COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

ELIZABETH REILLY, CAROL J. HALL, DONALD HALL, HILARY SMITH, DAVID SMITH, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMING, and JANICE DOYLE, Plaintiffs, v. TOWN OF HOPEDALE, LOUIS J. ARCUDI, III, BRIAN R. KEYES, GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, MICHAEL MILANOSKI, and ONE HUNDRED FORTY REALTY TRUST, Defendants.	Civil Action No. 2185-cv-000238D

PLAINTIFFS' MEMORANDUM (1) IN OPPOSITION TO THE BOARD OF SELECTMEN'S MOTION FOR JUDGMENT ON THE PLEADINGS, AND (2) IN REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs submit this Memorandum both in Opposition to the Hopedale Board of Selectmen's Cross-Motion for Judgment on the Pleadings and as a reply in support of Plaintiffs' Motion for Judgment on the Pleadings ("Motion"). Defendants' distilled response to Plaintiffs' Motion is that Massachusetts Appeals Court Single Justice Meade is wrong and that the clear statutory requirements of c. 61, § 8 and its appurtenant caselaw should simply be disregarded. To be clear, the Board had discretion to exercise or not exercise the first refusal Option. That is

the extent of its discretionary power under c. 61. Once the Board exercised the Option, it had obligations under c. 61 and c. 40, § 3. The Board could not assign the Town's rights in whole or in part to the Railroad under c. 61. The Board could only sell or transfer a portion of the Forestland after it acquired the whole under c. 61 and only with Town Meeting approval under c. 40, § 3. What the Board did do – acquire only a portion through a deal outside of c. 61 – lacked Town Meeting approval for the acquisition and the release of the Town's c. 61 property interests. The Court should rule that the Board exceeded its authority, and that the Town's c. 61 rights in the property remain enforceable and must be enforced through entry of judgment.

I. The Appeals Court Injunctive Order Must Be Respected And Made Permanent Through Entry Of Judgment On Count I.

Defendants' uneasy starting point in their respective briefs is that Appeals Court Justice Meade got it wrong and that the Special Town Meeting vote appropriating funds in order for the Board to exercise the Town's first refusal Option to the c. 61 Forestland was also, somehow, an authorization to acquire the property outside of the parameters of c. 61. There is simply no way to read into the Town Meeting vote on Article 3 an authorization to acquire property that is separate and independent from the exercise of the c. 61 first refusal Option. Neither the law, the facts nor the Single Justice order allow for such a strained interpretation.

The Board further mangles Plaintiffs' central point. Plaintiffs are not saying that because of the Special Town Meeting vote that it would violate Massachusetts law for the Board to acquire less than the entire 130 acres of Forestland or to spend less than $1,175,000. Rather, Plaintiffs are saying that the statute, c. 61, clearly limits the Board's authority to either take all or nothing of the c. 61 Forestland. The Board could have either exercised the first refusal Option or chosen not to exercise the Option. That is the extent of the Board's discretion under c. 61. The Board did so exercise, as it has admitted. The sole function of the Special Town Meeting vote

was to appropriate the necessary funds for the Board to fulfill its statutory duty pursuant to c. 61 upon the Board's exercise of the Option. To the extent there could be read into the Special Town Meeting vote any authorization to acquire property, it was expressly limited to acquisition of the property pursuant to the exercise of the first refusal Option – the specific take it or leave it contractual Option before the Town. The Town Meeting vote did not independently authorize an acquisition of any property. On this, Justice Meade is correct and Defendants are wrong.[1]

The Board has exposed the weakness of its position by again retreating to the false comfort of Russell v. Town of Canton, 361 Mass. 727 (1972). Justice Meade rejected that reliance and made clear that Russell does not control here: "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, § 8." Nor is the Board redeemed by turning to Smyly, which actually supports Plaintiffs' position. Smyly v. Town of Royalston, 2007 WL 2875942, at *5 (Mass. Land Ct. Oct. 4, 2007) ("statute demands strict compliance with the notice requirements", tolling ripening of Town's first refusal option due to defective notice, Town cannot waive provisions of statute), *judgment entered*, 2007 WL 2875941 (Mass. Land Ct. Oct. 4, 2007).

II. The Appeals Court Order Enjoining The Transfer And Waiver Of Chapter 61 Property Interests Must Also Be Made Permanent Because It Cannot Be Separated From The Illegal Expenditure Of Funds For The Same Property And The Purported Waiver Is Otherwise Illegal.

a. The transfer of the Town's property interests, including its c. 61 rights, must also be enjoined.

The Board and the Railroad spend an inordinate amount of time in their briefs arguing that Plaintiffs did not challenge transfer and waiver of the Town's c. 61 rights under M.G.L. c.

[1] While Justice Meade suggested that a new Town Meeting authorization to acquire property *may* provide the Board with discretion to purchase property outside of c. 61, that did not happen at the October 2020 Special Town Meeting nor was such an authorization sought or voted on at the recently-held May 22, 2021 Annual Town Meeting. At any rate, the Board did exercise the Option and cannot now waive and transfer the Town's c. 61 property interest without further Town Meeting authorization to release those property rights.

40, § 53. The Railroad argues that Plaintiffs did not challenge the transfer under Count I but the Railroad completely misses that Plaintiffs specifically did challenge the c. 61 transfer under M.G.L. c. 40, § 53 in Count II. The transfer is illegal under both c. 61 and c. 40, § 3, and Plaintiffs have standing to challenge the transfer. Indeed, Plaintiffs also included the c. 61 transfer argument under § 53 in their Motion for Preliminary Injunction. And in their Supplemental Memorandum following oral argument on the Preliminary Injunction, Plaintiffs made clear that the Board lacks authority to transfer the Town's c. 61 property interests without further Town Meeting approval. Because the Superior Court's order denying Plaintiffs' Motion for Preliminary Injunction was so scant, narrowly focusing on the authorization for the acquisition of the Forestland, the impropriety of the c. 61 transfer was not fully briefed for the Single Justice. However, the Single Justice did have all of the pleadings before him when he reversed the Superior Court's denial. The Railroad misunderstands both the nature of the Verified Complaint and the Single Justice's order.

Justice Meade's order is clear: "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". (emphasis added). The "transferring [of] any property interests" can only mean the purported waiver and release of the Town's c. 61 and c. 79 rights. There are no other "property interests" included in the Settlement Agreement which the Board could transfer. Meade's order already expressly enjoined and addressed the issuance of bonds that would be used to purchase the property and making expenditures and paying costs that would go to the land and hydrogeological surveying. There are simply no property interest

transfers by the Board contemplated in the Settlement Agreement other than the c. 61 and c. 79 transfers.[2]

Regardless, the transfer of c. 61 property rights is so wrapped up in the illegal expenditure of funds in the Settlement Agreement that it cannot be carved out. Despite the Railroad's best efforts in its Opposition, the relinquishment of the Town's property rights cannot be cleaved from the expenditure of funds for acquisition of the same property that is subject to those rights. The Superior Court must make the Single Justice's injunction permanent, including enjoining the transfer of the Town's c. 61 and c. 79 property rights.

b. The c. 61 transfer by the Board is independently illegal.

The Railroad argues that "[t]en taxpayers may not dictate how a select board exercises its discretion under G.L. c. 61, § 8." But what the Railroad gets wrong is that Plaintiffs are not dictating how the Board exercises its discretion. Chapter 61, § 8 dictates the parameters of the Board's discretion (to exercise the first refusal option or not) and the means to exercise or not exercise the first refusal option. It is the statute, not Plaintiffs, which binds the Board's discretion to the binary choice of "all-or-nothing", as Justice Meade correctly observed. And, here, the Board chose "all". The Board took all necessary steps to exercise, and did validly exercise, the Town's first refusal Option. See Plaintiffs' Memorandum in Support of Motion for Judgment on the Pleadings at pp. 4-5. The Board did not, at any point, have the authority under § 8 to negotiate different terms, assign the first refusal option, release the exercised option or revoke the exercised option. Id. at pp. 12-15. The Railroad feebly attempts to rewrite history but leaves gaping holes in its analysis. The Railroad simply has not answered whether or when the

[2] The Board's only obligations within the Settlement Agreement are the payment of $587,500 plus rollback taxes; the cost sharing of the land and hydrogeological surveys; the release of the Town's claims against the Railroad; and the waiver and release of the first refusal Option under c. 61 and a right to take any property under c. 79.

first refusal Option was triggered, a condition precedent for the Board to be empowered with a discretionary decision and if that never happened, the c. 61 rights remain in full. Smyly, 2007 WL 2875942, at *5. On the other hand, if the Option was triggered, by written or constructive notice, the Board validly exercised the Town's Option. But this is not an abstract, academic question. The facts remain undisputed. The Board properly exercised the Town's first refusal Option to purchase the entire c. 61 Forestland for $1,175,000 and the Town Meeting appropriated funds for that purpose.

The Board, for its part, is even more equivocal on its exercise of the first refusal Option, admitting that it used its authority to validly exercise the Town's c. 61 Option but then suggesting that it "agreed to waive its right to further exercise any right of first refusal the Town has pursuant to G.L. c. 61, §8" in the Settlement Agreement. Board's Memo at Arg. C (2) (emphasis added). The Board does not explain what possible "further exercise" there could be after having validly exercised the Option. Again, the Board had a binary choice: to exercise the Option or not exercise the Option. It chose the former and its discretion ended there. With no cite to any authority, because none exists, the Board now claims that it "may waive its authority to exercise such [c. 61] right . . . even after initially voting to exercise it". Setting aside the fact that the Board did far more than simply "vote" to exercise the Option – it also recorded notice of exercise of the Option at the Registry of Deeds and provided such notice to the Trust and Railroad, as required by c. 61, § 8 – what the Board is suggesting is that the language and intent of c. 61 does not apply to it. The Board would have this Court endorse a construction of c. 61 that would allow a Board to fully exercise a statutory option, following a public hearing and funding and recordation of the notice to exercise with the Registry of Deeds, only then to enter into a backroom deal, without Town Meeting approval – to give up the Commonwealth's finite

and shrinking Forestland, preserved for the benefit of the public, to be cleared by private for-profit development. [3]

The Board validly exercised the Option, creating a fully enforceable real property interest which, in addition to not being transferable under by c. 61, cannot be alienated without Town Meeting authorization, as required by c. 40, § 3. See Town of Franklin v. Wyllie, 443 Mass. 187, 197 (2005) ("It must be remembered that once the town acts, properly, it has a right that supersedes the rights of the seller and purchaser and which entitles the town ultimately to acquire for its purposes a large and valuable tract of land."); Harris v. Town of Wayland, 392 Mass. 237, 243 (1984); Oliver v. Town of Mattapoisett, 17 Mass. App. Ct. 286, 288-89 (1983) (majority vote of a town is necessary to convey any interest in land); Ten Taxpayer Grp. v. City of Fall River Redevelopment Auth., 2010 WL 5573723, at *3 (Mass. Super. Oct. 28, 2010) ("option to purchase creates an equitable property interest"). Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 32 (1983), is instructive, where the Court reversed so much of an agreement for judgment entered by the selectmen that included agreeing to encumber six lots owned by the Town because "[t]he power to alienate and dispose of real estate lies with the inhabitants of the town acting at town meeting", citing c. 40, § 3. The same result must follow here. The Board cannot alienate the Town's exercised c. 61 Option, a real property interest, without Town Meeting authorization.

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[3] To the extent the Board is now intimating that it can waive the Town's c. 61 rights because the initial July 2020 notice and exercise thereof were defective, the Board is estopped from such a position by its own pleadings, which allege and admit multiple times that its exercise of the Option was valid. See Board Answer, ¶ 52; Town Complaint against Railroad, ¶ 42-43; 51 ("The Hopedale Board of Selectmen validly exercised the first refusal option to purchase the Chapter 61 Land."). The Board further included in its letters and notice of exercise that the exercise was effective with respect to the July Notice and to the October 2020 notice of the Railroad's purchase of the beneficial interest in the same c. 61 Forestland for the same purchase price. See VC, Exs. 4 and 14. In any event, even if the exercise were invalid, the Board cannot prospectively waive the Town's c. 61 rights under the statute because c. 61 does not provide a process for a Board to choose to prospectively not exercise an unrealized right of first refusal in the abstract. Instead, c. 61, § 8 requires a sufficient notice of intent to sell or convert Forestland, which triggers the Board's authority to exercise or not exercise, followed by the expiration of 120 days or notice of non-exercise.

III. Plaintiffs Have Standing To Enforce These Rights.

Defendants want this Court to ignore the illegality of the Board's and the Railroad's actions through classic misdirection of the Court's attention. Defendants make this attempt by incorrectly restating Plaintiffs' position in their challenge of the Board's illegal actions. Defendants aver that Plaintiffs lack standing to directly challenge the Settlement Agreement which codified their illegal actions. The Plaintiffs are not, as Defendants suggest, collaterally attacking the Settlement Agreement or an entry of judgment.[4] Rather, Plaintiffs are appropriately requesting that this Court permanently enjoin the Board's specific illegal actions that the Board commemorated in the Settlement Agreement. Namely, the Board cannot, without Town Meeting authorization, make the contemplated payments or land acquisitions and the Board cannot waive, release or transfer the Town's c. 61 property interests. Each of these actions that the Board seeks to take is illegal and must be enjoined by the Court.

Defendants concede, as they must, that Plaintiffs have standing to bring their claims in Count I under c. 40, § 53. However, as discussed above, Defendants gloss over the fact that Plaintiffs' Count II claims are also brought, in part, under c. 40, § 53 because the Town's property interests, created through c. 61 and strengthened by the Board's exercise, may not be

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[4] Defendants' reliance on Harker v. Holyoke, 390 Mass. 555, 558-59 (1983) and Barrington v. Dyer, 95 Mass. App. Ct. 1116 (2019) to claim that a collateral attack is not permitted is misplaced. First, Plaintiffs are not attacking a judgment because there was no agreement for judgment entered in the Land Court case and, second, Plaintiffs' claims are attacking the illegal actions of the Board. Regardless, Defendants fail to establish the elements of a collateral attack, which mirror the principles forming the basis for the doctrine of res judicata. Old Colony Trust Co. v. Porter, 324 Mass. 581, 586 (1949). Moreover, Defendants also fail to establish that claim preclusion or issue preclusion are applicable here because a proscribed collateral attack must be "by a party on a prior judgment, order, or decree in an action between the same parties." Nat'l Lumber Co. v. Royal Tax Lien Servs., LLC, 95 Mass. App. Ct. 1103 (2019). Plaintiffs in this action were not parties to the Land Court. Defendants' glaring weakness is their allergic avoidance of the cases most on point and cited by Plaintiffs. See Daly v. McCarthy, 63 Mass. App. Ct. 1103, n. 14 (2005) (court disagrees with defendants contention that the matter is subject to res judicata because "[f]irst, res judicata does not apply because the plaintiffs were not parties in the first Land Court case" and "[s]econd, the very questions at issue [here] -whether the APR had continuing legal vitality, and whether the town officials could agree to a land swap deal that purported to terminate the APR-were not subject to being adjudicated in the first action."). Here, Plaintiffs' position is even stronger than in Daly, where an agreement for judgment had entered. See also Jarosz v. Palmer, 436 Mass. 526, 536 (2002) (entry of dismissal with prejudice does not apply to issue preclusion).

transferred or conveyed without Town Meeting authorization under c. 40, § 3. Indeed, the plain language of c. 40, § 53 "should be given a somewhat liberal construction." E. Side Const. Co. v. Town of Adams, 329 Mass. 347, 351 (1952) (quotations omitted). Here, the transfer and loss of the Town's property interests clearly fall within the interests and protections of c. 40, § 53.

Moreover, Defendants fail to address the authority cited by Plaintiffs that provides citizens standing to challenge land transfers that are part of transactions involving expenditures of money and transfers of property interests. See Oliver, *supra*; Fall River, *supra*. Nor do Defendants challenge standing under c. 214 § 3(10). See Plaintiffs' Memorandum in Opposition to Railroad's Motion for Judgment on the Pleadings, pp. 13-16. Nor do Defendants address the Plaintiffs' public rights mandamus cases. Id., pp. 16-18.

But most telling, Defendants do not even grapple with Daly, which is on all fours here. In Daly v. McCarthy, a ten taxpayer suit to enforce the purpose of an agricultural preservation restriction ("APR"), the court ordered that an APR deed be recorded despite the settlement agreement entered into between the board of selectmen and a private trust where the board purported to release the APR without town meeting approval. 2003 WL 25332929 (Mass. Land Ct. Aug. 04, 2003), *affirmed*, Daly, 63 Mass. App. Ct. 1103.

Thus, Plaintiffs' standing is essentially unchallenged and, regardless, Plaintiffs have the right and the standing to seek to enjoin the illegal transfer of the Town's c. 61 property interests. The intent of c. 61 is the protection and preservation of the Commonwealth's forestland. Part of the statutory scheme is giving municipalities the right to step in and acquire such land should its preservation ever be at risk of ending. Chapter 61 is strictly construed and cannot be tossed aside just because an aggressive, private party has no regard for public interest and thinks it can bully a Town into doing its bidding. The Board followed the requirements of c. 61 until it buckled

under the Railroad's duress and the Town's citizens have the right to enforce compliance with c. 61 now. This sordid deal involves illegal expenditure of public monies and a failure to comply with the statutory duties to protect public rights in land and the Board's actions thereunder must be stopped through entry of judgment on all counts.[5]

Finally, it is not sufficient to merely declare that the Board acted beyond its authority, but rather it is necessary to enforce the statutory obligations to order conveyance of all c. 61 land to Town and payment of the funds already appropriated for that acquisition. Plaintiffs have standing to obtain specific performance by mandamus and it is both necessary and appropriate here because "when the question is one of public right and the purpose is to procure the performance of a public duty, and no other remedy is open, a petitioner need not show that he has any special interest in the result: it is sufficient that as a citizen he is interested in the due execution of the laws." Bancroft v. Bldg. Comm'r of City of Bos., 257 Mass. 82, 84 (1926). See also Att'y Gen. v. Suffolk Cty. Apportionment Comm'rs, 224 Mass. 598, 609–10 (1916) (mandamus is appropriate "to set aside the illegal performance of duty and to compel the performance of duty according to law, by public officers"); Roy v. Town of Spencer, 1999 WL 228712, at *3, n. 3 (Mass. Super. Apr. 5, 1999) (citizen plaintiff has standing to compel selectmen to enforce Town's property interests). Here, the Board's discretion ended when it validly exercised the Town's Option and all that remains is its legal duty to fulfill the exercise of the Option. Accordingly, Defendants must be ordered to execute and fulfill the Purchase and Sale Agreement sent to the Trust and Railroad by the Town on November 2, 2020, as required by c. 61, § 8; and transfer title of the entire Forestland to the Town in exchange for payment of the appropriated funds.

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[5] Defendants argue that Count III's Article 97 claim fails because the Town did not first acquire the property. This is not correct. The protections of Article 97 apply equally to interests in real property, including statutory options, as set forth in Plaintiffs' Memo. at pp. 19-20.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above document was served upon the attorney of record for each other party by email on June 1, 2021.

Harley C. Racer