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VIA ELECTRONIC 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. 36464

Dear Ms. Brown:

I am attaching for e-filing the Town of Hopedale, Massachusetts' (1) Reply to Motion to Reopen and (2) Reply to Petition for Declaratory Order in the above-captioned proceeding.

Please do not hesitate to contact me with any questions.

Sincerely,



Charles A. Spitulnik

Attachment

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36464

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**REPLY OF THE TOWN OF HOPEDALE, MASSACHUSETTS
TO MOTION TO REOPEN AND
REPLY TO PETITION FOR DECLARATORY ORDER**

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Counsel for the Town of Hopedale, Massachusetts

Dated: April 30, 2024

INTRODUCTION

This proceeding is an attempt by Petitioner the Grafton & Upton Railroad Company (“GURR”) to use the Interstate Commerce Commission Termination Act (“ICCTA”) as a sword to excise provisions of state law with which it does not wish to comply, and a shield to excuse its flagrant violation of a Massachusetts state property law that limits the ability of any entity, including GURR, to acquire certain protected forest lands. Longstanding Board precedent makes clear, however, that railroads must comply with state laws when acquiring property before they can invoke the protections of the ICCTA for that property. Although the Town does not oppose GURR’s request to reopen this proceeding, the Town vigorously denies that GURR is entitled to the relief it seeks on the merits and urges the Board to apply its long-standing precedent to deny GURR’s Petition.

This case arises from GURR’s efforts to seize control of protected forest land in Hopedale, Massachusetts, through actions that Massachusetts courts have described as a “flagrant violation” of state law. Massachusetts General Laws Chapter 61 protects designated forest land from development by, among other things, granting cities and towns a right of first refusal to acquire forest land if the land is to be sold or converted for a non-forest purpose. In 2020, with full knowledge of that right, GURR sought to acquire, or gain control of, 130 acres of protected forest land in Hopedale (the “Forestland”) from a private owner unconnected to any railroad. Pursuant to Chapter 61, the Town of Hopedale (“Town” or “Hopedale”) timely and repeatedly exercised its statutory right of first refusal in order to purchase and preserve the Forestland.

GURR, however, undertook a series of illegal maneuvers to thwart the Town’s efforts to exercise its statutory right of first refusal. Massachusetts state courts have affirmed that Hopedale retains, and may renew its efforts to enforce, its right of first refusal. Hopedale continues to pursue

its state law remedies in the Massachusetts Land Court, where proceedings are ongoing and the Town recently filed an Amended Complaint, attached as Exhibit 1. To emphasize – the Town’s right to acquire the property at issue arose *before* the railroad acquired it, so that no principles of ICCTA preemption apply. The Town expects that it will obtain the title to the Forestland that it should have received when it exercised its right of first refusal. As discussed below, Board precedent is clear that the ICCTA does not preempt state law regarding the acquisition of property or litigation to determine whether a railroad properly acquired property under state law. The Board should apply that precedent here, deny GURR’s Petition, and allow the Massachusetts courts to resolve the issue as a matter of state law.

GURR ignores that precedent and argues that the Town is trying to “take” GURR’s property and interfere with its railroad operations. But the Town is not seeking to “take” property GURR legally obtained or regulate GURR’s use of property it legally owns. The Town seeks only to enforce the Town’s right of first refusal to acquire the Forestland, a property right it held before GURR began its scheme to seize control of the Forestland in violation of Massachusetts law. The authority GURR cites simply does not apply here because the issue is whether GURR lawfully obtained title to the Forestland in the first instance. It did not. Again, Board precedent is clear that state law regarding acquisition of property is not preempted and railroads must comply with state law in order to acquire property. The Board should allow Massachusetts state courts to determine ownership of the Forestland as a matter of Massachusetts law.

LEGAL AND FACTUAL BACKGROUND

GURR’s statement of the facts omits key relevant details. To assist the Board’s consideration of this proceeding, the Town sets forth a more complete statement of the relevant

facts and state law background, including Chapter 61 and the related state court litigation between the Town and GURR.

I. MASSACHUSETTS LAW PROVIDES TOWNS LIKE HOPEDALE A RIGHT OF FIRST REFUSAL TO ACQUIRE CERTIFIED FOREST LAND

The central issue in this dispute is whether the ICCTA preempts the Town's right of first refusal to acquire designated forest land under Massachusetts General Laws Chapter 61 solely because a railroad would like to acquire the same land. 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. Gen. Laws 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. *Id.* §§ 2, 2A, 5. Second, designated forest land is subject to a lien in favor of the municipality in which it is located. *Id.* § 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.* §§ 6, 7.

Most importantly for purposes of this case, the statute gives the municipality a right of first refusal if the owner decides to sell 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 *before* it is sold or *before* it is used for non-forest purposes, even if the owner or would-be owner has other plans.

II. GURR ILLEGALLY ATTEMPTS TO BLOCK HOPEDALE'S EXERCISE OF ITS CHAPTER 61 OPTION TO ACQUIRE THE FORESTLAND

A. The Forestland

The Forestland is a 130.18-acre tract of forest certified under Chapter 61. *Reilly v. Town of Hopedale*, 102 Mass. App. Ct. 367, 370 (2023) (Exhibit 3 hereto). The Forestland is part of a larger parcel located at 364 West Street totaling 155.24 acres. The parcel is undeveloped except for a single railroad track on the western edge on which GURR currently operates (which is not part of the Forestland) and a gas pipeline easement.¹ Currently, there are no buildings located on 364 West Street, including on the Forestland. The Town does not, and has never, claimed that it has a right to acquire GURR's existing right-of-way. A map of 364 West Street is attached as Exhibit A to the Amended Complaint (Exhibit 1 hereto), with the Forestland shaded in orange.

The Forestland was first classified as forest land under Chapter 61 in 1992. The Hopedale Board of Assessors approved the most recent re-certification of the Chapter 61 classification on or around September 3, 2014, and contemporaneously recorded the requisite Chapter 61 tax lien.

For years preceding any events relevant here, the Forestland was owned by the One Hundred Forty Realty Trust (the "140 Trust").² In 2019 and 2020, GURR made several efforts to purchase 364 West Street, including the Forestland, and other nearby property. Motion at 6.³ GURR even initiated condemnation proceedings under Massachusetts law, but later withdrew that

¹ The 364 West Street parcel also contains 25.06 acres of wetlands (the "Wetlands"), which were not classified as forest land under Mass. Gen. Laws c. 61. The Wetlands are shaded in red on Exhibit A to the Amended Complaint (Exhibit 1 hereto).

² The 140 Trust is a "nominee trust" under Massachusetts law. A nominee trust is a unique construct under Massachusetts law under which the trust is a bare "title-holding entity" in which the trustees "have no power to act in respect to the trust properties but may only act at the direction of the beneficiaries." *Guilfoil v. Sec'y of Exec. Office of Health and Human Serv's*, 162 N.E.3d 627, 632-33 (Mass. 2021). The owners of the beneficial interest of a nominee trust are treated as the true owners of the trust's property. *Goodwill Enterprises, Inc. v. Kavanaugh*, 132 N.E.3d 129, 133 (Mass. App. Ct. 2019).

³ GURR did not paginate the pages in its Motion. The pinpoint page references refer to the PDF page, which includes the cover letter, caption page, table of contents, and body of the Motion.

proceeding. *Id.* Beginning in July 2020, GURR began to pursue the acquisition of the Forestland and nearby non-forestland by agreement with the 140 Trust.

B. The Town’s Initial Attempts to Exercise its Chapter 61 Rights

On July 9, 2020, the Trustees of the 140 Trust sent a notice to Hopedale pursuant to Chapter 61 informing Hopedale of the Trust’s intent to sell 363 West Street and 364 West Street, including the Forestland, at a combined purchase price of \$1,175,000 (the “Notice of Intent”), to the New Hopping Brook Realty Trust, a trust controlled by Jon Delli Priscoli, who also owned (and still owns) GURR. See Motion at 6. In the Notice of Intent, the Trust stated that the proposed use of the Property, including the Forestland, was “to provide additional yard and track space in order to support the current and anticipated increase in rail traffic of GU[RR]’s transloading operations.”

The Notice of Intent did not comply with the requirements of Chapter 61 because it included the Forestland *and* land that was not classified as forest under Chapter 61 (*i.e.*, the Wetlands and 363 West Street), without specifying what portion of the price was for the Forestland. As a matter of Massachusetts law, however, the Notice of Intent triggered the Town’s right of first refusal. *Town of Sudbury v. Scott*, 787 N.E.2d 536, 543 (Mass. 2003) (“[A] town’s right of first refusal ripens into an option to purchase when the town receives notice of an intended sale of land”); *Town of Brimfield v. Caron*, No. 06 MISC 331899, 2010 WL 94280, at *10 (Mass. Land. Ct. 2010) (ruling that a seller’s failure “to comply with the notice requirements” of Chapter 61 could not prevent a town from exercising its right of first refusal, which had been triggered by sale intended to convert forestland to non-forest use). After July 9, 2020, but within the statutory option period, Town representatives made clear to representatives of the Trust and GURR that that the Town was considering exercising its first refusal option to purchase the Forestland.

Pursuant to Chapter 61, § 8 (par. 11), on August 19, 2020, counsel for the Town sent a letter to the Trust, with a copy to the New Hopping Brook Realty Trust (c/o Michael Milanoski), informing the Trust that the Notice of Intent did not comply with Chapter 61 because, *inter alia*, it covered more than the Forestland classified under Chapter 61 and the purchase price of \$1,175,000 did not segregate the consideration to be paid for the Forestland as required by Chapter 61. The Town expressly reserved all “rights and remedies available to it by law or equity regarding its exercise of its right of first refusal.” A true and accurate copy of the August 19, 2020, letter is attached as Exhibit D to the Amended Complaint (Exhibit 1 hereto).

Rather than provide a corrected notice, on October 7, 2020, counsel for the Trust sent a letter to counsel for Hopedale disagreeing that the July 9 Notice of Intent was “defective in any fashion pursuant to the provisions of M.G.L. c. 61, § 8.” A true and accurate copy of the October 7, 2020 letter is attached as Exhibit E to the Amended Complaint (Exhibit 1 hereto). The Trust’s counsel also stated that the July 7 “Notice of Intent is hereby withdrawn in its entirety . . . and shall be deemed of no further force and effect.” He further stated that “further notice to sell or convert the land will be subject to a new notice of intent.”

On October 8, 2020, counsel for the Town of Hopedale sent a letter to the 140 Trust, with a copy to the New Hopping Brook Realty Trust (c/o Mr. Milanoski), stating that the 140 Trust’s “purported withdrawal of the Notice of Intent has no effect” that the Town continued to hold “a first refusal option for any sale of classified forest land,” and that “Hopedale respectfully reserves all rights and remedies available to it by law or in equity regarding its exercise of its right of first refusal and its option to purchase.” A copy of the October 8 letter is attached as Exhibit F to the Amended Complaint (Exhibit 1 hereto).

C. GURR Implements An Illegal Strategy to Acquire the Forestland without Allowing the Town to Exercise Its Chapter 61 Rights

Despite the Trust's statement that it would send a new notice if it sold or converted the Forestland, it did not do so. Instead, GURR implemented an illegal plan to circumvent Hopedale's right of first refusal. *Id.* As the Appeals Court wrote: "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." *Reilly v. Town of Hopedale*, 102 Mass. App. Ct. 367, 371 (2023) (Exhibit 2 hereto). The Superior Court characterized GURR's subsequent actions as a "flagrant violation" of state law. *See* Memorandum and Decision on Motion to Preserve Status Quo, *Reilly v. Town of Hopedale et al.*, Case No. 2185-cv-00238, at 2 (Mass. Super. Ct. May 6, 2022) (Exhibit 4 hereto).

On October 12, 2020, the Trust conveyed by quitclaim deed to GURR the parcel located at 363 West Street and the Wetlands at 364 West Street for consideration of \$1.00. Also on October 12, the owner of 100% of the beneficial interest of the Trust assigned the beneficial interest to GURR for consideration of \$1,175,000.00 (the same amount as the purchase price for the Forestland and the non-Forestland noted in the July 9 Notice). On that same day, the trustees of the Trust, Charles E. Morneau and Gregg Nagel, resigned as trustees. Two days later, on October 14, 2020, the Trust appointed successor trustees who are affiliated with GURR: Mr. Delli Priscoli (the owner of GURR) and Mr. Milanoski (the then-President of GURR). As a result of these transactions, GURR purported to become the owner of the beneficial interest in the 140 Trust. *See* Amended Complaint ¶¶ 36-60 (Exhibit 1 hereto).

On October 15, 2020, Mr. Milanoski, as President of GURR, sent a letter to the Chair of the Hopedale Select Board (Hopedale's executive body) stating that GURR "has purchased all of the beneficial interest" in the 140 Trust. A true and accurate copy of that letter is attached as

Exhibit G to the Amended Complaint (Exhibit 1 hereto). No trustee or representative of GURR sent the Town a new Chapter 61 notice, however.

The events of July – October 15, 2020, gave rise to two separate and independent rights of first refusal for Hopedale. First, the 140 Trust’s July 9 Notice of Intent triggered a right of first refusal. Second, the transfer of the beneficial interest of the 140 Trust triggered a second, independent right of first refusal. Mass. Gen. Laws ch. 61, § 8, para. 1.

On October 21, 2020, counsel for the Town sent a letter to the Trust, c/o GURR, stating that the Town held two independent rights of first refusal. A true and accurate copy of that letter is attached as Exhibit H to the Amended Complaint (Exhibit 1 hereto).

D. Hopedale Votes to Exercise Its Chapter 61 Rights

On October 24, 2020, at a Special Town Meeting attended by over 400 residents, the Town of Hopedale adopted warrant articles by unanimous consent to appropriate money for the acquisition of the Forestland pursuant to Chapter 61.⁴ At a duly noticed public hearing held on October 30, 2020, the Hopedale Select Board voted to exercise the first refusal option to purchase the Chapter 61 Land. Hopedale recorded notice of the decision to exercise the first refusal option in the Worcester South District Registry of Deeds on November 2, 2020. A copy of the recorded Notice of Exercise is attached as Exhibit E. On November 2, 2020, Hopedale sent the Notice of Exercise accompanied by a proposed purchase and sale agreement for the Chapter 61 Land to the Trust’s prior and current trustees by certified mail, as required by M.G.L. c. 61, § 8.

E. GURR Disregards Hopedale’s Chapter 61 Rights and Begins Tree-Clearing

On or around October 27, 2020, just days after the Special Town Meeting voted to acquire and preserve the Forestland, agents and/or representatives of the Trust and/or GURR began to

⁴ At the same Special Town Meeting, Town Meeting authorized the Select Board to take title to the Wetlands by eminent domain, at a price of \$25,000. The Select Board later voted to exercise eminent domain over the Wetlands.

undertake site work activities on the Forestland, including but not limited to flagging for wetlands delineation and tree cutting. GURR directly or through its agents subsequently cut down virtually all of the trees on the Forestland.

This conversion of the Chapter 61 Land from forestland to residential, industrial, or commercial use gave rise to a third, separate and independent right of first refusal for Hopedale. As the Appeals Court wrote: “irrespective of any sale, G.L. c. 61, sec. 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.” *Reilly*, 102 Mass. App. Ct. at 371; *see also Town of Brimfield*, 2010 WL 94280, at *7.

Despite the Town’s repeated efforts to exercise its Chapter 61 rights to acquire the Forestland *before* a conveyance to GURR or before the Forestland was purportedly used for a railroad purpose, GURR and the 140 Trust disregarded their obligations under Chapter 61, disregarded the Town’s state law property rights, and refused to convey the Forestland to the Town.

III. LITIGATION OVER GURR’S SEIZURE OF THE FORESTLAND

A. Initial Litigation to Prevent GURR’s Conversion of the Forestland

In October 2020, the Town initiated what became protracted and convoluted litigation between the Town, its residents, and GURR regarding the Town’s rights under Chapter 61. The Massachusetts Appeals Court detailed the complex procedural history in its decision in *Reilly*, 102 Mass. App. Ct. at 372-76, which the Town will not repeat here. In brief, the Town filed suit in the Massachusetts Land Court to vindicate its Chapter 61 right of first refusal, GURR initiated this proceeding before the Board seeking a declaration that Chapter 61 was preempted, and the Town, through its Select Board, and GURR then entered into a settlement agreement resolving both proceedings. Residents of Hopedale challenged the settlement agreement in the Massachusetts

Superior Court, which vacated the agreement as beyond the Town Select Board’s authority to enter and held that Hopedale retained “the right to continue attempting to enforce the [Chapter 61] [o]ption.” *Id.* at 374. Following that decision, the Town and the citizens both sought to vacate the stipulation of dismissal entered in the Land Court pursuant to the settlement agreement, but the Land Court denied the Town’s motion on the narrow ground that even if the Town Select Board lacked the authority to enter into the Settlement Agreement, it did have the authority to dismiss the case,⁵ and denied the citizens’ motion on the grounds that the motion was moot and the citizens lacked standing to challenge the settlement agreement. *Id.* at 377. The citizens appealed those decisions. *Id.* at 375-76.

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. Super. Ct. May 6, 2022) (attached as Exhibit 4). 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. As discussed below, there is a dispute between GURR and the Town pending in the Massachusetts Land Court concerning whether GURR lawfully obtained ownership or control of the Forestland. That proceeding may result in a finding that GURR does not own the Forestland.

⁵ Hopedale has refiled its motion to vacate based on the subsequent decision of the Massachusetts Appeals Court, as described below. *Infra* pp. 11–12.

B. Massachusetts Appeals Court Confirms the Citizens' Ability to Challenge the Settlement Agreement and Hopedale's Ability to Enforce its 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. As relevant here, the Appeals Court affirmed the Superior Court's holdings that the Settlement Agreement was ineffective and that Hopedale could seek to enforce its Chapter 61 Option to purchase the Forestland. *Id.* at 377-80. The Appeals Court vacated the Land Court's decision denying the citizens' motion to intervene to vacate the stipulation of dismissal and the Settlement Agreement. *Id.* at 380-85. In doing so, the Appeals Court made clear that the citizens could enforce the Superior Court's decision finding the Settlement Agreement to be ineffective 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 vacated the Land Court's decision that the citizens' motion to intervene was moot. It explained 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. *Id.* at 385. Accordingly, the Appeals 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.*

C. 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 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 ICCTA. The District Court entered a preliminary injunction against Hopedale's exercise of eminent domain 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.⁶ *Grafton & Upton Railroad Co. v. Town of Hopedale*, Case No. 22-cv-40080, Memorandum & Order at 1-3, 12-25 (D. Mass. March 31, 2023). The District Court stayed the case and ordered GURR to file a Petition for Declaratory Order with the Board regarding Hopedale's taking. *Id.* at

⁶ The District Court also enjoined enforcement of an order by the Hopedale Conservation Commission intended to stop GURR from violating the Massachusetts Wetlands Protection Act.

27. Importantly for this proceeding, the District Court did not discuss or address the ongoing state court litigation over the Town's Chapter 61 rights.

Hopedale appealed the District Court's decision to the U.S. Court of Appeals for the First Circuit and GURR filed a petition with the Board in FD 36696 on April 14, 2023, as directed by the District Court.

D. The Board's Decision in FD 36696 and Termination of Eminent Domain Efforts

On November 15, 2023, the Board served its decision in FD 36696 finding that the Town's attempt to acquire the Forestland by eminent domain was preempted. Decision at 7-12. The Board was careful, however, to limit its decision to the question presented by the District Court regarding the Town's eminent domain authority and not to address the separate state law questions presented by the Town's efforts to enforce its Chapter 61 rights in state court. As the Board explained in rejecting the Town's request to hold FD 36696 in abeyance pending resolution of the state court litigation:

By contrast, what the Board is deciding here is whether the Town can presently use eminent domain or the Enforcement Order to prevent GURR's development of property to which it holds title, or whether such regulatory action is preempted. The Board need not know the outcome of the state court litigation to make that determination.

Decision at 6. The issue raised in the current Petition, in contrast, is not whether the Town can condemn the Forestland, but whether the ICCTA preempts the Town from exercising a statutory right of first refusal which, if GURR had not unlawfully thwarted the Town, would have properly allowed title to pass from one non-rail carrier to another without any contact with a railroad or the Board's jurisdiction, accordingly depriving GURR of the ability to acquire, control, or use the Forestland in the first place. The Board's decision in FD 36696, therefore, does not control its decision in this proceeding because, as the Board recognized, "if the courts ultimately determine

that the railroad does not have a state law property interest in the land, preemption may not shield the railroad from available state law remedies.” Decision at 6 n.14.

Following the Board’s decision in FD 36696, in December 2023, the Town withdrew its appeal in the First Circuit and dismissed the District Court case. Also in December 2023, the Town stopped reauthorizing the taking by eminent domain, and the Town is no longer seeking to acquire the Forestland, or any of the nearby land occupied by GURR, by eminent domain.⁷ The only issue before the Board is whether the ICCTA preempts the Towns first refusal rights for the Forestland granted by Chapter 61.

E. The Land Court Has Implemented the Appeals Court’s Decision and Has Allowed the Town to Pursue Its Chapter 61 Rights

On remand following the Appeals Court’s March 7, 2023 decision, the Land Court issued an Order confirming that the Settlement Agreement is ineffective and vacating the Stipulation of Dismissal, reversing its prior decision. The Land Court further directed the Town to file an Amended Complaint so that the Town could pursue its claims to enforce its Chapter 61 right of first refusal and related claims. The Town has filed that Amended Complaint, as attached as Exhibit 1, and the case is proceeding.

Despite the twists and turns and reversals of course of the multi-pronged litigation between the Town, GURR, and the citizens since October 2020, the position of the parties at this point is relatively straightforward. Massachusetts courts have recognized that the Town may enforce its right of first refusal to acquire the Forestland against GURR in Massachusetts Land Court, which the Town is pursuing. The Town has withdrawn its effort to acquire the Forestland by eminent domain and has dismissed the associated federal court litigation. GURR has renewed its efforts to

⁷ The Hopedale Conservation Commission has also stopped trying to enforce its Enforcement Order.

prevent the Land Court from addressing the merits of Hopedale's Chapter 61 claims by filing its Motion to Reopen in this proceeding on April 10, 2024, seeking a declaratory order that Chapter 61 is preempted by the ICCTA. But as the Board previously noted, "if the courts ultimately determine that the railroad does not have a state law property interest in the land, preemption may not shield the railroad from available state law remedies." FD 36966 Decision at 6 n.14. For the reasons stated below, the Board should confirm that if Massachusetts state courts determine GURR has no lawful state law property interest in the Forestland, then the ICCTA will not shield GURR from state law remedies under Chapter 61.

ARGUMENT

I. THE TOWN DOES NOT OPPOSE REOPENING THIS PROCEEDING

The Town agrees that the decisions of the Massachusetts state courts vacating the Town's purported settlement agreement with GURR represents the kind of substantially changed circumstances that warrant reopening this proceeding pursuant to 49 U.S.C. § 722 and 49 C.F.R. § 115.4. Accordingly, the Town does not oppose GURR's request that the Board reopen this proceeding and address the merits of GURR's Petition. The Town does, however, vigorously dispute the merits of GURR's Petition, as set forth in detail below, because nothing in the ICCTA preempts state laws that may limit the ability of a railroad to acquire property from a non-railroad. The Town urges the Board to address the merits of the petition expeditiously to provide definitive guidance to the parties and the state court that is addressing the scope of the Town's right to exercise its statutory right of first refusal under Massachusetts law. Because the Town did not submit a reply to the original Petition, it does so here in order to expedite this proceeding.

Alternatively, the Town would not object to the Board reopening this proceeding and holding it in abeyance while the Massachusetts courts resolve the Town's suit to enforce its right of first refusal. *See City of Milwaukie – Petition for Declaratory Order*, FD 35625, Slip Op. at 4-

5 (STB served March 25, 2013) (deferring ruling on preemption until state court decided the issue of ownership).

II. THE BOARD SHOULD DENY GURR’S PETITION ON THE MERITS

GURR seeks a declaration that the Town is preempted from exercising its statutory right of first refusal to acquire the Forestland from the Trust, a right that accrued *before* the Trust conveyed the Forestland, conveyed the beneficial interest in the Trust, or converted the Forestland to commercial, industrial, or residential use. Accordingly, the issue in this case is whether the ICCTA facially preempts a state law of general application that provides an affected city or town a right of first refusal to acquire statutorily designated forest land *before* that forest land is sold to an entity for a commercial, industrial, or residential use purpose or *before* the forest land is converted to a commercial, industrial, or residential use, simply because the would-be buyer happens to be a railroad. More broadly, the issue is whether the ICCTA preempts state laws of general applicability that might limit the ability of a railroad to acquire property the railroad desires for future railroad purposes.

The answer is clearly no. The Board has long held that the ICCTA does not preempt state laws regarding the acquisition of property, even when those laws may prevent a railroad from acquiring property the railroad wants for a railroad purpose. And the Board has also long held that the ICCTA does not preempt state and local governments from ejecting railroads who occupy land without lawfully acquiring a property interest in it.

A. The Scope of Preemption Under the ICCTA is Limited in Important Respects

Construing the preemptive reach of Section 10501(b) is primarily a task of statutory construction that focuses first on the plain language of the statute “which necessarily contains the best evidence of Congress’ pre-emptive intent.” *Emerson v. Kansas City Southern Ry. Co.*, 503

F.3d 1126, 1129 (10th Cir. 2007) (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002)).

The ICCTA provides that:

The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such 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. Except 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). The term “transportation” is defined as:

(A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(28).

Courts have been clear that “[w]hile certainly expansive, this definition of “transportation” does not encompass everything touching on railroads.” *Emerson*, 503 F.3d. at 1129-30. *See also* *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 118 (1st Cir. 2015) (ICCTA’s preemptive reach “does not encompass everything touching on railroads.”). Importantly, a railroad’s business activity, such as acquiring property, does not constitute “transportation” under ICCTA simply because a railroad happens to be the party undertaking the activity. *Del Grosso v. Surface Transp.*

Bd., 811 F.3d 83, 118 (1st Cir. 2016) (Order on Petition for Panel Rehearing) (“not all activities connected with rail transportation are considered ‘transportation’ under the statute.”).

To assess the limits of ICCTA preemption of “regulation of rail transportation,” courts have explained that the definition of “transportation” Section 10102(b) “focuses on physical instrumentalities ‘related to the movement of passengers or property’” and on “‘services related to that movement’”), as opposed to acts that may help facilitate the business of moving passengers or property but are not components of it. *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007). Because this definition marks the boundaries of the ICCTA’s express preemption of state and local law, it must be “narrowly and strictly construed.” *Montalvo v. Spirit Airlines*, 508 F.3d 464, 474 (9th Cir. 2007) (citing *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998)); *see also Franks Investment Co. v. Union Pacific R.R.*, 593 F.3d 404, 407 (5th Cir. 2011) (“[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.”) (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)).

B. The ICCTA Does Not Preempt Laws Regarding Property Acquisition by Railroads

The issue in this proceeding is whether Chapter 61, a law of general application, is preempted because it could prevent a railroad from acquiring a piece of property it desires. The answer is clearly no. Longstanding Board precedent shows that the ICCTA does not address how railroads acquire property and the Board has repeatedly affirmed that property acquisition is a matter of state law that is *not* preempted.

As a general matter, the ICCTA does not address the acquisition of non-railroad property by a railroad. Congress did not empower railroads to acquire property or provide any indication that it intended to preempt state laws regarding the acquisition of property. To be sure, Congress

intended to protect a railroad's use of property after that property had been lawfully obtained but conferred no special rights on railroads to acquire property.

The Board has expressly and repeatedly recognized that the ICCTA does not preempt state laws regarding ownership of property. In *Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP RLY Inc.*, FD 35692, Slip Op. at 3 (STB served March 8, 2022), the Board rejected as “clearly incorrect” the argument that the ICCTA preempted a state quiet title action over ownership of a railroad easement:

ECR has argued in the state appellate court that federal preemption under 49 U.S.C. § 10501(b) bars the state courts from ruling on state property law issues concerning property subject to this agency's licensing proceedings. That argument is clearly incorrect. Although federal preemption is broad, the Board has consistently held that disputes concerning state contract and property law should be decided by the appropriate courts with expertise in those matters, rather than by the Board.

See also Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP RLY Inc., FD 35692, Slip Op. at 3-4 (STB served April 24, 2023) (same); *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 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).

Even where the Board has authorized the acquisition of specific property for a railroad use, the Board has consistently denied that the ICCTA preempts state laws regarding the acquisition of property, requiring that any acquisition comply with state law even if that state law prevents the railroad (or would-be railroad) from acquiring the property. *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).

Those cases make clear the principle that a railroad must *first* comply with state law to acquire property *before* it can invoke the protections of federal preemption regarding its activities on that property. The Board has applied that principle in cases where the application of state law deprived a railroad of property it desired. For example, in *The Great Walton R.R. Co. – Petition for Declaratory Order*, AB 1242 (Sub-No. 1), Slip Op. at 7 (Served June 23, 2020), the Board squarely rejected an argument that a Georgia Public Service Commission decision denying a railroad the authority to condemn land to rebuild a “runaround” track was preempted:

Nor is the PSC's decision preempted. The Board notes that GWRC has argued to the state court that the PSC's decision was preempted by [ICCTA], and that the state court correctly rejected this argument. Specifically, the state court held that ICCTA "does not preclude the [PSC] from denying [GWRC] the statutory right to condemn property under state law. . . . A railroad must acquire property under state law—by purchase, lease, or to the extent permitted by condemnation." (Pet. Ex. 8 at 20.) This is consistent with prior court and agency decisions as well. *See Tongue River R.R.—Construction & Operation—W. Alignment*, FD 30186 (Sub-No. 3) et al., slip op. at 16 n.50 (STB served Oct. 9, 2007) ("Eminent domain proceedings are governed by state law. In rail construction cases, the Board determines whether the proposed line is consistent with the [public convenience and necessity]. The applicant is responsible for acquiring the land necessary to build the line.").

Slip Op. at 7. Accordingly, the Board did not disturb the Georgia PSC's decision even though it deprived the railroad of the authority to acquire land it wanted for a railroad purpose.

The Board reached the same conclusion in a case cited favorably by GURR itself in support of its request to reopen this proceeding. In *Texas Cent. R.R. and Infrastructure, Inc. & Texas Cent. R.R., LLC – Petition for Exemption – Passenger Rail Line Between Dallas and Houston, Tex.*, FD 36025, Slip Op. at 12 (STB Served July 16, 2020), the Board explained that "[c]onsistent with prior court and agency decisions, a finding of Board jurisdiction does not confer any federal power [on a railroad] to take privately owned property, nor would future Board approval of the proposed Line, if it were to occur, confer such federal power."

Courts have reached similar conclusions. In *Dakota, Minnesota & Eastern R.R. v. South Dakota*, 236 F. Supp. 2d 989, 1009 (D.S.D. 2002), *aff'd in part, vacated in part, remanded*, 362 F.3d 512 (8th Cir. 2004) ("DM&E"), which the Board cited favorably in *The Great Walton*, the court considered whether a South Dakota law conditionally granting railroads the power of eminent domain was preempted. After noting the generally broad preemptive reach of the ICCTA, the court explained that state laws limiting the ability of railroads to acquire land through eminent domain were not preempted:

Although it is clear that the area of railroad regulation is now off limits to the state, the area of eminent domain presents a more complex question. As the state properly pointed out, the STB's own position with respect to DM & E's eminent domain authority is that the question presents an issue of state law. The STB has acknowledged that it does not have a role to play in eminent domain proceedings and that DM & E is responsible for the acquisition of the land necessary to complete the project. Thus STB approval of the PRB project does not carry with it any federal power to take land to complete the project. For such authority, DM & E is wholly dependent upon the State of South Dakota. Therefore, the Court finds that Congress did not intend to preempt the field of eminent domain in enacting the ICCTA.

Id. This underscores the Board's general recognition that state law can limit the ability of a railroad to acquire property, even where the railroad wants to put the property to a railroad use.

The court in *DM&E* did find that certain aspects of the South Dakota law were preempted because they crossed the line between laws regarding eminent domain, which are not preempted, and laws regulating railroads, which are preempted. Specifically, the South Dakota law focused solely on a railroad's ability to use eminent domain and required the railroad to submit detailed plans for its project and provide a commitment to finance the project as a pre-condition of acquiring the land. 236 F. Supp. 2d at 1006-07. The court concluded that those and similar requirements in the statute amounted to regulation of the railroad. *Id.*

Chapter 61 presents none of those concerns. Chapter 61 is a statute of general applicability and applies to anyone seeking to acquire or convert forest land. Further, Chapter 61 does not include any requirements that could be understood to regulate a railroad or other user. The statute simply creates a right of first refusal in favor of the host city or town. Even if the exercise of that right were to prevent a railroad from acquiring the property, that would fall on the "not preempted" side of the line the court recognized in *DM&E*, as were the laws in *The Great Walton* and *Milwaukie* discussed above that were *not* preempted though they denied ownership to a railroad.

The requirement that a railroad obtain title to property in compliance with state law is not limited to a railroad's use of eminent domain authority. Any attempt by a railroad to acquire or use property is subject to the requirement that it acquire the property in compliance with state law. In *City of Milwaukie – Petition for Declaratory Order*, FD 35625, Slip Op. at 4-5 (STB served March 25, 2013), the railroad was using property adjacent to its yard to store rail cars and for other railroad purposes. Because those activities were creating health and safety risks, the City sought to enforce local laws prohibiting litter and obstructing public rights-of-way. Although the property was titled in the City, the railroad claimed that it had lawfully appropriated the property under state law. *Id.* at 1-2.

The Board declined to address whether the enforcement of local laws against a railroad was preempted because ownership of the property under state law was determinative of the preemption question:

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.

Id. at 4-5.

The Board reached that conclusion even though the railroad was occupying and using the property — the City was permitted to “eject” the railroad from land it was occupying and actively using for railroad purposes because the railroad had not acquired a valid interest in the land under state law. State laws regarding the acquisition of property drive the preemption analysis, not the

other way around. *See also Allied Indus. Dev. Corp. – Petition for Declaratory Order*, FD 35477, Slip Op. at 5-6 (STB served Sept. 17, 2015) (deferring to state court adjudication of ownership to determine whether certain track was ancillary or mainline track); *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.”).

That rule makes sense because otherwise a railroad could unilaterally and unlawfully seize control of non-railroad property claiming a future railroad need, which would automatically preempt the protections of state law that would otherwise be available to the owner. Nothing in the ICCTA suggests that state laws regarding the acquisition of property are preempted or that railroads have unlimited power to seize land they might want, as the Board has long held.

C. The ICCTA Does Not Preempt Chapter 61

Applying that precedent here, it is clear that Chapter 61 is not preempted. First, as the Board recognized in *The Great Walton* decision, state laws that may prevent a railroad from acquiring property are not preempted. That decision controls here. Just as the Board there recognized the authority of the Georgia PSC to decide whether a railroad could use eminent domain to acquire property, the Board here should allow the Massachusetts Land Court to determine whether Chapter 61 provides that the Town has a right of first refusal to buy the Forestland *before* GURR could take control of the property. Whatever the ultimate outcome of that case, the state’s authority to apply Chapter 61 is not preempted. Likewise, the Board in *Eastside Community Rail* and similar cases recognized that even where the Board has conferred specific authority to acquire property and operate a line of railroad, the railroad must properly acquire the property under state law; no Board authorization compels the acquisition or preempts state laws regarding the acquisition. Here, the case is even more clear because GURR has no

specific Board authority to acquire the Forestland or to build a transload facility on the Forestland, or indeed to make any use of the Forestland for any railroad purpose. If a railroad cannot use preemption to effectuate an acquisition that the Board has authorized, it certainly cannot use preemption to effectuate an acquisition the Board has not authorized.

Second, as the Board recognized in the *Milwaukie* decision, a railroad is not entitled to the protections of preemption unless and until it has legally obtained title under state law, regardless of whether the railroad has possession. Just as in *Milwaukie*, the legality of GURR's purported acquisition of the Forestland is being contested in state court as a matter of state law. Accordingly, GURR's claim of preemption is at best premature and unripe because its claim of title to the Forestland has not been determined as a matter of state law. Until the Land Court has resolved the issue, GURR cannot claim any of the protections of preemption. And if, as the Massachusetts Appeals Court's decision in *Reilly* strongly suggests, the Town may enforce its right of first refusal, GURR would have to vacate the Forestland just as the railroad in *Milwaukie* would have been required to abide by the state court decision on appropriation under state law.

To be sure, states may not impose regulations that would otherwise be preempted in the guise of state laws regarding property acquisition. *DM&E*, 236 F. Supp. 2d at 1006-07. Chapter 61, however, does not do so. Chapter 61 applies to any entity seeking to acquire protected forest land or to use protected forest land for non-forest purposes. Chapter 61 does not attempt to regulate any non-forest use of designated forest land by imposing conditions on such use. Indeed, there is no governmental review or approval process for the non-forest use. The only process is the exercise of the right of first refusal.

Chapter 61 confers a statutory property right, in the form of a right of first refusal, on the city or town where the forest is located. Nothing in the ICCTA expresses an intent by Congress

that the ICCTA preempts state-created property rights, and the Board has uniformly rejected such arguments as discussed above. Exercising a valid property or contract right is simply not a “regulation” that could be preempted by the ICCTA.

Preemption here is particularly unwarranted because Chapter 61, enacted in 1981, imposed limits on the alienability of the Forestland long before GURR sought to acquire the Forestland and GURR was fully aware of those limits, including the Town’s right of first refusal. Indeed, the Town recorded the most recent Chapter 61 tax lien on the Forestland in 2014, placing all subsequent purchasers, including GURR, on notice of the Chapter 61 limits on alienability. The 140 Trust and GURR were clearly aware of those limits when the 140 Trust sent the July 1 Notice of Intent to the Town in an attempt to comply with Chapter 61. Nothing in the ICCTA expresses an intent by Congress to preempt pre-existing limits on the alienability of non-railroad property just because a railroad would like to acquire that property.

D. GURR’s Takings and Preclearance Arguments Are Inapposite

GURR’s argument studiously ignores the cases and principles discussed above. In its Motion and original Petition, GURR argues that the Town is trying to “take” GURR’s property in manner akin to the exercise of eminent domain authority that the Board found preempted in FD 36696. In its original Petition, GURR tried to liken Chapter 61 to the kinds of “preclearance” regulations the Board and courts have found preempted. Both of those arguments lack merit.

1. Chapter 61 Is Not an Eminent Domain Statute

GURR cites the Board’s holding in FD 36696 and a number of other cases and decisions to support its argument that the Town’s prosecution of its Chapter 61 claims is akin to the condemnation action that the Board has found to be preempted. Motion at 12; Petition at 10-11 (citing *Union Pac. RR Co. v. Chicago Transit Auth.*, 647 F.3d 675 (7th Cir. 2011); *City of Lincoln v. STB*, 414 F.3d 858 8th Cir. 2005); *Norfolk Southern Ry. – Petition for Declaratory Order*, FD

35196 (STB served March 1, 2010); *14550 Ltd. – Petition for Declaratory Order*, FD 35788 (STB served June 5, 2014) (adverse possession); *Tri-City Railroad Company—Petition For Declaratory Order*, FD 35915 (STB served Sept. 14, 2016). None of those decisions are applicable here.

First, all of the cases cited in the Petition involved attempts to use eminent domain to acquire property already lawfully owned by the railroad; none involved a challenge to the legality of the railroad's acquisition of, or original title to, the property in the first instance. None of those cases apply here because Chapter 61 does not allow a municipality to take property from a railroad or any other entity. Chapter 61 confers a right of first refusal on entities like the Town under certain conditions, before other would-be purchasers may acquire any property interest. As discussed above, efforts to vindicate a claim of prior ownership of land against railroads are not preempted.

Second, although it does not explain its position, GURR's theory appears to be that, because GURR currently occupies the Forestland, ousting GURR now would constitute a taking that is preempted under the principles the Board stated in FD 36696. But FD 36696 is not applicable here because, following the Board's decision in FD 36696, the Town has abandoned its condemnation proceeding and is no longer trying to acquire the Forestland by eminent domain. Instead, the principles in the Board's case law concerning the acquisition of property govern because the Town is trying to vindicate its Chapter 61 right of first refusal that GURR illegally sought to destroy.

Because the Town *did* exercise its right of first refusal (and because GURR illegally refused to provide the proper notice under Chapter 61), GURR did not lawfully acquire any interest in the Forestland and has no legal right to use or occupy the Forestland. If the Town's suit in state court is successful, the Land Court will affirm that the Town was entitled to the Forestland in 2020

and that GURR has no rights in the Forestland. As the Board in *Milwaukie* recognized, the Town's efforts to enforce its pre-existing state law property rights and oust GURR from its illegal occupation of the Forestland are not preempted.

Moreover, GURR can only make its "taking" argument because it acted illegally to occupy the Forestland and clearcut the property. See Exhibit 1 at ¶ 85. GURR did so with full knowledge that the Town was asserting its Chapter 61 rights. Indeed, after the July 9 Notice, the Trust and GURR failed to provide any of the required notices and proceeded by stealth and subterfuge to occupy and denude the Forestland. The Town acted promptly to respond to GURR's machinations and vindicate its legal rights. The Board should not reward GURR's misconduct by finding that its illegal possession of the Forestland vested GURR with the protections of the ICCTA that GURR would not have enjoyed had it complied with Chapter 61.

GURR tries to bolster its "taking" theory by arguing that the Massachusetts Appeals Court's statement that "the Railroad would retain the land and the Town would retain its money and the right to continue attempting to enforce the Option," is somehow an implicit recognition of GURR's title to the Forestland. Motion at 12 (quoting *Reilly*, 102 Mass App. Ct at 374). But the Appeals Court's statement does not support GURR's "taking" argument at all. The court was merely describing the interim status of the parties while the Town enforces its right of first refusal, which the court expressly authorized. Indeed, the court used the word "retain" rather than "own" because it was not opining on ownership, which the court explicitly recognized was disputed while the Town continued to enforce its Chapter 61 Option. Similarly, the Board in *Milwaukie* recognized that the ultimate outcome of the state court litigation would be to dispossess the railroad of property it "retained" during the litigation.

2. Chapter 61 Is Not a “Preclearance” Permitting Law

In its original Petition GURR argued that Chapter 61 is the kind of “preclearance” condition that the Board has found to be preempted. Motion Exhibit 1 at 8-9. But the cases GURR cited, the GU 2014 decision, *Green Mountain Railroad v. Vermont*, 404 F.3d 638 (2d Cir. 2005), and *Boston and Maine Corp. and Springfield Terminal RR Co. – Petition for Declaratory Order*, FD 35749 (STB Served July 19, 2013) all involved efforts to regulate railroad activities on property the railroad already owned. Chapter 61 does no such thing. Chapter 61 limits the ability of any entity to *acquire* designated forest land. As the Board made clear in *The Great Walton, Milwaukie*, and the other cases discussed above, such limits on acquisition authority are not preempted because they do not purport to regulate railroad activities.

Moreover, Chapter 61 does not require the kind of detailed review and approval of railroad activities that characterize preempted preclearance laws or preempted conditions on eminent domain authority. Chapter 61 confers a right of first refusal for *any* attempt by *any* entity to acquire or use protected forest for a non-forest purpose without regard to the nature or extent of the non-forest use. If an entity holding a right of first refusal under Chapter 61 elects to exercise that right, then any entity seeking to buy forest land cannot acquire the property. If, as here, the buyer is a railroad, the prior exercise of a right of first refusal means that the property never comes within the scope of the ICCTA. Chapter 61 is not a preclearance permitting statute; it is a property rights conferring statute that is not preempted.

Finally, GURR relies heavily on the argument that it is currently using the Forestland for railroad purposes to argue that the Town cannot now exercise any legal right to acquire the Forestland. However, GURR cannot rely on its current activities and future plans for the Forestland because all of GURR’s efforts to acquire and use the Forestland were made despite GURR’s knowledge of the Town’s prior exercise of its right of first refusal. GURR has at all times

proceeded in the face of a known legal risk that its attempt to acquire the Forestland would be declared illegal and void. Its preemption argument is thus a bootstrap that uses the fruits of its illegal actions as the basis to claim that its actions are legal.⁸

The Board in *Milwaukie* rejected a similar bootstrap argument explaining that if the state court could not “eject or fine the railroad for its use of the land in violation of local regulations” its “use of public land would be absolute and unrestrained.” Slip Op. at 4-5. So too here, GURR should not be permitted to weaponize the ICCTA by violating state laws that are not preempted and then claiming that the conduct enabled by its illegal conduct creates the preemption that shields it from the consequences of its illegal action. *See also Diana Del Grasso et al. – Petition for Declaratory Order*, FD 35652, Slip Op. at 11-12 (STB served July 31, 2017) (“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.”) (Board Member Miller concurring in part and dissenting in part).

Finally, and to be clear, GURR is proposing a radical expansion of the scope of the ICCTA. The ICCTA is silent regarding a railroad’s ability or authority to acquire land from non-railroads. As the cases discussed above make clear, the Board and the courts have consistently and repeatedly found that acquisition of non-railroad property is not within the Board’s jurisdiction and that state laws regarding property acquisition by railroads are not preempted. GURR seeks to change that. It claims, in essence, the right to ignore *any* state law that might limit the ability of a railroad to

⁸ Moreover, as a matter of Massachusetts law, a right of first refusal “is not extinguished by sale to a third party with actual or constructive notice the right.” *Greenfield Country Estates Tenants Ass’n, Inc. v. Deep*, 666 N.E.2d 988, 993-94 (Mass. 1996). Similarly, “[a] right of first refusal provision is designed to afford the holder protection against a sale to others.” *Roy v. George W. Greene, Inc.*, 533 N.E.2d 1323, 1326 (Mass. 1989). The Town’s preexisting right of first refusal remains valid and enforceable despite GURR’s actions.

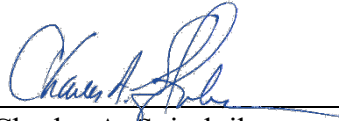
acquire property it wants for a railroad use. Indeed, because the motivating principle behind GURR's theory is that it needs the property for railroad operations, it is hard to imagine any limit to this claimed power. Although this case involves a statutory right of first refusal, under GURR's theory a railroad could also disregard a contractual right of first refusal or the interests of co-tenants by simply arguing that the exercise of such a right would prevent it from acquiring property it wants. Under GURR's theory, a railroad could ignore limits on the use of eminent domain by a railroad, effectively overturning *The Great Walton*. Under GURR's theory, it could acquire land simply by trespassing and using it for a railroad purpose, effectively overturning *Milwaukie*. GURR's theory would read into the ICCTA by implication a kind of federal eminent domain power that would allow it to brush aside any state law that might prevent a railroad from acquiring property it wanted.

That sweeping proposition is contrary to decades of Board and judicial precedent. Tellingly, in two separate briefs, GURR has failed to cite a single line from the ICCTA, a single Board decision, or a single court case, supporting its preemption theory. To the contrary, GURR's briefing studiously ignores the Board and judicial precedent finding that state laws regarding land acquisition by railroads are *not* preempted. In short, GURR presents no legal support for its sweeping new theory of preemption and the Court should reject it and deny the Petition.

CONCLUSION

For the foregoing reasons, the Town of Hopedale respectfully requests the Board, should it grant GURR's motion to reopen this proceeding, to deny the Petition and hold that the Town is not preempted from exercising its right of first refusal to acquire the Forestland pursuant to Massachusetts General Laws Chapter 61.

Respectfully submitted,



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Dated: April 30, 2024

CERTIFICATE OF SERVICE

I hereby certify that I have on the 30th of April, 2024, caused to be served a copy of the foregoing REPLY OF THE TOWN OF HOPEDALE, MASSACHUSETTS TO MOTION TO REOPEN AND PETITION FOR DECLARATORY ORDER, upon the following parties of record in this proceeding by email:

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Charles A. Spitulnik

Dated: April 30, 2024

EXHIBIT 1

Second Amended Verified Complaint with Exhibits

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

LAND COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 20 MISC 000467

TOWN OF HOPEDALE,	)
	)
Plaintiff,	)
	)
v.	)
	)
JON DELLI PRISCOLI and MICHAEL R.	)
MILANOKSI, as Trustees of the ONE	)
HUNDRED FORTY REALTY TRUST, and	)
GRAFTON & UPTON RAILROAD	)
COMPANY,	)
	)
Defendants.	)

SECOND AMENDED VERIFIED COMPLAINT

The Town of Hopedale (the “Town” or “Hopedale”) brings this civil action against the defendants Grafton & Upton Railroad Company *et al.* to assert its right of first refusal to buy property that was classified as forest land for tax purposes under Chapter 61 of the General Laws (the “Chapter 61 Land”). As the Superior Court noted in a related case, the Grafton & Upton Railroad Company (“GURR”) acted in “flagrant violation” of state law to deprive the Town of its statutory right of first refusal to buy the Chapter 61 Land—a right that the Massachusetts Appeals Court has noted the Town was entitled to. GURR never obtained control or possession of the Chapter 61 Land in compliance with state law. Instead, GURR illegally seized possession of the property by purchasing the beneficial interest in the trust that owned the land. Nonetheless, rulings from the Superior Court and Appeals Court now reflect that Hopedale continues to hold its right of first refusal. This lawsuit seeks to enforce that right, and recover damages sufficient to repair

the damage from the Defendants' illegal conduct.

Hopedale's state law statutory right of first refusal arose in July 2020, when the One Hundred Forty Realty Trust (the "Trust") gave the Town notice that it would sell the Chapter 61 Land to a trust controlled by GURR's owner. Because the property was classified as forestland under G.L. c. 61, Hopedale had a right of first refusal to purchase it directly from the Trust—before GURR or any other affiliated entity could take possession or title. But the Defendants have done everything they could to thwart the Town's property rights. As the Superior Court concluded, GURR violated G.L. c. 61 by restructuring the purchase of the Chapter 61 Land from the Trust as a purchase of the beneficial interest in the Trust itself. And the Defendants began cutting trees and working on the Chapter 61 Land while the Town sought to enforce these property rights, destroying approximately 100 acres of pristine forestland upgradient of the Town's water supply, which has resulted in investigations, and potential compliance orders, by federal environmental authorities.

Hopedale seeks a simple solution to this years-long dispute: this Court should return the parties to where they should have been in July 2020, when Hopedale first obtained its statutory right of first refusal. This Court should declare that Hopedale has a statutory right to buy 130.18 acres of forestland, and, after a trial, order the Defendants to pay for the cost of restoring the forest to its original condition, among other damages.

PARTIES

1. Hopedale is a Massachusetts municipality, here acting through its duly elected Select Board, with a principal address of 78 Hopedale Street in Hopedale, Massachusetts.

2. Defendants Jon Delli Priscoli and Michael R. Milanoski are Trustees of the One Hundred Forty Realty Trust, which is a nominee trust established under a declaration of trust dated September 16, 1981, and recorded in the Worcester Registry of Deeds (the "Registry") in Book 7322, Page 177. The trustees have a principal address of 7 Eda Avenue in Carver, Massachusetts.

This action is brought against Mr. Delli Priscoli and Mr. Milanoski in their capacities as trustees only.

3. Defendant GURR is a Massachusetts corporation with a principal place of business at 42 Westborough Road in North Grafton, Massachusetts.

4. GURR purchased 100% of the beneficial interest of the Trust pursuant to an Assignment of Beneficial Interest dated October 12, 2020, and recorded in the Registry in Book 63493, Page 39. There is no further public information available about the current owner(s) of the beneficial interest of the Trust.

JURISDICTION

5. This Court has jurisdiction over the parties and this action pursuant to G.L. c. 184, § 1(k), because this action involves matters cognizable under the general principles of equity jurisprudence where a right, title, or interest in land is involved, including but not limited to specific performance of a land contract.

FACTUAL BACKGROUND

6. The parcel located at 364 West Street consists of 155.24 total acres of generally undeveloped land, 130.18 acres of which was valued, assessed, and taxed as classified forest land under G.L. c. 61 (i.e., the Chapter 61 Land). A map of 364 West Street is attached as Exhibit A, with the Chapter 61 Land shaded in orange.

7. The Chapter 61 Land portion of 364 West Street was first classified as forest land in 1992.

8. The Hopedale Board of Assessors approved the most recent re-certification of the Chapter 61 classification on or around September 3, 2014, and the Chapter 61 tax lien was recorded in the Registry in Book 52875, Page 355.

9. The 364 West Street parcel also contains 25.06 acres of wetland (the “Wetlands”), which were not classified as forest land under G.L. c. 61. The Wetlands are shaded in red on Exhibit A.

10. In July 2020, the entire 364 West Street parcel was generally undeveloped except for a single railroad track and a gas pipeline easement that ran through the western portion of the managed forested land. Even today, there are no buildings located on 364 West Street.

11. According to a report prepared for the Town by Environmental Partners Group, Inc. (“EPG”), the 364 West Street parcel is located hydraulically-upgradient of all of Hopedale's public water supply sources and provides an important buffer for protection of the Town's public water supply wells. A copy of EPG's report is attached as Exhibit B.

12. In addition, EPG wrote that the Town’s “ownership of the Chapter 61 Parcel would ensure that future land uses on the parcel are consistent with water supply protection and would not adversely impact groundwater quality.”

13. The Chapter 61 Land is also located adjacent to, and contiguous with, the Hopedale Parklands, a public parkland first designated in 1899 with trails and landscape features designed by the American landscape architect Warren H. Manning.

14. Upon information and belief, GURR owns and operates on the railroad track that runs through the 364 West Street parcel.

15. GURR is a short line railroad that runs for 16.5 miles from Grafton to Milford.

The Trust’s Notice of Intent to Sell the Chapter 61 Land

16. On or around June 27, 2020, the Trust (under the control of a prior trustee and prior owner of the beneficial interest, both of whom are unaffiliated with the defendants named herein) entered into a purchase and sale agreement with Jon Delli Priscoli, Trustee of the New Hopping

Brook Realty Trust, for two parcels of land located in Hopedale, Massachusetts, known as 363 West Street and 364 West Street (including both the Chapter 61 Land and the Wetlands) for a purchase price of \$1,175,000.00 (the “P&S Agreement”). A true and accurate copy of the P&S Agreement is included in Exhibit C as described below.

17. 363 West Street is across the road from 364 West Street and, like the Wetlands, was not classified as forest land under G.L. c. 61. 363 West Street is shaded in purple on Exhibit A.

18. At the time of execution of the P&S Agreement, the Trust owned both parcels.

19. On or around July 9, 2020, the prior trustee of the Trust served a Notice of Intent to Sell Forest Land Subject to Chapter 61 Tax Lien on the Hopedale Select Board and other parties as required by M.G.L. c. 61, § 8 (the “Notice of Intent”). A true and accurate copy of the Notice of Intent is attached as Exhibit C.

20. In the Notice of Intent, the Trust indicated its intent to sell 363 West Street and 364 West Street, at a purchase price of \$1,175,000 for both parcels.

21. The Notice of Intent did not comply with the requirements of G.L. c. 61, because it included land classified under G.L. c. 61 (i.e., the Chapter 61 Land) and land that was not classified under G.L. c. 61 (i.e., the Wetlands and 363 West Street).

22. The Notice of Intent nonetheless, as a matter of law, triggered the Town’s right of first refusal to buy the Chapter 61 Land directly from the Trust.

23. In the Notice of Intent, the Trust indicated that the proposed use of the Property was “to provide additional yard and track space in order to support the current and anticipated increase in rail traffic of GU[RR]’s transloading operations.”

24. In July 2020, the Defendants intended to convert the Chapter 61 Land to residential, industrial, or commercial use, as indicated in the Notice of Intent.

25. Because the Notice of Intent triggered the Town's right of first refusal, all subsequent actions taken by the Trust and GURR to frustrate that statutory right are a nullity.

26. Section 8 of Chapter 61 provides: "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."

27. After July 9, 2020, but within the statutory option period, representatives for Hopedale told the Trust and GURR that the Town was considering exercising its right of first refusal to purchase the Chapter 61 Land, and was reserving all rights to do so.

28. On August 19, 2020, counsel for the Town sent a letter to the Trust, with a copy to the New Hopping Brook Realty Trust (c/o Michael Milanoski). A true and accurate copy of that letter is attached as Exhibit D.

29. In that August 19, 2020 letter, counsel for the Town wrote that the Trust's "Notice of Intent does not comply with M.G.L. c. 61, § 8 (pars. 4-5)..."

30. Counsel for the Town further wrote that the P&S Agreement, "which accompanied the Notice of Intent, covers more than the property classified under Chapter 61."

31. Counsel for the Town wrote that the P&S Agreement addressed land on 363 West Street, "which is not classified under Chapter 61," and "the entirety of the land located at 364 West Street, of which only 130.18 acres (out of a total of 155.25 acres) is classified under Chapter 61."

32. Counsel for the Town also wrote that "the purchase price set forth in Paragraph 2 of the P&S Agreement (\$1,175,000) does not segregate the consideration to be paid for the 130.18-

acre portion classified under Chapter 61 from the additional consideration to be paid for the contiguous land under the same ownership not classified under Chapter 61, but which is to be sold contemporaneously with the classified land.”

33. Counsel for the Town further wrote that “the Notice of Intent does not adequately convey the terms of the third-party offer to which Hopedale’s options applies” and that the Trust “should provide Hopedale with a notice of intent that specifies the purchase price and all terms and conditions offered for the 130.18-acre portion of 364 West Street that is classified under Chapter 61, and which complies with all other requirements of M.G.L. c. 61, § 8.”

34. In the same letter, counsel for the Town wrote that “Hopedale respectfully reserves all rights and remedies available to it by law or equity regarding its exercise of its right of first refusal.”

35. This August 19, 2020 letter from the Town complied with G.L. c. 61, § 8 (par. 11), which requires that if “the notice of intent to sell or convert does not contain all of the material [required], 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.”

36. On October 7, 2020, counsel for the Trust sent a letter to counsel for Hopedale, in which he noted that the Trust “disagreed that the Notice of Intent provided to the Town of Hopedale dated July 9, 2020 is defective in any fashion pursuant to the provisions of M.G.L. c. 61, § 8.” A true and accurate copy of the October 7, 2020 letter is attached as Exhibit F.

37. In that same letter, counsel for the Trust wrote: “Notwithstanding, the Notice of Intent is hereby withdrawn in its entirety” by the Trust, “and shall be deemed of no further force and effect.”

38. This purported withdrawal of the Notice of Intent had no legal effect because the

Town had an irrevocable right of first refusal.

39. The same letter from October 7, 2020, indicated that any “further notice to sell or convert the land will be subject to a new notice of intent.”

40. Despite this statement in the October 7, 2020 letter, the Trust never sent “further notice to sell or convert the land,” even though the beneficial interest of the Trust was sold less than a week later and GURR began to cut trees on the Chapter 61 Land within a matter of weeks.

41. It would reward illegal and inequitable behavior to allow a party who is subject to G.L. c. 61 to avoid a municipality’s right of first refusal simply by sending a defective notice of intent, and then withdrawing it once the Town notifies the seller of those defects, as required by G.L. c. 61, § 8.

42. On October 8, 2020, counsel for the Town of Hopedale sent a letter to the Trust, with a copy to the New Hopping Brook Realty Trust (c/o Mr. Milanoski). A true and accurate copy of the October 8, 2020, letter is attached as Exhibit F.

43. In that October 8, 2020 letter, counsel for Hopedale wrote that the “purported withdrawal of the Notice of Intent has no effect.”

44. In that same letter, counsel for Hopedale wrote that the Town “holds a first refusal option for any sale of classified forest land” and that “Hopedale respectfully reserves all rights and remedies available to it by law or in equity regarding its exercise of its right of first refusal and its option to purchase.”

45. The letter further advised the Trust “that the Town of Hopedale will proceed to consider whether to exercise its option to purchase the portion of the property located at 364 West Street which is classified forest land under Chapter 61 according to the terms of the offer contained in the Notice of Intent.”

The Trust and GURR Commit a “Flagrant Violation” of Chapter 61

46. The Trust and GURR then entered into a series of illegal transactions that violated c. 61. As the Appeals Court wrote: “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.” *Reilly v. Town of Hopedale*, 102 Mass. App. Ct. 367, 371 (2023).

47. The Superior Court characterized the following actions as a “flagrant violation” of state law. *See* Memorandum and Decision on Motion to Preserve Status Quo, *Reilly v. Town of Hopedale et al.*, Case No. 2185-cv-00238, Dkt. No. 72, at 2 (Mass. Super. Ct.).

48. First, the Trust conveyed by quitclaim deed to GURR the parcel located at 363 West Street and the Wetlands at 364 West Street for consideration of \$1.00. This quitclaim deed is dated October 12, 2020, and is recorded in the Registry in Book 63493, Page 34.

49. Second, the owner of 100% of the beneficial interest of the Trust assigned the beneficial interest to GURR for consideration of \$1,175,000.00 (the same amount as the purchase price in the P&S Agreement). The Assignment of Beneficial Interest is also dated October 12, 2020, and is recorded in the Registry in Book 63493, Page 39.

50. Third, the trustees of the Trust, Charles E. Morneau and Gregg Nagel, resigned as trustees. Their resignations are also dated October 12, 2020, and are recorded in the Registry in Book 63493, Pages 43 & 45 (respectively).

51. Fourth, the Trust appointed successor trustees who are affiliated with GURR: the defendants Mr. Delli Priscoli (the owner of GURR) and Mr. Milanoski (the then-President of GURR). The appointment of successor trustees to the Trust is dated October 14, 2020, and is recorded in the Registry in Book 63508, Page 8. The certificate of appointment and acceptance of appointment is also dated October 14, 2020, and is recorded in the Registry in Book 63508, Page

11.

52. As a result of these transactions, GURR became the owner of the beneficial interest in the Trust.

53. On October 15, 2020, Mr. Milanoski, as President of GURR, sent a letter to the Chair of the Hopedale Select Board. A true and accurate copy of that letter is attached as Exhibit G.

54. In that October 15, 2020 letter, Mr. Milanoski wrote that GURR “has purchased all of the beneficial interest” in the Trust.

55. A change in ownership—here, a change in who owns the beneficial interest of the nominee trust—gave rise to a second, separate and independent right of first refusal for Hopedale.

56. GURR has acknowledged that “the beneficiaries of a nominee trust . . . truly own the real property.” *Grafton & Upton Railroad Co. et al. v. Town of Hopedale et al.* Case No. 4:22-cv-40080, Verified Complaint, Dkt. No. 1, at p. 1 n.1 (D. Mass. July 18, 2022).

57. On October 21, 2020, counsel for the Town sent a letter to the Trust, c/o GURR. A true and accurate copy of that letter is attached as Exhibit H.

58. In that October 21, 2020 letter, counsel for the Town wrote that the Town “holds a first refusal option” as a result of the Notice of Intent received on July 9, 2020.

59. In that same letter, counsel for the Town wrote that, because the Trust is a nominee trust, the transfer of a controlling beneficial interest constituted the transfer of an interest in real estate.

60. Counsel for the Town wrote in his October 21, 2020 letter that this transfer of the controlling beneficial interest “grants the Town a separate and independent opportunity to exercise its statutory first refusal option on the Trust’s Chapter 61 land.”

Hopedale Votes to Exercise Its Chapter 61 Rights

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

62. At the same Special Town Meeting, Town Meeting authorized the Select Board to take title to the Wetlands by eminent domain, at a price of \$25,000. The Select Board later voted to exercise eminent domain over the Wetlands.

GURR Disregards Hopedale’s Chapter 61 Rights and Begins Tree-Clearing

63. Upon information and belief, on or around October 27, 2020, just days after the Special Town Meeting voted to acquire the Chapter 61 Land, agents and/or representatives of the Trust and/or GURR began to undertake site work activities on the Chapter 61 Land, including but not limited to flagging for wetlands delineation and tree cutting.

64. This conversion of the Chapter 61 Land from forestland to residential, industrial, or commercial use gave rise to a third, separate and independent right of first refusal for Hopedale.

65. As the Appeals Court wrote: “It should be noted that, irrespective of any sale, G.L. c. 61, sec. 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.” *Reilly*, 102 Mass. App. Ct. at 371.

66. At a duly noticed public hearing held on October 30, 2020, the Hopedale Select Board voted 2-0 to exercise the first refusal option to purchase the Chapter 61 Land.

67. Hopedale recorded notice of the decision to exercise the first refusal option in the

Worcester South District Registry of Deeds on November 2, 2020. A copy of the recorded Notice of Exercise is attached as Exhibit I.

68. On November 2, 2020, Hopedale sent the Notice of Exercise accompanied by a proposed purchase and sale agreement for the Chapter 61 Land to the Trust's prior and current trustees by certified mail, as required by M.G.L. c. 61, § 8.

69. On November 2, 2020, Hopedale recorded its taking by eminent domain of the 25.06 acres of Wetlands.

70. Despite Hopedale's attempt to exercise its rights, the Defendants refused to convey the Chapter 61 Land to the Town.

Hopedale Sues to Enforce Its Chapter 61 Rights

71. Since 2020, there has been active litigation concerning title and ownership of the Chapter 61 Land.

72. On October 28, 2020, the Town brought this suit to enforce the statutory right to which it was entitled under G.L. c. 61. The Select Board and the Defendants then attempted to settle this case in 2021 by agreeing that the Town would purchase only a portion of the Chapter 61 Land, and filed a Stipulation of Dismissal in this Court on February 10, 2021.

73. On March 3, 2021, a group of ten taxpayers of Hopedale filed a Verified Complaint in Massachusetts Superior Court that, among other things, sought to enjoin the Select Board from spending any funds to purchase less property from GURR than authorized by Special Town Meeting. *See Reilly v. Town of Hopedale et al.*, Case No. 2185-cv-00238 (Mass. Super. Ct.).

74. In November 2021, the Superior Court (Goodwin, J.) found that "the settlement agreement is not effective." *Reilly*, 102 Mass. App. Ct. at 374 (quoting Superior Court Memorandum and Order on Motions for Clarification). As the Superior Court ruled and the

Appeals Court later confirmed, without Town Meeting approval of the acquisition contemplated by the settlement agreement, “the town would retain its money and the right to continue attempting to enforce the option. Until the reduced acquisition is approved by town meeting, the agreement is not effective, and the town may (but is not required to) attempt to enforce the option.” *Id.*

75. In December 2021, based on the Superior Court ruling, the Town moved to vacate the stipulation of dismissal in this Court. The same group of taxpayers who sued in the Superior Court moved to intervene in this Court and to join the Town’s motion to vacate.

76. The Town’s motion was denied in January 2022 and the taxpayers’ motions to intervene and join the motion to vacate were denied as moot.

77. On March 26, 2022, Town Meeting rejected both the authorization of the acquisition provisions of the settlement agreement between the Town and GURR, and rejected the provisions under which the Town had attempted to release and waive its rights under G.L. c. 61.

78. The Town later dismissed its appeal in May 2022, but the taxpayers pursued their appeal (and ultimately succeeded in the Appeals Court). *See Reilly*, 102 Mass. App. Ct. at 385.

GURR Clear Cuts the Chapter 61 Land

79. On June 21, 2022, while the taxpayers pursued their appeal over the Town’s Chapter 61 rights, the Hopedale Select Board scheduled a Special Town Meeting for July 11, 2022. On the warrant for that Special Town Meeting was a motion to authorize the Select Board to take the Chapter 61 Land by eminent domain.

80. After Hopedale’s Select Board scheduled that Special Town Meeting, GURR clear-cut, or directed another to clear-cut, approximately 100 acres of trees on the Chapter 61 Land.

81. GURR knew it lacked license to cut any trees on the Chapter 61 Land. Ownership of the Chapter 61 Land was the subject of active litigation, and had been contested since the

summer of 2020.

82. Upon information and belief, GURR sold these trees for timber at a profit.

83. On July 11, 2022, Hopedale Town Meeting voted to take the Chapter 61 Land by eminent domain.

84. GURR filed a lawsuit against the Town's proposed taking in the United States District Court for the District of Massachusetts. *See Grafton & Upton Railroad Co. et al. v. Town of Hopedale et al.* Case No. 4:22-cv-40080 (D. Mass.). GURR moved for a preliminary injunction against the Town's planned taking and, in support of its request, argued that it was "working feverishly" to develop the Chapter 61 Land, which included "harvesting" trees. Memorandum in Support of Motion for Preliminary Injunction to Enjoin Taking, Dkt. No. 27, at p. 14 (July 28, 2022); Second Affidavit of Michael Milanoski, Dkt. No. 30, at ¶ 22 (July 28, 2022).

85. In support of its request for a preliminary injunction, GURR attached the following pictures of the clear-cut Chapter 61 Land to the Second Affidavit of Michael Milanoski. This property was completely forested in July 2020 when Hopedale had the right to buy it, as forestland. In the summer of 2022, GURR destroyed that formerly pristine forestland, as these photos show:





86. In addition to the “harvesting” of about 100 acres of trees, Mr. Milanoski admitted that GURR had begun “grading and preparing land adjacent” to existing rail lines. Second Affidavit of Michael Milanoski, Dkt. No. 30, ¶¶ 22, 25.

87. All this work was done while title to the Chapter 61 Land was in dispute.

88. GURR clear cut the forest on the Chapter 61 Land without a viable plan to use the

property for a rail purpose.

89. As Mr. Delli Priscoli wrote in a sworn affidavit for a separate, state court case (which did not involve Hopedale), the site layout plan on which the tree-clearing was allegedly based “was not workable since slope issues make track installation impractical.” *See* Affidavit of Jon Delli Priscoli, *Milanoski v. Delli Priscoli*, Case No. 2384CV00071-BLS2, Dkt. No. 17, ¶ 7 (Mass. Super. Ct.).

90. Mr. Delli Priscoli wrote in that same affidavit that “Milanoski’s decision to clearcut trees at the West Street site is now the focus of potential wetland violation investigations by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers” and that the “Milanoski-ordered clear-cutting at the West Street Site” resulted in “anticipated compliance orders from the EPA.” *See* Affidavit of Jon Delli Priscoli, *Milanoski v. Delli Priscoli*, Case No. 2384CV00071-BLS2, Dkt. No. 17, ¶¶ 7, 9 (Mass. Super. Ct.).

91. Mr. Milanoski pointed the finger back at Mr. Delli Priscoli and wrote that “Mr. Delli Priscoli personally ordered the removal of trees on the West Street property.” *See* Affidavit of Michael Milanoski, *Milanoski v. Delli Priscoli*, Case No. 2384cv00071-BLS2, Dkt. No. 18, ¶ 10 (Mass. Super. Ct.).

Effects of GURR’s Deforestation

92. GURR’s destruction of the trees significantly reduced the value of the Chapter 61 Land as forestland.

93. In addition to cutting the trees, GURR has altered the Chapter 61 Land through constructing roads into and across the property, removing rocks and stones, creating new grading and drainage patterns, and otherwise changing the landscape.

94. GURR's destruction and alteration of the Chapter 61 Land has affected waterways and other property in Hopedale.

95. The property at 364 West Street is sloped, upgradient of the Mill River, which flows into Hopedale Pond.

96. GURR has failed to implement best management practices for storm water mitigation on the Chapter 61 Land.

97. A forested area, even on a steep slope, generates very little stormwater runoff. But because GURR has clear-cut the Chapter 61 Land, the property is generating significant runoff into the Mill River and Hopedale Pond.

98. Sediment at 364 West Street has been washing into the Mill River because of GURR's needless destruction of the forestland, alteration of the property, and failure to implement proper stormwater mitigation and control.

99. Upon information and belief, the Environmental Protection Agency and Army Corps of Engineers are actively investigating and considering enforcement action about potential steps that GURR must take to remedy the damage inflicted on the Chapter 61 Land.

100. The Town was entitled to purchase forest land that had been protected pursuant to the provisions of G.L. c. 61, not a clear-cut hillside that requires significant restoration.

101. GURR's destruction and alteration of the forestland has caused the Town enormous damage.

102. GURR must indemnify Hopedale for the damages caused by GURR's destruction of the forestland, alteration of the property, and failure to implement proper stormwater mitigation and control, and for any steps the Town may be required to take to address that destruction.

COUNT I
M.G.L. c. 231A, § 1 – DECLARATORY JUDGMENT

103. Hopedale incorporates by reference the allegations in all previous paragraphs as if fully set forth herein.

104. An actual controversy exists between the Town of Hopedale and the Defendants over the statutory right of first refusal contained M.G.L. c. 61, § 8.

105. The Town of Hopedale seeks a binding declaration that the Notice of Intent of July 9, 2020, triggered the right of first refusal and Hopedale holds an irrevocable right of first refusal to purchase the Chapter 61 Land.

106. The Town of Hopedale seeks a binding declaration that, although the Notice of Intent did not provide the Town with a *bona fide* offer as required by G.L. c. 61, § 8, because the purchase price improperly included non-Chapter 61 Land, the Notice of Intent nonetheless triggered the Town's right of first refusal.

107. The Town of Hopedale seeks a binding declaration that, following trial, the Court will set the purchase price of the Chapter 61 Land, including any adjustments to the \$1,175,000 purchase price as required by the damage to Chapter 61 Land and the improper inclusion of the Wetlands and 363 West Street in the Notice of Intent, and that once the Court sets the purchase price, the Town can exercise its right of first refusal.

108. In the alternative, the Town of Hopedale seeks a binding declaration that the Trust's assignment of 100% of its beneficial interest to GURR was equivalent to a transfer of title of the Chapter 61 Land, and therefore constituted a sale of land taxed under Chapter 61, giving rise to a second, separate and independent right of first refusal for the Town.

109. The Town of Hopedale seeks a binding declaration that it exercised its option to purchase the Chapter 61 Land after this second, separate and independent right of first refusal arose.

110. In the alternative, the Town of Hopedale seeks a binding declaration that the conversion of the Chapter 61 Land from forestland to residential, industrial, or commercial use gave rise to a third, separate and independent right of first refusal.

111. The Town of Hopedale seeks a binding declaration that it exercised its option to purchase the Chapter 61 Land after this third, separate and independent right of first refusal arose.

112. The Town of Hopedale seeks a binding declaration that, because the Defendants failed to comply with the requirements of G.L. c. 61, they did not lawfully acquire the Chapter 61 Land.

COUNT II
M.G.L. c. 231A, § 1 – DECLARATORY JUDGMENT

113. Hopedale incorporates by reference the allegations in all previous paragraphs as if fully set forth herein.

114. An actual controversy exists between the Town of Hopedale and the Defendants over the effects caused by GURR's deforestation of the Chapter 61 Land.

115. The Town of Hopedale seeks a binding declaration that the Defendants must pay for the reasonable restoration of the forestland on the Chapter 61 Land, in an amount to be determined at trial.

116. The Town of Hopedale seeks a binding declaration that the Defendants must indemnify and hold harmless the Town for any costs incurred because of the Defendants' decision to clear cut trees, alter the land, or convert the Chapter 61 Land in any way from forestland to its current state.

COUNT III
SPECIFIC PERFORMANCE

117. Hopedale incorporates by reference the allegations in all previous paragraphs as if fully set forth herein.

118. Pursuant to M.G.L. c. 61, § 8, Hopedale has a right of first refusal to purchase the Chapter 61 Land.

119. Hopedale is ready, willing, and able to purchase the Chapter 61 Land.

120. Upon information and belief, the Trust will not agree to sell the Chapter 61 Land to the Town despite the Town's right of first refusal under Chapter 61.

121. The Town is entitled to specific performance of its right of first refusal.

COUNT IV
UNJUST ENRICHMENT

122. Hopedale incorporates by reference the allegations in all previous paragraphs as if fully set forth herein.

123. Upon information and belief, GURR clear cut and then sold the timber from the Chapter 61 Land for profit.

124. The trees that GURR clear-cut and sold rightfully belonged to Hopedale.

125. GURR has retained the profit from selling the timber from these clear-cut trees.

126. GURR's retention of this profit is against the fundamental principles of justice or equity and good conscience.

127. GURR was unjustly and inequitably enriched by selling the timber that rightfully belonged to Hopedale.

128. The principles of fairness and equity require that Hopedale receive the profit that GURR made from selling this timber.

COUNT V
VIOLATION OF G.L. c. 242, sec. 6

129. Hopedale incorporates by reference the allegations in all previous paragraphs as if fully set forth herein.

130. During the pendency of an action for the recovery of the Chapter 61 Land, GURR clear-cut the trees on the Chapter 61 Land.

131. GURR knew there was an action for the recovery of the Chapter 61 Land.

132. GURR was in possession of the Chapter 61 Land, albeit unlawfully.

133. Hopedale was damaged by GURR's actions, which constitute waste.

134. Pursuant to G.L. c. 242, § 6, Hopedale is entitled to treble damages for the waste committed during the pendency of the action for recovery of the Chapter 61 Land.

COUNT VI
VIOLATION of G.L. c. 242, sec. 7

135. Hopedale incorporates by reference the allegations in all previous paragraphs as if fully set forth herein.

136. After the Superior Court had concluded that GURR obtained the Chapter 61 Land through a "flagrant violation" of state law, and without Hopedale's permission, GURR willfully and without license cut down, carried away, girdled, or otherwise destroyed, or directed another to cut down, carry away, girdle, or otherwise destroy trees, timber, shrubs, or other types of woody growth on the Chapter 61 Land.

137. Pursuant to G.L. c. 242, § 7, the Town is entitled to treble damages for the cost of reasonable restoration of the forest on the Chapter 61 Land.

**COUNT VII
INDEMNIFICATION**

138. Hopedale incorporates by reference the allegations in all previous paragraphs as if fully set forth herein.

139. GURR acted wrongfully by clearing the trees, altering the property, and doing other work on the Chapter 61 Land.

140. Hopedale is without fault in GURR's decision to clear the trees, alter the property, and do other work on the Chapter 61 Land.

141. GURR must indemnify the Town for any costs the Town incurs because of GURR's wrongful tree-clearing, alteration, and other work at 364 West Street.

REQUESTS FOR RELIEF

WHEREFORE, based on the foregoing, Hopedale respectfully requests that the Court enter the following relief:

1. A judgment declaring the following:
 - a. that the Notice of Intent of July 9, 2020, triggered Hopedale's right of first refusal under M.G.L. c. 61, § 8;
 - b. that the Trust's assignment of 100% of its beneficial interest to GURR was equivalent to a transfer of title to the Chapter 61 Land and therefore constituted a sale of land taxed under Chapter 61 giving rise to a second, separate and independent right of first refusal under M.G.L. c. 61, § 8;
 - c. that the Defendants' notice of intent to convert and actual conversion of the Chapter 61 Land from forestland to residential, industrial, or commercial use gave rise to a third, separate and independent right of first refusal under M.G.L. c. 61, § 8;

d. that the Notice of Intent of July 9, 2020, failed to comply with the requirement of M.G.L. c. 61, § 8, because it included land not classified under c. 61 and the purchase price was for more than solely the Chapter 61 Land;

e. that, in the alternative, the Town properly exercised its option to purchase the Chapter 61 Land;

f. that the Trust must convey the Chapter 61 Land to the Town;

g. that any actions taken by the Defendants to thwart the Town's right of first refusal are a legal nullity;

h. that GURR must pay for the reasonable restoration of the forest on the Chapter 61 Land;

i. that GURR must indemnify and hold harmless the Town from any liability incurred by the Town as a result of GURR's work on the Chapter 61 Land; and

j. that GURR is prohibited from taking any action or conducting any activities on or concerning the Chapter 61 Land which would result in any alienation of the Chapter 61 Land or any conversion of its current use as forest land until such time as the Town of Hopedale no longer holds the option to purchase.

2. An order for specific performance directing the Trust to convey the Chapter 61 Land to the Town;

3. Judgment for the Town in the amount of GURR's revenue from the sale of the timber from trees unlawfully cut down on the Chapter 61 Land;

4. Judgment for treble damages sustained as a result of GURR's commission of waste on the Chapter 61 Land with knowledge of the pendency of an action for recovery of the land, in violation of G.L. c. 242, § 6;

5. Judgment for treble damages as a result of GURR's willful, and without license, destruction of trees on the Chapter 61 Land, in violation of M.G.L. c. 242, § 7;
6. An order indemnifying Hopedale from any liability arising from the Defendants' actions on the Chapter 61 Land;
7. Attorney fees and costs; and
8. Such other relief as the Court deems just and proper.

Respectfully submitted,

TOWN OF HOPEDALE

By its attorneys,

/s/ Sean Grammel
David S. Mackey, BBO # 542277
Sean Grammel, BBO #688388
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
Tel: 617-621-6523
dmackey@andersonkreiger.com
sgrammel@andersonkreiger.com

Dated: April 19, 2024

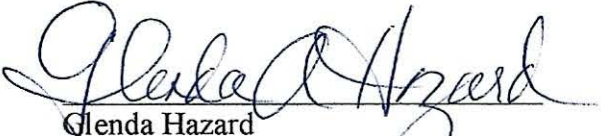
Certificate of Service

I certify that I served this document on each other party by e-mail to all counsel of record on this 19th day of April, 2024.

/s/ Sean Grammel
Sean M. Grammel

VERIFICATION

I, Glenda Hazard, Chair of the Select Board for the Town of Hopedale, have read the above Second Amended Verified Complaint and now state, under penalties of perjury, that the facts stated therein are true to the best of my personal knowledge and that no material facts have been omitted.


Glenda Hazard
Chair, Hopedale Select Board

Dated: 4/19/24

EXHIBIT A

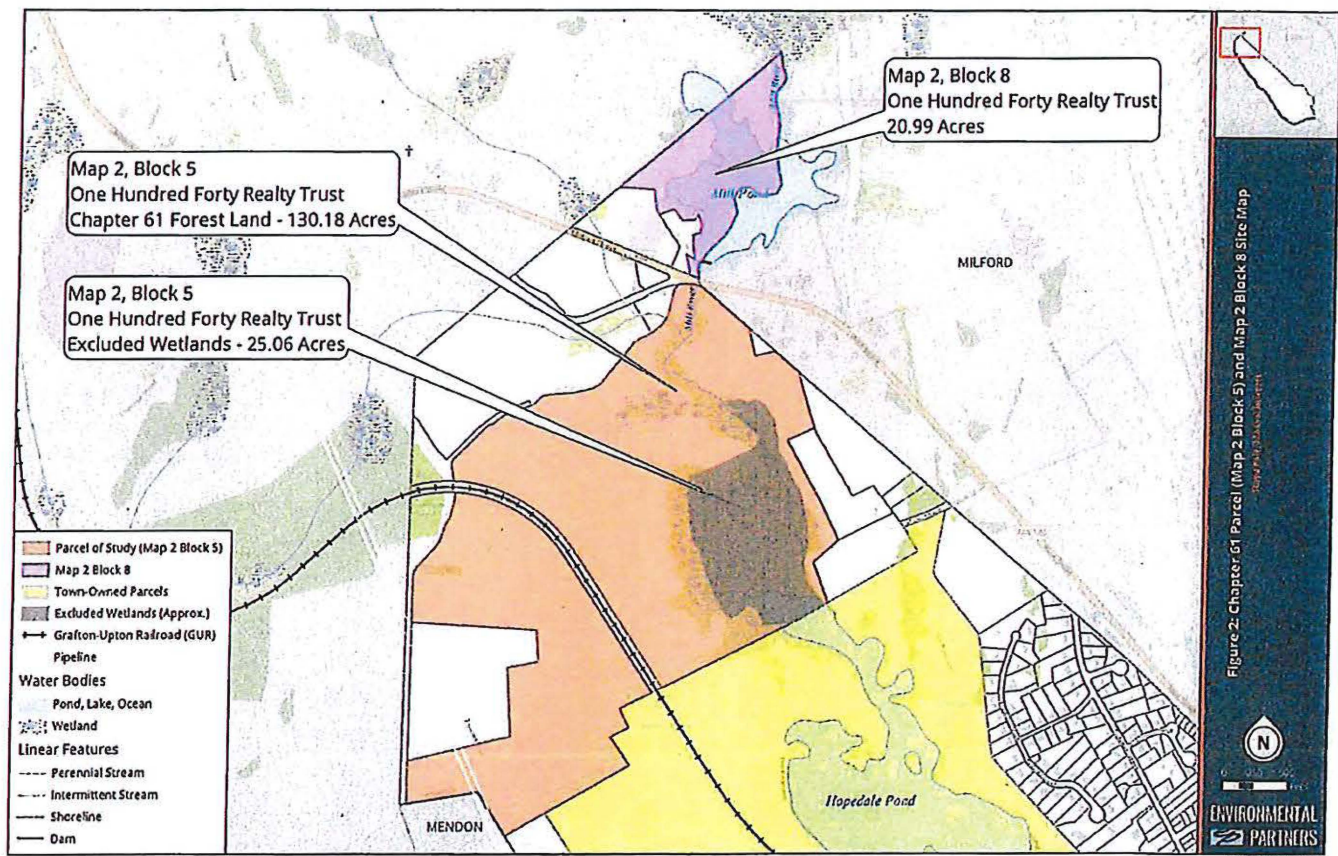


EXHIBIT B



LIMITED DESKTOP SITE SCREENING REPORT

Town of Hopedale, MA

October 22, 2020

ENVIRONMENTAL
 **PARTNERS**

CONTENTS

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1.0 INTRODUCTION

The Town of Hopedale is considering purchasing one privately held parcel at the north end of Town known as 364 West Street (Parcel 2-5-0)(herein referred to as the "Chapter 61 Parcel"). The Chapter 61 Parcel is currently owned by the One Hundred Forty Reality Trust and a portion of the parcel is currently managed as forest lands under M.G.L. c. 61 (herein referred to as the Chapter 61 Forest Land). The landowner provided a Notice of Intent to sell 364 West Street to the Town of Hudson on July 9, 2020. Pursuant to M.G.L. c. 61, the Town has the right of first refusal to purchase the chapter 61 Forest Land portion of the Chapter 61 Parcel. Environmental Partners Group, Inc. (EP) on behalf of the Town and Mackie Shea Durning PC (MSD) conducted a limited desktop evaluation of the Chapter 61 Parcel as a potential new public water supply source. Figure 1 is a topographic map showing the location of the Chapter 61 Parcel.

1.1 Background

The 364 West Street parcel is 155.24 acres in area, including 25.06 acres of wetlands that are excluded from the Chapter 61 Forest Land designation (Figure 2). Thus, the Chapter 61 Forest Land covers 130.18 acres. The Town is currently evaluating whether to exercise its right of first refusal for the Chapter 61 Forest Land, and it may seek to include the 25.06 acre "excluded wetland parcel" in the acquisition. For purposes of this desktop evaluation, EP has assumed that this wetland parcel is included in the purchase and can also be utilized for water supply protection purposes.

The Chapter 61 Parcel abuts the northern end of a 279.7 acre parcel owned by the Town of Hopedale Parks Commission (herein referred to as the Town Parcel) and is situated just north of Hopedale Pond (Figure 1). The Mill River runs north to south through the eastern portion of the Chapter 61 Parcel. Wetland Resource Areas (as mapped by Massachusetts Department of Environmental Protection) cover a section of the parcel's eastern portion that contains the Mill River. The Grafton-Upton Railroad (GUR) right-of-way crosses north-south through the Chapter 61 Parcel and the Town Parcel. Additionally, a gas line easement runs through the western edge of both parcels.

There are currently no public water supply wells located on the Town Parcel; however, the Zone II for the Town's public water supply wells extends onto the Town Parcel as shown on Figure 3. The Chapter 61 Parcel and Town Parcel are both located hydraulically upgradient of all of the Town's public water supply sources and these parcels provide an important buffer for protection of the Town's public water supply wells.

The existing public water supply wells in the Town of Hopedale consist of 33 wells within the Mill Street Wellfield, 3 gravel pack wells at Green Street, and 2 bedrock wells at Green Street (Figure 3). The combined permitted capacity of these three sources is 307.67 million gallons per year (MGY) or a combined pumping rate capacity of approximately 582 gallons per minute (gpm). The actual combined current capacity of these three sources is 136.91 MGY or approximately 260 gpm.

The Town has conducted limited desktop and field water supply exploration on both the Chapter 61 Parcel and Town Parcel in the past, but the two test borings did not identify productive well sites (Figure 4) and access to the larger portion of the parcels is a limiting factor. The combined addition of the Chapter 61 Parcel with the Town Parcel will provide a much larger available area for water supply exploration and development.

Based on existing service connections and water demands, the current water supply sources are pumping at full capacity and the Town is limited on any future development without a new or expanded water supply source.

The Town has interconnections with the water distribution system of neighboring communities for emergency service or to help meet high demand periods. A new water supply source would provide the Town with the additional capacity and add redundancy and resilience to the water system.

1.2 Desktop Study Area

As discussed above, the Town is considering acquiring all of 364 West Street for public water supply protection and possible development of a new public water supply source. The Chapter 61 Parcel is a 155.24 acre, undeveloped property consisting primarily of forestland and wetland and abuts the north end of a 279.7 acre undeveloped Town Parcel.

If the Town would like to develop a new public water supply source, then Massachusetts Department of Environmental Protection (MassDEP) Water Supply Regulations 310 CMR 22.21 require that the Town own or control a Zone I protective radius around the well or wellfield. Current and/or future land uses within the Zone I must be limited to those directly related to the provision of public drinking water or have no significant adverse impact on water quality. For public water supplies pumping greater than 100,000 gpd, the Zone I protective radius for a single well is 400 feet and for a wellfield is 250 feet.

The potential area for development of a new source public water supply well was determined by mapping the potential land area where the Town could own a Zone I protective radius. A 400-foot buffer for a single well and 250-foot buffer for a wellfield was mapped around the perimeter of the parcel boundaries and land within those buffers could be used for development of a public water supply well or wellfield, provided suitable aquifer material is present.

Figure 5 shows the 400-foot and 250-foot Zone I buffers on the Town Parcel and Figure 6 shows these buffers with the addition of the Chapter 61 Parcel. As shown, addition of the Chapter 61 land would significantly expand the potential area for public water supply development. Both the Chapter 61 Parcel and Town Parcel are the focus of this desktop study.

This report presents the results of the potential water supply development desktop screening study. This desktop study evaluates the Chapter 61 Parcel in conjunction with the Town Parcel against a defined set of criteria to assist the Town in determining whether these parcels individually or combined may be suitable for further exploration for a potential public water supply source or as water supply protection for the Town's existing sources.

2.0 METHODOLOGY

The physical characteristics of the Chapter 61 Parcel and Town Parcel were compiled and evaluated based on criteria described in Massachusetts Department of Environmental Protection (MassDEP) guidance for siting new public water supplies (*MassDEP Chapter 4 – Groundwater Supply Development and Source Approval Process – Section 4.3*). The following information was developed:

1. The location of the Chapter 61 Parcel was displayed over a topographic map (Figure 1), Town of Hopedale parcel data (Figure 2), and aerial photograph (Figure 3).
2. A map was prepared showing the 400-foot Zone I areas for a single well and 250-foot Zone I area for a wellfield for both the Chapter 61 Parcel and the Town Parcel. Hydrologic constraints, including a 100-foot wetlands and 150-foot surface water buffer were also mapped (Figures 5 and 6).
3. Mapped USGS Surficial Geology was examined and mapped in relation to potential Zone I areas (Figure 7).
4. The following features within the parcel of study and within a 0.5-mile radius of the parcel were mapped using data from Massachusetts Bureau of Geographic Information (MassGIS), United States Geologic Service (USGS), and Environmental Data Resources (EDR) Record Search, and other readily available public information.
 - Areas of Critical Environmental Concern
 - Priority habitats for rare and endangered species
 - Proximity to surface water bodies (lakes and ponds) and certified vernal pools
 - Wellhead protection areas
 - Private water supplies
 - NPDES permit sites
 - Hazardous waste (21E) sites, as listed in the Department of Environmental Protection data base
 - Stocked trout streams and cold water fisheries
 - Automobile graveyards and junkyards
 - Petroleum and oil bulk stations and terminals
 - Agricultural uses
 - Proximity to industrial parks
 - Parcels with conservation restrictions
 - Proximity to landfill disposal sites
 - Proximity to wastewater treatment and effluent disposal facilities
 - Municipal Zoning

This information is shown in Figures 8 and 9.

5. A map was prepared showing land uses within the 0.5-mile radius of each site. Land uses within the Zone I of the well site that are not consistent with MassDEP regulations, or land uses within a 0.5 mile radius that could potentially impact water quality (i.e., industrial properties, multifamily residential properties with onsite septic, etc.) were identified. The land uses are shown on Figure 9.

6. The Sustainable Water Management Initiatives (SWMI) Basins were evaluated and mapped to determine the percent groundwater depletion, to determine if the basin is potentially suitable for permitting a new groundwater public water supply source (Figure 10).
7. The Chapter 61 Parcel was also mapped in relation to existing water supply protection areas, being existing Zone IIs (Figure 3).
8. A review was performed of MassDEP's Waste Site and Reportable Releases Database for oil and/or hazardous materials releases on or near the parcel of study.
9. An EDR report was reviewed to inventory underground storage tanks, Superfund, Brownfield, RCRA, and NPDES-permitted sites within 0.5 miles from the parcel of study, as well as environmental records for various other nearby sites that could generate hazardous waste (included in Appendix A).
10. A review of a previous fracture trace analysis (FTA) and exploratory borings was performed and results compared with finding from this study (Figure 4).

It should be noted that this desktop screening evaluation is based solely on database searches of readily available public information. Prior to property acquisition or initiating additional water supply development activities at the potential site, the results of this desktop evaluation should be assessed further and/or verified in the field.

3.0 SITE EVALUATION RESULTS

The information collected for the Chapter 61 Parcel and Town Parcel combined are described below and include the criteria discussed in Section 2.

Land Ownership

The Land Ownership criteria evaluates what land is available for groundwater supply exploration, and is based on ownership and control of the MassDEP required Zone I area.

- The parcel of study, the Chapter 16 Parcel, is owned by the One Hundred Forty Realty Trust and is currently partially managed as forest lands under Chapter 61. The Town has the right of first refusal to acquire the forestry lands subject to M.G.L. c. 61.
- Figure 6 shows the land area within the Chapter 61 Parcel where the Town could site a public water supply well. As shown, the potential area for exploration could extend southward onto existing Town Parcel and combined there is significantly larger, than either the Town Parcel or Chapter 61 Parcel individually.
- As shown on Figure 5, there is sufficient area on the Town Parcel to the south to locate a public water supply well or wellfield. However, should someone else acquire the Chapter 61 Parcel and the property developed use is not consistent with public water supply protection or Zone II land uses, then portions of the Town Parcel may no longer be suitable for public water supply development.
- The parcel of study includes 25.06 acres of wetland resource areas that are excluded from the Chapter 61 Forest Lands designation. If the Town acquires the Chapter 61 land, but does not acquire the excluded wetlands portion of the parcel, the potential land area to site a water supply well within this parcel is significantly reduced. The development potential of the wetland resource area was not evaluated as part of this study.

Hydrogeology

The MassGIS database for public water supply wells, water supply protection areas, and aquifers was reviewed to determine if existing water supply information indicate the area may be suitable for development of a new source water supply. The MassGIS layers indicate that the Chapter 61 Parcel is:

- Not within a MassGIS mapped high or medium yield aquifer.
- Not within a Wellhead Protection Area.
- Located approximately 4,000 feet from the northernmost edge of a previously permitted Zone II aquifer protection area for the Hopedale Public Water Supply Wells.

Surficial Geology (from MassGIS Surficial Geology Data)

Figure 7 shows the USGS mapped surficial geology in the vicinity of the Chapter 61 Parcel and the Town Parcel. The surficial geology is reviewed to determine if there is mapped potential aquifer material for development of an overburden water supply source. Surficial geology does not preclude the potential development of a bedrock water supply source.

- The Chapter 61 Parcel geology consists of coarse glacial stratified deposits, swamp deposits, thin till, and thick till. The Town Parcel contains the same surficial geology deposits. Glacial till and swamp deposits are not typically suitable material for water supply development. The areas mapped as coarse glacial stratified deposits could potentially provide suitable aquifer material for development of an overburden public water supply. Subsurface exploration would be required to determine if there is potential aquifer material at potential sites.
- The coarse glacial stratified deposits (potential aquifer material) are located within the Mill River valley and the surrounding area is mapped as thin and thick till. The Town's current overburden water supply sources are located within the Mill River valley coarse glacial stratified deposits.
- As shown on Figure 7, the Town Parcel has limited areas of surficial geology potentially suitable for water supply development. Purchasing the Chapter 61 Parcel provides a much larger area with potentially suitable surficial geology for exploration.

Sensitive Receptors (Within 0.5 miles of parcel)

Figure 8 is a map showing potential environment concerns within the vicinity of the Chapter 61 Parcel and the Town Parcel. This map shows potential environmental receptors that should be evaluated to determine if development of a public water supply well could have an adverse impact to the receptor.

- Areas of Critical Environmental Concern (ACEC) – No ACEC within 0.5 miles of the subject parcel.
- Priority Habitats – No Natural Heritage and Endangered Species Program (NHESP) Priority Habitats of Rare Species and NHESP Estimated Habitats of Rare Wetland Species mapped within 0.5 miles of the subject parcel.
- Vernal Pools – Two potential vernal pools are within 0.5 miles of the subject parcel.
- Lakes and Ponds – Mill Pond and Hopedale Pond are both within 0.5 miles of the subject parcel. Hopedale Pond extends into the southeastern corner of the parcel itself and Mill Pond is within 250 feet of the parcel. Mill Pond has been identified as a Category 5 water body on the 2016 Integrated List of Waters, meaning its impairments require a Total Daily Maximum Load (TMDL) for related to the impairments from non-native aquatic plants, macrophytes, PCB in fish tissue, and other unidentified impairment(s). Potential impacts from a public water supply source to these surface water features would need to be evaluated further.
- Protected Open Space – To the south, the subject parcel abuts Town-owned parkland, a protected open space. The Town has noted that the protected open space restrictions on the Town Parcel can be modified to allow development of a public water supply well. To the west, the subject parcel abuts DCR protected open space. Additionally, Town of Milford-owned and privately owned protected open spaces are located within 0.5 miles of the parcel, to the north and northeast.
- Stocked Trout Streams and Cold Water Fisheries – There are none within 0.5 miles of the subject parcel.

Potential Threats (Within 0.5 miles of parcel)

Figure 7 shows potential areas or sites of concern that could adversely impact water quality at the Chapter 61 Parcel or the Town Parcel. Figure 8 is a map showing land uses on these parcels or in the surrounding area.

- NPDES Permit/Discharge Sites – None within 0.5 miles of the subject parcel.
- 21E Release Sites – A parcel 2,000 feet away from the Chapter 61 Parcel is listed as having had a 17-gallon transmission oil spill. A permanent solution (Class A2 Response Action Outcome) was submitted in 1996, indicating that a condition of No Signification Risk has been achieved, but the contamination was not reduced to background.
- Automobile Graveyards and Bulk Oil Stations – None within 0.5 miles of the subject parcel.
- Active or Inactive Landfills – None within 0.5 miles of the subject parcel. The nearest landfill is the Draper Landfill, 4,100 feet south of the subject parcel. The Draper Landfill (a closed landfill) is listed as a Massachusetts state hazardous waste site with chlorinated solvents detected in surface water and groundwater. Although the Draper Landfill is located greater than ½ mile from the Chapter 61 Parcel, the landfill abuts the Town Parcel to the west and southwest and based on proximity could potentially adversely impact water quality on the Town Parcel. The Chapter 61 Parcel would be more advantageous.
- Wastewater Treatment Facility – None within 0.5 miles of the subject parcel.
- Other Non-Open Land Uses Present
 - Industrial land, including a nursing home, a removal and salvage company, and a landscaping supply store.
 - Commercial land, including auto repair shops, car dealerships, and a storage company.
 - Residential land.

Fracture Trace Analysis and Previous Borings Findings

Figure 4 summarizes existing borings that have been drilled on the Chapter 61 Parcel or the Town Parcel or within Town, as well as areas previously recommended for water supply exploratory drilling.

- The Town of Hopedale has previously conducted a bedrock exploratory boring in 2008. The test well was located in the southern portion of the Town Parcel and drilled to 600 feet below ground surface. This well did not produce any viable amount of water.
- Shallow test wells were drilled across town over the past 30 years. In 1988, the Town conducted an exploratory boring in the south of the Town. In the 1990s, additional test wells were drilled in the Chapter 61 Parcel, to the east of the Mill River; the drilling location was selected based on ease of access. Test wells were drilled in 2019 in the center of Town. All these test wells found material too fine to be suitable aquifer material.
- The results of the exploratory borings completed since 1988 indicate that potential water supply sources within the Town may be limited.

- A Fracture Trance Analysis (FTA) was completed in September 2019 and identified three locations on the Chapter 61 Parcel that contain a high concentration of photolinears (fracture traces) in the bedrock of a significant length. Two of the locations identified are within 100 feet of wetlands. The proximity to wetlands does not preclude water supply well development; however, additional steps need to be taken, including approval from the Hopedale Conservation Commission and MassDEP. The third potential bedrock well location is on the boundary between the Chapter 61 Parcel and the Town Parcel.

Sustainable Water Management Initiatives (SWMI) Basins

SWMI Groundwater Withdrawal maps show the level of groundwater depletion within a drainage basin to determine the extent of impact from groundwater withdrawal sources. SWMI Basin Groundwater Withdrawal categories are ranked from 1 to 5 with Category 5 having the highest level of groundwater depletion.

- As shown on Figure 10, the Chapter 61 Parcel and Town Parcel are located within a SWMI Basin that is Category 4: 25 to <55% depleted. Based on a Category 4, the basin has some depletion, but the MassDEP could consider permitting a new public water supply source.

New Source Capacity Estimation

A rough estimation of potential well capacity was performed based on the following steps.

- The area of aquifer material present up-gradient of the Chapter 61 Parcel that approximates the Zone II area was estimated to be 16 million square feet (367 acres).
- Average annual rainfall in the Hopedale area is 45 inches per year. USGS estimates of recharge to the aquifer in Massachusetts is approximately 24 inches annually.
- Assuming two feet of recharge per year, the total recharge to the aquifer would be 650,000 gallons per day.
- Assuming that the whole area mapped by USGS as coarse sand deposits is a potentially productive aquifer and that a well could effectively produce 40 percent of the available water in the aquifer, a well could produce up to 260,000 gallons per day. This well capacity is within the range of the permitted capacity of the existing water supply sources in the Town of Hopedale.

4.0 CONCLUSIONS AND RECOMMENDATIONS

EP performed a limited evaluation of the Chapter 61 Parcel as the site for a potential new public water supply source. The goals of the evaluation were to provide the Town with a preliminary assessment of water supply viability, identify potential site constraints, and evaluate related factors concerning suitability of the subject parcels. The objective of the evaluation was to develop recommendations as to whether the Chapter 61 Parcel should be considered further for public water supply exploration or if identified site constraints may preclude development of a new public water supply source. In addition, the Chapter 61 Parcel was evaluated to determine if the Town should consider ownership of the parcel for protection of their existing public water supply sources.

The desktop study also included the adjacent Town Parcel to the south, because if combined the two parcels could provide a significantly larger area for potential water supply exploration and reduce potential site constraints associated with property boundaries. Following is a summary of the key conclusions of the limited desktop study.

1. Limited areas for public water supply exploration are identified on the Town Parcel. The Chapter 61 Parcel significantly increases the potential area for public water supply exploration.

Figure 11 shows the potential area identified for potential water supply exploration. This mapped area only includes:

- Land where the Town could own and control a 250-foot or 400-foot Zone I protective radius;
- Land outside the 100-foot wetlands and 150-foot surface water buffers; and,
- Land with mapped potential aquifer material.

The parcel of study, the Chapter 61 Parcel, is located in the northern section of the Town of Hopedale. The optimal location for siting a new water supply source within this parcel is just west of the wetlands buffer in the eastern portion of this parcel. The potential well site location is on undeveloped forested and non-forested land.

As shown on Figure 11, the Town currently owns approximately 1.67 acres of land within the northern portion of the Town Parcel that could be suitable for a single well source and approximately 2.82 acres for a wellfield. If the Town acquires the Chapter 61 Parcel, then combined the suitable land within this area is increased to approximately 16.72 acres for a single well and approximately 21.09 acres for a wellfield.

2. Potential sensitive environmental receptors are identified within a ½-mile radius that would need to be evaluated further.

Mill Pond and Hopedale Pond are both within 0.5 miles of the Chapter 61 Parcel. Hopedale Pond extends into the southeastern corner of the parcel itself and Mill Pond is within 250 feet of the parcel. Hopedale Pond is located within the Town Parcel. In addition, two potential vernal pools are located within a ½-mile radius of the Chapter 61 Parcel. Potential water supply pumping impacts to these surface water features would need to be evaluated further.

3. No obvious potential areas of concern are identified that would preclude development of a public water supply source on the Chapter 61 Parcel with the exception of the existing Grafton-

Upton railway. Further expansion of the railway operations on the parcel could lead to additional site constraints on both the Chapter 61 Parcel and the Town Parcel.

The Draper Landfill is a closed landfill and is located over ½ mile to the south and downgradient of the Chapter 61 parcel, and as such is not anticipated to impact water quality. However, the Draper Landfill abuts the Town Parcel and could be a potential source of contamination to groundwater near the central or south portions of the Town Parcel.

4. Potential bedrock water supply locations identified are on or require portions of the Chapter 61 Parcel for the MassDEP required Zone I.

The Town had a fracture trace analysis conducted in September 2019 to identify potential areas for bedrock groundwater exploration. Three potential locations were identified, of which two are located on the Chapter 61 Parcel and one location is located along the parcel boundary, which would require ownership or control of part of the Chapter 61 Parcel for a 400-foot Zone I.

5. The Chapter 61 Parcel provides additional protection for the Town's existing public water supply sources.

The Chapter 61 Parcel is located within the Mill River valley, upstream and upgradient of the Town's three existing public water supply sources. Ownership or control of this parcel would provide additional water quality protection. In addition, ownership of the Chapter 61 Parcel would ensure that future land uses on the parcel are consistent with water supply protection and would not adversely impact groundwater quality.

Based on the preliminary desktop study the Chapter 61 Parcel should be considered for further groundwater supply exploration and to provide additional water quality protection for the Town's three existing public water supply sources.

DEFINITIONS

NHESP Priority Habitats of Rare Species – The Priority Habitats of Rare Species data layer contains polygons representing the geographic extent of Habitat of state-listed rare species in Massachusetts based on observations documented within the last 25 years in the database of the Natural Heritage & Endangered Species Program (NHESP). Priority Habitat polygons are the filing trigger for project proponents, municipalities, and all others for determining whether or not a proposed project or activity must be reviewed by the NHESP for compliance with the (MESA) and its implementing regulations. Areas delineated as Priority Habitats can include wetlands, uplands, and marine habitats.

NHESP Estimated Habitats of Rare Wetland Wildlife – The Estimated Habitats of Rare Wildlife data layer contains polygons that are a subset of the Priority Habitats of Rare Species. They are based on occurrences of rare wetland wildlife observed within the last 25 years and documented in the NHESP database. They do not include those areas delineated as Priority Habitat for rare plants or for rare wildlife with strictly upland habitat requirements.

Zone I – Zone I means the protective radius required around a public water supply well or wellfield. For Public Water System wells with approved yields of 100,000 gallons per day (gpd) or greater, the protective radius is 400 feet. Wellfields and infiltration galleries with approved yields of 10,000 gpd or greater require a 250-foot protective radius. Protective radii for all other Public Water System wells, wellfields, and infiltration galleries are determined by the following equation: Zone I radius in feet = $(150 \times \log \text{ of pumping rate in gpd}) - 350$.

Zone II – Zone II means that area of an aquifer that contributes water to a well under the most severe pumping and recharge conditions that can be realistically anticipated (180 days of pumping at approved yield, with no recharge from precipitation). It is bounded by the groundwater divides that result from pumping the well and by the contact of the aquifer with less permeable materials such as till or bedrock. In some cases, streams or lakes may act as recharge boundaries. In all cases, Zone II shall extend upgradient to its point of intersection with prevailing hydrogeologic boundaries (a groundwater flow divide, a contact with till or bedrock, or a recharge boundary). The Zone II must include the entire Zone I area.

FIGURES

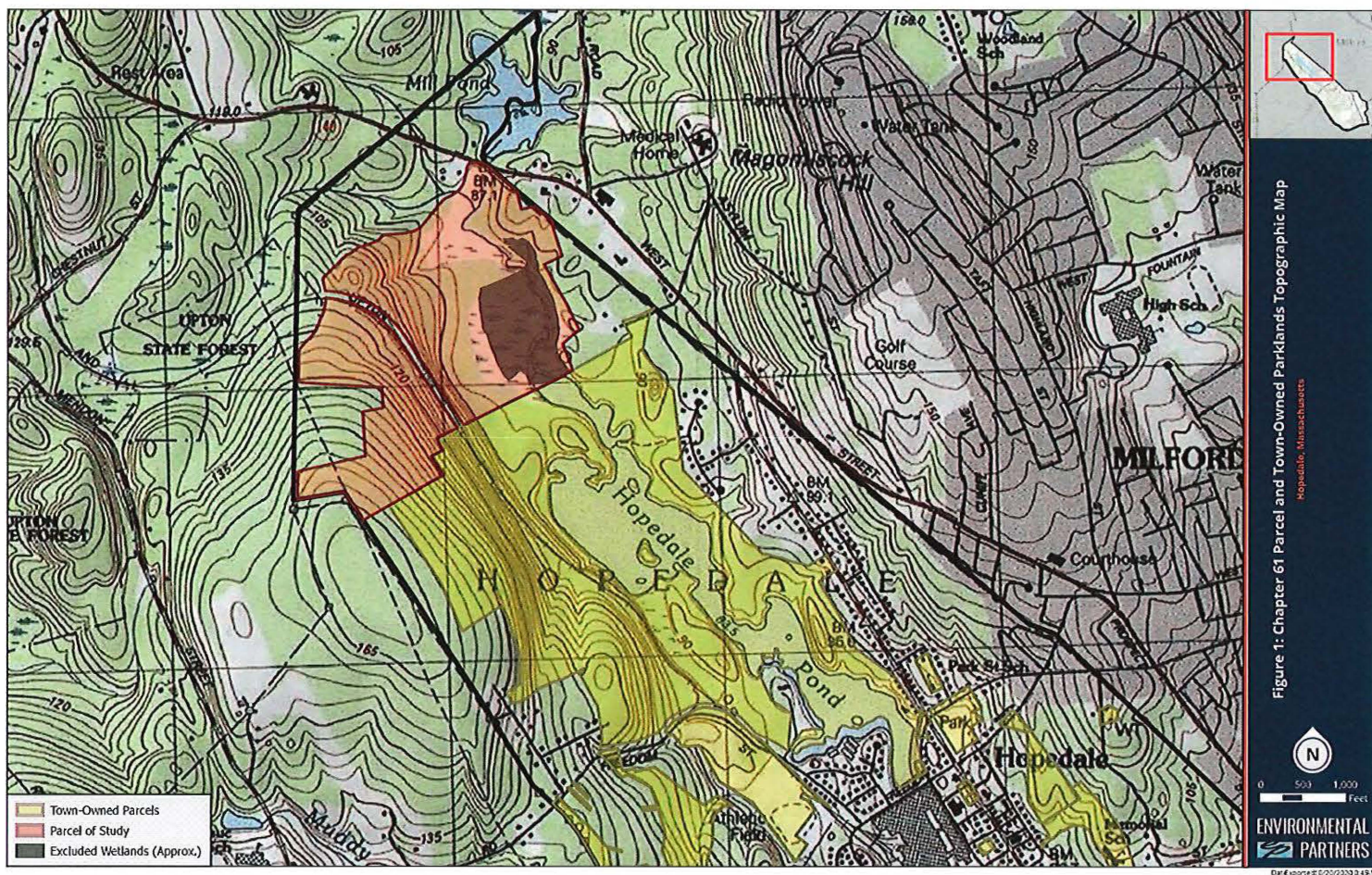


EXHIBIT C

Affidavit of Service
Notice of Intent to Purchase Forest Land Subject to M.G.L. c. 61
364 West Street Hopedale, MA

On this 9th day of July 2020, I, Michael R. Milanoski, on behalf of Seller, Charles Morneau, Trustee One Hundred Forty Realty Trust, served the Notice of Intent to Sell Forest Land Subject to MGL c.61 to the following as required pursuant to MGL. C. 61 s. 8:

1. Commissioner of the Department of Conservation and Recreation (certified mail)
251 Causeway Street
Boston, MA 02114
2. Town of Hopedale Board of Assessors (in hand)
74 Hopedale Street
Hopedale, MA 01747
3. Town of Hopedale Board of Selectmen (in hand)
78 Hopedale Street
Hopedale, MA 01747
4. Town of Hopedale Planning Board (in hand)
78 Hopedale Street
Hopedale, MA 01747
5. Town of Hopedale Conservation Commission (in hand)
78 Hopedale Street
Hopedale, MA 01747

Signed under the pains and penalties of perjury this 9th day of July 2020.

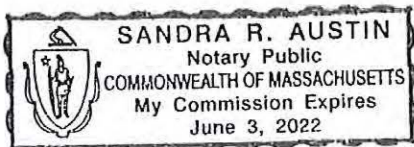


Michael R. Milanoski

Commonwealth of Massachusetts

Middlesex ss.

On this the 9th day of July 2020, before me, the undersigned Notary Public, personally appeared Michael R. Milanoski, personally known to me to be the individual who executed this Affidavit and acknowledged to me that he signed it voluntarily for its stated purpose.



Notary Public: Sandra R. Austin
My Commission Expires: June 3, 2022

NOTICE OF INTENT TO SELL
FOREST LAND SUBJECT TO CHAPTER 61 TAX LIEN

PROPERTY: 364 West Street, Hopedale, MA (Assessors Map 2; Block 5, consisting of 155.24 acres; recorded in the Worcester District Registry of Deeds Book 56336 Page 136).

SELLER: Charles E. Morneau, Trustee of the One Hundred Forty Realty Trust u/d/t September 16, 1981, recorded at the Worcester District Registry of Deeds in Book 7322 Page 177, with an address of 31 Conant Road, Lincoln, MA 01773.

BUYER: Jon Mark Delli Priscoli, Trustee, New Hopping Brook Realty Trust u/d/t June 5, 2000 recorded at Middlesex South District Registry of Deeds in Book 31501 Page 89, with an address of 7 Eda Avenue, Carver, Massachusetts 02330.

C. 61 LAND: 130.18 acres of the Property identified in the Classified Forest-Agricultural or Horticultural-Recreational Land Tax Lien dated September 3, 2014 and recorded in the Worcester District Registry of Deeds in Book 52875 Page 355.

SUPPORTING DOCUMENTS ATTACHED PURSUANT TO C. 61 S. 8 REQUIREMENTS:

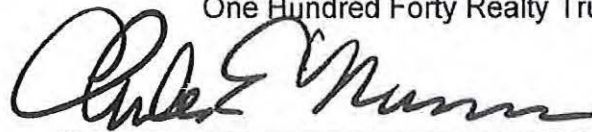
1. Statement from Seller of Intent to Sell
2. Proposed Use of Land
3. Property Description, Location and Acreage/Maps
4. Name and Address of Landowner
5. Purchase and Sale Agreement

Statement of Intent to Sell or Convert Land that is currently in Forest Land Subject to Chapter 61
Tax Lien

Charles E. Morneau, Trustee of the One Hundred Forty Realty Trust u/d/t September 16, 1981, recorded at the Worcester District Registry of Deeds in Book 7322 Page 177, with an address of 31 Conant Road, Lincoln, MA 01773 intends to sell to Jon Mark Delli Priscoli, Trustee of the New Hopping Brook Realty Trust u/d/t June 5, 2000 recorded at Middlesex South District Registry of Deeds in Book 31501 Page 89 with a principal address of 7 Eda Avenue, Carver, Massachusetts 02330, the property located at 364 West Street in Hopedale, MA as shown on the Hopedale Assessors Map as Map 2; Block 5: Lot 0 consisting of 155.24 acres and recorded in the Worcester District Registry of Deeds in Book 56336 Page 136. ("Property").

A 130.18 portion of the Property is currently classified as Forest Land pursuant to G.L. c. 61, as identified in the Classified Forest-Agricultural or Horticultural-Recreational Land Tax Lien dated September 3, 2014 and recorded in the Worcester District Registry of Deeds in Book 52875 Page 355, a copy of which is attached to this statement for reference.

One Hundred Forty Realty Trust by:

A handwritten signature in black ink, appearing to read "Charles E. Morneau", is written over a horizontal line.

Charles Morneau, Trustee

PROPOSED USE OF LAND

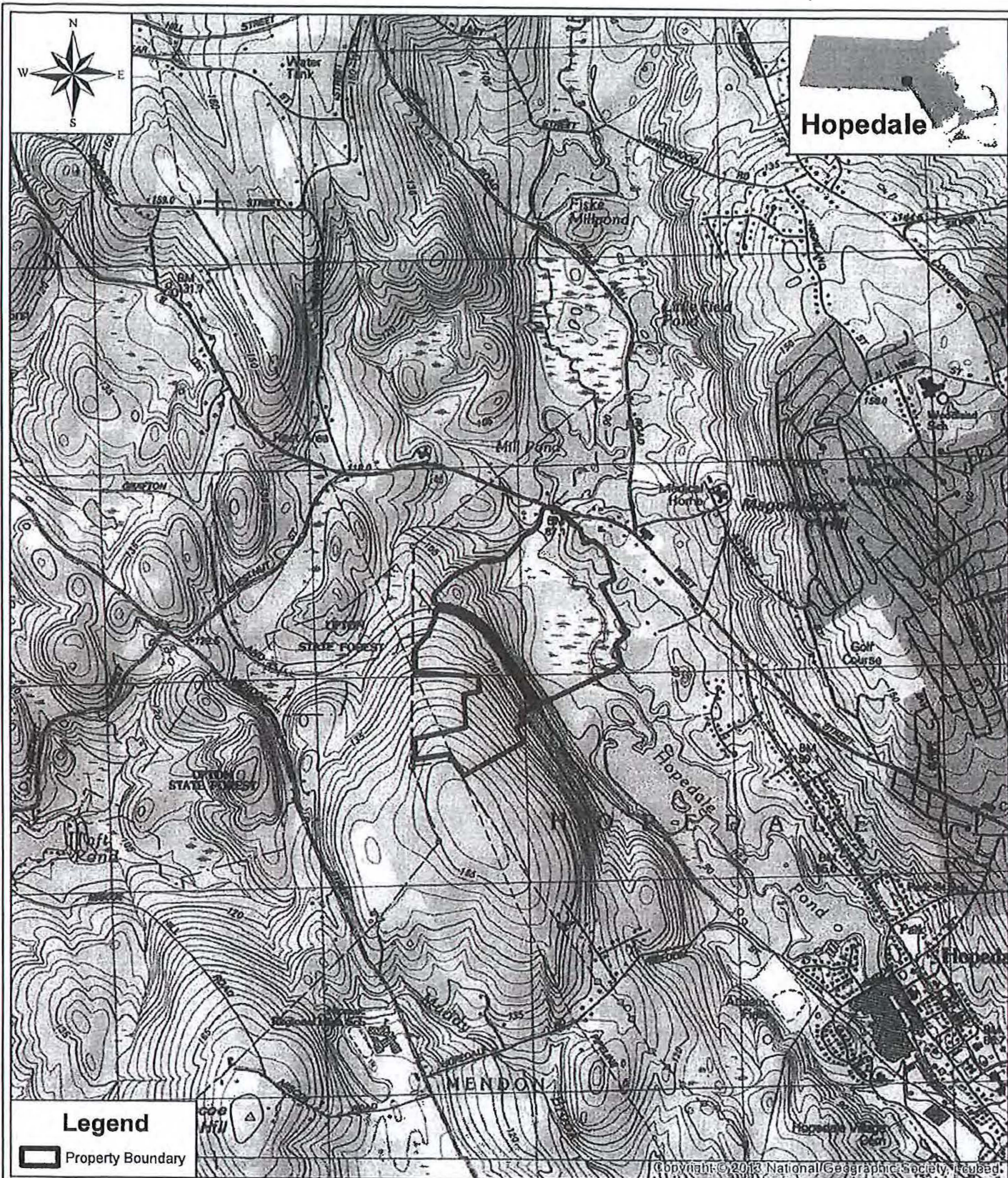
The proposed use of the Property is to provide additional yard and track space in order to support the current and anticipated increase in rail traffic of GU's transloading operations.

PROPERTY DESCRIPTION
FOREST LAND SUBJECT TO CHAPTER 61 TAX LIEN

PROPERTY: 364 West Street, Hopedale, MA; Assessors Map 2; Block 5; recorded in the Worcester District Registry of Deeds Book 56336 Page 136.

AREA: Property are is 155.24 acres of which 130.18 acres are classified as Forest Land pursuant to MGL c. 61.

DESCRIPTION: Undeveloped land located in the Industrial Zone; Railroad tracks located on Property; no buildings or other structures.



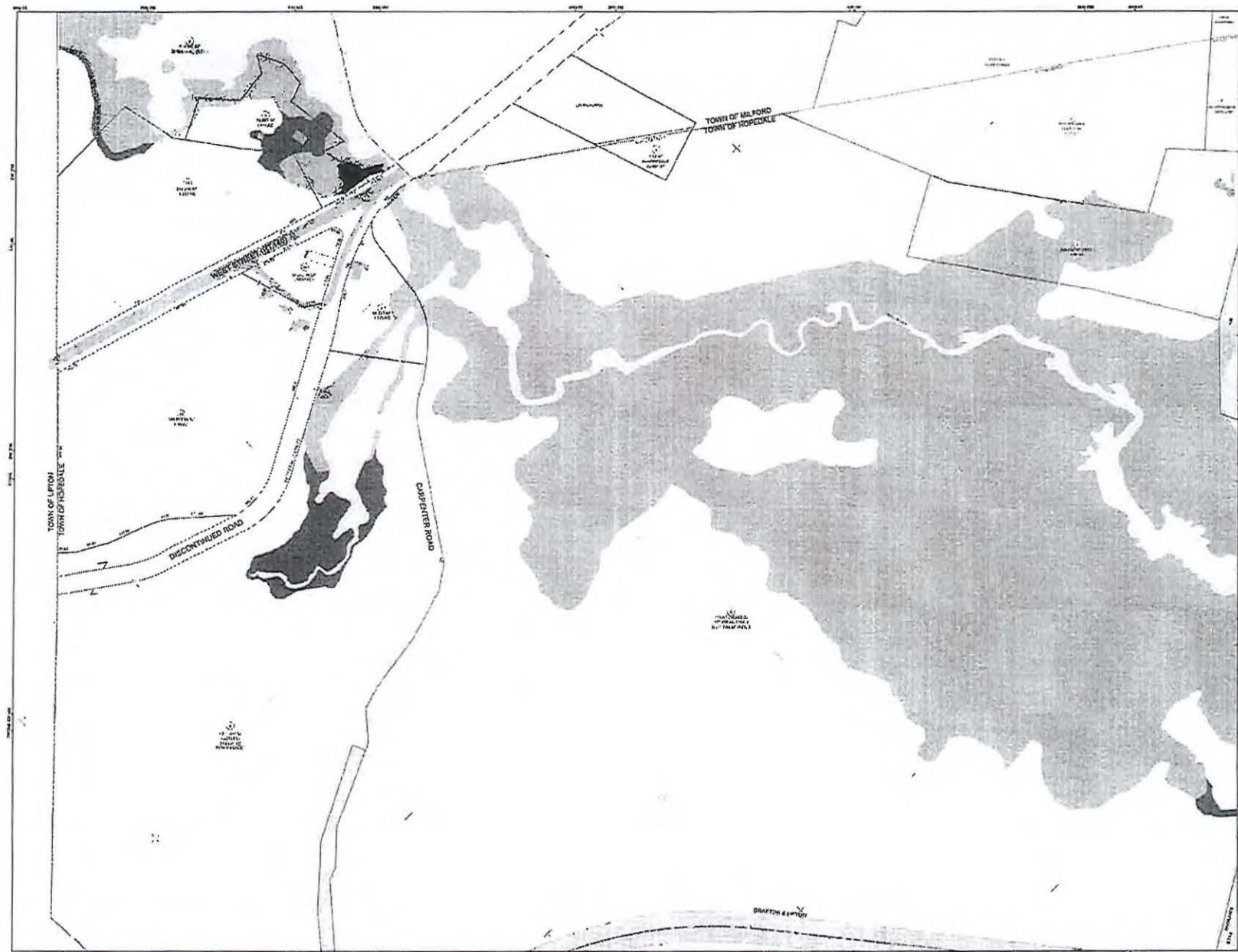
OXBOW
ASSOCIATES, INC.

1:24,000

1 inch = 2,000 feet

0 2,000 4,000
Feet

USGS Topographic Quad
Hopedale Logistics Yard
364 West Street
Hopedale, MA
July 01, 2020



Legend

Railroad	Water	Railroad
Road	Wet Areas	Road Right of Way Boundary
Pools	Streams	Town Boundary
Buildings (MassGIS)	Easements	Water
Condo	Rail	100-year Flood Area
Adjacent Map Parcels	Parcel Boundary	500-year Flood Area

Plant data derived from the Federal Emergency Management Agency (FEMA) Digital Flood Insurance Rate Map (DFIRM) as of 02/02/2011.

TOWN OF HOPEDALE
MASSACHUSETTS
ASSESSORS ATLAS
AS OF JANUARY 1, 2014

100 50 0 100 200 300 Feet
 1 inch = 100 feet



REVISION DATA			
Date	Drawn By	Rev.	Checked By

CONDO NOTE: Parcels indicated as Condos do not necessarily have land area associated with the structure. The parcels associated with these structures are expected for assessing purposes only. Condo unit numbers represent the general location of the unit and are approximate based on planimetric building footprints.

Plans shown herein are compiled from aerial photographs, deeds, and plans of record and are not to be construed as having sufficient accuracy for conveyances.





SHEET NO. 6

CORRO NOTE: Parcels indicated as Corro do not have aerial photographs, dead, or no planimetric building footprints. Parcels shown here are compiled from aerial photographs, dead, or no planimetric building footprints. Parcels shown here are compiled from aerial photographs, dead, or no planimetric building footprints. Parcels shown here are compiled from aerial photographs, dead, or no planimetric building footprints.

Parcel No.	Owner	Area (Acres)	Value
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
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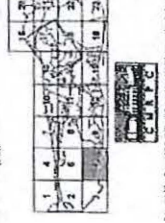
**TOWN OF HOPDALE
MASSACHUSETTS
ASSESSORS ATLAS
AS OF MAY 1, 2016**

1 inch = 100 feet

Legend

- Road Right of Way Boundary
- Water
- Wet Areas
- Streams
- Enclaves
- Rail
- Adjacent Map Parcel
- Parcel Boundary
- 100-year Flood Area
- 500-year Flood Area

Map Date: 05/01/2016
Map By: [Name]
Map For: [Name]



CONTACT INFORMATION OF LANDOWNER AND BUYER

Landowner:

One Hundred Forty Realty Trust
Charles E. Morneau, Trustee
31 Conant Road
Lincoln, MA 01773
Phone: 617-733-3790.

With a copy to:

Mark L. Donahue, Esquire
Fletcher Tilton PC
370 Main Street
Worcester, MA 01608
Email: mdonahue@fletchertilton.com
Phone : 508.459.8029

Buyer:

New Hopping Brook Realty Trust
7 Eda Ave
Carver, MA 02330
Attn: Michael Milanoski
Email: mmilanoski@griftonuptonrr.com
Phone: 508-965-3493

With a copy to:

Sandra R. Austin, Esquire
Law office of Sandra Rennie Austin
24 Bolton Street
Marlborough, MA 01752
E-mail: sandra@attyaustin.com
Phone: 508-281-2299

PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT ("**Agreement**") is made as of this ___ day of June 2020 ("**Effective Date**") by and between Charles E. Morneau and _____, Trustees of the One Hundred Forty Realty Trust u/d/t September 16, 1981, recorded at the Worcester District Registry of Deeds in Book 7322 Page 177, with an address of 31 Conant Road, Lincoln, MA 01773 ("**Seller**"), and Jon Mark Delli Priscoli, Trustee of the New Hopping Brook Realty Trust u/d/t June 5, 2000 recorded at Middlesex South District Registry of Deeds in Book 31501 Page 89 with a principal address of 7 Eda Avenue, Carver, Massachusetts 02330 ("**Buyer**").

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

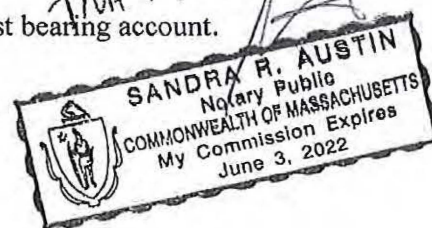
1.1 All that certain land located at 363 West Street Hopedale, Massachusetts subject to the tax taking recorded in the Worcester District Registry of Deeds ("**Registry**") in Book 56336 Page 136 ("**Tax Taking**") and 364 West Street, Hopedale, Massachusetts subject to the Forest Land Tax Lien pursuant to MGL c. 61 recorded in the Registry in Book 52875 Page 355 or similar notices (the "**Forest Lien**"), more particularly described in Exhibit A hereto, together with all privileges, rights, easements and appurtenances belonging to such land, and all right, title and interest (if any) of Seller in and to any streets, alleys, passages, and other rights-of-way or appurtenances included in, adjacent to or used in connection with such land, and all right, title and interest (if any) of Seller in all mineral and development rights appurtenant to such land;

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

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

2.1 *Deposit.* Concurrently with the execution and delivery of this Agreement by Buyer, Buyer shall deliver to the law office of Fletcher Tilton PC, 370 Main Street, Worcester, Massachusetts 01608 ("**Escrow Agent**"), in immediately available funds, to be held in escrow and delivered in accordance with this Agreement, a cash deposit in the amount of Fifty-Eight Thousand Seven Hundred Fifty and 00/100 Dollars (\$58,750.00) (the "**Initial Deposit**"). Within two (2) business days following the expiration of the Inspection Period as defined in Section 4.3 herein. Buyer shall deposit with Escrow Agent an additional deposit of Forty One Thousand Two Hundred Fifty and 00/100 (\$41,250.00) (the "**Additional Deposit**"). The Initial Deposit and Additional Deposit are hereinafter referred to collectively as the "**Deposit**". The Deposit shall be held and distributed as follows:

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



2.1.2 If the Closing takes place in accordance with the terms and conditions of this Agreement, the Escrow Agent shall deliver and pay the Deposit to Seller on the Closing Date, and the amount so delivered shall be credited to Buyer against the Purchase Price due Seller in accordance with the terms and conditions of this Agreement.

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

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

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

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

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

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

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

3.2 *Reliance.* The Escrow Agent may act in reliance upon any writing or instrument or signature which it, in good faith, believes to be genuine, and any statement or assertion contained in such

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

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

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

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

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

4.1 Inspection of Property. Buyer and its appointed agents or independent contractors shall, at all reasonable times prior to the Closing Date, have the privilege of going upon the Property to, at Buyer's sole cost and expense, inspect, examine, test, appraise, and survey the Property, including, but not limited to, investigations of the physical condition thereof provided, however, that no intrusive testing, drilling or similar testing to determine the status of the land with respect to geotechnical matters and/or hazardous materials and oils shall be performed without Seller's consent which may be withheld at Seller's sole discretion. Before entering upon the Property, Buyer shall obtain and maintain for itself and on behalf of each of its contractors and agents (and shall deliver to Seller evidence thereof), at Buyer's sole cost and expense, general liability insurance, from an insurer reasonably acceptable to Seller, in the amount of One Million Dollars and 00/00 (\$1,000,000.00) combined single limit for personal injury and property damage per occurrence, such policies to name Seller and Seller's trustees additional insured parties, which insurance shall provide coverage against any claim for personal liability or property damage

caused by Buyer or Buyer's contractors or agents in connection in with Buyer entry, tests and inspections upon the Property. Buyer shall, and does hereby covenant and agree to, repair any and all damage caused by the activities of Buyer or its agents on the Property and to indemnify, defend and hold Seller harmless from any actions, suits, liens, claims, damages, expenses, losses and liability arising out of any such entry by Buyer or its appointed agents or independent contractors or any acts performed in exercising Buyer's rights under this Paragraph 4.1 (including without limitation, any rights or claims of materialmen or mechanics to liens on the Property, but excluding matters merely discovered by, and not caused by, Buyer, its agents or contractors).

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

4.2.1 Existing building permits, if any;

4.2.2 The most recent existing survey of the Property;

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

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

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

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

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

4.4. Title and Survey Matters.

4.4.1 Buyer shall promptly at its sole cost and expense obtain a title commitment ("**Title Commitment**") from a nationally recognized title insurance company and a survey ("**Survey**") of

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

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

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

4.4.4 In the event Seller gives timely notice to Buyer that Seller will attempt to cure any objections set forth in Buyer's Title Objection Notice, and if this Agreement is not terminated pursuant to Paragraph 4.4.3 above, Seller shall use commercially reasonable efforts to cure such objections and deliver evidence of such cure satisfactory to the Escrow Agent and Buyer within the Title Cure Period, but in no event shall Seller be required to expend more than a maximum amount of One Hundred Thousand and 00/100 Dollars (\$100,000.00) Dollars in the aggregate to effectuate the cure of all such objections (excluding Monetary Liens (defined below), as to which such maximum amount shall not apply). If despite Seller's commercially reasonable efforts Seller fails to cure all such matters within the Title Cure Period, Buyer's sole right with respect thereto shall be to terminate this Agreement within two (2) business days after the expiration of the Title Cure Period, in which event (i) the Deposit shall be returned promptly to Buyer; and (ii) except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder. If Buyer does not so terminate this Agreement, Buyer shall be deemed to have waived its objections and to have agreed to accept title to the Property subject thereto, without reduction in the Purchase Price.

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

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

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

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

4.4.6.3 The tax taking and all obligations for any real estate taxes of any kind or nature as to that part of the Property known as 363 West Street, Hopedale, Massachusetts and any rollback, reassessed taxes or similar changes resulting from the conversion of that portion of the Property known as 364 West Street, Hopedale, Massachusetts pursuant to the Forest Lien.

4.5 "*As Is*" Sale. Except as expressly set forth in this Agreement, it is understood and agreed that Seller is not making and has not at any time made any warranties or representations of any kind or character, express or implied, with respect to the Property, including, but not limited to, any warranties or representations as to habitability, merchantability or fitness for a particular purpose or environmental matters of any kind. Buyer acknowledges and agrees that upon closing Seller shall sell and convey to Buyer and Buyer shall accept the Property "*as is, where is, with all faults,*" except to the extent expressly provided otherwise in this Agreement. Buyer has not relied and will not rely on, and Seller is not liable for or bound by, any express or implied warranties, guaranties, statements, representations, or information pertaining to the Property or relating thereto (including specifically, without limitation, any prospectus distributed with respect to the Property) made or furnished by Seller, the managers of the Property, or any real estate broker or agent representing or purporting to represent Seller, to whomever made or given, directly or indirectly, orally or in writing, unless specifically set forth in this Agreement. Buyer also acknowledges that the purchase price reflects and takes into account that the Property is being sold "as-is." Buyer represents to

Seller that Buyer has conducted, or will conduct prior to closing, such investigations of the Property, including, but not limited to, the physical and environmental conditions thereof, as Buyer deems necessary or desirable to satisfy itself as to the condition of the Property and the existence or nonexistence or curative action to be taken with respect to any hazardous or toxic substances on or discharged from the Property, and will rely solely upon same and not upon any information provided by or on behalf of Seller or its agents or employees with respect thereto, other than such representations, warranties, and covenants of Seller as are expressly set forth in this Agreement. Upon closing, Buyer shall assume the risk that adverse matters, including, but not limited to adverse physical and environmental conditions, may not have been revealed by Buyer's investigations, and Buyer, upon closing, shall be deemed to have waived, relinquished and released Seller (and Seller's trustees, employees and agents) from and against any and all claims, demands, causes of action (including causes of action in tort), losses, damages, liabilities, costs and expenses (including reasonable attorneys' fees) of any and every kind or character, *known or unknown*, which Buyer might have asserted or alleged against Seller (and Seller's trustees, employees and agents) at any time by reason of or arising out of any latent or patent construction defects or physical conditions, violations of any applicable laws and any and all other acts, omissions, events, circumstances or matters regarding the Property. The provisions of this paragraph shall survive closing or any termination of this agreement.

4.6 Buyer's Waiver and Release of Seller as to Certain Actions after Closing. Buyer agrees that, if at any time after the Closing, any third party or any governmental agency seeks to hold Buyer responsible for the presence of, or any loss, cost or damage associated with, Hazardous Materials (as hereinafter defined) in, on, above or beneath the Property or emanating therefrom, Buyer waives any rights it may have against Seller in connection therewith including, without limitation, under CERCLA (defined below), and Buyer agrees that it shall not (i) implead the Seller, (ii) bring a contribution action or similar action against the Seller or (iii) attempt in any way to hold the Seller responsible with respect to any such matter. The provisions of this Paragraph 4.6 shall survive the Closing. As used herein, "Hazardous Materials" shall mean and include, but shall not be limited to, any petroleum product and all hazardous or toxic substances, wastes or substances, any substances which because of their quantitated concentration, chemical, or active, flammable, explosive, infectious or other characteristics, constitute or may reasonably be expected to constitute or contribute to a danger or hazard to public health, safety or welfare or to the environment, including, without limitation, any hazardous or toxic waste or substances which are included under or regulated by law, governmental rules or regulations (whether now existing or hereafter enacted or promulgated, as they may be amended from time to time), including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601 et seq. ("CERCLA"), the Federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., similar state laws and regulations adopted thereunder.

4.7 Notice to the Town Pursuant to MGL c. 61B. Buyer shall file with the Town of Hopedale ("Town") notice required of Seller pursuant to MGL c. 61, that Property is intended to be conveyed to Buyer within fifteen (15) days following the Effective Date. Buyer shall incur and pay all expenses of filing, advertising, and other requirements related thereto and shall provide Seller with copies of all filings and advertisements promptly upon filing. Seller shall fully cooperate with Buyer as may be required for all matters related to notice requirements and other statutory compliance, including but not limited to executing all required applications, notices, and other documents, and appearing before any boards or commissions if so required. All correspondence

or communications by and between Buyer and the Town of Hopedale or any state agency shall promptly be provided by Buyer to Seller. In the event the Town exercises the right of first refusal pursuant to MGL C.61, this Agreement shall terminate, the Deposit shall be returned to Buyer and neither party shall have further recourse against the other whether in law or equity.

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

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

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

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

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

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

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

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

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

6. Casualty and Condemnation.

6.1 Casualty. Intentionally Omitted.

6.2 Condemnation. If prior to the Closing any portion of the Property is actually condemned by means of a recordation of an order at the Worcester District Registry of Deeds prior to the Closing Date by a body having the power of eminent domain or condemnation, or sale in lieu thereof,

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

7. Conditions Precedent to Buyer's Obligations.

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

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

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

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

7.1.4. *Condition of Title.* No new encumbrances or exceptions to title have been recorded for the first time pertaining to the Property between the date of the Title Commitment and the Closing that have not been approved by Buyer or that are not removed by Seller or agreed to be removed by Seller prior to or contemporaneously with the Closing, and the Escrow Agent is prepared to issue at the Closing an owner's policy of title insurance at commercially customary rates, subject only to the Permitted Encumbrances.

7.2. *Failure of Conditions.* In the event Seller shall not be able to convey the Property on the Closing Date in accordance with the provisions of this Agreement, then Buyer shall have the option, exercisable by written notice to Seller at or prior to Closing, of (i) accepting at Closing the

Property in such condition as Seller is able, waiving any unsatisfied condition precedent, with no deduction from or adjustment of the Purchase Price, (ii) extending the Closing Date one time only for an additional five (5) business days, or (iii) terminating this Agreement, in which event the Deposit shall be returned promptly to Buyer and, except as expressly set forth herein, neither party shall have any further liability or obligation to the other hereunder.

8. Closing; Deliveries.

8.1 Time of Closing. The Closing shall take place at 10 a.m. on October 30, 2020 (the "**Closing Date**") (subject to extension as expressly set forth herein) at the Law Office of Sandra Rennie Austin, 24 Bolton Street, Marlborough, MA 01752, unless otherwise agreed to in writing by both Seller and Buyer. If any date on which the Closing would occur by operation of this Agreement is not a business day in the Commonwealth of Massachusetts or Boston, Massachusetts, the Closing shall occur on the next business day. The Closing shall be conducted through an escrow agreement by means of document delivery of Seller's Deliveries (as herein defined) and Buyer's Deliveries (as herein defined). Buyer and Seller may execute supplemental escrow instructions as may be appropriate to enable compliance with the terms of this Agreement so long as such instructions are not in conflict with this Agreement.

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

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

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

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

8.2.4 A Non-Foreign Affidavit as required by the Foreign Investors in Real Property Tax Act ("**FIRPTA**"), as amended, in the form of Exhibit C, duly executed by Seller.

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

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

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

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

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

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

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

9. *Apportionments; Taxes; Expenses.*

9.1 *Apportionments.*

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

9.2. *Expenses.* Each party will pay all its own expenses incurred in connection with this Agreement and the transactions contemplated hereby, including, without limitation, (1) all costs and expenses stated herein to be borne by a party, and (2) all of their respective accounting, legal and appraisal fees. Buyer, in addition to its other expenses, shall pay at Closing (1) all recording charges incident to the recording of the deed for the Property; (2) the premium for Buyer's title insurance policy; and (3) one-half of the escrow fee of the Escrow Agent. Seller, in addition to its other expenses, shall pay at Closing (1) all documentary stamps, excise taxes and real estate transfer taxes, (2) all recording charges incident to the recording of any instruments to discharge or remove encumbrances not approved (or deemed approved) by Buyer, and (3) one-half of the escrow fee of the Escrow Agent.

10. *Remedies.*

10.1. *Buyer Default.* In the event Buyer breaches or fails, without legal excuse, to complete the purchase of the Property or to perform its obligations under this Agreement, then, except as otherwise expressly set forth in this Agreement, Seller shall, as its sole remedy therefor, be entitled to receive the Deposit as liquidated damages (and not as a penalty) in lieu of, and as full compensation for, all other rights or claims of Seller against Buyer by reason of such default, upon

receipt of which this Agreement shall terminate and the parties shall be relieved of all further obligations and liabilities hereunder, except as expressly set forth herein. Buyer and Seller acknowledge that the damages to Seller resulting from Buyer's breach would be difficult, if not impossible, to ascertain with any accuracy, and that the liquidated damage amount set forth in this Paragraph represents both parties' best efforts to approximate such potential damages.

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

11. *Confidentiality.* Buyer agrees to keep confidential and not to use, other than in connection with its determination whether to proceed with the purchase of the Property in accordance with the terms and conditions of this Agreement, any of the documents, material or information regarding the Property supplied to Buyer by Seller or by any third party at Seller's request, including, without limitation, any environmental site assessment reports furnished to Buyer, except to Buyer's, attorneys, accountants, consultants, investors and lenders on a "need to know" basis, unless Buyer is compelled to disclose such documents, material or information by law or by subpoena. In the event that the Closing does not occur in accordance with the terms of this Agreement, Buyer shall return to Seller all of the documents, material or information regarding the Property supplied to Buyer by Seller or at the request of Seller. The provisions of this Paragraph 11 shall survive the termination of this Agreement but shall no longer be applicable following Closing in accordance with the terms of this Agreement.

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

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

13.1. If to Seller:

One Hundred Forty Realty Trust
Charles E. Morneau and _____, Trustees

31 Conant Road
Lincoln, MA 01773
E-mail:

With a copy to:

Mark L. Donahue, Esquire
Fletcher Tilton PC
370 Main Street
Worcester, MA 01608
Email: mdonahue@fletchertilton.com

13.2. If to Buyer:

Grafton & Upton Railroad Company
7 Eda Ave
Carver, MA 02330
E-mail: jcotter@firstcolonydev.com
and mmilanoski@griftonuptonrr.com>

With a copy to:

Sandra R. Austin, Esquire
Law office of Sandra Rennie Austin
24 Bolton Street
Marlborough, MA 01752
E-mail: sandra@attyaustin.com

13.3. If to the Escrow Agent to:

Mark L. Donahue, Esquire
Fletcher Tilton PC
370 Main Street
Worcester, MA 01608
Email: mdonahue@fletchertilton.com

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

14. *Brokers.* N/A.

15. *Representations and Warranties of Seller.*

15.1. Subject to all matters disclosed in any document delivered to Buyer by Seller or on any exhibit attached hereto, and subject to any information discovered by Buyer or other information

disclosed to Buyer by Seller or any other person after the Effective Date and prior to the Closing, including, without limitation, any information contained in the Survey or the Title Commitment (all such matters being referred to herein as "**Exception Matters**"), Seller represents and warrants to Buyer as follows:

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

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

15.1.3. *Bankruptcy.* Seller has not (i) commenced a voluntary case, or had entered against it a petition, for relief under any federal bankruptcy act or any similar petition, order or decree under any federal or state law or statute relative to bankruptcy, insolvency or other relief for debtors, or (ii) caused, suffered or consented to the appointment of a receiver, trustee, administrator, conservator, liquidator or similar official in any federal, state or foreign judicial or nonjudicial proceeding, to hold, administer and/or liquidate all or substantially all of its assets.

15.1.4. *No Condemnation.*

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

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

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

15.1.7. *Leases.* The Property is not leased nor subject to any occupancy agreements covering any portion of the Property and there are no written or oral promises, agreements, amendments,

addenda, modifications, supplements, understandings, or commitments between Seller and any tenant of any nature whatsoever related to the Property and Seller agrees that it will not enter into any such agreements.

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

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

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

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

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

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

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

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

17. *Miscellaneous.*

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

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

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

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

17.5. *Headings.* The headings preceding the text of the paragraphs and subparagraphs hereof are inserted solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

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

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

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

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

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

agreement satisfactory to the Buyer and Seller in their sole discretion is executed and delivered by both Seller and Buyer.

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

17.12 Section 1031 Exchange. Seller may consummate the sale of the Property as part of a so-called like kind exchange (the “**Exchange**”) pursuant to §1031 of the Internal Revenue Code of 1986, as amended (the “**Code**”), provided that: (i) the Closing shall not be delayed or affected by reason of the Exchange nor shall the consummation or accomplishment of the Exchange be a condition precedent or condition subsequent to Seller’s obligations under this Agreement; (ii) Seller shall affect the Exchange through an assignment of its rights under this Agreement to a qualified intermediary; (iii) Buyer shall not be required to take an assignment of the purchase agreement for the replacement property or be required to acquire or hold title to any real property for purposes of consummating the Exchange; and (iv) Seller will reimburse Buyer for any additional costs and fees (including, without limitation, attorneys’ fees) incurred by the Buyer in connection with the Exchange. Buyer shall not by this Agreement or acquiescence to the Exchange (i) have its rights under this Agreement affected or diminished in any manner or (ii) be responsible for compliance with or be deemed to have warranted to Seller that the Exchange in fact complies with §1031 of the Code.

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

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

[Signature page – Purchase and Sale Agreement]

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

SELLER: One Hundred Forty Realty Trust

By: _____

Name: Charles E. Morneau

Title: Trustee

Date: _____

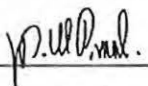
By: _____

Name: _____

Title: Trustee

Date: _____

BUYER: New Hopping Brook Realty Trust

By: 

Name: Jon M. Delli Priscoli

Title : Trustee

Date: June 26, 2020

[Signature page – Purchase and Sale Agreement]

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

SELLER: One Hundred Forty Realty Trust

By: Charles E. Morneau

Name: Charles E. Morneau

Title: Trustee

Date: 6/27/20

By: _____

Name: _____

Title: Trustee

Date: _____

BUYER: New Hopping Brook Realty Trust

By: _____

Name: Jon M. Delli Priscoli

Title: Trustee

Date: _____

EXHIBIT A
Description of the Land

Parcel I.

A parcel of land, approximately 20.99 acres located on and known as 363 West Street, Hopedale, Worcester County, Massachusetts; shown of the Town of Hopedale Assessors Map as Map 2 Parcel 8 and being part of the premises conveyed to the Seller, One Hundred Forty Realty Trust in a deed dated September 16, 1981 and recorded at the Worcester District Registry of Deeds in Book 73.22 Page 181.

Parcel II.

A parcel of land, approximately 155 acres located on and known as 364 West Street, Hopedale, Worcester County, Massachusetts; shown of the Town of Hopedale Assessors Map as Map 2 Parcel 5 and being part of the premises conveyed to the Seller, One Hundred Forty Realty Trust in a deed dated September 16, 1981 and recorded at the Worcester District Registry of Deeds in Book 73.22 Page 181.

EXHIBIT B
Form of Deed

Quitclaim Deed

Charles E. Morneau and _____, Trustees One Hundred Forty Realty Trust u/d/t September 16, 1981 and recorded at the Worcester District Registry of Deeds in Book 7322 Page 177 with an address of 31 Conant Road, Lincoln, MA 01773 grants to

New Hopping Brook Realty Trust u/d/t June 5, 2000 recorded at Middlesex South District Registry of Deeds in Book 31501 Page 89 with a principal address of 7 Eda Avenue, Carver, Massachusetts 02330

For consideration paid in the amount of One Million One Hundred Seventy Five Thousand and 00/100 Dollars (\$1,175,000.00)

With Quitclaim Covenants

The land in Hopedale, Worcester County, Massachusetts, bounded and described as follows:

Tract 1: All and the same parcel of land described in the deed of Paul Doane to Draper Company, dated October 13, 1915, recorded with the Worcester District Registry of Deeds in Book 2090 Page 314 being parcel 2-8 on the Hopedale Assessors Map containing 20.52 acres, more or less.

Tract 2: All and the same parcel of land described in the deed of Leo P. Taylor to Draper Company dated July 25, 1929, recorded with the Worcester District Registry of Deeds in Book 2500 Page 428 being parcel 2-8 on the Hopedale Assessors Map containing .4750 acres, more or less.

Tract 3: All and the same parcel of land described in the deed of Nancy C. Tisdale to Hemphill Company dated December 9, 1959, recorded with the Worcester District Registry of Deeds in Book 4085 Page 552 being parcel 2-5 on the Hopedale Assessors Map containing 82.35 acres, more or less.

Tract 4: All and the same parcel of land described in the deed of Sylvester L. Madden to Draper Company dated August 30, 1907, recorded with the Worcester District Registry of Deeds in Book 1863 Page 124 being parcel 2-5 on the Hopedale Assessors Map containing 68.97 acres, more or less.

Tract 5: All and the same parcel of land described in the deed of George Otis Draper to Draper Company dated October 13, 1905, recorded with the Worcester District Registry of Deeds in Book 1816 Page 216 being parcel 2-5 on the Hopedale Assessors Map containing 3.884 acres, more or less.

For Grantor's title see deed of Hopedale Development, Inc. to Grantor dated September 16, 1981 recorded in the Worcester District Registry of Deeds in Book 7311 Page 181.

Executed as a sealed instrument this ____ day of _____ 2020.

Charles E. Morneau, Trustee
One Hundred Forty Realty Trust

_____, Trustee
One Hundred Forty Realty Trust

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss

On this ____ day of _____ 2020, before me, the undersigned notary public personally appeared _____ trustee and _____ trustee of the One Hundred Forty Realty Trust, proved to me through satisfactory evidence of identification which was _____ to be the persons who signed the preceding or attached document voluntarily in my presence and acknowledged to me that they signed it voluntarily for its stated purpose.

Notary Public:
My Commission Expires:

is made as of this ____ day of June 2020 ("**Effective Date**") by and between One Hundred Forty Realty Trust u/d/t September 16, 1981, Charles E. Morneau and _____, Trustees with an address of 31 Conant Road, Lincoln, MA 01773 ("**Seller**"), and New Hopping Brook Realty Trust with a principal address of 7 Eda Avenue, Carver, Massachusetts 02330 ("**Buyer**").

EXHIBIT C

Form of Non-Foreign Affidavit NON-FOREIGN AFFIDAVIT

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

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

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

Date: As of _____, 2019

EXHIBIT D
Form of Guaranty

EXHIBIT D



MACKIE
SHEA
DURNING[®]

COUNSELORS AT LAW

20 Park Plaza, Suite 1001, Boston, MA 02116 • p 617 266 5800 f 617 266 3237

www.mackieshea.com

August 19, 2020

VIA ELECTRONIC AND FIRST CLASS MAIL

One Hundred Forty Realty Trust
c/o Charles E. Morneau, Trustee
31 Conant Road
Lincoln, MA 01773
Email c/o: mdonahue@fletcherilton.com

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

Dear Mr. Morneau:

The Town of Hopedale ("Hopedale") is in receipt of the Notice of Intent to Sell Forest Land Subject to M.G.L. c. 61, dated July 9, 2020 (the "Notice of Intent"), concerning the land located at 364 West Street in Hopedale, which is Block 5 on Assessors Map 2. The Notice of Intent does not comply with M.G.L. c. 61, § 8 (pars. 4-5), which provides (emphasis added):

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.

The Purchase and Sale Agreement between the Charles E. Morneau, Trustee of the One Hundred Forty Realty Trust, and Jon Mark Delli Priscoli, Trustee of the New Hopping Brook Realty Trust ("Buyer"), dated June 27, 2020 (the "P&S Agreement"), which accompanied the Notice of Intent, covers more than the property classified under Chapter 61. The P&S Agreement addresses: (1) the land located on and known as 363 West Street and shown on the Town of Hopedale Assessors Map as Map 2 Parcel 8, which is not classified under Chapter 61; and (2) the entirety of the land located at 364 West Street, of which only 130.18 acres (out of a total of 155.24 acres) is classified under Chapter 61. Also, the purchase price set forth in Paragraph 2 of the P&S Agreement (\$1,175,000.00) does not segregate the consideration to be paid for the 130.18-acre portion classified under Chapter 61 from the additional consideration to be paid for the contiguous land under the same ownership not classified under Chapter 61, but which is to be sold contemporaneously with the classified land. Nor does the Notice of Intent contain any statement of such additional consideration for the non-classified land.



This letter shall serve as notice pursuant to M.G.L. c. 61, § 8 (par. 11), that the Notice of Intent is insufficient and does not comply with the statute. Because Hopedale's statutory first refusal option likely does not extend beyond the land actually classified under Chapter 61, and the purchase price set forth in the P&S Agreement is the Buyer's offer for more land than is classified under Chapter 61, the Notice of Intent does not adequately convey the terms of the third-party offer to which Hopedale's option applies. The One Hundred Forty Realty Trust should provide Hopedale with a notice of intent that specifies the purchase price and all terms and conditions offered for the 130.18-acre portion of 364 West Street that is classified under Chapter 61, and which complies with all other requirements of M.G.L. c. 61, § 8.

Hopedale respectfully reserves all rights and remedies available to it by law or in equity regarding its exercise of its right of first refusal.

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

Sincerely,

A handwritten signature in cursive script that reads "Peter F. Durning".

Peter F. Durning

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

Mark L. Donahue, Esq.

New Hopping Brook Realty Trust c/o Michael Milanoski

Sandra R. Austin, Esq.

Brian Keyes, Hopedale Board of Selectmen, Chair

Diana Schindler, Hopedale Town Administrator

EXHIBIT E

Fletcher Tilton INC.
Attorneys at law

October 7, 2020

FEDERAL EXPRESS

Peter Durning, Esquire
Mackie Shea Durning PC
20 Park Plaza
Suite 1001
Boston, MA 02116

RE: Notice of Intent to Purchase Forest Land Classification subject to M.G.L. c., Section 61
("Notice of Intent")
364 West Street, Hopedale, Massachusetts
Assessors Map 2, Block 5

Dear Mr. Durning:

Please be advised this office represents One Hundred Forty Realty Trust.

Your correspondence of August 19, 2020 to my client is hereby acknowledged.

My client disputes that the Notice of Intent provided to the Town of Hopedale dated July 9, 2020 is defective in any fashion pursuant to the provisions of M.G.L.c., Section 61, §8. Notwithstanding, the Notice of Intent is hereby withdrawn in its entirety by One Hundred Forty Realty Trust, the property owner and shall be deemed of no further force and effect. My client is in the process of evaluating its options with regard to the property, subject to Forest Land Classification, but specifically withdraws its Notice of Intent to sell or convert the land that is currently in Forest Land subject to Chapter 61. Any further notice to sell or convert the land will be subject to a new Notice of Intent. To the extent that the Notice of Intent constituted an offer to sell to the Town of Hopedale, said offer is withdrawn.

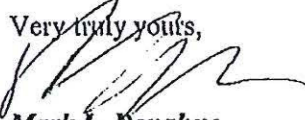
Fletcher Tilton PC

Attorneys at law

Peter Durning, Esquire
Mackie Shea Durning PC
October 7, 2020
Page 2

Should you have any questions or wish to discuss this matter further, kindly feel free to contact the undersigned.

Very truly yours,



Mark L. Donahue
Fletcher Tilton PC
The Guaranty Building
370 Main Street, 11th Floor
Worcester, MA 01608
Tel: 508.459.8029
Email: mdonahue@fletchertilton.com
MLD/mmp

cc: Commissioner of the Department of Conservation and Recreation
via Certified Mail
Hopedale Board of Assessors
Hopedale Board of Selectman
Hopedale Planning Board
Hopedale Conservation Commission
Via Federal Express

EXHIBIT F



MACKIE
SHEA
DURNING[®]

COUNSELORS AT LAW

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

www.mackieshea.com

October 8, 2020

VIA ELECTRONIC AND CERTIFIED MAIL

One Hundred Forty Realty Trust
c/o Charles E. Morneau, Trustee
31 Conant Road
Lincoln, MA 01773
Email c/o: mdonahue@fletcherilton.com

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

Dear Mr. Morneau:

I received the letter sent on your behalf by Mark L. Donahue, Esq., of Fletcher Tilton PC, dated October 7, 2020, purporting to withdraw the above-referenced Notice of Intent to Sell Forest Land Subject to Chapter 61 Tax Lien, dated July 9, 2020 (the "Notice of Intent"). The purported withdrawal of the Notice of Intent has no effect.

Pursuant to M.G.L. c. 61, § 8, the Town of Hopedale holds a first refusal option for any sale of classified forest land. This first refusal option ripened into an irrevocable option to purchase which vested when the Town received the Notice of Intent. Massachusetts law is clear on this point. See Sudbury v. Scott, 439 Mass. 288, 297-98 (2003) ("[A] town's right of first refusal ripens into an option to purchase when the town receives notice of an intended sale of [the] land."); Town of Billerica v. Card, 66 Mass.App.Ct. 664, 669 (2006) ("The option vests in the town as soon as it receives a notice of intent, and any purported subsequent withdrawal of the notice can have no effect."); Stapleton v. Macchi, 401 Mass. 725, 729 n.6 (1988) ("An option is simply an irrevocable offer creating a power of acceptance in the optionee.").

Please be advised that the Town of Hopedale will proceed to consider whether to exercise its option to purchase the portion of the property located at 364 West Street which is classified forest land under Chapter 61 according to the terms of the offer contained in the Notice of Intent.

Hopedale respectfully reserves all rights and remedies available to it by law or in equity regarding its exercise of its right of first refusal and its option to purchase.

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

Sincerely,

Peter F. Durning

One Hundred Forty Realty Trust
October 8, 2020
Page 2 of 2



cc: Mark L. Donahue, Esq. (*via federal express and electronic mail*)
Commissioner of the Department of Conservation and Recreation (*via certified mail*)

(Via Electronic and First Class Mail)

New Hopping Brook Realty Trust c/o Michael Milanoski
Sandra R. Austin, Esq.
Brian Keyes, Hopedale Board of Selectmen, Chair
Diana Schindler, Hopedale Town Administrator
Hopedale Board of Assessors
Hopedale Planning Board
Hopedale Conservation Commission

EXHIBIT G



Grafton & Upton Railroad Company

42 Westboro Rd.

North Grafton, MA 01536

508-481-6095 * Fax 508-460-0578

Mailing address: PO Box 952, Carver MA 02330

<http://graftonuptonrr.com/>

October 15, 2020

Brian Keyes, Chairman
Board of Selectmen
Town of Hopedale
78 Hopedale Street
Hopedale, MA 01747

Re: 363 and 364 West Street, Hopedale

Dear Chairman Keyes:

Please be advised that Grafton & Upton Railroad Company ("GU") has purchased the real property located at 363 West (known to the Town as 363 West ADJ) and all of the land located at 364 West Street excluding all land subject to the Classified Forest-Agricultural or Horticultural-Recreational Land Tax Lien recorded by the Town of Hopedale, Massachusetts on October 2, 2014 at the Worcester District Registry of Deeds in Book 52875 Page 355 ("Lien"). Additionally, GU has purchased all of the beneficial interest in the One Hundred Forty Realty Trust ("Trust"), which holds title to the aforementioned Lien.

It is with great disappointment to GU that its public private partnership with the Town of Hopedale ("Town") was unable to be memorialized on this project, despite the collective efforts of GU and the Board of Selectmen ("BOS") over the last several months. The BOS and Town Administrator put a lot of work into this effort to establish a long-term benefit for the Town and its residents, and GU is grateful for that hard work.

The grossly inaccurate information that was disseminated by the Town's Water and Sewer Commission Chairman and false slanderous public statements irreparably and needlessly harmed GU's and Mr. Delli Priscoli's reputation within the Town. Those efforts also unfortunately undermined GU's efforts to work cooperatively on a project that would easily and generously serve the present and future needs of both the Town and GU, at no cost to the Town.

As you will recall, GU had agreed in principal to a public private partnership which the BOS had presented to the Town at the BOS meeting on July 13, 2020 which partnership aligns with Jon Delli Priscoli's efforts (as the owner of GU) to maintain a mutually rewarding relationship with the Town since he purchased GU a dozen years ago¹. The identified efforts that GU had committed to on this project were:

1. GU agreed to protect potential well sites (these are the same sites identified in the September 25, 2019 study commissioned by the Water & Sewer Commission for new well locations) including the 400-foot radius.

¹ <https://www.metrowestdailynews.com/article/20090719/NEWS/307199981>

2. GU offered to provide the Town with several dozen acres of natural corridor habitat, that is otherwise developable under federal law, so that the land could enjoy conservation protection. This land exchange was offered to the Town on a 1.5 to 1 ratio in benefit of the Town and would result in a significant and meaningful increase in parkland acres and extending the parkland trails to the Upton/Milford Town Line while creating an expansive wildlife and recreational corridor. GU committed to focus on economic development in an environmentally sensitive manner while producing jobs and tax revenue for the Town's long-term benefit.
3. GU agreed to assist the Town's Park Commission on its exploration a solution to fund an open space plan for the Parklands and to determine the future of and extension to the Parklands, building on what Henry Manning, who was a student of the infamous Frank Law Olmstead, had originally developed. This effort was intended to include additional walking trails to be constructed by GU as well as other much needed upgrades to the Parklands.

Additionally challenging during these negotiations was the due diligence report prepared by the Town's Finance Committee which consists of numerous inaccurate statements unsupported by law or fact which further exacerbated the misinformation that had already been disseminated by the Town Water and Sewer Commission Chairman. At no time did any representative of the Finance Committee contact GU to confirm the information that was carelessly included in its report, lacking proper authoritative reference.

On August 19, 2020 Attorney Peter Durning, on behalf of the Town, sent a letter to the Trust indicating that the Notice of Intent ("Notice") was insufficient and did not comply with the statute and was therefore ineffective and yet on October 8, 2020 Attorney Durning took the position that the same Notice that he had determined was ineffective, could not be withdrawn.

The Town's inconsistent position on several aspects of its relationship with GU on this matter have befuddled and frustrated the public private partnership that GU had envisioned and previously enjoyed. GU has always taken the position that a public private partnership is the best approach with its relationship with Hopedale given the historical partnership that it has enjoyed with the Town over the last decade.

GU continues to strive for a public private partnership with the Town on this project as it is our strong conviction that our efforts would leave a great legacy for the Town, expand the Town Parklands, and protect wetlands. Should the Board of Selectmen find that it is in agreement, Mr. Delli Priscoli is available for an in-person executive session with the Board of Selectmen to discuss and negotiate amenable solutions regarding the real estate on either Tuesday the 20th or Thursday 22nd of next week. Please, let me know if you are interested in proceeding with this effort.

Sincerely,



Michael Milanoski, President
Grafton and Upton Railroad Company

EXHIBIT H



**MACKIE
SHEA
DURNING**

COUNSELORS AT LAW

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

www.mackieshea.com

October 21, 2020

VIA ELECTRONIC AND CERTIFIED MAIL

One Hundred Forty Realty Trust
c/o Grafton & Upton Railroad Company
42 Westboro Rd.
North Grafton, MA 01536
Email c/o: mmilanoski@graftonuptonrr.com

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

Dear Mr. Milanoski:

As stated in my prior correspondence to the One Hundred Forty Realty Trust (the "Trust") dated October 8, 2020, pursuant to M.G.L. c. 61, § 8, the Town of Hopedale holds a first refusal option on the sale of the above-referenced classified forest land which ripened into an irrevocable option to purchase when the Town received the Notice of Intent to Sell Forest Land Subject to Chapter 61 Tax Lien, dated July 9, 2020 (the "Notice of Intent").

The Town acknowledges receipt of an email dated October 15, 2020, from Mark L. Donahue, Esq., of Fletcher Tilton PC, on behalf of the Trust, containing copies of certain documents recorded at the Worcester South District Registry of Deeds, in particular: the trustee certificate recorded in Book 63493, Page 31; the assignment of 100% of the beneficial interest of the Trust to the Grafton & Upton Railroad Company ("GURR") for \$1,175,000.00, recorded in Book 63493, Page 39; and the resignations of the trustees of the Trust recorded in Book 63493, Pages 43 & 45.

Because the Trust is a nominee trust under the terms of its declaration of trust, recorded in said registry in Book 7322, Page 177, and because a controlling beneficial interest in a nominee trust constitutes an interest in the real property held by the trust, the sale of 100% of the beneficial interest in the Trust to GURR constituted a transfer of title in the real estate owned by the Trust to GURR. By operation of M.G.L. c. 61, § 8, this transfer grants the Town a separate and independent opportunity to exercise its statutory first refusal option on the Trust's Chapter 61 land.

Please be advised that the Town of Hopedale will continue to consider whether to exercise its option to purchase the classified forest land according to the terms of the offer contained in the Notice of Intent. The Town will concurrently consider whether to exercise the similar option which has separately arisen as a result of the sale of the controlling beneficial interest of the Trust to GURR.

Hopedale respectfully reserves all rights and remedies available to it by law or in equity regarding its exercise of its right of first refusal and its option to purchase the Chapter 61 land located at 364 West Street.

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

Sincerely,



Peter F. Durning

encl.

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

Mark L. Donahue, Esq.

Sandra R. Austin, Esq.

Brian Keyes, Hopedale Board of Selectmen, Chair

Diana Schindler, Hopedale Town Administrator

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

Hopedale Board of Assessors

Hopedale Planning Board

Hopedale Conservation Commission

EXHIBIT I



Bk: 03651 Pg: 272

Page: 1 of 3 11/02/2020 01:49 PM WD

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

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

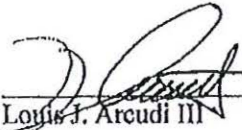
Subsequent to the notice of intent sent pursuant to Chapter 61, § 8, the above-named Trust: sold the non-classified portion of said property, consisting of 25 +/- acres, to the Grafton & Upton Railroad Company by quitclaim deed dated October 12, 2020, recorded in said registry in Book 63493, Page 34;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

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

TOWN OF HOPEDALE

By and through its Board of Selectmen,


Brian R. Keyes, Chair



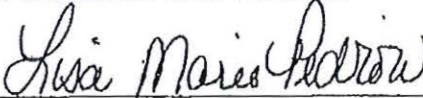
Louis J. Arcudi III

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

November 2, 2020

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

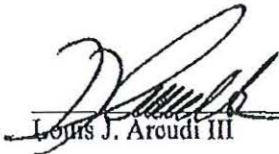


Lisa Marie Pedrolli

Notary Public

My commission expires: March 15, 2024



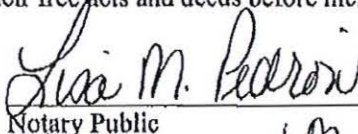

Louis J. Arcudi III

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

November 2, 2020

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


Notary Public

My commission expires: March 15, 2024



EXHIBIT 2

Mass. Gen Laws c. 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 61CLASSIFICATION 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. Hopedale*, 102 Mass. App. Ct. 367 (2023)**



Neutral

As of: April 25, 2024 3:36 PM Z

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 *; 206 N.E.3d 572 **; 2023 Mass. App. LEXIS 38 ***

ELIZABETH REILLY & others¹ *vs.* **TOWN OF HOPEDALE & others**² (and a companion case³).

Subsequent History: Appeal denied by Hopedale v. Priscoli, 492 Mass. 1102, 2023 Mass. LEXIS 176, 210 N.E.3d 353 (May 12, 2023)

Appeal denied by Reilly v. Hopedale, 492 Mass. 1102, 2023 Mass. LEXIS 187, 210 N.E.3d 355 (May 12, 2023)

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)

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.

LexisNexis® Headnotes

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.

Governments > Local Governments > Property

HN3 Local Governments, Property

Since 1847, 1847 Mass. Acts 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 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. Mass. Gen. Laws ch. 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. 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. Instead, taxpayer plaintiffs must show a statutory foundation for standing apart from § 53, in order to challenge a town's entering into a contract or settlement.

Administrative Law > Judicial

Review > Remedies > Declaratory Judgments

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > ... > Declaratory Judgments > State

Declaratory Judgments > Scope of Declaratory Judgments

HN4 Remedies, Declaratory Judgments

Plaintiffs have standing under the declaratory judgment statute, Mass. Gen. Laws ch. 231A, § 1, 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.

Environmental Law > Natural Resources & Public

Lands > Forest Management

HN5 Natural Resources & Public Lands, Forest Management

Mass. Gen. Laws ch. 61 reflects a legislative interest in promoting and maintaining forest land, which it seeks to achieve

Environmental Law > Natural Resources & Public

Lands > Forest Management

Governments > Local Governments > Property

HN1 Natural Resources & Public Lands, Forest Management

Mass. Gen. Laws ch. 61 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 devoted to the growth of forest products. Mass. Gen. Laws ch. 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. Mass. Gen. Laws ch. 61, §§ 2, 2A, 5. Land certified under chapter 61 is subject to a lien by the municipality in which the land is located. § 2. If an owner of forest land certified under chapter 61 wishes to sell the land or convert it to another use, certain consequences follow. To begin with, the land may be subject to roll-back taxes or a conveyance tax. Mass. Gen. Laws ch. 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. Mass. Gen. Laws ch. 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. § 8, seventeenth par.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Pretrial
Judgments > Judgment on Pleadings

Civil Procedure > Preliminary
Considerations > Justiciability > Standing

HN2 Standards of Review, De Novo Review

When the issue of standing was decided on cross motions for judgment on the pleadings under Mass. R.Civ.P. 12(c), an appellate court's review is de novo.

The hallmark of an assignment is the assignor's transfer of a right to an assignee.

Civil Procedure > Parties > Intervention > Intervention of Right
Civil Procedure > Parties > Intervention > Time Limitations
Civil Procedure > Parties > Intervention > Permissive Intervention

HN8 Intervention, Intervention of Right

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.

Civil Procedure > Parties > Intervention > Intervention of Right
Civil Procedure > Parties > Intervention > Statutory Right to Intervene

Civil

Procedure > ... > Pleadings > Interpleader > Jurisdictional Requirements

HN9 Intervention, Intervention of Right

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 intervenor must satisfy four criteria: (1) the application must be timely; (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. 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 or her to intervention as of right. 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.

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 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. 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 chapter 61 have been given no rights under the statutory scheme.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Waiver

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

HN6 Affirmative Defenses, Waiver

A waiver is the intentional relinquishment of a known right, it is not a transfer of that right to another.

Contracts Law > ... > Negotiable Instruments > Types of

Parties > Assignees & Assignors
Business & Corporate Compliance > ... > Negotiable Instruments > Types of Parties > Assignees & Assignors

Civil Procedure > ... > Equity > Maxims > Assignees

Principle

Contracts Law > Types of Commercial Transactions > Negotiable Instruments > Transfer of Negotiable Instruments
Business & Corporate Compliance > Contracts > Negotiable Instruments > Transfer of Negotiable Instruments

Business & Corporate Compliance > ... > Secured Transactions > Third Party Rights > Assignments of Secured Transactions
Contracts Law > ... > Secured Transactions > Third Party Rights > Assignments of Secured Transactions

HN7 Types of Parties, Assignees & Assignors

Civil Procedure > Parties > Intervention > Conditional Right to Intervene

Civil Procedure > Parties > Intervention > Permissive Intervention

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN10 **Intervention, Conditional Right to Intervene**

Permissive intervention is 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. 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, and other similar factors.

Headnotes/Summary

Headnotes

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Practice, Civil > Standing > Declaratory proceeding > Judgment on the pleadings > Intervention > Moot case > Taxable inhabitants' action > *Jurisdiction* > Taxable inhabitants' action

In the circumstances of two civil actions arising from a dispute concerning the development of G. L. c. 61 forest land by a railroad (through a transaction with the landowner trust and its trustees), over opposition by the town in which the land was located and certain of the town's citizens, in which the town, in an action it brought against the railroad and the trust in the Land Court, entered a settlement agreement (approved by the board of selectmen [board]) that, inter alia, stipulated to dismissal with prejudice of the Land Court action, and in which

the citizens then brought an action in the Superior Court challenging that settlement agreement and a Superior Court judge ruled, inter alia, in the citizens' favor on one count that the settlement agreement was not effective because the board had acted outside the authority given by the town meeting, but dismissed another count, and in which the town then filed in the Land Court (in light of the Superior Court judge's ruling that the settlement agreement was not effective) a motion pursuant to Mass. R. Civ. P. 60 (b) to vacate the stipulation of dismissal that had been filed pursuant to the settlement agreement, arguing that the Superior Court judge's ruling constituted an extraordinary circumstance warranting reinstatement of the Land Court case, and in which the citizens then sought in the Land Court case an interdepartmental assignment and transfer of the Land Court case to the Superior Court for consolidation with the Superior Court case, moved to intervene in the Land Court case (both as a matter of right and permissively pursuant to Mass. R. Civ. P. 24), and moved to join the town's motion to vacate the stipulation of dismissal (and further filed a motion for expedited treatment of their motion to intervene, which the Land Court judge denied), and the Land Court judge denied the town's motion to vacate **[*368]** (concluding that no extraordinary circumstances warranted vacating the stipulation of dismissal given that the parties had filed a stipulation of dismissal with prejudice rather than an agreement for judgment with the court, but not considering the validity or enforceability of the settlement agreement) and denied the citizens' motion to intervene and to join the town's motion to vacate on the ground that it was moot, the citizens as taxpayers had standing under G. L. c. 40, § 53, to pursue a declaration that the settlement agreement was void and unenforceable (although the statute did not give the citizens standing to seek 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 remained 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, given that none of those forms of relief could be characterized as the raising or expenditure of funds or as the incurring of obligations by the town, nor did the declaratory judgment statute, G. L. c. 231A, § 1, independently give them standing to pursue the relief they sought, nor did the citizens have standing to pursue an action in the nature of mandamus against the assignment, an argument that the citizens had in any event waived by failing to raise it below) [377-380] further, the citizens' motion to intervene in the Land Court case should not have been denied as moot, to the extent that the citizens sought to intervene in order to effectuate the judgment in the Superior Court case by having the stipulation of dismissal in the Land Court case vacated on the

ground that the settlement agreement was not effective, in that the citizens' right to protect the Superior Court judgment was independent of the town, given that it had been obtained through the citizens' exercise of their right as ten or more taxpayers under G. L. c. 40, § 53, and thus the stipulation of dismissal could not extinguish their claims or the judgment [380-383]; finally, this court remanded to the Land Court the citizens' motion to intervene in the Land Court case, given that both permissive intervention and intervention as of right entailed factual assessments that were best left to determination by the Land Court judge in the first instance [383-385].

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

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

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

Opinion by: WOLOHOJAN

Opinion

[**576] WOLOHOJAN, 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 **HNA** 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 [**577] 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

⁵Jon 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.

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

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 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 [*578] 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

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.”

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

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

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.

not clear **[**579]** whether or when **[***8]** 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:

[580]** “[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, 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

¹⁴The 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).”

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

[**581] 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

¹⁵The 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.”

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 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

¹⁶Initially, 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

[*377] [*582] 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. *HN2* [↑] 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.

HN3 [↑] 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.

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.

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] [*583] 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.

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, independently gives them standing to pursue the relief they seek in count II. *HN4* [↑] 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.

HN5  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 Emvtl. 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 ****584** 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. **HN6**  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.

HN7  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 ****585** 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

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

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 [***586] was obtained 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 *Jaros 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. *HN8* 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.

HN9 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 intervenor

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.”

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.

“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 **[**587]** is not adequately represented by existing parties.”

[*384] *Balden 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 Inn. & 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.*

HN10 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.”

See *Matter of the Liquidation of Am. Mut. Life. 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 Inn. & 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 *Balden*, 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 **[**588]** 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

²²The 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 intervenor 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.” *Balden 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”).

consideration [***30] of the citizens' motion to join the town's motion to vacate the stipulation of dismissal.²³

So ordered.

End of Document

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

EXHIBIT 4

***Reilly v. Town of Hopedale et al.*, Case No. 2185-cv-00238
(Mass. Super. 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 Dell Priscoti, 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).

⁴The 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 "balancing 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