

COMMONWEALTH OF MASSACHUSETTS  
LAND COURT  
DEPARTMENT OF THE TRIAL COURT

WORCESTER, SS.

CASE NO. 20 MISC 000467 (DRR)

TOWN OF HOPEDALE,

Plaintiff,

v.

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

Defendants.

**MOTION TO VACATE STIPULATION OF DISMISSAL**

Pursuant Mass. R. Civ. P. 60(b), Plaintiff Town of Hopedale (“Hopedale” or “Town”) hereby moves to vacate the Stipulation of Dismissal with Prejudice filed in this action on February 10, 2021, and to reinstate this action so that Hopedale can enforce its option to purchase certain real property under G.L. c. 61, § 8 (the “Chapter 61 Option”).

Compelling and extraordinary circumstances justify vacating the Stipulation of Dismissal and reinstating this action in order to accomplish substantial justice for Hopedale. Conditions have changed since the parties filed the Stipulation of Dismissal pursuant to the Settlement Agreement reached after mediation: in a subsequent ten-taxpayer action, the Worcester Superior Court determined that the Town lacked authority to complete the agreed-upon land acquisition and that the Settlement Agreement was not effective and void for failure of consideration. Because the Settlement Agreement is null and void, any obligations required to be performed pursuant to it are themselves null and void—including the filing of the Stipulation of Dismissal.

The Court is therefore justified under either Rule 60(b)(5) or Rule 60(b)(6) to vacate the Stipulation of Dismissal and reinstate this action. Reinstatement of the action is the most efficient, and perhaps the only, way for Hopedale to pursue enforcement of its option to purchase the forest land classified under Chapter 61 which was the subject of this action.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

1. On June 27, 2020, the One Hundred Forty Realty Trust (under the control of a prior trustee and prior owner of the beneficial interest, both of whom were unaffiliated with the Railroad at the time; hereinafter, the “Trust”) entered into a purchase and sale agreement with Jon Mark Delli Priscoli, as Trustee of the New Hopping Brook Realty Trust, for two parcels of land located in Hopedale, known as 363 West Street and 364 West Street, for a purchase price of \$1,175,000.00 (the “P&S Agreement”).

2. At the time of execution of the P&S Agreement, the Trust owned both parcels. The parcel located at 364 West Street consisted of 155.24 total acres of generally undeveloped land, of which 130.18 acres was classified as forest land under G.L. c. 61 (the “Chapter 61 Land” or the “Forestland”). The remaining 25.06 acres of land at 364 West Street was unclassified wetlands adjacent to the Forestland (the “Wetlands”).

3. The Forestland portion of 364 West Street has been under Chapter 61 classification since 1992. The Hopedale Board of Assessors approved the most recent re-certification of the Chapter 61 classification on September 3, 2014. The current Chapter 61 tax lien is recorded in the Worcester South Registry of Deeds (the “Registry”) in Book 52875, Page 355. The 364 West Street parcel is generally undeveloped except for a single railroad track

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<sup>1</sup> Reference is made to Hopedale’s Amended Verified Complaint, at ¶¶ 5-36, for the factual background as of the time of the original filing of this action.

and a gas pipeline easement that run through the managed Forestland. There are no buildings or other structures located on the parcel.

4. The Grafton & Upton Railroad (the "Railroad") owns and operates the railroad track that runs through the 364 West Street parcel. The Railroad is a short line railroad that runs for 16.5 miles from Grafton to Milford. The Railroad is owned by Mr. Delli Priscoli.

5. On July 9, 2020, the prior trustee of the Trust served a Notice of Intent to Sell Forest Land Subject to Chapter 61 Tax Lien on the Hopedale Board of Selectmen and other parties as required pursuant to G.L. c. 61, § 8 (the "Notice of Intent"). See Amended Verified Complaint, at Ex. A.

6. On October 12, 2020, the Trust and the Railroad entered into a series of transactions relating to the parcels that were the subject of the P&S Agreement. First, the Trust conveyed the 363 West Street parcel and the Wetlands portion of 364 West Street to the Railroad by quitclaim deed for \$1.00. Second, the owner of 100% of the beneficial interest of the Trust assigned the beneficial interest to the Railroad for \$1,175,000.00. Third, the prior trustees of the Trust resigned as trustees. These transactions were recorded simultaneously in the Registry. Fourth, the Trust appointed successor trustees affiliated with the Railroad: Mr. Delli Priscoli (CEO) and Mr. Milanoski (President). As a result of these transactions, the Railroad came to own the controlling beneficial interest in the Trust, which holds legal title to the Chapter 61 Land.

7. On October 24, 2020, at a Special Town Meeting attended by over 400 residents, the Town of Hopedale adopted warrant articles by unanimous consent to appropriate money for the acquisition of the Chapter 61 Land for \$1,175,000 and to maintain and preserve the Chapter 61 Land "and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes to be managed under the control of the Hopedale Parks

Commission.” The Town Meeting also adopted a warrant article by unanimous consent authorizing the Town to take by eminent domain the Wetlands parcel and appropriated \$25,000 as compensation for the parcel.

8. On or around October 27, 2020, agents and/or representatives of the Trust and/or the Railroad began to undertake site work activities on the Chapter 61 Land, including but not limited to flagging for wetlands delineation and tree cutting. See Amended Verified Complaint, at ¶ 33; Memo. in Support of Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction, at 5; Affidavit of David Sarkisian, at ¶¶ 7-10.

9. On October 28, 2020, Hopedale commenced this action in the Land Court for injunctive relief to prevent the Trust and the Railroad from clearing trees on the Chapter 61 Land and for declaratory relief relating to the validity of the Chapter 61 Option.

10. On October 30, 2020, the Hopedale Board of Selectmen (the “Board”) voted at a duly noticed public hearing to exercise the Chapter 61 Option.

11. On November 2, 2020, Hopedale recorded a Notice of Exercise of First Refusal Option Pursuant to M.G.L. c. 61, § 8 (the “Notice of Exercise”) in the Registry at Book 63651, Page 272. See Amended Verified Complaint, at Ex. E.

12. Also on November 2, 2020, Hopedale recorded an Order of Taking for the Wetlands portion of 364 West Street in the Registry at Book 63651, Page 269.

13. Also on November 2, 2020, Hopedale sent written notice to the current and former trustees of the Trust that the Board voted to exercise the Chapter 61 Option. The Board included a copy of the Notice of Exercise and a proposed purchase and sale agreement as required by G.L. c. 61, § 8. See Exhibit 1 (notice to former trustee) and Exhibit 2 (notice to current trustees).

14. Also on November 2, 2020, Hopedale filed the Amended Verified Complaint in the Land Court action to incorporate the Board's vote to exercise the Chapter 61 Option and the recording of the Notice of Exercise.
15. On November 22, 2020, the Railroad filed a petition with the Surface Transportation Board ("STB") seeking a declaratory order that federal law preempted the application of Chapter 61.
16. On November 23, 2020, the Land Court (Rubin, J.) held a Hearing on Hopedale's request for a preliminary injunction and an Initial Case Management Conference for the Land Court action. The Court made a docket entry following the hearing (the "Nov. 23 Docket Entry"). See Docket Entry dated Nov. 23, 2020.
17. On November 24, 2020, the Land Court (Rubin, J.) issued an Order Referring Case to Dispute Resolution Screening Session.
18. On January 8 and 21, 2021, Hopedale, the Trust, and the Railroad participated in mediation sessions with the Hon. Leon J. Lombardi (ret.).
19. On February 8, 2021, Hopedale, the Trust, and the Railroad entered into a Settlement Agreement and Mutual Release after mediation (the "Settlement Agreement.>").
20. Pursuant to the Settlement Agreement, the Town agreed to purchase a 64-acre parcel comprised of the Chapter 61 Land and the Wetlands from the Trust for \$587,500. The parties agreed that the Trust would retain ownership to the rest of the Chapter 61 Land; that this land would no longer be classified under Chapter 61; and that the Town would waive its Chapter 61 Option. The parties also agreed to file a stipulation of dismissal with prejudice in the Land Court action.

21. On February 10, 2021, pursuant to the Settlement Agreement, Hopedale, the Trust, and the Railroad filed a Stipulation of Dismissal with Prejudice in the Land Court action.

22. On March 3, 2021, a group of ten citizens of Hopedale filed an action in Worcester Superior Court seeking to enjoin the Board and the Railroad from completing the land acquisition contemplated in the Settlement Agreement; to enforce the Town's right to exercise the Chapter 61 Option; and to protect the Chapter 61 Land under Article 97 of the Amendments to the Massachusetts Constitution (the "Citizens Suit"). See Exhibit 3 (Verified Complaint).

23. On September 24, 2021, the Worcester Superior Court (Goodwin, J.) issued a Memorandum and Order on Motion for Preliminary Injunction in the Citizens Suit (the Sept. 24 Decision"). See Exhibit 4. Addressing the plaintiffs' allegations (supported by affidavits) that the Railroad had resumed cutting trees on the Forestland, the Superior Court enjoined the Railroad and the Trust "from any further alteration or destruction of the 130.18 acres of Forestland that is the subject of this lawsuit pending further order of the court." Id. at 5.

24. On November 4, 2021, the Worcester Superior Court (Goodwin, J.) issued a Memorandum of Decision on Cross-Motions for Judgment on the Pleadings in the Citizens Suit (the "Nov. 4 Decision"), which included an order prohibiting the Railroad from clearing trees or performing any other site work for a period of 60 days. See Exhibit 5.

25. Prior to a public hearing on December 13, 2021, the Board received a petition signed by hundreds of residents of the Town requesting that the Board continue to move forward to exercise the Chapter 61 Option and acquire the Forestland and the Wetlands pursuant to the October 2020 Town Meeting vote. See Exhibit 6.

26. On December 14, 2021, the Worcester Superior Court (Goodwin, J.) issued a Memorandum of Decision on Hopedale's Motion for Clarification in the Citizens Suit (the

“Dec. 14 Decision”). See Exhibit 7. In addition, the Court granted an assented-to motion to extend the 60-day injunction order against the Railroad through January 31, 2022.

### LEGAL STANDARD

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) ... it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.” Mass. R. Civ. P. 60(b).

“Rule 60 (b) (5) is designed to allow ‘relief from a judgment which was valid and equitable when rendered but whose prospective application has, because of changed conditions, become inequitable.’” Atlanticare Med. Ctr. v. Div. of Med. Assistance, 485 Mass. 233, 247 (2020), quoting Reporters’ Notes (1973) to Mass. R. Civ. P. 60. “The rule ‘derives from the traditional power of a court of equity to modify its decree in light of changed circumstances.’” Id., quoting Mitchell v. Mitchell, 62 Mass. App. Ct. 769, 778 (2005).

[I]n essence, rule 60(b)(6) vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. ... It is the function of rule 60(b)(6) to preserve the delicate balance between the sanctity of final judgments ... and the incessant command of the court’s conscience that justice be done in light of *all* the facts. ... Although [r]elief under rule 60(b)(6) requires compelling or extraordinary circumstances, ... courts should keep in mind the purpose of the rule to accomplish substantial justice.

Rezendes v. Rezendes, 46 Mass. App. Ct. 438, 440–41 (1999) (internal citations and quotations omitted; emphasis in original). “Another prerequisite to obtaining relief under rule 60(b)(6) is that the relief sought cannot fall under any of the grounds enumerated in subsections (1) through (5)” of Rule 60(b). Id. at 441 n.2. “A judge considering a rule 60(b)(6) motion may consider whether the moving party has a meritorious claim or defense ... whether extraordinary circumstances warrant relief ... and whether the substantial rights of the parties in the matter in

controversy will be affected by granting the motion.” Owens v. Mukendi, 448 Mass. 66, 72 (2006) (internal quotations omitted).

“[O]nce filed, a stipulation of dismissal is treated as a judgment under Mass. R. Civ. P. 58(a).” Tuite & Sons, Inc. v. Shawmut Bank, N.A., 43 Mass. App. Ct. 751, 755 (1997); see also Boyd v. Jamaica Plain Co-op. Bank, 7 Mass. App. Ct. 153, 158 n.8 (1979) (“A dismissal ‘with prejudice’ constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial.”).

## ARGUMENT

### **I. Vacating the Stipulation of Dismissal is Necessary to Enable the Town of Hopedale to Pursue its Statutory Right to Purchase the Chapter 61 Land and thereby Accomplish Justice.**

Without question, the Board validly exercised the Chapter 61 Option on November 2, 2020, by recording the Notice of Exercise and sending written notice to the landowner with a proposed purchase and sale agreement, as required under G.L. c. 61, § 8.<sup>2</sup> Thereafter, following two mediation sessions conducted at the Court’s suggestion, the Board entered into the Settlement Agreement in order to resolve the litigation between the Town and the Trust and the Railroad in the Land Court and before the STB. A condition of the Settlement Agreement was the dismissal of both actions. Accordingly, Hopedale agreed to the filing of the Stipulation of Dismissal solely pursuant to its obligations under the Settlement Agreement.

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<sup>2</sup> The option was triggered either on: (1) July 9, 2020, by the Town’s receipt of the Notice of Intent, see Town of Sudbury v. Scott, 439 Mass. 288, 297 & 297 n.12 (2003); cf. Nov. 23 Docket Entry (raising issue of whether NOI was defective); or (2) October 12, 2020, by the Railroad’s acquisition of the controlling beneficial interest of the Trust. See Goodwill Enterprises, Inc. v. Garland, No. MC15MISC000317RBF, 2017 WL 4801104, at \*9-10 (Mass. Land Ct. Oct. 20, 2017) (holding that sale of controlling interest in nominee trust is equivalent to transfer of title sufficient to trigger right of first refusal in lease agreement). Hopedale satisfied the statutory prerequisites for exercising the option well within the 120-day period for either trigger date.



Public sentiment was always in favor of acquiring the full Chapter 61 Land, however. This was evident by the unanimous Town Meeting vote (attended by over 400 voters) and also by the filing of the Citizens Suit. Crucial here is that the Citizens Suit materially changed Hopedale's circumstances vis-à-vis the land at 364 West Street.

In the Nov. 4 Decision in the Citizens Suit, the Superior Court determined that the acquisition contemplated in the Settlement Agreement "was a substantial deviation from the acquisition authorized by the Town Meeting," Ex. 5, at 7, and therefore "the Board exceeded its authority when it entered into the Settlement Agreement without Town Meeting authorization" to purchase less than the full Chapter 61 Land. Id. at 8. In the Dec. 14 Decision, the Superior Court clarified that in its prior decision it had enjoined the Town from purchasing the land as contemplated in the Settlement Agreement unless the Town obtained authorization from Town Meeting. The Superior Court also clarified that the Settlement Agreement was not effective until the Town obtained that authorization:

[A]lthough the terms of the Settlement Agreement are legal (including the Board's agreement to waive the [Chapter 61] Option), the Board exceeded its authority when it unilaterally entered into that agreement without Town Meeting approval of the reduced acquisition. **Therefore, the Settlement Agreement is not effective.** The Board might hold the required Town Meeting or might fail to obtain enough votes to approve the acquisition. In either case, the Settlement Agreement would fail to take effect, meaning that the Railroad would retain the land and the Town would retain its money and the right to continue attempting to enforce the Option.<sup>[1]</sup> Until the reduced acquisition is approved by Town Meeting, the agreement is not effective, and the Town may (but is not required to) attempt to enforce the Option.

Ex. 7, at 2 (emphasis added; footnote omitted). The Town is now faced with the prospect of getting nothing from its effort to compromise and resolve its dispute with the Railroad, and the Railroad getting everything—a result which the Superior Court called "unjust, to say the least." Id. at 2 n.3.

Public sentiment remains in favor of acquiring the full Chapter 61 Land. The Board has received petition signatures from hundreds of Hopedale residents in favor of exercising the Chapter 61 Option. Ex. 6. Based on this overwhelming public support, the Board anticipates that a Town Meeting vote would almost certainly fail to obtain enough votes to approve the acquisition contemplated in the Settlement Agreement. Pursuant to G.L. c. 40, § 14, a two-thirds vote in favor of the Settlement Agreement is required to authorize its terms, and aside from the Trust and the Railroad, no other party has lodged an opposition to the acquisition of the full Chapter 61 Land. Moreover, the public health risk in convening an indoor Town Meeting in January 2022 during the rapid spread of the new variant of the Coronavirus is too great to justify holding a futile vote. Where the choice is between an “unjust” result and an appeal to “the [C]ourt’s conscience that justice be done in light of *all* the facts,” Rezendes, supra, the Board has determined that proceeding with enforcing the Chapter 61 Option is in the best interests of the Town. In order to do so, this Court must vacate the Stipulation of Dismissal.

The circumstances here warrant relief from the Stipulation of Dismissal under Rule 60(b).<sup>3</sup> Under Rule 60(b)(5), relief is warranted where “it is no longer equitable that the judgment should have prospective application,” particularly “because of changed conditions.” Atlanticare, supra. The Superior Court’s determination in the Citizens Suit that the Settlement Agreement is not effective is a material change in conditions. Because the Settlement Agreement was not effective, everything downstream of it—including the condition to file the Stipulation of

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<sup>3</sup> The classification of a Rule 60(b) motion under a particular subdivision of the rule is not dispositive. See Bowers v. Bd. of Appeals of Marshfield, 16 Mass. App. Ct. 29, 33 (1983), citing King v. Allen, 9 Mass. App. Ct. 821, 821-22 (1980). Where “[t]he resolution of motions for relief from judgment rests in the discretion of the trial judge,” Atlanticare, 485 Mass. at 247 (internal quotation omitted), the Court should enter relief under the applicable subdivision of Rule 60(b) for which such relief is warranted.

Dismissal—was also not effective. The Court should find no obstacle in vacating a stipulation that no longer has any effect.

Alternatively, Rule 60(b)(6) is a catch-all provision for “instances when the vacating of judgment is justified by some reason other than those stated in subdivisions (1) through (5) ... that presents ‘extraordinary circumstances.’” Owens, 448 Mass. at 71 (internal citations omitted). The Appeals Court has ruled that relief under Rule 60(b)(6) is proper where a board of selectmen has exceeded its authority in entering into an agreement for judgment to settle litigation. See Bowers, 16 Mass. App. Ct. at 33 (vacating part of agreement for judgment encumbering six lots such that town would cease using them as public parking area in exchange for property owner’s abandonment of challenge to site plan approval for sewage pumping station as beyond authority of selectmen). The Superior Court determined that “the Board exceeded its authority when it entered into the Settlement Agreement without Town Meeting authorization.” Ex. 5, at 8. Under Bowers, vacating the Stipulation of Dismissal (which the Town filed solely because it was a condition of the Settlement Agreement) is therefore warranted here.

Another Massachusetts court has found that “the failure of the defendant to abide by the terms of [a] settlement agreement is reason for th[e] court to vacate the stipulation of dismissal and reopen the ... case” under Rule 60(b)(6). Reading Dev. Co. II, L.L.P. v. First Nat. Stores, Inc., No. 981187, 2001 WL 1174190, at \*1 (Mass. Super. July 30, 2001). Here, the Nov. 4 Decision of the Superior Court renders the Town incapable of acquiring the land contemplated under the Settlement Agreement. As the Superior Court noted in the Dec. 14 Decision, “where a particular term was the ‘essence and foundation of a Land Court settlement agreement[,] the failure of that consideration due to a judgment in a subsequent ten-taxpayer action warranted rescission of the settlement agreement.” Ex. 7, at 2 n.3 (quote modifications omitted), quoting

Abrams v. Bd. of Selectmen of Sudbury, No. 09-P-1226, 76 Mass. App. Ct. 1128, 2010 WL 1740435, at \*2 (May 3, 2010) (Rule 1:28 decision); see also Abrams, 2010 WL 1740435, at \*2 n.7 (“[F]ailure of consideration voids the settlement agreement.”).<sup>4</sup>

The acquisition of some land under the Settlement Agreement (even if it was not the full Chapter 61 Land) was the material inducement for the Board’s decision to enter into the Settlement Agreement in the first place. The inability of either party to perform this material obligation prevents them from abiding by the terms of the Settlement Agreement. See Reading Dev. Co., supra. Thus, it is reason for the Court to vacate the Stipulation of Dismissal under Rule 60(b)(6) and reopen this action.

Finally, a Massachusetts court has entered relief under Rule 60(b)(6) in order to enable a party to enforce a statutory right to which it is entitled. See Greater Bos. Legal Servs. v. Haddad, No. 935961, 2000 WL 1474516, at \*27 (Mass. Super. June 28, 2000) (finding extraordinary circumstances existed to justify relief from stipulation of dismissal where defendant purposefully set out to deprive plaintiff’s attorneys from collecting an award of fees under attorney lien statute). See also Owens, 448 Mass at 72 (“A judge considering a rule 60(b)(6) motion may consider ... whether the substantial rights of the parties in the matter in controversy will be affected by granting the motion.”) (internal quotations omitted).

Reopening this action would be the most efficient avenue for enabling Hopedale to pursue its claim to enforce the Chapter 61 Option. Indeed, it may be the only one. See Dec. 14

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<sup>4</sup> Even though the relief sought in the lower court in Abrams was a declaratory action for rescission of a contract and not a request for relief from judgment under Rule 60(b), the Appeals Court agreed with the lower court that the case presented “the sort of extraordinary circumstance that would warrant relief from judgment” under Rule 60(b) because the relief gained “as a result of the taxpayer action resulted in a failure of the consideration” under the original settlement agreement. Abrams, 2010 WL 1740435, at \*2, citing Mass. R. Civ. P. 60(b) and Owens, 448 Mass. at 71-73.

Decision, at 2 n.3 (“[C]laim preclusion might bar the Town from filing a *new* suit to enforce the Option....”) (emphasis in original); Jarosz v. Palmer, 436 Mass. 526, 531 n.3 (2002) (“Claim preclusion ‘makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been litigated in the action.’”), quoting Heacock v. Heacock, 402 Mass. 21, 23 (1988). In addition, reopening this action would enable the Town to assert its eminent domain right to acquire the Wetlands parcel which was also authorized by Town Meeting.

**II. Continuing the Superior Court’s Injunction is Necessary to Maintain the Status Quo and Prevent the Railroad from Further Tree Cutting Activities.**

The Trust and the Railroad have repeatedly demonstrated that they will seize upon any opportunity to clear the Forestland and cut trees unless enjoined by court order. They did so in October 2020 upon acquiring the controlling interest in the Trust and taking legal title to the Forestland, which prompted the filing of this action. See Factual and Procedural Background, supra., at ¶¶ 8-9. They did so again in September 2021 in order to take advantage of a narrow reading of the Appeals Court’s injunction in an appeal of the Citizen Suit. See Ex. 4, Sept. 24 Decision, at 4 (“The Railway argues that the injunction entered by the appeals court does not restrain its actions on the Forestland because the order only prevents the town from spending money to acquire a just portion of the Forestland. In the court’s view, the Railway reads the injunction too narrowly.”); Exhibit 8, Notice of Docket Entry dated Apr. 8, 2021, in No. 2021-J-0111, at 3 (Mass. App. Ct.) (entering injunction).

The Superior Court has twice enjoined the Trust and the Railroad from altering the Forestland. See Ex. 4, Sept. 24 Decision, at 5 (temporarily enjoining the Railroad and the Trust “from any further alteration or destruction of the 130.18 acres of Forestland that is the subject of this lawsuit pending further order of the court”); Ex. 5, Nov. 4 Decision, at 12-13 (enjoining the

Railroad and the Trust “from carrying out any clearing or other site work on the Property for a period of 60 days following the issuance of this decision”). On November 30, 2021, the Superior Court extended the injunction through January 31, 2022. See Exhibit 9.

In light of the history of the Railroad’s and the Trust’s site clearing activities, the immense public interest in protecting the Forestland, and the fact that “[o]nce trees are removed, they are gone for the foreseeable future,” Ex. 4, Sept. 24 Decision, at 4-5, this Court is warranted in continuing the Superior Court’s injunction preventing any tree clearing or other site work on the Chapter 61 Land until the issues in this litigation are fully adjudicated.

### **CONCLUSION**

Compelling and extraordinary circumstances justify relief from the Stipulation of Dismissal in this matter. The Board engaged in good faith negotiations with the Trust and the Railroad to settle litigation between them; however, the subsequent Citizens Suit prevented the Town from receiving the essential consideration for which it bargained. This material change in circumstances renders the prospective application of the Stipulation of Dismissal inequitable, or otherwise justifies relief from its operation in order to accomplish substantial justice for the Town in the vindication of its statutory rights under Chapter 61.

WHEREFORE, based on the foregoing, the Town of Hopedale respectfully requests that the Court grants this Motion to Vacate and enters the following relief:

1. Vacate the Stipulation of Dismissal with Prejudice filed on February 10, 2021;
2. Reinstate this action to its status as of November 24, 2020, when the Court issued the Docket Entry after the Hearing on Preliminary Injunction and Lis Pendens and Initial Case Management Conference;

3. Continue the injunction entered by the Worcester Superior Court on September 24, 2021, enjoining the Trust and the Railroad and each of their agents and representatives from any "further alteration or destruction of the 130.18 acres of forest land" pending further order of the Court; and

4. Enter such other relief as the Court deems just and proper.

Respectfully submitted,

**TOWN OF HOPEDALE**

By its attorneys,



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Peter F. Durning (BBO# 658660)  
Peter M. Vetere (BBO# 681661)  
MACKIE SHEA DURNING, P.C.  
20 Park Plaza, Suite 1001  
Boston, MA 02116  
(t) (617) 266-5104  
pdurning@mackieshea.com  
pvetere@mackieshea.com

Dated: December 30, 2021

#### **CERTIFICATE OF SERVICE**

I certify that on December 30, 2021, I served this Motion to Vacate Stipulation of Dismissal on the Defendants by emailing a copy thereof to their attorney, Donald C. Keavany, Jr., Esq., of Christopher Hays, Wojcik & Mavricos, LLP, 370 Main Street, Suite 970, Worcester, Massachusetts.

Signed under the penalties of perjury.



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Peter M. Vetere

# **EXHIBIT 1**





November 2, 2020

**VIA CERTIFIED MAIL**

Charles E. Morneau, Trustee (fmr.)  
One Hundred Forty Realty Trust  
31 Conant Road  
Lincoln, MA 01773

**Re: Notice of Exercise of First Refusal Option to Purchase Forest Land Subject to  
M.G.L. c. 61  
364 West Street, Hopedale, MA (Assessors Map 2, Block 5)**

Dear Mr. Morneau:

As the landowner specified in the Notice of Intent to Sell Forest Land Subject to Chapter 61 Tax Lien for the above-referenced property, dated July 9, 2020, you are entitled to notice, pursuant to M.G.L. c. 61, § 8, ¶ 14, that the Town of Hopedale Board of Selectmen voted to exercise the first refusal option to purchase the Chapter 61 land at the above-stated property on behalf of the Town of Hopedale. A copy of the Notice of Exercise which the town recorded in the Worcester South Registry of Deeds on this date is enclosed with this letter. Also enclosed is a proposed purchase and sale agreement which the Town is required to provide with the Notice of Exercise pursuant to M.G.L. c. 61, § 8, ¶ 16.

The Town of Hopedale is aware that you are no longer a trustee of the One Hundred Forty Realty Trust and that said trust's controlling beneficial interest has been assigned to the Grafton & Upton Railroad Company. Please be advised that this letter is being sent in strict compliance with the provisions of M.G.L. c. 61, § 8, and that a similar notice letter is also being sent to the current trustees of the One Hundred Forty Realty Trust.

Thank you for your attention to this matter. Please contact me with any questions.

Sincerely,

Peter F. Durning

encl.

cc: *(Via Electronic and First Class Mail)*

Mark L. Donahue, Esq.

Sandra R. Austin, Esq.

Brian Keyes, Hopedale Board of Selectmen, Chair

Diana Schindler, Hopedale Town Administrator

Commissioner of the Department of Conservation and Recreation (via certified mail)

Hopedale Board of Assessors

Hopedale Planning Board

Hopedale Conservation Commission



Bk: 83651 Pg: 272

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**NOTICE OF EXERCISE OF FIRST REFUSAL OPTION  
PURSUANT TO M.G.L. c. 61, § 8**

The TOWN OF HOPEDALE, acting by and through its Board of Selectmen, after a public hearing held on October 30, 2020, duly noticed, and pursuant to M.G.L. c. 61, § 8, hereby exercises the option to purchase the real property located at 364 West Street in Hopedale, Worcester County, Massachusetts, shown as Block 5, Lot 0, on Assessors Map 2 in said Town, owned as of the date of the notice of intent required by said Chapter 61, § 8, by the ONE HUNDRED FORTY REALTY TRUST, and as of said date consisting of 155.24 acres, of which 130.18 acres is classified as forest land pursuant to M.G.L. c. 61, § 2, as indicated by the Classified Forest-Agricultural or Horticultural-Recreational Land Tax Lien dated September 3, 2014, recorded in said registry in Book 52875, Page 355, said option applying only to the portion of said property classified as such. For said owner's title, see the certificate recorded in said registry in Book 61533, Page 78.

Subsequent to the notice of intent sent pursuant to Chapter 61, § 8, the above-named Trust: sold the non-classified portion of said property, consisting of 25 +/- acres, to the Grafton & Upton Railroad Company by quitclaim deed dated October 12, 2020, recorded in said registry in Book 63493, Page 34; had 100% of its beneficial interest assigned to the Grafton & Upton Railroad Company by assignment dated October 12, 2020, recorded in said registry in Book 63493, Page 39; resigned its trustees by notices dated October 12, 2020, recorded in said registry in Book 63493, Pages 43 and 45; and appointed successor trustees by notices dated October 14, 2020, recorded in said registry in Book 63508, Pages 8 and 11. Said Trust continues to hold record title to the classified Chapter 61 land over which the Town of Hopedale exercises its option to purchase.

Executed as a sealed instrument this 2nd day of November, 2020.

**TOWN OF HOPEDALE**

By and through its Board of Selectmen,

  
\_\_\_\_\_  
Brian R. Keyes, Chair

364 West Street, Hopedale, MA


  
Louis J. Arcudi III

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

November 2, 2020

Then personally appeared the above named, Brian R. Keyes and Louis J. Arcudi III, and acknowledged the foregoing document to be their free acts and deeds before me.

  
Notary Public  
My commission expires: March 15, 2024



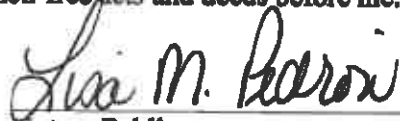
  
Louis J. Arcudi III

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

November 2, 2020

Then personally appeared the above named, Brian R. Keyes and Louis J. Arcudi III, and acknowledged the foregoing document to be their free acts and deeds before me.



Notary Public

My commission expires: March 15, 2024



## PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT ("Agreement") is made as of this \_\_\_\_ day of November, 2020 ("Effective Date") by and between Jon Mark Delli Priscoli, and Michael Milanoski, Trustees of the One Hundred Forty Realty Trust u/d/t September 16, 1981, recorded at the Worcester District Registry of Deeds in Book 7322 Page 177, with an address of 7 Eda Avenue, Carver, Massachusetts 02230 ("Seller"), and the Town of Hopedale a Massachusetts municipality with offices at 78 Hopedale Street, Hopedale, Massachusetts 01747 ("Buyer").

1. *Purchase and Sale.* Subject to the terms and conditions set forth in this Agreement, Seller agrees to sell, transfer and convey to Buyer, and Buyer agrees to purchase and accept from Seller, the following real (the "Property"):

1.1. The portion of 364 West Street, Hopedale, Massachusetts subject to the Forest Land Tax Lien pursuant to MGL c. 61 recorded in the Registry in Book 52875 Page 355 consisting of 130.18 acres of forest land out of the 155.24 acres of land, more particularly described in Exhibit A hereto, together with all privileges, rights, easements and appurtenances belonging to such land, and all right, title and interest (if any) of Seller in and to any streets, alleys, passages, and other rights-of-way or appurtenances included in, adjacent to or used in connection with such land, and all right, title and interest (if any) of Seller in all mineral and development rights appurtenant to such land;

1.2. All of Seller's right, title and interest, if any, in all intangible assets of any nature relating to the Property, including without limitation all of Seller's right, title and interest in all (i) warranties all licenses, permits, and approvals and (ii) all plans and specifications, in each case to the extent that Seller may legally transfer the same (the "Intangible Personalty").

2. *Purchase Price.* The purchase price for the Property (the "Purchase Price") shall be One Million One Hundred Seventy Five Thousand and 00/100 Dollars (\$1,175,000.00), which, subject to the terms and conditions hereinafter set forth, shall be paid to Seller by Buyer as follows:

2.1. *Deposit.* Concurrently with the execution and delivery of this Agreement by Buyer, Buyer shall deliver to the Law Office of Sandra Rennie Austin, 24 Bolton Street, Marlborough, MA 01752 ("Escrow Agent"), in immediately available funds, to be held in escrow and delivered in accordance with this Agreement, a cash deposit in the amount of Fifty-Eight Thousand Seven Hundred Fifty and 00/100 Dollars (\$58,750.00) (the "Initial Deposit"). Within two (2) business days following the expiration of the Inspection Period as defined in Section 4.3 herein. Buyer shall deposit with Escrow Agent an additional deposit of Forty One Thousand Two Hundred Fifty and 00/100 (\$41,250.00) (the "Additional Deposit"). The Initial Deposit and Additional Deposit are hereinafter referred to collectively as the "Deposit." The Deposit shall be held and distributed as follows:

2.1.1. The Deposit shall be held by the Escrow Agent in a non-interest bearing account.

2.1.2. If the Closing takes place in accordance with the terms and conditions of this Agreement, the Escrow Agent shall deliver and pay the Deposit to Seller on the Closing Date, and the amount

so delivered shall be credited to Buyer against the Purchase Price due Seller in accordance with the terms and conditions of this Agreement.

2.1.3. If this Agreement is terminated by Buyer in accordance with the terms and conditions of this Agreement prior to the expiration of the Inspection Period (defined below), then the Escrow Agent shall promptly deliver the Initial Deposit to Buyer.

2.1.4. If this Agreement is terminated by Buyer in accordance with the terms and conditions of Paragraph 7 of this Agreement, then the Escrow Agent shall deliver the Deposit to Buyer promptly in accordance with the provisions of this Agreement.

2.1.5. If the Closing does not take place under this Agreement by reason of the failure of either party to comply with its obligations hereunder, the Escrow Agent shall promptly deliver the Deposit to the party entitled thereto in accordance with the provisions of this Agreement.

2.1.6. Except for a demand made by Buyer pursuant to a termination of this Agreement by Buyer prior to the expiration of the Inspection Period, upon receipt of a written demand from Seller or Buyer claiming the Deposit, the Escrow Agent shall promptly forward written notice of Escrow Agent's receipt of such demand together with a copy thereof to the other party hereto. Unless such other party, within seven (7) days after actual receipt of such notice, notifies the Escrow Agent in writing of any objection to such requested delivery of the Deposit, the Escrow Agent shall deliver the Deposit to the party demanding the same and thereupon shall be released and discharged from any further duty or obligation hereunder by all parties hereto. Notwithstanding anything to the contrary contained herein, the Escrow Agent shall not deliver the Deposit pursuant to any such demand for the same unless and until the Escrow Agent has received confirmation that the party not making the demand for the Deposit has actually received notice of said demand and that the time for responding to said demand has passed.

2.2. *Payment at Closing.* At the consummation of the transaction contemplated hereby (the "Closing"), Buyer shall deliver to the Escrow Agent by federal wire transfer in an amount equal to the Purchase Price less the Deposit. The Purchase Price, subject to adjustments and apportionments as set forth herein, shall be paid at Closing by wire transfer of immediately available federal funds, transferred to the order or account of Seller or such other person as Seller may designate in writing, for receipt by the bank designated by Seller not later than 1 P.M., Eastern Daylight or Standard (as applicable) Time.

3. *Escrow Agent.* The Escrow Agent shall hold the Deposit as escrow agent in accordance with the terms and provisions of this Agreement, subject to the following:

3.1. *Obligations.* The Escrow Agent undertakes to perform only such duties as are expressly set forth in this Agreement and no implied duties or obligations shall be read into this Agreement against the Escrow Agent.

3.2. *Reliance.* The Escrow Agent may act in reliance upon any writing or instrument or

signature which it, in good faith, believes to be genuine, and any statement or assertion contained in such writing or instrument, and may assume that any person purporting to give any writing, notice, advice, or instrument in connection with the provisions of this Agreement has been duly authorized to do so. The Escrow Agent shall not be liable in any manner for the sufficiency or correctness as to form, manner and execution, or validity of any instrument deposited in escrow, nor as to the identity, authority, or right of any person executing the same.

3.3. *Indemnification.* Unless the Escrow Agent discharges any of its duties under this Agreement in a grossly negligent manner or is guilty of willful misconduct with regard to its duties under this Agreement, Seller and Buyer shall indemnify the Escrow Agent and hold it harmless from any and all claims, liabilities, losses, actions, suits or proceedings at law or in equity, or other expenses, fees, or charges of any character or nature, which it may incur or with which it may be threatened by reason of its acting as escrow agent under this Agreement; and in such connection Seller and Buyer shall indemnify the Escrow Agent against any and all expenses including reasonable attorneys' fees and the cost of defending any action, suit or proceeding or resisting any claim in such capacity.

3.4. *Disputes.* If the parties (including the Escrow Agent) shall be in disagreement about the interpretation of this Agreement, or about their respective rights and obligations, or the propriety of any action contemplated by the Escrow Agent, or the application of the Deposit, the Escrow Agent shall have the right to hold the Deposit until the receipt of written instructions from both Buyer and Seller or a final order of a court of competent jurisdiction. In addition, in any such event, the Escrow Agent may, but shall not be required to, file an action in interpleader to resolve the disagreement. The Escrow Agent shall be indemnified for all costs and reasonable attorneys' fees in its capacity as escrow agent hereunder in connection with any such interpleader action and shall be fully protected in suspending all or part of its activities under this Agreement until a final judgment in the interpleader action is received.

3.5. *Counsel.* The Escrow Agent may consult with counsel of its own choice and have full and complete authorization and protection in accordance with the opinion of such counsel. The Escrow Agent shall otherwise not be liable for any mistakes of fact or errors of judgment, or for any acts or omissions of any kind, unless caused by its negligence or willful misconduct.

#### 4. *Buyer's Due Diligence Inspection and Termination Rights; "As Is " Sale*

4.1. *Inspection of Property.* Buyer and its appointed agents or independent contractors shall, at all reasonable times prior to the Closing Date, have the privilege of going upon the Property to, at Buyer's sole cost and expense, inspect, examine, test, appraise, and survey the Property, including, but not limited to, investigations of the physical condition thereof provided, however, that no intrusive testing, drilling or similar testing to determine the status of the land with respect to geotechnical matters and/or hazardous materials and oils shall be performed without Seller's consent which may be withheld at Seller's sole discretion- Before entering upon the Property, Buyer shall obtain and maintain for itself and on behalf of each of its contractors and agents (and shall deliver to Seller evidence thereof), at Buyer's sole cost and expense, general liability insurance,

from an insurer reasonably acceptable to Seller, in the amount of One Million Dollars and 00/00 (\$1,000,000.00) combined single limit for personal injury and property damage per occurrence, such policies to name Seller and Seller's trustees additional insured parties, which insurance shall provide coverage against any claim for personal liability or property damage caused by Buyer or Buyer's contractors or agents in connection in with Buyer entry, tests and inspections upon the Property. Buyer shall, and does hereby covenant and agree to, repair any and all damage caused by the activities of Buyer or its agents on the Property and to indemnify, defend and hold Seller harmless from any actions, suits, liens, claims, damages, expenses, losses and liability arising out of any such entry by Buyer or its appointed agents or independent contractors or any acts performed in exercising Buyer's rights under this Paragraph 4.1 (including without limitation, any rights or claims of materialmen or mechanics to liens on the Property, but excluding matters merely discovered by, and not caused by, Buyer, its agents or contractors).

4.2. *Inspection of Documents.* Without any representation or warranty as to the completeness of any deliveries or the accuracy of any information provided in said documents as may be delivered. Seller shall deliver to Buyer within five (5) days after the Effective Date copies of the following documents, that it has readily in his possession if any (the documents described below herein referred to as the "Due Diligence Documents"):

4.2.1. Existing building permits, if any;

4.2.2. The most recent existing survey of the Property;

4.2.3. A copy of Seller's policy of title insurance on the Property and all title exception documents that are listed therein;

4.2.4. Maintenance agreements, and other agreements relating to the operation of the Property, if any;

4.2.5. Real estate tax bills with respect to the Property for the immediately prior and current tax fiscal years;

4.2.6. Existing reports and correspondence in Seller's possession relating to the environmental status of the Property;

4.3. *Termination.* The term "Inspection Period," as used herein, shall mean the period ending at 5:00 P.M. Eastern Daylight or Standard (as applicable) Time Sixty (60) days from the Effective Date. Buyer may terminate this Agreement in its sole discretion by giving written notice of such election to Seller prior to the end of the Inspection Period, in which event (i) the Initial Deposit shall be returned promptly to Buyer; subject to Buyer's right to terminate and receive the return of the entire Deposit under Section 4.4 (Title) and 6.2 (Condemnation) of this Agreement and (ii) except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder. In the absence of timely delivery by Buyer to Seller of such written notice, Buyer shall be deemed to have waived its right to terminate this Agreement under this Paragraph



4.3, and this Agreement shall continue in full force and effect.

4.4. *Title and Survey Matters.*

4.4.1. Buyer shall promptly at its sole cost and expense obtain a title commitment ("Title Commitment") from a nationally recognized title insurance company and a survey ("Survey") of the Property. Buyer shall have until the end of the Inspection Period to give written notice to Seller of any objections with respect thereto ("Buyer's Title Objection Notice"), indicating in reasonable detail the nature and reasons for Buyer's objections and including with such notice a copy of the Title Commitment and Survey, together with copies of any documents containing matters objected to in such notice. Failure to give such notice shall constitute Buyer's approval of (i) all title and survey matters as a matter of record title and/or physically existing upon the Property as of the expiration of the Inspection Period, and (ii) all matters set forth in the Title Commitment and the Survey.

4.4.2. Seller shall have the right, but not the obligation, to attempt to cure any objections set forth in Buyer's Title Objection Notice. Seller shall notify Buyer within five (5) business days after receipt of Buyer's Title Objection Notice ("Seller's Title Objection Response Period") whether Seller agrees to attempt to cure any objections set forth in Buyer's Title Objection Notice. If Seller so agrees to attempt to cure any objections, then Seller shall have a period of up to thirty (30) days after the end of the Inspection Period ("Title Cure Period") in order to effectuate such cure. If the Closing Date is scheduled to occur prior to the end of the Title Cure Period, then, upon written notice from Seller to Buyer delivered not less than three (3) business days prior to the then scheduled Closing Date, the Closing Date shall be extended until a date not later than three (3) business days after the end of the Title Cure Period in order for Seller to continue to effectuate such cure.

4.4.3. If Seller fails to give notice to Buyer prior to the expiration of Seller's Title Objection Response Period that Seller will attempt to cure all objections set forth in Buyer's Title Objection Notice, Buyer may, within five (5) business days after the expiration of Seller's Title Objection Response Period, terminate this Agreement by written notice to Seller, in which event (i) the Deposit shall be returned promptly to Buyer, and (ii) except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder. If Buyer does not so terminate this Agreement within said five (5) business days after the expiration of Seller's Title Objection Response Period, Buyer shall be deemed to have waived its objections set forth in Buyer's Title Objection Notice that Seller has not agreed in writing to attempt to cure, and to have agreed to accept title to the Property subject thereto, without reduction in the Purchase Price.

4.4.4. In the event Seller gives timely notice to Buyer that Seller will attempt to cure any objections set forth in Buyer's Title Objection Notice, and if this Agreement is not terminated pursuant to Paragraph 4.4.3 above, Seller shall use commercially reasonable efforts to cure such objections and deliver evidence of such cure satisfactory to the Escrow Agent and Buyer within the Title Cure Period, but in no event shall Seller be required to expend more than a maximum amount of One Hundred Thousand and 00/100 Dollars (\$100,000.00) Dollars in the aggregate to

effectuate the cure of all such objections (excluding Monetary Liens (defined below), as to which such maximum amount shall not apply). If despite Seller's commercially reasonable efforts Seller fails to cure all such matters within the Title Cure Period, Buyer's sole right with respect thereto shall be to terminate this Agreement within two (2) business days after the expiration of the Title Cure Period, in which event (i) the Deposit shall be returned promptly to Buyer; and (ii) except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder. If Buyer does not so terminate this Agreement, Buyer shall be deemed to have waived its objections and to have agreed to accept title to the Property subject thereto, without reduction in the Purchase Price.

4.4.5. Notwithstanding the foregoing, Seller agrees to cure at or prior to the Closing all "Monetary Liens" at Seller's sole cost and expense. As used herein, "Monetary Lien" means any security deed, mortgage, lien, security interest, monetary judgment, past due taxes or assessments or similar monetary encumbrance upon the Property created by Seller or placed on the Property by Seller's actions or inaction except as provided in Section 4.4.6.3. A Monetary Lien shall be deemed cured by Seller if such Monetary Lien is released, satisfied or canceled of record at or prior to the Closing at no additional cost to Buyer, provided, however, that as to any institutional mortgage, the lien of such mortgage shall be deemed satisfactorily released if written confirmation is received from the mortgagee stating the amount to be delivered at the Closing to discharge such mortgage, in form and substance satisfactory to the Escrow Agent to remove such mortgage from the list of encumbrances in Buyer's title insurance policy upon payment of such amount to said mortgagee out of Seller's proceeds at the Closing.

4.4.6. If Buyer does not terminate this Agreement pursuant to this Paragraph 4.4, the following matters shall be deemed accepted by Buyer and shall be referred to herein as "Permitted Encumbrances."

4.4.6.1. All matters disclosed in the Title Commitment and the Survey, or which exist as of record title and/or are physically existing upon the Property as of the expiration of the Inspection Period to which Buyer does not object or which Buyer is deemed to have accepted pursuant to the terms and conditions of this Paragraph 4.4, other than Monetary Liens;

4.4.6.2. Except as provided in Section 4.4.6.3, any liens for such taxes for the then current year as are not due and payable on the Closing Date, and any liens for municipal betterments assessed after the Effective Date; and the provisions of any building, zoning, subdivision, and similar laws applicable to the Property.

4.4.6.3. The tax taking and all obligations for any real estate taxes of any kind or nature and any rollback, reassessed taxes or similar changes resulting from the conversion of that portion of the Property known as 364 West Street, Hopedale, Massachusetts pursuant to the Forest Lien.

4.5. *"As Is" Sale.* Except as expressly set forth in this Agreement, it is understood and agreed that Seller is not making and has not at any time made any warranties or representations of any kind or character, express or implied, with respect to the Property, including, but not limited to,

any warranties or representations as to habitability, merchantability or fitness for a particular purpose or environmental matters of any kind. Buyer acknowledges and agrees that upon closing Seller shall sell and convey to Buyer and Buyer shall accept the Property "as is, where is, with all faults," except to the extent expressly provided otherwise in this Agreement. Buyer has not relied and will not rely on, and Seller is not liable for or bound by, any express or implied warranties, guaranties, statements, representations, or information pertaining to the Property or relating thereto (including specifically, without limitation, any prospectus distributed with respect to the Property) made or furnished by Seller, the managers of the Property, or any real estate broker or agent representing or purporting to represent Seller, to whomever made or given, directly or indirectly, orally or in writing, unless specifically set forth in this Agreement. Buyer also acknowledges that the purchase price reflects and takes into account that the Property is being sold "as-is." Buyer represents to Seller that Buyer has conducted, or will conduct prior to closing, such investigations of the Property, including, but not limited to, the physical and environmental conditions thereof, as Buyer deems necessary or desirable to satisfy itself as to the condition of the Property and the existence or nonexistence or curative action to be taken with respect to any hazardous or toxic substances on or discharged from the Property, and will rely solely upon same and not upon any information provided by or on behalf of Seller or its agents or employees with respect thereto, other than such representations, warranties, and covenants of Seller as are expressly set forth in this Agreement. Upon closing, Buyer shall assume the risk that adverse matters, including, but not limited to adverse physical and environmental conditions, may not have been revealed by Buyer's investigations, and Buyer, upon closing, shall be deemed to have waived, relinquished and released Seller (and Seller's trustees, employees and agents) from and against any and all claims, demands, causes of action (including causes of action in tort), losses, damages, liabilities, costs and expenses (including reasonable attorneys' fees) of any and every kind or character, known or unknown, which Buyer might have asserted or alleged against Seller (and Seller's trustees, employees and agents) at any time by reason of or arising out of any latent or patent construction defects or physical conditions, violations of any applicable laws and any and all other acts, omissions, events, circumstances or matters regarding the Property. The provisions of this paragraph shall survive closing or any termination of this agreement.

4.6. *Buyer's Waiver and Release of Seller as to Certain Actions after Closing.* Buyer agrees that, if at any time after the Closing, any third party or any governmental agency seeks to hold Buyer responsible for the presence of, or any loss, cost or damage associated with, Hazardous Materials (as hereinafter defined) in, on, above or beneath the Property or emanating therefrom, Buyer waives any rights it may have against Seller in connection therewith including, without limitation, under CERCLA (defined below), and Buyer agrees that it shall not (i) implead the Seller, (ii) bring a contribution action or similar action against the Seller or (iii) attempt in any way to hold the Seller responsible with respect to any such matter. The provisions of this Paragraph 4.6 shall survive the Closing. As used herein, "Hazardous Materials" shall mean and include, but shall not be limited to, any petroleum product and all hazardous or toxic substances, wastes or substances, any substances which because of their quantitated concentration, chemical, or active, flammable, explosive, infectious or other characteristics, constitute or may reasonably be expected to constitute or contribute to a danger or hazard to public health, safety or welfare or to the environment, including, without limitation, any hazardous or toxic waste or substances which are included under

or regulated by law, governmental rules or regulations (whether now existing or hereafter enacted or promulgated, as they may be amended from time to time), including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601 et seq. ("CERCLA"), the Federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., similar state laws and regulations adopted thereunder.

5. *Seller's Covenants Regarding Operation of Property.* From and after the Effective Date until the Closing or earlier termination of this Agreement, Seller agrees as follows:

5.1. *Notice of Defaults.* Seller will promptly deliver to Buyer any written notice received by Seller relating to the occurrence of any default or alleged default by Seller.

5.2. *Leases.* During the term of this Agreement, Seller will not enter into any lease for any portion of the Property without the prior written approval of Buyer.

5.3. *Encumbrances.* Seller will not grant or purport to create in favor of any third party any interest in the Property or any part thereof without the prior written approval of Buyer, which approval shall not be unreasonably withheld, conditioned, or delayed prior to the end of the Inspection Period but which may be withheld in Buyer's sole and absolute discretion after the end of the Inspection Period.

5.4. *Other Agreements; Property Contracts.* Seller will not enter into any maintenance, management, or other service contracts relating to the Property without the prior written approval of Buyer, which approval shall not be unreasonably withheld, conditioned or delayed prior to the end of the Inspection Period but which may be withheld in Buyer's sole and absolute discretion after the end of the Inspection Period.

5.5. *Insurance.* Seller will continue to maintain in full force and effect all insurance as presently carried by Seller.

5.6. *Violations of Law.* Seller will promptly notify Buyer in writing of any violation of any law, regulation, ordinance, order, or other requirement of any governmental authority having jurisdiction over or affecting the Property, or any part thereof, of which Seller receives written notice.

5.7. *Structural Modifications.* Seller will not permit any structural erections to the Property without the prior written consent of Buyer which may be withheld in Buyer's sole and absolute discretion.

5.8. *Operation of Property.* Seller shall continue to maintain, operate and manage the Property in the same manner that Seller has heretofore maintained and operated the Property.

6. *Casualty and Condemnation.*

6.1. *Casualty. Intentionally Omitted.*

6.2. *Condemnation.* If prior to the Closing any portion of the Property is actually condemned by means of a recordation of an order at the Worcester District Registry of Deeds prior to the Closing Date by a body having the power of eminent domain or condemnation, or sale in lieu thereof, which either (A) in Buyer's reasonable judgment adversely affects access to the Property, or (B) is reasonably estimated to cost in excess of \$200,000.00 for restoration and repair of the remaining Property then Buyer shall have the right, by giving Seller notice within ten (10) days after receipt of notice from Seller of such occurrence (with the Closing Date to be postponed, if necessary, to give the Buyer the benefit of the full ten (10) day period) to elect to: (i) terminate this Agreement, in which case the Deposit shall be returned promptly to Buyer and, except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder; or (ii) close the sale contemplated herein. If Buyer does not have the right to terminate this Agreement or having such right elects or is deemed to have elected not to terminate this Agreement, then this Agreement shall remain in full force and effect and the purchase contemplated herein, less any portion of the Property taken by eminent domain or condemnation, shall be effected without reduction in the Purchase Price. In such event, Seller shall at the Closing assign, transfer and set over unto Buyer all of Seller's right, title and interest in and to any awards paid or payable in connection with such taking. The pendency of the condemnation proceedings referred to in Section 15.1.4 shall not constitute a condemnation pursuant to this Section unless an actual order of taking is recorded at the Worcester District Registry of Deeds prior to the Closing Date.

7. *Conditions Precedent to Buyer's Obligations.*

7.1. Buyer's obligation to purchase the Property at the Closing hereunder is expressly conditioned on the satisfaction at or before the time of Closing hereunder, or at or before such earlier time as may be expressly stated below, of each of the following conditions (any one or more of which may be waived in writing in whole or in part by Buyer, at Buyer's option):

7.1.1. *Accuracy of Representations.* All of the representations and warranties of Seller contained in this Agreement shall have been true and correct in all material respects when made, and shall be true and correct in all material respects on the date of Closing with the same effect as if made on and as of such date.

7.1.2. *Performance.* Seller shall have performed, observed and complied with all material covenants, agreements and conditions required by this Agreement to be performed, observed and complied with on its part prior to or as of Closing hereunder.

7.1.3. *No Material Adverse Change.* Seller shall not cause to be removed any trees, clear the property, or otherwise cause a material adverse change to the Property between the Effective Date and the Closing.

7.1.4. *Condition of Title.* No new encumbrances or exceptions to title have been recorded for the first time pertaining to the Property between the date of the Title Commitment and the Closing that

have not been approved by Buyer or that are not removed by Seller or agreed to be removed by Seller prior to or contemporaneously with the Closing, and the Escrow Agent is prepared to issue at the Closing an owner's policy of title insurance at commercially customary rates, subject only to the Permitted Encumbrances.

7.2. *Failure of Conditions.* In the event Seller shall not be able to convey the Property on the Closing Date in accordance with the provisions of this Agreement, then Buyer shall have the option, exercisable by written notice to Seller at or prior to Closing, of (i) accepting at Closing the Property in such condition as Seller is able, waiving any unsatisfied condition precedent, with no deduction from or adjustment of the Purchase Price, (ii) extending the Closing Date one time only for an additional five (5) business days, or (iii) terminating this Agreement, in which event the Deposit shall be returned promptly to Buyer and, except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder.

## 8. *Closing; Deliveries.*

8.1. *Time of Closing.* The Closing shall take place at 10 a.m. on \_\_\_\_\_, 2020 (the "Closing Date") (subject to extension as expressly set forth herein) at the Law Office of Sandra Rennie Austin, 24 Bolton Street, Marlborough, MA 01752, unless otherwise agreed to in writing by both Seller and Buyer. If any date on which the Closing would occur by operation of this Agreement is not a business day in the Commonwealth of Massachusetts or Boston, Massachusetts, the Closing shall occur on the next business day. The Closing shall be conducted through an escrow agreement by means of document delivery of Seller's Deliveries (as herein defined) and Buyer's Deliveries (as herein defined). Buyer and Seller may execute supplemental escrow instructions as may be appropriate to enable compliance with the terms of this Agreement so long as such instructions are not in conflict with this Agreement.

8.2. *Seller Deliveries.* At Closing, Seller shall deliver to Buyer the following, and it shall be a condition to Buyer's obligation to close that Seller shall have delivered the same to Buyer:

8.2.1. A Massachusetts Quitclaim Deed ("Deed") to the Property from Seller, duly executed and acknowledged by Seller in the form of Exhibit B subject to the Permitted Encumbrances which shall be listed in Exhibit B of the Deed.

8.2.2. A certification by Seller that all representations and warranties made by Seller in Paragraph 15 of this Agreement are true and correct in all material respects on the date of Closing, except as may be set forth in such certificate.

8.2.3. Such affidavits or letters of indemnity as the title insurer shall require in a usual and customary format in order to issue, without extra charge, an owner's policy of title insurance free of any exceptions for unfilled mechanics' or materialmen's liens, or for rights of parties in possession.

8.2.4. A Non-Foreign Affidavit as required by the Foreign Investors in Real Property Tax Act

("FIRPTA"), as amended, in the form of Exhibit C duly executed by Seller.

8.2.5. All utilities layout plans, topographical plans and the like in Seller's possession and owned by Seller used in the construction, improvement, alteration or repair of the Property.

8.2.6. Originals or copies certified by Seller of all books, records and files maintained by Seller and Seller's property manager, if any, relating to the operation and maintenance of the Property.

8.2.7. All other instruments and documents reasonably required to effectuate this Agreement and the transactions contemplated thereby.

8.3. *Buyer Deliveries.* At Closing, Buyer shall deliver to Seller the following, and it shall be a condition to Seller's obligation to close that Buyer shall have delivered the same to Seller:

8.3.1. Funds by wire transfer in the amount required under Paragraph 2.2 hereof (subject to the adjustments provided for in this Agreement).

8.3.2. A certification by Buyer that all representations and warranties made by Buyer in Paragraph 16 of this Agreement are true and correct in all material respects on the date of Closing, except as may be set forth in such certificate.

8.3.3. All other instruments and documents reasonably required to effectuate this Agreement and the transactions contemplated thereby.

9. *Apportionments; Taxes; Expenses.*

9.1. *Apportionments.*

9.1.1. *Taxes and Operating Expenses.* All real estate taxes, charges and assessments affecting the Property relating to the 364 West Street, Hopedale, Massachusetts portion of the Property shall be prorated on a per diem basis as of the Closing Date, with the exception of the Forest Lien. All roll back taxes or other charges resulting from the conversion of the property subject to the Forest Lien shall be the obligation of the Buyer. All unpaid taxes and charges relating to that portion of the Property at 363 West Street, Hopedale, Massachusetts shall be paid by the Buyers including tax taking on 363 West Street. If any Taxes have not been finally assessed as of the Closing Date for the current fiscal year of the taxing authority, then the same shall be adjusted at Closing based upon the most recently issued bills therefor, and shall be readjusted when final bills are issued. Buyer hereby agrees to assume all nondelinquent assessments affecting the Property, whether special or general.

9.2. *Expenses.* Each party will pay all its own expenses incurred in connection with this Agreement and the transactions contemplated hereby, including, without limitation, (1) all costs and expenses stated herein to be borne by a party, and (2) all of their respective accounting, legal and appraisal fees. Buyer, in addition to its other expenses, shall pay at Closing (1) all recording

charges incident to the recording of the deed for the Property; (2) the premium for Buyer's title insurance policy; and (3) one-half of the escrow fee of the Escrow Agent. Seller, in addition to its other expenses, shall pay at Closing (1) all documentary stamps, excise taxes and real estate transfer taxes, (2) all recording charges incident to the recording of any instruments to discharge or remove encumbrances not approved (or deemed approved) by Buyer, and (3) one-half of the escrow fee of the Escrow Agent.

## 10. Remedies.

10.1. *Buyer Default.* In the event Buyer breaches or fails, without legal excuse, to complete the purchase of the Property or to perform its obligations under this Agreement, then, except as otherwise expressly set forth in this Agreement, Seller shall, as its sole remedy therefor, be entitled to receive the Deposit as liquidated damages (and not as a penalty) in lieu of, and as full compensation for, all other rights or claims of Seller against Buyer by reason of such default, upon receipt of which this Agreement shall terminate and the parties shall be relieved of all further obligations and liabilities hereunder, except as expressly set forth herein. Buyer and Seller acknowledge that the damages to Seller resulting from Buyer's breach would be difficult, if not impossible, to ascertain with any accuracy, and that the liquidated damage amount set forth in this Paragraph represents both parties' best efforts to approximate such potential damages.

10.2. *Seller Default.* If Seller fails to perform any of its obligations under this Agreement, then Buyer, as its sole remedy for such failure, may either: (i) terminate this Agreement by written notice to Seller and Escrow Agent given prior to or on the Closing Date whereupon (x) Escrow Agent shall pay the Deposit to Buyer, and (y) if, but only if, the closing of the purchase of the Property does not occur as a result of Seller's intentional and willful failure to close, then Buyer the Seller shall pay to Buyer an amount equal to the out-of-pocket expenses (not to exceed Twenty Thousand and 00/100 Dollars (\$20,000.00) in the aggregate) incurred by Buyer in finalizing this Agreement and in performing Buyer's due diligence with respect to the Property, said amount to be paid within thirty (30) days after Buyer delivers to Seller written demand therefor accompanied by commercially customary third party receipts therefor; or (ii) enforce specific performance of Seller's obligations under this Agreement; provided, however, that if Seller willfully and intentionally conveys the Property to a bona fide third-party buyer or encumbers the Property in favor of a bona fide third party in a manner the result of which is that specific performance is not an available remedy, then Buyer may seek to recover Buyer's actual damages arising therefrom. The exercise by the Town of the right of first refusal as referred to in Section 4.7 shall not be deemed a breach by Seller.

11. *Confidentiality.* Buyer agrees to keep confidential and not to use, other than in connection with its determination whether to proceed with the purchase of the Property in accordance with the terms and conditions of this Agreement, any of the documents, material or information regarding the Property supplied to Buyer by Seller or by any third party at Seller's request, including, without limitation, any environmental site assessment reports furnished to Buyer, except to Buyer's, attorneys, accountants, consultants, investors and lenders on a "need to know" basis, unless Buyer is compelled to disclose such documents, material or information by law or by subpoena. In the



event that the Closing does not occur in accordance with the terms of this Agreement, Buyer shall return to Seller all of the documents, material or information regarding the Property supplied to Buyer by Seller or at the request of Seller. The provisions of this Paragraph 11 shall survive the termination of this Agreement but shall no longer be applicable following Closing in accordance with the terms of this Agreement.

12. *Possession.* Possession of the Property shall be surrendered to Buyer at Closing.

13. *Notices.* All notices and other communications provided for herein shall be in writing and shall be sent to the address set forth below (or such other address as a party may hereafter designate for itself by notice to the other parties as required hereby) of the party for whom such notice or communication is intended:

13.1. If to Seller:

One Hundred Forty Realty Trust  
Jon Mark Delli Priscoli and Michael Milanoski, Trustees  
7 Eda Avenue  
Carver, Massachusetts 02230  
E-mail: [mmilanoski@graftonuptonrr.com](mailto:mmilanoski@graftonuptonrr.com)

With a copy to:

Sandra R. Austin, Esquire  
Law Office of Sandra Rennie Austin  
24 Bolton Street  
Mariborough, MA 01752  
E-mail: [sandra@attyaustin.com](mailto:sandra@attyaustin.com)

13.2. If to Buyer:

Grafton & Upton Railroad Company  
7 Eda Ave  
Carver, MA 02330  
E-mail: [jcottert@firstcolonydev.com](mailto:jcottert@firstcolonydev.com) and  
[mmilanoski@graftonuptonrr.com](mailto:mmilanoski@graftonuptonrr.com)

With a copy to:

Peter F. Durning, Esquire  
Mackie Shea Durning, PC  
20 Park Plaza Suite 1001  
Boston, MA 02116  
E-mail: [pdurning@mackieshea.com](mailto:pdurning@mackieshea.com)

13.3. If to the Escrow Agent to:

Sandra R. Austin, Esquire  
Law Office of Sandra Rennie Austin  
24 Bolton Street  
Marlborough, MA 01752  
E-mail: [sandra@attyaustin.com](mailto:sandra@attyaustin.com)

Any such notice or communication shall be sufficient if sent by registered or certified mail, return receipt requested, postage prepaid; by hand delivery; by overnight courier service; or by email to the address indicated above with receipt confirmed and with an original by regular mail. Any such notice or communication shall be effective when delivery is received or refused.

14. *Brokers.* N/A.

15. *Representations and Warranties of Seller.*

15.1. Subject to all matters disclosed in any document delivered to Buyer by Seller or on any exhibit attached hereto, and subject to any information discovered by Buyer or other information disclosed to Buyer by Seller or any other person after the Effective Date and prior to the Closing, including, without limitation, any information contained in the Survey or the Title Commitment (all such matters being referred to herein as "Exception Matters"), Seller represents and warrants to Buyer as follows:

15.1.1. *Authority.* Seller is a nominee trust duly organized and validly existing under the laws of the Commonwealth of Massachusetts and has all requisite power and authority to enter into this Agreement and perform its obligations hereunder. The execution and delivery of this Agreement have been duly authorized pursuant to the terms and conditions of the Trust as recorded.

15.1.2. *No Conflict.* The execution and delivery of this Agreement and the consummation of the transactions contemplated hereunder on the part of Seller do not and will not conflict with or result in the breach of any material terms or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge, or encumbrance upon any of the Property of the Seller by reason of the terms of any contract, mortgage, lien, lease, agreement, indenture, instrument or judgment to which Seller is a party or which is or purports to be binding upon Seller or which otherwise affects Seller, which will not be discharged, assumed or released at Closing. No action by any federal, state, municipal or other governmental department, commission, board, bureau or instrumentality is necessary to make this Agreement a valid instrument binding upon Seller in accordance with its terms.

15.1.3. *Bankruptcy.* Seller has not (i) commenced a voluntary case, or had entered against it a petition, for relief under any federal bankruptcy act or any similar petition, order or decree under any federal or state law or statute relative to bankruptcy, insolvency or other relief for debtors, or

(ii) caused, suffered or consented to the appointment of a receiver, trustee, administrator, conservator, liquidator or similar official in any federal, state or foreign judicial or nonjudicial proceeding, to hold, administer and/or liquidate all or substantially all of its assets.

15.1.4. To Seller's knowledge there are no there pending condemnation, eminent domain or similar proceedings other than the current Petition of Grafton & Upton Railroad Company which is currently before the Department of Public Utilities (case number: D.P-U. 19-39), with respect to all or any portion of the Property.

15.1.5. *Compliance.* Seller has not received written notice of any existing violations of any federal, state, county or municipal laws, ordinances, orders, codes, regulations or requirements affecting the Property which have not been cured with the exception of Seller's refusal or failure to pay real estate taxes and municipal charges relating to 363 West Street, Hopedale, Massachusetts.

15.1.6. *Litigation.* With the exception of the potential taking of the Property which Seller has advised Buyer, there is no action, suit or proceeding pending or, to the best of Seller's actual knowledge, threatened against or affecting the Property, or arising out of the ownership, management or operation of the Property, this Agreement or the transactions contemplated hereby.

15.1.7. *Leases.* The Property is not leased nor subject to any occupancy agreements covering any portion of the Property and there are no written or oral promises, agreements, amendments, addenda, modifications, supplements, understandings, or commitments between Seller and any tenant of any nature whatsoever related to the Property and Seller agrees that it will not enter into any such agreements.

15.1.8. *Hazardous Materials.* INTENTIONALLY OMITTED. SELLER MAKES NO REPRESENTATION, WARRANTY OR STATEMENT OF ANY KIND RELATIVE TO HAZARDOUS MATERIALS.

15.1.9. *Other Agreements.* There are no written agreements affecting the Property to which Seller is party that will be binding on Buyer. Excepting the rights granted pursuant to the Forest Lien, Seller has not entered into and will not during the term of this Agreement enter into, any other agreement giving any other party a right to purchase the Property.

15.1.10. *FIRPTA.* Seller is not a "foreign person" as defined in Section 1445(f)(3) of the Internal Revenue Code.

15.2. *Definition of Seller's Knowledge.* As used in this Agreement, or in any other agreement, document, certificate or instrument delivered by Seller to Buyer, the phrase "to the best of Seller's actual knowledge, to the best of Seller's knowledge" or any similar phrase shall mean the actual, not constructive or imputed, knowledge of Charles E. Morneau without any obligation on their part to make any independent investigation of the matters being represented and warranted, or to make any inquiry of any other persons, or to search or examine any files, records, books, correspondence and the like.

15.3. *Survival of Seller's Representations and Warranties.* The representations and warranties of Seller set forth in this Paragraph 15 shall survive Closing for a period of Ninety (90) days and shall not be merged with the execution and delivery of the Deed and other closing documents hereunder.

16. *Representations of Buyer.* Buyer represents and warrants that:

16.1. *Authority.* Buyer is a Massachusetts municipality, duly organized, validly existing and in good standing under the laws of the Commonwealth of Massachusetts and has all requisite power and authority to enter into this Agreement and to perform its obligations hereunder. The execution and delivery of this Agreement by Buyer has been duly authorized.

16.2. *No Conflict.* The execution and delivery of this Agreement and the consummation of the transactions contemplated hereunder on the part of Buyer does not and will not violate any applicable law, ordinance, statute, rule, regulation, order, decree or judgment, conflict with or result in the breach of any material terms or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge, or encumbrance upon any of the property or assets of the Buyer by reason of the terms of any contract, mortgage, lien, lease, agreement, indenture, instrument or judgment to which Buyer is a party or which is or purports to be binding upon Buyer or which otherwise affects Buyer, which will not be discharged, assumed or released at Closing. No action by any federal, state or municipal or other governmental department, commission, board, bureau or instrumentality is necessary to make this Agreement a valid instrument binding upon Buyer in accordance with its terms.

17. *Miscellaneous.*

17.1. *Assignability.* Buyer may assign or transfer all or any portion of its rights or obligations under this Agreement to any other individual or entity without the consent thereto by Seller. Further, Buyer may assign or transfer such rights and obligations to an entity controlling, controlled by or under common control with Buyer without Seller's consent, with prior notice to Seller. No assignment or transfer by Buyer will be permitted if such assignment or transfer would, in Seller's opinion, cause this transaction to violate any provision of applicable law.

17.2. *Governing Law; Bind and Inure.* This Agreement shall be governed by the laws of the Commonwealth of Massachusetts and shall bind and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, assigns and personal representatives.

17.3. *Recording.* This Agreement or any notice or memorandum hereof shall not be recorded in any public record. A violation of this prohibition by Buyer shall constitute a material breach of this Agreement by Buyer, entitling Seller to terminate this Agreement and retain the Deposit.

17.4. *Time of the Essence.* Time is of the essence of this Agreement.

17.5. *Headings.* The headings preceding the text of the paragraphs and subparagraphs hereof are

inserted solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

17.6. *Counterparts.* This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement may be executed by electronic means, such as a facsimile or email of .pdf signature pages, which shall have the same force and effect as the delivery of an original signature.

17.7. *Exhibits.* All Exhibits which are referred to herein and which are attached hereto constitute a part of this Agreement.

17.8. *Survival.* Unless otherwise expressly stated in this Agreement, each of the warranties and representations of Seller and Buyer shall not survive the Closing and delivery of the Deed and other closing documents by Seller to Buyer and shall be deemed to have merged therewith. Unless expressly made to survive, all obligations and covenants of Seller contained herein shall be deemed to have been merged into the Deed and shall not survive the Closing.

17.9. *Use of Proceeds to Clear Title.* To enable Seller to make conveyance as herein provided, Seller may, at the time of Closing, use the Purchase Price or any portion thereof to clear the title of any or all encumbrances or interests, provided that provision reasonably satisfactory to the Escrow Agent and Buyer's attorney is made for prompt recording of all instruments so procured in accordance with conveyancing practice in the jurisdiction in which the Property is located.

17.10. *Submission not an Offer or Option.* The submission of this Agreement or a summary of some or all of its provisions for examination or negotiation by Buyer or Seller does not constitute an offer by Seller or Buyer to enter into an agreement to sell or purchase the Property, and neither party shall be bound to the other with respect to any such purchase and sale until a definitive agreement satisfactory to the Buyer and Seller in their sole discretion is executed and delivered by both Seller and Buyer.

17.11. *Entire Agreement; Amendments.* This Agreement and the Exhibits hereto set forth all of the promises, covenants, agreements, conditions and undertakings between the parties hereto with respect to the subject matter hereof, and supersede all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written, except as contained herein. This Agreement may not be changed orally but only by an agreement in writing, duly executed by or on behalf of the party or parties against whom enforcement of any waiver, change, modification, consent or discharge is sought.

17.12. *Section 1031 Exchange.* Seller may consummate the sale of the Property as part of a so-called like kind exchange (the "Exchange") pursuant to §1031 of the Internal Revenue Code of 1986, as amended (the "Code"), provided that: (i) the Closing shall not be delayed or affected by reason of the Exchange nor shall the consummation or accomplishment of the Exchange be a condition precedent or condition subsequent to Seller's obligations under this Agreement; (ii) Seller shall affect the Exchange through an assignment of its rights under this Agreement to a qualified

intermediary; (iii) Buyer shall not be required to take an assignment of the purchase agreement for the replacement property or be required to acquire or hold title to any real property for purposes of consummating the Exchange; and (iv) Seller will reimburse Buyer for any additional costs and fees (including, without limitation, attorneys' fees) incurred by the Buyer in connection with the Exchange. Buyer shall not by this Agreement or acquiescence to the Exchange (i) have its rights under this Agreement affected or diminished in any manner or (ii) be responsible for compliance with or be deemed to have warranted to Seller that the Exchange in fact complies with § 1031 of the Code.

17.13. *Compliance with Federal Laws; OFAC.* Each of Buyer and Seller each, a "**Representing Party**") represents and warrants to the other (i) that neither the Representing Party, nor any owner of a beneficial interest in it, nor any of its officers, directors, managers or managing members is a person or entity (each, a "**Prohibited Person**") with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control ("**OFAC**") of the Department of the Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order (including Executive Order 13224 (the "**Executive Order**") signed on September 23, 2001 and entitled "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism"), or other governmental action, (ii) that the Representing Party's activities do not violate the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001 or the regulations or orders promulgated thereunder (as amended from time to time, the "**Money Laundering Act**"), and (iii) that throughout the term of this Agreement the Representing Party shall comply with the Executive Order and with the Money Laundering Act.

[The remainder of this page is intentionally left blank; signature page follows.]

[Signature page — Purchase and Sale Agreement]

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the date first above written.

**SELLER: One Hundred Forty Realty Trust**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**BUYER: Town of Hopedale**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

## EXHIBIT A

### Description of the Land

Certain property containing 130.18 acres of land out of approximately 155 acres located on and known as 364 West Street, Hopedale, Worcester County, Massachusetts; shown on the Town of Hopedale Assessors Map as Map 2 Parcel 5 and being part of the premises conveyed to the Seller, One Hundred Forty Realty Trust in a deed dated September 16, 1981 and recorded at the Worcester District Registry of Deeds in Book 7322 Page 181.

The property being conveyed is the land subject to the Forest Land Tax Lien pursuant to MGL c. 61 recorded in the Registry in Book 52875 Page 355 consisting of 130.18 acres of forest land out of the 155.24 acres of land, and expressly excluding 23.29 acres of unproductive wetlands and 1.67 acres of a gas line easement described in the June 27, 2012 Certificate for Chapter 61/61A Forest Lands as follows:

**Unproductive Wetland:** 23.39 acres of wetlands that were not included in the woodland classification being the land beginning at a stone bound along the south easterly boundary line S83.5W, 54' +/-; thence northerly along the swamp edge 300'+/-; thence westerly along the swamp edge 216'+/-; thence northerly 1,165+/- along the swamp edge; thence easterly 600'+/- along the swamp edge; thence northerly 480' along the swamp edge; thence south easterly 2000'+/- to a point on the south easterly boundary line; thence S59.5E, 81'+/- to a corner of the property; thence S83.5W, 329' along the property line to the point of beginning.

**Gas Line Easement:** Beginning at a drill hole on a stone wall on the gas line and the southerly most corner of the property N18.5W, 124' +/- to a point; thence N6W, 675'+/- along the gas line to a point on the westerly side of the gas line and property line; thence due east, 85'+/- to a point on the easterly side of the gas line and property line; thence S6E, 788'+/- along the gas line to a point on a stone wall; thence S74W, 54' +/- along the property line and stone wall to a point of beginning.



**EXHIBIT B**  
**Form of Deed**

EXHIBIT C

Form of Non-Foreign Affidavit

NON-FOREIGN AFFIDAVIT

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person.

To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by \_\_\_\_\_ a \_\_\_\_\_ ("Seller"), the undersigned hereby certifies the following:

1. Seller is not a foreign person, foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. Seller is not a disregarded entity as defined in § 1.1445-2(b)(2)(iii) of the Income Tax Regulations;
3. Seller's U.S. taxpayer identification number is [ \_\_\_\_\_ ]; and
4. Seller's address is \_\_\_\_\_. The undersigned understands that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement contained herein could be punished by fine, imprisonment, or both. Under penalties of perjury, the undersigned declares that it has examined this certification and to the best of its knowledge and belief it is true, correct, and complete, and further declares that it has authority to sign this document.

Date: As of \_\_\_\_\_, 2020

# **EXHIBIT 2**



COUNSELORS AT LAW

20 Park Plaza, Suite 1001, Boston, MA 02116 • p 617 266 5700 f 617 266 5237

www.mackieshea.com

November 2, 2020

**VIA CERTIFIED MAIL**

Michael R. Milanoski, Trustee  
One Hundred Forty Realty Trust  
7 Eda Avenue  
Carver, MA 02230

Jon Delli Priscoli, Trustee  
One Hundred Forty Realty Trust  
7 Eda Avenue  
Carver, MA 02230

**Re: Notice of Exercise of First Refusal Option to Purchase Forest Land Subject to  
M.G.L. c. 61  
364 West Street, Hopedale, MA (Assessors Map 2, Block 5)**

Dear Mr. Milanoski and Mr. Delli Priscoli:

As the current trustees of the One Hundred Forty Realty Trust, the landowner specified in the Notice of Intent to Sell Forest Land Subject to Chapter 61 Tax Lien for the above-referenced property, dated July 9, 2020, which trust retains legal title to the forest land at issue, please be advised that, pursuant to M.G.L. c. 61, § 8, the Town of Hopedale Board of Selectmen voted to exercise the first refusal option to purchase the Chapter 61 land at the above-stated property on behalf of the Town of Hopedale. A copy of the Notice of Exercise which the town recorded in the Worcester South Registry of Deeds on this date is enclosed with this letter.

Also enclosed is a proposed purchase and sale agreement which the Town is required to provide with the Notice of Exercise pursuant to M.G.L. c. 61, § 8, ¶ 16. This proposed agreement contains substantially the same terms and conditions as the bona fide offer which was made in the original purchase and sale agreement to the One Hundred Forty Realty Trust as set forth in the above-stated Notice of Intent. As such, the Town of Hopedale believes that the parties can proceed without issue to execute the agreement and complete Hopedale's purchase of the property. If you or your counsel has any comments or revisions on the proposed agreement, please send them to my attention at your earliest convenience.

Thank you for your attention to this matter. Please contact me with any questions.

Sincerely,

A handwritten signature in black ink that reads "Peter F. Durning".

Peter F. Durning

encl.

cc: *(Via Electronic and First Class Mail)*

Sandra R. Austin, Esq.  
Brian Keyes, Hopedale Board of Selectmen, Chair  
Diana Schindler, Hopedale Town Administrator  
Commissioner of the Department of Conservation and Recreation (via certified mail)  
Hopedale Board of Assessors  
Hopedale Planning Board  
Hopedale Conservation Commission



**NOTICE OF EXERCISE OF FIRST REFUSAL OPTION  
PURSUANT TO M.G.L. c. 61, § 8**

The TOWN OF HOPEDALE, acting by and through its Board of Selectmen, after a public hearing held on October 30, 2020, duly noticed, and pursuant to M.G.L. c. 61, § 8, hereby exercises the option to purchase the real property located at 364 West Street in Hopedale, Worcester County, Massachusetts, shown as Block 5, Lot 0, on Assessors Map 2 in said Town, owned as of the date of the notice of intent required by said Chapter 61, § 8, by the ONE HUNDRED FORTY REALTY TRUST, and as of said date consisting of 155.24 acres, of which 130.18 acres is classified as forest land pursuant to M.G.L. c. 61, § 2, as indicated by the Classified Forest-Agricultural or Horticultural-Recreational Land Tax Lien dated September 3, 2014, recorded in said registry in Book 52875, Page 355, said option applying only to the portion of said property classified as such. For said owner's title, see the certificate recorded in said registry in Book 61533, Page 78.

Subsequent to the notice of intent sent pursuant to Chapter 61, § 8, the above-named Trust: sold the non-classified portion of said property, consisting of 25 +/- acres, to the Grafton & Upton Railroad Company by quitclaim deed dated October 12, 2020, recorded in said registry in Book 63493, Page 34; had 100% of its beneficial interest assigned to the Grafton & Upton Railroad Company by assignment dated October 12, 2020, recorded in said registry in Book 63493, Page 39; resigned its trustees by notices dated October 12, 2020, recorded in said registry in Book 63493, Pages 43 and 45; and appointed successor trustees by notices dated October 14, 2020, recorded in said registry in Book 63508, Pages 8 and 11. Said Trust continues to hold record title to the classified Chapter 61 land over which the Town of Hopedale exercises its option to purchase.

Executed as a sealed instrument this 2nd day of November, 2020.

**TOWN OF HOPEDALE**

By and through its Board of Selectmen,

  
\_\_\_\_\_  
Brian R. Keyes, Chair

364 West Street, Hopedale, MA

  
Louis J. Arcudi III

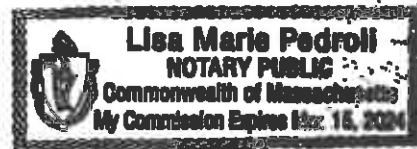
COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

November 2, 2020

Then personally appeared the above named, Brian R. Keyes and Louis J. Arcudi III, and acknowledged the foregoing document to be their free acts and deeds before me.

  
Notary Public  
My commission expires: March 15, 2024



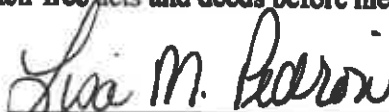
  
Louis J. Arcudi III

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

November 2, 2020

Then personally appeared the above named, Brian R. Keyes and Louis J. Arcudi III, and acknowledged the foregoing document to be their free acts and deeds before me.



Notary Public

My commission expires: March 15, 2024



## PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT ("Agreement") is made as of this \_\_\_\_ day of November, 2020 ("Effective Date") by and between Jon Mark Delli Priscoli, and Michael Milanoski, Trustees of the One Hundred Forty Realty Trust u/d/t September 16, 1981, recorded at the Worcester District Registry of Deeds in Book 7322 Page 177, with an address of 7 Eda Avenue, Carver, Massachusetts 02230 ("Seller"), and the Town of Hopedale a Massachusetts municipality with offices at 78 Hopedale Street, Hopedale, Massachusetts 01747 ("Buyer").

1. *Purchase and Sale.* Subject to the terms and conditions set forth in this Agreement, Seller agrees to sell, transfer and convey to Buyer, and Buyer agrees to purchase and accept from Seller, the following real (the "Property"):

1.1. The portion of 364 West Street, Hopedale, Massachusetts subject to the Forest Land Tax Lien pursuant to MGL c. 61 recorded in the Registry in Book 52875 Page 355 consisting of 130.18 acres of forest land out of the 155.24 acres of land, more particularly described in Exhibit A hereto, together with all privileges, rights, easements and appurtenances belonging to such land, and all right, title and interest (if any) of Seller in and to any streets, alleys, passages, and other rights-of-way or appurtenances included in, adjacent to or used in connection with such land, and all right, title and interest (if any) of Seller in all mineral and development rights appurtenant to such land;

1.2. All of Seller's right, title and interest, if any, in all intangible assets of any nature relating to the Property, including without limitation all of Seller's right, title and interest in all (i) warranties all licenses, permits, and approvals and (ii) all plans and specifications, in each case to the extent that Seller may legally transfer the same (the "Intangible Personalty").

2. *Purchase Price.* The purchase price for the Property (the "Purchase Price") shall be One Million One Hundred Seventy Five Thousand and 00/100 Dollars (\$1,175,000.00), which, subject to the terms and conditions hereinafter set forth, shall be paid to Seller by Buyer as follows:

2.1. *Deposit.* Concurrently with the execution and delivery of this Agreement by Buyer, Buyer shall deliver to the Law Office of Sandra Rennie Austin, 24 Bolton Street, Marlborough, MA 01752 ("Escrow Agent"), in immediately available funds, to be held in escrow and delivered in accordance with this Agreement, a cash deposit in the amount of Fifty-Eight Thousand Seven Hundred Fifty and 00/100 Dollars (\$58,750.00) (the "Initial Deposit"). Within two (2) business days following the expiration of the Inspection Period as defined in Section 4.3 herein. Buyer shall deposit with Escrow Agent an additional deposit of Forty One Thousand Two Hundred Fifty and 00/100 (\$41,250.00) (the "Additional Deposit"). The Initial Deposit and Additional Deposit are hereinafter referred to collectively as the "Deposit." The Deposit shall be held and distributed as follows:

2.1.1. The Deposit shall be held by the Escrow Agent in a non-interest bearing account.

2.1.2. If the Closing takes place in accordance with the terms and conditions of this Agreement, the Escrow Agent shall deliver and pay the Deposit to Seller on the Closing Date, and the amount



so delivered shall be credited to Buyer against the Purchase Price due Seller in accordance with the terms and conditions of this Agreement.

2.1.3. If this Agreement is terminated by Buyer in accordance with the terms and conditions of this Agreement prior to the expiration of the Inspection Period (defined below), then the Escrow Agent shall promptly deliver the Initial Deposit to Buyer.

2.1.4. If this Agreement is terminated by Buyer in accordance with the terms and conditions of Paragraph 7 of this Agreement, then the Escrow Agent shall deliver the Deposit to Buyer promptly in accordance with the provisions of this Agreement.

2.1.5. If the Closing does not take place under this Agreement by reason of the failure of either party to comply with its obligations hereunder, the Escrow Agent shall promptly deliver the Deposit to the party entitled thereto in accordance with the provisions of this Agreement.

2.1.6. Except for a demand made by Buyer pursuant to a termination of this Agreement by Buyer prior to the expiration of the Inspection Period, upon receipt of a written demand from Seller or Buyer claiming the Deposit, the Escrow Agent shall promptly forward written notice of Escrow Agent's receipt of such demand together with a copy thereof to the other party hereto. Unless such other party, within seven (7) days after actual receipt of such notice, notifies the Escrow Agent in writing of any objection to such requested delivery of the Deposit, the Escrow Agent shall deliver the Deposit to the party demanding the same and thereupon shall be released and discharged from any further duty or obligation hereunder by all parties hereto. Notwithstanding anything to the contrary contained herein, the Escrow Agent shall not deliver the Deposit pursuant to any such demand for the same unless and until the Escrow Agent has received confirmation that the party not making the demand for the Deposit has actually received notice of said demand and that the time for responding to said demand has passed.

2.2. *Payment at Closing.* At the consummation of the transaction contemplated hereby (the "Closing"), Buyer shall deliver to the Escrow Agent by federal wire transfer in an amount equal to the Purchase Price less the Deposit. The Purchase Price, subject to adjustments and apportionments as set forth herein, shall be paid at Closing by wire transfer of immediately available federal funds, transferred to the order or account of Seller or such other person as Seller may designate in writing, for receipt by the bank designated by Seller not later than 1 P.M., Eastern Daylight or Standard (as applicable) Time.

3. *Escrow Agent.* The Escrow Agent shall hold the Deposit as escrow agent in accordance with the terms and provisions of this Agreement, subject to the following:

3.1. *Obligations.* The Escrow Agent undertakes to perform only such duties as are expressly set forth in this Agreement and no implied duties or obligations shall be read into this Agreement against the Escrow Agent.

3.2. *Reliance.* The Escrow Agent may act in reliance upon any writing or instrument or

signature which it, in good faith, believes to be genuine, and any statement or assertion contained in such writing or instrument, and may assume that any person purporting to give any writing, notice, advice, or instrument in connection with the provisions of this Agreement has been duly authorized to do so. The Escrow Agent shall not be liable in any manner for the sufficiency or correctness as to form, manner and execution, or validity of any instrument deposited in escrow, nor as to the identity, authority, or right of any person executing the same.

3.3. *Indemnification.* Unless the Escrow Agent discharges any of its duties under this Agreement in a grossly negligent manner or is guilty of willful misconduct with regard to its duties under this Agreement, Seller and Buyer shall indemnify the Escrow Agent and hold it harmless from any and all claims, liabilities, losses, actions, suits or proceedings at law or in equity, or other expenses, fees, or charges of any character or nature, which it may incur or with which it may be threatened by reason of its acting as escrow agent under this Agreement; and in such connection Seller and Buyer shall indemnify the Escrow Agent against any and all expenses including reasonable attorneys' fees and the cost of defending any action, suit or proceeding or resisting any claim in such capacity.

3.4. *Disputes.* If the parties (including the Escrow Agent) shall be in disagreement about the interpretation of this Agreement, or about their respective rights and obligations, or the propriety of any action contemplated by the Escrow Agent, or the application of the Deposit, the Escrow Agent shall have the right to hold the Deposit until the receipt of written instructions from both Buyer and Seller or a final order of a court of competent jurisdiction. In addition, in any such event, the Escrow Agent may, but shall not be required to, file an action in interpleader to resolve the disagreement. The Escrow Agent shall be indemnified for all costs and reasonable attorneys' fees in its capacity as escrow agent hereunder in connection with any such interpleader action and shall be fully protected in suspending all or part of its activities under this Agreement until a final judgment in the interpleader action is received.

3.5. *Counsel.* The Escrow Agent may consult with counsel of its own choice and have full and complete authorization and protection in accordance with the opinion of such counsel. The Escrow Agent shall otherwise not be liable for any mistakes of fact or errors of judgment, or for any acts or omissions of any kind, unless caused by its negligence or willful misconduct.

#### 4. *Buyer's Due Diligence Inspection and Termination Rights; "As Is " Sale*

4.1. *Inspection of Property.* Buyer and its appointed agents or independent contractors shall, at all reasonable times prior to the Closing Date, have the privilege of going upon the Property to, at Buyer's sole cost and expense, inspect, examine, test, appraise, and survey the Property, including, but not limited to, investigations of the physical condition thereof provided, however, that no intrusive testing, drilling or similar testing to determine the status of the land with respect to geotechnical matters and/or hazardous materials and oils shall be performed without Seller's consent which may be withheld at Seller's sole discretion- Before entering upon the Property, Buyer shall obtain and maintain for itself and on behalf of each of its contractors and agents (and shall deliver to Seller evidence thereof), at Buyer's sole cost and expense, general liability insurance,

from an insurer reasonably acceptable to Seller, in the amount of One Million Dollars and 00/00 (\$1,000,000.00) combined single limit for personal injury and property damage per occurrence, such policies to name Seller and Seller's trustees additional insured parties, which insurance shall provide coverage against any claim for personal liability or property damage caused by Buyer or Buyer's contractors or agents in connection in with Buyer entry, tests and inspections upon the Property. Buyer shall, and does hereby covenant and agree to, repair any and all damage caused by the activities of Buyer or its agents on the Property and to indemnify, defend and hold Seller harmless from any actions, suits, liens, claims, damages, expenses, losses and liability arising out of any such entry by Buyer or its appointed agents or independent contractors or any acts performed in exercising Buyer's rights under this Paragraph 4.1 (including without limitation, any rights or claims of materialmen or mechanics to liens on the Property, but excluding matters merely discovered by, and not caused by, Buyer, its agents or contractors).

4.2. *Inspection of Documents.* Without any representation or warranty as to the completeness of any deliveries or the accuracy of any information provided in said documents as may be delivered. Seller shall deliver to Buyer within five (5) days after the Effective Date copies of the following documents, that it has readily in his possession if any (the documents described below herein referred to as the "Due Diligence Documents"):

4.2.1. Existing building permits, if any;

4.2.2. The most recent existing survey of the Property;

4.2.3. A copy of Seller's policy of title insurance on the Property and all title exception documents that are listed therein;

4.2.4. Maintenance agreements, and other agreements relating to the operation of the Property, if any;

4.2.5. Real estate tax bills with respect to the Property for the immediately prior and current tax fiscal years;

4.2.6. Existing reports and correspondence in Seller's possession relating to the environmental status of the Property;

4.3. *Termination.* The term "Inspection Period," as used herein, shall mean the period ending at 5:00 P.M. Eastern Daylight or Standard (as applicable) Time Sixty (60) days from the Effective Date. Buyer may terminate this Agreement in its sole discretion by giving written notice of such election to Seller prior to the end of the Inspection Period, in which event (i) the Initial Deposit shall be returned promptly to Buyer; subject to Buyer's right to terminate and receive the return of the entire Deposit under Section 4.4 (Title) and 6.2 (Condemnation) of this Agreement and (ii) except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder. In the absence of timely delivery by Buyer to Seller of such written notice, Buyer shall be deemed to have waived its right to terminate this Agreement under this Paragraph

4.3, and this Agreement shall continue in full force and effect.

4.4. *Title and Survey Matters.*

4.4.1. Buyer shall promptly at its sole cost and expense obtain a title commitment ("Title Commitment") from a nationally recognized title insurance company and a survey ("Survey") of the Property. Buyer shall have until the end of the Inspection Period to give written notice to Seller of any objections with respect thereto ("Buyer's Title Objection Notice"), indicating in reasonable detail the nature and reasons for Buyer's objections and including with such notice a copy of the Title Commitment and Survey, together with copies of any documents containing matters objected to in such notice. Failure to give such notice shall constitute Buyer's approval of (i) all title and survey matters as a matter of record title and/or physically existing upon the Property as of the expiration of the Inspection Period, and (ii) all matters set forth in the Title Commitment and the Survey.

4.4.2. Seller shall have the right, but not the obligation, to attempt to cure any objections set forth in Buyer's Title Objection Notice. Seller shall notify Buyer within five (5) business days after receipt of Buyer's Title Objection Notice ("Seller's Title Objection Response Period") whether Seller agrees to attempt to cure any objections set forth in Buyer's Title Objection Notice. If Seller so agrees to attempt to cure any objections, then Seller shall have a period of up to thirty (30) days after the end of the Inspection Period ("Title Cure Period") in order to effectuate such cure. If the Closing Date is scheduled to occur prior to the end of the Title Cure Period, then, upon written notice from Seller to Buyer delivered not less than three (3) business days prior to the then scheduled Closing Date, the Closing Date shall be extended until a date not later than three (3) business days after the end of the Title Cure Period in order for Seller to continue to effectuate such cure.

4.4.3. If Seller fails to give notice to Buyer prior to the expiration of Seller's Title Objection Response Period that Seller will attempt to cure all objections set forth in Buyer's Title Objection Notice, Buyer may, within five (5) business days after the expiration of Seller's Title Objection Response Period, terminate this Agreement by written notice to Seller, in which event (i) the Deposit shall be returned promptly to Buyer, and (ii) except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder. If Buyer does not so terminate this Agreement within said five (5) business days after the expiration of Seller's Title Objection Response Period, Buyer shall be deemed to have waived its objections set forth in Buyer's Title Objection Notice that Seller has not agreed in writing to attempt to cure, and to have agreed to accept title to the Property subject thereto, without reduction in the Purchase Price.

4.4.4. In the event Seller gives timely notice to Buyer that Seller will attempt to cure any objections set forth in Buyer's Title Objection Notice, and if this Agreement is not terminated pursuant to Paragraph 4.4.3 above, Seller shall use commercially reasonable efforts to cure such objections and deliver evidence of such cure satisfactory to the Escrow Agent and Buyer within the Title Cure Period, but in no event shall Seller be required to expend more than a maximum amount of One Hundred Thousand and 00/100 Dollars (\$100,000.00) Dollars in the aggregate to

effectuate the cure of all such objections (excluding Monetary Liens (defined below), as to which such maximum amount shall not apply). If despite Seller's commercially reasonable efforts Seller fails to cure all such matters within the Title Cure Period, Buyer's sole right with respect thereto shall be to terminate this Agreement within two (2) business days after the expiration of the Title Cure Period, in which event (i) the Deposit shall be returned promptly to Buyer; and (ii) except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder. If Buyer does not so terminate this Agreement, Buyer shall be deemed to have waived its objections and to have agreed to accept title to the Property subject thereto, without reduction in the Purchase Price.

4.4.5. Notwithstanding the foregoing, Seller agrees to cure at or prior to the Closing all "Monetary Liens" at Seller's sole cost and expense. As used herein, "Monetary Lien" means any security deed, mortgage, lien, security interest, monetary judgment, past due taxes or assessments or similar monetary encumbrance upon the Property created by Seller or placed on the Property by Seller's actions or inaction except as provided in Section 4.4.6.3. A Monetary Lien shall be deemed cured by Seller if such Monetary Lien is released, satisfied or canceled of record at or prior to the Closing at no additional cost to Buyer, provided, however, that as to any institutional mortgage, the lien of such mortgage shall be deemed satisfactorily released if written confirmation is received from the mortgagee stating the amount to be delivered at the Closing to discharge such mortgage, in form and substance satisfactory to the Escrow Agent to remove such mortgage from the list of encumbrances in Buyer's title insurance policy upon payment of such amount to said mortgagee out of Seller's proceeds at the Closing.

4.4.6. If Buyer does not terminate this Agreement pursuant to this Paragraph 4.4, the following matters shall be deemed accepted by Buyer and shall be referred to herein as "Permitted Encumbrances."

4.4.6.1. All matters disclosed in the Title Commitment and the Survey, or which exist as of record title and/or are physically existing upon the Property as of the expiration of the Inspection Period to which Buyer does not object or which Buyer is deemed to have accepted pursuant to the terms and conditions of this Paragraph 4.4, other than Monetary Liens;

4.4.6.2. Except as provided in Section 4.4.6.3, any liens for such taxes for the then current year as are not due and payable on the Closing Date, and any liens for municipal betterments assessed after the Effective Date; and the provisions of any building, zoning, subdivision, and similar laws applicable to the Property.

4.4.6.3. The tax taking and all obligations for any real estate taxes of any kind or nature and any rollback, reassessed taxes or similar changes resulting from the conversion of that portion of the Property known as 364 West Street, Hopedale, Massachusetts pursuant to the Forest Lien.

4.5. "*As Is*" Sale. Except as expressly set forth in this Agreement, it is understood and agreed that Seller is not making and has not at any time made any warranties or representations of any kind or character, express or implied, with respect to the Property, including, but not limited to,

any warranties or representations as to habitability, merchantability or fitness for a particular purpose or environmental matters of any kind. Buyer acknowledges and agrees that upon closing Seller shall sell and convey to Buyer and Buyer shall accept the Property "as is, where is, with all faults," except to the extent expressly provided otherwise in this Agreement. Buyer has not relied and will not rely on, and Seller is not liable for or bound by, any express or implied warranties, guaranties, statements, representations, or information pertaining to the Property or relating thereto (including specifically, without limitation, any prospectus distributed with respect to the Property) made or furnished by Seller, the managers of the Property, or any real estate broker or agent representing or purporting to represent Seller, to whomever made or given, directly or indirectly, orally or in writing, unless specifically set forth in this Agreement. Buyer also acknowledges that the purchase price reflects and takes into account that the Property is being sold "as-is." Buyer represents to Seller that Buyer has conducted, or will conduct prior to closing, such investigations of the Property, including, but not limited to, the physical and environmental conditions thereof, as Buyer deems necessary or desirable to satisfy itself as to the condition of the Property and the existence or nonexistence or curative action to be taken with respect to any hazardous or toxic substances on or discharged from the Property, and will rely solely upon same and not upon any information provided by or on behalf of Seller or its agents or employees with respect thereto, other than such representations, warranties, and covenants of Seller as are expressly set forth in this Agreement. Upon closing, Buyer shall assume the risk that adverse matters, including, but not limited to adverse physical and environmental conditions, may not have been revealed by Buyer's investigations, and Buyer, upon closing, shall be deemed to have waived, relinquished and released Seller (and Seller's trustees, employees and agents) from and against any and all claims, demands, causes of action (including causes of action in tort), losses, damages, liabilities, costs and expenses (including reasonable attorneys' fees) of any and every kind or character, known or unknown, which Buyer might have asserted or alleged against Seller (and Seller's trustees, employees and agents) at any time by reason of or arising out of any latent or patent construction defects or physical conditions, violations of any applicable laws and any and all other acts, omissions, events, circumstances or matters regarding the Property. The provisions of this paragraph shall survive closing or any termination of this agreement.

4.6. *Buyer's Waiver and Release of Seller as to Certain Actions after Closing.* Buyer agrees that, if at any time after the Closing, any third party or any governmental agency seeks to hold Buyer responsible for the presence of, or any loss, cost or damage associated with, Hazardous Materials (as hereinafter defined) in, on, above or beneath the Property or emanating therefrom, Buyer waives any rights it may have against Seller in connection therewith including, without limitation, under CERCLA (defined below), and Buyer agrees that it shall not (i) implead the Seller, (ii) bring a contribution action or similar action against the Seller or (iii) attempt in any way to hold the Seller responsible with respect to any such matter. The provisions of this Paragraph 4.6 shall survive the Closing. As used herein, "Hazardous Materials" shall mean and include, but shall not be limited to, any petroleum product and all hazardous or toxic substances, wastes or substances, any substances which because of their quantitated concentration, chemical, or active, flammable, explosive, infectious or other characteristics, constitute or may reasonably be expected to constitute or contribute to a danger or hazard to public health, safety or welfare or to the environment, including, without limitation, any hazardous or toxic waste or substances which are included under

or regulated by law, governmental rules or regulations (whether now existing or hereafter enacted or promulgated, as they may be amended from time to time), including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601 et seq. ("CERCLA"), the Federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., similar state laws and regulations adopted thereunder.

5. *Seller's Covenants Regarding Operation of Property.* From and after the Effective Date until the Closing or earlier termination of this Agreement, Seller agrees as follows:

5.1. *Notice of Defaults.* Seller will promptly deliver to Buyer any written notice received by Seller relating to the occurrence of any default or alleged default by Seller.

5.2. *Leases.* During the term of this Agreement, Seller will not enter into any lease for any portion of the Property without the prior written approval of Buyer.

5.3. *Encumbrances.* Seller will not grant or purport to create in favor of any third party any interest in the Property or any part thereof without the prior written approval of Buyer, which approval shall not be unreasonably withheld, conditioned, or delayed prior to the end of the Inspection Period but which may be withheld in Buyer's sole and absolute discretion after the end of the Inspection Period.

5.4. *Other Agreements; Property Contracts.* Seller will not enter into any maintenance, management, or other service contracts relating to the Property without the prior written approval of Buyer, which approval shall not be unreasonably withheld, conditioned or delayed prior to the end of the Inspection Period but which may be withheld in Buyer's sole and absolute discretion after the end of the Inspection Period.

5.5. *Insurance.* Seller will continue to maintain in full force and effect all insurance as presently carried by Seller.

5.6. *Violations of Law.* Seller will promptly notify Buyer in writing of any violation of any law, regulation, ordinance, order, or other requirement of any governmental authority having jurisdiction over or affecting the Property, or any part thereof, of which Seller receives written notice.

5.7. *Structural Modifications.* Seller will not permit any structural erections to the Property without the prior written consent of Buyer which may be withheld in Buyer's sole and absolute discretion.

5.8. *Operation of Property.* Seller shall continue to maintain, operate and manage the Property in the same manner that Seller has heretofore maintained and operated the Property.

6. *Casualty and Condemnation.*

6.1. *Casualty. Intentionally Omitted.*

6.2. *Condemnation.* If prior to the Closing any portion of the Property is actually condemned by means of a recordation of an order at the Worcester District Registry of Deeds prior to the Closing Date by a body having the power of eminent domain or condemnation, or sale in lieu thereof, which either (A) in Buyer's reasonable judgment adversely affects access to the Property, or (B) is reasonably estimated to cost in excess of \$200,000.00 for restoration and repair of the remaining Property then Buyer shall have the right, by giving Seller notice within ten (10) days after receipt of notice from Seller of such occurrence (with the Closing Date to be postponed, if necessary, to give the Buyer the benefit of the full ten (10) day period) to elect to: (i) terminate this Agreement, in which case the Deposit shall be returned promptly to Buyer and, except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder; or (ii) close the sale contemplated herein. If Buyer does not have the right to terminate this Agreement or having such right elects or is deemed to have elected not to terminate this Agreement, then this Agreement shall remain in full force and effect and the purchase contemplated herein, less any portion of the Property taken by eminent domain or condemnation, shall be effected without reduction in the Purchase Price. In such event, Seller shall at the Closing assign, transfer and set over unto Buyer all of Seller's right, title and interest in and to any awards paid or payable in connection with such taking. The pendency of the condemnation proceedings referred to in Section 15. I.4 shall not constitute a condemnation pursuant to this Section unless an actual order of taking is recorded at the Worcester District Registry of Deeds prior to the Closing Date.

7. *Conditions Precedent to Buyer's Obligations.*

7.1. Buyer's obligation to purchase the Property at the Closing hereunder is expressly conditioned on the satisfaction at or before the time of Closing hereunder, or at or before such earlier time as may be expressly stated below, of each of the following conditions (any one or more of which may be waived in writing in whole or in part by Buyer, at Buyer's option):

7.1.1. *Accuracy of Representations.* All of the representations and warranties of Seller contained in this Agreement shall have been true and correct in all material respects when made, and shall be true and correct in all material respects on the date of Closing with the same effect as if made on and as of such date.

7.1.2. *Performance.* Seller shall have performed, observed and complied with all material covenants, agreements and conditions required by this Agreement to be performed, observed and complied with on its part prior to or as of Closing hereunder.

7.1.3. *No Material Adverse Change.* Seller shall not cause to be removed any trees, clear the property, or otherwise cause a material adverse change to the Property between the Effective Date and the Closing.

7.1.4. *Condition of Title.* No new encumbrances or exceptions to title have been recorded for the first time pertaining to the Property between the date of the Title Commitment and the Closing that



have not been approved by Buyer or that are not removed by Seller or agreed to be removed by Seller prior to or contemporaneously with the Closing, and the Escrow Agent is prepared to issue at the Closing an owner's policy of title insurance at commercially customary rates, subject only to the Permitted Encumbrances.

7.2. *Failure of Conditions.* In the event Seller shall not be able to convey the Property on the Closing Date in accordance with the provisions of this Agreement, then Buyer shall have the option, exercisable by written notice to Seller at or prior to Closing, of (i) accepting at Closing the Property in such condition as Seller is able, waiving any unsatisfied condition precedent, with no deduction from or adjustment of the Purchase Price, (ii) extending the Closing Date one time only for an additional five (5) business days, or (iii) terminating this Agreement, in which event the Deposit shall be returned promptly to Buyer and, except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder.

## 8. *Closing; Deliveries.*

8.1. *Time of Closing.* The Closing shall take place at 10 a.m. on \_\_\_\_\_, 2020 (the "Closing Date") (subject to extension as expressly set forth herein) at the Law Office of Sandra Rennie Austin, 24 Bolton Street, Marlborough, MA 01752, unless otherwise agreed to in writing by both Seller and Buyer. If any date on which the Closing would occur by operation of this Agreement is not a business day in the Commonwealth of Massachusetts or Boston, Massachusetts, the Closing shall occur on the next business day. The Closing shall be conducted through an escrow agreement by means of document delivery of Seller's Deliveries (as herein defined) and Buyer's Deliveries (as herein defined). Buyer and Seller may execute supplemental escrow instructions as may be appropriate to enable compliance with the terms of this Agreement so long as such instructions are not in conflict with this Agreement.

8.2. *Seller Deliveries.* At Closing, Seller shall deliver to Buyer the following, and it shall be a condition to Buyer's obligation to close that Seller shall have delivered the same to Buyer:

8.2.1. A Massachusetts Quitclaim Deed ("Deed") to the Property from Seller, duly executed and acknowledged by Seller in the form of Exhibit B subject to the Permitted Encumbrances which shall be listed in Exhibit B of the Deed.

8.2.2. A certification by Seller that all representations and warranties made by Seller in Paragraph 15 of this Agreement are true and correct in all material respects on the date of Closing, except as may be set forth in such certificate.

8.2.3. Such affidavits or letters of indemnity as the title insurer shall require in a usual and customary format in order to issue, without extra charge, an owner's policy of title insurance free of any exceptions for unfiled mechanics' or materialmen's liens, or for rights of parties in possession.

8.2.4. A Non-Foreign Affidavit as required by the Foreign Investors in Real Property Tax Act

("FIRPTA"), as amended, in the form of Exhibit C duly executed by Seller.

8.2.5. All utilities layout plans, topographical plans and the like in Seller's possession and owned by Seller used in the construction, improvement, alteration or repair of the Property.

8.2.6. Originals or copies certified by Seller of all books, records and files maintained by Seller and Seller's property manager, if any, relating to the operation and maintenance of the Property.

8.2.7. All other instruments and documents reasonably required to effectuate this Agreement and the transactions contemplated thereby.

8.3. *Buyer Deliveries.* At Closing, Buyer shall deliver to Seller the following, and it shall be a condition to Seller's obligation to close that Buyer shall have delivered the same to Seller:

8.3.1. Funds by wire transfer in the amount required under Paragraph 2.2 hereof (subject to the adjustments provided for in this Agreement).

8.3.2. A certification by Buyer that all representations and warranties made by Buyer in Paragraph 16 of this Agreement are true and correct in all material respects on the date of Closing, except as may be set forth in such certificate.

8.3.3. All other instruments and documents reasonably required to effectuate this Agreement and the transactions contemplated thereby.

9. *Apportionments; Taxes; Expenses.*

9.1. *Apportionments.*

9.1.1. *Taxes and Operating Expenses.* All real estate taxes, charges and assessments affecting the Property relating to the 364 West Street, Hopedale, Massachusetts portion of the Property shall be prorated on a per diem basis as of the Closing Date, with the exception of the Forest Lien. All roll back taxes or other charges resulting from the conversion of the property subject to the Forest Lien shall be the obligation of the Buyer. All unpaid taxes and charges relating to that portion of the Property at 363 West Street, Hopedale, Massachusetts shall be paid by the Buyers including tax taking on 363 West Street. If any Taxes have not been finally assessed as of the Closing Date for the current fiscal year of the taxing authority, then the same shall be adjusted at Closing based upon the most recently issued bills therefor, and shall be readjusted when final bills are issued. Buyer hereby agrees to assume all nondelinquent assessments affecting the Property, whether special or general.

9.2. *Expenses.* Each party will pay all its own expenses incurred in connection with this Agreement and the transactions contemplated hereby, including, without limitation, (1) all costs and expenses stated herein to be borne by a party, and (2) all of their respective accounting, legal and appraisal fees. Buyer, in addition to its other expenses, shall pay at Closing (1) all recording

charges incident to the recording of the deed for the Property; (2) the premium for Buyer's title insurance policy; and (3) one-half of the escrow fee of the Escrow Agent. Seller, in addition to its other expenses, shall pay at Closing (1) all documentary stamps, excise taxes and real estate transfer taxes, (2) all recording charges incident to the recording of any instruments to discharge or remove encumbrances not approved (or deemed approved) by Buyer, and (3) one-half of the escrow fee of the Escrow Agent.

#### 10. *Remedies.*

10.1. *Buyer Default.* In the event Buyer breaches or fails, without legal excuse, to complete the purchase of the Property or to perform its obligations under this Agreement, then, except as otherwise expressly set forth in this Agreement, Seller shall, as its sole remedy therefor, be entitled to receive the Deposit as liquidated damages (and not as a penalty) in lieu of, and as full compensation for, all other rights or claims of Seller against Buyer by reason of such default, upon receipt of which this Agreement shall terminate and the parties shall be relieved of all further obligations and liabilities hereunder, except as expressly set forth herein. Buyer and Seller acknowledge that the damages to Seller resulting from Buyer's breach would be difficult, if not impossible, to ascertain with any accuracy, and that the liquidated damage amount set forth in this Paragraph represents both parties' best efforts to approximate such potential damages.

10.2. *Seller Default.* If Seller fails to perform any of its obligations under this Agreement, then Buyer, as its sole remedy for such failure, may either: (i) terminate this Agreement by written notice to Seller and Escrow Agent given prior to or on the Closing Date whereupon (x) Escrow Agent shall pay the Deposit to Buyer, and (y) if, but only if, the closing of the purchase of the Property does not occur as a result of Seller's intentional and willful failure to close, then Buyer the Seller shall pay to Buyer an amount equal to the out-of-pocket expenses (not to exceed Twenty Thousand and 00/100 Dollars (\$20,000.00) in the aggregate) incurred by Buyer in finalizing this Agreement and in performing Buyer's due diligence with respect to the Property, said amount to be paid within thirty (30) days after Buyer delivers to Seller written demand therefor accompanied by commercially customary third party receipts therefor; or (ii) enforce specific performance of Seller's obligations under this Agreement; provided, however, that if Seller willfully and intentionally conveys the Property to a bona fide third-party buyer or encumbers the Property in favor of a bona fide third party in a manner the result of which is that specific performance is not an available remedy, then Buyer may seek to recover Buyer's actual damages arising therefrom. The exercise by the Town of the right of first refusal as referred to in Section 4.7 shall not be deemed a breach by Seller.

11. *Confidentiality.* Buyer agrees to keep confidential and not to use, other than in connection with its determination whether to proceed with the purchase of the Property in accordance with the terms and conditions of this Agreement, any of the documents, material or information regarding the Property supplied to Buyer by Seller or by any third party at Seller's request, including, without limitation, any environmental site assessment reports furnished to Buyer, except to Buyer's, attorneys, accountants, consultants, investors and lenders on a "need to know" basis, unless Buyer is compelled to disclose such documents, material or information by law or by subpoena. In the

event that the Closing does not occur in accordance with the terms of this Agreement, Buyer shall return to Seller all of the documents, material or information regarding the Property supplied to Buyer by Seller or at the request of Seller. The provisions of this Paragraph 11 shall survive the termination of this Agreement but shall no longer be applicable following Closing in accordance with the terms of this Agreement.

12. *Possession.* Possession of the Property shall be surrendered to Buyer at Closing.

13. *Notices.* All notices and other communications provided for herein shall be in writing and shall be sent to the address set forth below (or such other address as a party may hereafter designate for itself by notice to the other parties as required hereby) of the party for whom such notice or communication is intended:

13.1. If to Seller:

One Hundred Forty Realty Trust  
Jon Mark Delli Priscoli and Michael Milanoski, Trustees  
7 Eda Avenue  
Carver, Massachusetts 02230  
E-mail: [mmilanoski@graftonuptonrr.com](mailto:mmilanoski@graftonuptonrr.com)

With a copy to:

Sandra R. Austin, Esquire  
Law Office of Sandra Rennie Austin  
24 Bolton Street  
Marlborough, MA 01752  
E-mail: [sandra@attyaustin.com](mailto:sandra@attyaustin.com)

13.2. If to Buyer:

Grafton & Upton Railroad Company  
7 Eda Ave  
Carver, MA 02330  
E-mail: [jcottert@firstcolonydev.com](mailto:jcottert@firstcolonydev.com) and  
[mmilanoski@graftonuptonrr.com](mailto:mmilanoski@graftonuptonrr.com)

With a copy to:

Peter F. Durning, Esquire  
Mackie Shea Durning, PC  
20 Park Plaza Suite 1001  
Boston, MA 02116  
E-mail: [pdurning@mackieshea.com](mailto:pdurning@mackieshea.com)

13.3. If to the Escrow Agent to:

Sandra R. Austin, Esquire  
Law Office of Sandra Rennie Austin  
24 Bolton Street  
Marlborough, MA 01752  
E-mail: [sandra@attyaustin.com](mailto:sandra@attyaustin.com)

Any such notice or communication shall be sufficient if sent by registered or certified mail, return receipt requested, postage prepaid; by hand delivery; by overnight courier service; or by email to the address indicated above with receipt confirmed and with an original by regular mail. Any such notice or communication shall be effective when delivery is received or refused.

14. *Brokers.* N/A.

15. *Representations and Warranties of Seller.*

15.1. Subject to all matters disclosed in any document delivered to Buyer by Seller or on any exhibit attached hereto, and subject to any information discovered by Buyer or other information disclosed to Buyer by Seller or any other person after the Effective Date and prior to the Closing, including, without limitation, any information contained in the Survey or the Title Commitment (all such matters being referred to herein as "Exception Matters"), Seller represents and warrants to Buyer as follows:

15.1.1. *Authority.* Seller is a nominee trust duly organized and validly existing under the laws of the Commonwealth of Massachusetts and has all requisite power and authority to enter into this Agreement and perform its obligations hereunder. The execution and delivery of this Agreement have been duly authorized pursuant to the terms and conditions of the Trust as recorded.

15.1.2. *No Conflict.* The execution and delivery of this Agreement and the consummation of the transactions contemplated hereunder on the part of Seller do not and will not conflict with or result in the breach of any material terms or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge, or encumbrance upon any of the Property of the Seller by reason of the terms of any contract, mortgage, lien, lease, agreement, indenture, instrument or judgment to which Seller is a party or which is or purports to be binding upon Seller or which otherwise affects Seller, which will not be discharged, assumed or released at Closing. No action by any federal, state, municipal or other governmental department, commission, board, bureau or instrumentality is necessary to make this Agreement a valid instrument binding upon Seller in accordance with its terms.

15.1.3. *Bankruptcy.* Seller has not (i) commenced a voluntary case, or had entered against it a petition, for relief under any federal bankruptcy act or any similar petition, order or decree under any federal or state law or statute relative to bankruptcy, insolvency or other relief for debtors, or

(ii) caused, suffered or consented to the appointment of a receiver, trustee, administrator, conservator, liquidator or similar official in any federal, state or foreign judicial or nonjudicial proceeding, to hold, administer and/or liquidate all or substantially all of its assets.

15.1.4. To Seller's knowledge there are no there pending condemnation, eminent domain or similar proceedings other than the current Petition of Grafton & Upton Railroad Company which is currently before the Department of Public Utilities (case number: D.P-U. 19-39), with respect to all or any portion of the Property.

15.1.5. *Compliance.* Seller has not received written notice of any existing violations of any federal, state, county or municipal laws, ordinances, orders, codes, regulations or requirements affecting the Property which have not been cured with the exception of Seller's refusal or failure to pay real estate taxes and municipal charges relating to 363 West Street, Hopedale, Massachusetts.

15.1.6. *Litigation.* With the exception of the potential taking of the Property which Seller has advised Buyer, there is no action, suit or proceeding pending or, to the best of Seller's actual knowledge, threatened against or affecting the Property, or arising out of the ownership, management or operation of the Property, this Agreement or the transactions contemplated hereby.

15.1.7. *Leases.* The Property is not leased nor subject to any occupancy agreements covering any portion of the Property and there are no written or oral promises, agreements, amendments, addenda, modifications, supplements, understandings, or commitments between Seller and any tenant of any nature whatsoever related to the Property and Seller agrees that it will not enter into any such agreements.

15.1.8. *Hazardous Materials.* INTENTIONALLY OMITTED. SELLER MAKES NO REPRESENTATION, WARRANTY OR STATEMENT OF ANY KIND RELATIVE TO HAZARDOUS MATERIALS.

15.1.9. *Other Agreements.* There are no written agreements affecting the Property to which Seller is party that will be binding on Buyer. Excepting the rights granted pursuant to the Forest Lien, Seller has not entered into and will not during the term of this Agreement enter into, any other agreement giving any other party a right to purchase the Property.

15.1.10. *FIRPTA.* Seller is not a "foreign person" as defined in Section 1445(f)(3) of the Internal Revenue Code.

15.2. *Definition of Seller's Knowledge.* As used in this Agreement, or in any other agreement, document, certificate or instrument delivered by Seller to Buyer, the phrase "to the best of Seller's actual knowledge, to the best of Seller's knowledge" or any similar phrase shall mean the actual, not constructive or imputed, knowledge of Charles E. Morneau without any obligation on their part to make any independent investigation of the matters being represented and warranted, or to make any inquiry of any other persons, or to search or examine any files, records, books, correspondence and the like.

15.3. *Survival of Seller's Representations and Warranties.* The representations and warranties of Seller set forth in this Paragraph 15 shall survive Closing for a period of Ninety (90) days and shall not be merged with the execution and delivery of the Deed and other closing documents hereunder.

16. *Representations of Buyer.* Buyer represents and warrants that:

16.1. *Authority.* Buyer is a Massachusetts municipality, duly organized, validly existing and in good standing under the laws of the Commonwealth of Massachusetts and has all requisite power and authority to enter into this Agreement and to perform its obligations hereunder. The execution and delivery of this Agreement by Buyer has been duly authorized.

16.2. *No Conflict.* The execution and delivery of this Agreement and the consummation of the transactions contemplated hereunder on the part of Buyer does not and will not violate any applicable law, ordinance, statute, rule, regulation, order, decree or judgment, conflict with or result in the breach of any material terms or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge, or encumbrance upon any of the property or assets of the Buyer by reason of the terms of any contract, mortgage, lien, lease, agreement, indenture, instrument or judgment to which Buyer is a party or which is or purports to be binding upon Buyer or which otherwise affects Buyer, which will not be discharged, assumed or released at Closing. No action by any federal, state or municipal or other governmental department, commission, board, bureau or instrumentality is necessary to make this Agreement a valid instrument binding upon Buyer in accordance with its terms.

17. *Miscellaneous.*

17.1. *Assignability.* Buyer may assign or transfer all or any portion of its rights or obligations under this Agreement to any other individual or entity without the consent thereto by Seller. Further, Buyer may assign or transfer such rights and obligations to an entity controlling, controlled by or under common control with Buyer without Seller's consent, with prior notice to Seller. No assignment or transfer by Buyer will be permitted if such assignment or transfer would, in Seller's opinion, cause this transaction to violate any provision of applicable law.

17.2. *Governing Law; Bind and Inure.* This Agreement shall be governed by the laws of the Commonwealth of Massachusetts and shall bind and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, assigns and personal representatives.

17.3. *Recording.* This Agreement or any notice or memorandum hereof shall not be recorded in any public record. A violation of this prohibition by Buyer shall constitute a material breach of this Agreement by Buyer, entitling Seller to terminate this Agreement and retain the Deposit.

17.4. *Time of the Essence.* Time is of the essence of this Agreement.

17.5. *Headings.* The headings preceding the text of the paragraphs and subparagraphs hereof are

inserted solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

17.6. *Counterparts.* This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement may be executed by electronic means, such as a facsimile or email of .pdf signature pages, which shall have the same force and effect as the delivery of an original signature.

17.7. *Exhibits.* All Exhibits which are referred to herein and which are attached hereto constitute a part of this Agreement.

17.8. *Survival.* Unless otherwise expressly stated in this Agreement, each of the warranties and representations of Seller and Buyer shall not survive the Closing and delivery of the Deed and other closing documents by Seller to Buyer and shall be deemed to have merged therewith. Unless expressly made to survive, all obligations and covenants of Seller contained herein shall be deemed to have been merged into the Deed and shall not survive the Closing.

17.9. *Use of Proceeds to Clear Title.* To enable Seller to make conveyance as herein provided, Seller may, at the time of Closing, use the Purchase Price or any portion thereof to clear the title of any or all encumbrances or interests, provided that provision reasonably satisfactory to the Escrow Agent and Buyer's attorney is made for prompt recording of all instruments so procured in accordance with conveyancing practice in the jurisdiction in which the Property is located.

17.10. *Submission not an Offer or Option.* The submission of this Agreement or a summary of some or all of its provisions for examination or negotiation by Buyer or Seller does not constitute an offer by Seller or Buyer to enter into an agreement to sell or purchase the Property, and neither party shall be bound to the other with respect to any such purchase and sale until a definitive agreement satisfactory to the Buyer and Seller in their sole discretion is executed and delivered by both Seller and Buyer.

17.11. *Entire Agreement; Amendments.* This Agreement and the Exhibits hereto set forth all of the promises, covenants, agreements, conditions and undertakings between the parties hereto with respect to the subject matter hereof, and supersede all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written, except as contained herein. This Agreement may not be changed orally but only by an agreement in writing, duly executed by or on behalf of the party or parties against whom enforcement of any waiver, change, modification, consent or discharge is sought.

17.12. *Section 1031 Exchange.* Seller may consummate the sale of the Property as part of a so-called like kind exchange (the "Exchange") pursuant to §1031 of the Internal Revenue Code of 1986, as amended (the "Code"), provided that: (i) the Closing shall not be delayed or affected by reason of the Exchange nor shall the consummation or accomplishment of the Exchange be a condition precedent or condition subsequent to Seller's obligations under this Agreement; (ii) Seller shall affect the Exchange through an assignment of its rights under this Agreement to a qualified



intermediary; (iii) Buyer shall not be required to take an assignment of the purchase agreement for the replacement property or be required to acquire or hold title to any real property for purposes of consummating the Exchange; and (iv) Seller will reimburse Buyer for any additional costs and fees (including, without limitation, attorneys' fees) incurred by the Buyer in connection with the Exchange. Buyer shall not by this Agreement or acquiescence to the Exchange (i) have its rights under this Agreement affected or diminished in any manner or (ii) be responsible for compliance with or be deemed to have warranted to Seller that the Exchange in fact complies with § 1031 of the Code.

17.13. *Compliance with Federal Laws; OFAC.* Each of Buyer and Seller each, a "**Representing Party**") represents and warrants to the other (i) that neither the Representing Party, nor any owner of a beneficial interest in it, nor any of its officers, directors, managers or managing members is a person or entity (each, a "**Prohibited Person**") with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control ("**OFAC**") of the Department of the Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order (including Executive Order 13224 (the "**Executive Order**") signed on September 23, 2001 and entitled "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism"), or other governmental action, (ii) that the Representing Party's activities do not violate the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001 or the regulations or orders promulgated thereunder (as amended from time to time, the "**Money Laundering Act**"), and (iii) that throughout the term of this Agreement the Representing Party shall comply with the Executive Order and with the Money Laundering Act.

[The remainder of this page is intentionally left blank; signature page follows.]

[Signature page — Purchase and Sale Agreement]

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the date first above written.

**SELLER: One Hundred Forty Realty Trust**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**BUYER: Town of Hopedale**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

## EXHIBIT A

### Description of the Land

Certain property containing 130.18 acres of land out of approximately 155 acres located on and known as 364 West Street, Hopedale, Worcester County, Massachusetts; shown on the Town of Hopedale Assessors Map as Map 2 Parcel 5 and being part of the premises conveyed to the Seller, One Hundred Forty Realty Trust in a deed dated September 16, 1981 and recorded at the Worcester District Registry of Deeds in Book 7322 Page 181.

The property being conveyed is the land subject to the Forest Land Tax Lien pursuant to MGL c. 61 recorded in the Registry in Book 52875 Page 355 consisting of 130.18 acres of forest land out of the 155.24 acres of land, and expressly excluding 23.29 acres of unproductive wetlands and 1.67 acres of a gas line easement described in the June 27, 2012 Certificate for Chapter 61/61A Forest Lands as follows:

**Unproductive Wetland:** 23.39 acres of wetlands that were not included in the woodland classification being the land beginning at a stone bound along the south easterly boundary line S83.5W, 54' +/-; thence northerly along the swamp edge 300'+/-; thence westerly along the swamp edge 216'+/-; thence northerly 1,165+/- along the swamp edge; thence easterly 600'+/- along the swamp edge; thence northerly 480' along the swamp edge; thence south easterly 2000'+/- to a point on the south easterly boundary line; thence S59.5E, 81'+/- to a corner of the property; thence S83.5W, 329' along the property line to the point of beginning.

**Gas Line Easement:** Beginning at a drill hole on a stone wall on the gas line and the southerly most corner of the property N18.5W, 124' +/- to a point; thence N6W, 675'+/- along the gas line to a point on the westerly side of the gas line and property line; thence due east, 85+/- to a point on the easterly side of the gas line and property line; thence S6E, 788'+/- along the gas line to a point on a stone wall; thence S74W, 54' +/- along the property line and stone wall to a point of beginning.

**EXHIBIT B**  
**Form of Deed**

EXHIBIT C

Form of Non-Foreign Affidavit

NON-FOREIGN AFFIDAVIT

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person.

To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by \_\_\_\_\_ a \_\_\_\_\_ ("Seller"), the undersigned hereby certifies the following:

1. Seller is not a foreign person, foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. Seller is not a disregarded entity as defined in § 1.1445-2(b)(2)(iii) of the Income Tax Regulations;
3. Seller's U.S. taxpayer identification number is [ \_\_\_\_\_ ]; and
4. Seller's address is \_\_\_\_\_. The undersigned understands that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement contained herein could be punished by fine, imprisonment, or both. Under penalties of perjury, the undersigned declares that it has examined this certification and to the best of its knowledge and belief it is true, correct, and complete, and further declares that it has authority to sign this document.

Date: As of \_\_\_\_\_, 2020

# **EXHIBIT 3**

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.

**VERIFIED COMPLAINT**

This is an action by more than ten taxpaying citizens of the Town of Hopedale ("Town") against the Hopedale Board of Selectmen ("Board") and the Grafton & Upton Railroad Company ("Railroad")<sup>1</sup> to restrain the Board from making unauthorized expenditures as part of a settlement agreement between the Board and the Railroad ("Settlement Agreement"); to enforce the Town's statutory right to exercise its first refusal option to acquire 130 acres of forestland pursuant to M.G.L. c.61, which the Board illegally agreed to release and waive; and to protect

<sup>1</sup> Railroad parties includes the defendants Grafton & Upton Railroad, its owner, Jon Delli Priscoli and its president, Michael Milanoski, and the One Hundred Realty Trust, collectively, "Railroad".

from damage the forestland as parkland dedicated to the public use and protected by Article 97 of the Amendments to the Massachusetts Constitution.

The Town and the Railroad each sought to acquire 155 acres of undeveloped property at 364 West St., Hopedale (the "Property"). Of the 155 acres of the Property, 130 acres are classified as forestland (the "Forestland") under M.G.L. c. 61. Chapter 61 requires that a notice be sent to the Town of any intent to sell or convert the Forestland for another use and provides the Town a statutory right of first refusal to purchase the Property. The remaining 25 acres of the Property are wetlands that run through a portion of the Forestland (the "Wetlands"). 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 intended to raze the Forestland and construct an industrial railyard on the Property.

The Property owner entered into a Purchase and Sale Agreement with the Railroad and provided the Town with a Notice of Intent to sell the Property and the Town took all the necessary steps to exercise its statutory first refusal option. This included a Town Meeting vote to authorize the option's exercise and appropriation of \$1,175,000, in substantial reliance on a \$750,000 gift from the Hopedale Foundation. The Board then voted to exercise the Town's option and recorded the Town's exercise of its option at the Registry of Deeds.

During the process of the Town's exercise of its statutory option, the Railroad orchestrated an unlawful series of maneuvers designed to extinguish the Town's c. 61 rights and claim effective control of the Property, improperly invoking federal railroad preemption as a bar against the Town's exercise of its c. 61 first refusal option.



The Town sued the Railroad in Land Court to protect its c. 61 rights and prevent the Railroad from clearing the Property. As part of the litigation, the Railroad and the Town engaged in confidential mediation which culminated with two of the three members of the Board<sup>2</sup> entering into the Settlement Agreement without statutorily-required Town Meeting approval. The Settlement Agreement exceeds the Board's authority, expends unauthorized funds, wrongfully transfers the Town's ownership interests in the Property to the Railroad for non-Forestland, non-parkland use, violates the purpose of the c. 61 conveyance and violates laws designed to protect the environment. In contradiction with the Town Meeting vote, the Board agreed to give the Railroad approximately 90 of the 130 acres of Forestland, to which the Town is rightfully entitled, to be developed into an industrial railyard. The Board also improperly obligated, without authorization of a Town Meeting vote or Finance Committee review, the Town to pay the Railroad more than \$587,500 to purchase from the Railroad approximately 40 acres, or less than one-third, of the Forestland.

Plaintiffs bring these claims to restrain the Board from making the illegal expenditures and to protect and reclaim the Property that rightfully belongs to the Town as public parkland and as a potential water supply source.

#### PARTIES

1. Plaintiffs are Elizabeth Reilly, Carol J. Hall, Donald Hall, Hillary Smith, David Smith, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle. Each Plaintiff is a taxpaying resident and citizen of Hopedale, Massachusetts.

2. Defendant Town of Hopedale is a body corporate and politic established under the

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<sup>2</sup> A third member of the Board, Glenda Hazard, refused to sign the Settlement Agreement and has since resigned from the Board.

laws of the Commonwealth of Massachusetts.

3. Defendant Hopedale Board of Selectmen is a duly constituted board of Hopedale with its principal office at 78 Hopedale Street, Hopedale, Massachusetts.

4. Defendant Louis J. Arcudi, III is a member of the Hopedale Board of Selectmen and resides in Hopedale, Massachusetts. He is sued in his official capacity.

5. Defendant Brian R. Keyes is a member of the Hopedale Board of Selectmen and resides in Hopedale, Massachusetts. He is sued in his official capacity.

6. Defendant Grafton & Upton Railroad Company is a domestic profit corporation organized and existing under the laws of Massachusetts and with its principal place of business located in North Grafton, Massachusetts.

7. Defendant Jon Delli Priscoli is the principal owner of Grafton & Upton Railroad Company and resides in North Grafton, Massachusetts. Delli Priscoli is also a Trustee of the One Hundred Forty Realty Trust, which is a nominee trust established under a declaration of trust dated September 16, 1981 and recorded in the Worcester Registry of Deeds in Book 7322, Page 177. This action is brought against Delli Priscoli in his capacity as owner of the Railroad and as a trustee.

8. Defendant Michael R. Milanoski is the president of the Railroad and resides in Cohasset, Massachusetts. Milanoski is also a Trustee of the One Hundred Forty Realty Trust, which is a nominee trust established under a declaration of trust dated September 16, 1981 and recorded in the Worcester Registry of Deeds in Book 7322, Page 177. This action is brought against Milanoski in his capacity as president of the Railroad and as a trustee.

9. One Hundred Forty Realty Trust is a nominee trust established under a declaration of trust dated September 16, 1981 and recorded in the Worcester Registry of Deeds in Book 7322, Page 177.

### **JURISDICTION AND VENUE**

10. This Court has jurisdiction over the parties and the subject matter of this action pursuant to M.G.L. c. 40, § 53; c. 40A, § 3; c. 44, §§ 31, 53, 59 c. 45, § 7; c. 212, § 4; and c. 214, and 7A.

11. This Court has personal jurisdiction over Defendants pursuant to M.G.L. c. 223A because each Defendant is (1) a body corporate and politic established under the laws of the Commonwealth of Massachusetts, (2) is a duly constituted board or committee thereto, (3) transacted business in Massachusetts, and/or (4) resides in Massachusetts.

12. Venue is proper in this Court because the municipal entity Defendant's location is in Worcester County, Massachusetts, it affects land in Worcester County, Massachusetts and all Defendants conduct business in Worcester County, Massachusetts.

### **FACTS**

13. Charles E. Morneau was the prior Trustee ("Prior Trustee") of the One Hundred Forty Realty Trust (the "Trust"), which owns 155.24 acres of undeveloped land at 364 West Street in the northern tip of Hopedale, Massachusetts (the "Property").

14. Of the 155.24 acres, 130.18 acres are, and have been since 1992, classified as forestland subject to M.G.L. c. 61 (the "Forestland").

15. The Forestland surrounds and has running through it 25.06 acres of wetlands that are excluded from the Forestland c. 61 classification (the "Wetlands").

16. The Property is depicted on the map attached hereto as Exhibit 1. The Property is indicated on Exhibit 1 as the orange area in the center of the map. The dark shaded area in the southeast portion of the Property is the Wetlands, the non-shaded portion is the Forestland.

17. The Property abuts and is contiguous with the Town-owned 279-acre public forested park, the Hopedale Parklands, depicted by the yellow area on Ex. 1.

18. The Property is also one of the few remaining sites available to the Town to potentially locate a much-needed Town water supply. See Environmental Partners Group, Inc. Report on the Property as new water supply, attached hereto as Exhibit 2. The report notes that the Property is within the watershed for all of Hopedale's public water supply wells and that the Property provides an important buffer to protect the Town's water supply.

19. The Grafton & Upton Railroad crosses the Forestland running, roughly, north to south. See Ex. 1.

20. The Railroad has also long coveted the Property to expand its rail system in Hopedale and construct a transloading facility.

21. The Railroad had, since March 15, 2019, tried to obtain the Property by eminent domain by filing a petition with the Massachusetts Department of Public Utilities. The Railroad's attempt to take the Property through the eminent domain process was stymied after opposition by the Town, Conservation Commission, and Water & Sewer Commission, among others.

22. The Railroad also failed to secure a public private partnership with the Town to obtain some portion of the Property.

23. On or about June 27, 2020, the Prior Trustee of the Property entered into a Purchase and Sale Agreement with Defendant Jon Delli Priscoli, owner of the Railroad and

trustee of New Hopping Book Realty Trust, for the Railroad to purchase the Property from the Trust for \$1,175,000.

24. The 130.18 acres of Forestland on the Property are subject to the protections of M.G.L. c. 61, including § 8, which prohibits sale for or conversion to industrial or commercial use unless the Town has been properly notified of the intent to sell for or to convert to that other use and given 120 days to exercise a right of first refusal to purchase the land pursuant to the same terms set forth in the purchase and sale agreement.

25. On or about July 9, 2020, Defendant Michael Milanoski, President of the Railroad, on behalf of the Prior Trustee, provided the Town with a Notice of Intent to Sell Forest Land Subject to Chapter 61 ("Notice") to be used for railroad transloading uses. The Notice is attached hereto as Exhibit 3.

26. The Notice included the entire 155.24 acres of the Property in the \$1,175,000 purchase price, including the 130.18 acres of Forestland and the 25.06 acres of Wetlands, without providing the purchase price of the 130.18 acres Forestland separately.

27. The Town informed the Prior Trustee and the Railroad that the Town was considering exercise of its statutory first refusal option to purchase the Property from the Prior Trustee. The Town also informed the Trust and the Railroad that the Notice was insufficient because it included non-Forestland in the total purchase price. See August 19, 2020 letter, attached hereto as Exhibit 4.

28. On or about August 26, 2020, the Hopedale Foundation informed the Town by letter that "[i]f the Town of Hopedale decides to exercise its option to purchase property at 364 West Street, Hopedale, MA . . . [t]he Hopedale Foundation would be willing to assist the Town of Hopedale in reducing its financial burden as a result of the purchase." See Exhibit 5.

29. By letter on or about October 7, 2020, a month before the Town's 120-day option period would expire on the Notice, the Prior Trustee claimed that its own prior Notice was not defective due to its inclusion of the Wetlands in the purchase price. See Exhibit 6.

30. The Prior Trustee by the same letter purported to also withdraw its Notice, claiming it "specifically withdraws its Notice of Intent to sell or convert the land that is currently in Forest Land subject to Chapter 61. Any further notice to sell or convert the land will be subject to a new notice of Intent." Ex. 6,

31. The Town responded by letter dated October 8, 2020 that the first refusal option had ripened and, therefore, is irrevocable. See Exhibit 7. The Town continued its process towards exercising its first refusal option to purchase the Forestland.

32. On September 10, 2020, the Hopedale Finance Committee voted to approve its Due Diligence Report on the financial impact of the Town's exercise of its first refusal option to purchase the Forestland. See Exhibit 8. The Finance Committee strongly recommended that the Town purchase the Forestland. In its report, the Finance Committee noted that the Hopedale Foundation had indicated interest in assisting acquiring the property under the Town's first refusal option. The Finance Committee did not have any further details of the gift from the Hopedale Foundation but did include a hypothetical net debt service estimate based on an assumed donation from the Hopedale Foundation of \$750,000 over time, or approximately half of the cost of the purchase of the Property, including debt service. Id., Exhibit C.

33. Just two days after the Finance Committee Report and four days after the Town informed the Railroad it was moving forward to exercise its first refusal option, the Railroad orchestrated a series of conveyances designed to illegally seize control of the Property before the

Town could finalize the exercise its first refusal option and attempted to squelch the Town's first refusal right.

34. On October 12, 2020, the owner of the beneficial interest of the Trust assigned the entire beneficial interest in the Forestland of the Property, protected under c. 61, to the Railroad for \$1,175,000.

35. On the same day, the Prior Trustees resigned and named defendants Delli Priscoli and Milanoski as the new trustees.

36. On the same day, the Prior Trustee sold to the Railroad the Property's 25.06 acres of Wetlands that are surrounded by the Forestland plus an additional 20-acre parcel on the opposite side of West Street, at 363 West Street, for \$1.00.

37. On or about October 15, 2020, the Railroad informed the Town by letter of its bait and switch land deal but did not provide a further formal notice pursuant to c. 61 or recognize the Town's right of first refusal. See Exhibit 9.

38. The Prior Trustee and the Railroad never provided the Town with a formal Notice of its intent to sell the Forestland to the Railroad for Railroad use through sale of 100% beneficial interest and appointment of the Railroad as Trustee, in violation of the requirements of c. 61.

39. The Trust's assignment of 100% of its beneficial interest to the Railroad was equivalent to a transfer of title to the c. 61 Forestland and therefore constituted a sale of land taxed under c. 61 for non-forest purposes giving rise to a separate and independent first refusal option in the Town.

40. On or about October 17, 2020, the Hopedale Foundation reaffirmed its gift offer, "to assist the Town of Hopedale in reducing its financial burden as a result of the Town of

Hopedale exercising its option to purchase the [Property], as represented in the Notice of Intent to Sell . . . [t]he Trustees voted that after the purchase of the land The Hopedale Foundation would grant to the Town of Hopedale the amount of seven hundred and fifty thousand dollars (\$750,000) to be paid in increments of fifty thousand dollars (\$50,000) per year for a period of fifteen years." See Exhibit 10.

41. On October 21, 2020, the Town informed the Trust and the Railroad that the Town holds an irrevocable option to purchase the Forestland based on the July 9, 2020 Notice that cannot be withdrawn, but in addition, that the Town has a separate and independent opportunity to exercise its statutory first refusal option to the Forestland based on the sale of the 100% of the beneficial interest in the Trust to the Railroad. See October 21, 2020 letter attached hereto as Exhibit 11.

42. On October 22, 2020, the Environmental Partners Group, Inc. provided its Report to the Town, reporting that conservation of the Property is critical to protection of the Town's water supply and that the Town would need to control of the Property in order for the Town to develop a new water supply. Ex. 2.

43. On October 24, 2020, the Town held a Special Town Meeting, attended in person (despite Covid-19) by over 400 citizens of Hopedale.

44. Article 3 of the Town Meeting Warrant was:

To see if the Town will vote to acquire, by purchase or eminent domain, certain property, containing 130.18 acres, more or less, located at 364 West Street . . . 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 to be managed under the control of the Hopedale Parks Commission, and further authorize the Board of Selectmen to take any and all actions and execute any and all documents to carry out the purposes of this article; or take any action related thereto.**

See Special Town Meeting Minutes, attached hereto as Exhibit 12 (emphasis added).

45. The members of the Town spoke overwhelmingly in favor of acquiring 130.18 acres of Forestland for the use of the public for conservation and recreation purposes. The Finance Committee recommended approval of Article 3 and informed the Town Meeting of the Hopedale Foundation's gift offer. Chairs of the Conservation Commission and Water and Sewer Commissions all spoke in favor of the Article.

46. Board Chairman Brian Keyes moved to appropriate \$1,175,000, less amounts received by gift, to acquire the 130.18-acre Forestland and the motion passed unanimously.

47. Article 5 asked the Town to consider whether "to take by eminent domain pursuant to Chapter 79 of the General Laws, for the purpose of public park land" the 25.06 Wetlands and to appropriate funds for the taking.

48. The Town approved the motion to purchase or take by eminent domain the Wetlands and to appropriate \$25,000 to fund the acquisition.

49. The Board, on October 30, 2020, voted to exercise its first refusal option to acquire the Forestland and to take by eminent domain the Wetlands, each vote consistent with the Town Meeting warrant votes. The October 30, 2020 Board meeting minutes reflect that when the Board voted, it thanked the Hopedale Foundation for its donation, and confirmed "that this warrant article 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.” October 30, 2020 Board minutes attached hereto as Exhibit 13.

50. Despite the Town’s ongoing process of exercising its first refusal option through Town Meeting votes and the Board’s votes, the Railroad began clearing the Forestland, prompting the Town, on October 28, 2020, to sue the Railroad in Land Court, styled Town of Hopedale v. Jon Delli Priscoli Trustee of the One Hundred Forty Realty Trust, et al., 20 MISC 000467, to seek a judicial order that the Notice was effective. The Town also moved to enjoin the Railroad’s Forestland clearing.

51. On November 2, 2020, the Town recorded notice of the decision to exercise the first refusal option in the Worcester South District Registry of Deeds, attached hereto as Exhibit 14. The Notice of Exercise references the dubious steps taken by the Railroad in its attempt to squelch the Town’s c. 61 rights.

52. The Town sent the Notice of Exercise with the purchase and sale agreement to the Trust, perfecting its exercise of the first refusal option as required under c. 61, § 8.

53. The Board validly exercised the first refusal option to purchase the c. 61 Forestland on behalf of the Town.

54. The Railroad refused to agree to sell the c. 61 Forestland to the Town despite the Town’s valid exercise of its first refusal option.

55. Also on November 2, 2020, the Town formally recorded its taking by eminent domain of the 25.06 acres of Wetlands. See Exhibit 15.

56. The Railroad, just before hearing on the Town’s motion for preliminary injunction, filed a Petition for a Declaratory Order with the Surface Transportation Board that the Town’s rights under c. 61 were preempted by federal railroad law.

57. Following a hearing on November 23, 2020, the Land Court denied the Town's request for a preliminary injunction in a brief and narrow decision 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:

**While the Town is entitled to a right of first refusal under Chapter 61, it is not clear whether an option period has been triggered and if so, when that occurred. The July 9, 2020 NOI appears to be defective because it encompassed both Chapter 61 forest land and another parcel of land without Chapter 61 protections, but did not include segregated valuations for each parcel. The NOI was defective because it did not provide adequate statutory notice to the Town of the cost to purchase the Chapter 61 land as required and therefore did not constitute a bona fide offer.**

See Land Court Docket, Order dated 11/23/2020 attached as **Exhibit 16**

(emphasis added).

58. The Land Court further found that because the Railroad represented that it would work with the Town to maintain the status quo and not clear any more of the Forestland, there was no risk of irreparable harm.

59. Thus, the Land Court held preliminarily that the only formal Notice of Intent sent to the Town was defective, as the Town had initially advised, because it included non-Forestland with the Forestland in the Notice's purchase price. The Court did not reach any of the other issues raised in the litigation by the Town or the Railroad, including whether federal railroad preemption trumped the Town's c. 61 rights.

60. In January 2021, the Town and the Railroad engaged in two sessions of mediation, culminating in a Term Sheet that was revealed to the Town at a January 25, 2021 Board meeting. Despite ongoing community opposition, the Board voted 2-1 to approve the Term Sheet. The Term Sheet called for a Settlement Agreement to be prepared and executed no later than February 9, 2021.

61. On February 5, 2021, the Hopedale Board of Water and Sewer Commissioners requested, by letter, that the Board cease and desist from any further negotiations or agreement with the Railroad with respect to water rights for the Town. See Exhibit 17. The Water and Sewer Commissioners informed the Board that the Term Sheet abrogates and impairs the authority and sole jurisdiction of the Commission and that the Board lacks the authority to speak on behalf of the Commission or limit its powers.

62. By a letter dated February 7, 2021, the Citizen Plaintiffs expressed their strong objections to the Term Sheet, including that it was illegal because, *inter alia*, the Railroad is not the rightful property owner, it is in violation of the Town's right of first refusal pursuant to M.G.L. c. 61, is an agreement to which the Board has not been authorized to enter and would be in violation of Article 97. See Demand Letter attached hereto as Exhibit 18.

63. Despite the Demand Letter and other objections voiced by Town residents, the Board voted 2-1 to in executive session to approve a Settlement Agreement with the Railroad.

64. The Settlement Agreement was executed between the Board and the Railroad on February 9, 2021 and is attached hereto as Exhibit 19.

65. The Agreement is in direct conflict with what the Town appropriated at Town Meeting and is in excess of the Board's authority.

66. In the Agreement, the Board agreed that the Town would pay \$587,500 to the Railroad in exchange for only approximately 40 acres of the 130.18 acres of Forestland.

67. The Town Meeting vote, however, approved purchase of the entire 130.18 acres of Forestland for \$1,175,000, not 40 +/- acres for \$587,500.

68. It is less than a third of the land and the cost is higher. The approximate cost per acre of Forestland that was authorized was \$9,026; the Settlement requires that the Town pay \$14,687.50 per acre of Forestland.

69. The Board is not authorized to pay \$587,500 for 40 acres of Forestland.

70. The purpose of the Town Meeting vote on Article 3 was to acquire all 130.18 acres of Forestland and preserve it as parkland and prevent industrial development by the Railroad on that land.

71. The Settlement Agreement is starkly inconsistent with this expressed purpose as it allows the Railroad to acquire and develop 90 of the 130 acres of Forestland, and to build industrial buildings on that land.

72. The Town Meeting vote authorized the appropriation only in the event that the first refusal right was exercised. The gift from the Hopedale Foundation, accepted by the Town through the Town Meeting vote, was also conditioned on the exercise of the first refusal right for the entire c. 61 Forestland.

73. In the Agreement, the Board frustrated and acted contrary to the purpose of the Hopedale Foundation's gift by agreeing to purchase only a third of the Forestland and allow the Railroad to clear two-thirds of the Forestland for an industrial railyard.

74. On February 24, 2021, the Hopedale Foundation restated its offer because the Board had so vastly changed the terms of the deal the Foundation had agreed to assist in funding. By letter, the Hopedale Foundation told the Board that because "the original facts and circumstances have been or are in the process of being reworked" the Foundation was only willing to contribute the gift "to exercise an option to purchase 155.24 acres of land for a certain price". See Hopedale Foundation February 24, 2021 letter, attached hereto as Exhibit 20.

75. In the Agreement, the Board agrees to waive the Town's c. 61 first refusal rights in the Agreement.

76. The Board was not authorized to and cannot, as a matter of law, waive the Town's c. 61 first refusal rights.

77. Moreover, the Town Meeting voted to exercise its first refusal option, the Board ratified that vote and executed the recordation of the exercise of its first refusal option.

78. In the Agreement, the Board agrees to waive the Town's right to acquire any of the Property by eminent domain under Chapter 79.

79. The Board was not authorized to and cannot, as a matter of law, waive the Town's Chapter 79 eminent domain authority.

80. Moreover, the Town Meeting voted to take the Wetlands by eminent domain under Chapter 79.

81. In the Agreement, the Board also agrees to cover the rollback taxes owed by the Property owner in the event of a conversion of use from Forestland along with half of the costs of surveying the Property. There was no Town Meeting authorization for that expenditure.

82. In the Agreement, the Board agrees to additional encumbrances on the c. 61 Forestland that the Town would acquire, including several easements, not authorized by Town Meeting vote.

83. The Town Meeting vote authorized taking the 25.06 acres of the Wetlands by eminent domain for \$25,000.

84. In the Settlement, however, the Board agreed to include the Wetlands, for which the Railroad paid less than \$1.00, as part of the \$587,500 purchase price.

85. The Town Meeting vote discussed that the acquisition of the Property was for conservation and recreations of parkland.

86. The Town Meeting authorization of the acquisition of the Property, the Board's vote and the Town's recordation of the exercise of its first refusal option and the eminent domain taking established the Property as parkland, dedicated to the public use and protected under Article 97 against any change from parkland without a two-thirds vote of the Massachusetts Legislature.

87. The Board's purported agreement to transfer any portion of the Town's parkland Property to the Railroad is in violation of the prior public use doctrine and Article 97, which requires a two-thirds vote of the Legislature before converting parklands to a different use.

88. Plaintiffs were not aware of the Board's illegal actions until it released a Term Sheet on or about January 25, 2021. The Term Sheet called for the execution of a Settlement Agreement by February 9, 2021.

89. On February 7, 2021, the Plaintiffs sent the Board a Notice of Intent to Sue pursuant to c. 214, § 7A if it moved forward with executing the Settlement Agreement. The Attorney General was copied on the letter but has not responded.

90. On or about February 9, 2021, the Board executed the Settlement Agreement.

91. The Settlement Agreement requires the Board to make best efforts to close the contemplated transactions within 60 days of February 9, 2021, or April 10, 2021.

92. Accordingly, preliminary relief is required to prevent the illegal expenditures and property transfers contemplated by the Settlement Agreement.

**COUNT I – AGAINST THE BOARD:  
PRELIMINARY INJUNCTION TO ENJOIN AND RESTRAIN THE BOARD  
(M.G.L. c. 40, § 53; c. 44 § 59; c. 214, § 3(10)) FROM ILLEGAL EXPENDITURES AND  
OBLIGATIONS UNDER THE SETTLEMENT AGREEMENT**

93. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

**A. The Board Illegally Agreed to the Town's Payment of more than \$587,500.**

94. The Board agreed to and will soon spend more than \$587,500, an amount not specifically appropriated by Town Meeting.

95. The expenditure of more than \$587,500 for only 40 acres of the Forestland is a substantial change from the Town Meeting votes.

96. The expenditure is for a different amount, different acreage, higher price per acre, and for a different purpose than authorized and voted at Town Meeting.

97. The expenditure of \$587,500 is unauthorized by Town Meeting vote because the Town Meeting vote relied on the \$750,000 Hopedale Foundation gift, whose purpose was acquisition of 155.24 acres via the Town's first refusal option, and which was to fund half of the \$1,175,000 for the full acquisition.

98. On information and belief, the Board caused the Hopedale Foundation to rescind its offer of assistance because the Board entered into an unauthorized, starkly different Agreement.

99. On information and belief, the Board will imminently issue municipal bonds to make the payment of \$587,500 and the additional expenditures.

100. The Board had no discretion to substantially change the terms or purpose of the land acquisition as authorized at Town Meeting.



101. The expenditure of more than \$587,500 further violates Town of Hopedale Bylaw, § 79-3, pursuant to which the Finance Committee recommended purchase of the 155 acres for \$1,175,000 in its report at Town Meeting.

102. The Finance Committee approved a very different deal and does not even know how the Board intends to fund the more than \$587,500 acquisition.

103. Taxpaying Plaintiffs will be harmed by the Board's unauthorized expenditure of more than \$587,500.

104. The Board must be enjoined from spending more than \$587,500 as set forth in the Settlement Agreement.

**B. The Board Illegally Agreed to Payments of Rollback Taxes, Survey Costs, and Hydrogeological Analysis.**

105. The Board agreed to and will soon pay the rollback taxes that are owed to the Town by the Property owner pursuant to c. 61 upon a change in use from Forestland.

106. The Board agreed to and will soon pay half of the survey costs to divide the Property as set forth in the Concept Plan attached to the Settlement Agreement.

107. The Board agreed to and will soon pay half of the hydrogeological analysis costs to assess the viability of a well or wells on both the land to be owned by the Town and land to be owned by the Railroad under the Settlement Agreement.

108. These expenditures were not appropriated or authorized by Town Meeting vote and must be enjoined.

109. These expenditures by the Town are a very substantial change from the Town Meeting vote as none were discussed or considered at Town Meeting.

110. These expenditures are in further violation of Town Bylaw §§ 79-3; 79-8; and 49-7. because the Finance Committee has never reviewed these items.

111. On information and belief, the Board will imminently issue bonds to make these expenditures.

112. Taxpaying Plaintiffs will be harmed by the Board's unauthorized expenditures.

113. The Board must be enjoined from making these expenditures.

**COUNT II – AGAINST THE BOARD AND THE RAILROAD:  
DECLARATORY JUDGMENT AND ENFORCEMENT OF TOWN'S c. 61 RIGHTS  
(M.G.L. c. 40, §§ 3 and 53; c. 214, § 3(10); c. 231A, §1)**

114. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

115. An actual controversy exists between the Plaintiffs and the Town and the Railroad over the Town's statutory first refusal option.

116. The Town effectively and fully exercised its c. 61 first refusal option and can purchase the Forestland subject to the July 9, 2020 notice of intent.

117. Even if the option is not effective because the Property owner's July 9, 2020 notice of intent was defective, the Town's c. 61 right of first refusal remained intact and was effectively exercised upon constructive notice of the Railroad's control of the Property.

118. The Railroad is estopped from denying the effectiveness of the Notice because it drafted the Notice and, in any event, the Town agrees to pay the \$1,175,000 price, rendering moot any issue as to any allocation of the price between the Forestland and the Wetlands.

119. Even if the option is not effective because there has been no notice, constructive or otherwise, of an intent to sell or convert the Forestland for another use, the Town's c. 61 rights remain enforceable against the Railroad.

120. Federal Railroad Preemption does not apply since state law property rights must first be determined.

121. The Board's purported release and waiver of the Town's c. 61 rights in the Settlement Agreement is not effective since those rights cannot be waived as a matter of law and there was no approval by Town Meeting to not exercise or waive those rights.

122. Therefore the c. 61 option deed recorded by Town can be enforced as to the 130.18 acres of c. 61 Forestland.

123. Similarly, easements in c. 61 Forestland granted under the Settlement but never approved by Town Meeting are void for the same reason.

124. The Board's purported waiver of the Town's c. 61 rights and interests in the land is an unlawful consideration, together with the payment of \$587,500 and other expenditures, under the Settlement Agreement.

125. Plaintiffs request a declaratory judgment that the Town's c. 61 rights remain enforceable against the Railroad and an order transferring title of all c. 61 Forestland to the Town without any easements.

126. Plaintiffs seek a further binding declaration that the Railroad is prohibited from taking any action or conducting any activities on or concerning the c. 61 Forestland which would result in any alienation of the c. 61 Forestland or any conversion of its current use as forest land until such time as this issue is fully and finally adjudicated.

127. Plaintiffs seek a further declaration that the Trust's assignment of 100% of its beneficial interest to the Railroad was equivalent to a transfer of title to the c. 61 Forestland and therefore constituted a sale of land taxed under c. 61 giving rise to a separate and independent first refusal option in the Town.

**COUNT III – AGAINST THE BOARD:**  
**USE OF c. 61 FORESTLAND FOR RAILROAD AND NON-PARKLAND PURPOSES IS**  
**ILLEGAL HARM TO THE ENVIRONMENT**  
**(M.G.L. c. 214, §§ 3(10) and 7A; c. 40, § 53; c. 45, § 7 AND MANDAMUS)**

128. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

129. The Settlement Agreement allows for unfettered Railroad use, buildings, and easements for non-forestland purposes on c. 61 Forestland.

130. These uses are also non-parkland uses.

131. This violates Article 3 as approved at Town Meeting that says the Forestland will be acquired for public parkland and placed under control of Parks Commission.

132. Town Meeting acceptance of the Property as public parkland creates parkland that is protected under Article 97 and that public use cannot now be changed without a 2/3 vote of Legislature under Article 97 and Town Meeting vote.

133. Failure to get 2/3 vote of the Legislature means sale and conversion of any portion of the Property to railroad use is harm to environment in violation of law intended to protect environment.

134. Construction of more than 600 feet of buildings on parkland as planned by the Railroad is in further violation of c. 45 § 7.

135. Plaintiffs seek a declaration that the Property has been dedicated to and accepted by the public as parkland and is protected under Article 97.

136. Plaintiffs also seek an order mandating that the Board comply with its affirmative obligation to treat and maintain the 130 acres as parkland.


## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court award the following relief:

- a. Preliminarily and permanently enjoin the Board from obtaining any bonds, making any expenditures, paying any costs, or transferring any property interests pursuant to the Settlement Agreement;
- b. Enter an order that the Town's c. 61 right of first refusal option as to the Forestland was effectively exercised, or in the alternative, that the first refusal option remains intact and has not been waived and is enforceable against the Railroad;
- c. Enter an order to transfer title of the Forestland to the Town, free and clear of any new easements or burdens described in the Settlement Agreement;
- d. Enter an order that the Town's eminent domain taking of the Wetlands is effective, is not preempted and order title to transfer to the Town, free and clear of any new easements or burdens described in the Settlement Agreement;
- e. Preliminarily and permanently enjoin the Railroad from taking any action nor conducting any activities on or concerning the c. 61 Forestland which would result in any alienation of the c. 61 Forestland or any conversion of its current use as forest land;
- f. Enter an order that the Property, including the Forestland and the Wetlands, is public parkland protected under Article 97 by public dedication and acceptance and prior public use and cannot, therefore, be converted to non-parkland use without a Town Meeting vote and the two-thirds votes of the Massachusetts Legislature;
- g. Enter an order that the Board treat and maintain the 130 acres of c. 61 land as parkland;
- h. Preliminarily and permanently enjoin the Railroad from constructing any buildings or conducting any activities on the Property that would harm the Article 97 parkland;
- i. Enter a judgment on each Count for the Plaintiffs;
- j. Award Plaintiffs their attorneys' fees and costs incurred in this action; and
- k. Grant such further relief as the Court deems just and proper.

Respectfully submitted,

ELIZABETH REILLY, CAROL J. HALL,  
HILARY SMITH, DAVID SMITH,  
DONALD HALL, MEGAN FLEMING,  
STEPHANIE A. MCCALLUM, JASON A.  
BEARD, AMY BEARD, SHANNON W.  
FLEMING, and JANICE DOYLE

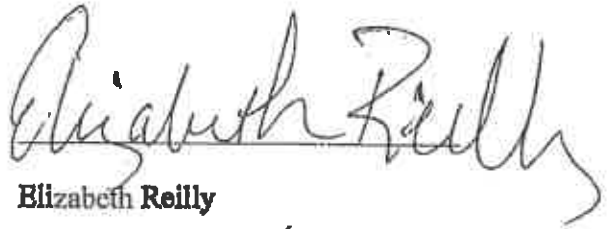
By their attorneys, 

David B. Lurie, BBO# 542030  
Harley C. Racer, BBO# 688425  
Lurie Friedman LLP  
One McKinley Square  
Boston, MA 02109  
Tel: 617-367-1970  
Fax: 617-367-1971  
[dlurie@luriefriedman.com](mailto:dlurie@luriefriedman.com)  
[hracer@luriefriedman.com](mailto:hracer@luriefriedman.com)

Dated: March 3, 2021

**VERIFICATION**

I, Elizabeth Reilly, have read the above Verified Complaint and now state, under the penalties of perjury, that the facts stated therein are true to the best of my personal knowledge and that no material facts have been omitted.

A handwritten signature in cursive script that reads "Elizabeth Reilly". The signature is written in dark ink and is positioned above the printed name.

Elizabeth Reilly

Dated: 3/3/24

# **EXHIBIT 4**



COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 21CV00238

ELIZABETH REILLY and others,<sup>1</sup>

Plaintiff,

v.

TOWN OF HOPEDALE and others,<sup>2</sup>

Defendants.

**MEMORANDUM AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION**

Before the court is the plaintiffs' motion to "preserve the status quo" and prevent the defendants, Grafton & Upton Railway ("Railway") and related persons and entities, from removing trees and otherwise interfering with property designated as protected forestland. Consider the motion as one for injunctive relief, the court **ALLOWS** the motion.

**BACKGROUND**<sup>3</sup>

The court briefly summarizes the factual and procedural background of this case. Approximately 30 years ago, the assessor of the Town of Hopedale ("Hopedale" or the "Town") approved the application of the owner of 130.18 acres of woodlands to designate the property as forestland (the "Forestland") under G. L. c. 61, §2 ("Chapter 61"). In return for preferential tax treatment under Chapter 61, the Forestland could not be sold for residential, industrial, or

<sup>1</sup> Carol J. Hall, Donald D. Hall, Hilary Smith, David Smith, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Shannon W. Fleming, and Janice Doyle.

<sup>2</sup> Louis J. Arcudi, III, Brian Keyes, Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and One Hundred Realty Trust.

<sup>3</sup> The facts are drawn from the verified complaint and exhibits as well as affidavits submitted in connection with the motion to preserve the status quo.

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commercial purposes unless the Town received notice of the proposed sale and an opportunity to exercise its right of first refusal. G. L. c. 61, §8.

On July 9, 2020, Charles Morneau, as Trustee for One Hundred-Forty Realty Trust (the "Trust"), the owner of the Forestland, notified Hopedale of the Trust's intent to sell to the Railway 155.24 acres of land, which included the Forestland as well as 25.06 acres of wetlands (the "Wetlands"). On August 19, 2020, Hopedale asked the Trust to clarify its notice to specify the terms applicable specifically to the Forestland.

The Trust's response reflected a blurring of the lines between the Trust and the Railway. On October 7, 2021, that the law firm that now represents the Railway, notified the town on behalf of its client (which the firm did not identify) that rather it was withdrawing its Chapter 61 notice. Hopedale responded the following day,<sup>4</sup> stating that the Trust's purported withdrawal was of no effect, and that Hopedale would proceed to consider whether to exercise its right of first refusal. On October 15, 2020, the Railway notified the town that it had purchased "all of the beneficial interest" of the Trust in the Forestland. Around the same time, Railway officials replaced Morneau as Trustees of the Trust.

On October 21, 2020, Hopedale notified the Railway and the Trust that it was moving forward with its option to buy the Forestland. On October 24, 202, residents at the Hopedale town meeting voted to appropriate money \$1,175,000 to acquire the Forestland under Chapter 61 and to fund the taking of the Wetlands by eminent domain. Six days later, the Board of Selectmen voted to buy the Forestland and take the Wetlands by eminent domain. On November 2, 2020, Hopedale recorded in the Worcester South District Registry of Deeds notice of its decision to exercise its right of First Refusal in the Forestland and eminent domain rights over the Wetlands.

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<sup>4</sup> Hopedale's response was addressed to the Trust.

In the meantime, the Railway had begun to clear the Forestland. Hopedale filed a lawsuit in the Land Court seeking to stop the clearing and effectuate its acquisition of the Forestland and Wetlands. The Land Court litigation resulted in a Settlement Agreement executed on February 9, 2021, under which Hopedale would buy approximately 40 acres of the Forestland for \$587,500. The plaintiffs filed the instant lawsuit on March 3, 2021, along with a motion for a preliminary injunction seeking to enjoin the Town from buying a portion of the Forestland.

On March 11, 2021, the court (Frison, J.) denied the motion for a preliminary injunction. The plaintiffs appealed and a single justice of the Appeals Court on April 8, 2021, enjoined Hopedale from making any expenditure, issuing any bonds, or transferring any property pursuant to the Settlement Agreement.

Thereafter, the parties filed cross motions for judgment on the pleadings which were heard by the court on September 9, 2021. On the day of the hearing, the plaintiffs filed an "Emergency Motion to Preserve the Status Quo." The motion and supporting affidavits stated that the Railway had resumed cutting trees on the Forestland. Following a September 9, 2021, hearing on the motions for judgment on the pleading and the motion for injunctive relief, the court entered a Temporary Restraining Order preventing any further alteration or destruction of the Forestland pending further order of the court. The court also invited the parties to supplement their filings relating to the requested injunction, which the parties did on September 13, 2021.

#### DISCUSSION

A court addressing a request for injunctive relief must balance the risk of irreparable harm to the parties in light of each party's likelihood of success on the merits. See *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 710 (1990). See also *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 606, 616–17 (1980). "Since the

goal is to minimize the risk of irreparable harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction.” *Packaging Industries*, 380 Mass. at 617, n.12. In addition, given the nature of this case, the court must also consider “the risk of harm to the public interest.” *Brookline v. Goldstein*, 388 Mass. 443, 447, 447 N.E.2d 641 (1983).

Before the court turns to applying that standard here, it will address the impact of the appeals court injunction on the current request to “preserve the status quo.” The Railway argues that the injunction entered by the appeals court does not restrain its actions on the Forestland because the order only prevents the town from spending money to acquire a just portion of the Forestland. In the court’s view, the Railway reads the injunction too narrowly. The purpose of the injunction was to temporarily prevent the town from releasing the Chapter 61 limitations on a large portion of the Section 61 Forestland owned by the Trust. By 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.

To the extent the appeals court order is not broad enough to constrain the Railway’s actions, this court believes it appropriate to extend its reach to the Trust and the Railway.<sup>5</sup> If the plaintiffs are successful in this lawsuit, the Forestland would remain in its natural state. The Railway’s continued clearing of the Forestland would make that result impossible.

Finally, the court’s own analysis of the appropriateness of injunctive relief leads it to the same conclusion. The court agrees with the Appeals Court that the plaintiffs have at least a reasonable likelihood of success on the merits and adopts its analysis here. See *Reilly v. Hopedale*, Appeals Court No. 2021-J00111 (April 8, 2021). That the plaintiffs would suffer

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<sup>5</sup> Although the Trust still appears to be the record owner, the Railway is treating the property as its own.


irreparable harm requires little discussion. Once trees are removed, they are gone for the foreseeable future. The Railway's claimed – delays in maintaining a construction schedule – pales in comparison. The question of harm to the public interest depends to a large degree on which side of the litigation is correct. In any event, the court see no obvious risk of harm to the public interest occasioned by issuing the preliminary injunction.

**ORDER**

For the above reasons, it is **ORDERED THAT:**

1. The plaintiff's Motion for a Preliminary Injunction is **ALLOWED**.
2. Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and One Hundred Realty Trust are **TEMPORARILY ENJOINED** from any further alteration or destruction of the 130.18 acres of Forestland that is the subject of this lawsuit pending further order of the court.

Dated: September 24, 2021

  
\_\_\_\_\_  
Karen Goodwin  
Associate Justice, Superior Court

# **EXHIBIT 5**

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2185CV00238

ELIZABETH REILLY and others<sup>1</sup>

vs.

TOWN OF HOPEDALE and others<sup>2</sup>

MEMORANDUM OF DECISION AND ORDER ON  
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiffs, eleven taxpayers residing in the Town of Hopedale ("Town"), have sued the Town and two members of its Board of Selectmen ("Board") (collectively "Town") as well as John Delli Priscoli, Michael Milanosky, One Hundred Forty Realty Trust ("Trust"), and Grafton & Upton Railroad Company ("G&U") (collectively, "Railroad Defendants"). The plaintiffs allege that the Board exceeded its authority when it approved a Settlement Agreement with the Railroad Defendants involving forestland protected under G. L. c. 61. The plaintiffs seek an injunction preventing the Board from purchasing land as set forth in the Settlement Agreement (Count I); a declaration of Town's rights pursuant under G. L. c. 61, § 8 and an order enforcing those rights against the Railroad Defendants (Count II); and a declaration that certain property at issue in the Settlement Agreement is protected parkland under to art. 97 of the Amendments to the Massachusetts Constitution (Count III).

The Railroad Defendants now move for judgment on the pleadings as to Count II (the only count against them), and the plaintiffs and the Town Defendants both move for judgment on

<sup>1</sup> 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

<sup>2</sup> Louis J. Arcude III, Brian R. Keyes, Jon Delli Priscoli, and Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company

Entered and Copies Mailed 11/10/21

the pleadings. After a hearing and review of the parties' submissions, the plaintiffs' motion is **ALLOWED** as to Court I and **DENIED** as to Counts II and III. The Railroad Defendants' motion is **ALLOWED** as to Count II, the only count against them. The Town Defendants' motion is **DENIED** as to Count I and **ALLOWED** as to Counts II and III. In addition, as set forth below, the court enters a Preliminary Injunction preventing the Railroad Defendants from carrying out any work on the contested forest land for a period of 60 days from the date of this order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The following facts are taken from the allegations of the Complaint and the exhibits attached thereto, with some facts reserved for later discussion. The Trust owns slightly more than 155 acres of property at 364 West Street in Hopedale ("Property") of which 130.18 acres are classified as forest land under to G.L. c. 61 and 25.06 acres are classified as wetlands. The Property is contiguous with the Hopedale Parklands, a 279-acre recreational and conservation park owned by the Town.

On June 27, 2020, the Trust and G&U entered into a purchase and sale agreement for the Property. On July 9, G&U (on behalf of the Trust) sent the Town a Notice of Intent to purchase the Property for \$1,175,000, as required by G.L. c. 61, § 8.<sup>3</sup> The Town promptly informed the Trust and G&U of its intent to exercise its statutory right of first refusal ("Option") to buy the Property on the same terms as the proposed sale to G&U. October 24, 2020, residents voted at a timely held Town Meeting to appropriate the necessary funds to exercise the Option. The Board then voted to exercise the Option, recorded notice of its exercise at the Registry of Deeds, and

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<sup>3</sup> As described in more detail below, municipalities have the right of first refusal when an owner of forest land protected under Chapter 61 plans to sell the land for residential, commercial, or industrial use.



sent the Trust and G&U notice that it had exercised the Option along with a proposed purchase and sale agreement.

On October 7, 2020, the lawyer now representing the Railroad Defendants notified the Town that the Trust was withdrawing its Notice of Intent. Around the same time, G&U purchased the “beneficial interest” in the 130.18 acres of forest land for the same price as contemplated in the purchase and sale agreement without giving the Town any Notice of Intent under G. L. c. 61, § 8.<sup>4</sup> G&U President Jon Delli Priscoli and G&U chief executive officer Michael Mr. Milanosky were appointed as the new trustees of the Trust. G&U then began clearing the Property of trees.

On October 28, 2020, the Town sued the Railroad Defendants in Massachusetts Land Court,<sup>5</sup> seeking (1) a declaratory judgment that the Town’s Option remained valid, and (2) an injunction against further land clearing by G&U. The Land Court denied the Town’s motion for a preliminary injunction, finding that on the limited facts before it the court could not conclude that the Option had ripened. The Land Court accepted the Railroad Defendants’ representation that they would not continue to clear the land during the pendency of the case and ordered the Town and the Railroad Defendants to engage in mediation. In the meantime, G&U filed a declaratory petition with the Surface Transportation Board (“STB”), seeking federal preemption of the Town’s Option to purchase the forest land and its statutory right to acquire the wetlands by eminent domain.

In February 2021, the Town and the Railroad Defendants entered into the Settlement Agreement (“Agreement”) resolving Land Court action and G&U’s STB petition. The Railroad Defendants agreed to sell the Town 40 acres of the Property’s 130.18 acres of forest land and the

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<sup>4</sup> G&U also purchased the 25-acre wetlands for \$1.00

<sup>5</sup> *Town of Hopedale v. John Delli Priscoli, Trustee of the One Hundred Forty Realty Trust*, 20-MISC-0467

full 25.06 acres of wetlands for \$587,500. The Railroad Defendants also agreed to donate to the Town a separate parcel of 20 acres located at 363 West Street in Hopedale. The donation was subject to Town Meeting approval. In return, the Town agreed to waive its Option with respect to the remaining 90 acres of forest land. On February 10, 2021, the Town and the Railroad Defendants filed a Stipulation of Dismissal in the Land Court action.

On March 3, 2021, the plaintiffs filed the Verified Complaint in this action and sought a preliminary injunction preventing the Town from making any expenditures pursuant to the Settlement Agreement. On March 11, the court (Frison, J.) denied the plaintiffs' motion for preliminary injunction. The plaintiffs appealed. On April 8, the Single Justice of the Appeals Court (Meade, J.) issued an order allowing the plaintiffs' motion for preliminary injunction. Despite the injunction, G&U apparently resumed cutting trees on the forest land, prompting the plaintiffs to seek an injunction preventing alteration of the forest land. By order dated September 24, 2021, the court enjoined the Railway Defendants from any "further alteration or destruction of the 130.18 acres of forest land" pending further order of the court. The Railway Defendants appealed that order to a single justice of the Massachusetts Court of Appeals, who has justice declined to intervene.

### **DISCUSSION**

"A defendant's rule 12(c) motion [for judgment on the pleadings] is 'actually a motion to dismiss . . . [that] argues that the complaint fails to state a claim upon which relief can be granted.'" *Jarosz v. Palmer*, 436 Mass. 526, 529 (2002), quoting J.W. Smith & H.B. Zobel, Rules Practice § 12.16 (1974). "In deciding a rule 12(c) motion, all facts pleaded by the nonmoving party must be accepted as true." *Id.* at 529-30. The court "draws [its] facts from the well pleaded allegations of the complaint and the admissions or failures of denial presented by

the answer." *Ridgeley Mgmt. Corp. v. Planning Bd. of Gosnold*, 82 Mass. App. Ct. 793, 797 (2012). Judgment on the pleadings is appropriate when, as here, "there are no material facts in dispute on the face of the pleadings." *Clarke v. Metro. Dist. Comm'n*, 11 Mass. App. Ct. 955, 956 (1981).

**A. Scope of the Board's Settlement Authority (Count I)**

General Laws c. 61, § 8, provides that "[l]and taxed under this chapter shall not be sold for, or converted to, residential, industrial or commercial use . . . unless the city or town in which the land is located has been notified of the intent to sell for, or to convert to, that other use." Once notice is provided, "the city or town shall have, in the case of intended sale, a first refusal option to meet a bona fide offer to purchase the land." G.L. c. 61, § 8. In order to exercise this option, the Town must hold a public hearing, mail notice to the landowner (including a proposed purchase and sale agreement), and record the exercise of the option in the registry of deeds.

Separately, G.L. c. 40, § 14, allows the "selectmen of a town . . . [to] purchase . . . any land, easement or right therein within the city or town . . ." However, "no land, easement or right therein shall be taken or purchased under this section unless the taking or purchase thereof has previously been authorized . . . by vote of the town . . ." G.L. c. 40, § 14.

In this case, it is undisputed that the Town attempted to carry out the steps necessary to exercise its Option with respect to the 130.18 acres of forest land pursuant to Chapter 61. To that end, it held a Town Meeting on October 24, 2020, at which it placed before town residents several Articles for a vote. Article 3 stated in pertinent part:

"To see if the Town will vote to acquire, by purchase or eminent domain, certain property, containing 130.18 acres, more or less, located at 364 West Street . . . and in order to fund such acquisition, raise and appropriate . . . [\$1,175,000] . . . said property being acquired pursuant to a right of first refusal in G.L. c. 61, § 8."

The motion carried with a unanimous vote. Article 5 stated in pertinent part: "To see if the Town will vote to take by eminent domain . . . the land located at 364 West Street which is not classified as forest land under Chapter 61 of the General Laws, consisting of 25.06 acres, more or less" and to borrow up to \$25,000 to fund the acquisition. That motion also carried unanimously.

The Town Defendants concede that G.L. c. 40, § 14, provides the sole basis for the Board's authority to acquire virtually any real property and to appropriate funding for such acquisition. They argue, however, that the Town Meeting's appropriation of funds represents an upper limit on spending: that is, that the Board had discretionary authority to acquire any portion of the Property up to the full 155 acres, for any price up to \$1,175,000 for the 130.18 acres of forest land and up to \$25,000 for the 25.06 acres of wetlands.

For this proposition, the Town Defendants rely on *Russell v. Town of Canton*, 361 Mass. 727 (1972). There, the town meeting was presented with an article pursuant to G.L. c. 40, § 14, to take by eminent domain "20 acres, more or less" of property owned by the plaintiff landowners. *Id.* at 728. The town meeting voted unanimously to take "approximately 18 acres" and to appropriate \$36,000 for that purpose. The Canton board of selectmen ultimately took only 15.25 acres, paying the plaintiff landowners \$30,500 and leaving them with a 1.5 acre lot. In setting forth the factual background of its decision, the court highlighted the town superintendent's testimony that the leftover 1.5-acre lot "was all rock," which "rose rapidly as solid ledge . . . to a point about 80 feet from the street, and some twenty feet higher than the street, and then sloped off to the rear of the property" and that creating roadway access across the lot to the rest of the property "would require the removal of 1,000 cubic yards of ledge," presumably at significant cost to the town. *Id.* at 729.

The court rejected the plaintiffs' argument that the town meeting authorized only the taking of their whole 16.75 acres, not the 15.25-acre subset, explaining: "[neither] the warrant or the vote of the town . . . expressly limits the power of the board to a taking of the entire parcel owned by the plaintiffs. Rather, each purports to estimate the area authorized to be taken, the warrant by the words '20 acres, more or less,' and the vote by the words 'approximately 18 acres.' Both estimates exceeded the area which the plaintiffs actually owned at the time, viz. 16.75 acres." *Id.* at 732. Because "the 15.25 acres covered by the board's taking [were] admittedly included in and a part of the parcel described by more general language in the warrant and the town vote," the board had discretion to take only that lesser portion. *Id.*

This case is different. Unlike the warrant and vote in *Russell*, here the area to be taken was precisely defined. Although the documents used the term of art "more or less," both set forth precise acreage: "130.18 acres more or less of forest land; and "25.06 acres, more or less" of other property. Together those portions constitute the exact recorded acreage of the Property. In addition, unlike in *Russell*, the Board's actions here represent a substantial departure from the original Town Meeting authorizations. In *Russell*, the Canton board of selectmen took nearly all of the land authorized by the town meeting. In contrast, here the Board settled for less half of the Property, which was a substantial deviation from the acquisition authorized by the Town Meeting.<sup>6</sup>

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<sup>6</sup> Although the Town Defendants point out that they are acquiring 85 acres under the Settlement Agreement (slightly less than half the area of the Property) for \$587,500 (half the contemplated purchase price for the 130-acre forest land area), only 65 acres of that is part of the Property and only 40 of those 64 acres are forest land. The remaining 20 acres was to be donated by the Railroad Defendants from a separate parcel – which donation, notably, the Settlement Agreement itself states is subject to Town Meeting approval because it represents an acquisition of land not previously authorized pursuant to G.L. c. 40, § 14. Correspondence about the original sale by the Trust to G&U reflects that G&U was to pay \$1,175,000 for the entire 155 acres of the Property; under the terms of Article 3 and Article 5, the Town would have paid slightly more – \$1.2 million in total (\$1,175,000 for the forest land and \$25,000 for the wetlands).

Moreover, the Chapter 71 Option referenced in Article 3 can only be exercised according to the terms of the triggering purchase and sale agreement between the Trust and G&U. The Town may not materially alter those terms by exercising the Option only as to part of the land. See *Town of Franklin v. Wylie*, 443 Mass. 187, 195-196 (2005) (“to meet the purchasers’ bona fide offer, the town was required to purchase the land on substantially the same terms and conditions as presented in [that] agreement”). In contrast, *Russell* addressed a general taking under eminent domain. These distinctions preclude analogy to *Russell*’s narrow holding, in which the court took care to state that “*on the limited facts of this case*, we hold that the board’s taking was authorized by the town vote and was in all respects valid” (emphasis added). *Russell*, 361 Mass. at 732.

In sum, while the Town Defendants are correct that the G.L. c. 61, § 8, does not permit the plaintiffs to force the Board to exercise the Town’s Option in the first instance, the statute does not allow the Board to acquire land without Town Meeting approval. Once the Board elected to exercise the Option and obtained a precisely worded authorization to acquire specific land pursuant to specific rights, it was bound by the terms of that authorization. Therefore, the Board exceeded its authority when it entered into the Settlement Agreement without Town Meeting authorization.

This is not, however, to suggest that settlement of the Land Court case could never be proper. As a general rule, select boards empowered to act as a town’s agents in litigation are likewise empowered to settle such claims. See *George A. Fuller Co. v. Com.*, 303 Mass. 216, 222 (1939), citing *Jones v. Inhabitants of Natlck*, 267 Mass. 567, 569 (1929) (“It is in the power of towns to settle claims which may be made upon them arising out of their administration of their municipal affairs”); *Campbell v. Inhabitants of Upton*, 113 Mass. 67, 70 (1873) (municipal

capacity to sue or be sued includes “consequently [the capacity] to submit to arbitration”). Nothing in the language of G.L. c. 61, § 8, or related case law bars a town from settling a claim simply because that claim arises out of the town’s attempt to invoke a first refusal option. Indeed, as Justice Meade pointed out in granting the plaintiffs’ motion for a preliminary injunction in this very case, “a town vote authorizing the select board to purchase any or all of the land at issue . . . would render the transaction lawful.” The sole impediment to execution of the Settlement Agreement is that the Board failed to obtain prior authorization from the Town Meeting as required by G.L. c. 40, § 14.

For these reasons, the plaintiffs’ motion for judgment on the pleadings is allowed as to Count I and the Town Defendants’ cross-motion is denied as to Count I.

**B. Enforcement of the G.L. c. 61, § 8, Option (Count II)**

In Count II, the plaintiffs go further by requesting a declaration that the Town validly exercised the Option. They ask the court to order the Railroad Defendants to sell the Property to the Town according to the terms of the Town’s October 2020 proposed purchase and sale agreement. The plaintiffs lack standing to seek this relief. Although G.L. c. 40, § 53, gives any ten taxpayers a right of action to prevent a municipality from illegally spending or raising funds, as in Count I, it does not follow that they have a right of action to compel the Town to spend funds. Similarly, G.L. c. 214, § 3(10), creates a ten-taxpayer right of action to “enforce the purpose or purposes of any . . . conveyance which has been . . . made to and accepted by any . . . town . . . for a specific purpose or purposes.” At issue here, however, is not whether the Town illegally altered the use of property conveyed to it for a specific purpose; rather the plaintiffs seek to compel the Town to carry out a conveyance in the first instance. This is plainly beyond the scope of § 3(10).

Moreover, as the Town Defendants correctly note, the power to exercise the Option rests solely with the Board and not with the Town Meeting. See G.L. c. 61, § 8. “Although G.L. c. 40, § 14, requires that . . . [a] taking be authorized by a vote of the town, it vests the power to make the taking in the selectmen of the town. . . . If the selectmen, being authorized by the town to make a taking, do not make it, the decision is not judicially reviewable as to its wisdom.” *Russell*, 361 Mass. at 731. Therefore, it lies within the Board’s sole discretion to determine whether to seek Town Meeting approval for the Settlement Agreement, to renew its attempts to enforce the Option, or to do neither. For all of the foregoing reasons, the plaintiffs’ motion for judgment on the pleadings is denied as to Count II; the Town Defendants’ cross-motion for judgment on the pleadings is allowed as to Count II; and the Railroad Defendants’ motion for judgment on the pleadings as to Count II is allowed.

**C. Statutory Environmental Protections (Count III)**

Finally, the plaintiffs seek a declaration that the 130.18 acres of forest land within the Property are protected parkland under art. 97 of the Amendments to the Massachusetts Constitution. Art. 97 provides that land dedicated as parkland “shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.” See *Smith v. City of Westfield*, 478 Mass. 49, 55 (2017). The basis for this declaration, the plaintiffs contend, is the language in Article 3 specifying that the Town would acquire the 130 acres, pursuant to the Option, for the purpose of “maintain[ing] and preserv[ing] said property and the forest, water, air, and other natural resources thereon for the use of the public for conservation and recreation purposes.”

This argument, however, puts the cart before the horse: while Article 3 *authorized* the Town to expend funds to acquire the forest land for a particular purpose, that authorization did



not by itself complete the acquisition of the property at issue. Were it otherwise, G.L. c. 61, § 8, would not need to specify that a town exercising its statutory first refusal option must include with its notice of exercise “a proposed purchase and sale contract or other agreement between the city or town and the landowner” to be executed within 90 days. No such purchase and sale contract was executed in this case because the Railroad Defendants challenged whether the Town had validly exercised the Option. The notice of exercise of the Option recorded in the Registry of Deeds was signed only by the Board of Selectmen, on behalf of the Town, and not by the Trust. Accordingly, the Town never acquired the 130 acres of forest land in the first instance, much less dedicated it as parkland pursuant to art. 97. The plaintiffs’ motion for judgment on the pleadings is therefore denied as to Count III and the Town Defendants’ cross-motion is allowed as to Count III.

#### **D. Injunction**

The court acknowledges that there has been substantial litigation before the Land Court, this court, and the Appeals Court over whether the Railroad Defendants may continue clearing and other site work during the pendency of litigation related to the Property. Although this judgment on the pleadings, effectively ends this litigation, 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. See *Goodwill Enters., Inc. v. Garland*, 2017 WL 4801104 at \*8 (Mass. Land Ct., Oct. 20, 2017) (contractual right of first refusal triggered by alienation of beneficial interest in property). Moreover, 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 to appropriate funds to exercise the Option; and (2) its resumption of clearing operations while the Appeals Court's injunction remained in place.

Therefore, the court finds it appropriate to issue continue the temporary injunction barring the Railroad Defendants from conducting clearing or other site work on the Property for a limited period of time sufficient to allow the Town to decide whether to seek the Town Meeting authorization necessary to validate the Settlement Agreement or to take the necessary steps to proceed with its initial decision to exercise the Option for the entire Property. While G.L. c. 40, § 14, does not provide any particular time period in which a town must hold a town meeting to authorize the acquisition of land, the Legislature has expressed a view on the appropriate time frame for such matters in G.L. c. 61, §8, which gives a town 120 days to exercise its first refusal option. Because the decision now before the Town is more limited in scope, however, a shorter period of 60 days is appropriate for this temporary injunction.

Therefore, the Railroad Defendants are enjoined from carrying out any clearing or other site work on the Property for a period of 60 days following the issuance of this decision.

### **ORDER**

For the foregoing reasons:

- 1) Defendants, Jon Delli Priscoli, Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company Motion for Judgment on the Pleadings as to Count II of Plaintiffs' Verified Complaint is **ALLOWED**.
- 2) Plaintiffs' Motion for Judgment on the Pleadings is **ALLOWED** as to Count I and **DENIED** as to Counts II and III.
- 3) The Town of Hopedale and Hopedale Board of Selectmen's Cross-Motion for Judgment on the Pleadings is **DENIED** as to Count I and **ALLOWED** as to Counts II and III.
- 4) It is further **ORDERED** that Jon Delli Priscoli, Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company are enjoined from

carrying out any clearing or other site work on the Property for a period of 60 days following the issuance of this decision.

A handwritten signature in black ink, appearing to read "Karen L. Goodwin", written over a horizontal line.

**Karen L. Goodwin**  
**Justice of the Superior Court**

**DATED: November 4, 2021**

# **EXHIBIT 6**

PETITION TO THE BOARD OF SELECTMEN, TOWN OF HOPEDALE

We, the undersigned Hopedale Residents, request that the Town of Hopedale continue to move forward to exercise its right to purchase the 130 acres, more or less, and to acquire the 25 acres of wetlands, more or less, located at 364 West St in Hopedale, MA as directed by the Special Town Meeting in October of 2020 and as provided by the Superior Court in its order issued November 10, 2021. Such action is sought to secure a designation for this area which will enable a protective classification of this vital forestland, wetlands, watershed, and critical habitat area.

NAME	ADDRESS	EMAIL	DATE
Wilma Manning	87 Hopedale St	—	11/15/21
Gloria Lewis	87 Dutcher St		11/15/21
Mary Ann Carter	17 Hope St.		11/15/21
Shirley Greene	13 Daniels St		11/15/21
Pat J. Stone	3 CUTLER ST.		11/15/21
Cinest J. Valpe	60 Hopedale St #1		11/15/21
Catherine J. Meffin	34 Mellen St		11-15-21
BORGES	10 Mendon St		11-15-21
Eusan Heuley	115 Laurelwood Av		11-15-21
Sally Decelles	74 Bancroft PK		11-15-21
Maria Ann Caballo	310 S. Main St		11-15-21
Thy Cochrane	310 S. Main St		11-15-21
Ann Russett	217 Laurelwood Dr		11-15-21
Muriel Mitchell	114 Hopedale St		11-15-21

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NAME	ADDRESS	EMAIL	DATE
MARY P. BOUDREAU	28 LAURELWOOD DR.		11-15-2021
Ann England	26 Duffway St.		11-15-21
Brenda Kraty	9 Heron Ln.		11-15-21
Susan Conclatori	8 Tamme R.		11/15/21
Cheryl Hanley	33 Hammond Rd		11/15/21
Catherine Gusselm	34 Prospect		11/16/21
Joyce Beard	61 Bancroft Pk		11/16/21
Joyce Farmer	136 Laurelwood Dr		11/16/21
Susan Seymour	42 Bancroft Pk		11/16/21
Carol Hall	64 Westcott Rd		11/16/21
Yvonne M. M.	16 Prospect St.		11/16/21
Marianne Watson	120 Mill St Hopedale		11/16/21
Thomas R. D'Orso	10 Westcott Rd Hopedale		11/16/21
Jean Dubois	94 Dutch St Hopedale		11/16/21

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NAME	ADDRESS	EMAIL	DATE
Carla MacQuarrie	68 Greene St		11.16.2021
<u>E. Donnelly</u>	7 CROCKETT CIR.		11/16/21
Dan Birias	37 Dutcher St. #6		11/16/21
Mary Watson	12 Nelson St	twatsonb14@comcast.net	11/17/21
Nam Watson	12 Nelson St		11/17/21
Gorraine Vitali	100 Plain St.		11/17/21
John & Ellen	142 Freedom St		11/17/21
Lizbeth Norton	69 Mill St		11/17/21
Crista Gillette	19 Nelson St		11/17/21
Elisabeth Hellmuth	105 Jones Rd		11/17/21
Elizabeth Turner	9 Moore Rd		11/17/21
Jeffrey Turner	9 Moore Rd		" "
EVAN KERRER	"	"	" "
Janice McCausland	89 Mill St. Hopedale		11-17-21

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NAME	ADDRESS	EMAIL	DATE
Jean Capello	104 Hopedale St #25		11/15/21
Alexandra E. Baker	104 Hopedale St #29		11-15-21
Jacqueline Hutchings	98 Hopedale St Apt 3		11-15-21
De Ann Proctor	Hopedale St		11-16-21
Supreme Edwards	104 Hopedale St Apt 31	suzzed2@yahoo.com	11-16-21
Linda Montani	98 Hopedale St Apt 8		11-16-21
Nancy Graham	104 Hopedale St Hopedale MA		11-17-21
Nancy Roudreau	98 Hopedale St Hopedale MA		
Kristin Sheppard	98 Hopedale St Apt 7		11-17-21
Christa D'Amico	98 Hopedale St Apt #6		11/17/21
Mindy Talbot	98 Hopedale St Apt #6		11/17/21
Janet Haworth	110 Hopedale St #30		11/17/21
Sylvia Roche	110 Hopedale St #31		11/18/21
Wayne Larson	98 Hopedale St		11/17/21



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NAME ADDRESS EMAIL DATE

<sup>9 TWP LINDA HOPEDALE</sup>  
Eileen DeCovelli deiacovelli@comcast.net

<sup>9 TWP LINDA HOPEDALE</sup>  
David J. Javell IALOVILLIDAVE@yahoo.com

Michelle Zucardo 8 Heron Lane michelekzucardo@yahoo.com

<sup>Hopedale</sup>  
Steve Goldstein 4 LIBERTY CIR goldstein.steve@gmail.com

James Foley 8 Bens Way jimufoleyri@comcast.net

Kathleen ~~St~~ 8 Bens Way KDHF@comcast.net

~~Russell Bogartz~~ 8 hope St. russell.bogartz@gmail.com

Bonnie Gaus 8 Gannett Way bonnie.muir@yahoo.com

Brian Terando 8 Heron Ln gsh\_dad@yahoo.com

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PETITION TO THE BOARD OF SELECTMEN, TOWN OF HOPEDALE

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NAME	ADDRESS	EMAIL	DATE
Marian Mostow	57 Laurelwood Dr.		11/17/21
Roberta Spivack	98 Laurelwood Dr.		11/17/21
Constance Potter	17 Driftway St		11/17/21
<del>Eric</del>	65 Laurelwood Dr		11/17/21
Matthew Deane	" "	" "	11/17/21
<del>Eric</del>	67 Laurelwood Dr		11/17/2021
DIXIE BRACK	85 LAURELWOOD DR	dixbra@comcast.net	11/17/21
Jim Fisher	84 Laurelwood Dr		11/17/21
Robert H. Steen	94 Laurelwood Dr.		11/17/21
Susan Luciani	99 Laurelwood Dr		11/17/21
Nancy Attoratta	100 Hopedale St	APT 13	11/18/2021
Rose Allunta	100 Hopedale St	APT 13	11/18/2021
Ronica Talamini	100 Hopedale St.	APT 15	11/18/21

[The page contains extremely faint and illegible text, likely a scan of a document with very low contrast or significant noise. The text is organized into several columns and rows, but the individual characters and words are not discernible.]



1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is crucial for ensuring transparency and accountability in the organization's operations.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It highlights the need for consistent data collection procedures and the use of advanced analytical techniques to derive meaningful insights from the data.

3. The third part of the document focuses on the role of technology in data management and analysis. It discusses how modern software solutions can streamline data collection, storage, and processing, thereby improving efficiency and accuracy.

4. The fourth part of the document addresses the challenges associated with data management, such as data quality, security, and privacy. It provides strategies to mitigate these risks and ensure that the data remains reliable and secure throughout its lifecycle.

5. The fifth part of the document concludes by summarizing the key findings and recommendations. It stresses the importance of ongoing monitoring and evaluation to ensure that the data management processes remain effective and aligned with the organization's goals.

# **EXHIBIT 7**



COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2185CV00238

ELIZABETH REILLY and others<sup>1</sup>

vs.

TOWN OF HOPEDALE and others<sup>2</sup>

MEMORANDUM OF DECISION ON DEFENDANT TOWN OF HOPEDALE'S  
MOTION FOR CLARIFICATION

Eleven taxpayers residing in the Town of Hopedale ("Town") sued to challenge a Settlement Agreement between the Town and Grafton & Upton Railroad Company ("Railroad"), concerning disputed forest lands. In pertinent part, the Settlement Agreement provided that in exchange for the Railroad voluntarily selling a portion of the forest lands to the Town, the Town would cease efforts to enforce its G.L. c. 61, § 8 Option to purchase the entirety of the forest lands from the original seller. The plaintiffs sought an injunction preventing the Board from purchasing the forest lands under the terms of the Settlement Agreement (Count I); a declaration of the Town's G.L. c. 61, § 8 rights (Count II); and a declaration that the lands were protected parkland pursuant to art. 97 (Count III).

On November 4, 2021, the court allowed the Town's motion for judgment on the pleadings on Count II because the plaintiffs lacked standing to assert the Town's rights. The court also entered judgment in favor of the Town on Count III because the allegations did not plausibly suggest that the lands met the requirements for art. 97 protection. As to Count I,

<sup>1</sup> Carol J. Hall, Donald Hall, Hilary Smith, David Smith, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janica Doyle

<sup>2</sup> Louis J. Arcude III, Brian R. Keyes, Jon Delli Priscoll, and Michael R. Milanosky, One Hundred Forty Realty Trust, and Grafton & Upton Railroad Company

Entered and Copies Mailed 12/16/21


however, the court determined that the execution of the Settlement Agreement was procedurally defective because the Board failed to obtain Town Meeting approval for the reduced land acquisition as required by G.L. c. 40, § 14. The court enjoined the Town from purchasing the land unless it obtained such approval. .

The Town has requested amendment or clarification of the decision to state that the Town has lost its statutory Option to buy the entire parcel. However, that is not what the court decided. As previously explained, although the terms of the Settlement Agreement are legal (including the Board's agreement to waive the Option), the Board exceeded its authority when it unilaterally entered into that agreement without Town Meeting approval of the reduced acquisition. Therefore, the Settlement Agreement is not effective. The Board might not hold the required Town Meeting or might fail to obtain enough votes to approve the acquisition. In either case, the Settlement Agreement would fail to take effect, meaning that the Railroad would retain the land and the Town would retain its money and the right to continue attempting to enforce the Option.<sup>3</sup> Until the reduced acquisition is approved by Town Meeting, the agreement is not effective, and the Town may (but is not required to) attempt to enforce the Option.

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<sup>3</sup> In its Response, the Railroad argues that because the Settlement Agreement contains a severability clause, a failed Town Meeting vote would mean the Railroad need not sell any land, but the Town is still bound to its the waiver of the Option; in other words, the Railroad gets all the benefits of the agreement and gives up nothing in exchange. This would be unjust, to say the least. See *Carrig v. Gilbert-Yarker Corp.*, 314 Mass. 351, 357 (1943) (contract only severable where it "consists of several and distinct items to be furnished or performed by one party" and "consideration [is] apportioned to each item [separately]"). In a similar case, a panel of the Appeals Court held that where a particular term was the "essence and foundation of [a Land Court] settlement agreement . . . the failure of that consideration [due to a judgment in a subsequent tax-payer action] warranted rescission of the settlement agreement . . ." *Abrams v. Bd. of Selectmen of Sudbury*, 76 Mass. App. Ct. 1128, 2010 WL 175045 at \*2 (2010) (Rule 1:28 decision). For this reason, the Railroad's claim preclusion argument misses the mark: while claim preclusion might bar the Town from filing a *new* suit to enforce the Option, the Town could seek rescission of the Settlement Agreement. *Id.* at \*2. Moreover, as to *this* suit, claim preclusion would not apply because the plaintiff taxpayers were not parties to the Land Court litigation.

Therefore, the court **DENIES** the Town's motion to the extent it seeks to amend the decision and **ALLOWS** the request for clarification as set forth above.

  
\_\_\_\_\_  
Karen L. Goodwin  
Justice of the Superior Court

**DATED:** December 14, 2021

# **EXHIBIT 8**

**From:** [AppealsCtClerk@apjct.state.ma.us](mailto:AppealsCtClerk@apjct.state.ma.us)  
**To:** Brian Riley  
**Subject:** 2021-J-0111 - Notice of Docket Entry  
**Date:** Thursday, April 8, 2021 1:03:47 PM

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- COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE

April 8, 2021

RE: No. 2021-J-0111  
Lower Ct. No.: 2185CV0238

ELIZABETH REILLY & others [1]  
vs.  
TOWN OF HOPEDALE & others [2]

NOTICE OF DOCKET ENTRY

Please take note that on April 8, 2021, the following entry was made on the docket of the above-referenced case:

**MEMORANDUM AND ORDER:** This matter is before me by virtue of a petition, pursuant to G. L. c. 231, s. 118, first para., filed by the plaintiffs in Reilly, et al. v. Town of Hopedale, et al., Worcester Superior Court docket no. 2185CV0238. The plaintiffs are ten taxpayers residing in the Town of Hopedale (the town), and their suit, brought pursuant to G. L. c. 40, s. 53, seeks to enjoin the town, through its select board, from purchasing certain real property as an unauthorized expenditure for acquisition of land by purchase.

The plaintiffs sought an order from the Superior Court to enjoin the town and the defendant members of the town's select board from issuing any bonds, making any expenditures, paying any costs, including without limitation, for land or hydrogeological surveying, or transferring any property interests pursuant to a settlement agreement dated February 9, 2021, entered into with the Grafton and Upton Railroad ("the railroad") [3] pending resolution of the Superior Court action. The Superior Court judge denied the plaintiffs' motion and this petition followed. In this petition, the plaintiffs request the relief that was denied in the Superior Court. I issued a temporary stay pending resolution of the petition, and at my request, the defendants filed oppositions to the petition. The plaintiffs filed a reply to the opposition.

**Background.** The facts of this case are not contested. Although the legal significance of those facts is the subject of substantial dispute, a brief overview will suffice. The owner of certain forestland within the town took advantage of the advantageous tax treatment of that land offered by G. L. c. 61 thereby subjecting the property to the provisions of section 8 of that chapter. According to section 8, upon receipt of a bona fide offer to purchase forestland, the municipality wherein the land is located gains a statutory right of first refusal. In this case, the town sought to exercise that right. Whether the town effectively perfected that right and whether that right is preempted by federal law pertaining to railroads is the subject of on-going litigation in other fora.

Assuming that the town had or would effectively exercise its option to stand in place of the original purchaser, on October 24, 2020, the town meeting voted unanimously "to appropriate, the sum of One Million One Hundred Seventy-Five Thousand Dollars (\$1,175,000), to pay costs of acquiring certain property, consisting of 130.18 acres, more or less, located at 364 West Street . . . , and for the payment of all other costs incidental and related thereto, and that to meet this appropriation, the Treasurer, with the approval of the Board of Selectmen, is authorized to borrow said amount under and pursuant to G.L. c. 44, s.7(1) or pursuant to any other enabling authority, and to issue bonds or notes of the Town therefor."

In the same special town meeting, the town voted "to purchase, or take by eminent domain pursuant to Chapter 79 of the General Laws, for the purpose of public park land, the land located at 364 West Street which is not classified as

forestland under Chapter 61 of the General Laws, consisting of 25.06 acres, more or less, . . . and in order to fund said acquisition, borrow . . . the sum of \$25,000, and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land conservation, and further to authorize the Board of Selectmen to take any and all actions and execute any and all documents to carry out the purposes of this article."

Thereafter, in the related Land Court proceedings wherein the town was attempting to assert its statutory right of first refusal, the town and the railroad were encouraged to mediate that dispute. As a result of that mediation, on February 9, 2021, the town, through its select board, and the railroad entered into a settlement agreement. The settlement provided for the town to, among other things, purchase 64 acres for \$587,000, rather than the full 155 acres of land for \$1,175,000. This litigation ensued.

Discussion. A single justice of this court has the authority to enter a preliminary injunction like the one requested by the plaintiffs, and that authority "does not depend on a determination that the trial court judge, in denying relief, made incorrect rulings of law or abused his [or her] discretion." *Jet-Line Servs., Inc. v. Bd. of Selectmen of Stoughton*, 25 Mass. App. Ct. 645, 646 (1988); G. L. c. 40, s. 53.

In a ten taxpayer case, such as this one, I am required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public, and I must consider whether is a likelihood of statutory violations and how such statutory violations affect the public interest. See *Edwards v. Boston*, 408 Mass. 643, 647 (1990).

Because the Superior Court judge's decision turned on whether the plaintiffs had shown a likelihood of success in their claim that the settlement agreement was unlawful, I start with an analysis of the plaintiffs' chances. For the reasons stated herein, I conclude that the plaintiffs have shown a likelihood of success sufficient to consider the effect of an injunction on the public interest.

A town select board's general authority to acquire land is granted by statute. G.L. c. 40 s. 14. However, to exercise that general authority, the select board requires the vote of the town at town meeting. *Id.* The powers to purchase or take real property for public purposes set forth in section 14, though, are not the only methods by which a town may acquire real property. See G.L. c.60, s.s. 64 et seq., G.L. c.45, 14, and G.L. c.40, s.8C.

The plaintiffs argue that G. L. c. 61, s. 8 is another source of authority for a town to acquire real property outside the provisions of G. L. c. 40, s. 14. The defendants contend that completion of the purchase secured by the right of first refusal found in G. L. c. 68, s. 8 is implicitly dependent on the authority to purchase set forth in G. L. c. 40, s. 14. Neither party has cited, nor am I aware of, any appellate cases deciding this issue. I need not and do not resolve this dispute.

Even if a town vote was necessary to authorize the board's decision to exercise the right of first refusal pursuant to G.L. c. 40, s. 14, the plaintiffs' argument that no such authorization occurred at the October 24, 2020 special town meeting is sufficiently meritorious to consider granting the requested injunction.

The motion at town meeting plainly does not contain an authorization to purchase but was merely an appropriation of funds for the purchase pursuant to G. L. c. 68, s. 8. Section 14 of chapter 40 requires both authorization and an appropriation. G.L. c. 40, s. 14. The absence of an explicit authorization is particularly noteworthy where, at the same town meeting, the motion to acquire the portion of the property at issue that was not forestland contained an explicit authorization. Because there were two motions to acquire land at the special town meeting and the motions utilized different language, it would be reasonable to conclude that the voters understood there to be a material difference in what they were voting in favor of. *CF Fernandes v. Attleboro Hous. Auth.*, 470 Mass. 117, 129 (2014) ("The omission of particular language from a statute is deemed deliberate where the Legislature included such omitted language in related or similar statutes").

Assuming, arguendo, that the defendants' position is correct, i.e. that G. L. c. 40, s. 14 authorization was required to complete the purchase pursuant to the right of first refusal, the result of the vote would have been ineffective to complete the purchase of the entirety of the forestland. Thus, it would not serve as an authorization to complete a purchase of a lesser amount thereof.

Assuming, arguendo and as the plaintiffs contend, that G.L. c. 61, s. 8 is an independent source of the select board's

authority to purchase land in the absence of a town vote, the select board's authority would be limited by the language of that statute.

The plain language of that statute would not appear to authorize the select board to acquire any less than the entirety of the real property subject to the right of first refusal. "No sale of the land shall be consummated if the terms of the sale differ in any material way from the terms of the purchase and sale agreement which accompanied the bona fide offer to purchase as described in the notice of intent to sell except as provided in this section." G. L. c. 61, s. 8. Here, the significant reduction in both the acreage of land to be sold and the purchase price as set forth in the settlement agreement constitute a material change in the terms.

This interpretation of the source of the select board's authority would also distinguish this case from *Russell v. Town of Canton*, 361 Mass. 727 (1972), a case upon which the plaintiffs and the Superior Court judge relied. In *Russell*, the Supreme Judicial Court concluded that the motion authorizing the select board to take all of an owners' land by eminent domain did not preclude selectmen from choosing and taking only part thereof. *Id.* at 732. In *Russell*, neither the town of Canton, nor the Supreme Judicial Court, were faced with the all-or-nothing nature of the right of first refusal found in G. L. c. 61, s. 8. *Id.* ("We express no opinion on the question whether a town's authorization for a taking may, by appropriate language, be expressly limited to or conditioned upon the taking of the entire parcel authorized to be taken, for this was not attempted in the case before us.") Consequently, while *Russell* may guide in this case, it is not controlling.

For these reasons, I find that the plaintiffs have demonstrated some likelihood of success in establishing that the town's purchase of the land, pursuant to the settlement agreement, would be a statutory violation. To be clear, I am not deciding this case on the merits; only that the plaintiffs have demonstrate some chance of success on their claim. See *Jet-Line Servs., Inc.*, 25 Mass. App. Ct. at 648 (single justice "not required to, and did not, decide the case or any of its pivotal issues on the merits"). Having so concluded, I move on to the effect an injunction would have on the public interest.

The public interest in protecting the public funds from unauthorized expenditure is self-evident. "The words of [G. L. c. 40, s. 53] and our cases interpreting it demonstrate that a violation of any law designed to prevent abuse of public funds is, by itself, sufficient harm to justify an injunction." *Edwards v. Boston*, 408 Mass. 643, 646 (1990). Section 14 of chapter 40, with its statutory requirement of a town vote before a purchase, is a statute designed to prevent the abuse of public funds. Thus, the plaintiffs have demonstrated that the requested injunction serves the public interest.

I am mindful of the defendants' arguments that the settlement agreement allows the public to salvage some of the benefits of its right of first refusal, and that permanently preventing the execution of that agreement could result in the town receiving none of the forestland. The settlement agreement may represent sound public policy, the correct litigation strategy in the Land Court, and a general benefit to the public and the town. Nevertheless, it may well be unlawful.

Nothing in this memorandum and order should be construed as preventing the town from conducting a town vote authorizing the select board to purchase any or all of the land at issue, which would render the transaction lawful.

**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. (Meade, J.). \*Notice/Attest/Frison, J.

Footnotes:

1. Carol J. Hall, Hillary Smith, David Smith, Megan Fleming, Stephanie A McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle.

2. Louis J. Arcudi, III, Brian R. Keyes, Grafton & Upton Railroad Company, John Delli Prisculi, Michael R. Milanoski, and One Hundred Forty Realty Trust.

3. The land is owned by the trust defendant. However, the trust is controlled by the railroad. For convenience, I refer only to the railroad but include the trust where appropriate.

**REGISTRATION FOR ELECTRONIC FILING.** Every attorney with an appeal pending in the Appeals Court must have an account with eFileMA.com. Registration with eFileMA.com constitutes consent to receive electronic notification from the Appeals Court and e-service of documents. Self-represented litigants are encouraged, but not required, to register for electronic filing.

**ELECTRONIC FILING.** Attorneys must e-file all non-impounded documents. Impounded documents and submissions by self-represented litigants may be e-filed. No paper original or copy of any e-filed document is required. Additional information is located on our Electronic Filing page: <http://www.mass.gov/courts/court-info/appealscourt/efiling-appeals-faq-gen.html>

**FILING OF CONFIDENTIAL OR IMPOUNDED INFORMATION.** Any document containing confidential or impounded material must be filed in compliance with Mass. R. App. P. 16(d), 16(m), 18(a)(1)(A)(iv), 18(d), and 21. Very truly yours,

The Clerk's Office

Dated: April 8, 2021

To: Harley Clarke Racer, Esquire  
David E. Lurie, Esquire  
Brian W. Riley, Esquire  
Donald C. Keavany, Jr., Esquire  
Andrew DiCenzo, Esquire  
Worcester Superior Court Dept.

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If you have any questions, or wish to communicate with the Clerk's Office about this case, please contact the Clerk's Office at 617-725-8106. Thank you.



# **EXHIBIT 9**

E-FILED

11/24/2021

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT  
C.A. NO. 2185CV00238D

E-Documents sent 11/20/21

ELIZABETH REILLY, CAROL J. HALL,  
DONALD HALL, HILLARY SMITH, DAVID  
SMITH, MEGAN FLEMING, STEPHANIE A.  
MCCALLUM, JASON A. BEARD, AMY  
BEARD, SHANNON-W. FLEMMING, and  
JANICE DOYLE,

Plaintiffs,

v.

TOWN OF HOPEDALE, LOUIS J. ARCUDI,  
III, BRIAN R. KEYES, GRAFTON & UPTON  
RAILROAD COMPANY, JON DELLI  
PRISCOLI, MICHALE MILANOSKI, and ONE  
HUNDRED FORTY REALTY TRUST,

Defendants.

ASSENTED TO EMERGENCY  
MOTION OF DEFENDANTS TOWN  
OF HOPEDALE AND HOPEDALE  
BOARD OF SELECTMEN FOR STAY  
OF JUDGMENT PROVISION

#47

The defendants Town of Hopedale and Louis J. Arcudi, III and Brian R. Keyes, named in their capacity as members of the elected Hopedale Board of Selectmen (hereinafter "Town" or "Board"), hereby submit an Emergency Motion regarding a provision of the November 10, 2021 Judgment ("Judgment") and the Court's Order entered in the above captioned matter. A true copy of the Judgment is attached to this motion for reference, and the relevant provision is also set forth on pages 12-13 of the Memorandum of Decision and Order.

Superior Court Rule 9A(1)(1) Certification

The Town certifies that Town Counsel contacted counsel for all other parties and said counsel have assented to the within motion.

November 30, 2021  
ALLOWED  
JUDGE: June DeS  
KID Clerk

In support of this motion, the Town states that the Judgment found in favor of the Plaintiffs on Count I of the Verified Complaint, and in favor of the Town and other defendants ("Railroad Defendants") on Counts II and III. On November 22, 2021, the Town served a Motion for Clarification of the Judgment upon counsel for the other parties. Pursuant to Superior Court Rule 9A, however, it may be the first full week of December before the Town can file the Rule 9A package with the Court. Counsel for the Plaintiffs and for the Railroad Defendants have informed Town Counsel that, while assenting to this Emergency Motion, they will each be submitting an opposition or response to the Town's Motion for Clarification, and all pleadings shall be filed in conformance with Rule 9A.

In addition to the Memorandum of Decision's discussion as to Counts I - III, the Court included an Order enjoining the Railroad Defendants from performing any clearing or other site work on the subject Property for a period of 60 days after entry of judgment. While this injunction is expressly directed at the Railroad Defendants, the Court stated in relevant part:

While G.L. c.40, §14, does not provide any particular time period in which a town must hold a town meeting to authorize the acquisition of land, the Legislature has expressed a view on the appropriate time frame for such matters in G.L. c.61, §8, which gives a town 120 days to exercise its first refusal option. Because the decision now before the Town is more limited in scope, however, a shorter period of 60 days is appropriate for this temporary injunction.

As a result, the Board of Selectmen is effectively required to either obtain a new Town Meeting vote or take some other action to acquire the Property (the latter being the subject of the Town's Motion for Clarification) *within the same 60 day period*, which will expire on or about January 9, 2022. It is critical to the Town's important interests regarding the Property that the Motion to Clarify the Judgment be considered before the Board can address its next step, but the current 60-day period may expire or be too limited if the early January deadline stay in place.

Therefore, the Town moves that this honorable Court extend the 60-day injunctive period contained in the Order and Judgment through and including January 31, 2022, such that after the Court rules on the Town's Motion to Clarify, the Board of Selectmen will have sufficient time to act pursuant to the terms of the Judgment.

Defendants,  
TOWN OF HOPEDALE, LOUIS J.  
ARCUDI AND BRIAN R. KEYES,

By their attorney,



Brian W. Riley (BBO# 555385)

KP Law, P.C.

101 Arch Street

12th Floor

Boston, MA 02110-1109

(617) 556-0007

[briley@kp-law.com](mailto:briley@kp-law.com)

Dated: November 24, 2021

789134/HOPD/0145

**CERTIFICATE OF SERVICE**

I, Brian W. Riley, hereby certify that on the below date, I served a copy of the foregoing Assented To Emergency Motion of Defendants Town of Hopedale and Hopedale Board of Selectmen for Stay of Judgment Provision, by first class mail and electronic mail, to the following counsel of record:


David B. Lurie, Esq.  
Harley C. Racer, Esq.  
Lurie Friedman LLP  
One McKinley Square  
Boston, MA 02109  
[dlurie@luriefriedman.com](mailto:dlurie@luriefriedman.com)  
[hracer@luriefriedman.com](mailto:hracer@luriefriedman.com)

David C. Keavany, Jr., Esq.  
Christopher Hays Wojcik & Mavricos, LLC  
370 Main Street, Suite 970  
Worcester, MA 01608  
[dkeavany@chwmilaw.com](mailto:dkeavany@chwmilaw.com)



Brian W. Riley

Dated: November 24, 2021

<b>JUDGMENT ON THE PLEADINGS</b>		Trial Court of Massachusetts The Superior Court 
DOCKET NUMBER	2185CV00238	Dennis P. McMenus, Clerk of Courts
CASE NAME	Reilly, Elizabeth et al vs. Town of Hopdale et al	COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608

This action came before the Court, Hon. Karen Goodwin, presiding, upon a motion for judgment on the pleadings,

After hearing or consideration thereof,

\*  
4/0

**It is ORDERED AND ADJUDGED:**

Judgment to enter for the Plaintiffs on Count I, enjoining the Board of Selectmen and The Town of Hopdale from purchasing land as set forth in the Settlement Agreement and the Railroad Defendants are enjoined for 60 days from the date of this Judgment from carrying out any work on the contested forest land. Counts II and III are hereby dismissed.

DATE JUDGMENT ENTERED 11/10/2021	CLERK OF COURTS/ ASST. CLERK X 
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Date/Time Printed: 11-10-2021 11:20:54

BCV117: 07/2018

Entered and Copies Mailed: 11/10/21