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January 19, 2022

By First Class Mail

Hon. Paula M. Carey
Chief Justice of the Trial Court
Executive Office of the Trial Court
One Pemberton Square
Boston, MA 02108

RE: Request for Interdepartmental Judicial Assignment and transfer of Town of Hopedale v. Jon Delli Priscoli, et al., Land Court No. 20-MISC-000467 to Worcester County Superior Court and for consolidation with Reilly, et al. v. Town of Hopedale, Grafton & Upton Railroad, et al., No. 2185-cv00238

Dear Chief Justice Carey:

On behalf of the Town of Hopedale (the "Town"), I am writing to supplement my letter dated January 18, 2022, and to provide a fuller response to the Request for Interdepartmental Judicial Assignment (the "Request") filed by Elizabeth Reilly and ten more citizens of the Town of Hopedale ("Citizen Plaintiffs") and the Opposition filed by the Grafton and Upton Railroad Company and Jon Delli Priscoli and Michael Milanoski, Trustees of the One Hundred Forty Realty Trust (the "G&U Defendants").

The Town takes no position on the Request, but writes only to provide further context and perspective on this complex legal matter and to highlight certain legal and equitable considerations that should guide a decision on the Request.

These cases concern the fate of 130 acres of undeveloped forest land in Hopedale that, for nearly 30 years, was enrolled in Massachusetts' Forest Tax Program under G.L. c. 61, § 2, and managed under an approved forestry management plan (the "Chapter 61 Land"). See Forest Management Plan, attached hereto as Exhibit 1. G.L. c. 61, § 8, gives a municipality a right of first refusal whenever the owner of classified forest land would sell or convert the land for development. The residents of the Town unanimously supported the Town's exercise of the statutory right of first refusal and authorized the purchase of all 130 acres of the Chapter 61 Land for \$1,175,000 during a special town meeting in October 2020.

It is important to note that the G&U Defendants were not the landowners while the Chapter 61 Land was enrolled in the Chapter 61 program. In June 2020, the G&U Defendants offered to buy the Chapter 61 Land (and other land) from the long-time landowner for \$1,175,000. On July 9, 2020, they served the required statutory notice of intent on the landowner's behalf. See G.L. c. 61, § 8. This triggered the Town's right of first refusal. The Town repeatedly indicated that it intended to exercise its statutory right. However, the G&U Defendants tried to withdraw the notice of intent.

Then, on October 12, 2020, instead of purchasing the land directly, the G&U Defendants acquired 100% of the beneficial interest of the nominee trust that held record title to the Chapter 61 Land for \$1,175,000. The G&U Defendants thus came to control the Chapter 61 Land. They served notice of the acquisition of the beneficial interest to the Town on October 15, 2020. This independently triggered the Town's right of first refusal. 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).

The Town followed every prerequisite of G.L. c. 61, § 8, to perfect the statutory right. On October 30, 2020, the Town's Board of Selectmen exercised the first refusal option after a duly noticed public hearing, and on November 2, 2020, the Town served a notice of exercise on the landowner with a proposed purchase and sale agreement and recorded the notice of exercise in the registry of deeds. The Town took these actions well within 120 days of either July 9 (the date of the original notice of intent) or October 15, 2020 (the date of notice of the sale of the beneficial interest of the nominee trust).

The G&U Defendants have repeatedly expressed their intent to develop the Chapter 61 Land for railroad purposes rather than preserve it as forest land, and have on several occasions proceeded with site work and tree clearing activities. The Town brought the Land Court action to enjoin the tree clearing activities and to enforce its statutory right to purchase the Chapter 61 Land. The G&U Defendants then brought an action before the Surface Transportation Board ("STB") seeking a declaratory order that the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 (the "ICCTA"), preempted the application of G.L. c. 61, § 8.

After the hearing on the Town's motion for preliminary injunction, the Land Court (Rubin, J.) opined that the July 9 notice was defective but left open the question of whether the acquisition of the beneficial interest independently triggered the Town's Chapter 61 option. See Docket Entry dated Nov. 24, 2020. That question was never adjudicated, however. At the Land Court's suggestion, the parties participated in two mediation sessions and ultimately reached the Settlement Agreement. The Settlement Agreement, *inter alia*, provided that the G&U Defendants, "in consideration of the payment of \$587,500, shall effectuate the conveyance of" a certain parcel containing approximately 39 acres of the Chapter 61 Land and other land.

The Town entered into the Settlement Agreement to avoid the litigation costs associated with the Land Court and STB proceedings and to avoid an outcome after extensive litigation where it would end up with none of the Chapter 61 Land. Acquiring and controlling approximately 39 acres of the Chapter 61 Land was the primary consideration for the Settlement Agreement. Without that element of the consideration, the Town would not have entered into any settlement. At the time of the Settlement Agreement (and as the Town subsequently argued in Superior Court), the Town was confident that the Board of Selectmen had sufficient authority to execute the Settlement Agreement, including sufficient authority to apply the money previously appropriated for the acquisition of the entire 130 acres of the Chapter 61 Land to a smaller portion of that parcel along with other adjacent land). Given this posture, the Town agreed to the dismissal of both

proceedings. On February 10, 2021, the parties jointly filed the Stipulation of Dismissal in the Land Court.

Shortly thereafter, the Citizen Plaintiffs filed an action in the Worcester Superior Court. That action resulted in a judgment “enjoining the [Town] from purchasing land as set forth in the Settlement Agreement.” See Judgment dated Nov. 10, 2021. The Superior Court (Goodwin, J.) clarified that “[u]ntil the reduced acquisition is approved by Town Meeting, the [settlement] agreement is not effective, and the Town may (but is not required to) attempt to enforce the [Chapter 61] Option.” See Memo. of Decision on Defendant Town of Hopedale’s Motion for Clarification, dated Dec. 14, 2021, at 2. The Town defended the Settlement Agreement in the Superior Court, but is now compelled to follow the Superior Court’s decision and judgment. The G&U Defendants, who did not file any appeal of Judge Goodwin’s decision, are likewise compelled to follow the Superior Court’s decision and judgment as well.

In the Town’s view, by the Superior Court’s decision and by operation of law, the Settlement Agreement is not effective unless Town Meeting authorizes the reduced land purchase contemplated in the Settlement Agreement; without that authorization, there is a failure of consideration rendering the entire Settlement Agreement null and void. See Dec. 14 Decision, at 2 n.3 (“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 ten-taxpayer action] warranted rescission of the settlement agreement....’”), citing *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). In the present context, the Town’s waiver of its Chapter 61 rights; the Town’s agreement to dismiss the Land Court case; and the other provisions of the Settlement Agreement which the G&U Defendants point to as other consideration are all null and void until the Town receives this authorization.

The Town is thus bound by the Superior Court’s injunction preventing the completion of the land purchase contemplated in the Settlement Agreement without explicit authority. However, the Town has good reason to believe that if the Settlement Agreement authorization is brought to a vote, it will surely fail given the expressed will of the Town’s residents for the Town to purchase all 130 acres of the Chapter 61 Land. Also, the public health risk in holding an indoor special town meeting at this time is too great to justify a futile vote. Therefore, the Town chose to move to re-open the Land Court action instead of jumping through this trivial hoop only to land in this same position after the vote fails.

The Town appreciates the Citizen Plaintiffs’ Request for Interdepartmental Judicial Assignment, but it does not take a specific position with respect to judicial assignment. Both the Land Court and the Superior Court have jurisdiction over the relevant issues in the current action and would have jurisdiction if the Town is required to make some filing to seek formal rescission of the Settlement Agreement. The Town simply wants the opportunity to vindicate its right to the Chapter 61 Land now that the validity of the Settlement Agreement has been called into question. Therefore, the Town will defer to the determination of the Trial Court regarding the appropriate forum for the adjudication of this matter in light of the past procedural history and the Trial Court’s assessment of the proper approach to promote judicial efficiency and comity.

The Town also wants to highlight several important legal and equitable considerations that should guide any decision on the Request:

- (1) Ownership and control of the Chapter 61 Land changed such that a conversion of the land for development has occurred. This is the scenario for which the statutory right of first refusal exists.
- (2) There is a clear trigger date for the Town's exercise of its Chapter 61 option—October 15, 2020, when the G&U Defendants sent written notice of their acquisition of the beneficial interest of the nominee trust holding title to the Chapter 61 Land. The Town took all steps necessary to perfect the Chapter 61 option within 120 days. The Town is thus likely to prevail on a claim that it has a valid and enforceable Chapter 61 option.
- (3) First Circuit precedent holds that only activities that facilitate the movement of people or freight have preemptive effect under the ICCTA. See Grosso v. Surface Transportation Bd., 804 F.3d 110, 119 (1st Cir. 2015) (holding that “proper focus” of the STB is on “whether the [railroad] activities ... facilitated the physical movement of ‘passengers or property’”). The activity at issue here is the acquisition of undeveloped land (or, more accurately, the acquisition of the beneficial interest of a nominee trust holding record title to undeveloped land), which by itself does not immediately facilitate the movement of people or freight. The G&U Defendants are thus likely to fail on their preemption claim.
- (4) The Town has a significant public interest in protecting its municipal water supply. The Chapter 61 Land is hydraulically-upgradient of all of Hopedale's public water supply sources and provides an important buffer for protection of the Town's public water supply wells. It is also the only optimal location for siting a new public water supply source in the Town, and ownership of the Chapter 61 Land would ensure that future land uses on the parcel are consistent with water supply protection and would not adversely impact groundwater quality. See also New England Forestry Found., Inc. v. Bd. of Assessors of Hawley, 468 Mass. 138, 151 (2014) (“[P]roperly preserved and managed conservation land can provide a tangible benefit to a community even if few people enter the land ... [F]orest land ... regulates and purifies the fresh water supply by stabilizing soils that store water over time and filter contaminants.”).
- (5) Development of any part of the Chapter 61 Land requires site work and tree clearing activities that would irreparably alter the Chapter 61 Land and impair the benefits it provides for protection of the municipal water supply.
- (6) There remains a real question as to whether a formal rescission of the Settlement Agreement is required. The Land Court has authority to rescind the Settlement Agreement if necessary. See G.L. c. 185, § 1(k) (“The land court department shall have exclusive original jurisdiction of ... [a]ll cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved.”). The Town could seek this remedy in a re-opened proceeding, if necessary.

Thank you for the opportunity to provide this supplemental letter. The Town eagerly awaits a decision on the Request.



Peter F. Durning

cc: Hon. Heidi E. Brieger, Chief Justice the Superior Court Department
Hon. Gordon H. Piper, Chief Justice of the Land Court (*via email to Clerk John Battle*)
Hon. Diane Rubin, Justice of the Land Court (*via email to Clerk Jennifer Noonan*)
Hon. Karen Goodwin, Justice of the Superior Court (*via email to Clerk Laurie Jurgiel*)
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