "transferring any property interests" including its c. 61 rights, and any release of those rights will surely be found illegal. Fourth, the BOS has already been shown to have acted improperly regarding the Settlement Agreement, and it should not dig itself a deeper political and legal hole.

The BOS should not now go back to the Hopedale Foundation to see if they will fund the acquisition of only 40 of the 130 acres of forestland. The BOS may also be tempted to try to sidestep the Appeals Court ruling by attempting to get stopgap funding from the Hopedale Foundation. Any such effort will not rescue the illegal Settlement Agreement. It will not provide the authorization required to acquire land under c. 40 § 14 that resides only with Town Meeting. Nor will it overcome the illegal transfer of the Town's c. 61 rights to the Railroad. In any event, given the Appeals Court ruling, it is doubtful that the Hopedale Foundation would provide funding until this matter is clarified by the court.

Given the Appeals Court ruling, the BOS should acknowledge that it lacks authority to enter into the Settlement Agreement, and should join with the Town residents to enforce the Town's property rights:

- 1. The Settlement Agreement is Null and Void.** Because the Board lacked authority to enter into it, the Settlement Agreement is null and void, and the Town will not breach any obligations to the Railroad by acknowledging that reality. The case law is absolutely clear that parties who contract with towns must make sure that the town officials they are dealing with have legal authority to act. Here, the Railroad took a big chance in avoiding review by the Land Court and by Town Meeting before entering into the Settlement, and it chose wrongly. The Settlement Agreement is also void because the Town received nothing of value under it. For these reasons, the Railroad has no claim against the Town under the Settlement Agreement.
- 2. The Town's Chapter 61 Rights are Enforceable.** There is simply no question that the Town has valid, enforceable rights to acquire all 130 acres of forestland as directed by Town Meeting. The Land Court did not indicate otherwise; the Town did nothing to undercut its rights; and the case law is strongly in favor of the Town's enforcement.

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3. **The Railroad's Preemption Argument is a Hollow Threat.** Federal railroad preemption does not apply to cancel the Town's c. 61 rights, because preemption has no applicability whatsoever until the Railroad establishes its ownership. Here, the Railroad does not validly own the 130 acres, the Town does. Nor does preemption cancel the Town's rights to acquire the 25 acres of wetlands by eminent domain, as voted by Town Meeting. Although the railroad owns those wetlands, preemption does not supercede the Town's power to acquire the property for public health purposes because acquiring those acres would not unreasonably impair the Railroad's operations. Indeed, the Railroad has never operated on those acres, acquired them knowing that the Town was going to take them by eminent domain, and could not operate on them anyway, both because they are wetlands subject to valid state protection and because the Railroad has no valid ownership of any land surrounding them.

4. **The Spectre of Big Legal Fees is a Big Lie.** We understand that the BOS's missteps have caused the Town to owe substantial legal fees. However, two wrongs do not make a right. It would be an egregiously bad decision for the Board to spend more money, unnecessarily, fighting to save the Settlement Agreement, given that an appellate court has already found that it is likely illegal. Instead, the Board should admit the Settlement Agreement is flawed, follow the unanimous Town meeting vote, and resume enforcement of acquisition of all 130 acres of forestland as parkland. The legal fees in such effort would most certainly be less than the legal fees to continue to defend the indefensible Settlement Agreement. Importantly, if the BOS resumes enforcement of efforts to protect all 130 acres, it is highly likely that all of its legal fees would be paid by private donors, as was the case until the Board abandoned its responsibilities.

CONCLUSION

We strongly urge the Board not to make the same mistake twice. The Board will be supported tremendously if it chooses to follow the will of the Town. If it does not, it will continue to lose in court and will suffer the inevitable political consequences and public judgment.

Very truly yours,



David E. Lurie



Harley C. Racer

cc: Clients
Hopedale Water & Sewer Commission
Hopedale Conservation Commission
Hopedale Finance Committee