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MEMORANDUM

TO: Brian Riley, Peter Durning, Town of Hopedale

FROM: David E. Lurie, Harley C. Racer

RE: Strategy to Enforce Town of Hopedale's Right of First Refusal Option to c. 61 Forestland and Likelihood of Success

DATE: December 20, 2021

Following the Superior Court's decision on the Town of Hopedale's Motion for Clarification, the Board of Selectmen should move forward, quickly, to enforce the Town's Option to acquire all of the 130 acres of c. 61 Forestland at 364 West St. To enforce the properly exercised Option, the Board should return to Land Court, move to vacate the judgment entered in the form of a stipulation of dismissal and seek a preliminary injunction against any work or disturbance by the Railroad of the c. 61 Forestland during the pendency of the Land Court action. The Superior Court has made it abundantly clear through four decisions now that the Town is highly likely to succeed in its renewed effort to enforce the Town's Option.

1. **The Town Can Vacate the Stipulation of Dismissal Entered in the Land Court.**

It is black letter law under Mass. R. Civ. P. 60(b)(6) that the Court, at the trial judge's discretion, may relieve a party from a final judgment upon motion or by independent action made within a "reasonable time." The Court has power "to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 615 (1949); see also Parrell v. Keenan, 389 Mass. 809, 813-16 (1983) (judgment for damages properly vacated pursuant to Rule 60(b)(6) because settlement agreement was signed by counsel

without proper authority); Abrams v. Bd. of Selectman of Sudbury, 76 Mass. App. Ct. 1128 (2010) (finding unenforceable settlement agreement entered into without authorization of planning board would warrant relief from judgment in an independent action under Rule 60(b)(6)). In Bowers v. Bd. of Appeals of Marshfield, 16 Mass. App. Ct. 29, 35 (1983), where the Board of Selectmen exceeded its authority by entering an agreement without approval of the Town Meeting, the appropriate relief was to vacate the judgment under Mass. R. Civ. P. 60(b)(6).

Where, as here, a settlement agreement is entered into without proper authority, it is unenforceable. In City of Lawrence v. Stratton, 312 Mass. 517, 519-20 (1942), after the city acquired a property by tax foreclosure, the city council agreed by unanimous vote to sell the property to a private party on the condition that he spend $50,000 to improve the property and authorized the mayor to execute and deliver the deed. Instead, the mayor entered the city into an agreement to sell the property for $1. The Court determined the mayor had no authority to bind the city by such an agreement, found the deed null and void, and ordered the reconveyance of the land to the city. Id. at 520. See also Rossi v. School Committee of Everett, 354 Mass. 461, 464 (1968) (Civil Service Commission decision based on unauthorized compromise agreement by city solicitor changing order voted upon by school committee "cannot stand"); Parrell v. Keenan, 389 Mass. 809, 813-16 (1983) (judgment for damages properly vacated pursuant to Rule 60(b)(6) because settlement agreement was signed by counsel without proper authority).

Judge Goodwin's decisions make it clear that the Settlement Agreement is ineffective and void due to lack of municipal authority and that the Town may file a timely Rule 60(b) motion in the Land Court to vacate the stipulation and enforce the Town's c. 61 rights. See Reilly v. Town of Hopedale, No. 2185-cv-00238, Mem. of Decision and Order at 8 (Mass. Super. Ct. Nov. 10,

2021) ("[T]he Board exceeded its authority when it entered into the Settlement Agreement without Town Meeting authorization."); Reilly v. Town of Hopedale, Mem. of Decision on Mot. for Clarif., No. 2185-cv-00238 at 2, n. 3 (Mass. Super. Ct. Dec. 16, 2021) ("[T]he Town could seek recission of the Settlement Agreement" and "[has] the right to continue attempting to enforce the Option"). As demonstrated through Parrell, Bowers, and Abrams among other cases, a vehicle by which the Town may seek relief from the unenforceable agreement is a motion to vacate the voluntary dismissal under Rule 60(b)(6) in the Land Court.

2. The Town is Highly Likely to Succeed in Enforcing its Exercised Option and Obtaining the Entire 130 Acres of Forestland.

The Superior Court, the first to give the Railroad's illegal acts proper scrutiny, indicated at least four times that the Town would win if it pursued enforcement of the Option against the Railroad. The Court first, on September 9, 2021, "temporarily restrained [the Railroad] from any further alteration or destruction of the Chapter 61 land". See Dkt. No. 34. Next, on September 24, 2021, after full briefing on the issues, the Court entered a preliminary injunction against the Railroad because "[b]y clearing the Forestland, the Railway, in essence, is treating the Forestland as though it were released from Chapter 61 constraints, a result the appeals court injunction sought to prevent." Dkt. 38 at 4. The Court further noted, "[i]f the plaintiffs are successful in this lawsuit, the Forestland would remain in its natural state." Id. The plaintiffs were ultimately successful. On November 10, 2021, the Court entered judgment for the citizen plaintiffs on Count I. In that Decision, the Court held that the Town did what was necessary to exercise its Option to the c. 61 Forestland, including obtaining authorization from Town Meeting for the purchase of the Forestland pursuant to the Option. Dkt. No. 45 at 5, 8. Because the Board is not authorized for any other purchase or acquisition, the Court informed the Board that it could "seek Town Meeting approval for the Settlement Agreement, [] renew its attempts to enforce the

Option, or [] do neither." Id. at 10. The Court also extended the injunction against the Railroad, *sua sponte*, because the Railroad's bad acts were not lost on the Court – "the court is mindful of the Railroad Defendants' attempt to circumvent the Chapter 61, § 8 process by purporting to acquire only the 'beneficial interest' in the forest land while undertaking the same commercial operations that Chapter 61 allows municipalities to preclude" and "the court cannot ignore (1) the Railroad Defendants' initiation of clearing operations after the Town issued a notice of intent but before it could hold a Town Meeting . . . and (2) its resumption of clearing operations while the Appeals Court injunction remained in place." Id. at 11.

Lest any doubt remained, the Court put it to bed in its December 14, 2021 Decision on the Town's Motion for Clarification. The Court ruled that "the Settlement Agreement is not effective." Dkt. No. 50. Moreover, the Court held that if the Board does not obtain Town Meeting authorization of the Settlement Agreement (either because it chooses not to hold the Town Meeting or because the vote fails) "the Settlement Agreement would fail to take effect, meaning the Railroad would retain the land and the Town would retain its money and the right to continue attempting to enforce the Option." Id. at 2 (emphasis added). The Court again neutralized the Railroad's threats, noting that the Railroad's position – if a vote failed, the Town gets nothing and the Railroad gets everything – "would be unjust, to say the least." Id. at n. 3 (emphasis added). In note 3, the Court further explained why the Railroad's arguments of severability and claim preclusion are meritless. Id. ("the Railroad's claim preclusion argument misses the mark"); see also Salem Highland Dev. Corp., v. City of Salem, 27 Mass. App. Ct. 1423 (1989) (where City Solicitor entered into agreement to convey property to a developer without authorization by the City Council or Mayor, Court vacated the agreement under Rule

60(b)(6) resulting in reconveyance of the locus to the city), discussed in Eastern Sav. Bank v. City of Salem, 33 Mass. App. Ct. 140, 142 (1992).

3. **Federal Railroad Preemption is Not Available to the Railroad and Any Surface Transportation Board Petition Would Fail.**

Finally, the Railroad's preemption threat is toothless. Any petition that the Railroad may file with the Surface Transportation Board ("STB") or any other attempt to claim preemption will fail. The Railroad's acquisition of the Forestland and its title to the same is in violation of a state statute that establishes property rights held by a municipality. When ownership of the property implicated state property rights, those issues must be resolved in state court before the STB can or will consider preemption. See STB Decision in Docket No. FD 265518 dated November 3, 2021 (holding that "a court is typically the more appropriate forum for interpreting contracts and resolving state property law disputes"); First American Realty, Inc., et al. v. Grafton & Upton Railroad Company, et al. No. 2185-cv-00784, docket entry dated November 5, 2021 (concurring with the STB that the state court is the proper forum). Here, none of the Forestland (or Wetland) is properly held by the Railroad and no rail transportation issue is presented. Massachusetts State Court is the only forum that can adjudicate the issue of the Town's c. 61 Option and the Railroad's violations of that statute.

The Town can and should move to vacate the Stipulation of Dismissal of the Land Court action because the settlement agreement upon which the Stipulation was based is null, void, and without effect. At the same time, the Town should seek a new preliminary injunction to enjoin the Railroad from further clearing the Forestland, because the current preliminary injunction expires on January 31, 2022. The Railroad is not looking out for the Town's best interests and consequently, has led the Town down the path of illegalities as recognized by Judge Goodwin in her most recent decisions. The Board now has the opportunity to get it right by enforcing the

Option to which it was bound following a "precisely worded authorization to acquire specific land pursuant to specific rights" following Town Meeting approval. Dkt. No. 45 at 8. Because a vote to obtain a retroactive authorization of the Board's bad deal will surely fail – especially in light of the recent citizen petitions signed by well over 500 voters – vacating the judgment and enforcing the Option is the path the Board should take to preserve the Forestland. As stated, this path, in our view, is highly likely to be successful.