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. 2185CV0238

PLAINTIFFS' OPPOSITION TO BOARD'S MOTION FOR CLARIFICATION OF JUDGMENT

The Court's Order is clear. Because the Board was and remains unauthorized to agree to the key material term in the Settlement Agreement, the Agreement is void *ab initio*. All of the Agreement's terms are void, including the Board's purported waiver of the Town's c. 61 Option rights. Those rights remain in full despite the Railroad Defendants' attempts to skirt c. 61, steal away the Town's Forestland and destroy it. This Court astutely saw through the Railroad Defendants' malfeasances and appropriately gave the Board the opportunity and time to fulfill its duties to the Town. Unfortunately, this Motion is yet another example of the impotence of this

Board (or further evidence that it remains beholden to the Railroad) and further justifies the Citizen Plaintiffs' action.

It is not the Court's job to hold the Board's hand and walk them through how to complete what it and the citizens of the Town started. The citizens of Hopedale have resoundingly insisted and recently reaffirmed what the Board must do – enforce the Option and acquire all of the Forestland from the Trust.

The Town unanimously provided the Board the authority at the Special Town Meeting, c. 61 provides the Board with the process and this Court provided the Board the time to act. The Motion should be denied for the reasons set forth below, but ultimately because this Court's Order is clear.

Plaintiffs respectfully request that the Court deny the Town's Motion and extend the Injunction against the Railroad Defendants from any work in the Forestland for an additional 60 days following entry of the Court's order on the Town's Motion.

1. No Clarification of the Court's Order is Needed

The Court's Order is clear, written advisedly and there is no ambiguity. The Court notes early in the Order that "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." Order at 5. The Court took a closer look than the Land Court did when it denied the Town's Motion for preliminary injunction, setting the stage for the void Settlement Agreement. In this Court's Order at n. 6, the Court found that there was no uncertainty with respect to the c. 61 Forestland at issue, neither as to area nor as to cost. The Court also explains that the "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" and "the Town may not materially alter those

terms by exercising the Option only as to part of the land." Order at 8. To make the point abundantly clear, the Court held "[o]nce the Board elected 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." The Board is so bound, and the Board has a duty to act. [1] The Court then, twice, recognized that the Board has the authority to move forward with the exercise of the Option. The Court advised that the Board could "determine whether to seek Town Meeting approval for the Settlement Agreement, renew its attempts to enforce the Option, or to do neither." Order at 10 (emphasis added). Later, the Court went further and enjoined the Railroad from any land clearing activity or work in the Forestland for 60 days to give the Board the time to decide and to act. The injunction would not be necessary or make any sense if enforcement of the Option in full was not available. In entering the injunction, the Court hit the Board over the head with the reason for the injunction: "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." Id. at 12 (emphasis added). The Court could not be clearer, and the Court should not be asked by the Board to teach it how to bake bread. The Board has two experienced attorneys from two reputable law firms who should know how to read, interpret and act on the clear Order of the Court.

The Court's Order is appropriate. The unauthorized agreement is void and unenforceable, in its entirety. Town of Brimfield v. Caron, 2010 WL 94280, *10-11 (Mass. Land Ct. Jan. 12, 2010) (Town's right of first refusal pursuant to G.L. c. 61, §8 not yet ripe due to failure to strictly

[1] The Board's lack of backbone is exactly what caused the Citizen Plaintiffs to bring this action and include the request for mandamus to force the Board to finalize its obligations to the citizens of Hopedale and preserve the Forestland from wholesale industrial destruction by a notorious bad actor.

comply with notice requirements, all subsequent acts were "a nullity"); *after trial*, 2015 WL 5008125 (2015) (ruling that Town had right to purchase forest lot for $186,500); Daly v. McCarthy, 2003 WL 25332929 (Mass. Land Ct. Aug. 04, 2003) (in ten taxpayer suit, court invalidates purported release of agricultural preservation restriction ("APR") in a settlement agreement entered into by board of selectmen without town meeting approval), *affirmed*, Daly v. McCarthy, 63 Mass. App. Ct. 1103 (2005); Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 32 (1983), (reversing 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 unauthorized payment was the only provision of the Settlement Agreement requiring the Town to pay any funds or take actions. Without it, nothing remains. As the Court noted in the Order, the sum and substance of the Settlement Agreement is that the Railroad Defendants agreed to sell 40 acres of the Forestland and all of the wetlands for $587,500; the Railroad Defendants would donate a separate parcel, subject to Town Meeting approval and "[i]n return the Town agreed to waive its Option with respect to the remaining 90 acres of forest land." Order at 4 (emphasis added). Because the key consideration was unauthorized under c. 61, § 8 or c. 40, § 14, the Agreement is void.

Accordingly, the Town certainly can enforce the rights purportedly waived under the Settlement Agreement. The necessary consequence of the lack of authority to execute the unauthorized Settlement Agreement is that it is void, a nullity, does not exist. That is why Judgment on the Pleadings on Count I was entered and that is exactly the relief requested by Plaintiffs. The necessary consequence of being back at square one is that the Board now has the

choice, again, to seek approval to give away two-thirds of the Forestland to the Railroad or to seek to enforce the Town's Option.

The Railroad Defendants as "party who enters into a contract with a public entity without ensuring that proper authority exists for that contract does so at its own risk." Colantonio, Inc. v. Fitchburg Hous. Auth., 2008 WL 3311892, at *2 (Mass. Super. July 23, 2008) (denying summary judgment to contractor seeking recovery from housing authority that was not authorized to expend the funds under the contract) *quoting*, Potter & McArthur, Inc. v. Boston, 15 Mass.App.Ct. 454, 459 (1983). The Railroad Defendants cannot now enforce the unauthorized Settlement Agreement. Any "reading" of the Decision as saying there is nothing illegal or invalid about the Settlement Agreement is wishful thinking.[2] It is certainly illegal in the sense that c. 40, §14 has not been complied with for acquisition of municipal property. Plaintiffs assert it is similarly illegal for transfer of municipal property rights – an exercised and recorded option in real property – without Town Meeting approval under G.L. c. 40, §3 and in violation of the anti-assignment provisions of G.L. c. 61 § 8. See Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings at 14-16; Plaintiffs' Memorandum in Opposition to the Board's Motion for Judgment on the Pleadings at 7-9. In any event, without Town Meeting approval, the Court's decision made clear the Settlement Agreement is indeed unenforceable.

[2] The Railroad Defendants have indicated that they intend to submit a response or opposition to the Town's Motion to Clarify. The Court should reject, disregard and strike any submission from the Railroad Defendants. The Railroad Defendants were not a named party to Count I, the only claim for which the Town seeks clarification, and the Railroad Defendants lack standing to be heard on the Town's Motion. Daigle v. Daigle, 85 Mass. App. Ct. 1105 (2014).

2. The Board Seeks "Clarification" Because it is Paralyzed.

The real reason the Board seeks clarification, at the last possible day of Rule 59's ten-day deadline, is that it is frozen. As referenced by the Board in its Memorandum in Support of its Motion (at 6), the people of Hopedale made clear immediately following the Order by campaign, including a petition signed by over 500 residents, that they want Board to proceed to enforce the Option. See Petition, Signatures and Public Comments, attached hereto as **Exhibit 1**; November 19, 2021 Milford Daily News Article, *Judge Rules Hopedale Select Board Has Final Say in Protecting Forestland*, attached as **Exhibit 2**. The Board must finish what it started.

Despite the Court's clear 60-day Order, the Board has not scheduled a Town Meeting because it knows that approval of the ill-conceived Settlement Agreement, which would require a 2/3 vote, would surely be defeated. Undersigned counsel and counsel for Railroad have submitted their respective views on the choice now before the Board, with undersigned counsel strongly urging that the Board pursue enforcement of the Option, as an option clearly stated by this Court. See November 12, 2021 Lurie Letter , attached as **Exhibit 3**; November 15, 2021 Keavany Letter, attached as **Exhibit 4**.[3]

The Board is using this Motion as way to avoid responding to the citizen petition and comments and to refuse to allow public discussion in an open Board meeting. See November 22, 2021 Board of Selectmen video, beginning at timestamps 1:27:18 and 1:37:08 https://townhallstreams.com/stream.php?location_id=56&id=41404, where Board Chair Brian Keyes claimed that he was not trying to shut down the issue by blocking public discussion, but

[3] The Railroad Defendants' repeated assertions that that the Settlement Agreement remains fully enforceable and that the Town's c. 61 rights remain unenforceable due to the waiver in the Settlement Agreement and dismissal of the Land Court action based on that Settlement Agreement are simply wrong in light of the Court's decision. Ex. 4 at 2. Those claims are at odds with the Court's decision. If the Town intends to comply with the decision rather than appeal it, then plainly the c. 61 rights have not been validly waived and enforcement of the Option remains available to the Town.

plainly he is. Contrast this with Chair Keyes' penchant for using his position for bombastic soliloquy regarding this litigation. See October 25, 2021 Board of Selectmen meeting beginning at timestamp 46:05, https://townhallstreams.com/stream.php?location_id=56&id=40754.

Though the Board's spine needs stiffening, that is not the Court's job. However, if the Court is inclined allow the Motion, "clarification" that enforcement of the Option is indeed available to the Town – that the Court meant what it said – may help the Board understand that such option is not only available but is indeed viable on the facts of this case. Moreover, it may help the Board realize, again, that it need not be coerced by the Railroad Defendants' bluster that it would be violating the non-existent Settlement Agreement if it continues its initial efforts to enforce the Option.

3. The Motion should be denied in any event as served without consultation required under Rule 9C.

The Motion should be denied because the Board failed to consult as required under Sup. Ct. R. 9C. As the Board is aware, time is of the essence as the Court's 60-day injunction ticks by. On the tenth day following the Court's Decision, the Board served its Motion, without having previously consulted with Plaintiffs' counsel or even mentioning the possibility of such a motion. Following the entry of the Court's Order, counsel for Plaintiffs reached out to counsel for the Board to discuss the clear implications of the Order immediately on November 10, by leaving voicemails on his office and cell phones and two days later by the aforementioned letter attached as Ex. 3. Despite this, counsel for the Board never responded or reached out to confer about this Motion, which may have narrowed the issue considerably given that the Court's Order is not ambiguous or inconsistent to undersigned counsel.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny the Town's Motion for Clarification and, in any event, continue the injunction for 60 days from the entry of an order on the Motion.

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,

/s/ David E. Lurie

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November 24, 2021

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 November 24, 2021.

/s/ Harley C. Racer
Harley C. Racer