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May 11, 2023

SUBMITTED VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: *Grafton and Upton Railroad Company – Petition for Declaratory Order*
STB Finance Docket No. 36696

Dear Ms. Brown:

I am attaching for e-filing the Reply of The Town of Hopedale, Massachusetts to Petition for Declaratory Order and Reply to Motion for Expedited Consideration in the above-captioned proceeding.

Please do not hesitate to contact me with any questions.

Sincerely,

Charles A. Spitulnik

Enclosure

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36696

GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER

REPLY OF THE TOWN OF HOPEDALE, MASSACHUSETTS TO PETITION FOR DECLARATORY ORDER AND REPLY TO MOTION FOR EXPEDITED CONSIDERATION

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Counsel for the Town of Hopedale, Massachusetts

Dated: May 11, 2023

INTRODUCTION

Petitioner the Grafton & Upton Railroad Company ("GURR") portrays its Petition as presenting a "straightforward" question of whether the Town of Hopedale ("Town" or "Hopedale") can use its power of eminent domain to acquire property GURR claims it wants for a planned transload facility. That is a gross misstatement of the case because GURR fails to disclose that there is ongoing state court litigation about GURR's ownership of the property, independent of Hopedale's eminent domain power. *See Reilly v. Town of Hopedale,* 102 Mass. App. Ct. 367, 369 (2023) (attached as Exhibit 1). Ignoring that critical fact, GURR attempts to use principles of federal preemption as a sword to take control of 155 acres of land that includes 130 acres of protected forest land (the "Forestland") in violation of Massachusetts law.[1]

Under Massachusetts General Laws Chapter 61, Hopedale has a right of first refusal to acquire the Forestland. However, in what one Massachusetts court described as a "flagrant violation" of state law, GURR acquired control of the Forestland in a manner that deprived Hopedale of its statutory right. The legality of GURR's actions, and the right of Hopedale to acquire the Forestland, is the subject of ongoing litigation in Massachusetts Land Court. If successful, as two courts have strongly suggested is likely, GURR will not own the Forestland; Hopedale will.

Because state law will determine whether GURR owns the Forestland, longstanding Board precedent requires that the Board decline to accept the Petition and allow the Massachusetts courts to resolve that threshold property issue first. Simply stated, if Hopedale prevails, GURR will have no property right in the Forestland and cannot build its purported transload facility. Further, Hopedale will not need to exercise its eminent domain authority to acquire the Forestland, making

[1] The 25 acres of non-forest land are wetlands.

GURR's preemption argument moot. In short, there is no reason for the Board to exercise its discretion to issue a declaratory order until the Massachusetts courts have resolved the underlying property issue.

Even with respect to the narrow issue presented by GURR, the issue is not simply whether Hopedale can condemn so-called railroad property. GURR does not have a bona fide plan for a transload facility, or for any railroad use of the Forestland. Although GURR had drawn plans purporting to show a large transload facility, that plan is physically unworkable. The Forestland is steeply sloped – *averaging* 13% with large portions exceeding 20% – making it unsuitable for railroad use. Moreover, the truck loading areas next to warehouses are too small to accommodate trucks, further casting doubt that the plans are bona fide. Further, the plans were drawn only *after* Hopedale approved the use of eminent domain, strongly suggesting that the plans are an after-the-fact invention to create the appearance of a railroad use. In fact, one of GURR's principals acknowledged that GURR's owner has engaged in "preemption activities" on the Forestland, seemingly admitting that GURR has acted pretextually. If the Board decides to address the preemption issue, it should adopt a procedural schedule that allows for discovery into whether GURR has a bona fide railroad use for the Forestland so the Board can make an informed decision on a fully developed record.

Further, there is no urgency to this matter that requires expedited consideration, as GURR requests. No railroad construction is occurring on the Forestland and GURR has voluntarily agreed to stay construction pending the resolution of the federal court litigation or upon thirty days' notice to Hopedale. Further, GURR's principals are embroiled in internal litigation over control of GURR that GURR's lawyer has admitted is preventing GURR from undertaking any construction on the Forestland. There is nothing urgent about this case.

As Board Member Miller noted in an earlier case involving GURR's transloading activities, "Section 10501(b) should not be used as a sword—freeing rail carriers from regulatory restraints that would apply to any other entity engaging in precisely the same economic activity—but rather as a shield against unreasonable interference with interstate commerce, as was intended by Congress." *Diana Del Grasso et al. – Petition for Declaratory Order*, FD 35652, Slip Op. at 11-12 (STB served July 31, 2017) (Board Member Miller concurring in part and dissenting in part). So too here, GURR attempts to use its purported transload facility as a sword to evade generally applicable Massachusetts law that prevents GURR from acquiring the Forestland in the first place. The Board should not allow GURR to abuse the Board's jurisdiction but should allow the Massachusetts state courts to decide whether GURR has a property interest in the Forestland. In the interim, the Board should dismiss this proceeding, or hold it in abeyance.

LEGAL AND FACTUAL BACKGROUND

There is more to this case than just a dispute over whether Hopedale's exercise of its eminent domain authority is preempted. Massachusetts law protects designated forest land from *any* development and there is ongoing state court litigation in which Hopedale seeks to vindicate its state law rights that GURR has wrongfully attempted to destroy. To properly understand this case, the Board must understand that Massachusetts law and the related litigation in state court.

I. MASSACHUSETTS LAW ALLOWS TOWNS LIKE HOPEDALE TO ACQUIRE CERTIFIED FOREST LAND

The central issue in this dispute is whether GURR can acquire land designated as "forest" pursuant to Massachusetts General Laws Chapter 61. The current version of Chapter 61 dates to 1981 and applies to all land certified as forest land and subject to a forest management plan. Chapter 61 is intended to "promote the preservation and maintenance of forest land," which the

statute defines as "land devoted to the growth of forest products." Mass. G.L.c. 61, § 1 (attached as Exhibit 2).

Chapter 61 does this in several ways. First, the statute provides that land certified as forest land is subject to lower tax rates. Mass. G.L.c. 61, §§ 2, 2A, 5. Second, designated forest land is subject to a lien in favor of the municipality in which it is located. *Id.* at § 2. Third, if the owner of certified forest land sells the property or converts it to a non-forest purpose, it may be subject to roll-back taxes or a conveyance tax. *Id.* at §§ 6, 7. Fourth, and of particular importance here, the statute gives the municipality a right of first refusal if the owner sells the property or seeks to convert it to a non-forest purpose. *Id.* § 8, 12th par. The statute provides a mechanism for a municipality to preserve certified forest land even if the owner has other plans.

II. HOPEDALE'S INITIAL ATTEMPT TO EXERCISE ITS CHAPTER 61 OPTION TO ACQUIRE THE FORESTLAND

The Forestland is a 130.18-acre tract of forest certified under Chapter 61. *Reilly*, 102 Mass. App. Ct. at 370 (Exhibit 1). The Forestland is located in Hopedale and owned by the One Hundred Forty Realty Trust ("140 Trust"). On June 27, 2020, GURR agreed to purchase the Forestland from the 140 Trust. On July 9, 2020, GURR sent a notice to Hopedale pursuant to Chapter 61 informing Hopedale of the proposed purchase and stating that GURR intended to use the property for non-forest, railroad purposes. *Id.* at 371. Hopedale subsequently told GURR that the notice was statutorily defective, requested a revised, corrected notice, and reserved all of its rights under Chapter 61. *Id.*

Rather than provide a corrected notice, GURR implemented a plan that was apparently intended to avoid Hopedale's right of first refusal. *Id.* Instead of acquiring the Forestland itself, GURR acquired the 140 Trust and installed GURR's two principals as the trustees. *Id.* Hopedale took the position that the change in control triggered Hopedale's right of first refusal and called a

Town Meeting, which appropriated the funds to acquire the Forestland. *Id.* at 372. Despite that vote, GURR claims to have effective control over the Forestland and has been treating the Forestland as its own property.

III. INITIAL LAND COURT LITIGATION TO PREVENT GURR'S CONVERSION OF THE FORESTLAND

GURR ignored Hopedale's demand and soon began to clear the forest. *Id.* Hopedale filed suit in Massachusetts Land Court to obtain declaratory relief vindicating its Chapter 61 right of first refusal. *Id.* at 372. GURR filed a petition with the Board seeking a declaration that Chapter 61 was preempted, improperly characterizing the statute as implicating "eminent domain." *Id.* (Petition for Declaratory Order of GURR, FD 36464 (Filed Nov. 23, 2020)). Although the Land Court denied Hopedale's request for injunction because the July 9 notice may have been defective, the Land Court made clear that Hopedale retained its Chapter 61 option and directed the parties to mediate. *Reilly*, 102 Mass. App. Ct. at 372.

In January 2021, Hopedale's Select Board ultimately reached a purported settlement with GURR. *Id.* at 373. In summary, the settlement allowed GURR to retain approximately 71 acres of the forest land and GURR would sell and donate to Hopedale a total of approximately 84 acres of both forest and non-forest land. *Id.* The parties agreed to, and subsequently did, dismiss the STB and Land Court proceedings, and Hopedale attempted to waive its Chapter 61 rights and eminent domain rights with respect to the land retained by GURR. *Id.*

IV. SUPERIOR COURT LITIGATION TO VACATE THE SETTLEMENT AGREEMENT

A group of Hopedale residents filed suit in Massachusetts Superior Court against Hopedale and GURR challenging the settlement agreement and Hopedale's authority to execute its terms. *Id.* at 373. On November 4, 2021, the Superior Court held that "the settlement agreement is not effective" because Hopedale exceeded its authority by not acquiring approval from Town Meeting

of its proposal to acquire some, but not all, of the Forestland. *Id.* at 374 (quoting Superior Court). The Superior Court also held that because the settlement agreement was beyond Hopedale's authority, Hopedale retained "the right to continue attempting to enforce the [Chapter 61] [o]ption." *Id.*[2] No party appealed that portion of the decision.

The Superior Court dismissed Count II, which sought a declaration that Hopedale's waiver of its Chapter 61 option was void and the option remained enforceable, on the ground that the citizens lacked standing, without addressing the merits. *Id.* at 374.

V. HOPEDALE'S EFFORT TO VACATE SETTLEMENT AGREEMENT IN LAND COURT

Relying on the Superior Court's ruling that the Settlement Agreement was unauthorized, Hopedale filed a motion in the Land Court to vacate the stipulation of dismissal arguing that the Superior Court's ruling was an extraordinary circumstance warranting reinstatement of the Land Court case. *Id.* at 375. The Land Court denied that motion on the narrow ground that even if Hopedale lacked the authority to enter into the Settlement Agreement, Hopedale did have the authority to dismiss the case. *Id.* at 375-76. Although Hopedale initially appealed that decision, it subsequently withdrew the appeal. *Id.* at 376, n. 16. Hopedale has refiled its motion to vacate based on the subsequent decision of the Massachusetts Appeals Court. *Infra* 9.

Separately, the citizens also sought relief from the Land Court to set aside the Settlement Agreement by, *inter alia*, seeking to intervene in the case and seeking to join Hopedale's motion to vacate the stipulation of dismissal. *Id.* at 376. After the Land Court denied Hopedale's motion to vacate, the Land Court denied the citizens' motions as moot and held they lacked standing to

[2] Subsequent to the Superior Court judgment, the Town Meeting voted not to approve the settlement agreement or any of its terms.

seek a declaration that the settlement agreement is void and unenforceable. *Id.* at 377. The citizens appealed those decisions.

VI. CITIZENS' LITIGATION IN SUPERIOR COURT TO PRESERVE FORESTLAND

While those appeals were pending, the citizens sought an injunction in the Superior Court to prevent GURR from cutting down more trees on the Forestland. *Reilly v. Town of Hopedale*, Civil Action No. 2185CV238, Memorandum and Order on Motion to Preserve Status Quo (Mass. Sup. Ct. May 6, 2022) (attached as Exhibit 3). Although the Superior Court reluctantly denied the motion, it made clear its view that GURR's "acquisition of a 'beneficial interest in the Forestland … was a flagrant violation of Chapter 61." *Id.* at 4. The Superior Court further stated its view that

> the actions of [GURR] were wrong. In addition there appears to be grounds to rescind the Settlement Agreement. This case, however, does not present an opportunity for this court to address those issues.

Id. at 5. As discussed below, those issues are now before the Land Court, and may result in a finding that GURR does not own the Forestland.

VII. MASSACHUSETTS APPEALS COURT CONFIRMS THE CITIZENS' ABILITY TO CHALLENGE THE SETTLEMENT AGREEMENT AND TO PURSUE HOPEDALE'S CHAPTER 61 RIGHTS

The citizens' appeals from both the Superior Court and the Land Court were considered by the Appeals Court in a single decision, issued on March 7, 2023. The Appeals Court affirmed the Superior Court's decision, including that the Settlement Agreement was ineffective, that Hopedale could seek to enforce its Chapter 61 Option to purchase the Forestland, and that the citizens lacked standing to challenge the Settlement Agreement as illegal under Chapter 61. *Id.* at 377-380. The Appeals Court reversed the Land Court's decision denying the citizens' motion to intervene to vacate the stipulation of dismissal and the Settlement Agreement. *Id.* at 380-385. In doing so, the Appeals Court made clear that that the citizens could enforce the Superior Court's decision finding

the Settlement Agreement to be unenforceable and that Hopedale's Chapter 61 right of first refusal remained effective. *Id.*

First, the Appeals Court emphasized that the Superior Court had ruled in the citizens' favor that "the [Town] exceeded its authority when it entered into the settlement agreement without town meeting authorization" and that "the settlement agreement could not take effect until approved by a town meeting and that, without such town meeting approval, Hopedale retained its right to attempt to enforce its option." *Id.* at 383-84. Because those decisions were not appealed by Hopedale, GURR, or the citizens, they are binding on Hopedale and GURR and are "entitled to full respect and force." *Id.* at 385.

Second, the Appeals Court reversed the Land Court's decision that the citizens' motion to intervene was moot explaining that because the "citizens sought to intervene in the Land Court to effectuate the Superior Court judgment by having the Land Court stipulation of dismissal vacated on the ground that the Settlement Agreement was not effective, the citizens' motion to intervene was not moot." *Id.* at 383.

Third, although the Appeals Court declined to rule on the merits of the citizens' motion to intervene, it gave strong instructions to the lower court to allow the citizens to enforce the Superior Court's decision by vacating the Settlement Agreement:

> But it is nonetheless important to ensure that events and decisions in the Land Court case not make toothless the judgment and rulings in the Superior Court case, particularly in a matter of public significance such as this one and where the citizens have not been given an opportunity to be heard. On remand, the Land Court judge should keep in mind that the Superior Court has determined some of the substantive issues on the merits, that the citizens are entitled to the benefit of those favorable rulings, that the rulings are binding on Hopedale, the railroad, and the trust (all of whom were parties in the Superior Court case and have not appealed), and that those rulings are entitled to full respect and force. The Land Court judge should ensure that her rulings are not inconsistent or unfair in light of

> rulings that have been made in a sister department of the trial court. These considerations will come into special play when deciding the citizens' motion to vacate the stipulation of dismissal.

Id. at 385. Accordingly, the Court vacated the order denying the citizens' motion to intervene and remanded the matter "to the Land Court for further proceedings consistent with this opinion, including consideration of the citizens' motion to join the town's motion to vacate the stipulation of dismissal." *Id.*

The Appeals Court decision makes clear that despite the twists and turns of prior litigation, the question of GURR's right to own the Forestland is very much contested and uncertain, and that Hopedale retains its Chapter 61 rights to acquire the Forestland.

The Land Court has scheduled a status conference on May 16, 2023. Hopedale has filed a Renewed Motion to Vacate in light of the Appeals Court's decision and the citizens have filed their own motion to vacate. Hopedale and the citizens have also filed motions to transfer the matter to the Superior Court, as indicated by the Appeals Court decision. The success of these motions would result in Hopedale's ability to pursue its Chapter 61 rights and take ownership of the Forestland.

VIII. FEDERAL COURT LITIGATION CHALLENGING HOPEDALE'S EXERCISE OF EMINENT DOMAIN TO ACQUIRE THE FORESTLAND

While the litigation in the Superior Court and the Land Court was proceeding, Hopedale, following a change in membership of the Select Board (Hopedale's governing body), considered its options. In addition to pursuing, for a time, an appeal of the Land Court decision, Hopedale voted, at a properly convened town meeting, to exercise its power of eminent domain to acquire most of the Forestland, expressly excluding the land on which GURR's rails lie and any other portions of the Forestland currently used by GURR for railroad operations or transloading. Shortly after Hopedale approved that action, GURR filed a lawsuit in the U.S. District Court of

Massachusetts seeking to block the condemnation and obtain a declaration that Hopedale's exercise of eminent domain was preempted by the ICC Termination Act, 49 U.S.C. § 10501(b).

After extensive briefing, on March 31, 2023 the District Court issued a Memorandum & Order addressing Hopedale's Motion to Dismiss the Complaint and GURR's Motion for Preliminary Injunction to enjoin Hopedale's exercise of eminent domain and an Enforcement Order issued by the Hopedale Conservation Commission intended to stop GURR from violating the Massachusetts Wetlands Protection Act. *Grafton & Upton Railroad Co. v. Town of Hopedale*, Case No. 22-cv-40080-ADB, Memorandum & Order at 1-3 (D. Mass. March 31, 2023) (attached as Exhibit 4). The District Court dismissed several of GURR's claims, but granted a preliminary injunction primarily on the ground that GURR had a substantial likelihood of success on the merits of its claim that the ICCTA preempts Hopedale's ability to condemn the Forestland due to GURR's purported transload project. *Id.* at 12-25. Without any explanation, the District Court stayed the case and ordered GURR to file a Petition for Declaratory Order with the Board regarding Hopedale's taking and the Conservation Commission's Enforcement Order. *Id.* at 27. Importantly for this proceeding, the District Court did not discuss or address the ongoing state court litigation challenging GURR's title to the Forestland and the effectiveness of Hopedale's 2021 Settlement Agreement. Nor did the District Court consider the impracticality of GURR's plans or how the continued uncertainty of GURR's ownership of the Forestland affected the preemption or likelihood of success on the merits analysis, even though Hopedale briefed those issues.

Hopedale has appealed the District Court's decision to the U.S. Court of Appeals for the First Circuit and GURR filed the Petition in this proceeding on April 14, 2023. While the First Circuit considers the appeal, by letter dated April 19, 2023 ("April 19 Letter Agreement") (attached as Exhibit 5), GURR has agreed to suspend any construction activities on the Forestland (except

work required by the Environmental Protection Agency or Army Corps of Engineers), or upon 30-days' notice provided by GURR to Hopedale that GURR will be commencing construction activities. As of the date of this Reply, GURR has not provided any such notice.

IX. GURR IS HAMSTRUNG BY INTERNAL STRUGGLES

In addition to the uncertainty created by the state court litigation over Hopedale's Chapter 61 rights, GURR is embroiled in litigation between two of its principals, Mr. Delli Priscoli and Mr. Milanoski, over ownership and control of GURR. Although it is not necessary for the Board to understand the substance of that litigation, it is important to understand that the litigation has effectively paralyzed GURR's ability to pursue projects like the putative transload facility on the Forestland. Mr. Jack Merrill, who represents GURR in that litigation has stated that GURR "cannot fully operate, it can't put any kind of – getting loans out or encumbering any debts, so it's effectively crippled right now" by the dispute over its ownership. *See Rule 12 Hearing Before Hon. Valerie A. Yarashus at 1-21, Jon Delli Priscoli v. Michael Milanoski, et al.*, Docket No. 2385CV00022 (Worcester Superior Court Jan. 10, 2023) (attached as Exhibit 6).

REPLY TO MOTION FOR EXPEDITED CONSIDERATION

There is no Board rule that allows for expedited consideration of a petition for declaratory order, and GURR's Motion for Expedited Consideration fails to present any reason for the Board to exercise its discretion to give this matter priority. GURR seeks to expedite consideration because of the purported need to build a transload facility on the Forestland. But other than pointing to general demand for transload capacity in Massachusetts, and general expressions of shipper interest, GURR presents no evidence of actual urgency. GURR does not provide any target completion date for its putative transload facility or identify any shippers waiting to use that projected facility by any date. Indeed, GURR has voluntarily agreed to stay construction of its putative transload facility and has further admitted in open court that its own internal strife and

related litigation are preventing it from moving forward with construction of any transload facility on the Forestland. There is simply no urgency to this matter and GURR provides no reason for the Board to divert resources from the other important matters before it to address this matter on an expedited basis.

First, GURR argues that expedited consideration will assist the District Court in reaching a final decision in that case. Motion at 1-2. Although it is true that the District Court stayed that case while GURR pursues its Petition, the District Court did not state any reason why it ordered GURR to file a Petition, and did not point to any specific decision or action it may take that depends on the Board's decision. *See* District Court Memorandum & Order at 27 (Exhibit 4). Indeed, there are no motions pending in the District Court, no pre-trial deadlines have been set, no trial date has been set, and Hopedale has appealed the injunction to the U.S. Court of Appeals for the First Circuit. There is simply no urgency to the matter, and there is obviously no negative impact from the case remaining in abeyance while the Board addresses the matter.

More fundamentally, GURR fails to acknowledge the substantial, continuing, litigation over whether it even owns the Forestland and whether, even if it does, it has a *bona fide* plan to use the property for railroad purposes given the steep slope of the property and the facially unworkable nature of its so-called plans. The District Court did not address those issues and would benefit more from a considered decision from this Board that addresses *all* of the relevant facts, rather than a hasty decision based on incomplete facts.

Second, GURR argues that this case is a "straightforward" preemption case with "no factual disputes." Motion at 2. Neither description is accurate. Critically, this is not simply a preemption case, given the substantial doubt that GURR even owns, or can acquire, the Forestland under Massachusetts law. GURR claims the property based on a legally void agreement, and one

Massachusetts court has held that Hopedale lacked the authority to waive its Chapter 61 rights and that GURR obtained control of the property through a "flagrant violation" of state law. Exhibit 3, Slip Op. at 4. The Massachusetts Appeals Court has now affirmed the ability of Town residents to challenge the transaction and to preserve Hopedale's statutory right to exercise its right of first refusal. 102 Mass. App. Ct at 385 (Exhibit 1). If that litigation ultimately confirms that GURR wrongfully obtained the Forestland, there can be no preemption. The state law issue is complex and must be resolved in state court before this Board (or the District Court) can meaningfully address the preemption issue. *See Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP RLY Inc.,* STB Docket No. 35692 (Decided April 24, 2023) (stating that disputes concerning state contract and property law should be decided by appropriate courts with expertise in those matters, not by the Board.). *See also, infra*, 16-20.

Moreover, even with respect to the preemption issue regarding eminent domain authority, there is a disputed factual issue as to whether GURR has a bona fide plan to use all, or any, of the Forestland for railroad purposes. *Infra*, 20-25. To properly resolve that issue, should the Board accept the Petition, Hopedale needs time to take discovery on GURR's purported plans and the Board should allow time for discovery and additional briefing to assure that this issue – which the District Court did not address – is fully and properly considered.

Third, GURR argues that an expedited decision will bring rail service to customers and that its current development work and financing would be jeopardized by delay. Motion at 3-4. That is simply not true. There are no rail facilities on the Forestland now, and GURR itself has halted any construction (other than environmental work required by the EPA and Army Corps of Engineers) pursuant to the April 19 Letter Agreement. Further, the internecine litigation between GURR's principals has left GURR unable to "fully operate, it can't put any kind of – getting loans

out or encumbering any debts, so it's effectively crippled right now . . . ." Exhibit 6, Transcript of Motion Hearing, at 21:1-3. That dispute includes two lawsuits – *Milanoski v. Delli Priscoli*, Case No. 2384-cv-00071 (Mass. Superior Ct.); *Delli Priscoli v. Milanoski*, Case No. 2385-cv-00022 (Mass. Superior Ct.) – which will likely take a year or more to resolve. GURR's putative project is not moving forward for reasons independent of this proceeding and expedited resolution of this proceeding will not speed construction of the putative project. There is no particular urgency to this matter.

In conclusion, expediting consideration of this proceeding will not expedite construction of any rail facility, will not expedite the delivery of rail service, and will not allow GURR to move forward. If the Board decides to allow this proceeding to move forward despite the state court litigation over Hopedale's Chapter 61 rights, there is simply no reason to expedite consideration of this proceeding, and the Board should allow the case to proceed in the ordinary course.

REPLY TO PETITION FOR DECLARATORY ORDER

I. STANDARD FOR INSTITUTING A DECLARATORY ORDER PROCEEDING

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to "terminate controversy or remove uncertainty" regarding issues of federal preemption. *Grafton & Upton R.R. Co. – Petition for Declaratory Order* FC 36518, Slip Op. at 2 (STB served Nov. 3, 2021). However, when the preemption issue depends on the resolution of an underlying state law issue regarding ownership of property, the Board will decline to exercise jurisdiction. For example, in *Allegheny Valley R.R. Co. – Petition for Declaratory Order – William Fiore*, FD 35388, Slip Op. at 3 (STB served April 25, 2011), the Board declined to open a declaratory proceeding and discontinued the proceeding when the case turned on the size and extent of a railroad easement, which was a matter of state law. *See also Grafton & Upton*, *supra* (holding proceeding in abeyance pending resolution of state law determination of the location and size of

easements). Because GURR's preemption claim depends first on resolving ongoing litigation in state court regarding the validity of GURR's acquisition and claim to control of the Forestland, the Board should dismiss the petition, or hold it in abeyance, pending resolution of those issues in state court.

II. THE PREEMPTION QUESTION PRESENTED BY GURR IS PREMATURE GIVEN THE DISPUTE OVER GURR'S OWNERSHIP OF THE FORESTLAND

Questions of property and contract rights are matters of state law that the Board has long declined to address. *V&S Ry.—Pet. for Declaratory Ord.—R.R. Operations in Hutchinson, Kan.*, FD 35459 (STB served July 12, 2012) (question about property rights should be decided by the district court applying state property and contract law); *Allegheny Valley R.R.—Pet. for Declaratory Ord.—William Fiore*, FD 35388 (STB served Apr. 25, 2011) (questions concerning size, location, and nature of property rights are best addressed by a state court); *General Railway Corp., D/B/A Iowa Northwestern R.R. – Exemption for Acquisition or R.R. Line – in Osceola and Dickinson Counties, IA*, FD 34867, Slip Op. at 4 (STB served June 15, 2007) (disputes about the "validity of [an]agreement, or ownership of the Line, involve[] questions of state contract and property law … that are best left for state courts to decide."); *Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP RLY Inc.*, FD 35692, Slip Op. at 4 (STB served April 24, 2023) ("although federal preemption is broad, the Board has consistently held that disputes concerning state contract and property law should be decided by appropriate courts with expertise in those matters, not by the Board); *Allegheny Valley R.R.—Pet. for Declaratory Order—William Fiore*, FD 35388 (STB served Apr. 25, 2011) (denying a petition for declaratory order because the question posed was a property line dispute best adjudicated by the state court); *CSX Transp.—Aban. Exemption—in Allegany Cty., Md.*, AB 55 (Sub-No. 659) (STB served Apr. 24, 2008)

(holding that questions presented there involving an alleged error in the form of a deed transfer were matters best left for the state court to decide).

Because property rights are matters of state law, independent of Board jurisdiction, the Board has also long held that Board authority does not also preempt state law regarding the acquisition of property and does not allow a railroad to acquire property in a manner inconsistent with state law. *Eastside Community Rail*, Slip Op. at 4 ("Moreover, the Board explained [in a prior decision] that the federal authority to acquire a rail line is permissive, and that parties must also obtain the necessary property rights under state law in order to exercise that authority."); *General Railway Corp.*, Slip Op. at 4 ("It is well settled that the Board's issuance of a notice of exemption authorizing the acquisition of a line gives the petitioner permission to acquire the line, but does not mandate the acquisition"); *In re Chicago, Milwaukee, St. Paul and Pacific R.R. Co*., 882 F.2d 1188, 1191 (7th Cir. 1989) (affirming Interstate Commerce Commission's determination that its grant of authority to acquire and operate a line is "merely permissive," does not require the transfer of the line, and does not affect the rights and remedies of the parties to the transaction in the event of a dispute); *James Riffin – Petition for Declaratory Order,* STB Finance Docket No. 35245, Slip Op. at 6 (STB served Sept. 15, 2009), *aff'd* No. 09-1277 (D.C. Cir. Nov. 30, 2010) (per curiam) (failure to obtain a cognizable property interest in a line of railroad under state law rendered petitioner incapable of exercising the authority granted to him to acquire and operate the line); *James Riffin d/b/a The N. Cent. R.R. – Acquisition and Operation Exemption – In Baltimore City, MD*, STB Finance Docket No. 34982, Slip Op. at 3 (STB served Oct. 9, 2007) (the Board prevented use of, and revoked, a class exemption to operate on a dormant rail line when there were substantial doubts about an entity's ability to obtain property rights under state law).

Thus, a railroad must *first* comply with state law to acquire property *before* it can involve the protections of federal preemption regarding its activities on that property.[3]

Applying those basic principles, the Board has repeatedly held that it will not address a petition for declaratory order when resolution of an issue in the Board's jurisdiction, such as preemption, depends on the outcome of a disputed question of state law that is beyond the Board's jurisdiction. GURR is well aware of this principle because the Board recently rejected a similar Petition by GURR because preemption depended first on determining the nature and extent of property rights under Massachusetts law.

In *Grafton & Upton*, *supra*, GURR sought a declaration that the ICCTA preempted any state or local law that would prevent GURR from closing two private grade crossings. The Board declined to address that claim until the underlying issue of the nature of the easement rights were resolved:

> However, resolution of this dispute appears to be contingent upon the interpretation of an easement that Hopedale Properties allegedly has over Grafton & Upton's right-of-way. As the Board has explained, a court is typically the more appropriate forum for interpreting contracts and resolving state property law disputes. [citations omitted]. Here, what rights Hopedale Properties has, if any, with regard to the Crossings pursuant to the claimed easement is before the Superior Court of the Commonwealth of Massachusetts, Worcester County. And the court is the more appropriate forum to decide that issue.

Id. at 3. The Board subsequently did not address the preemption issue and held the proceeding in abeyance pending resolution of the state court issues. *Id.*

[3] This rule underscores why GURR's preemption argument is premature. The Board did not authorize or approve GURR's acquisition of the 140 Trust or its plan to build a transload facility on the Forestland, and no such approval was required. If there is no preemption of state property law when the Board does authorize acquisition of property, there is certainly no preemption when there has been no Board authorization.

Similarly, in *City of Milwaukie – Petition for Declaratory Order*, FD 35625, Slip Op. at 4-5 (STB served March 25, 2013) (citation omitted), the Board declined to address whether the enforcement of local laws against a railroad were preempted because of an underlying state law controversy as to whether the railroad owned the property. The Board explained:

> If the court determines that OPRC does not have a state law property interest in the land, and is therefore using public land for storage of its equipment without authorization, the City could eject or fine the railroad for its use of the land in violation of local regulations in the same manner it would eject or fine any other person. Otherwise, the railroad's unauthorized use of public land would be absolute and unrestrained.
>
> On the other hand, should the court determine that OPRC properly appropriated the land, and thus has a sufficient property interest therein, then the court could address the preemption issue raised here in the first instance and determine if application of the local regulations would unreasonably interfere with railroading.

In *Allied Indus. Dev. Corp. – Petition for Declaratory Order*, FD 35477, Slip Op. at 5 (STB served Sept. 17, 2015), the Board needed to determine whether certain track was ancillary or mainline track. The Board concluded that it could not perform that analysis until a state court decided whether the property had been conveyed to one of the parties as a matter of state law. *Id.* The Board explained that

> even if Federal preemption is applicable, that fact does not bar the state court from deciding whether the sale of Lot No. 62188 was valid under Ohio law. Neither party has suggested that the Board should address the merits of that dispute here. In fact, the Board generally leaves questions of state property law to state courts because they have the necessary expertise. [citations omitted]
>
> Accordingly, we will now return this proceeding to the state court so that it can determine the validity of the sale of Lot No. 62188. Knowing whether MVRY validly sold Lot No. 62188 under state law would inform the Board's determination of what regulatory approvals may be needed.

Id. at 5-6.

The Board went on to explain how the different possible outcomes of the state court litigation would affect the Board's analysis of the federal issues, underscoring that resolution of the state law issues was a critical predicate to any discussion of the federal law issues. *Id.* at 6. *See also V&S Ry*., Slip Op. at 7 ("The district court's determination of the respective property rights of the parties will inform the Board's determination of which party has a common carrier obligation over the portion of the Line that traverses the Salt Mine Property."); *Mid-America Locomotive and Car Repair, Inc. – Petition for Declaratory Order* STB Docket No. FD 34599 (STB served June 6, 2005) (Board declined to grant a petition and open a proceeding where a state law issue could be decisive). Conversely, the Board has declined to provide declaratory relief when resolving an issue within its jurisdiction "would have no bearing on the state court's application of state property law . . . ." *JBG Properties, LLC – Petition for Declaratory Order* STB Docket No. FD 35817 at 5 (STB Served Dec. 10, 2015).

The Board should follow that precedent here and dismiss (or hold in abeyance) this proceeding until the Massachusetts state court determines who owns the Forestland. It is clear from the state court rulings that GURR may have violated Chapter 61 in 2020 when it took over the 140 Trust and refused to honor Hopedale's attempts to exercise its Chapter 61 rights. It is also clear from state court rulings that the 2021 Settlement Agreement is void. *Supra* 7-9. It is therefore premature to discuss whether Hopedale may be preempted from acquiring the Forestland through eminent domain when the state court could find that Hopedale has the ability to acquire the property under Chapter 61. Even if GURR is able to maintain control of some of the Forestland, the Board will need to know the exact extent and nature of that title in order to analyze the extent of preemption. *See Allegheny Valley R.R.*, Slip Op. at 3-4 (dismissing declaratory order proceeding

to allow state court to determine the "size and extent of a railroad easement" as a matter of state law).[4]

Regardless of the outcome of the state court litigation, the Board cannot meaningfully apply its preemption analysis until the Massachusetts courts have resolved the underlying state law property issues. Accordingly, the Board should dismiss, or hold in abeyance, this proceeding until the Massachusetts state courts have resolved the underlying property issues.

III. IF THE BOARD DECIDES TO OPEN A PROCEEDING, GURR DOES NOT HAVE A BONA FIDE PLAN TO MAKE RAILROAD USE OF THE FORESTLAND THAT COULD PREEMPT HOPEDALE'S POWER OF EMINENT DOMAIN

GURR argues that ICCTA preempts Hopedale's attempted taking because GURR has transportation-related plans for the entire parcel of land. Petition at 13-14. But GURR fails to apply the correct legal standards, does not acknowledge the explicit limitations of the potential taking, and fails to explain how ICCTA applies to this specific hypothetical proposed development.

A. Hopedale's Proposed Taking Will Not Interfere with GURR's Existing Use of the Forestland.

ICCTA's preemptive reach "does not encompass everything touching on railroads." *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 118 (1st Cir. 2015). Relevant here, ICCTA preempts eminent domain proceedings only "if they have the effect of unreasonably burdening or interfering with rail transportation." *Franks Inv. Co. LLC v. Union Pacific R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010); *Bayou Dechene Reservoir Comm'n v. Union Pac. R.R Corp.*, Case No. 09-0429, 2009 WL 1604658, *2 (W.D. La. June 8, 2009) (collecting decisions from courts and the STB for this

[4] GURR may argue that Chapter 61 itself is preempted. That argument is misplaced because, as the cases discussed above make clear, GURR must first acquire the Forestland under state law before in can claim that any state law is preempted. Because compliance with Chapter 61 is a state law prerequisite to GURR's acquisition of the Forestland, it cannot be preempted and GURR must comply with Chapter 61 as a matter of state law.

standard). ICCTA does not categorically preempt eminent domain actions.[5] The Board has been crystal clear: "neither the court cases, nor Board precedent, suggest a blanket rule that any condemnation action against railroad property is impermissible." *Lincoln Lumber Co.* – Petition for Declaratory Order – Condemnation of Railroad Right-of-Way for a Storm Sewer, FD 34915 Slip Op. at 2-3 (STB served Aug. 13, 2007) (rejecting preemption for "routine, non-conflicting uses" on railroad property); *see Benton v. CSX Transp.*, Case No. 19-109, 2021 WL 3099502, at *3 (E.D. Pa. July 21, 2021) (noting that "particularly expansive claims" of ICCTA preemption "have been criticized and rejected by courts"). Instead, "interference with rail transportation must always be demonstrated." *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 104 (2d Cir. 2009).

Hopedale's Special Town Meeting explicitly limited its eminent domain authorization to avoid interference with GURR's ongoing transportation activities. *See* Town of Hopedale Special Town Meeting Warrant, July 11, 2022 (forbidding the Board from taking any land that is "currently in use by the Railroad for railroad transportation purposes or transloading facilities") (attached as Exhibit 7). Curiously, GURR fails to acknowledge this limitation and does not argue about the true nature of the proposed taking. Instead, GURR repeatedly asserts that the taking will render "GURR's property of little or no use at all." Petition at 13. In fact, Special Town Meeting explicitly forbade Hopedale from doing anything of the sort. GURR will continue operating its current track and will continue to own all the property it needs for current rail operations and transloading facilities.

GURR focuses on the number of acres being taken, Petition at 13, but preemption does not depend on the number of acres, or the percentage of the property, being taken. Instead, the

[5] GURR asserts categorical preemption, Petition at 13 & n.7, but, as stated herein, courts and the STB have used an "as applied" standard.

"preemption inquiry focuses on the degree to which the challenged regulation burdens rail transportation." *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 103 (2d Cir. 2009) (citation omitted); *see also Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 85 (2012) (collecting cases for the rule that ICCTA focuses on regulations that restrict the operation of a railroad, while it permits laws with a more "remote or incidental" effect). If GURR can operate its tracks "as usual," then it cannot show unreasonable interference. *Reading Blue Mtn. & N. R.R. Co. v. UGI Utils., Inc.*, Case. No. 3:11-cv-2182, 2012 WL 251960, at *2-3 (M.D. Pa. Jan. 25, 2012); *Dist. of Columbia v. 109,205.5 Sq. Feet of Land*, Case No. Civ. A 05-202 (RMU), 2005 WL 975745, at *3-4 (D.D.C. Apr. 21, 2005) (rejecting preemption for easement over railroad property because the railroad maintained access to signal equipment and for maintenance); *Franks*, 593 F.3d at 415 (rejecting preemption where the railroad only showed that "all railroad crossings affect rail transportation" without showing that the four specific crossings in that case unreasonably interfere with its rail operations). It points to no evidence that, given the explicit limitation by the Special Town Meeting, Hopedale will be unreasonably interfering with its operations. GURR relies on *Buffalo Southern Railroad*, but the municipality there sought to take "the entire parcel of land," which included a track spur and transloading facilities, all of which Hopedale is explicitly forbidden from taking. Petition at 12-13; *Buffalo S. R.R. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241, 249 (S.D.N.Y. 2006). GURR must show unreasonable interference and its references to acreage are simply irrelevant.

B. GURR Cannot Rely on Impractical and Unbuildable Plans for Future Development.

Since GURR cannot successfully argue that Hopedale's planned taking interferes with its existing use of the Forestland, it next argues that its future plans should preempt any taking, Petition at 11 n.6, but GURR must show that these future plans are likely to come to fruition. *See*

Girard, 134 Ohio St. 3d at 91 (noting that while it is "acceptable and sometimes necessary" to consider a railroad's future plans, "it is also necessary to consider whether it is likely that the railway company's plans will come to fruition" (citation omitted)).

If GURR were correct, a railroad could deprive any state or local government entity of its eminent domain authority simply by claiming it is contemplating future development. And that is precisely what GURR does here. GURR offers a site plan with 22 proposed buildings, without any specifics of which companies will fill those buildings, if those companies would be part of the railroad operations, or how likely it is that those buildings will even be built. Under GURR's argument, it could propose plans, receive preemption, and then be immune from local regulation even if that property is never actually developed.

The need to determine if "plans" are achievable is particularly important here because GURR's plans are unbuildable. Mr. Milanoski has previously acknowledged that there are "topography challenges with the site." *Grafton & Upton R.R. Co. v. Town of Hopedale*, Civil Action 4:22-cv-40080-ADB, Affidavit of Sean P. Reardon, P.E. at ¶ 6 (D. Mass. Mar. 31, 2023) (attached as Exhibit 8). That is a serious understatement. The Forestland is steeply sloped, with an *average* grade of 13%. *Id*. The grade exceeds 20% for a significant portion of the property. *Id.* The existence of GURR's tracks, and of a gas easement on the property, effectively preclude grade changes across large swaths of the property. *Id.* at ¶ 7. Because of this, it is unrealistic and impractical for GURR to build the plans as proposed and still meet permissible grades for tracks and spurs. *Id.* More strikingly, GURR's hastily drawn plans are so crowded that there is not even room for a tractor trailer to back in and pull out from a typical loading dock. *Id.* at ¶ 8. GURR asks for this Board to extend ICCTA preemption to plans that cannot be built and would never work as a transloading facility even if they were built.

On top of these impracticalities, it appears that GURR devised these plans simply as a litigation strategy or in an effort to improperly invoke Board jurisdiction for a non-railroad purpose. A tiny notation at the bottom right-hand corner of the site plan says that it was drafted on May 21, 2021, and then revised on July 8, 2022. *See* Exhibit 4 to GURR's Petition for Declaratory Order, Milanoski Affidavit, at p. 21. The July 8 revision came two-and-a-half weeks *after* Hopedale's Select Board voted to call a Special Town Meeting. A prior version of this plan showed a much more limited undertaking, which was itself a merely hypothetical development. Given that the revision came shortly before GURR filed its Complaint, and the paucity of evidence to support the likelihood that these plans will actually happen, GURR cannot use these speculative, litigation-fueled plans to preempt a taking.

Further, in his sworn complaint against GURR owner Jon Delli Priscoli, former-GURR President Michael Milanoski testified that Mr. Delli Priscoli was not actively involved in the day-to-day operations of GURR "with the exception of engaging in preemption activities [and] directing tree clearing activities in the Town of Hopedale. *Milanoski v. Delli Priscoli*, Case No. 2384-cv-00071, Dkt. No. 1, *Verified Complaint* ¶ 18 (Mass. Super. Ct. filed Jan. 11, 2023) (attached as Exhibit 9). "Preemption activities" is not a railroad activity, and the use of that term strongly suggests that Mr. Delli Priscoli's "preemption activities" are activities designed to create a pretext upon which to claim the protections of preemption. This, taken together with the infeasible nature of building a railroad facility on the steeply sloped Forestland, strongly suggests that GURR, or its owner, is seeking to abuse the Boards' jurisdiction by falsely asserting a railroad purpose in order to gain control of the Forestland in order to use it for some non-railroad purpose.

The Board has made clear that it "will not permit [its] processes to be misused" by using Board authority to block condemnation of property "as a device to acquire or retain property for

non-rail purposes using federal preemption as a shield." *Jefferson Terminal Railroad Co. – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, FD 33950, Slip Op. at 5 (STB served March 19, 2001). Given the facts and circumstances of GURR's attempts to gain control of the Forestland in the absence of a credible, bona fide plan to use the Forestland for rail purposes, the Board should not allow GURR to abuse the Board's authority and should refuse to recognize GURR's putative plans as evidence of a railroad purpose. At a minimum, the Board should allow Hopedale to take discovery into the *bona fides* of GURR's putative plans.

The Board should also consider GURR's current disarray, which affects its ability to execute any plan. As discussed above, GURR's senior leadership are embroiled in litigation that has "effectively crippled" the company such that GURR cannot "fully operate" or get any loans or financing. *See* Exhibit 6, Transcript of Motion Hearing, at 20:21-21:4 (GURR "can't do anything" because of those disputes). *Id.* at 23:5-10. Given GURR's uncertain future, no future plans of GURR can be considered "bona fide."

C. GURR's Legal Arguments Fail to Justify Affording the Protections of Preemption to its Suspect Plans.

GURR argued to the federal district court that ICCTA preempts the eminent domain proceedings because Hopedale "does not say that GURR will be unable to construct any portion of its Plan, or unable to use any portion of the property for railroad purposes." GURR's Opposition to Defendants' Motion for Leave to File Affidavit of Sean P. Reardon, P.E., ECF 42, at 3. According to GURR, the "wholesale taking of the entire property will still interfere with GURR's rail transportation activities" and is therefore preempted, even if "the current vision for the site is not completely realized." *Id.* at 4. This flips the standard on its head. GURR contends that Hopedale must show that GURR cannot build *any* of its plans in order to take *any* of the property by eminent domain. The inverse, however, is correct: GURR must show that the taking would

unreasonably burden at least some of GURR's operations. The only interference GURR claims, however, is interference with infeasible, speculative, and inchoate plans. GURR does not, and cannot, point to any authority that extends the protection of preemption to infeasible plans, or that prevents the acquisition of property that is not, and cannot be, used for a railroad purpose.

GURR argues that *Girard* does not support Hopedale, but cites to the wrong part of the analysis to make its argument. *See* Petition at 13 n.7 (citing discussion about a non-rail operator's plans). The court in *Girard* specifically analyzed the railroad's own plans "in the future for expansion and development in order to accommodate the growing interstate railway business in the area." 134 Ohio St. 3d at 91. But the railroad had "no concrete plans to put these hypothetical plans into execution" and was potentially selling the land to a company that would make different use of the property. *Id.* Future plans can sometimes be enough, even without any concrete steps to execute on these plans, but those cases involve "already existing tracks or rights-of-way." *Id.* This "does not extend to an undeveloped parcel of land containing no rail line and no right-of-way." *Id.* Similarly, GURR has no concrete plans beyond a hasty sketch and is not seeking to defend its existing infrastructure, which Hopedale has not proposed to take.

Girard is the case most on point with the facts of this dispute, especially compared to the cases cited by GURR. For instance, the Board in *Norfolk Southern Railway* focused much of its analysis on how the railroad was currently using the property that the government sought to take. *See Norfolk S. Ry. Co. and the Alabama Great S. R.R. Co.- Petition for Dec. Order*, FD 35196, Slip Op. at -43 (STB late served March 1, 2010) (listing the current uses of the property, in addition to potential future plans that were concrete and related to the current use). This case is more like *Girard*, where the vast majority of the property is undeveloped (and undevelopable for the uses GURR describes) and has only vague potential plans. GURR cites another case that involved a

railroad's plans that would "neither *extend* nor *add to*" the existing rail system, was not a preemption case, and did not involve any of the property-related disputes at issue here. *See also Detroit/Wayne County Port Auth. v. I.C.C.*, 59 F.3d 1314, 1316 (D.C. Cir. 1995) (agreeing with the STB that a railroad could build another tunnel, which was "functionally equivalent to simply enlarging the existing tunnel).

D. Even If The Plans Are Buildable, GURR Fails to Show The Development Is Integrally Related to Railroad Transportation.

Even if GURR shows that it can and will construct these buildings, that does not end the inquiry. GURR must also show that the activities in these buildings would be "integrally related" to railroad operations. *See Hi Tech Trans, LLC*, *Petition for Declaratory Order – Hudson County, NJ*, FD 34192, Slip Op. at 3 (STB served Nov. 20, 2002). These "integrally related" activities must be part of GURR's "ability to provide transportation services" and cannot just be some activity that economically benefits from being near a railroad. *Id.*; *Grafton & Upton R. Co. v. Town of Milford*, 417 F. Supp. 2d 171, 178-79 (D. Mass. 2006). GURR was also the plaintiff in *Town of Milford* and argued there that ICCTA preempted regulation of a company that planned to move its operations to GURR's railyard. 417 F. Supp. 2d at 176. Both the STB and Judge Gorton rejected that argument. Judge Gorton closed his decision by pointing out that ICCTA preemption does not suddenly cover a company that simply moves its operations from elsewhere to a railyard. *Id.* at 178-79; *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 118-19 (1st Cir. 2015) ("In particular, the ICCTA does not preempt all state and local regulation of activities that has any efficiency-increasing relationship to rail transportation.").

Similarly, GURR has made no showing that any of its prospective tenants would have activities "integrally related" to GURR's ability to provide rail transportation services. In July 2022, Mr. Milanoski mentioned a number of new customers that allegedly want access to the line.

Exhibit 4 to GURR's Petition for Declaratory Order, Milanoski Affidavit, ¶ 20; *see also* Exhibit 1 to GURR's Petition for Declaratory Order, Verified Statement of Jon Delli Priscoli, ¶ 23. GURR does not, however, explain why those customers' activities are "integrally related" to rail transportation operations just because they are offloaded and stored near a train. *See Grosso*, 804 F.3d at 118-19 ("Thus, manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term 'transportation'."). GURR points to one letter (from 2021) from an entity that expressed some interest in their transloading facility, but this does not show these activities would be "integrally related" to railroad transportation purposes. GURR needs more than speculation and argument—it needs "specific facts" to show that any taking would interfere with rail operations. *See Reading Blue Mtn.*, 2012 WL 251960, at *2-3.

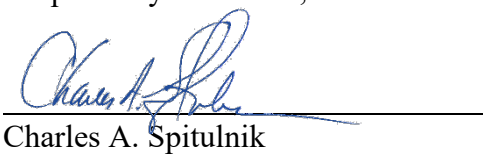
GURR has a steep hill to climb. It must show unreasonable interference with its rail operations, but it does so by relying on future plans that are speculative, without any evidence that those proposed activities would be integrally related to GURR's ability to provide rail transportation services, and without any showing that the internecine battle going on inside GURR will prevent these plans from being executed. GURR has not done so, and the Board should find that ICCTA does not preempt this specific proposed taking.

CONCLUSION

For the foregoing reasons, the Town of Hopedale respectfully requests the Board to dismiss the Petition, or hold it in abeyance, pending resolution of the state court litigation over GURR's ability to own or use the Forestland under state law. If the Board decides to accept the Petition and allow the proceeding to move forward, Hopedale respectfully requests the Board to deny GURR's Motion to Expedite and establish a procedural schedule that allows at least three months

for Hopedale to take discovery regarding GURR's putative plans for a transload facility on the Forestland and for the parties to submit final briefs to the Board to address all of the issues raised in this matter.

Respectfully submitted,



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Dated: May 11, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have on the 11th of May, 2023, caused to be served a copy of the foregoing REPLY OF THE TOWN OF HOPEDALE, MASSACHUSETTS TO PETITION FOR DECLARATORY ORDER AND REPLY TO MOTION FOR EXPEDITED CONSIDERATION, upon the following parties of record in this proceeding by first-class mail (for Mr. Scheib) and email (for Mr. Howard):

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Charles A. Spitulnik

Dated: May 11, 2023

EXHIBIT 1

Reilly v. Hopedale, 102 Mass. App. Ct. 367 (2023)

Reilly v. Hopedale

Appeals Court of Massachusetts

November 15, 2022, Argued; March 7, 2023, Decided

Nos. 22-P-314 & 22-P-433.

Reporter
102 Mass. App. Ct. 367 *; 2023 Mass. App. LEXIS 38 **

ELIZABETH REILLY & others[1] *vs*. **TOWN OF HOPEDALE** & others[2] (and a companion case[3]).

Prior History: [1]** Worcester. CIVIL ACTION commenced in the Superior Court Department on March 3, 2021.

The case was heard by *Karen L. Goodwin*, J., on motions for judgment on the pleadings, and a motion for clarification was considered by her.

David E. Lurie (*Harley C. Racer* also present) for Elizabeth Reilly & others.

Sean M. Grammel for town of Hopedale & others.

Donald C. Keavany, Jr., for Jon Delli Priscoli & others.

Robert A. Indresano, for Friends of the Centerville Cranberry Bog Preservation, Inc., amicus curiae, submitted a brief.

CIVIL ACTION commenced in the Land Court Department on October 28, 2020.

[*369] Following a joint stipulation of dismissal, a motion to vacate the stipulation was heard by *Diane R. Rubin*, J., and motions to intervene and for an expedited hearing were considered by her.

Reilly v. Town of Hopedale, 2021 Mass. Super. LEXIS 508, 2021 WL 6297927 (Mass. Super. Ct., Nov. 4, 2021)

[1] 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.

[2] Bernie Stock, Brian R. Keyes, Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and One Hundred Forty Realty Trust.

[3] Town of Hopedale *vs*. Jon Delli Priscoli, trustee, & others.

Core Terms

forest land, railroad, settlement agreement, motion to vacate, superior court, motion to intervene, intervene, town meeting, vacate, parties, rights, taxpayers, declaration, moot, municipality, settlement, merits, acres, join, declaratory judgment, restructured, expend, notice, circumstances, injunction, triggered, conveyed, expedite, convert, confer

Case Summary

Overview

HOLDINGS: [1]-In two cases that stemmed from a dispute concerning Mass. Gen. Laws ch. 61 forest land located in the town that the railroad had begun to develop, the citizens did not have standing under either *Mass. Gen. Laws ch. 40, § 53* or Mass. Gen. Laws ch. 231A for a declaration that the town's agreement, as part of the settlement, to waive its statutory option to purchase the forest land was invalid and unenforceable because none of the forms of relief could have been characterized as the raising or expenditure of funds or as the incurring of obligations by the town; [2]-The land court judge should not have denied the motion to intervene as moot because the land court judge conflated the citizens' right to enforce the superior court judgment they had obtained with the town's motion to vacate the stipulation of dismissal in the land court case.

Outcome

In superior court case, judgment, as clarified, affirmed. In land court case, order affirmed in part and vacated and remanded in part.

Counsel: *Harley C. Racer* for Elizabeth Reilly & others.

Donald C. Keavany, Jr., for Jon Delli Priscoli & others.

Judges: Present: WOLOHOJIAN, DITKOFF, & WALSH, JJ.

Opinion by: WOLOHOJIAN

Opinion

WOLOHOJIAN, J. These two cases stem from a dispute concerning G. L. c. 61 forest land located in the town of Hopedale (town) that the Grafton & Upton Railroad (railroad) wishes, and already has begun, to develop over opposition by the town **[**2]** and certain of its residents. The first case (No. 22-P-314) was filed in the Superior Court by a group of town residents (citizens) challenging a settlement agreement reached between the town and the railroad, the owner of the land (the One Hundred Forty Realty Trust [trust]), and the trustees of the trust (Jon Delli Priscoli and Michael Milanoski). The essential question raised in the appeal from the Superior Court case is whether the citizens have standing to pursue the declaratory relief they sought in count II of their complaint. As pertinent to this appeal, that count sought a declaration that the town's agreement, as part of the settlement, to waive its statutory option to purchase the forest land pursuant to G. L. c. 61, § 8, was invalid and unenforceable. We affirm the dismissal of Count II because, like the Superior Court judge, we conclude that the citizens do not have standing under either G. L. c. 40, § 53 (pertaining to citizen suits), or G. L. c. 231A (pertaining to declaratory actions) for the particular relief sought in count II.[4]

The second case (No. 22-P-433) comes to us on appeal from the Land Court, where the citizens' motion to intervene in a suit brought by the town against the railroad and the trust was denied **[**3]** as moot. We conclude that the Land Court judge should not have denied the motion to intervene as moot, and accordingly we vacate that order and remand the matter to the Land Court to permit the Land Court judge to consider the motion to intervene on the merits, as well as the citizens' motion to join in the town's motion to vacate the stipulation of dismissal.

Background. We begin by setting out the pertinent aspects of G. L. c. 61, which governs the classification and taxation of forest land and forest products, and the purpose of which is to promote the preservation and maintenance of forest land, i.e., "land de- **[*370]** voted to the growth of forest products." G. L. c. 61, § 1. The statute achieves this purpose by giving owners of land classified as forest land a significantly reduced tax rate for as long as the land remains certified as forest land by the State forester and is maintained according to an approved forest management plan. See G. L. c. 61, §§ 2, 2A, 5. Land certified under G. L. c. 61 is subject to a lien by the municipality in which the land is located. See G. L. c. 61, § 2.

If an owner of forest land certified under G. L. c. 61 wishes to sell the land or convert it to another use, certain consequences follow. To begin with, the land may be subject **[**4]** to roll-back taxes or a conveyance tax. See G. L. c. 61, §§ 6, 7. In addition, the owner must notify the municipality in which the land is located so that the municipality may decide whether to exercise its statutory "first refusal option" (option). G. L. c. 61, § 8, twelfth par. The municipality may exercise the option itself or may assign the option to a "nonprofit conservation organization or to the Commonwealth or any of its political subdivisions." G. L. c. 61, § 8, seventeenth par.

In this case, the trust owned 155.24 acres of land in the town located at 364 West Street, 130.18 acres of which were classified as forest land subject to G. L. c. 61. On June 27, 2020, the railroad entered into a purchase and sale agreement with the trust to buy the land.[5] Not long thereafter, on July 9, 2020, the railroad's president notified the town of the planned land purchase,[6] and stated that the railroad intended to use the land "to provide additional yard and track space in order to support the current and anticipated increase in rail traffic of [the railroad's] transloading operations."[7] In other words, the notice clearly conveyed the railroad's intent to convert the forest land to a use outside the scope of

[4] We acknowledge the amicus brief submitted by Friends of the Centerville Cranberry Bog Preservation, Inc.

[5] Jon Delli Priscoli, the railroad's principal owner, signed the purchase and sale agreement in his capacity as trustee of the New Hopping Brook Realty Trust, which was the anticipated purchaser.

[6] The railroad's president, Michael Milanoski, served the notice on behalf of Charles Morneau, the trustee of the trust.

[7] See G. L. c. 61, § 8, seventh par., which provides:

> "Any notice of intent to convert to other use shall **[**5]** be accompanied by a statement of intent to convert, a statement of proposed use of the land, the location and acreage of land as shown on a map drawn at the scale of the assessors map in the city or town in which the land is situated, the name, address and telephone number of the landowner and the landowner's attorney, if any."

G. L. c. 61.

[*371] Although the notice clearly conveyed an intent to convert the forest land to another use, thus implicating the town's option, the town believed that the notice did not adequately convey the terms of the offer to which the option applied. See G. L. c. 61, § 8, eleventh par.[8] The town therefore requested that a revised notice complying with the requirements of the statute be submitted. The town identified two defects in particular: first, that the transaction included land not classified under G. L. c. 61; and second, that the purchase price was for more than the c. 61 land. At the same time, the town reserved its rights with respect to the option.[9]

Instead of sending a corrected notice, and apparently wishing to prevent the town from exercising the option to which it was entitled, the railroad restructured the transaction. In this iteration of the transaction, rather than taking ownership of the forest land by purchasing it directly from the trust for $1.175 million, the railroad instead purchased the beneficial interest in the trust for the exact same amount.[10] Also as part of the restructured transaction, the railroad's president and the railroad's principal owner were installed as cotrustees of the trust.[11] The practical result of the restructured transaction was to give the railroad control of the trust and of the c. 61 forest land the trust owned, while not constituting a sale of the forest land. It should be noted that, irrespective of any sale, G. L. c. 61, § 8, thirteenth par., prohibits the conversion of forest land to residential, industrial, or commercial use without first offering the municipality the right to purchase it.

On October 21, 2020, the town informed the trust and the railroad that, because the trust was a nominee trust, the transfer of a controlling beneficial interest constituted the transfer of an **[*372]** interest in real estate, **[**7]** again triggering the town's option of first refusal under G. L. c. 61, § 8. At a special town meeting on October 24, 2020, it was unanimously voted to appropriate $1.175 million to acquire (either by purchase or eminent domain) the 130.18 acres of forest land, and to appropriate $25,000 to acquire the 25.06 acres of nonforest land.[12]

Meanwhile, the railroad began site work on the forest land, including large-scale tree cutting. The town accordingly filed a complaint in the Land Court seeking injunctive relief, a declaratory judgment, approval of the town's memorandum of lis pendens, an order for specific performance directing that forest land be conveyed to the town, and an order permitting the town to enter the forest land to conduct inspections.[13] The railroad and the trust responded to the Land Court complaint in various ways, including by filing a petition with the Surface Transportation Board (STB), seeking a declaration that Federal railroad law preempted the town from exercising its c. 61 rights.

After a hearing, the Land Court judge denied the town's motion for a preliminary injunction. The judge reasoned that, although the town was entitled to an option under G. L. c. 61, § 8, it was not clear whether or when **[**8]**

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[8] General Laws c. 61, § 8, eleventh par., provides:

> "If the notice of intent to sell or convert does not contain all of the material as described above, then the town or city, within [thirty] days after receipt, shall notify the landowner in writing that the notice is insufficient and does not comply." **[**6]**

[9] On October 7, 2020, the trust claimed to withdraw the notice of intent. The town responded on October 8, stating its view that the option ripened with receipt of the July 9 notice of intent, so the purported withdrawal lacked legal effect.

[10] The 130.18 acres of forest land subject to G. L. c. 61 was owned by the trust; the non-c. 61 land was purchased by the railroad for one dollar, and thus no longer remained in the trust. The railroad also purchased about twenty acres of nonforest land situated nearby at 363 West Street.

[11] Charles E. Morneau, the former trustee, resigned as part of the transaction.

[12] The board of selectmen voted to exercise the town's option, and the town recorded the exercise of its option regarding the forest land and an order of taking as to the nonforest portion of the property in the Worcester registry of deeds on November 2, 2020.

[13] Through its request for a declaratory judgment, the town sought to establish that the July 9 notice of intent complied with G. L. c. 61, § 8; the offer in the purchase and sale agreement was a bona fide offer; the town's option vested on July 10, 2020; the town held an irrevocable option to purchase the forest land for the length of the statutory period; the town's time period in which it needed to exercise its option was tolled until the end of Governor Baker's March 10, 2020 declaration of a state of emergency related to the COVID-19 pandemic; the trust and the railroad were prohibited from alienating the forest land or converting its use from forest land until the town's option expired; the town was entitled to conveyance of the forest land from the trust; and the trust's assignment of its beneficial interest to the railroad constituted a sale of forest land that separately triggered the town's option.

the option period had been triggered, because the July 9 notice of intent was defective for the reasons identified by the town. The judge did not decide whether the subsequent restructured transaction triggered the town's option under G. L. c. 61, § 8. Nor did she reach the question of preemption. The judge also concluded that there was no irreparable harm, because the parties had agreed to work cooperatively to prepare a stipulation to maintain the status quo while the STB **[*373]** proceeding and the Land Court case were pending. Finally, the judge referred the parties to mediation.

Through mediation, the parties then reached a settlement, which the town's board of selectmen (board) approved on January 25, 2021. In broad strokes, the settlement agreement provided that (1) the parties would stipulate to the dismissal with prejudice of the Land Court suit, (2) the railroad would withdraw its petition to the STB, (3) the town would purchase about forty acres of forest land and twenty-four acres of nonforest land for $587,500, plus the cost of any roll-back taxes that might be due, (4) subject to a vote at town meeting, the railroad would donate twenty acres of nonforest land at 363 West Street to the town or **[**9]** its designee, (5) all the remaining land would remain in the trust's ownership, free from G. L. c. 61, and (6) the town would waive its option under G. L. c. 61, as well as its eminent domain rights under G. L. c. 79.[14]

As agreed, the parties filed a joint stipulation of dismissal with prejudice in the Land Court case on February 10, 2021. The settlement agreement was not filed with the Land Court, nor were its terms otherwise submitted to the judge. The board took the position that the previous town meeting vote authorizing the purchase of all of the forest land implicitly authorized the purchase of only a subset of that land.

The citizens then commenced the Superior Court case. The citizens' complaint asserted three counts, the nature and ultimate disposition of which were as follows:

Count I was brought against the board and sought **[**10]** to enjoin the board from expending funds under the settlement agreement. The citizens brought this claim under G. L. c. 40, § 53 (allowing ten taxpayers to enjoin a town from raising or spending money without legal or constitutional authorization); G. L. c. 44, § 59 (allowing a taxpayer to compel a municipality "to conform to [G. L. c. 44]," which relates to municipal finance generally); and G. L. c. 214, § 3 (10) (allowing ten taxpayers to bring an action **[*374]** to "enforce the purpose or purposes of any gift or conveyance which has been or shall have been made to and accepted by any … town"). After cross motions for judgment on the pleadings, the citizens prevailed on count I on the ground that the authority granted to the board in the special town meeting required acquisition of the entire parcel of forest land and did not allow the town to acquire only the subset to which it had agreed under the settlement agreement. The Superior Court judge explained the meaning and consequences of her ruling as follows:

> "[A]lthough the terms of the [s]ettlement [a]greement are legal (including the [b]oard's agreement to waive the [o]ption), the [b]oard exceeded its authority when it unilaterally entered into that agreement without [t]own [m]eeting approval **[**11]** of the reduced acquisition. Therefore, the [s]ettlement [a]greement is not effective. The [b]oard might not hold the required [t]own [m]eeting or might fail to obtain enough votes to approve the acquisition. In either case, the [s]ettlement [a]greement would fail to take effect, meaning that the [r]ailroad would retain the land and the [t]own would retain its money and the right to continue attempting to enforce the [o]ption. Until the reduced acquisition is approved by [t]own [m]eeting, the agreement is not effective, and the [t]own may (but is not required to) attempt to enforce the [o]ption." (Footnote omitted.)

No one has appealed from this aspect of the judgment. As a matter of practical interest, we note that the board's subsequent request for approval to fund the purchase of land as provided in the settlement agreement was rejected at a town meeting in March 2022.

Count II was asserted against the board and the railroad, and sought a declaration that the board's release of its c. 61 option as part of the settlement agreement was void, that the town's c. 61 rights remain enforceable, that the restructured transaction by which the railroad obtained control of the trust and its beneficial **[**12]** interest triggered the town's option,

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[14] The settlement agreement also contained a severability provision, which stated as follows:

> "The provisions of this [a]greement are severable and should any provision be deemed for any reason to be unenforceable the remaining provisions shall nonetheless be of full force and effect; provided however, that should any provision be deemed unenforceable by a court of competent jurisdiction, the parties shall negotiate in good faith to cure any such defect(s) in the subject provision(s)."

that all forest land held by the trust be transferred to the town with no easements, and that the railroad be prevented from alienating the forest land or converting any of it from its current use. Count II was brought under G. L. c. 40, § 53, and G. L. c. 214, § 3 (10), as well as G. L. c. 40, § 3 (authorizing towns to hold and convey property through **[*375]** their selectmen), and G. L. c. 231A, § 1 (the declaratory judgment statute). The judge dismissed count II on the ground that the citizens lacked standing to pursue the relief sought. The citizens' appeal from this ruling is before us.

Count III was asserted against the board and sought a declaration that use of c. 61 forest lands for nonparkland purposes constitutes illegal harm to the environment. This count was brought under G. L. c. 40, § 53; G. L. c. 214, §§ 3 (10) and 7A (allowing ten citizens to bring claims to prevent damage to the environment); G. L. c. 45, § 7 (allowing ten taxpayers to restrain the erection of a building in a park); and mandamus. The judge dismissed count III on the ground that the town never acquired the forest land. The citizens do not challenge this portion of the judgment on appeal. Additional details of the procedural history in the Superior Court case that are not pertinent to this appeal are set forth **[**13]** in the margin.[15]

In light of the Superior Court judge's ruling that the settlement agreement was not effective because the board had acted outside the authority given by the town meeting, the town then filed in the Land Court a motion pursuant to Mass. R. Civ. P. 60 (b), 365 **[*376]** Mass. 828 (1974), to vacate the stipulation of dismissal that had been filed pursuant to the settlement agreement. In essence, the town argued that the Superior Court judge's ruling that the settlement agreement was ineffective constituted an extraordinary circumstance warranting reinstatement of the Land Court case.

The citizens advanced in the Land Court case on different, but related, fronts. To begin with, the citizens sought an interdepartmental assignment and transfer of the Land Court case to the Superior Court for consolidation with the Superior Court case. The citizens also moved to intervene in the Land Court case, both as a matter of right and permissively. See Mass. R. Civ. P. 24, 365 Mass. 769 (1974). They also moved to join the town's motion to vacate the stipulation of dismissal. The Land Court judge deferred consideration of these motions until after she decided the town's motion to vacate, a decision that prompted the citizens to file a motion **[**14]** for expedited treatment of their motion to intervene. That motion was denied.

After a hearing, the Land Court judge denied the town's motion to vacate. The core of the judge's reasoning was that, unlike Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 448 N.E.2d 1293 (1983), which involved similar circumstances, the parties in this case did not file an agreement for judgment with the court, but rather filed only a stipulation of dismissal with prejudice without submitting the terms of the settlement agreement to the court. The judge reasoned that, even accepting that the town acted outside its authority in entering into the settlement agreement, it was beyond dispute that the town had the authority to stipulate to the dismissal of the Land Court case that the town itself had filed. Accordingly, the judge concluded that there were no extraordinary circumstances that warranted vacating the stipulation of dismissal. It bears noting that the Land Court judge understood the motion to vacate to present only the narrow issue whether exceptional circumstances existed to vacate the stipulation of

[15] The citizens filed a motion for a preliminary injunction, which was denied by a Superior Court judge on March 11, 2021. A single justice of this court reversed, concluding that the citizens had demonstrated a reasonable likelihood of success on their claim that the board had acted without authority to purchase the forest land described in the settlement agreement, and enjoining the town from "issuing any bonds, making any expenditures, paying any costs, or transferring any property interests pursuant to the [s]ettlement [a]greement."

On June 3, 2021, all parties separately moved for judgment on the pleadings. Before these cross motions could be resolved, the citizens filed an emergency motion to preserve the status quo on September 9, 2021, in response to learning that the railroad had resumed clearing trees from the forest land. A second Superior Court judge, who presided over all subsequent events in this case, issued a temporary restraining order the next day, pending further action by the court; the temporary restraining order became a preliminary injunction on September 24, 2021. The railroad and the trust appealed, and a second single justice of this court declined to intervene because the Superior Court judge was then considering dispositive motions.

The Superior Court judge ruled on the cross motions for judgment on the pleadings on November 10, 2021. As we describe in the text, the judge issued judgment in favor of the citizens on count I, but against the citizens on counts II and III. Nevertheless, the judge extended the temporary injunction against the railroad defendants for sixty days to give the town time to "decide whether to seek the [t]own [m]eeting authorization necessary to validate the [s]ettlement [a]greement or to take the necessary steps to proceed with its initial decision to exercise the [o]ption for the entire [p]roperty."

dismissal; she did not consider the validity or enforceability of the settlement agreement to be before her. The town no longer challenges the order denying its motion **[**15]** to vacate the stipulation of dismissal.[16]

[*377] Having denied the motion to vacate, the Land Court judge then denied the citizens' motion to intervene and to join the town's motion to vacate on the ground that it was moot. The citizens' appeal of this order is before us, as is the order denying the citizens' motion to expedite hearing on their motion to intervene.[17]

Discussion. Despite the complicated path that has led to these appeals, the issues at this point are only two: first, whether the citizens have standing to pursue a declaration that the settlement agreement is void and unenforceable (count II of the complaint in the Superior Court case); and second, were the citizens' motions (a) to intervene and to join the town's motion to vacate, and (b) to expedite hearing of those motions in the Land Court case properly denied.

1. *Standing*. The citizens assert three theories of standing to pursue a declaration that the settlement agreement is void and unenforceable. Because the issue of standing was decided on cross motions for judgment on the pleadings under Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974), our review is de novo. See Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 726, 985 N.E.2d 388 (2013). We discuss each of the citizens' theories in turn.

a. *Taxpayer standing under* G. L. c. 40, § 53. Since **[**16]** 1847, see St. 1847, c. 37, the Legislature has given groups of ten or more taxable inhabitants of a town the right to sue to restrain the unlawful or unconstitutional exercise of the town's power to raise or expend funds:

> "If a town, … or any of its officers or agents are about to raise or expend money or incur obligations purporting to **[*378]** bind said town … for any purpose or object or in any manner other than that for and in which such town … has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon petition of not less than ten taxable inhabitants of the town … restrain the unlawful exercise or abuse of such corporate power."

G. L. c. 40, § 53.

The basic provision of the statute is that the "town or its officers must be about to raise or expend money or incur obligations" in an unlawful manner. North v. City Council of Brockton, 341 Mass. 483, 484, 170 N.E.2d 470 (1960). Equitable principles do not confer on taxpayers the right to sue "to restrain cities and towns from carrying out invalid contracts, and performing other similar wrongful acts." Pratt v. Boston, 396 Mass. 37, 42, 483 N.E.2d 812 (1985), quoting Fuller v. Trustees of Deerfield Academy, 252 Mass. 258, 259, 147 N.E. 878 (1925). Instead, taxpayer plaintiffs must show a statutory foundation for standing apart from G. L. c. 40, § 53, in order to challenge a town's entering into a **[**17]** contract or settlement. See Pratt, supra at 42-44.

It is important at this point to focus on the difference between count I and count II of the Superior Court complaint. In count I, the citizens sought to enjoin the town from expending funds under the settlement agreement because the expenditure had not been authorized at a town meeting. This type of allegation falls easily within the ambit of G. L. c. 40, § 53, as the Superior Court judge determined when she ruled in favor of the citizens on count I.

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[16] Initially, the town vigorously pursued relief from the Land Court judge's order denying the motion to vacate. The town filed a timely notice of appeal and also sought an injunction pending appeal to prevent any further destruction or alteration of the forest land, a request that was joined by the citizens. The Land Court judge denied the request for injunctive relief on the ground that the filing of the stipulation of dismissal with prejudice had closed the case, and so the town could not demonstrate a likelihood of success on the merits. The town and the citizens appealed to a single justice of this court, who upheld the denial of the motions on the ground that neither party had demonstrated that the Land Court judge "likely erred." The town then moved to voluntarily dismiss its appeal from the order denying its motion to vacate, and that motion was allowed on May 2, 2022. On May 5, 2022, the citizens filed a motion asking the Land Court judge to reconsider both her order allowing the town's motion for voluntary dismissal and her order denying the citizens' motion to intervene. The judge denied that motion the next day, and the citizens filed an amended notice of appeal to include the order denying their motion for reconsideration.

[17] The parties are also engaged in litigation in the United States District Court for the District of Massachusetts, where the railroad and the trust have sued the town over its attempt to take the forest land by eminent domain, which they claim is preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101 et seq. That litigation is ongoing.

By contrast, in count II, the citizens sought declarations that the board's waiver of its c. 61 option as part of the settlement agreement was void, that the town's c. 61 rights remain enforceable, that the restructured transaction by which the railroad obtained control of the trust and its beneficial interest triggered the town's option, that all forest land held by the trust be transferred to the town with no easements, and that the railroad be prevented from alienating the forest land or converting any of it from its current use. None of these forms of relief can be characterized as the raising or expenditure of funds or as the incurring of obligations by the town and, accordingly, G. L. c. 40, § 53, did not give the citizens standing **[**18]** to pursue them.

b. *Standing under* G. L. c. 231A, § 1. The citizens also claim that the declaratory judgment statute, G. L. c. 231A, § 1, inde- **[*379]** pendently gives them standing to pursue the relief they seek in count II. But that statute "does not in and of itself provide the plaintiffs with the 'standing' required to maintain" a taxpayer suit such as this one. *Pratt, 396 Mass. at 43*. Instead, the citizens have standing under the declaratory judgment statute only if they "can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." *Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 607, 71 N.E.3d 457 (2017)*. Thus, fundamentally, the standing inquiry under the declaratory judgment statute depends on whether the citizens are seeking in count II to protect a cognizable interest under either G. L. c. 40, § 53, or G. L. c. 61. As we have already said, they do not have such a cognizable interest under G. L. c. 40, § 53. And so we turn to G. L. c. 61.

General Laws c. 61 reflects a legislative interest in promoting and maintaining forest land, which it seeks to achieve through an incentive structure of reduced taxation on landowners who submit their forest land to regulation under the statute. Although a town's citizens clearly have an interest — as that term is colloquially understood — in the preservation of green space, including forest **[**19]** land, that generalized interest in protecting the environment, as laudable as it is, is not enough to confer standing in the absence of cognizable injury. See *Enos v. Secretary of Envtl. Affairs, 432 Mass. 132, 138, 141, 731 N.E.2d 525 (2000)* (interest in protecting environment, in absence of cognizable injury, is too generalized to confer standing). The statute creates a voluntary tax program by which landowners can agree to preserve and maintain forest land in order to receive advantageous tax treatment, in exchange for which the town receives certain rights should the land be transferred or otherwise fail to continue to qualify. Individual taxpayers whose land is not subject to G. L. c. 61 have been given no rights under the statutory scheme. Contrast G. L. c. 61, §§ 2, 3 (creating procedures for landowner to challenge land classification and tax assessment).

c. *Standing to pursue mandamus*. The citizens argue that the town's waiver of its option constituted an illegal assignment of the option, and as such they have standing to pursue a mandamus action against the assignment. Setting aside the fact that the citizens did not raise this argument below with respect to count II of the Superior Court complaint and it is accordingly waived, we note that the argument is based on a faulty premise. **[**20]**

Although it is true, as the citizens argue, that G. L. c. 61, § 8, does not allow a town to assign its option to a private for-profit **[*380]** organization, but only to nonprofit conservation organizations, the Commonwealth, or any of its political subdivisions, it does not follow that the town's waiver of its option in this case, simply because it occurred within the context of the settlement agreement with the railroad and trust — neither of which is a nonprofit conservation organization — constituted an illegal assignment. A waiver is the "intentional relinquishment of a known right," *BourgeoisWhite, LLP v. Sterling Lion, LLC, 91 Mass. App. Ct. 114, 119, 71 N.E.3d 171 (2017)*; it is not a transfer of that right to another.

By contrast, the hallmark of an assignment is the assignor's transfer of a right to an assignee. See H.J. Alperin, Summary of Basic Law § 5:99, at 1190 (5th ed. 2014). Here, the town did not transfer its option to anyone under the settlement agreement, which by its plain language provided only for a waiver of the option:

> "*Waiver of Right of First Refusal*. The [t]own acknowledges that it waives any and all claims and/or rights to acquire any property subject to this [a]greement by right of first refusal under [c]hapter 61 or by eminent domain under [c]hapter 79 of the Massachusetts General Laws."

2. *Motion to intervene*. a. *Mootness*. In order to understand why the citizens' **[**21]** motion to intervene in the Land Court case should not have been denied on the ground that it was moot, we begin by setting out the relevant chronology of events.

On November 4, 2021, the Superior Court judge issued her decision on the parties' cross motions for judgment

on the pleadings, ruling in the citizens' favor that "the [b]oard exceeded its authority when it entered into the [s]ettlement [a]greement without [t]own [m]eeting authorization." No one challenges this ruling.[18] Also never appealed from are the Superior Court judge's clarification rulings that the settlement agreement could not take effect until approved by a town meeting and that, without such town meeting approval, the town retained its right to attempt to enforce its option.

On December 30, 2021, approximately two weeks after the Superior Court judgment was clarified, the town filed in the Land Court, pursuant to *Mass. R. Civ. P. 60*, a motion to vacate the stipulation of voluntary dismissal on the ground that the Superior **[*381]** Court judgment invalidating the settlement agreement was an extraordinary circumstance warranting such relief.

On January 18, 2022, the railroad and the trust filed their opposition to the motion to vacate. Two days later, **[**22]** on January 20, the citizens filed a motion to intervene in the Land Court case and to join the town's motion to vacate the stipulation of dismissal. The citizens' motion sought to effectuate the favorable judgment they had obtained on count I of their complaint in the Superior Court, including — but not limited to — the injunction the citizens had obtained to preserve the forest land. In addition, the citizens sought to vacate the stipulation of dismissal, to obtain a preliminary injunction against land clearing pending disposition of the claim to vacate the dismissal, to obtain a declaratory judgment that any settlement between the town and the railroad and trust could not include the waiver of the town's c. 61 rights without town meeting authorization, and to obtain a declaration that the town's ultimate purchase price of the forest land be reduced due to the railroad's unlawful clearing of the land during the pendency of the Superior Court case and the single justice's injunction.

On January 21, 2022, the town filed its reply brief in support of the motion to vacate. On January 24, 2022, the railroad and the trust filed a surreply brief. In other words, the citizens' motion was fully **[**23]** briefed by January 24, 2022, when the Land Court judge held a hearing on the town's motion to vacate the stipulation of dismissal.

At the January 24 hearing, the Land Court judge heard argument from the town, the railroad, and the trust on the motion to vacate, but did not permit argument by counsel for the citizens. The judge then took the town's motion to vacate under advisement, deferring the submission of oppositions and a hearing on the citizens' motion to intervene until after she decided the motion to vacate. The next day, the citizens filed a motion seeking an expedited hearing on their motion to intervene and to join, which the Land Court judge denied two days later on the ground that it was untimely.[19]

The following day, the Land Court judge denied the town's motion to vacate the stipulation of dismissal. The judge's core **[*382]** reasoning was that even if the board did not have authority to enter into the settlement agreement on the terms that it did without town meeting approval, the board had authority to stipulate to the dismissal of its Land Court case. Central to the judge's reasoning was the fact that neither the settlement agreement, nor its terms, had ever been put before the **[**24]** court.

The Land Court judge then denied the citizens' motion to intervene on the ground that it was moot because the judge had denied the town's motion to vacate the stipulation of dismissal.[20]

As should be clear from the above recitation, the fundamental problem here is that the Land Court judge conflated the citizens' right to enforce the Superior Court judgment they had obtained with the town's motion to vacate the stipulation of dismissal in the Land Court case. Although the motions were conceptually related, they were not mutually dependent for at least two reasons. First, the relief they sought was not coterminous, and second, the citizens' right to protect the Superior Court judgment was independent of the town. The Superior Court judgment was obtained

[18] The town moved for clarification on December 1, 2021, and that motion was allowed in part on December 14, 2021.

[19] The judge reasoned that the citizens should have filed their motion to intervene several days earlier instead of first seeking interdepartmental transfer. Although the judge failed to identify any prejudice from the timing, we cannot say that she abused her wide discretion in denying the motion to expedite on timeliness grounds.

[20] The Land Court judge's order denying the motion to vacate did not mention the citizens' pending motion to intervene. Instead, the order on that motion appears in a docket entry dated February 1, 2022:

> "The court today received an inquiry as to whether the court would be issuing a decision on the merits of the citizens' motion to intervene. However, that motion is moot since in a decision issued on January 28, 2022, the court declined to vacate the stipulation with prejudice filed by the parties to this case."

through the citizens' exercise of their statutory right as ten or more taxpayers under G. L. c. 40, § 53. The citizens' entitlement to enforce **[**25]** that favorable judgment did not depend on whether the town had the authority to stipulate to the dismissal of its own claims in the Land Court. The stipulation of dismissal did not — and could not — extinguish the citizens' claims or judgment under G. L. c. 40, § 53. See Jarosz v. Palmer, 436 Mass. 526, 529, 766 N.E.2d 482 (2002) ("a stipulation of dismissal with prejudice is not the equivalent of a final judgment on the merits for the purposes of issue preclusion"). Not only were the citizens not parties to the stipulation of dismissal, they were not before the Land Court when the stipulation of dismissal was filed (nor is there any claim that the citizens should have been), nor had the validity of the settlement agreement been placed before the Land Court. Thus, to the extent that the citizens sought to intervene in the Land Court suit to effectuate the Superior Court judgment by having the Land **[*383]** Court stipulation of dismissal vacated on the ground that the settlement agreement was not effective, the citizens' motion to intervene was not moot.[21]

b. *Merits of motion to intervene*. The citizens argue that we should decide the merits of their motion to intervene even though the Land Court judge did not reach them. Although there may be limited situations in a civil **[**26]** case where an appellate court may decide the merits of an issue in the first instance, this is not one of them. Both permissive intervention and intervention as of right entail factual assessments that are best left to determination by the trial judge in the first instance.

Intervention is governed by Mass. R. Civ. P. 24, which allows nonparties to intervene in an action, either as of right under subsection (a), or permissively under subsection (b). As to intervention as of right, the proposed intervener

> "must satisfy four criteria: (1) the application must be timely;[22] (2) the applicant must claim an interest relating to the property or transaction which is the subject of the litigation in which the applicant wishes to intervene; (3) the applicant must show that, unless able to intervene, the disposition of the action may, as a practical matter, impair or impede his ability to protect the interest he has; and (4) the applicant must demonstrate that his interest in the litigation is not adequately represented by existing parties."

[*384] Bolden v. O'Connor Cafe of Worcester, Inc., 50 Mass. App. Ct. 56, 61, 734 N.E.2d 726 (2000). Contrary to the citizens' argument, intervention as of right is not purely a question of law. "A judge has discretion in determining whether an intervening party has demonstrated facts that entitle him **[**27]** or her to intervention as of right." Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 217, 944 N.E.2d 1019 (2011). It is only after the subsidiary facts have been determined that an appellate court then determines as a matter of law whether the circumstances are sufficient to meet the requirements of intervention as of right. See *id.*

Permissive intervention is also a fact-dependent decision conferred to a judge's sound discretion, and is governed by Mass. R. Civ. P. 24 (b), which provides:

> "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the Commonwealth confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. … In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

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[21] We note that after the citizens' motion to intervene was denied, the citizens' request for interdepartmental transfer was denied on the ground that the Land Court case was closed. In the event the Land Court judge permits the citizens to intervene in the Land Court suit, it seems to us that it would make sense to reconsider the citizens' request for interdepartmental transfer so as to avoid any inconsistency between the Superior Court judgment and its effect on the claims asserted in the Land Court case.

[22] The railroad and the trust make much of the fact that the citizens' motion to intervene was filed after the stipulation of dismissal in the Land Court case. "[P]ostjudgment motions to intervene, whether as of right or permissive, are seldom timely . … The proposed postjudgment intervener must accordingly not only justify its failure to intervene at an earlier stage of the action, but must also establish that it has not just an interest, but a compelling one, in the litigation." Bolden v. O'Connor Cafe of Worcester, Inc., 50 Mass. App. Ct. 56, 61, 734 N.E.2d 726 (2000). Here, there was no reason nor basis for the citizens to intervene until the parties to the Land Court case entered into the settlement agreement and filed their stipulation of dismissal, and after the citizens obtained the favorable Superior Court judgment. See McDonnell v. Quirk, 22 Mass. App. Ct. 126, 133, 491 N.E.2d 646 (1986) ("If the underlying action takes an unexpected turn, we perceive no reason why the third party cannot intervene to protect its position").

See *Matter of the Liquidation of Am. Mut. Liab. Ins. Co., 417 Mass. 724, 734-736, 632 N.E.2d 1209 (1994)* (creditors had no standing to intervene in settlement agreement between bankruptcy receiver and other creditors). "[A] judge might consider such factors as a party's delay in seeking intervention (and the circumstances of such a delay), the number of intervention requests or likely intervention requests, the adequacy of representation of the intervening party's interests, **[**28]** and other similar factors." *Fremont Inv. & Loan, 459 Mass. at 219*.

Although we are not in a position to decide the merits of the citizens' motion to intervene in the first instance, the following observations may be helpful on remand. First, we acknowledge the general rule that "postjudgment motions to intervene, whether as of right or permissive, are seldom timely," but stress that the rule has little application on the facts of this case because the basis for intervention did not arise until the town settled and stipulated to the dismissal of the Land Court case. See *Bolden, 50 Mass. App. Ct. at 61*. This is a situation where "the underlying action takes an unexpected turn" at its very end, and accordingly, **[*385]** there is "no reason why the third party cannot intervene to protect its position." *McDonnell v. Quirk, 22 Mass. App. Ct. 126, 133, 491 N.E.2d 646 (1986)*.

Second, we recognize that the citizens' road to relief in the Land Court case has been made difficult by the fact that the town has not pursued an appeal of the order denying its motion to vacate the stipulation of dismissal. But it is nonetheless important to ensure that events and decisions in the Land Court case not make toothless the judgment and rulings in the Superior Court case, particularly in a matter of public significance such as this one and where the **[**29]** citizens have not been given an opportunity to be heard. On remand, the Land Court judge should keep in mind that the Superior Court has determined some of the substantive issues on the merits, that the citizens are entitled to the benefit of those favorable rulings, that the rulings are binding on the town, the railroad, and the trust (all of whom were parties in the Superior Court case and have not appealed), and that those rulings are entitled to full respect and force. The Land Court judge should ensure that her rulings are not inconsistent or unfair in light of rulings that have been made in a sister department of the trial court. These considerations will come into special play when deciding the citizens' motion to vacate the stipulation of dismissal.

Conclusion. In the Superior Court case, the judgment, as clarified by the order dated December 14, 2021, is affirmed. In the Land Court case, the order denying the citizens' motion to expedite hearing on their motion to intervene is affirmed. The order denying the citizens' motion to intervene as moot is vacated, and the matter is remanded to the Land Court for further proceedings consistent with this opinion, including consideration **[**30]** of the citizens' motion to join the town's motion to vacate the stipulation of dismissal.[23]

So ordered.

End of Document

[23] The defendants in the Land Court case have requested double costs and attorney's fees in connection with the appeal. That request is denied.

EXHIBIT 2

Massachusetts General Law
Part I, Title XI, Chapter 61

Part I ADMINISTRATION OF THE GOVERNMENT

Title IX TAXATION

Chapter 61 CLASSIFICATION AND TAXATION OF FOREST LANDS AND FOREST PRODUCTS

Section 1 DEFINITIONS

Section 1. For purposes of this chapter, unless the context otherwise requires, the following words shall have the following meanings:—

"Cut", sever or taken from the soil.

"Forest land", land devoted to the growth of forest products. Upon application, the state forester may allow accessory land devoted to other non-timber uses to be included in certification.

"Forest products", wood, timber, Christmas trees, other tree forest growth and any other product produced by forest vegetation.

"Certification", approval of a forest management plan by the state forester.

"Contiguous land", land separated from other land under the same ownership by a public or private way, waterway or an easement for water supply.

"Forest management plan" or "management plan", a completed copy of a form provided by the state forester executed by the owner and the state forester that provides for a ten year program of forest management, including intermediate and regeneration cuttings.

"Cutting plan", a completed copy of a form approved by the state forester which describes the species, dimensions, and quantity of a proposed forest crop to be harvested and which is certified by the state forester as being in accordance with the provisions of section forty to forty-six, inclusive, of chapter one hundred and thirty-two.

"Not used for purposes incompatible with forest production", uses formally proposed or permitted that do not interfere with or reduce the quantity and quality of a continuous forest crop.

"Owner", person, persons, or another legal entity holding title to a parcel of forest land.

"Parcel", land held by the same owner under a deed of title which has no encumbrance incompatible with this chapter.

"Region", one of the five geographic subdivisions of the commonwealth utilized for administrative purposes by the department of environmental management.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title IX	TAXATION
Chapter 61	CLASSIFICATION AND TAXATION OF FOREST LANDS AND FOREST PRODUCTS
Section 2	CLASSIFICATION OF FOREST LANDS BY ASSESSORS; APPLICATION

Section 2. Except as otherwise herein provided, all forest land, parcels of not less than 10 contiguous acres in area, used for forest production shall be classified by the assessors as forest land upon written application sufficient for identification and certification by the state forester. Such application shall be accompanied by a forest management plan. The state forester will have sole responsibility for review and certification with regard to forest land and forest production.

The rate of tax applicable to certified forest land shall be the rate determined to be applicable to class three, commercial property under chapter 59.

Upon receipt of such certified application, the board of assessors shall, upon a form approved by the commissioner of revenue, forthwith record in the registry of deeds of the county or district in which the parcel is situated, a statement of such classification which shall constitute a lien upon the land for taxes levied under the provisions of this chapter. The

statement shall name the owner and a description of the land. The assessors shall return a copy of said recorded statement to the office of the state forester containing the date, book and page number of such recording. Said lien may be discharged by the board of assessors. All recording fees in connection with such statement or discharge shall be paid by the owner of such parcel.

Land shall be removed from classification by the assessor unless, at least every ten years, the owner files with said assessor a new certification by the state forester. The state forester, or his designee, shall have the authority to enter on private lands for the purpose of making investigations to assure compliance with this chapter. Classified forest land shall be subject to the taxes provided in section three. Buildings and structures and the land on which they are erected and which is accessory to their use shall not be entitled to be classified as forest land.

If a single parcel or tract of land consists in part of forest land and in part of other land, the portion consisting of forest land, if said portion comprises at least ten contiguous acres in area and otherwise conforms to the requirements of this chapter shall be classified forest land upon application as hereinbefore provided.

[Sixth paragraph effective until November 10, 2022. For text effective November 10, 2022, see below.]

An application to have land classified as forest land shall be submitted to the state forester not later than July first in any year. After certification the owner shall submit to the assessors not later than October first of the same year evidence of certification together with the approved

management plan. Classification shall take effect on January first of the year following certification and taxation under this chapter and shall commence with the fiscal year beginning after said January first.

[Sixth paragraph as amended by 2022, 268, Sec. 90 effective November 10, 2022. For text effective until November 10, 2022, see above.]

An application to have land classified as forest land shall be submitted to the state forester not later than July first in any year. After certification the owner shall submit to the assessors not later than December first of the same year evidence of certification together with the approved management plan. Classification shall take effect on January first of the year following certification and taxation under this chapter and shall commence with the fiscal year beginning after said January first.

[Seventh paragraph effective until November 10, 2022. For text effective November 10, 2022, see below.]

When in judgment of the assessors, land which is classified as forest land or which is the subject of an application for such classification is not being managed under a program, or is being used for purposes incompatible with forest production, or does not otherwise qualify under this chapter, the assessors may, on or before December first in any year file an appeal in writing mailed by certified mail to the state forester requesting a denial of application or, in the case of classified land, requesting removal of the land from such classification. Such appeal shall state the reasons for such request. A copy of the appeal shall be mailed by the assessors by certified mail to the owner of the land. The state forester may initiate, on or before December first of any year, a proceeding to remove land from classification, sending notice of his action by certified mail to the assessors and the owner of such land. The state forester may

deny the owner's application, may withdraw all or part of the land from classification, or may grant the application, imposing such terms and conditions as he deems reasonable to carry out the purpose of this chapter, and shall notify the assessors and the owner of his decision no later than March first of the following year. If the owner or the assessors are aggrieved by his decision they may, on or before April fifteenth, give notice to the state forester of a claim of appeal. The state forester shall convene on or before May fifteenth, a panel in the region in which the land is located. Said panel shall consist of three members, one of whom shall be named by the state forester, one of whom shall be named by the assessors, and one of whom shall be named by the state forester and the assessors. Said panel shall give notice of the date and place of the hearing in writing to the parties seven days at least before the date of said hearing. The panel shall furnish the parties, in writing, a notice of its decision within ten days after the adjournment of said hearing. Decisions of the panel shall be by majority vote of its members. If the owner or the assessors are aggrieved by such decision, they may, within forty-five days from receipt of the decision, petition either the superior court in the county in which the land is located for a review of such decision under the provisions of chapter thirty A or the appellate tax board under the provisions of chapter fifty-eight A, and said land shall not be classified or withdrawn from classification until the final determination of such petition. The state forester may adopt such regulations as he deems necessary to carry out the provisions of this chapter.

[Seventh paragraph as amended by 2022, 268, Sec. 91 effective November 10, 2022. For text effective until November 10, 2022, see above.]

If, in the judgment of the assessors, land which is classified as forest land or which is the subject of an application for such classification is not being managed under a program, is being used for purposes incompatible with forest production or does not otherwise qualify under this chapter, the assessors may, not later than February 1 in any year, file an appeal in writing, which shall be sent by certified mail, to the state forester requesting a denial of the application or, in the case of classified forest land, requesting removal of the land from such classification. The appeal shall state the reasons for the request. A copy of the appeal shall be sent by the assessors by certified mail to the owner of the land. Not later than December 1 of any year, the state forester may initiate a proceeding to remove the land from classification and shall send notice of the action by certified mail to the assessors and the owner of the land. The state forester may deny the owner's application, may withdraw all or part of the land from classification or may grant the application, imposing terms and conditions that the state forester deems reasonable to carry out this chapter and shall notify the assessors and the owner of that decision not later than March 1 of the following year. If the owner or the assessors are aggrieved by a decision of the state forester, the aggrieved party may, not later than June 15, submit a notice of appeal to the state forester. Not later than 30 days after receipt of a notice of appeal from an aggrieved party, the state forester shall convene a panel in the region in which the land is located. The panel shall consist of 3 persons, 1 of whom shall be selected by the state forester, 1 of whom shall be selected by the assessors and 1 of whom shall be selected jointly by the state forester and the assessors. The panel shall give written notice of the date, time and place of the hearing to the parties by certified mail not less than 7 days before the date of that hearing. The panel shall provide written notice to the parties, of its

decision not later than 10 days after the adjournment of the hearing. Decisions of the panel shall be by majority vote of its members. If the owner or the assessors are aggrieved by a decision of the panel, the aggrieved party may, not later than 45 days after receipt of the decision, petition the superior court in the county in which the land is located for a review of the decision pursuant to chapter 30A or petition the appellate tax board pursuant to chapter 58A; provided, however, that the land shall not be classified or withdrawn from classification until the final determination of the petition. The state forester may adopt such regulations as the state forester deems necessary to administer this chapter.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title IX	TAXATION
Chapter 61	CLASSIFICATION AND TAXATION OF FOREST LANDS AND FOREST PRODUCTS
Section 3	VALUATION OF FOREST PRODUCTION LAND; ASSESSMENT OF PROPERTY TAXES; GRIEVANCE PROCEDURE

Section 3. For general property tax purposes, the value of land that is actively devoted to forest production use during the tax year in issue and has not been used for purposes incompatible with forest production in the 2 immediately preceding tax years, shall, upon application of the owner of that land and approval of that application, be the value that the land has for forest production purposes.

The board of assessors of a city or town, in valuing land with respect to which timely application has been made and approved as provided in this chapter, shall consider only those indicia of value which the land has for forest production. The board, in establishing the use value of land, shall use the list of ranges published under section 11 of chapter 61A and its personal knowledge, judgment and experience as to forest land values, but these factors shall be limited to data specific to forest production.

For general property tax purposes, the factual details to be shown on the tax list of a board of assessors with respect to land which is valued, assessed and taxed under this chapter shall be the same as those set forth by the assessors with respect to other taxable property in the same city or town and the collector shall notify the person assessed of the amount of the tax in the manner provided in section 3 of chapter 60. For the collection of taxes under this chapter, the collector shall have all the remedies provided by said chapter 60. The assessment, collection, apportionment and payment over of the roll-back taxes imposed by section 7 shall be governed by the procedures provided for the assessment and taxation of omitted property under section 75 of chapter 59. Such procedures shall apply to each tax year that roll-back taxes may be imposed notwithstanding the limitation in said chapter 59 with respect to the periods that omitted property assessments may be imposed.

Any person aggrieved by an assessment by the board of assessors under this chapter may, within 30 days of the date of notice thereof, apply in writing to the assessors for abatement thereof. Any person aggrieved by the refusal of the assessors to make such an abatement or by the assessor's failure to act upon such an application may appeal to the appellate tax board within 30 days after the date of notice of the assessor's decision or within 3 months of the date of the application, whichever date is later. It shall be a condition of such appeal, with respect to the annual general property tax, that the asserted tax be paid, but no payment shall be required as a condition of such appeal with respect to any asserted conveyance tax or roll-back tax. If a payment of any tax imposed by this chapter should be made and as a result of such abatement by the board of assessors or decision by the appellate tax board, it shall appear that such tax has been overpaid, such excess payment shall be

reimbursed by the town treasurer with interest at the rate of 6 per cent per annum from the time of payment. Collection of conveyance or roll-back taxes, by sale or taking or otherwise, may be stayed by the appellate tax board while such an appeal is pending. A partial payment of the asserted tax that may be required by the appellate tax board in connection with such stay shall not exceed .5 of the asserted tax.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title IX	TAXATION
Chapter 61	CLASSIFICATION AND TAXATION OF FOREST LANDS AND FOREST PRODUCTS
Section 4	VALUATION OF BUILDINGS AND DWELLINGS LOCATED ON FOREST PRODUCTION LAND

Section 4. All buildings located on land which is valued, assessed and taxed on the basis of its forest production use in accordance with this chapter and all land occupied by a dwelling or regularly used for family living shall be valued, assessed and taxed by the same standards, methods and procedures as other taxable property.

Part I ADMINISTRATION OF THE GOVERNMENT

Title IX TAXATION

Chapter 61 CLASSIFICATION AND TAXATION OF FOREST LANDS AND FOREST PRODUCTS

Section 5 SPECIAL AND BETTERMENT ASSESSMENTS

Section 5. Land qualifying for valuation, assessment and taxation under this chapter shall be subject to special assessments or betterment assessments to the pro rata extent that the service or facility financed by the assessment is used for improving the forest production use capability of the land or for the personal benefit of the owner of the land. These assessments shall, upon application, be suspended during the time the land is in forest production use and shall become due and payable as of the date when the use of the land is changed. Payment of the assessment and interest on it shall be made in accordance with section 13 of chapter 80, but interest shall be computed from the date of the change in use. In the event only a portion of a tract of land which benefits from a suspension of payment is changed from this use, the assessment shall become due and payable as of the date when the use was changed only to the extent of and in the proportion that the frontage of that portion bears to the street frontage of the entire tract of land which originally benefited from a suspension of payment. Upon receipt of full payment of a portion of a suspended assessment, the tax collector shall dissolve the lien for the

assessment insofar as it affects the portion of the land changed from forest production use. The lien for the portion of the original assessment which remains unpaid shall continue and remain in full force and effect until dissolved in accordance with law. A request for a release shall be made in writing to the tax collector and shall be accompanied by a plan and any other information that is required in the case of a request for a division of an assessment under section 4.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title IX	TAXATION
Chapter 61	CLASSIFICATION AND TAXATION OF FOREST LANDS AND FOREST PRODUCTS
Section 6	CONVEYANCE TAX ON FOREST PRODUCTION LAND SOLD FOR OTHER USE; RATE; EXCEPTIONS

Section 6. Any land in forest production use which is valued, assessed and taxed under this chapter, if sold for other use within a period of 10 years after the date of its acquisition or after the earliest date of its uninterrupted use by the current owner in forest production, whichever is earlier, shall be subject to a conveyance tax applicable to the total sales price of that land, which tax shall be in addition to taxes that may be imposed under any other law. Notwithstanding the previous sentence, no conveyance tax shall be assessed if the land involved, or a lesser interest in that land, is acquired for a natural resource purpose by the city or town in which it is situated, by the commonwealth or by a nonprofit conservation organization, but if any portion of the land is sold or converted to commercial, residential or industrial use within 5 years after acquisition by a nonprofit conservation organization, the conveyance tax shall be assessed against the nonprofit conservation organization in the amount that would have been assessed at the time of acquisition of the subject parcel by the nonprofit conservation organization had such

transaction been subject to a conveyance tax. The conveyance tax shall be assessed on only that portion of land whose use has changed. The conveyance tax shall be at the following rate: 10 per cent if sold within the first year of ownership; 9 per cent if sold within the second year of ownership; 8 per cent if sold within the third year of ownership; 7 per cent if sold within the fourth year of ownership; 6 per cent if sold within the fifth year of ownership; 5 per cent if sold within the sixth year of ownership; 4 per cent if sold within the seventh year of ownership; 3 per cent if sold within the eighth year of ownership; 2 per cent if sold within the ninth year of ownership; and 1 per cent if sold within the tenth year of ownership. No conveyance tax shall be imposed under this section after the end of the tenth year of ownership. The conveyance tax shall be due and payable by the grantor at the time of transfer of the property by deed or other instrument of conveyance and shall be payable to the tax collector of the city or town in which the property is entered upon the tax list, but in the case of taking by eminent domain, the value of the property taken shall be determined in accordance with chapter 79, and the amount of conveyance tax, if any, shall be added as an added value. If there is filed with the board of assessors an affidavit by the purchaser that the land is being purchased for forest production use, no conveyance tax shall be payable by the seller by reasons of the sale, but if the land is not in fact continued in this use for at least 5 consecutive years, the purchaser shall be liable for any conveyance tax that would have been payable on the sale as a sale for other use. The conveyance tax shall be assessed on only that portion of land for which the use has changed.

Except with respect to eminent domain takings, this section shall not be applicable to the following: mortgage deeds; deeds to or by the city or town in which the land is located; deeds which correct, modify,

supplement or confirm a deed previously recorded; deeds between husband and wife and parent and child when no consideration is received; tax deeds; deeds releasing any property which is a security for a debt or other obligation; deeds for division of property between owners without monetary consideration; foreclosures of mortgages and conveyances by the foreclosing parties; deeds made under a merger of a corporation or by a subsidiary corporation to its parent corporation for no consideration other than the cancellation and surrender of capital stock of the subsidiary which do not change beneficial ownership; and property transferred by devise or otherwise as a result of death.

A nonexempt transfer after any exempt transfer or transfers shall be subject to this section. Upon the nonexempt transfer, the date of acquisition by the grantor, for purposes of this section, shall be considered to be the date of the last preceding transfer not excluded by the foregoing provisions from application of this section, but in the case of transfer by a grantor who has acquired the property from a foreclosing mortgagee, the date of acquisition shall be considered to be the date of the acquisition. Any land in forest production use which is valued, assessed and taxed under this chapter, if changed by the owner of the land to another use within a period of 10 years after the date of its acquisition by that owner, shall be subject to the conveyance tax applicable under this section at the time of the change in use as if there had been an actual conveyance, and the value of the land for the purpose of determining a total sales price shall be fair market value as determined by the board of assessors of the city or town involved for all other property.

If any tax imposed under this section should not be paid, the collector of taxes shall have the same powers and be subject to the same duties with respect to these taxes as in the case of the annual taxes upon real estate,

and the law in regard to the collection of the annual taxes, the sale of land for the nonpayment of taxes and redemption shall apply to these taxes.

No conveyance tax imposed by this section will be assessed on land that is considered to be in agricultural use under sections 1 and 3 of chapter 61A, in horticultural use under sections 2 and 3 of said chapter 61A or recreational land under section 1 of chapter 61B.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title IX	TAXATION
Chapter 61	CLASSIFICATION AND TAXATION OF FOREST LANDS AND FOREST PRODUCTS
Section 7	DISQUALIFICATION OF LAND FROM CLASSIFICATION; ROLL-BACK TAXES; CALCULATION; INTEREST

Section 7. Whenever land which is valued, assessed and taxed under this chapter no longer meets the definition of forest land, it shall be subject to additional taxes, in this section called roll-back taxes, in the tax year in which it is disqualified and in each of the 4 immediately preceding tax years in which the land was so valued, assessed and taxed, but these roll-back taxes shall not apply unless the amount of the taxes, as computed under this section, exceeds the amount, imposed under section 6 and, in that case, the land shall not be subject to the conveyance tax imposed under said section 6. For each tax year, the roll-back tax shall be an amount equal to the difference, if any, between the taxes paid or payable for that tax year in accordance with this chapter and the taxes that would have been paid or payable in that tax year had the land been valued, assessed and taxed without regard to these provisions. Notwithstanding this paragraph, no roll-back taxes shall be assessed if the land involved, or a lesser interest in the land, is acquired for a natural resource purpose by the city or town in which it is situated, by the commonwealth or by a

nonprofit conservation organization; provided, however, that if any portion of the land is sold or converted to commercial, residential or industrial use within 5 years after acquisition by a nonprofit conservation organization, roll-back taxes shall be assessed against the nonprofit conservation organization in the amount that would have been assessed at the time of acquisition of the subject parcel by the nonprofit conservation organization had the transaction been subject to a roll-back tax.

If, at the time during a tax year when a change in land use has occurred, the land is not valued, assessed and taxed under this chapter, then the land shall be subject to roll-back taxes only for those years of the 5 immediately preceding years in which the land was valued, assessed and taxed under this chapter.

In determining the amount of roll-back taxes on land which has undergone a change in use, the board of assessors shall ascertain the following for each of the roll-back tax years involved:—

(a) the full and fair value of the land under the valuation standard applicable to other land in the city or town;

(b) the amount of the land assessment for the particular tax year;

(c) the amount of the additional assessment on the land for the particular tax year by deducting the amount of the actual assessment on the land for that year from the amount of the land assessment determined under subsection (a); and

(d) the amount of the roll-back tax for that tax year by multiplying the amount of the additional assessment determined under subsection (c) by the general property tax rate of the city or town applicable for that tax year.

Roll-back taxes will be subject to simple interest at a rate of 5 per cent per annum. If the board of assessors determines that the total amount of roll-back taxes to be assessed under this section, before the addition of any interest, as provided for in the preceding paragraph, would be less than $10, no tax shall be assessed.

No roll-back tax imposed by this section will be assessed on land that meets the definition of land in agricultural use under sections 1 and 3 of chapter 61A or the definition of land in horticultural use under sections 2 and 3 of said chapter 61A or the definition of recreational land under section 1 of chapter 61B.

Land retained as open space as required for the mitigation of a development shall be subject to the roll-back taxes imposed by this section.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title IX	TAXATION
Chapter 61	CLASSIFICATION AND TAXATION OF FOREST LANDS AND FOREST PRODUCTS
Section 8	CONVERSION OF LAND TO RESIDENTIAL, INDUSTRIAL OR COMMERCIAL USE; NOTICE TO CITY OR TOWN; FIRST REFUSAL OPTION

[Section impacted by 2020, 53, Sec. 9 effective April 3, 2020 relating to the suspension of all time periods within which any municipality is required to act, respond, effectuate or exercise an option to purchase in order to address disruptions caused by the outbreak of COVID-19.]

Section 8. Land taxed under this chapter shall not be sold for, or converted to, residential, industrial or commercial use while so taxed or within 1 year after that time 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.

The discontinuance of forest certification shall not, in itself, for the purposes of this section, be considered a conversion. Specific use of land for a residence for the owner, the owner's spouse or a parent, grandparent, child, grandchild, or brother or sister of the owner, or surviving husband or wife of any deceased such relative, or for living quarters for any

persons actively employed full-time in the forest use of that land, shall not be a conversion for the purposes of this section, and a certificate of the board of assessors, recorded with the registry of deeds, shall conclusively establish that particular use.

Any notice of intent to sell for other use shall be accompanied by a statement of intent to sell, a statement of proposed use of the land, the location and acreage of land as shown on a map drawn at the scale of the assessors map in the city or town in which the land is situated, and the name, address and telephone number of the landowner.

Any notice of intent to sell for other use shall be accompanied by a certified copy of an executed purchase and sale agreement specifying the purchase price and all terms and conditions of the proposed sale, which is limited to only the property classified under this chapter, and which shall be a bona fide offer as described below.

Any notice of intent to sell for other use shall also be accompanied by any additional agreements or a statement of any additional consideration for any contiguous land under the same ownership, and not classified under this chapter, but sold or to be sold contemporaneously with the proposed sale.

For the purposes of this chapter, a bona fide offer to purchase shall mean a good faith offer, not dependent upon potential changes to current zoning or conditions or contingencies relating to the potential for, or the potential extent of, subdivision of the property for residential use or the potential for, or the potential extent of development of the property for industrial or commercial use, made by a party unaffiliated with the landowner for a fixed consideration payable upon delivery of the deed.

Any notice of intent to convert to other use shall be accompanied by a statement of intent to convert, a statement of proposed use of the land, the location and acreage of land as shown on a map drawn at the scale of the assessors map in the city or town in which the land is situated, the name, address and telephone number of the landowner and the landowner's attorney, if any.

The notice of intent to sell or convert shall be sent by the landowner, by certified mail or hand-delivered, to the mayor and city council of a city, or board of selectmen of a town, and in the case of either a city or a town, to its board of assessors, to its planning board and conservation commission, if any, and to the state forester.

A notarized affidavit that the landowner has mailed or delivered a notice of intent to sell or convert shall be conclusive evidence that the landowner has mailed the notice in the manner and at the time specified. Each affidavit shall have attached to it a copy of the notice of intent to which it relates.

The notice of intent to sell or convert shall be considered to have been duly mailed if addressed to the mayor and city council or board of selectmen in care of the city or town clerk; to the planning board and conservation commission if addressed to them directly; to the state forester if addressed to the commissioner of the department of conservation and recreation and to the assessors if addressed to them directly.

If the notice of intent to sell or convert does not contain all of the material as described above, then the town or city, within 30 days after receipt, shall notify the landowner in writing that the notice is insufficient and does not comply.

For a period of 120 days after the day following the latest date of deposit in the United States mail of any notice which complies with this section, 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.

In the case of intended or determined conversion not involving sale, the municipality shall have an option to purchase the land at full and fair market value to be determined by an impartial appraisal performed by a certified appraiser hired at the expense of the municipality or its assignee, the original appraisal to be completed and delivered to the landowner within 30 days after the notice of conversion to the municipality. In the event that the landowner is dissatisfied with the original appraisal, the landowner may, at the landowner's expense, contract for a second appraisal, the second appraisal to be completed within 60 days after the delivery of the notice to convert. If, after completion of the second appraisal, the parties cannot agree on a consideration, the parties shall contract with a mutually acceptable appraiser for a third appraisal whose cost will be borne equally by both parties. The third appraisal shall be delivered to both parties within 90 days after the notice of conversion to the municipality and shall be the final determination of consideration. Upon agreement of a consideration, the city or town shall then have 120 days to exercise its option. During the appraisal process, the landowner may revoke the intent to convert at any time and with no recourse to either party.

This option may be exercised only after a public hearing followed by written notice signed by the mayor or board of selectmen, mailed to the landowner by certified mail at such address as may be specified in the notice of intent. Notice of the public hearing shall be given in accordance with section 23B of chapter 39.

The notice of exercise shall also be recorded at the registry of deeds and shall contain the name of the record owner of the land and description of the premises adequate for identification of it.

The notice to the landowner of the city or town's election to exercise its option shall be accompanied by a proposed purchase and sale contract or other agreement between the city or town and the landowner which, if executed, shall be fulfilled within a period of not more than 90 days after the date the contract or agreement, endorsed by the landowner, is returned by certified mail to the mayor or board of selectmen, or upon expiration of any extended period the landowner has agreed to in writing, whichever is later.

At the public hearing or a further public hearing, the city or town may assign its option to a nonprofit conservation organization or to the commonwealth or any of its political subdivisions under terms and conditions that the mayor or board of selectmen may consider appropriate. Notice of the public hearing shall be given in accordance with section 23B of chapter 39.

The assignment shall be for the purpose of maintaining no less than 70 per cent of the land in use as forest land as defined in section 1 of this chapter, as agricultural and horticultural land as defined in sections 1 and 2 of chapter 61A or as recreation land as defined in section 1 of chapter 61B, and in no case shall the assignee develop a greater proportion of the land than was proposed by the developer whose offer gave rise to the assignment. All land other than land that is to be developed shall then be bound by a permanent deed restriction that meets the requirements of chapter 184.

If the first refusal option has been assigned to a nonprofit conservation organization or to the commonwealth or any of its political subdivisions as provided in this section, the mayor or board of selectmen shall provide written notice of assignment to the landowner.

The notice of assignment shall state the name and address of the organization or agency of the commonwealth which will exercise the option in addition to the terms and conditions of the assignment. The notice of assignment shall be recorded with the registry of deeds.

Failure to record either the notice of exercise or the notice of assignment within the 120 day period shall be conclusive evidence that the city or town has not exercised its option.

If the option has been assigned to a nonprofit conservation organization or to the commonwealth or any of its political subdivisions, the option may be exercised by the assignee only by written notice to the landowner signed by the assignee, mailed to the landowner by certified mail at the address that is specified in the notice of intent. The notice of exercise shall also be recorded with the registry of deeds and shall contain the name of the record owner of the land and description of the premises adequate for identification of them.

The notice of exercise to the landowner shall be accompanied by a proposed purchase and sale contract or other agreement between the assignee and landowner which, if executed, shall be fulfilled within a period of not more than 90 days, or upon expiration of any extended period the landowner has agreed to in writing, from the date the contract or agreement, endorsed by the landowner, is returned by certified mail to the assignee.

During the 120 day period, the city or town or its assignees, shall have the right, at reasonable times and upon reasonable notice, to enter upon said land for the purpose of surveying and inspecting said land, including but not limited to soil testing for purposes of Title V and the taking of water samples.

The city or town or its assignee shall have all rights assigned to the buyer in the purchase and sales agreement contained in the notice of intent.

If the city or town elects not to exercise the option, and not to assign its right to exercise the option, the city or town shall send written notice of non-exercise signed by the mayor or board of selectmen to the landowner by certified mail at the address that is specified in the notice of intent. The notice of non-exercise shall contain the name of the owner of record of the land and description of the premises adequate for identification of them, and shall be recorded with the registry of deeds.

No sale or conversion of the land shall be consummated until the option period has expired or the notice of non-exercise has been recorded with the registry of deeds, and 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.

This section shall not apply to a mortgage foreclosure sale, but the holder of a mortgage shall, at least 90 days before a foreclosure sale, send written notice of the time and place of the sale to the parties in the manner described in this section for notice of intent to sell or convert, and the giving of this notice may be established by an affidavit as described in this section.

EXHIBIT 3

Reilly v. Town of Hopedale, Civil Action No. 21CV238, Memorandum and Order on Motion to Preserve Status Quo (Mass. Sup. Ct. May 6, 2022)

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION NO. 21CV00238

ELIZABETH REILLY and others,[1]

Plaintiff,

v.

TOWN OF HOPEDALE and others,[2]

Defendants.

MEMORANDUM AND ORDER ON MOTION TO PRESERVE STATUS QUO

Before the court is the plaintiffs' motion to "preserve the status quo" and prevent the defendants, Grafton & Upton Railroad ("Railroad") and related persons and entities from removing trees and otherwise altering property designated as protected forestland. Considering the motion as one for injunctive relief pending appeal under Mass. R. Civ. P. 629(c), the court reluctantly **DENIES** the motion.

BACKGROUND

The court briefly summarizes the factual and procedural background of this dispute about 130.18 acres of protected forestland. At some point before the events giving rise to this lawsuit, the City of Hopedale ("Hopedale" or "City") designated and taxed 130.18 acres owned by One Hundred-Forty Realty Trust ("Trust") as forestland ("Forestland") under G. L. c. 61 ("Chapter 61"). Chapter 61 provides a tax benefit to an owner of forest land. In return for the benefit, the

[1] Carol J. Hall, Donald D. Hall, Hilary Smith, David Smith, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Shannon W. Fleming, and Janice Doyle.
[2] Louis J. Arcudi, III, Brian Keyes, Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski, and One Hundred Realty Trust.

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owner must offer the municipality in which the land is located the right of first refusal before selling the land for residential, industrial, or commercial purposes. G, L. c. 61, § 8. The municipality's right of first refusal may only be assigned to a non-profit entity that agrees to maintain at least 70 percent of the land as forestland. *Id.*

On July 9, 2020, the Trust notified Hopedale it intended to sell to the Railroad 155.24 acres of land, which included the Forestland as well as 25.06 acres of wetlands.[3] On October 21, 2020, Hopedale notified the Railroad and the Trust that it was moving forward with its option to buy the Forestland. Three days later, Hopedale convened a town meeting, and residents voted to appropriate the money necessary to exercise the option. On November 2, 2020, Hopedale recorded in the county's land records notice of its decision to exercise its right of first refusal and buy the Forestland.

In the meantime, the Railroad purported to buy the Trust's "beneficial interest" in the Forestland and began clearing trees. Hopedale sued the Railroad in Land Court, seeking to stop the clearing and effectuate its acquisition of the Forestland. In February 2021, Hopedale and the Railroad settled the Land Court litigation with an agreement for Hopedale to buy approximately 40 acres of the Forestland for $587,500 and waive its Chapter 61 rights. On March 3, 2021, the plaintiffs, more than ten taxpaying citizens of Hopedale ("Taxpayers"), challenged the settlement in the instant lawsuit. The Taxpayers also sought a preliminary injunction to stop the Railroad from clearing trees, which the court allowed.

On November 4, 2021, the court decided cross-motions for judgment on the pleadings. The court decided the first count in favor of the Taxpayers, holding that Hopedale lacked authority to buy the smaller piece of land because the purchase was not approved by City voters.

[3] The wetlands portion of the property is not relevant to this decision.

The court decided in favor of the Railroad and Hopedale on the second count, concluding that the Taxpayers did not have standing to compel Hopedale to exercise its Chapter 61 rights. The court also found for Hopedale on the request in the third count for a declaratory judgment that the Forestland was protected parkland. The court enjoined further clearing by the Railroad for 60 days to give Hopedale time to decide whether it would (1) seek town meeting approval to acquire the smaller parcel; or (2) take further steps to exercise its purchase option for the entire parcel. The Taxpayers appealed the court's decision. The appeal is pending.

The following relevant actions have taken place between November 4, 2021, and today:

- Voters at town meeting rejected the City's proposal to buy the smaller piece of land.
- The Land Court denied the City's motion to reopen the judgment of dismissal filed after the parties settled the case. The Land Court also denied the City's motion to enjoin further clearing and rejected the Taxpayer's effort to intervene in the case.
- The City appealed the Land Court decision and asked the Court of Appeals to enjoin the Railroad from cutting down trees. The Court of Appeals denied the City's motion. The City has withdrawn its appeal of the Land Court decision.[4]
- The Railroad has continued to clear trees.

DISCUSSION

A court addressing a request for injunctive relief pending appeal 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).

[4]The Taxpayers have said they plan to appeal the Land Court's denial of their motion to intervene.

See also *Spence v. Reeder*, 382 Mass. 398, 422 (1981) (in emergency eviction procedure, "the issuance or denial of a stay of execution pending appeal ... is a discretionary one for the judge"). "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, in certain cases such as this one, 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).

The court begins its discussion with the Railroad's acquisition of a "beneficial interest" in the Forestland. In this court's view, this action by the Railroad was a flagrant violation of Chapter 61. However, the Taxpayers' lawsuit does not put that issue before the court. Rather, the court must decide whether the Taxpayers have a likelihood of succeeding in their challenge to the legality of the Settlement Agreement. Unfortunately, the court's answer to that question is "no."

First, while G. L. c. 40, § 53 gives the Taxpayer's standing to sue to prevent the illegal expenditure of money,[5] it does not give them the right to compel the town to exercise its option to buy the Forestland. Second, the court is not persuaded that the Taxpayers have a likelihood of proving that the Settlement Agreement was an illegal assignment of the City's Chapter 61 rights. Rather, by settling the case, the City decided to forgo its Chapter 61 option, which the statute plainly allows it to do. G. L. c. 61, § 8. Cf. *Russell v. Town of Canton*, 361 Mass. 727, 731 (1972) (a town meeting vote cannot compel a municipality to take property by eminent domain). Since the City is not required to exercise the option, even though authorized to do so, a mandamus action cannot succeed.

[5] Indeed, the Taxpayers were successful in that effort in Count 1 of their complaint.

It is true that a lesser showing of likelihood of success is required when, as here, the irreparable harm is great. See *Ross–Simons of Warwick, Inc.* v. *Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (court conducts "sliding scale analysis" where "the predicted harm and the likelihood of success on the merits [are] juxtaposed and weighed in tandem"). However, there must be some likelihood of success on the merits. The court cannot in good conscience find that likelihood of success here.

In the court's view, the actions of the Railroad were wrong. In addition, there appears to be grounds to rescind the Settlement Agreement. This case, however, does not present an opportunity for this court to address those issues.

ORDER

For the above reasons, it is **ORDERED THAT** the plaintiff's Motion for a Preliminary Injunction is **DENIED**.

Dated: May 5, 2022

Karen Goodwin
Associate Justice, Superior Court

EXHIBIT 4

***Grafton & Upton Railroad Co. v. Town of Hopedale*, Case No. 22-cv-40080-ADB, Memorandum & Order at 1-3 (D. Mass. March 31, 2023)**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	*	Civil Action No. 4:22-cv-40080-ADB

MEMORANDUM & ORDER

BURROUGHS, D.J.

I. INTRODUCTION

At its core, this is a dispute between Grafton & Upton Railroad Company ("GURR" or "Plaintiffs"), a Class III rail carrier, and the Town of Hopedale,[1] regarding a portion of property at 364 West Street in Hopedale, Massachusetts. GURR has planned and is working on building a transloading and logistics facility on the property to support its rail operations. Hopedale meanwhile seeks to take by eminent domain a substantial portion of the property and is also

[1] Defendants in this case include the Town of Hopedale (the "Town" or "Hopedale"); the Hopedale Select Board (the "Select Board"); the Select Board's members, Glenda Hazard, Bernard Stock, and Brian Keyes; the Hopedale Conservation Commission (the "Conservation Commission"); and the Conservation Commission's members, Becca Solomon, Marcia Matthews, and David Guglielmi.

trying to stop GURR's development of the property through an Enforcement Order issued by its Conservation Commission. To forestall the taking and any interference with their development plans, Plaintiffs initiated this action and argue, primarily, that both the proposed taking and the Enforcement Order are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq*. Presently before the Court are Defendants' motion to dismiss the complaint, [ECF No. 51], and Plaintiffs' motions for a preliminary injunction to enjoin the proposed taking and any actions to carry out the Enforcement Order, [ECF Nos. 26 and 28]. For the reasons set forth below, the motion to dismiss is GRANTED in part and DENIED in part, and the motions for preliminary injunction are ALLOWED.

II. FACTUAL BACKGROUND

A. The Railroad and the Property

GURR is a short-line rail carrier that owns and operates 16.5 miles of rail line that runs in part through Hopedale, Massachusetts. [ECF No. 1 ("Compl.") ¶ 17]. A portion of that rail line "bifurcates and runs through property located at 364 West Street in Hopedale[,]" [id.], which has been "zoned for industrial uses," [id. ¶ 26]. One Hundred Forty Realty Trust (the "Trust") is the record owner of title to the property at 364 West Street, [Compl. at 1 n.1], and on October 12, 2020, GURR purchased the beneficial interest of the Trust and is the Trust's sole beneficiary, [id. ¶¶ 3, 27].[2] As a result of this purchase, GURR "became the owner of the 155-acre parcel at 364 West Street including the approximately 130 acres of what was, at that time, forestland." [Id. ¶ 27]. GURR also later acquired additional land parcels such that its total acreage in the area of 364 West Street is currently 198.607 acres. [Id. ¶¶ 28–29].

[2] Plaintiffs Jon Delli Priscoli and Michael R. Milanoski are the trustees of the Trust. [Id. ¶ 4].

The "Transloading and Logistics" center that GURR intends to build on the property will include new track, more than 1,500,000 square feet of space for transloading and temporary storage, and necessary infrastructure to support the facility including stormwater detention and basins, as well as sewage treatment. [Id. ¶ 31]. As of the filing of this lawsuit, the transloading and logistics center was "under construction."[3] [Id. ¶ 33]. GURR further states that it acquired the property, and worked to develop it, "to support rail transportation that will include on the entirety of the site transloading, temporary storage, services related to transloading or temporary storage, and whatever additional rail activities are necessary or required in order to support the rail business that currently exists and is anticipated in the future . . . ." [Id. ¶ 34].

B. Proposed Taking & Enforcement Order

At a meeting on June 21, 2022, the Hopedale Select Board voted to pursue the taking of approximately 130 acres of real property at 364 West Street by eminent domain, pursuant to Chapter 79 of the Massachusetts General Laws. See [Compl. ¶¶ 62, 74]. At that same meeting, the Select Board scheduled a Special Town Meeting for July 11, 2022 to vote on a motion to authorize the Select Board to carry out the proposed taking. [Id. ¶ 63]. On that day, the Special Town Meeting voted to authorize the Select Board to take the 130 acres, plus or minus, of real property located at 364 West Street by eminent domain. [Id. ¶ 70]. On July 14, 2022, the Select Board noticed a meeting for July 19, 2022, at which they would vote on the taking authorized by the Special Town Meeting. [Id. ¶¶ 71–72].

[3] GURR's development of 364 West Street is subject to federal environmental statutes and regulations and is further subject to oversight by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers. [Compl. ¶¶ 124, 129]. The EPA has inspected the sight on at least one occasion, on May 31, 2022, regarding a general permit for stormwater discharges from construction activities. [Compl. ¶ 124; ECF No. 6-1 at 58–62].

At the earlier July 11, 2022 Select Board meeting, the "Special Town Counsel" stated that the Select Board could record a notice of taking immediately after voting to take the land. [Id. ¶ 75]. Plaintiffs thus allege, on information and belief, that the Select Board intended to record a notice of taking of real property immediately after the scheduled vote on July 19, 2022. [Id. ¶ 76]. Plaintiffs additionally note that under Chapter 79, "the recording of the notice of taking immediately vests title to the property in the municipality." [Id. ¶ 77]; see also Mass. Gen. Laws ch. 79, § 3 ("Upon the recording of an order of taking under this section, title to the fee of the property taken or to such other interest therein as has been designated in such order shall vest in the body politic or corporate on behalf of which the taking was made . . . .").

Around the same time that the Select Board was moving towards recording a notice of taking of a portion of the property at 364 West Street, the Conservation Commission also acted to interrupt GURR's development of the property. On July 14, 2022, the Conservation Commission emailed an Enforcement Order to GURR's president that stated that GURR and the record owner of title of 364 West Street, the Trust, were in violation of the Massachusetts Wetlands Protection Act as a result of the work being done at the property to develop the transloading facility. [Compl. ¶ 126]. The Enforcement Order directed GURR to cease and desist from further development of the facility. [Id. ¶ 127].

III. PROCEDURAL HISTORY

Plaintiffs filed suit on July 18, 2022, see [Compl.], and simultaneously filed emergency motions for preliminary injunctions and temporary restraining orders to (1) stop the Select Board from recording a notice of taking by eminent domain of any portion of GURR's property at 364 West Street in Hopedale, Massachusetts, and (2) enjoin the Conservation Commission from enforcing its July 14, 2022 Enforcement Order, [ECF Nos. 2 and 4]. Defendants filed a combined opposition to the emergency motions on July 19, 2022, [ECF No. 14], and later that

day the parties appeared before Chief Judge Saylor for a hearing on the motions, see [ECF No. 17]. Following the hearing, Chief Judge Saylor entered a temporary restraining order prohibiting Defendants from recording any notice of taking of property at 364 West Street. [ECF No. 18]. Two days later, the parties appeared telephonically for a status conference before this Court. [ECF No. 20]. At that hearing, the parties each expressed an intent to re-brief the pending motions for preliminary injunction and the oppositions. On July 26, 2022, the Court entered an amended temporary restraining order that extended the order entered by Chief Judge Saylor until this Court issued a ruling on the forthcoming motions for preliminary injunction. [ECF No. 23].

Plaintiffs filed the currently pending motions for preliminary injunction, [ECF Nos. 26 and 28], on July 28, 2022. Defendant filed its combined opposition on August 4, 2022, [ECF No. 32], Plaintiffs replied on August 8, 2022, [ECF No. 40], and Defendants filed a sur-reply on August 9, 2022, [ECF No. 45]. Supplemental briefing eventually followed. [ECF Nos. 62–66].

On August 12, 2022, Defendants moved to dismiss Plaintiffs' complaint for failing to establish subject matter jurisdiction or to state a claim. [ECF No. 51]. Plaintiffs opposed the motion on August 25, 2022, [ECF No. 53], Defendants replied, [ECF No. 56], and Plaintiffs filed a sur-reply, [ECF No. 57].

Plaintiffs have also filed a motion for clarification of the orders issued by this Court, [ECF No. 59], which Defendants oppose, [ECF No. 60].

IV. MOTION TO DISMISS

A. Motion to Dismiss for Lack of Jurisdiction

i. Legal Standard

"A district court generally has the obligation, when there is any question, to confirm that it has subject matter jurisdiction prior to considering the merits of the underlying controversy." Sinapi v. R.I. Bd. of Bar Exam'rs, 910 F.3d 544, 549 (1st Cir. 2018). When evaluating a motion

to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) at the pleading stage, granting such a motion "is appropriate only when the facts alleged in the complaint, taken as true, do not justify the exercise of subject matter jurisdiction." Muniz-Rivera v. United States, 326 F.3d 8, 11 (1st Cir. 2013). "When a district court considers a 12(b)(1) motion, it must credit the plaintiff's well-pled factual allegations and draw all reasonable inferences in the plaintiff's favor." Merlonghi v. United States, 620 F.3d 50, 54 (1st Cir. 2010). "In deciding the question, [courts] may consider whatever evidence has been submitted in the case." Acosta-Ramirez v. Banco Popular de P.R., 712 F.3d 14, 18 (1st Cir. 2013) (citing Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996)). "While the court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion," and attaching exhibits to a Rule 12(b)(1) motion does not convert it to a motion for summary judgment. Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002).

ii. The Court Has Jurisdiction over Plaintiffs' ICCTA Preemption Claims

Congress passed the ICCTA in 1995, in part, to "substantially deregulate[] the rail and motor carrier industries." Pejepscot Indus. Park, Inc. v. Me. Cent. Ry. Co., 215 F.3d 195, 197 (1st Cir. 2000) (citing H.R. Rep. No. 104-311, at 95 (1995) ("[C]hanges are made to reflect the direct and complete preemption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907.")). Consistent with this policy, the ICCTA established the Surface Transportation Board ("STB") within the Department of Transportation, see Pub. L. 104-88, § 201(a), 109 Stat. 803, 932 (1995) (codified as amended at 49 U.S.C. § 1301), and granted it exclusive regulatory authority over rail transportation. In pertinent part, § 10501(b) of the ICCTA states that the STB's jurisdiction over

(1) transportation by rail carriers . . . ; and

> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state,
>
> is exclusive.

49 U.S.C. § 10501(b). The ICCTA's definition of "transportation" sweeps broadly and includes a "yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . . [and] services related to that movement, including receipt, delivery, . . . transfer in transit, . . . handling, and interchange of passengers and property . . . ." Id. § 10102(9). The First Circuit has found that transloading facilities fall under the definition of transportation under the ICCTA and that "[i]t is well-established that the preemption of state and local regulation under the ICCTA generally extends to transloading facilities." Grosso v. Surface Transp. Bd., 804 F.3d 110, 118 (1st Cir. 2015).

Section 10501(b) of the ICCTA further states that "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). Courts have thus held that the "ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." Island Park, LLC v. CSX Transp., 559 F.3d 96, 102 (2d Cir. 2009) (internal quotation marks omitted) (quoting N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007)). Further, courts have found that the ICCTA preempts takings, or attempted takings, that would unduly interfere with rail transportation, but permits those where, for example, a town seeks to acquire routine, non-conflicting uses. See City of Lincoln v. Surface Transp. Bd., 414 F.3d 858, 858, 861–62 (8th Cir. 2005) (affirming STB's finding that a city's proposed taking by eminent

domain of a 20-foot strip of a rail line's right of way was preempted by § 10501(b) because it interfered with rail transportation); Union Pac. R.R. Co. v. Chi. Transit Auth., 647 F.3d 675, 680–82 (7th Cir. 2011) (attempted condemnation of right of way was federally preempted because it interfered with railroad's use of the property by, among other things, preventing use of property for additional tracks). Courts have also held it appropriate to consider a railway's "future plans as well as its current uses" of property to determine whether a proposed taking, or other state regulation, is preempted. City of Lincoln, 414 F.3d at 862.

Defendants argue that because the ICCTA vests exclusive jurisdiction in the STB, and because § 10501(b) is a preemption statute and not a cause of action, the Court lacks jurisdiction. Plaintiffs respond that their claims under § 10501(b) present a federal question and invoke the Court's equity jurisdiction.

The Court begins by noting that the outcome Defendants propose would appear to be antithetical to Congress's expressed intent in passing the ICCTA. As noted above, by passing the ICCTA, Congress intended to accomplish the "complete pre-emption of State economic regulation of railroads" and to "extend[] exclusive Federal jurisdiction" over elements of rail transportation that had been "formerly reserved for State jurisdiction." H.R. Rep. No. 104-311, at 95 (1995). Yet if the Court finds, as Defendants urge, that it lacks jurisdiction over this action, the Town will record the notice of taking and title to the property—on which GURR is constructing a transloading facility—will be immediately transferred to the Town. While the Court sets forth its reasoning more fully below, it seems clear that such a taking reflects the sort of interference that Congress sought to prohibit in passing the ICCTA. With that framing, the Court considers whether it has jurisdiction over Plaintiffs' preemption claims.

In Shaw v. Delta Airlines, Inc., the Supreme Court stated that "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights[,]" 463 U.S. 85, 96 n.14 (1983) (citing Ex parte Young, 209 U.S. 123, 160–62 (1908)), and that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve[,] id. (citing Smith v. Kan. City Title & Tr. Co., 255 U.S. 180, 199–200 (1921)). Although this case would seem to fall within this description, Defendants contend that jurisdiction is nonetheless foreclosed because the ICCTA explicitly vests "exclusive" jurisdiction in the STB. Defendants further argue that courts sitting in equity are "subject to express and implied statutory limitations" and that by creating the STB and granting it exclusive jurisdiction over "transportation by rail carriers" as well as "the construction . . . of spur, industrial, team, switching, . . . or facilities[,]" 49 U.S.C. § 10501(b), Congress divested federal courts of jurisdiction to hear claims alleging that state regulation of rail transportation is preempted by the ICCTA. See, e.g., [ECF No. 52 at 6 (citing Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320 (2015))].

Defendants analogize this case to Seminole Tribe of Florida v. Florida wherein a tribe brought suit under the Indian Gaming Regulatory Act ("IGRA") to compel the Governor of Florida to negotiate with the tribe toward a compact regarding gaming activities, as required by Section 2710(d)(3) of the IGRA. 517 U.S. 44, 47 (1996). The tribe argued, in part, that federal jurisdiction was proper under the doctrine of Ex parte Young. Id. at 73. The Supreme Court disagreed. Id. Although the Court acknowledged that it had "often found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order

to 'end a continuing violation of federal law[,]'" id. (quoting Green v. Mansour, 474 U.S. 64, 68 (1985), it nonetheless found the situation presented in Seminole Tribe to be "sufficiently different from . . . the traditional Ex parte Young action so as to preclude the availability of that doctrine," id. There, even though the Governor's failure to negotiate with the tribe was inconsistent with § 2710(d)(3), the provision requiring such negotiation had to be considered in conjunction with the remedial provision, § 2710(d)(7) which was both intricate and "intended . . . not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3)." Id. at 74. The Court concluded that, based on the intricacy of the statute and the limited nature of the remedy,[4] Congress, through the IGRA, "displayed an intent not to provide the 'more complete and immediate relief' that would otherwise be available under Ex parte Young." Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 647 (2002) (citing Seminole Tribe, 517 U.S. at 75) (discussing Seminole Tribe); see also Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 256 n.3 (2011) (explaining that the Court had not permitted cases alleging violation of the IGRA to proceed in equity because doing so would undermine the limited nature of the remedial provision).

The Supreme Court reached a similar conclusion in Armstrong, wherein healthcare providers in Idaho sued state officials under the Medicaid Act seeking a court order requiring the officials to raise reimbursement rates in compliance with the statute. 575 U.S. 323–24. The plaintiffs argued that their suit could proceed in equity, but the Court again disagreed. Id. at 328. It found that Congress had intended to foreclose equitable relief because (1) the only remedy the

[4] "The 'intricate procedures set forth in [§ 2710(d)(7)]' prescribed that a court could issue an order directing the State to negotiate, that it could require the State to submit to mediation, and that it could order the Secretary of the Interior be notified." Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 647 (2002) (citing Seminole Tribe, 517 U.S. at 74–75).

statute provided for a State's breach was the withholding of Medicaid funds, and (2) the statute was "judicially unadministrable[.]" Id. The Supreme Court noted that the fact that Congress had provided a sole remedy "might not, *by itself*, preclude the availability of equitable relief" but the fact of a sole remedy "when combined with the judicially unadministrable nature" of the statute was sufficient to find equity jurisdiction foreclosed. Id. (citing Stewart, 563 U.S. at 256 n.3).

Turning to the instant matter, the Court finds that the Supreme Court's decisions in Seminole Tribe and Armstrong do not compel the conclusion that the Court lacks jurisdiction here. Perhaps the most distinguishing characteristic is the limited nature of the remedial schemes imposed by the IGRA and Medicaid Act that were at issue in Seminole Tribe and Armstrong, respectively, compared to the broad language of § 10501(b). In Seminole Tribe, the remedy for a violation of § 2710(d)(3) of the IGRA was limited to an order directing state officials to negotiate, submit to mediation, or that the Secretary of the Interior could be notified. Seminole Tribe, 517 U.S. at 74–75. And in Armstrong, the remedy for setting reimbursement rates in a manner inconsistent with § 30A of the Medicaid Act was the withholding of Medicaid funds by the Secretary of Health and Human Services. Armstrong, 575 U.S. at 328–29. In the Supreme Court's view, such "modest . . . sanctions" displayed Congressional intent "not to provide the 'more complete and more immediate relief' that would otherwise be available under Ex parte Young." Verizon Md., 535 U.S. at 647. In contrast, the "strong language" of the ICCTA's preemption provision, § 10501(b), is not similarly constrained, reflecting Congress's intent to proscribe any undue interference with rail transportation by state regulation. See New Eng. Cent. R.R., Inc. v. Springfield Terminal Ry. Co., 415 F. Supp. 2d 20, 23 (D. Mass. 2006); see also Engelhard Corp. v. Springfield Terminal Ry. Co., 193 F. Supp.2d 385, 389 (D. Mass. 2002) ("The concluding sentence of section 10501(b) is an unmistakable statement of Congress's intent

to preempt state laws touching on the substantive aspects of rail transportation."). And unlike the IGRA and Medicaid Act, the language of the ICCTA does not indicate Congressional intent to foreclose relief available under Ex parte Young. While permitting the claims in Seminole Tribe and Armstrong to proceed in equity would have allowed for remedies greater than those imagined by the statutes themselves, thereby undermining congressional intent, exercising jurisdiction under Ex parte Young here, for the limited purpose of evaluating preemption, does not similarly run afoul of the statute or congressional intent because determining whether a state regulation should be enjoined as preempted is entirely consistent with the purpose of the ICCTA.[5]

The present situation is further distinguishable from Armstrong because § 10501(b) of the ICCTA, unlike § 30(A) of the Medicaid Act, is not judicially unadministrable. As the parties agree, § 10501(b) is, at least in part, a preemption statute, and federal courts are routinely called upon to make findings regarding the preemptive effect of federal laws. In contrast, the Supreme Court observed that it was "difficult to imagine a requirement broader and less specific" than § 30(A) of the Medicaid Act, which it referred to as a "judgment-laden standard," Armstrong, 575 U.S. at 328, that benefitted from "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking," id. at 328–29 (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in judgment)).

[5] In their briefing, the parties appear to assume, without discussing, that Defendants qualify as state actors. Because the parties do not dispute this point, and because courts have found that municipalities and local officials are sometimes considered to be acting as an arm of the state or as state actors for purposes of a specific case, see, e.g., McGee v. Cole, 115 F. Supp. 3d 765, 773 (S.D.W. Va. 2015) (collecting cases), the Court accepts, for the purposes of this order, that Defendants, acting under color of state law, qualify as state actors.

Therefore, unlike in Armstrong, the exercise of federal jurisdiction here does not undermine the purpose of the statute nor is the provision at issue judicially unadministrable.

For the foregoing reasons, the Court concludes that it may properly exercise its equity jurisdiction over Plaintiffs' preemption claims.[6] Defendants' motion to dismiss for lack of jurisdiction is therefore DENIED.

iii. Plaintiffs' § 1983 Claim Fails to the Extent It Is Brought Under the ICCTA

Plaintiffs also bring a claim under 42 U.S.C. § 1983 alleging interference with the federal right to participate in interstate commerce, and purport to bring this claim, in part, pursuant to the ICCTA. Defendants argue that Plaintiffs' § 1983 claim fails under Rule 12(b)(1) to the extent it is brought pursuant to the ICCTA because § 1983 does not create a substantive cause of action

[6] Because the Court finds that it may properly exercise equity jurisdiction over Plaintiffs' preemption claims, the Court does not reach the issue of whether the preemption claims raise a federal question or, alternatively, if the language of § 10501(b) precludes federal question jurisdiction.

Nonetheless, the Court notes that numerous other federal courts and the STB have found that federal courts do have jurisdiction to determine issues of preemption. See, e.g., Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands, 841 F.3d 1069, 1072 (9th Cir. 2016) (the plaintiff railroad "present[ed] a federal question by alleging that enforcement of the state removal-fill law is preempted by the federal ICCTA; thus the district court had subject matter jurisdiction under 28 U.S.C. § 1331"); Elam v. Kan. City S. Ry. Co., 635 F.3d 796, 810 (5th Cir. 2011) (finding that the ICCTA's "legislative history suggests Congress did not intend § 10501(b) to preclude original (or removal) federal jurisdiction over claims arising under the ICCTA" and "recognizing the STB's primary jurisdiction does not divest the district court of its original subject matter jurisdiction"); Coastal Distrib., LLC v. Town of Babylon, 216 Fed. App'x 97, 103 (2d Cir. 2007) ("The very basis for federal jurisdiction here was the appellees' assertion that the Town and its [Zoning Board of Appeals] were preempted by federal law from taking any action to regulate [a transloading facility operated by Plaintiff] . . . ."); Jie Ao & Xin Zhou — Pet. for Declaratory Order, No. FD 35539, 2012 WL 2047726, at *3 (S.T.B. June 4, 2012) (STB decision stating that "issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance"); Brookhaven Rail Terminal and Brookhaven Rail, LLC — Pet. for Declaratory Order, No. FD 35819, 2014 WL 4253048, at *3 (S.T.B. Aug. 26, 2014) (finding similarly that "the Board and courts have concurrent jurisdiction to determine preemption").

by itself and also does not create an individually enforceable right. [ECF No. 52 at 11]. Because the Court agrees that § 10501 does not create an individually enforceable right, Plaintiffs' § 1983 claim fails to the extent it is brought under the ICCTA.

Section 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Not all federal statutes create rights which are remediable by § 1983, and courts must look to "rights-creating language" and an "individual[] focus" in the statute's text and structure to determine whether Congress unambiguously intended to create individual rights. Gonzaga, 536 U.S. at 290.

In Gonzaga, the Supreme Court found that the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which provides for the withdrawal of federal funding from educational institutions that impermissibly release student records, does not confer rights to individual students—and thus conferred no rights enforceable under § 1983—because the statute's nondisclosure provisions "contain no rights-creating language" and "they have an aggregate, not individual focus . . . ." 536 U.S. at 290. The same is true of § 10501 of the ICCTA, which merely forbids State and local legislation in the area of rail transportation. Put differently, the statute creates a regulatory scheme which requires State and local authorities to refrain from regulating rail transportation. The statute's "focus on the person regulated rather than the individuals protected creates 'no implication of an intent to confer rights on a particular class of persons.'" Id. at 287 (quoting Alexander v. Sandoval, 532 U.S. 275, 289 (2001)). The "person's regulated," in § 10501(b) are the State and political subdivisions, insofar as they are forbidden

from promulgating laws related to "transportation by rail carriers, and . . . the construction . . . of spur, industrial, team, switching, or side tracks, or facilities . . . ." 49 U.S.C. § 10501(b). Thus, like FERPA, the statute, § 10501(b), regulates the activities of the targeted governmental entities, and does not manifest an intent to grant a specific entitlement to any individuals or entities.

Accordingly, Defendants' motion to dismiss Plaintiffs' § 1983 claim is GRANTED to the extent the claim was brought under the ICCTA.

B. Motion to Dismiss for Failure to State a Claim

i. Legal Standard

In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept as true all well-pled facts, analyze those facts in the light most favorable to the plaintiff, and draw all reasonable factual inferences in the plaintiff's favor. See Gilbert v. City of Chicopee, 915 F.3d 74, 80 (1st Cir. 2019).

"To cross the plausibility threshold a claim does not need to be probable, but it must give rise to more than a mere possibility of liability." Grajales v. P.R. Ports Auth., 682 F.3d 40, 44–45 (1st Cir. 2012) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "The plausibility standard invites a two-step pavane." A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 80 (1st Cir. 2013) (citing Grajales, 682 F.3d at 45). First, the Court "must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Id. (quoting Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012)). Second, the Court "must determine whether the remaining factual content allows a 'reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting Morales-Cruz, 676 F.3d at 224).

ii. Plaintiffs' § 1983 Claim Asserting Violation of the Dormant Commerce Clause Fails

Defendants argue that Plaintiffs' § 1983 claim also fails to the extent it is brought under the dormant Commerce Clause because the complaint is "devoid of any specific factual allegations about how the taking would affect the interstate rail transportation network." [ECF No. 52 at 12]. The Court largely agrees.

The Supreme Court "has long construed the Commerce Clause to be not only an affirmative grant of authority to Congress to regulate interstate commerce but also a negative, 'self-executing limitation on the power of the states to enact laws that place substantial burdens on interstate commerce.'" Ne. Patients Grp. V. United Cannabis Patients & Caregivers of Me., 45 F.4th 542, 545 (1st Cir. 2022) (internal brackets omitted) (quoting S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984)). The Supreme Court has further stated that the dormant Commerce Clause "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby 'impedes free private trade in the national marketplace.'" Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) (citations and internal brackets omitted) (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980)). Put differently, "[i]f a state or local government . . . enacts a law that unduly favors in-state commercial interests over their out-of-state counterparts, that law 'routinely' will be defenestrated under the dormant Commerce Clause 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'" Houlton Citizens' Coal. v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999) (quoting West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192–93 (1994)).

> To determine whether a statute violates the dormant Commerce Clause, we apply one of several levels of analysis, depending on the effect and reach of the legislation.
>
> First, a state statute is a per se violation of the Commerce Clause when it has an "extraterritorial reach." "[A] statute that directly controls commerce occurring

> wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." When a state statute regulates commerce wholly outside the state's borders or when the statute has a practical effect of controlling conduct outside of the state, the statute will be invalid under the dormant Commerce Clause.
>
> …
>
> Second, if a state statute discriminates against interstate commerce, we apply strict scrutiny. It will be scrutinized under a "virtually per se invalid rule," which means that the statute will be invalid unless the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." This level of scrutiny will be applied if the state statute discriminates against interstate commerce on its face or in practical effect. When a state statute "discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."
>
> Third, a lower standard of scrutiny is applied when the state statute regulates evenhandedly and has only incidental effects on interstate commerce. In this situation, a balancing test is applied. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Pharm. Rsch. & Mfrs. Of Am. v. Concannon, 249 F.3d 66, 79–80 (1st Cir. 2001) (citations omitted).

Plaintiffs contend that the Town's intended taking would "unreasonably interfere with GURR's participation in interstate commerce by rail transportation." [Compl. ¶ 102]. Plaintiffs, however, do not allege that the taking has an extraterritorial reach, so the Court moves to the second step and considers whether the taking discriminates against interstate commerce. "Discrimination" in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Or. Waste Sys., Inc. v. Dep't of Env't. Quality of State of Or., 511 U.S. 93, 99 (1994). Here, Plaintiffs allege that GURR, an in-state carrier, is burdened to the extent it cannot ameliorate supply chain issues. But the

inability to ease such issues is not the same as alleging that a state regulation benefits an in-state carrier to the detriment of out-of-state carriers. Thus, the Court finds that Plaintiffs have not alleged that the taking is discriminatory in the context of the dormant Commerce Clause.

The Court therefore proceeds to the third step and applies the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). When a state statute regulates evenhandedly and has only incidental effects on interstate commerce, that statute will be upheld unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." Id. at 142.

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

Id. (citations omitted).

The First Circuit has directed that when applying the Pike balancing test, courts should consider: "(1) the nature of the putative local benefits advanced by the statute; (2) the burden the statute places on interstate commerce; and (3) whether the burden is 'clearly excessive' as compared to the putative local benefits." Concannon, 249 F.3d at 83–84 (quoting Pike, 397 U.S. at 142). "[T]he fact that a law may have 'devastating economic consequences' on a particular interstate firm is not sufficient to rise to a Commerce Clause burden." Id. at 84 (quoting Instructional Sys. v. Comput. Curriculum Corp., 35 F.3d 813, 827 (3d Cir. 1994) (further citation omitted)); see also Exxon Corp. v. Governor of Md., 437 U.S. 117, 127–28 (stating that "the

[Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations").

Here, the Court finds that Plaintiffs' § 1983 dormant Commerce Clause claim fails because they have not adequately alleged an adverse effect on interstate commerce. While the taking would likely have a significant impact on GURR, that alone is not sufficient to make out a claim under the Commerce Clause. Concannon, 249 F.3d at 84. Further, although Plaintiffs allege that the taking would hinder a facility that would eventually "have a positive impact on national supply chain issues" that is different in kind from a state or local law or regulation that adversely effects existing interstate commerce. [Compl. ¶ 33]. Because the Court concludes that Plaintiffs have not sufficiently alleged a burden that gives rise to a Commerce Clause claim, Defendants' motion to dismiss the claim is GRANTED.[7]

iii. State Law Claims

Plaintiffs also bring counts for violations of Mass. Gen. Laws ch. 160, § 7, Mass. Gen. Laws. Ch. 40, §§ 8C, 14, Mass. Gen. Laws ch. 45, §§ 3, 19, and Massachusetts' prior public use doctrine. Defendants argue that each count fails to state a claim.

Defendants first argue that each of Plaintiffs' state law claims fails because any challenge to the validity of the proposed taking must be part of a Chapter 79 proceeding because Chapter 79 provides the "exclusive statutory remedy for takings made thereunder." [ECF No. 52 at 16 (citing Whitehouse v. Town of Sherborn, 419 N.E.2d 293, 297 (Mass. App. Ct. 1981))]. Although Plaintiffs opposed the motion to dismiss their state law claims, they did not offer arguments in response to Defendants' contention that Chapter 79 provides the exclusive remedy for takings made thereunder. As the First Circuit has repeatedly stated, "district court[s] [are]

[7] To the extent Plaintiffs brought a § 1983 claim pursuant to the Supremacy Clause, this claim also fails because neither § 1983 nor the Supremacy Clause confer a cause of action.

free to disregard arguments that are not adequately developed . . . ." Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 260 (1st Cir. 1999); see also Nikijuluw v. Gonzales, 427 F.3d 115, 120 n.3 (1st Cir. 2005) ("It is well-established that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'"); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), cert. denied, 494 U.S. 1082 (1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work . . . . 'Judges are not expected to be mindreaders . . . .'" (citation omitted)). Because Plaintiffs did not adequately respond to Defendants' arguments, the motion to dismiss the state law claims (Counts III, IV, and V) is GRANTED.

V. MOTIONS FOR PRELIMINARY INJUNCTION

The Court now turns to Plaintiffs motions for preliminary injunction seeking to (1) enjoin the town from recording notice of the disputed property, [ECF No. 26], and (2) enjoin enforcement of the July 14, 2022 Enforcement Order issued against GURR by Defendant Hopedale Conservation Commission, [ECF No. 28].

A. Legal Standard

In considering whether to grant a request for a preliminary injunction, "a district court is tasked with considering the movant's likelihood of success on the merits; whether and to what extent the movant will suffer irreparable harm in the absence of preliminary injunctive relief; the balance of relative hardships, that is, the hardship to the nonmovant if enjoined as opposed to the hardship to the movant if no injunction issues; and the effect, if any, that either a preliminary injunction or the absence of one will have on the public interest." Ryan v. U.S. Immigr. & Customs Enf't, 974 F.3d 9, 18 (1st Cir. 2020) (citations omitted). "The movant's likelihood of success on the merits weighs most heavily in the preliminary injunction calculus[,]" and the First Circuit has described that factor "as the 'sine qua non' of preliminary injunctive relief." Id.

(quoting New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002)). Thus, "if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." New Comm Wireless Servs., Inc., 287 F.3d at 9. When considering the motions, the Court "may accept as true 'well-pleaded allegations in the complaint and uncontroverted affidavits.'" Howe v. U.S. Bank Nat'l Ass'n as Tr. for RMAC Tr. Series 2016-CTT, 440 F. Supp. 3d 99, 102–03 (D. Mass. Feb. 13, 2020) (quoting Rohm & Haas Elec. Materials, LLC v. Elec. Cirs., 759 F. Supp. 2d 110, 114 n.2 (D. Mass. 2010)).

B. Motion to Enjoin the Taking

i. Likelihood of Success

Plaintiffs argue that they are likely to succeed on the merits because Hopedale's proposed taking qualifies as a state or local action that unreasonably interferes with GURR's railroad operations at 364 West Street and is thus preempted by the ICCTA. [ECF No. 27 at 9].

> Under the Supremacy Clause of the United States Constitution, "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." As the Supreme Court has held, "Where a state statute conflicts with, or frustrates, federal law, the former must give way."

Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 237 (D. Mass. 2004) (first quoting U.S. Const. art. VI, cl. 2.; and then quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663 (1993)). As touched on above, the ICCTA—and its precursor, the Interstate Commerce Act—reflects Congress's intent to federalize the regulation of rail transportation in the United States, and to "complete[ly] preempt[] [] State economic regulation of railroads." H.R. Rep. No. 104-311, at 95. To accomplish this goal, Congress established, through the ICCTA, the STB, which has exclusive jurisdiction over "transportation by rail[,]" including "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . . ." 49 U.S.C. § 10501(b). And "[f]or more than a century, the

Supreme Court has made it clear that under the U.S. Constitution's Supremacy Clause (Art. VI, cl. 2), state laws or regulations that are inconsistent with the [STB's] plenary authority or with the Congressional policy reflected in the [ICCTA] are preempted." B & S Holdings, LLC v. BNSF Ry. Co., 889 F. Supp. 2d 1252, 1256 (E.D. Wash. 2012) (citing City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998)).

Notwithstanding the ICCTA's clear and broad preemptive sweep, Defendants argue that the proposed taking is not preempted because (1) the taking will not unreasonably interfere with GURR's operations and (2) GURR's development of the transloading facility is not far enough along to allow the conclusion that the construction will "come to fruition." [ECF No. 32 at 16]. The Court finds that Defendants' argument is contrary to the language and intent of the ICCTA. "The statutory language indicates an express intent on the part of Congress to preempt the entire field of railroad regulation, including activities related to but not directly involving railroad transportation." Town of Milford, 337 F. Supp. 2d at 238 (citing 49 U.S.C. § 10102(6)(A), (C)). In particular, the ICCTA defines "transportation" as including a "yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . . [and] services related to that movement, including receipt, delivery, . . . transfer in transit, . . . handling, and interchange of passengers and property . . . ." 49 U.S.C. § 10102(9). As noted above, the First Circuit has held that transloading facilities fall within the ICCTA's definition of transportation, and therefore it is beyond dispute that the taking would be preempted if the facility were fully constructed. See Grosso, 804 F.3d at 118 ("It is well-established that the preemption of state and local regulation under the ICCTA generally extends to transloading facilities."). The question then is whether the taking is preempted even though the facility is still in the nascent stages of construction. The Court finds that it is.

Federal appellate courts in at least the Seventh, Eighth, and the District of Columbia Circuits, as well as the STB, have held that when determining whether a proposed taking, or other regulation, is preempted, it is appropriate to consider a rail carrier's future plans as well as its current uses. City of Lincoln v. Surface Transp. Bd., 414 F.3d 858, 862 (8th Cir. 2005); Union Pac. R.R. Co. v. Chi. Transit Auth., 647 F.3d 675, 681 (7th Cir. 2011); City of South Bend v. Surface Transp. Bd., 566 F.3d 1166, 1169 (D.C. Cir. 2009); Tri–City R.R. — Pet. for Declaratory Order, No. FD 35915, 2016 WL 5904750, at *7–8 (S.T.B. Sept. 12, 2016); Norfolk S. Ry. Co. — Pet. for Declaratory Order, No. FD 35196, 2010 WL 691256, at *4 (S.T.B. Feb. 26, 2010). Here, Plaintiffs' verified complaint and the second affidavit of Michael R. Milanoski make it clear that GURR intends to use the property at 364 West Street to house a transloading and logistics facility, and that the property has already undergone substantial development to advance the facility's construction. [ECF No. 30 ¶ 22 ("GURR's contractor has now finished harvesting the trees at the site . . . . Grading and preparing land adjacent to existing [] rail line has begun. . . . [and] rail ties and plates are on the site and the process of laying these ties and plates has begun."); Compl. ¶ 31 (listing GURR's plan for 364 West Street including development of, among others, new tracks and 1,500,000 square feet for transloading); id. ¶ 33 ("GURR's anticipated transloading and logistics center is under construction . . . .")]. And although Defendants contend that the taking would not interfere with GURR's rail operations because the eminent domain authorization forbids the Board from taking land that is "currently in use by the Railroad for railroad operations purposes or transloading facilities," [ECF No. 32 at 16], that argument rings hollow given Hopedale's insistence that property in the process of being developed such purposes does not fall within the ICCTA's definition of transportation. Therefore, the Court finds that because GURR has plans for developing 364 West Street as a

logistics and transloading facility, has already begun to develop the land to support that use, and has invested substantial capital in said development, the property falls under the ICCTA's definition of transportation. The Court therefore concludes that the Town's proposed taking is preempted and that Plaintiffs will likely succeed in proving that.

ii. Additional Prerequisites for a Preliminary Injunction

The additional factors—irreparable harm, the balance of hardships, and the effect of an injunction on the public interest—weigh in favor of allowing Plaintiffs' motion for a preliminary injunction.[8]

First, there is credible evidence that GURR will suffer irreparable harm if the request for a preliminary injunction is denied. Although "economic loss alone does not usually rise to the level of irreparable harm[,]" Suero v. Fed. Home Loan Mortg. Corp., No. 13-cv-13014, 2013 WL 6709001, *7 (D. Mass. Dec. 17, 2013) (citation omitted), "[r]eal estate has long been thought unique, and thus, injuries to real estate qualify as "the type of harm not readily measurable or fully compensable in damages—and for that reason, more likely to be found 'irreparable[,]'" K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989) (quoting Camel Hair & Cashmere Inst. v. Associated Dry Goods, 799 F.2d 6, 14 (1st Cir. 1986)); see also Ocean Spray Cranberries, Inc. v. PepsiCo, Inc., 160 F.3d 58, 61 (1st Cir. 1998) (stating that injunctive relief is often granted in the context of real property because such property is unique). Here, pursuant to Chapter 79 of the Massachusetts General Laws, the recording of the notice of taking will immediately vest title to the property in the Town. Therefore, if Hopedale is not enjoined from recording notice, GURR will quickly be divested of title to the property and therefore unable to

[8] The Court considers the final two factors—balancing of the equities and the public interest—together "as they 'merge when the government is the opposing party.'" Does 1-6 v. Mills, 16 F.4th 20, 37 (1st Cir. 2021) (alteration omitted) (quoting Nken v. Holder, 556 U.S. 418, 435 (2009)).

continue developing its facility. The fact that GURR would be deprived of real property, which is by itself unique and not well suited to economic damages, weighs in favor of finding that GURR would be irreparably harmed. That is especially true here where the property is of heightened value to GURR because it contains several parcels of industrially zoned land bisected by an operating railroad right of way. The Court thus finds that Plaintiffs have met their burden of showing irreparable harm. The Court is not persuaded by Defendants' argument that GURR has an adequate remedy at law under Mass. Gen. Laws ch. 79, § 18. Contrary to Defendants characterization, Chapter 79, § 18 does not operate as a defense to a proposed taking but only provides a mechanism to invalidate a taking after the fact, a process that could take months, if not years, to resolve. This sort of lengthy process and the resulting impact caused by the delay is what Congress sought to avoid when it enacted the ICCTA.

Second, the combined balance of hardships and public interest factors also weigh in Plaintiffs' favor. As discussed, denying injunctive relief would almost certainly result in GURR losing title to the real property at 364 West Street and, as a result, being unable to take advantage of its unique characteristics, including that it is zoned for industrial use and bisects a railroad right of way. The loss of title would necessarily foreclose GURR's ability to continue developing the property. While the Court is sympathetic to Hopedale's interest in protecting its forest land, as of the submission of the second Milanoski affidavit, much of the forest land they seek to protect has already been harvested. [ECF No. 30 ¶¶ 22, 25]. Without in any way demeaning that interest, the harm the Town seeks to prevent appears to have already occurred, thus diminishing the force of the argument. Moreover, to the extent Defendants argue that GURR's development of the property risks contamination of Hopedale's groundwater, as another session of this Court found in a separate lawsuit involving GURR, "the public interest will be

protected by the enforcement of federal environmental statutes and regulations promulgated thereunder" and further, that "considering the potential for economic development for the region which may arise from the development of the [transloading facility at 364 West Street], the risk of harm is outweighed by the potential benefit." Town of Milford, 337 F. Supp. 2d at 239. Additionally, the Town appears to acknowledge in its briefing that the potential harm to the Town's water supply is speculative, as it asserts, in part, that GURR's development of the land would lead to a "greater risk of contamination." [ECF No. 32 at 19].

C. Motion to Enjoin the Enforcement Order

In Defendants' combined opposition to Plaintiffs' motions for injunctive relief, [ECF No. 32], only passing reference is made to the July 14, 2022 Enforcement Order, and Defendants do not respond to Plaintiffs arguments that the Enforcement Order is a preclearance regulation that is preempted by the ICCTA. Defendants also do not meaningfully respond to Plaintiffs' arguments regarding the additional preliminary injunction factors. As discussed above, because Defendants failed "to spell out [their] arguments squarely and distinctly" those arguments are deemed waived. Rivera–Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) (quoting Paterson–Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988)).

Even if Defendants had responded, the Court finds that the Enforcement Order is a preclearance regulation that unduly interferes with GURR's development of its transloading facility and is thus preempted by the ICCTA. Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 16 (1st Cir. 2003) (describing STB preemption analysis of preclearance requirements as "finely crafted" where STB found that "preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities

or conduct operations"). The Enforcement Order is not the kind of environmental regulation that could qualify as a "[n]on-discriminatory . . . requirement[] such as [a] building and electrical code[]" but is instead a pre-construction requirement that gives a local body "the ability to deny the carrier the right to construct facilities or conduct operations" and is therefore preempted. Id. at 16; see also [ECF No. 6-1 at 53–57 (Enforcement Order) (faulting GURR for "activities done without permit or prior notification")].

Plaintiffs have also met their burden with respect to the remaining preliminary injunction factors. First, Plaintiffs will suffer irreparable harm if the Conservation Commission is permitted to enforce its order. The Enforcement Order would indefinitely bar GURR from developing its transloading facility, which would likely cause GURR to lose "incalculable revenues" and impair customer relationships. See Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 485 (1st Cir. 2009) (noting that the First Circuit has held that the irreparable harm requirement may be met upon a showing that, absent injunctive relief, the party seeking relief "would lose incalculable revenues and sustain harm to its goodwill" (quoting Ross–Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996)). Plaintiffs' burden of showing irreparable harm is further satisfied because the Enforcement Order threatens a fine of up to $25,000 or imprisonment for not more than two years, and "the risk . . . of incurring civil and criminal liability constitutes a threat of immediate and irreparable harm." Hyde Park Partners v. Connolly, 676 F. Supp. 391, 394 (D. Mass. 1987). The Court also finds that the combined balance of hardships and public interest factors weigh in favor of granting the injunction for the same reasons discussed with respect to the motion to enjoin the taking. Moreover, allowing the Order to be enforced would stop GURR's development of the transloading facility for an indeterminate period of time, stripping GURR of its use of this unique property and causing reputational harm. These harms

would be difficult to mitigate whereas the risk of environmental harm is lessened because the development is subject to federal environmental regulation and oversight. Because each of the factors weighs in favor of granting the injunction, the Court allows Plaintiffs' motion for a preliminary injunction enjoining enforcement of the Conservation Commission's order.

VI. CONCLUSION

For the reasons discussed herein, Defendants' motion to dismiss, [ECF No. 51], is GRANTED in part and DENIED in part and Plaintiffs' motions for preliminary injunction, [ECF Nos. 26 and 28], are ALLOWED. While the Court will retain jurisdiction over this matter, consistent with this Order, the matter will be stayed to permit the STB to consider the matter in full. To accomplish this, the Court ORDERS Plaintiff GURR to file a Petition for Declaratory Order with the STB for the purpose of the STB issuing a declaratory order regarding the Town's proposed taking and the Conservation Commission's Enforcement Order. During the pendency of the STB proceeding, Defendants are hereby enjoined from (1) recording any notice of taking of any portion of GURR's property at 364 West Street, Hopedale, Massachusetts or (2) taking any action to enforce the Conservation Commission's Enforcement Order.[9]

SO ORDERED.

March 31, 2023

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE

[9] The Court further DENIES as moot GURR's motion for clarification. [ECF No. 59].

EXHIBIT 5

GURR - Hopedale Agreement Letter dated April 19, 2023

ANDERSON
KREIGER

DAVID S. MACKEY
dmackey@andersonkreiger.com
T: 617.621.6531

April 19, 2023

VIA EMAIL (dkeavany@chwmlaw.com)

Donald C. Keavany Jr.
Christopher, Hays, Wojcik & Mavricos, LLP
370 Main Street, Suite 970
Worcester, MA 01608

Re: Agreement Regarding 364 West Street
Case No. 4:22-cv-40080-MRG

Dear Mr. Keavany:

This letter will memorialize the agreement between your clients, the Grafton & Upton Railroad Company, Jon Delli Priscoli, Michael Milanoski and the One Hundred Forty Realty Trust (collectively "GURR"), and our clients, the Town of Hopedale, its Select Board and its members, and its Conservation Commission and its members (collectively "the Town").

Following the Court's grant of a preliminary injunction against the Town's planned exercise of its power of eminent domain regarding the property at issue, I informed you that the Town was preparing a motion for security under Fed. R. Civ. P. 65, to secure funding for any restoration work required on the property as a result of GURR's construction if the preliminary injunction against the taking was ultimately overturned. You indicated in response that, at least for the immediate future given the pending legal proceedings, GURR did not intend to pursue construction related to the transloading facility depicted in the plan it presented to the federal court, but that it would continue to take whatever steps were necessary to comply with the Stormwater Pollution Prevention Plan ("SWPPP") required by the Environmental Protection Agency ("EPA"), or any other work ordered by EPA and/or the Army Corps. of Engineers ("ACOE"). In order to avoid unnecessary dispute, counsel will endeavor to communicate in good faith regarding any anticipated work to be conducted in accordance with the SWPPP or pursuant to any order issued by the EPA or ACOE.

Based on our discussion, and pending the Town's anticipated appeal from the Court's preliminary injunction, my clients have agreed to refrain from filing a motion for security under Fed. R. Civ. P. 65, in so long as GURR does not commence construction activities related to its transloading facility, except for work required by its SWPPP or any other work ordered by any

state or federal agency, including EPA, ACOE, and/or Massachusetts Department of Environmental Protection. In the event that GURR decides to commence construction activities, it shall provide the Town thirty (30) days prior notice, and upon receipt of said notice, or upon commencement of construction activity, the Town may file its motion for security under Fed. R. Civ. P. 65.

If this Agreement is acceptable to your clients, please indicate by signing below.

Sincerely,

David S. Mackey
for the Town of Hopedale *et al.*

Donald C. Keavany Jr.
for the Grafton & Upton Railroad Company *et al.*

EXHIBIT 6

Rule 12 Hearing Before Hon. Valerie A. Yarashus at 1-21, Jon Delli Priscoli v. Michael Milanoski, et al., **Docket No. 2385CV00022 (Worcester Superior Court Jan. 10, 2023)**

Volume: 1
Pages: 1-40
Exhibits: See Index

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

****
*
JON DELLI PRISCOLI *
*
vs. * Docket No. 2385CV00022
*
MICHAEL MILANOSKI, ET AL. *
*
****

RE: RULE 12 HEARING
BEFORE THE HONORABLE VALERIE A. YARASHUS

APPEARANCES:

For the Plaintiff:
Wickstrom Morse, LLP
By: Timothy P. Wickstrom, Esquire
60 Church Street
Whitinsville, Massachusetts 01588
508.234.4551

For the Defendant, Dana Railcare:
Seder & Chandler, LLP
By: James A. Vevone, Esquire
339 Main Street, Suite 300
Worcester, Massachusetts 01608
508.757.7721

(Appearances continued on page 2.)

Worcester, Massachusetts
Courtroom 26
April 6,

Court Transcriber: Lisa Marie Phipps, Certified Shorthand Reporter, Registered Professional Reporter, Certified Realtime Reporter

APPEARANCES (continued):

For the Defendants, John DeWaele & Michael Milanoski:
Phifer Pinkham, LLC
By: Jenifer M. Pinkham, Esquire
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617.409.7409

For the Defendant, The Grafton & Upton Railroad Company:
Kushner, Sanders, Ravinal, LLP
By: Jack Merrill, Esquire
160 Gould Street
Needham Heights, Massachusetts 02494
781.418.5116

I N D E X

WITNESS:

(None.)

EXHIBITS:

(None.)

P R O C E E D I N G S

(2:39 p.m.)

THE CLERK: Your Honor, the next matter is Civil Docket 23CV22, John Delli Priscoli versus Michael Milanoski.

This is before the Court for a motion hearing to consolidate and a Rule 12 hearing.

Will counsel please identify themselves for the Court.

Plaintiff.

MR. WICKSTROM: Timothy Wickstrom representing the plaintiff in this case.

THE COURT: Good afternoon.

MS. PINKHAM: Jennifer Pinkham on behalf of the defendants, Michael Milanoski and John DeWaele.

THE COURT: Good afternoon.

MS. PINKHAM: Good afternoon.

MR. VEVONE: Good afternoon, your Honor.

James Vevone representing Dana Railcare.

THE COURT: Good afternoon.

MR. MERRILL: Good afternoon, your Honor.

Jack Merrill for Grafton & Upton Railroad.

THE COURT: Good afternoon.

Okay. So I know that both sides have motions, so do you have any suggestion about who would like to go first on any of this?

MR. WICKHAM: Probably --

THE COURT: I'll start with the plaintiff, but I know you're a moving party and an opposing party at the same time; but why don't you address both issues at once and then when I hear from defense counsel, they can address both issues at once.

MR. WICKSTROM: Okay. So we'll start with the plaintiff's motion to transfer the case from the Suffolk Court.

We have filed a brief on this matter.

You'll note that the case here in Worcester was filed before the case was filed in Suffolk.

The case in Worcester involves a declaratory judgment action. And it's a very narrow issue, it's whether or not the right of first refusal in a document is valid or not.

We have set forth the facts in our declaratory judgment action and also established the controversy, which I'm sure your Honor is familiar with, now having read the various papers

in this case.

One side says the -- that they have a right of first refusal -- that would be the Dana group -- they have a right of first refusal to purchase the assets that are at -- at issue with respect to a letter of intent, which is the subject of the Suffolk Court action.

So there's a controversy as to whether or not that right of first refusal is valid.

The Dana group says that it is; Milanoski and DeWaele say that it is not, and they're -- and we -- "we" being Mr. Delli Priscoli -- have come to the court to ask us -- ask the Court what the rights and the obligations of these parties are.

Now, with respect to the transfer question, there are common issues with respect to the Suffolk action that are brought here.

And this case was filed first, and there is a general rule that says that the first filed action would take in the second filed action.

Very interestingly in this case, your Honor, counsel for Mr. Milanoski and DeWaele knew about this Worcester action; but when they filed the Suffolk action, they did not put on the cover

sheet that there was a related action pending.

So that court went forward on a motion for a preliminary injunction, and nowhere in the complaint in the Suffolk case does it say anything about the Worcester action, nor the right of first refusal.

So when we went there, we agreed on a standstill, essentially, agreement; but there's a pending motion to dismiss or stay that action.

And the reason for staying that action is that this action, which involves the right of first refusal, will dictate which way this case goes.

So it really is a first initial question to the Court which will dictate whether the right of first refusal is a good one and then the Suffolk action's going to go away, or whether it's not.

And the letter of intent would govern the parties, so that's why it's -- that's why we're asking the Court to bring that Suffolk case here, consolidate it, and then address the right of first refusal first.

THE COURT: Okay. All right.

And do you want to address that -- their

motion to dismiss?

MR. WICKSTROM: Yes.

So this motion to dismiss basically is just a couple of points they make.

No. 1, they say that we have failed to name a necessary party to the case, and it centers around the Dana Corporation.

And you'll see in the papers that the letter of intent in 2009 references Dana as Dana Railcare.

And that's the reason why we named Dana Railcare in this declaratory judgment action here in Worcester.

Subsequently, Dana was served, and Dana filed an answer and said that the Dana Railcare is a trade name for the Dana Transport, Inc., but they answered the complaint and raised no issue as to who the proper party was.

They simply answered it saying Dana Railcare is the trade name.

And, in cases like that where they may be a misnomer, that's not going to rise to the level of dismissing a complaint; that would simply, if we needed to, we would amend the complaint.

But I don't think it's even needed, if

you read the answer to the complaint filed by Dana, so that issue is certainly very easily explained.

The second is that they claim that there's no actual controversy.

Well, looking at the volumes of paper that your Honor has, and after understanding that there, in fact, is a controversy as to whether the right of first refusal is valid, one party says no; the other party says yes, and it clearly -- it clearly meets the definition of an actual controversy which would rise -- give rise to a declaratory judgment action in this case.

If you would like to understand better how the actual controversy arose, I would ask that you -- that you look at Attorney Joe -- Joseph Antonellis's affidavit.

Attorney Antonellis was involved with this company for many years and knows all the parties.

He set forth in very great detail why it is his opinion that -- that there is an actual controversy here after he went through the facts and the paperwork that was submitted to him.

And he determined that the right of first

refusal was something that needed to be further examined by the Court under all the circumstances of the case.

So the actual controversy, that part of whether or not this is a valid declaratory judgment action, the actual controversy part, Attorney Antonellis's affidavit lays it out very nicely for the Court.

I don't think there's really any doubt that there's an actual controversy here between and amongst the parties, and that the right of first refusal needs to be addressed.

And after that's addressed and the rights and the responsibilities of the parties with respect to that right of first refusal is determined by the Court, then this case will take the next steps.

So that's our position.

THE COURT: Okay. Thank you very much.

I'll hear from the defense.

MS. PINKHAM: Thank you, your Honor.

Just briefly on the history of this case and a little bit of the factual background, my clients, defendants Michael Milanoski and John DeWaele, entered into a binding LOI on December

1, 2022.

In that binding LOI, they were agreeing to purchase the ownership, the stock, of Grafton & Upton Railroad in several parcels of real estate.

They were going to purchase it for $36,000,000; they were also going to assume $8,000,000 of debt for a total deal price of $44,000,000.

Immediately after signing that LOI, Mr. Delli Priscoli breached it in several key areas.

No. 1, he breached the confidentiality provision, he breached the exclusivity provision, and he breached the standstill provision.

This isn't an actual controversy, your Honor, this is a fabricated controversy.

The reason why it's fabricated is because this LOI -- this purported LOI that the plaintiffs are alleging exists is from 2009.

We all know that a letter of intent is just that, a letter of intent that would require further documents to actually substantiate the purchase of anything.

Since 2009, nothing has transpired with

that LOI.

In fact, there was a writing that terminated it, which we've attached to our pleadings, your Honor.

So just to give you that history, in light of all of that, let me go first to the motion to transfer and consolidate the matters in our cross motion to consolidate the matters before the business litigation section.

When my Brother speaks about Suffolk Superior Court, he failed to mention that that's the business litigation session that's hearing this matter.

And it was our claim brought on January 11th, the day after their claim.

And, your Honor, let me tell you a little bit about why we didn't say there was another matter pending on that civil action cover sheet.

Because we had a call scheduled to discuss settlement on January 10th.

The call was set up on January 6th in the guise of discussing settlement.

We get on the call; it wasn't a settlement call, it was a ploy.

They got us on the call, and then they

said, By the way, we've hired other counsel, they're going to be filing a lawsuit today.

You know why they did that? In order to be first in time; in order to use this against us.

But, luckily, we had already drafted a complaint, and, in fact, we attempted to file it on January 10th, and the only reason why it wasn't docketed before theirs is because we had an eFile issue and we can show that to the Court, your Honor.

So this first-in-time argument is absolutely ludicrous.

With respect to the motion to transfer or consolidate the matters, these matters are separate.

Our matter relates to our binding LOI that was just entered into at the end of last year.

This matter is about this purported LOI from 2009; that it was subsequently terminated.

And, again, the reason why this is being brought to a head, your Honor, is because we have a deal.

And, guess what, plaintiff has seller's

remorse. He doesn't like the deal anymore.

So he went to somebody else and asked for, Hey, I got this deal for 44 million, what can you give me?

Well, guess what, it's going to be more than 44 million now, your Honor.

And so that's what's going on behind the scenes.

So as far as a motion to transfer or consolidate, we would request that this Court deny that motion.

But to the extent that your Honor thinks these matters should be consolidated, I would argue that this matter should be transferred to the business litigation session.

These are business transactions at issue, your Honor.

This case has already been heard before Judge Kenneth Salinger on February 2, 2023. He's intimately familiar with the case.

He seems particularly well-suited to hear the consolidated cases.

This is a complex case, $44,000,000, M&A concepts; lots of paperwork, as you can see, your Honor.

We would ask that this be moved, if at all, to the business litigation session, and with respect to the one day difference between January 10th and January 11th, the only reason that was the case is because we were bamboozled by the plaintiff.

With regard to the motion to dismiss that we filed, I've hit on some of the high points, your Honor.

They bring a complaint for declaratory judgment.

A declaratory judgment must have a controversy; they must have legal standing to bring it, and they must include all necessary parties.

Well, not all necessary parties are named.

It's a very simple rule in declaratory judgment law.

Dana Transport is a party to the purported LOI from 2009, but they're not a party to this complaint.

Similarly, Dana Railcare has this alleged right of first refusal.

Dana Railcare is a division of Dana

Container, also not a party. Two companies that are not parties to this complaint.

In addition, there's no controversy. This isn't a real dispute. The prior LOI was terminated.

This is just, again, a made-up, fabricated controversy, not an actual controversy.

And it's a fabricated controversy in order to get a new deal, because he didn't like the $44,000,000 deal he had.

In addition, the plaintiff fails to state a claim.

Dana LOI, the alleged LOI, is not a binding agreement.

It was terminated in 2010 formally in writing; and, furthermore, the parties have entered into this transloading agreement, which we ask the Court to take judicial notice of.

That transloading agreement supercedes the LOI and had an integration clause, which your Honor understands to mean that that was the full and complete agreement between the parties at that time.

It also addressed the same exact subject matter as the LOI in 2009.

Your Honor, with all that being said, we ask that this complaint be dismissed.

If not, we ask that the case be moved to the business litigation session.

Thank you.

THE COURT: Okay. Thank you very much.

MR. VEVONE: Thank you.

I'll address the motion to dismiss first. We clearly oppose that motion.

With respect to the naming of the party, the misnomer is moot.

We -- the -- Dana Transport -- Dana Railcare is a trade name of Dana Transport, the entity that signed the LOI. Dana Railcare is mentioned in the LOI.

The Dana companies are an umbrella, and they have many different trade names.

But Dana Railcare is a trade name of Dana Transport. We were properly served; we answered. We explained the difference in the names. The misnomer is just a moot issue, so, that's the (indiscernible).

I'll address a little bit as far as the allegations about the LOI. It's outside of the motion to dismiss. That's more of a summary

judgment, and we're not to that point, but I'll address it anyway.

The LOI with Dana and Grafton-Upton Railroad was in 2009.

It had many parts, one of which was the right of first refusal, which, looking at the LOI, specifically says, This will survive the purchase option, so with the LOI being in place, that survives.

Now, the purported termination in 2010, what the movants failed to mention is that within a few days after that, there was a letter from Dana going back to the railroad saying, No, it's not terminated, here are the reasons why, and then the parties continue for the next 12 years to pursue the terms of the LOI.

As we pointed out, a transloading agreement was entered into with a affiliate of Dana, a purchase and sale agreement for the property that the facility's on was entered into with an affiliate of Dana and the railroad and (indiscernible) was also part of the LOI, so -- and millions of dollars have been invested in the property in accordance with the LOI, so the LOI survived.

Even if the LOI were terminated, it specifically says that that right of first refusal survives, and, thus, it survives.

Now, as far as the case in controversy, clearly there's controversy.

In January of 2023 when we found out that there was an attempt to sell the railroad to another party, we immediately sent a letter to counsel, to Mr. Priscoli, saying that we were exercising our right of first refusal.

And the fact that we're both here and one side's saying that there is no LOI and the other's saying we've exercised our right of first refusal under that LOI, clearly there's a controversy. And this case needs to go forward.

There's some other items that weren't addressed in the oral argument but are in the papers that for the moment I will -- I won't go into because they were addressed in the oral argument, and they're irrelevant to the motion to dismiss.

As far as the consolidation's concerned, this would be the case to have everything consolidated, so there should be a transfer and consolidation into this case.

This is the threshold issue. If there was -- the 2009 LOI exists, and we had the right of first refusal, that's it.

We've exercised our right of first refusal, so if that survives, there is no other case, so this would be the court in which we should be hearing this case.

THE COURT: Okay. Thank you very much.

MR. VEVONE: Thank you.

MR. MERRILL: Just briefly, your Honor, on behalf of the railroad, I think my Brothers have made the arguments that I would make.

I don't even understand the motion to dismiss from the railroad's perspective, because from the railroad's perspective, there's no doubt there's a conflict here.

I have an attorney standing next to me saying his client wants to buy the stock; I have another attorney saying that her client wants to buy the stock.

The railroad's sitting here trying to operate, it's dealing right now with two lawsuits, one of which it's not a party to, but where there's an injunction that says basically it can't operate, effectively anyway -- it

fully -- cannot fully operate, it can't put any kind of -- getting loans out or encumbering any debts, so it's effectively crippled right now by the litigation, by this dispute.

And for -- for Mr. Milanoski, though, I understand he's a co-defendant, it's just a matter of happenstance, to be moving to dismiss it makes no sense at all to the railroad.

We need -- the railroad -- for this to be resolved. We can't operate without it.

The Milanoski case in Suffolk does not name the railroad as a party (inaudible).

Whatever happens there might happen; but if this case doesn't stay here with the right of first refusal resolving, I don't know what that case is going -- is going to do.

I don't know what Mr. Milanoski thinks is going to happen if he successfully enforces an LOI in Suffolk and then tries to get -- stop transfer of the books and records of this corporation in the face of the right of first refusal that is asserted by (inaudible), so I don't think there's any question that it has to be done.

And I don't -- we're in a difficult

position because Delli Pascoli is the 100 percent owner of the railroad, I represent the railroad, so I'm here to speak only to that.

But I will note that some of the strategy of Ms. Pinkham, it's interesting in light of -- I'm recalling it, for whatever it's worth, Mr. Milanoski's been terminated from his job. He was the president of the company. He no longer is the president of the company.

The reason he's been terminated is for cause based on a number of misrepresentations that he made, actually, that he took against the best interests of the company.

Among them, and I know this because of what Ms. Pinkham said, is that the value of the company, which she happened to reveal, apparently for $44,000,000 worth of (inaudible) and by its own writing he thinks the company's worth somewhere between seven and (inaudible) million.

So I don't know what's going on here. The railroad is not in the same position as to the (inaudible) between Milanoski (inaudible), and what the railroad wants is for that just to be resolved, for the right of first refusal issue to be resolved. We think it has to be resolved.

The right of first refusal is what got in the way of this whole thing going totally (indiscernible) and (inaudible) is this company (inaudible).

This company can't do anything. The corporation itself, as an entity, doesn't have any particular interest, I suppose, in who the owner of it is or owner of its stock is, but it does have an interest in continuity and ability to operate (inaudible).

So we oppose it in terms of consolidation, Judge.

The railroad would much prefer to have the case here.

I think the practical reasons my Brothers have outlined to the extent, but apart from that, this is a Worcester County entity. This is the subject. Grafton-Upton Railroad is the subject. It should be handled in Worcester County, and that's where we'd like it.

And that's all (inaudible).

THE COURT: Okay. Thank you.

Anything further that's not already in the papers?

MR. WICKSTROM: Just, your Honor, I'd

like you to consider scheduling a Rule 16 conference so that we can move this case towards summary judgment as soon as possible.

THE COURT: Okay. All right. I will rule on it as soon as I can.

It's not going to be instant, but as soon as I can, having in mind some of the urgency for the time issues and if it is staying here, I will schedule a Rule 16, okay.

All right. Thank you very much.

MS. PINKHAM: Thank you, your Honor.

MR. WICKSTROM: Thank you, your Honor.

(At 3:02 p.m. proceedings concluded.)

The Commonwealth of Massachusetts
OFFICE OF COURT MANAGEMENT, Transcription Services

AUDIO ASSESSMENT FORM

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CASE NAME: PRISCOLI V. MILANOSK

DOCKET NUMBER: 2385CV00022

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background noise XXXX	time stamp:_____
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low audio at sidebar	_____
simultaneous speech	_____
speaking away of microphone XXXXX	_____
other:_____	time stamp:_____
_____	_____
_____	_____
_____	_____

COMMENTS: No log notes, spellings, or speaker IDs provided. Poor audio; acoustics, low audio.

C E R T I F I C A T E

I, LISA MARIE PHIPPS, AN APPROVED COURT TRANSCRIBER, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT FROM THE AUDIO RECORDING PROVIDED TO ME OF THE PROCEEDINGS IN THE MATTER OF JON DELLI PRISCOLI V. MICHEL MILANOSK HELD ON APRIL 6, 2023.

I, LISA MARIE PHIPPS, FURTHER CERTIFY THAT THE FOREGOING IS IN COMPLIANCE WITH THE ADMINISTRATIVE OFFICE OF THE TRIAL COURT DIRECTIVE ON TRANSCRIPT FORMAT.

I, LISA MARIE PHIPPS, FURTHER CERTIFY THAT I NEITHER AM COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN WHICH THIS HEARING WAS TAKEN, AND FURTHER THAT I AM NOT FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.

/s/ Lisa Marie Phipps
NAME OF THE APPROVED COURT TRANSCRIBER
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April 25, 2023
DATE

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EXHIBIT 7

Town of Hopedale Special Town Meeting Warrant, July 11, 2022

TOWN OF HOPEDALE
SPECIAL TOWN MEETING WARRANT
FY23

Dennett Auditorium
Junior/Senior High School
25 Adin Street

Monday, July 11, 2022
7:00 pm

Worcester SS: To the Constables in the Town of Hopedale in the County of Worcester.

Greetings: In the name of the Commonwealth of Massachusetts you are hereby required to notify and warn the inhabitants of the Town of Hopedale qualified to vote in town affairs to meet in the Dennett Auditorium of the Junior/Senior High School located at 25 Adin Street, Hopedale, MA 01747, on Monday, July 11, 2022, at 7:00 pm, then and there to act on the following articles:

ARTICLE 1: To see if the Town will vote to acquire, by purchase, eminent domain, or otherwise, certain property, containing up to 130.18 acres, more or less, located at 364 West Street, being a portion of that land described in an instrument of redemption of tax title taking recorded with the Worcester South District Registry of Deeds in Book 61533, Page 78, and shown on a sketch plan on file with the Town Clerk (the "Property"), 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 therefor, and to apply any discretionary grants, gifts, awards, or donations of money given to the Town for the purpose of land conservation, 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, provided that such authorization shall not be construed as (1) ratifying the terms of the Settlement Agreement between the Town and the Grafton & Upton Railroad (the "Railroad") dated February 8, 2021; or (2) authorizing the Select Board to acquire fee title to any portions of the Property that are currently in use by the Railroad for railroad operations purposes or transloading facilities; and further to authorize the Select Board to take any and all actions and execute any and all documents to carry out the purposes of this article; or to take any other action in relation thereto.

You are hereby directed to serve this Warrant by posting attested copies thereof at three public places in different parts of the Town not less than fourteen days before the holding of said meeting. Here of fail not to make the due return of the meeting aforesaid.

Given under our hands, this 21st day of June 2022.

HOPEDALE SELECT BOARD

Glenda A. Hazard, Chairwoman

Brian R. Keyes

Bernard J. Stock

A True Copy, ATTEST:
Posted in the Town Hall, Police Station, and Post Office Lobby.

Constable

06/24/22
Date

EXHIBIT 8

***Grafton & Upton R.R. Co. v. Town of Hopedale*, Civil Action 4:22-cv-40080-ADB, Aff. of Sean P. Reardon, P.E., (D. Mass. Mar. 31, 2023)**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB **Leave to file granted on August 9, 2022**

AFFIDAVIT OF SEAN P. REARDON, P.E.

I, Sean P. Reardon, P.E., depose and state as follows:

1. I am a Vice President at Tetra Tech, a provider of engineering services for complex infrastructure projects for private and governmental clients around the world. I am a Licensed Professional Engineer with 28 years of experience in planning, permitting, design and construction of facilities and infrastructure. My curriculum vitae is attached at Exhibit 1.

2. I have carefully reviewed the "Site Layout Plan" revised through July 8, 2022 by an entity known as the D&L Design Group ("D&L"), for the Grafton & Upton Railroad ("GURR"). This plan was attached to GURR's Verified Complaint, and I have attached it here

for ease of reference as Exhibit 2. I have also reviewed the Second Affidavit of Michael R. Milanoski filed in this matter, which references the Site Layout Plan.

3. Though I am generally familiar with design and engineering firms in Massachusetts, I have never heard of D&L.

4. D&L's Site Layout Plan was not signed or stamped by any person.

5. Though difficult to read because of its size, the lower right hand corner of the Site Layout Plan reflects the following information for D&L:

> 115 Water Street • Milford, MA 01757
> P: (508) 408-2577
> www.dandldesigngroup.com

I attempted to access the website. It does not exist, but simply directs you to "GoDaddy.com." I attempted to call the phone number. The phone number is "not in service."

6. Mr. Milanoski acknowledges in his affidavit, at paragraph 28, that there are "topography challenges with the site." This is an understatement. I am extremely skeptical that the project shown on the Site Layout Plan is buildable. I have attached as Exhibit 3 a Topographic Heat Map for the project site, which is derived from 2010 FEMA Blackstone LiDAR Data publicly available from MassGIS. The site rises approximately 260 feet over approximately 2000 feet, for an average grade of 13%. The grade for a significant portion of the site, shown in the darkest red shading, is 20% or more. The existence of the current rail tracks and a gas easement running across the site effectively preclude grade changes across significant portions of the site.

7. The project shown on the Site Layout Plan is unrealistic and impractical given the topography and related site challenges. The Site Layout Plan fails to provide any realistic accommodation for a railroad's limited tolerance for grade changes. I have attached as Exhibit 4 an excerpt from design specifications published by Norfolk Southern Railway Company.

Sections 6.04 and 6.05 reflect permissible grades limiting loading and unloading tracks to 0%, lead tracks to 2% and spur tracks to 3% with required reductions for any curves in the tracks. These grade tolerances are typical in the railroad industry, and are not practically achievable given the number of curves in the tracks and the density of the project shown on the D&L Site Plan Layout.

8. In addition to problems with topography, the plan shows glaring flaws with respect to tractor trailer access. The plan shows paved areas 70 feet wide or less adjacent to the buildings. At least 100 - 120 feet of paved area is required to back a tractor trailer into a loading dock and to be able to pull out again in a typical docking configuration. The paved area around each side of the buildings would need to expand by 50 feet in width before any of the uses shown would be practically accessible by tractor trailers, and the plan does not provide any room for that. The plan also fails to provide any accommodation or dedicated space for fire truck emergency vehicles.

9. Finally, the plan fails to show a reasonable storm water mitigation strategy given the massive conversion of woods to impervious surface. Woods, even steeply sloped woods, generate very little stormwater runoff, while roofs and paved surfaces generate the highest volume and intensity of runoff which, unless mitigated properly, will result in downstream flooding and potentially uncontrolled erosion. Mitigation shown on the plan is inadequately sized and at illogical locations for the development. In all likelihood a significantly larger portion of the site will be required to adequately mitigate changes in runoff.

Dated: August 8, 2022

Sean P. Reardon, P.E.

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 9th day of August, 2022.

/s/ Sean Grammel
Sean Grammel

EXHIBIT 9

Milanoski v. Delli Priscoli, **Case No. 2384-cv-00071, Dkt. No. 1, Verified Complaint ¶ 18 (Mass. Super. Ct. filed Jan. 11, 2023)**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS BUSINESS LITIGATION SESSION
DOCKET NO.

MICHAEL R. MILANOSKI
Plaintiff,

JOHN P. DEWAELE, III
Plaintiff,

vs.

JON DELLI PRISCOLI
Defendant.

VERIFIED COMPLAINT

SUMMARY OF CASE

Michael R. Milanoski (hereinafter, "Mr. Milanoski") and John P. DeWaele III (hereinafter, "Mr. DeWaele"), by and through their undersigned counsel, bring suit against Jon Delli Priscoli (hereinafter, "Mr. Delli Priscoli") to enforce a binding letter of intent by requiring specific performance, to seek all costs and fees associated with this action because of Mr. Delli Priscoli's bad faith dealings and breach of the binding letter of intent and to prevent Mr. Delli Priscoli from continuing to breach the binding letter of intent by offering the subject assets to unrelated third-parties through the Court's issuance of injunctive relief.

PARTIES

1. Mr. Milanoski, Plaintiff, is a Massachusetts resident with an address of 171 South Main Street, Cohasset, Massachusetts 02025. Mr. Milanoski is currently the President of the Grafton & Upton Railroad Company (hereinafter, "Grafton & Upton" or the "Company").

2. Mr. DeWaele, Plaintiff, is a Massachusetts resident with an address of 8 Crestwood Drive, Blackstone, Massachusetts 01504. Mr. DeWaele is currently employed as General Manager and Vice President of Railroad Operations at Grafton & Upton.

3. Defendant, Mr. Delli Priscoli, is a New Hampshire resident with a residential address of 69 South Main St. Wolfeboro, NH 03894. Mr. Delli Priscoli is the Treasurer and Secretary of Grafton & Upton and the sole member of the Company's Board of Directors. Mr. Delli Priscoli is also the holder of all of the outstanding and issued shares of Grafton & Upton.

FACTS

Parties and Background

4. Mr. Milanoski has been employed with First Colony Development Group, LLC since May 19, 2017, serving in various capacities, including as President of all companies owned in whole or part by Mr. Delli Priscoli. Mr. Milanoski has been the President of Grafton & Upton since May 19, 2017.

5. Mr. DeWaele has been employed with Grafton & Upton since February 22, 2018. Mr. DeWaele was initially hired as General Manager. Mr. DeWaele was promoted to Vice President of Railroad Operations and General Manager at Grafton & Upton on January 3, 2020.

6. Mr. Delli Priscoli has been the sole owner of Grafton & Upton since 2009.

7. Mr. Delli Priscoli is also the majority owner of Quonset Transportation and Logistics LLC (hereinafter, "Quonset Transportation"), a Massachusetts based limited liability company with a principal place of business at the McCormack Firm, LLC, One International Place, 7th Floor, Boston, Massachusetts 02110.

8. Mr. Delli Priscoli is also a part owner of the outstanding and issued shares of Seaview Transportation Company, Inc. (hereinafter, "Seaview Transportation"), a Rhode Island based corporation with a principal place of business at 25 Compass Circle, North Kingstown, Rhode Island 02852.

9. Mr. Delli Priscoli holds a sixty-six and 66/100 (66.66%) percent ownership interest in One Hundred Forty Realty Trust u/d/t dated September 16, 1981 and recorded with the Worcester County District Registry of Deeds at Book 7322 and Page 177 (hereinafter, the "One Hundred Forty Realty Trust").

10. Mr. Delli Priscoli also holds all of the outstanding membership interests of 1 Fitzgerald Drive, LLC, a Massachusetts limited liability company with a principal place of business of 7 Eda Avenue, P.O. Box 952, Carver, Massachusetts 02330 (hereinafter, "1 Fitzgerald Drive") that owns certain real estate assets located in Hopedale, Massachusetts.

11. Mr. Milanoski and Mr. DeWaele have been running Grafton & Upton since 2017 and 2018, respectively. Prior to an including 2018, Grafton & Upton consistently struggled to operate as a profitable entity.

12. Since Mr. Milanoski and Mr. DeWaele joined Grafton & Upton, the company has become successful. Under their leadership, Grafton & Upton has increased its operational footprint, expanded the service mix offered to customers, obtained both financial success and stability and operated in a safe an efficient manner.

13. During the course of their employment, Mr. Delli Priscoli made various promises to Mr. Milanoski and Mr. DeWaele. Mr. Delli Priscoli often declared Mr. Milanoski and Mr. DeWaele would succeed him at the helm of Grafton & Upton and his other enterprises for

their unwavering commitment and success.

14. Mr. Delli Priscoli went as far as outlining his succession plan to the families of Mr. Milanoski and Mr. DeWaele as well as his financial institution that has Grafton & Upton's current debt.

15. Given Mr. Delli Priscoli's representations and promises in an effort to maintain their employment, Mr. Milanoski and Mr. DeWaele have forgone various other potential business opportunities and continued to focus on Grafton & Upton and Mr. Delli Priscoli's other business ventures.

Letter of Intent Between Parties

16. Starting in November of 2022, Mr. Milanoski and Mr. DeWaele learned of Mr. Delli Priscoli's decision to sell his interest in Grafton & Upton and several other tangentially related assets to another railroad despite his aforementioned succession plan.

17. Mr. Milanoski and Mr. DeWaele understood Mr. Delli Priscoli's inclination to sell some illiquid assets stemmed from his precarious financial situation and lack of liquidity and cashflow, leading Mr. Delli Priscoli to have concerns about potential foreclosures on his businesses.

18. While Mr. Milanoski and Mr. DeWaele continued to operate Grafton & Upton, as Mr. Delli Priscoli has largely stepped away from the day-to-day operations of Grafton & Upton with the exception of direction railroad preemption activities, directing tree clearing activities in the Town of Hopedale, and signing all Grafton & Upton checks, the parties continued the preliminary discussions about the aforementioned sale of assets for an employee/management buyout of Mr. Delli Priscoli's interest.

19. These preliminary discussions ultimately resulted in the parties executing a Letter of Intent on November 23, 2022, attached hereto as Exhibit A, an Amendment to the Letter of Intent on November 28, 2022, attached hereto as Exhibit B, and a Restated Letter of Intent on December 1, 2022 (hereinafter, the "Restated LOI"), attached hereto as Exhibit C.

20. According to the terms of the Restated LOI, the Restated LOI replaced "all previous agreements (verbal or written) including but not limited to original LOI dated November 23, 2022 and Amendment #1 to LOI dated November 28, 2022[.]"

21. On November 28, 2022, in an email communication with a third party, Mr. Delli Priscoli documented his desire to structure a transaction that placed Mr. Milanoski and Mr. DeWaele in control of Grafton & Upton.

22. In the Restated LOI, Mr. Delli Priscoli agreed to sell: (1) Grafton & Upton and all related assets and easements; (2) Quonset Transportation; (3) his ownership stake in Seaview Transportation; (4) his ownership stake in One Hundred Forty Realty Trust; (5) 1 Fitzgerald Drive LLC; and (6) equipment from Fast Forward Auto Sales (hereinafter, the "Assets").

23. Mr. Milanoski and Mr. DeWaele agreed to provide Mr. Delli Priscoli with $36,000,000 and assume debt of approximately $8,000,000 for a total purchase price of roughly $44,000,000 (hereinafter, the "Purchase Price").

24. The Restated LOI also included several other relevant provisions:

(a) Section 9 – The parties acknowledged that the Restated LOI was binding.

(b) Section 20 – The parties agreed to keep the terms and existence of the LOI confidential.

(c) Section 21 – The parties agreed to "act honestly and diligently to enter into 'good faith' negotiations to execute a [purchase and sale agreement], consistent with the terms of

this LOI."

(d) Section 22 – Mr. Delli Priscoli agreed to grant Mr. Milanoski and Mr. DeWaele the "exclusive opportunity" to purchase the Assets for forty-five (45) days after the execution of the Restated LOI. This provision also prevented Mr. Delli Priscoli and his affiliates and respective officers, directors, employees and agents from engaging in any discussions with any third parties about the sale of the Assets. Specifically, "[f]ollowing the execution of this LOI, [Mr. Delli Priscoli] agree[s] to not negotiate or enter into discussion[s] with any other party."

(e) Section 23 – Mr. Delli Priscoli agreed not to sell or transfer any portion of the Assets.

Mr. Delli Priscoli's Campaign of Obfuscation and Underhandedness

25. Since the week after the execution of the Restated LOI, Mr. Delli Priscoli has shown a blatant disregard for the agreed upon contractual terms.

26. Starting on or about December 7, 2022, Mr. Delli Priscoli began his attempts to renegotiate the Restated LOI.

27. In or about this timeframe, Mr. Delli Priscoli suggested to Mr. Milanoski that Mr. Milanoski and Mr. DeWaele were replaceable.

28. Starting on or about December 9, 2022, Mr. Delli Priscoli began stating there was a need to offer a "new deal" to a third party.

29. From this point onwards, Mr. Delli Priscoli's sole focus was to work with a third party to complete a transaction different than the transaction set forth in the Restated LOI.

30. Specifically, Mr. Delli Priscoli unearthed a letter of intent from 2009, Letter of Intent (dated January 23, 2009) attached hereto as Exhibit D.

31. Despite the grandstanding from Mr. Delli Priscoli and his affiliates, Mr. Delli Priscoli knew the letter of intent was terminated by Grafton & Upton on October 25, 2010, which at the time of the termination, was wholly owned and managed by Mr. Delli Priscoli, Notice of Termination (dated October 25, 2010) attached hereto as Exhibit E.

32. Mr. Delli Priscoli attempted to use the smokescreen created by the terminated letter of intent to renege on his obligations under the Restated LOI, in part, by creating roadblocks and preventing Mr. Milanoski and Mr. DeWaele from communicating with potential investors.

33. Mr. Delli Priscoli began using this expired document to renegotiate the terms of the Restated LOI with Mr. Milanoski and Mr. DeWaele, attempting to force Mr. Milanoski and Mr. DeWaele to pay more money for less assets and threatening Mr. Milanoski and Mr. DeWaele with the risk of total loss unless they engaged in said renegotiations.

34. In direct conflict with Section 20, Section 22 and Section 23 of the Restated LOI, Mr. Delli Priscoli also began negotiating a sale of Grafton & Upton with unrelated third-parties for more money and less assets than the Restated LOI.

35. On or about December 9, 2022, in violation of the Restated LOI, Mr. Delli Priscoli reached out to an unaffiliated third-party to discuss the sale of the Assets discussed in the Restated LOI.

36. Around this same time, Mr. Delli Priscoli began attempting to revise material terms of the Restated LOI in negotiations with Mr. Milanoski and Mr. DeWaele, such as changing the composition of the Assets and increasing their cash payment.

37. On or about December 19, 2022 while meeting with Mr. Milanoski and Mr. DeWaele, Mr.

Delli Priscoli proclaimed that the third party named in the stale letter of intent could not have Mr. Milanoski and Mr. DeWaele's deal, leading Mr. Milanoski and Mr. DeWaele to have significant reservations about Mr. Delli Priscoli's handling of the deal.

38. Upon information and belief, Mr. Delli Priscoli has discussed the sale of Grafton & Upton with several additional third parties from December 9, 2022 to the present, in violation of the confidentiality clause of the Restated LOI.

39. On January 3, 2023, and without any legal basis, Mr. Delli Priscoli's attorney sent an email purporting to terminate the Restated LOI.

Present Situation and Necessary Remedial Actions

40. From the execution of the Restated LOI on December 1, 2022 to the present, Mr. Milanoski and Mr. DeWaele have acted in "good faith" to satisfy their obligations under the Restated LOI. Mr. Milanoski and Mr. DeWaele continue to operate the company as they have in good faith since hired and through this transition.

41. Mr. Milanoski and Mr. DeWaele have engaged counsel, discussed financing with various entities and individuals and completed preliminary due diligence on the Assets, including receiving a loan commitment for proposed financing of roughly twenty million ($20,000,000) dollars.

42. Mr. Milanoski's and Mr. DeWaele's efforts and reputations have been torpedoed by Mr. Delli Priscoli's subterfuge.

43. From on or about December 7, 2022 to the present, Mr. Delli Priscoli has refused to engage in "good faith" negotiations to execute a purchase and sale agreement in accordance the Restated LOI's terms.

44. Mr. Delli Priscoli has refused to meaningfully engage in any discussions related to the consummation of the Restated LOI and the creation of a corresponding purchase and sale agreement.

45. From on or about December 9, 2022 to the present, Mr. Delli Priscoli has continued to negotiate with various third-parties about the sale of the Assets for an amount significantly greater than the Purchase Price in direct violation of several provisions of the Restated LOI, undermining Mr. Milanoski and Mr. DeWaele's efforts to secure financing.

46. Without the relief requested herein, Mr. Milanoski and Mr. DeWaele will suffer irreparable harm.

47. The parties recognized that any remedies at law would be inadequate relief for a breach of the Restated LOI. Section IX of the Restated LOI states that "the parties acknowledge that the remedies at law will be inadequate for any breach of the LOI and consequently agree that this LOI shall be enforceable by specific performance."

48. Mr. Milanoski and Mr. DeWaele have already expended significant amounts of time and resources to satisfy their obligations under the Restated LOI.

49. Mr. Delli Priscoli's obfuscation and underhandedness beginning on or about December 7, 2022 have resulted in significant damages to both Mr. Milanoski and Mr. DeWaele.

50. Many provisions of the Restated LOI are set to elapse on or about January 17, 2023 – forty-five (45) days after the execution of the Restated LOI.

51. Prompt remedial action provided in the form of specific performance of Mr. Delli Priscoli's obligations under the Restated LOI and injunctive relief to prevent Mr. Delli Priscoli from shopping the Assets to any unaffiliated third parties is warranted.

COUNT I - BREACH OF WRITTEN CONTRACT

52. Plaintiffs reassert and reallege the allegations set forth above as if each were separately stated herein.

53. The parties entered into a binding, express written agreement.

54. Plaintiffs have not violated any terms of the binding, express written agreement.

55. Defendant has materially breached the terms of the binding, express written agreement.

56. Plaintiffs have suffered and will continue to suffer irreparable harm as a result of Defendant's breaches.

WHEREFORE THE PLAINTIFFS DEMAND THAT THIS COURT:

a) Enter a preliminary injunction, in form substantially similar to the proposed order submitted herewith, prohibiting Defendant from engaging in the conduct complained of herein.

b) After hearing, enter a permanent injunction, in the form substantially similar to the proposed order submitted herewith, prohibiting Defendant from engaging in the conduct complained of herein.

c) After hearing, award Plaintiffs damages for the injuries suffered as a result of the Defendant's unlawful conduct.

d) Ordering Defendant to specifically perform his obligations under the Restated LOI and consummate the closing in accordance with the terms of the Restated LOI.

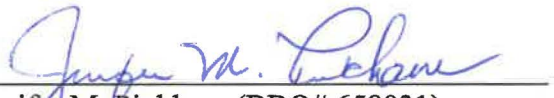
e) Ordering an extension of all deadlines established by the Restated LOI.

f) Ordering Defendant to continue to employ Plaintiffs in their current positions to

maintain and preserve the valuation of the Grafton & Upton.

g) Such other relief as the Court deems just and reasonable.

Respectfully submitted,
Michael R. Milanoski and John P. DeWaele, III
By their attorneys,



Jenifer M. Pinkham (BBO# 658031)
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Suite 309
Quincy, MA 02169
T: 617-409-7409
F: 617-419-1199
jpinkham@phiferpinkham.com
csilva@phiferpinkham.com

Date: January 10, 2023

Date: January 10, 2023

VERIFICATION OF COMPLAINT

I, Michael Milanoski, hereby certify that I have read the above Verified Complaint and each of the attached exhibits, and that each of the allegations set forth are true and accurate of my own knowledge, information and belief, and so far as based upon information and belief, I believe the information to be true and each of the exhibits to be authentic.

Signed under the pains and penalties of perjury this 10th day of January 2023.

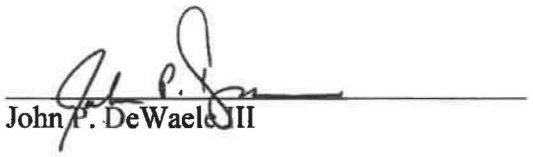
Michael Milanoski

Date: January 10, 2023

VERIFICATION OF COMPLAINT

I, John P. DeWaele III, hereby certify that I have read the above Verified Complaint and each of the attached exhibits, and that each of the allegations set forth are true and accurate of my own knowledge, information and belief, and so far as based upon information and belief, I believe the information to be true and each of the exhibits to be authentic.

Signed under the pains and penalties of perjury this 10th day of January 2023.



John P. DeWaele III