GENTRY LOCKE
Attorneys

John M. Scheib
Scheib@gentrylocke.com
P: (757) 916-3511
F: (540) 983-9400

April 10, 2023

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

Re: STB FD 36464- *Grafton and Upton Railroad Company –Petition for Declaratory Order*

Dear Ms. Brown:

Attached please find a "Motion to Reopen" the above-captioned docket filed by the Grafton and Upton Railroad Company.

Sincerely,

/s/ John M. Scheib

John M. Scheib
Attorney for Grafton
and Upton Railroad Company

F I L E D

April 10, 2024
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED

April 10, 2024
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER

GRAFTON AND UPTON RAILROAD COMPANY'S MOTION TO REOPEN

John M. Scheib
Emily Mordecai
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233 office
617-905-6083 mobile
jim@jehowardlaw.com

Attorneys for Grafton
and Upton Railroad Company

Dated: April 10, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER

GRAFTON AND UPTON RAILROAD COMPANY'S MOTION TO REOPEN

Verified Statement of Emily Mordecai

- Attachment A – Verified Petition for Declaratory Order of Grafton and Upton Railroad Company, F.D. No 36464 (STB filed Nov. 23, 2000).
- Attachment B – Motion to Dismiss Proceeding, F.D. No 36464 (STB entered Feb. 16, 2021).
- Attachment C – Verified Petition for Declaratory Order of Grafton and Upton Railroad Company, F.D. No. 36696 at 6 (STB filed Apr. 14, 2023).
- Attachment D -- Order of the Massachusetts Land Court (Mar. 27, 2024)

Grafton & Upton Railroad Company ("GURR") hereby moves to reopen this proceeding based on substantially changed circumstances. GURR filed this declaratory order action on November 23, 2020 seeking a determination that the Town of Hopedale's ("Hopedale" or "Town") attempts "to use state and local law in a lawsuit initiated by the Town in state court in Massachusetts not only in order to block use by GU[RR] but also to take the property from GU[RR] . . . is preempted by Section 10501." Verified Statement of Emily Mordecai, Attachment A (Verified Petition for Declaratory Order of Grafton and Upton Railroad Company, F.D. No. 36464 (filed Nov. 23, 2020)) ("Mordecai V.S."). On February 16, 2021, the Board dismissed the proceeding at GURR's request because "GU[RR] and the Town have resolved the issues raised by the Town in the Land Court litigation and by GU[RR] in the Verified Petition. …. and have filed a stipulation of dismissal with Land Court." Mordecai V.S., Attachment B (Motion to Dismiss Proceeding, F.D. No. 36464 (STB order entered February 16, 2021)) ("Motion to Dismiss").

Recently, after years of litigation up and down the Massachusetts court system, on March 25, 2024, the Massachusetts Land Court vacated the stipulation of dismissal referenced in the Motion to Dismiss Proceeding. The vacatur of the stipulated judgment revives the Town's previously dismissed claims to use state and local law to take property from GURR, which represents a substantially changed circumstance that warrants reopening this proceeding.[1] Once reopened, the preemption is straightforward – particularly in light of the preclusive effect of a variety of Board and court decisions addressing Hopedale's long-running effort to thwart rail transportation.

[1] The Land Court's allowance of the Town's motion to vacate the stipulated judgment will be subject to a motion for reconsideration and appellate practice by GURR.

I. BACKGROUND

This proceeding is part of a long and winding road by Hopedale to obstruct rail transportation, including its attempts to renege on a Settlement Agreement that it entered into with GURR in 2021, that was a predicate to dismissal of state court proceedings, and that was a predicate to the dismissal of this proceeding.

A. The Original Finance Docket 33646 Proceeding Demonstrates that Chapter 61 Is Preempted As Applied to GURR.

GURR, a Class III rail carrier in Massachusetts that has operated since 1873, sought to acquire the 130 acres pursuant to Massachusetts statutes that permit railroads to acquire land for rail transportation purposes. MGL c. 160, § 83 provides in relevant part that if a railroad requires land for any of the purposes specified in MGL c. 160 § 78 and is unable to obtain the property by agreement with the owner, the railroad may apply to the Department of Public Utilities ("DPU"), which after notice and hearing can authorize the taking of the property by the railroad by eminent domain.[2] GURR initiated the DPU proceeding on March 15, 2019. A number of interested persons, including Hopedale, asked the DPU for leave to intervene or to participate in the proceeding. In support of intervention, Hopedale contended, among other things, that GURR had not presented sufficiently specific plans for its use of the 155 acre parcel. Significantly, the Town never contended that GURR could not acquire the property and use it for rail transportation purposes or that the Town itself could acquire the property.

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[2] MGL c. 160 § 78 authorizes a railroad to purchase land that may be "reasonably necessary" for the "proper construction and security" and the "convenient operation" of the railroad, including a variety of specified purposes, such as "one or more new tracks adjacent to other land occupied by it by a track or tracks already in use, and for the purpose of cuttings, embankments, for procuring stone and gravel, and for stations, car houses, round houses, freight houses, yards, docks, wharves, elevators and other structures".

Beginning in 2019 and continuing through October, 2020, GURR representatives discussed with Hopedale a possible a public-private partnership. While GURR and Hopedale continued these discussions, GURR and the property owner resumed negotiations about the terms of a private sale of the property. As of June 27, 2020, the trustee of the realty trust that owned the property entered into an agreement with a realty trust that was indirectly controlled by GURR for the purchase and sale of the 155 acre parcel. Because approximately 130 acres of the property was classified as forest land pursuant to MGL c. 61 (the "Chapter 61 Property"), the owner gave notice to Hopedale of its intent to sell the Chapter 61 Property to be used for rail transportation purposes.

Chapter 61 is a state tax statute that provides for a lower taxation rate for forest land. According to that provision, when land classified under Chapter 61 is converted, or sold with the intent to convert, from forestry use to a different use, the local taxing authority acquires a right of first refusal to purchase the land. Whether or not notice is required, the owner provided notice to Hopedale of the transfer of ownership and change in use. The Notice stated 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 [GURR's] transloading operations".

On October 7, 2020, the trustee of the trust that owned the property advised Hopedale of the withdrawal of the notice of intent to sell the Chapter 61 Property. GURR and the trust agreed to transfer ownership of the Chapter 61 Property by means of the beneficiaries of the trust selling their beneficial interest to GURR, which was accomplished on October 12, 2020. On the same day, the owner also conveyed by quitclaim deed to GURR the 25 acre portion of the property that was not subject to Chapter 61. As a result of these transactions, GURR owned the beneficial

interest in the trust that holds title to the Chapter 61 Property, thereby controlling the Chapter 61 Property, and owned the other 25 acres.

After GURR acquired control of the property, Hopedale advised the trustees of the trust by letter dated November 2, 2020, that the Town had decided to exercise the right of first refusal to acquire the Chapter 61 Property while also simultaneously acknowledging that the trust "retains legal title to the [Chapter 61 Property] at issue". In addition, the Town's governing body, the Board of Selectmen, voted in favor of using eminent domain to acquire the 25 acre portion of the property owned in fee by GURR.

Hopedale then filed a complaint on October 28, 2020 in the Land Court Department ("Land Court"), which is part of the trial court system in Massachusetts, against the trust and GURR asking for various forms of declaratory and injunctive relief. Hopedale alleged that it held an option to purchase the Chapter 61 Property and asked the court to prohibit GURR from taking any actions or engaging in any activities with respect to the Chapter 61 Property that would convert the use of the property from the Chapter 61 forestry designation. Hopedale also requested the Land Court to order specific performance requiring GURR to convey the Chapter 61 Property to Hopedale.

On November 22, 2020, GURR filed its Petition for Declaratory Order in this proceeding in which it asked the Board to rule that the attempt to use state law -- Chapter 61 -- to take the property from GURR is preempted by 49 U.S.C. § 10501.[3]

[3] The following information is provided in more detail in the Verified Petition for Declaratory Order of Grafton and Upton Railroad Company, F.D. No. 36464 (STB filed Nov. 23, 2000). See Verified Statement of Emily Mordecai, Attachment A ("Mordecai V.S.").

B. GURR and Hopedale Enter Into a Settlement Agreement and Dismiss the State Land Court Case, and the Board Dismisses the Proceeding.

After GURR filed the Petition for Declaratory Order, Hopedale and GURR entered into discussions concerning a possible resolution of the issues presented in the Land Court and in the petition to the Board. *See* Motion to Hold Proceeding in Abeyance, F.D. No. 36464 (STB entered Dec. 4, 2020). Those discussions bore fruit, and GURR and Hopedale entered into a Settlement Agreement, which included, inter alia, a compromise of the Town's disputed and contested right of first refusal claim under Chapter 61 to acquire 130 acres of forest land, dismissal of the Land Court action, and dismissal of the STB Petition. The Town and GURR filed a stipulation of dismissal with the Land Court on February 10, 2021. The Settlement Agreement also required GURR to request the Board to dismiss this proceeding, which GURR did and which the Board granted. Motion to Dismiss at 1-2.

GURR began development of the property at 364 West Street, which included a significant portion of the 130 acres of formerly Chapter 61 property, into a rail transloading facility, the details of which were set forth for the Board in Finance Docket 36696, including grading, acquisition of rail ties, and more. Mordecai V.S., Attachment C (Verified Petition for Declaratory Order, F.D. No. 36696 at 6 (STB filed Apr. 14, 2023)) ("F.D. No. 36696 Verified Petition").

C. Despite the Settlement Agreement, Hopedale Again Tries to Take GURR's Property and Otherwise Impose Preclearance Requirements.

Starting in 2022, Hopedale attempted to renege on the Settlement Agreement and continued to try to thwart the development of rail transloading facilities on the property controlled by GURR. In particular, Hopedale sought to condemn a total of approximately 130

acres of GURR's land at 364 West Street by eminent domain and to thwart rail development through the Hopedale Conservation Commission ("Commission").

Faced with the imminent prospect of losing title to its property through Hopedale's eminent domain threat or the ability to use it for rail transportation facilities due to the cease and desist order of the Commission, GURR was forced to take legal action. GURR filed suit in the United States District Court for the District of Massachusetts ("District Court") on July 18, 2022, and moved on an emergency basis for a temporary restraining order ("TRO") against the Town and the Commission. *See Grafton & Upton Railroad Company et al v. Town of Hopedale et al*, Docket No. 22-cv-40080MRG.

The District Court initially granted the TRO, which was converted to a preliminary injunction. Then, on April 3, 2023, the District Court issued a memorandum and order in which it found that it had jurisdiction over GURR's preemption claims and found that GURR had established likelihood of success on its preemption claims against the Town and Commission. The District Curt enjoined the Town, its Selectmen, and the Commission from "(1) recording any notice of taking of any portion of GURR's property at 364 West Street, Hopedale, Massachusetts or (2) taking any action to enforce the Commission's Enforcement Order." The District Court also ordered GURR to file a petition for declaratory order with the Board, and stayed its proceedings pending Board action.

D. The Board Rules that Hopedale's New Attempts to Circumvent the Settlement Agreement and to Obstruct GURR Are Preempted.

On April 14, 2023, as directed by the District Court, GURR filed a separate petition for declaratory order at the Board with regard to Hopedale's ongoing efforts. The issues presented were whether the Town's attempt to use state eminent domain law to take the 130 acres of GURR's property at 364 West Street was preempted and whether the enforcement by the

Commission of an order that would prohibit GURR from constructing facilities on the property without preclearance from the Commission was preempted.

GURR's second petition began by reminding the Board that (1) in 2020, the Town filed suit in Land Court to use state and local law, specifically Chapter 61, to block GURR's use of the land for rail transportation purposes and to seize ownership from GURR; (2) in response, GURR filed the petition for a declaratory order with the Board in this proceeding, and (3) in February 2021, the Town and GURR settled that lawsuit, dismissed the Land Court action, and had the Board dismiss the petition for declaratory order. F.D. No. 36696 Verified Petition at 6.

GURR's second petition then detailed the Hopedale's efforts to renege on the Settlement Agreement and the steps Hopedale had taken to thwart GURR with respect to the 364 West Street property.

- In July 2022, Hopedale voted at a Special Town Meeting to authorize the Selectboard to use eminent domain to take ~130 acres of GURR-owned land at 364 West Street.

- Within weeks, the Selectboard subsequently voted to take the ~130 acres by eminent domain, but was enjoined by temporary restraining orders, and then a preliminary injunction issued by the federal court, from recording the Order of Taking.

- The ~130 acres that the Town voted to take is a substantial and critical part of GURR's ~198 acres and are needed for the development and operation of rail transportation facilities at 364 West Street.

- Concurrently with the Town's attempt to use eminent domain, the Commission issued and sought to enforce a cease and desist order that would prohibit GURR from developing and operating the rail transportation facility without preclearance from the Commission. The Commission alleged that GURR engaged in development activities "without permit or prior notification to the Commission", and it further alleges that GURR placed fill in certain areas "for which no permit was issued, or notice of exempt work received." The Commission then issued a "finding" that GURR acted "without approval," subjecting GURR to substantial fined and penalties. Lastly, it issued an order requiring GURR to file a restoration plan with the Commission on or before October 3, 2022.

Id. at 6-7 (citations omitted).

The Board issued a declaratory order in GURR's favor on both issues. *Grafton and Upton Railroad Company – Petition for Declaratory Order,* F.D. No. 36696 (STB Decided Nov. 14, 2023) ("*GURR Dec. Order*"). First, the Board found that GURR was a rail carrier. *Id*. at 1. The Board rejected the Town's argument that the Board should not get involved:

> [I]n the primary cases relied upon by the Town, the Board's resolution of the issues presented to it in those cases was "contingent upon the interpretation of an easement" or encompassed regulatory determinations (for example, whether track was mainline or ancillary, as opposed to a preemption question) that would vary in scope depending on a state law matter. 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.

Id. at 5-6.

The Board also found that "GURR recently purchased the Property, has detailed plans for the Property, and has taken numerous concrete steps to execute its plans." *Id.* at 8. The Board rule that "GURR acquired adjoining properties in 2020 and 2021 specifically 'to support its rail operations to meet current customer needs and expected growth' and developed detailed plans for a transload facility, which it seeks to complete by the summer of 2024. Subsequently, GURR acquired private funding for the project, made arrangements with customers for the use of the facility, and began work on the project, which has cost it over $1 million to date." *Id.* at 8. The Board concluded that "[b]ecause the Town's attempted taking would foreclose GURR's development of the property for rail 'transportation' purposes, it is preempted." *Id.* at 11. In short, the Board made clear that the use of state law to take the property controlled by GURR and that GURR was actively developing into a rail transload facility was preempted.

With respect to the Commission's efforts to enforce an order prohibiting GURR to construct without preclearance, the Board held that it "and the courts have held that state or local

permitting or preclearance requirements, including environmental and land use permitting requirements, of such facilities are categorically preempted." *Id.* at 11.

E. The Massachusetts Land Court Vacates the February 2021 Stipulated Judgment and Hopedale Pledges to Use Chapter 61 Again to Take GURR's Property.

Meanwhile, in a tortured procedural history that involved the Land Court, the Worcester Superior Court, and the Massachusetts Court of Appeals, in March 2024,the Land Court vacated the February 2021 stipulated judgment entered into by the Town and GURR, relying on language in a separate ruling that entered in the Superior Court in 2021, which stated in part:

> "[A]lthough the terms of the [s]ettlement [a]greement are legal (including [Hopedale's] agreement to waive the [o]ption), [Hopedale] exceeded its authority when it unilaterally entered into that agreement without [t]own [m]eeting approval of the reduced acquisition. Therefore, the [s]ettlement [a]greement is not effective. [Hopedale] 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."

Mordecai V.S., Attachment D (Order of the Massachusetts Land Court, at 3[4] (March 27, 2024)) (quoting Reilly, 102 Mass. App. Ct. at 374) (emphasis added) ("Land Court Order"). The Land Court judge concluded by stating:

> "This court having today vacated the Stipulation of Dismissal, *the Town now stands ready and willing to advance its claim to enforce the G.L. c. 61 right of first refusal. Count I of the [Intervenors'] Amended Complaint is dismissed as moot. The Town has confirmed its intention to do so*."

Land Court Order at 6.

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[4] The Land Court Order was provided by email. Page numbers cited for the Land Court Order are to the page number of Mordecai V.S., Attachment D, for ease of reference.

II. ARGUMENT

A. This Proceeding Should Be Reopened Because the Land Court's Revival of Hopedale's Chapter 61 Claim Is a Substantially Changed Circumstance.

Pursuant to 49 U.S.C. 722 and 49 CFR 1115.4, the Board grants a petition to reopen upon a showing that the proceeding involves material error, new evidence, or substantially changed circumstances. *See e.g., Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order*, F.D. No. 35057, 2009 STB LEXIS 477 (STB decided Oct. 15, 2009) ("*Babylon*").

In this case, the substantially changed circumstance is the Land Court ruling vacating the February 2021 stipulated judgment that was a predicate to the filing of the February 2021 motion to dismiss this proceeding. Compare Motion to Dismiss at 1-2 with Land Court Order. The Land Court's vacating of the stipulated judgment revives the Town's Chapter 61 claims to take GURR's property and therefore also revives GURR's claims before the Board in this proceeding that Chapter 61 is preempted by 49 U.S.C. §10501. Like *Babylon*, this case involves a change in an agreement material to the proceeding. *Babylon* at *6 ("[T]he petition raises an issue about the Amended Agreement between Respondents, which became effective after the September 2008 Decision. . . . We agree with Petitioners that [the] intervening events amount to substantially changed circumstances. To address these events, we will therefore grant the petition to reopen this docket."). In other situations, the Board has found that a material change to the status of agreements constitutes substantially changed circumstances that warrant reopening. *See Texas Cent. R.R. and Infrastructure, Inc. & Texas Cent. R.R., LLC – Petition for Exemption – Passenger Rail Line Between Dallas and Houston, Tex.*, F.D. No. 36025 (STB Decided July 16, 2020).

B. Hopedale's Attempt To Use Chapter 61 Is Preempted.

Once this proceeding is reopened, the question of whether Hopedale's latest attempt to use Chapter 61 to take GURR's property is preempted is straightforward – particularly given the preclusive effect of the Board's prior decision in Finance Docket 36696 and the state courts' decisions. It is.

- Indisputably, GURR is a rail carrier. *GURR Dec. Order* at 1.
- The project to develop a transloading facility at the site is "transportation by a rail carrier. *Id.* at 8.
- The Massachusetts Superior Court ruled that, although the stipulation of dismissal is vacated, "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." Land Court Order at 3 (quoting Reilly, 102 Mass. App. Ct. at 374).
- Hopedale seeks to take – again – the 364 West Street property that is controlled and being developed by GURR using a different state law; this time Chapter 61. Land Court Order at 6 ("This court having today vacated the Stipulation of Dismissal, the Town now stands ready and willing to advance its claim to enforce the G.L. c. 61 right of first refusal. Count I of the Amended Complaint is dismissed as moot. *The Town has confirmed its intention to do so*.") (emphasis added).
- State statutes that permit the taking of railroad property actively being developed -- and in particular that seek to take this property specifically -- are preempted. *GURR Dec. Order* at 11.

* * *

In sum, the standard for reopening this proceeding is met by the substantially changed circumstance the Settlement Agreement has been determined to be "ineffective." Attempts to take property actively owned and under development for transloading facilities are preempted.

Respectfully submitted,

/s/ John M. Scheib

John M. Scheib
Emily Mordecai
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233 office
617-905-6083 mobile
jim@jehowardlaw.com

Attorneys for Grafton
and Upton Railroad Company

Dated: April 10, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have served by email a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows:

on this 10th day of April, 2023.

/s/ John M. Scheib

John M. Scheib
Emily Mordecai
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511

Attorney for Grafton
and Upton Railroad Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF EMILY MORDECAI

1. My name is Emily Mordecai, and I am an attorney at Gentry Locke Attorneys.

2. I verify that the documents attached here to are true and correct copies.

/s/ Emily Mordecai

Emily Mordecai
Gentry Locke Attorneys
919 E. Main Street, Suite 1130
Richmond, VA 23219
(804) 956-2073
emordecai@gentrylocke.com

Attorney for Canadian Pacific Kansas City

April 10, 2024

MORDECAI VERIFIED STATEMENT, ATTACHMENT A

Verified Petition for Declaratory Order of Grafton and Upton Railroad Company, F.D. No 36464 (STB filed Nov. 23, 2000).

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

VERIFIED PETITION FOR DECLARATORY ORDER OF GRAFTON AND UPTON RAILROAD COMPANY

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233
jim@jehowardlaw.com

Attorney for Grafton and
Upton Railroad Company

Dated: November 22, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

VERIFIED PETITION FOR DECLARATORY ORDER OF GRAFTON AND UPTON RAILROAD COMPANY

INTRODUCTION

By this Petition, Grafton and Upton Railroad Company ("GU") requests the Board to issue a declaratory order, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to the effect that state and local statutes and regulations are preempted pursuant to 49 U.S.C. § 10501 in connection with the efforts of the Town of Hopedale (the "Town" or "Hopedale") to prevent GU from using its property located in Hopedale for purposes of rail transportation. As explained below, construction of additional tracks and rail transportation facilities is critical in order to support the existing and future operations of GU. Hopedale is attempting to use state and local law in a lawsuit initiated by the Town in state court in Massachusetts not only in order to block such use by GU but also to take the property from GU. This blatant attempt by Hopedale to interfere with rail transportation is preempted by Section 10501.

FACTS AND RELEVANT BACKGROUND

GU is a Class III rail carrier that has been in continuous operation since its incorporation in 1873. GU owns and operates a 16.5 mile rail line that runs in a north-south direction between a connection with CSX in North Grafton, Massachusetts and Milford, Massachusetts. Over the

last 10 years, GU has invested millions of dollars in order to upgrade its line and to establish transloading facilities at North Grafton and Upton, Massachusetts. At North Grafton, GU operates a facility where liquid propane arrives by rail and is transloaded to trucks for distribution in the Eastern Massachusetts area. GU has also developed a significant transloading operation in Upton, which handles a variety of chemicals and other bulk commodities. In addition, for many years GU has maintained and operated a small yard at Hopedale where GU transloads cement, sheet rock and several other commodities. See accompanying Verified Statement of Michael R. Milanoski ("Milanoski VS") at ¶¶ 2-3.

GU has experienced significant traffic growth over recent years. In 2010, GU interchanged approximately 200 cars with CSX, and by 2019 the number of cars interchanged was approximately 3000. A steady growth in business is expected to continue into the future. For calendar year 2021, GU anticipates moving 3500 carloads. Milanoski VS at ¶ 4.

A recent acquisition transaction guarantees that GU will move a minimum of an additional 400 carloads per year of new business. CSX and GU have recently entered into a lease and related agreements pursuant to which GU will operate an 8.4 mile CSX line between the terminus of the GU-owned line in Milford and Franklin, Massachusetts, where GU will have a new, second interchange with CSX. See *Grafton and Upton Railroad Company--Acquisition and Operation Exemption—CSX Transportation, Inc.*, Docket No. FD 36444. The traffic over the line leased from CSX will move between the interchange with CSX in Franklin, through Hopedale, Upton and the CSX-GU interchange in North Grafton. Milanoski VS at ¶ 5.

The continuous growth in business has led GU to look for property along its right-of-way in order to expand its yard capacity and ability to handle the new business expeditiously. In 2018, GU initiated discussions with the owner of a 155 acre parcel of real estate located at 364

West Street in Hopedale. The property is zoned industrial, bisected by the GU right-of-way and would make an ideal location for a much-needed expansion of GU's existing yard in Hopedale. The property could be used for additional yard and side tracks and for car storage and switching. Such additional property could also be used for transloading facilities, for which there is a demand, equipment maintenance and other activities essential to the functioning and support of rail operations generally. Milanoski VS at ¶¶ 6-7.

The negotiations with the owner of the 364 West Street were initially unsuccessful in reaching an agreement. As an alternative means to acquire the property, GU turned to Massachusetts statutes that permit railroads to acquire land for rail transportation purposes. MGL c. 160, § 83 provides in relevant part that if a railroad requires land for any of the purposes specified in MGL c. 160 § 78 and is unable to obtain the property by agreement with the owner, the railroad may apply to the Department of Public Utilities ("DPU"), which after notice and hearing can authorize the taking of the property by the railroad by eminent domain. MGL c. 160 § 78 authorizes a railroad to purchase land that may be "reasonably necessary" for the "proper construction and security" and the "convenient operation" of the railroad, including a variety of specified purposes, such as "one or more new tracks adjacent to other land occupied by it by a track or tracks already in use, and for the purpose of cuttings, embankments, for procuring stone and gravel, and for stations, car houses, round houses, freight houses, yards, docks, wharves, elevators and other structures". Milanoski VS at ¶ 8.

The DPU proceeding was initiated by GU on March 15, 2019. A number of interested persons, including the Town, asked the DPU for leave to intervene or to participate in the proceeding. In support of intervention, Hopedale contended that GU had not presented sufficiently specific plans for its use of the 155 acre parcel. The Town also expressed a desire to

maintain town park and trail lands and suggested, without support, that GU's acquisition of the property "may" pose risks to the Town's water supply. Significantly, the Town never contended that GU could not acquire the property and use it for rail transportation purposes or that the Town itself could acquire the property. While the DPU reached decisions in February, 2020 concerning the parties that would be permitted to participate, the DPU has yet to address the merits of GU's petition. Milanoski VS at ¶¶ 8-9.

Beginning in 2019 and continuing through October, 2020, GU representatives had numerous conversations with the Town to discuss a public-private partnership pursuant to which Hopedale would forego the exercise of the right of first refusal. For its part, GU indicated a willingness to carve off a portion of the 155 acre parcel and convey it to Hopedale to enable the Town to increase the size of its park land and to pay for infrastructure improvements to the Town's existing park land. GU also offered to take steps to protect well sites in order to address a concern expressed by the Hopedale Water and Sewer Commission. In short, GU made it clear to Hopedale that GU was willing to take steps to mitigate reasonable concerns expressed by Hopedale and that GU recognized its obligation to comply with generally applicable health and safety regulations in connection with its use of the property. Milanoski VS at ¶¶ 10-11.

While GU and the Town continued to discuss a public-private partnership, GU and the property owner resumed negotiations in an effort to agree on the terms of a private sale. As of June 27, 2020, the trustee of the realty trust that owned the property entered into an agreement with a realty trust that was indirectly controlled by GU for the purchase and sale of the 155 acre parcel. Because approximately 130 acres of the property was classified as forest land pursuant to MGL c. 61 (the "Chapter 61 Property"), the owner gave notice to Hopedale of the intention to sell the Chapter 61 Property to be used for rail transportation purposes. Milanoski VS at ¶ 9.

Chapter 61 is a state tax statute that provides for lower taxation rate for forest land. According to that provision, when land classified under Chapter 61 is converted, or sold with the intent to convert, from forestry use to a different use, the local taxing authority acquires a right of first refusal to purchase the land. While it was not entirely clear whether, in the circumstances presented here, notice to the Town of the transfer of ownership and change in use would be required, the owner provided notice which, if effective, afforded Hopedale a right of first refusal, exercisable within 120 days, to purchase the Chapter 61 Property. The Notice stated 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's] transloading operations". On August 19, 2020, the Town advised the owner that, in the view of the Town, the notice was defective. Milanoski VS at ¶ 9.

On October 7, 2020, the trustee of the trust that owned the property advised Hopedale of the withdrawal of the notice of intent to sell the Chapter 61 Property. GU and the trust agreed to transfer ownership of the Chapter 61 Property by means of the beneficiaries of the trust selling their beneficial interest to GU, which was accomplished on October 12, 2020. On October 12, the owner also conveyed by quitclaim deed to GU the 25 acre portion of the property that was not subject to Chapter 61. The owner of GU and the president of GU became the new trustees of the trust that owns the Chapter 61 Property. As a result of these transactions, GU now owns the beneficial interest in the trust, which holds legal title to the Chapter 61 Property, thereby effectively gaining control of the Chapter 61 Property. Milanoski VS at ¶ 12.

By letter dated November 2, 2020, Hopedale advised the trustees of the trust that the Town had decided to exercise the right of first refusal to acquire the Chapter 61 Property while also simultaneously acknowledging that the trust "retains legal title to the [Chapter 61 Property]

at issue". In addition, the Town's governing body, the Board of Selectmen, voted in favor of using eminent domain in order to acquire the 25 acre portion of the property owned in fee by GU. Milanoski VS at ¶¶ 13-14.

Hopedale has followed up by filing a complaint on October 28, 2020 in the Land Court Department, which is part of the trial court system in Massachusetts, against the trust and GU asking for various forms of declaratory and injunctive relief. Hopedale alleged that it held an option to purchase the Chapter 61 Property and asked the court to prohibit GU from taking any actions or engaging in any activities with respect to the Chapter 61 Property that would convert the use of the property from the Chapter 61 forestry designation. Hopedale has also requested the court to order specific performance requiring GU to convey the Chapter 61 Property to Hopedale.

GU has opposed the Town's request for such injunctive relief and has urged the state court to allow the Board to decide whether such relief is preempted. The Town's request for such injunctive relief is scheduled to be heard by the court on November 23, 2020.

ARGUMENT

GU is the owner of the Chapter 61 Property. Such ownership is clear based upon the assignment of the beneficial interest by the prior owner to GU. Hopedale has acknowledged GU's ownership of the Chapter 61 Property in an amended complaint filed on November 2, 2020: "[GU] now owns the controlling beneficial interest in the Trust, which holds legal title to the Chapter 61 Land" and "the Trust's assignment of 100% of its beneficial interest to [GU] was equivalent to a transfer of title to the Chapter 61 Land". Amended Complaint at ¶¶ 31 and 43.

As demonstrated below, the Town's reliance in the state court proceedings on Chapter 61 should be preempted for two reasons. First, the Town's efforts to prevent GU from using the

Chapter 61 Property for rail transportation purposes amount to an attempt to impose preclearance or permitting requirements that would deny or unreasonably delay GU's ability to conduct rail transportation operations and, consequently, are categorically preempted. Second, reliance on Chapter 61 and state court proceedings to compel a conveyance of real estate owned by GU is tantamount to an attempted eminent domain taking that cannot be permitted, because it would unreasonably burden and interfere with rail transportation and interstate commerce.

I. A Declaratory Order is Required to Remove Uncertainty.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. As demonstrated above, there is an actual controversy between GU and Hopedale concerning GU's right to use and continue to own the Chapter 61 Property for rail transportation purposes. The Board should issue the requested declaratory order to remove the uncertainty.

II. This is an Appropriate Case to Apply Preemption.

Since the enactment of the Interstate Commerce Commission Termination Act, the Board and the courts have considered the preemption provisions set forth at Section 10501(b) on many occasions so that the contours of preemption are now well defined. The Board's jurisdiction over "transportation by rail carriers" is exclusive. The threshold inquiry for the application of preemption is whether that "transportation" is being or will be provided by a "rail carrier".

There is no question that GU is a rail carrier that currently provides transportation and will provide transportation services by using the Chapter 61 Property in the manner described above. "Transportation" is broadly defined by statute as including any "yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail

regardless of ownership or an agreement concerning use" and "services related to that movement". 49 U.S.C. § 10102(9). The term "railroad" is also expansively defined as including "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation". 49 U.S.C. § 10102(6)(C). The acquisition and use of property for purposes of constructing and operating additional tracks and facilities clearly comes within the meaning of "rail transportation".

As the Board is well aware, preemption applies equally to rail transportation activities over which the Board has jurisdiction even though it does not exercise direct licensing authority. In particular, preemption applies to the acquisition, construction or operation of facilities, such as yards and sidetracks that are ancillary or adjacent to a rail carrier's line and therefore do not require Board authorization, by reason of 49 U.S.C. § 10906, for the construction or operation of such facilities. Attempts by state or local authorities to regulate such facilities have been preempted. *Borough of Riverdale—New York, Susquehanna and Western Railway*, 4 S.T.B. 380, 387-88 (1999); *Friends of the Aquifer*, Docket No. FD 33966, decision served August 15, 2001 ("this broad statutory preemption applies to the construction of ancillary facilities under section 10906, even though we lack licensing authority over such projects"); *Grafton & Upton Railroad Company--Petition for Declaratory Order*, Docket No. FD 35779, decision served January 27, 2014 ("*GU 2014 Decision*") and decisions cited therein.

III. Chapter 61 is Preempted as an Attempt to Impose a Preclearance Condition.

Section 10501 precludes states or local authorities from intruding into matters that are directly regulated by the Board, such as rail services or construction. Section 10501 also prevents the use of state or local law to impose requirements that could be used to deny a rail carrier the ability to conduct rail operations. Consequently state and local permitting or

preclearance regulations are categorically preempted as to any transportation facilities that are integral to the provision of rail transportation. *GU 2014 Decision; Green Mountain Railroad v. Vermont,* 404 F.3d 638 (2d Cir. 2005) (preconstruction permitting requirements were preempted because otherwise the locality could delay the process indefinitely or deny the carrier the right to construct facilities or conduct operations); *Boston and Maine Corporation and Springfield Terminal Railroad Company—Petition for Declaratory Order*, Docket No. FD 35749, decision served July 19, 2013 (requirements that by their nature could be used to deny a railroad the ability to conduct rail operations are preempted).

A review of the facts relating to this Petition leads to the conclusion that the attempt by Hopedale to prevent GU from constructing additional tracks and facilities at the Chapter 61 Property is categorically preempted. Clearly, GU is a rail carrier providing transportation services subject to the jurisdiction of the STB. GU intends to use the Land for the construction of sidetracks and additional yard tracks and other facilities in order to meet the increased traffic demands that GU has experienced over the last several years and the growth that is expected in the future. The Chapter 61 Property, the tracks and the other facilities constitute "transportation". Consequently, GU is a rail carrier providing rail transportation, and the only remaining question is whether the efforts of Hopedale are preempted.

The Board's discussion and rationale in *GU 2014 Decision* are instructive. In that matter, GU asked the Board to issue a declaratory order to the effect that state and local permitting and preclearance regulations were preempted in connection with GU's construction of additional yard and storage tracks on a 5 acre parcel of property located in the Town of Grafton, Massachusetts. GU acquired the 5 acre parcel, which is located along the right-of-way, in order to provide additional yard and track space to relieve congestion at the interchange between GU

and CSX in North Grafton. The Town of Grafton threatened to seek injunctive relief in order to block the construction of the new yard, arguing not only that local permitting regulations had not been met but also that the construction and use of the property by GU would pose a risk to the town's water supply.

The Board concluded that the regulations and permitting requirements relied upon by the Town of Grafton were categorically preempted in connection with GU's construction and operation of the yard. The Board acknowledged the town's ability to request information from GU concerning the project, so long as such requests did not unreasonably burden interstate commerce or hold up or defeat GU's right to construct and operate the yard. The Board noted that GU had adequately addressed the town's purported concern about potential impacts on the water supply.

As in the earlier matter involving the Town of Grafton, Hopedale is relying on state and local regulations and litigation in order to prevent GU from constructing and operating new tracks and rail facilities. Consequently, Hopedale's actions are categorically preempted.

IV. The Town's Attempt to Use Eminent Domain is Preempted.

By means of its state court action in reliance on Chapter 61, the Town is trying to acquire title to the Chapter 61 Property from GU. This effort is tantamount to an attempted eminent domain taking, which in these circumstances is preempted. Even more clearly, the threat by Hopedale to take the 25 acre parcel, which is not subject to Chapter 61, by eminent domain is preempted.

The Board and courts have decided numerous cases involving attempts by state or local authorities to acquire or use railroad property by means of eminent domain. While certain takings of railroad property would not be preempted if they did not interfere with or impede rail

operations, attempts by state or local authorities to take rail property for another use that would unreasonably burden or interfere with present or future rail use are preempted. *Union Pacific Railroad Company v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011) (a proposed condemnation for a permanent easement over the railroad's right-of-way was preempted); *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) (the proposed use of eminent domain to acquire a 20 foot strip of railroad right-of-way that had the potential to interfere with the storage of materials moved by the rail was preempted); *Norfolk Southern Railway—Petition for Declaratory Order*, Docket No. FD 35196, decision served March 1, 2010 (attempted condemnation of property that the railroad was not actively using was preempted because the proposed condemnation would unreasonably interfere with the railroad's future plans); *14550 Ltd.--Petition for Declaratory Order*, Docket No. FD 35788, decision served June 5, 2014 (claims of adverse possession and a prescriptive easement were preempted).

In order to determine whether a proposed acquisition of rail property by a state or local authority is preempted, the Board undertakes a fact specific analysis as to whether the proposed condemnation would prevent or unduly interfere with railroad operations or interstate commerce. The analysis takes into account not only the railroad's current use of the property but also future plans for use. *Tri-City Railroad Company--Petition for Declaratory Order*, Docket No. FD 35915, decision served September 14, 2016.

Hopedale acknowledges that GU owns the Chapter 61 Property. In order to block GU's use of the property for rail transportation purposes and to acquire the Chapter 61 Property itself, Hopedale has relied on a right of first refusal provided pursuant to Chapter 61. While Hopedale is not attempting to proceed on the basis of an express eminent domain statute, the intended

effect of exercising a right of first refusal to acquire the property owned by GU is tantamount to an effort to use eminent domain.

As demonstrated above, wresting the Chapter 61 Property and the 25 acre parcel not subject to Chapter 61 from GU's ownership would prevent or unduly interfere with rail operations and unreasonably burden interstate commerce. If deprived of ownership and the right to use these properties, GU will be severely handicapped in its ability to meet the demands of its current and anticipated new customers. This is a classic case for the application of preemption to protect rail transportation that is subject to the exclusive jurisdiction of the Board.

V. This Matter is Ripe for Decision by the Board.

It may be anticipated that Hopedale will oppose this Petition by arguing that there is a state law property issue that should be resolved by the Massachusetts court before the Board considers the merits of the Petition. More specifically, Hopedale may contend that there is some question concerning Chapter 61 or GU's acquisition or ownership of the property that needs to be decided under state law prior to any resolution of the preemption issues.

Any such contention by Hopedale should be summarily rejected. Hopedale has admitted that GU is the owner of the Chapter 61 Property. Indeed, the entire premise of the relief requested by Hopedale in the state court, i.e. reliance on Chapter 61 as the basis for an injunction preventing GU from changing the use of the property and specific performance requiring GU to convey the property to Hopedale, is based on GU's ownership and intended use of the property for rail transportation purposes. Hopedale has acknowledged GU's ownership, and the intended change of use by GU to rail transportation is a matter within the exclusive jurisdiction of the Board. It is not a matter of state property law.

The Board should proceed immediately to address the preemption issues even if there may be some question whether the Town has a valid, enforceable right of first refusal. As demonstrated above, the Town admits that GU owns or controls the Chapter 61 Property, and, as the Board knows, the definition of "transportation" includes property and facilities "regardless of ownership or an agreement concerning use". There is an existing controversy that should be resolved now by recognizing that preemption prevents Hopedale from attempting to use Chapter 61, whatever the status of any right of first refusal or any other arguments based on state or local law that Hopedale may advance in order to attempt to deny GU the right to use the property for rail transportation purposes. Indeed, given the Town's approach thus far, further attempts to block GU's use of the property can be anticipated and should be resolved now by the entry of a declaratory order preempting such attempts.

CONCLUSION

For the reasons outlined above, the attempt by the Town to use state law to prevent GU from constructing and using new transportation facilities on the Chapter 61 Property amounts to an attempt to impose a preapproval requirement that is categorically preempted. Furthermore, the Town's effort to convert Chapter 61 into an eminent domain statute to take GU property is also preempted as imposing an unreasonable burden on rail transportation. Consequently, the

Board should grant the Petition and enter a declaratory order to the effect that the actions by Hopedale are preempt.

Respectfully,

/s/James E. Howard

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233
jim@jehowardlaw.com

Attorney for Grafton and
Upton Railroad Company

Dated: November 22, 2020

VERIFICATION

I, Michael R. Milanoski, president of Grafton and Upton Railroad Company, hereby verify under the penalty of perjury that to the best of my knowledge the facts set forth in the foregoing Verified Petition for Declaratory Order are true and correct. Furthermore, I certify that I am qualified and authorized to make such verification on behalf of Grafton and Upton Railroad Company.

Executed this 22nd day of November, 2020.

Michael R. Milanonski

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF
MICHAEL R. MILANONSKI

1. My name is Michael R. Milanoski, and I am the President of Grafton and Upton Railroad Company ("GU"). I have held this position for the last three years. I am familiar with the Petition for Declaratory Order being filed simultaneously on behalf of GU, and I am also familiar with the business and operations of GU and the matters referred to in the Petition and this Verified Statement.

2. GU was incorporated in 1873 in Massachusetts, and it has been in continuous operation since that time. The line of railroad owned by GU extends for approximately 16.5 miles between a connection at North Grafton, Massachusetts with the CSX mainline through Massachusetts and Milford, Massachusetts.

3. Over the last 10 years, GU has invested a substantial amount of capital in order to rehabilitate and upgrade its line. In addition, GU has been very active in promoting and growing its transloading business. There is a substantial demand for transloading services for commodities that can be shipped to Eastern Massachusetts by rail and transloaded into trucks for final delivery. GU has built a transload facility in Upton that handles a variety of chemicals and

other bulk commodities. In addition, GU has built and operates a facility in North Grafton for the delivery of liquid propane by rail and transloading the propane to trucks for distribution. GU also has a small yard in Hopedale, Massachusetts that can handle the transloading of cement, sheet rock and other commodities.

4. As a result of GU's investment and the demand for transloading services, GU's business has grown significantly. In 2010, GU interchanged approximately 200 cars with CSX in North Grafton, and by 2019 the number of carloads interchanged had grown to approximately 3000. Continued steady growth is expected in the future, and the projections projections for 2021 indicate that the number of carloads will be approximately 3500.

5. GU has recently entered into an STB authorized transaction with CSX pursuant to which GU will lease and operate an 8.4 mile CSX line between the terminus of the line owned by GU in Milford and Franklin, Massachusetts, where GU will have a second interchange with CSX. Rail traffic will be received from CSX in Franklin and moved over the newly leased line and the existing GU line to the CSX-GU interchange in North Grafton. This transaction is expected to produce a minimum of an additional 400 new carloads annually of traffic moving over the GU line.

6. The continuous increase in business has required GU to identify parcels of real estate located along the right-of-way in order to expand its facilities. In addition to the expansion of the yards in North Grafton and Upton, GU acquired a five-acre parcel of real estate in North Grafton in order to build additional yard tracks. Even with this expansion, GU has continued to have a pressing need for additional yard space for tracks and facilities.

7. Beginning in 2018, GU entered into discussions with the owner of a 155 acre parcel of real estate located at 364 West Street in Hopedale (the "Town" or "Hopedale"). The property is

zoned industrial, bisected by the GU right-of-way and would make an ideal location in order to expand GU's existing small yard in Hopedale as well as to accommodate additional business, such as the new traffic that will be generated by the lease from CSX of the CSX line Milford and Franklin. The property could be used to build additional yard and sidetracks to be used for switching and car storage. The property could also be used for additional transloading facilities, equipment maintenance and other activities essential to the functioning and support of rail operations generally.

8. Discussions with the owner of the property at 364 West Street did not initially result in an agreement. As an alternative means to acquire the property, GU filed a petition in March, 2019 with the Massachusetts Department of Public Utilities ("DPU") asking for authorization to acquire the property by eminent domain. Massachusetts law permits the DPU to enable railroads that are unable to obtain needed property by private agreement to acquire land that may be reasonably necessary for the proper and convenient operation of the railroad, including the construction of tracks and facilities. The Town intervened in the DPU proceedings and contended that GU had not presented sufficiently detailed plans of its rail transportation use of the property and that it had some concern about the potential effect of rail use on the Town's water supply. Hopedale never suggested in the DPU proceedings that there was any theory by which GU could be prevented from acquiring and using the property for rail transportation purposes.

9. By the summer of 2020, the DPU proceedings had not made any substantive progress due in part to the impact of the coronavirus pandemic. GU and the owner of 364 West Street resumed their discussions concerning a purchase and sale of the property. As of June 27, 2020, the owner of the property, which was a trust, agreed to sell the property to a trust that was

controlled by Jon Delli Priscoli, the sole owner of GU. Approximately 130 acres of the property had been classified as forest land pursuant to Chapter 61 of the Massachusetts statutes (the "Chapter 61 Property"), which provides that the owner should give notice to the Town of the intention to sell the property and convert its use to something other than forestry. The owner gave such notice to the Town, which then had 120 days to exercise a right of first refusal to acquire the Chapter 61 Property. The notice also indicated that the sale would involve a change of use of the property from forestry to rail transportation. Hopedale responded by advising the owner that the notice was defective.

10. Beginning in 2019 and continuing through October, 2020, I engaged in numerous discussions with the two members of the Hopedale Board of Selectmen, the governing body for the Town. We discussed a public-private partnership pursuant to which Hopedale would not exercise any right of first refusal and GU would take various steps to satisfy goals of the Selectmen. Specifically, GU indicated a willingness to convey a portion of the property to Hopedale in order to enable the Town to increase its park land and to pay for infrastructure improvements to the Town's existing park land. GU also agreed to take steps to protect well sites in order to address a concern expressed by the Hopedale Water and Sewer Commission.

11. As the Board is aware, GU has been a party to several proceedings before the Board in which the Board has determined that preemption would preclude actions based on state or local regulations that would interfere with or prevent GU's ability to provide rail transportation. As result of these proceedings, GU is acutely aware of its obligation to comply with reasonable health and safety regulations in connection with projects that have been preempted. GU has made it clear to Hopedale that GU will construct and operate facilities on the 155 acre parcel in compliance with such health and safety regulations and that GU will take reasonable steps, as it

has in Upton and North Grafton, to mitigate concerns expressed by the Town. By the end of September, 2020, however, Hopedale had not agreed to any public-private partnership and had not waived or attempted to exercise any right of first refusal.

12. In light of the absence of progress in the DPU proceedings and the inability to reach any agreement with the Town, GU and the owner of the 155 acre parcel reached an agreement for the purchase and sale of the property. On October 7, 2020, the owner advised Hopedale that it was withdrawing the earlier notice of intent to sell the Chapter 61 Property, which the Town had earlier considered to be ineffective. On October 12, 2020, the owner of the property conveyed the fee interest in the 25 acre portion directly to GU by quitclaim deed. In addition, the owner of 100% of the beneficial interest of the trust assigned the entire beneficial interest in the Chapter 61 Property to GU. In connection with these transactions, Mr. Delli Priscoli and I became the trustees of the trust that owns the Chapter 61 Property. As a result, GU now controls the Chapter 61 Property.

13. On October 28, 2020, the Town filed a complaint in the Land Court Department of the trial court in Massachusetts asking for declaratory and injunctive relief that would, if granted, prevent GU from using the Chapter 61 Property for rail purposes and also required GU to convey the property to Hopedale. As of November 2, 2020, the Town gave notice that it was attempting to exercise a right to purchase the Chapter 61 Property. GU has opposed Hopedale's requested relief and has urged the trial court to allow the Board to decide the preemption question before trying to resolve the issues raised by the Town's complaint. A hearing is scheduled for November 23, 2020.

14. On October 30, 2020 the Selectmen of Hopedale voted to attempt to acquire, by eminent domain, the 25 acre parcel that is owned in fee by GU and not subject to Chapter 61.

There is no apparent basis for Hopedale to seize what is clearly property owned by GU and intended to be used for rail transportation purposes.

15. The inability to use the 155 acre property, including the Chapter 61 Property, for rail transportation purposes would severely hamper GU's ability to meet the demands of rail customers and to continue to provide efficient service. As described above, GU has a critical need to expand its track and rail facilities and the property in Hopedale appears to be the only location along the GU right-of-way that would meet GU's needs. GU remains committed to conducting the construction and operation on the property in accordance with relevant and reasonable health and safety regulations, and GU continues to be hopeful that the Town will decide to resume conversations concerning a public-private partnership.

VERIFICATION

I, Michael R. Milanoski, president of Grafton and Upton Railroad Company, verify under penalty of perjury that the facts set forth in the foregoing Verified Statement are true and correct. Furthermore, I certify that I am qualified and authorized to verify the foregoing document and cause it to be filed.

Executed on November 22, 2020

Michael R. Milanoski

MORDECAI VERIFIED STATEMENT, ATTACHMENT B

Motion to Dismiss Proceeding, F.D. No 36464 (STB entered Feb. 16, 2021).

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36464

GRAFTON AND UPTON RAILROAD COMPANY --
VERIFIED PETITION FOR DECLARATORY ORDER

MOTION TO DISMISS PROCEEDING

Grafton and Upton Railroad Company ("GU") hereby requests the Board to dismiss this proceeding. As explained more fully below, GU and the Town of Hopedale, Massachusetts (the "Town") have engaged in mediation and discussions that have resulted in the resolution of the issues described in the Verified Petition for Declaratory Order filed by GU with the Board on November 23, 2020. These issues include matters raised by the Town in the litigation it filed in the Land Court in Massachusetts and the preemption issues raised by GU in the Verified Petition.

In order to afford GU and the Town time within which to reach an amicable resolution, the Board, at the request of GU, held this proceeding in abeyance pursuant to decisions entered on December 4, 2020 and January 28, 2021. The latter decision required GU to file a further status report on or before February 24, 2021.

Pursuant to a Settlement Agreement dated February 8, 2021, GU and the Town have resolved the issues raised by the Town in the Land Court litigation and by GU in the Verified Petition. In accordance with the Settlement Agreement, the Town and GU have filed a stipulation of dismissal with the Land Court. The Settlement Agreement also requires GU to

request the Board to dismiss this proceeding. Accordingly, the Board is respectfully requested to dismiss the proceeding.

Respectfully,

/s/James E. Howard
James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233
jim@jehowardlaw.com

Attorney for Grafton and
Upton Railroad Company

Dated: February 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2021, I served a copy of the foregoing Motion to Dismiss on counsel for the Town of Hopedale, Massachusetts by email as follows:

Peter F. Durning
Peter M. Vetere
Mackie Shea Durning, PC
20 Park Plaza, Suite 1001
Boston, MA 02116
pdurning@mackieshea.com
pvetere@mackieshea.com

/s/James E. Howard
James E. Howard

MORDECAI VERIFIED STATEMENT, ATTACHMENT C

Verified Petition for Declaratory Order of Grafton and Upton Railroad Company, F.D. No. 36696 at 6 (STB filed Apr. 14, 2023) (Exhibits and Attachments Omitted).

GENTRY LOCKE
Attorneys

John M. Scheib
Scheib@gentrylocke.com
P: (757) 916-3511
F: (540) 983-9400

306456

April 14, 2023

ENTERED
Office of Proceedings
April 14, 2023
Part of
Public Record

VIA ELECTRONIC FILING

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

Re: STB FD 36696- *Grafton and Upton Railroad Company –Petition for Declaratory Order*

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is a request for a declaratory order filed by Grafton and Upton Railroad ("GURR") and a motion for expedited handling. We respectfully request expedited consideration because the Town of Hopedale, Massachusetts, continues to attempt to impede the development that is underway of a rail transportation facility on GURR's property, investments are at stake, GURR is actively discussing arrangements with rail customers, and the law governing this case compels a finding that preemption under 49 U.S.C. 10501 applies.

The sum of $1,400, representing the appropriate fee for this filing, has been tendered electronically via Pay.gov.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

John M. Scheib
Attorney for Grafton
and Upton Railroad Company

FILED
April 14, 2023
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
April 14, 2023
SURFACE
TRANSPORTATION BOARD

23947/4000/11096090v1

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36696

GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER

PETITION OF GRAFTON AND UPTON RAILROAD COMPANY FOR DECLARATORY ORDER

John M. Scheib
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233 office
617-905-6083 mobile
jim@jehowardlaw.com

Attorneys for Grafton
and Upton Railroad Company

Dated: April 14, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36696

GRAFTON AND UPTON RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER

PETITION OF GRAFTON AND UPTON RAILROAD COMPANY FOR DECLARATORY ORDER

I. Introduction

Grafton and Upton Railroad Company ("GURR") hereby petitions the Surface Transportation Board to issue a declaratory order, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, to the effect that the ongoing efforts permanently to preclude or to otherwise impede the use of GURR's property for rail transportation purposes are preempted pursuant to 49 U.S.C. § 10501.[1] Specifically preempted are (1) the attempt of the Town of Hopedale, Massachusetts, ("Town" or "Hopedale") to take by eminent domain GURR's real property at 364 West Street that GURR is currently developing as a transload facility and other rail transportation facilities (collectively, "rail transportation facilities") and (2) efforts by the Hopedale Conservation Commission to attempt to

[1] Separately, GURR has filed a motion for expedited consideration and request for an expedited procedural schedule given the harm GURR is incurring. Expedited consideration is requested to avoid further delay to the completion of the project, which deprives rail customers of the benefits of the rail transportation facilities at issue.

enforce a cease and desist order that would prohibit GURR from developing and operating the rail transportation facilities without preclearance from the Commission.[2]

This is a simple, straightforward case of state and local action being preempted. GURR is a rail carrier. GURR has 198 acres of property that includes 130 acres that the Town of Hopedale seeks to acquire by eminent domain. All 198 acres are essential for the planned development of a rail transportation facility, which for ease of reference will be sometimes referred to as "the project." The Town's continuing efforts to thwart the project by taking GURR's real property or by imposing preclearance requirements through the Hopedale Conservation Commission are preempted by 49 U.S.C. § 10501(b).

As demonstrated below, the law is clear that a municipality may not condemn railroad property for other conflicting uses that would make impossible or unreasonably interfere with a railroad's ability to engage in rail transportation. *See e.g., City of Lincoln—Petition for Declaratory Order*, FD 34425 (STB served Aug. 11, 2004) ("*City of Lincoln*"), *aff'd, City of Lincoln v. Surface Transportation Board*, 414 F.3d 858, 862 (8th Cir. 2005). Furthermore, a local authority, such as the Conservation Commission, may not impose preclearance or permitting requirements that would unduly interfere with rail transportation. *See e.g., Green Mt. R.R. v. Vermont*, 404 F.3d 638 (2nd Cir. 2005)("*Green Mt. R.R.*"); *City of Auburn v. U.S. Gov't*, 154 F.3d 1025 (9th Cir. 1998)("*City of Auburn*").

GURR has worked with the Town in good faith and as a good neighbor for many years, including being open and transparent about various GURR projects, including the rail transportation facilities at 364 West Street. Verified Statement of Jon Delli Priscoli ("Priscoli VS")

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[2] The terms "Town", "Hopedale" and "Commission" will for ease of reference in this Petition sometimes simply be referred to as the "Town" or "Hopedale" where the context demonstrates that that the Town of Hopedale, acting through its Board of Selectmen, and the Hopedale Conservation Commission are together or separately trying to accomplish the same result--blocking GURR from developing and operating the rail transportation facilities on its property.

at ¶¶ 27-29, attached as Exhibit 1. However, the Town's unrelenting attempts to disrupt and interfere with GURR's property and rail transportation facilities has left GURR no choice but to seek protection from the United States District Court for the District of Massachusetts, and now action by the Board, to end the Town's obstruction.

This Petition is before the Board as a result of the United States District Court for the District of Massachusetts ordering GURR "to file a Petition for Declaratory Order with the STB for the purpose of the STB issuing a declaratory order regarding the Town's proposed taking and the Commission's Enforcement Order." *Grafton & Upton Railroad, et al. v. Town of Hopedale, et al.,* Case No. 4:22-cv-40080-ADB (D. Mass. Apr. 3, 2023) ("Decision"), attached as Exhibit 2. The Court has preliminarily enjoined the Town both from recording any notice of taking of any portion of GURR's property at 364 West Street, Hopedale, Massachusetts and from taking any action to enforce the Commission's Enforcement Order. The Court also ordered GURR to file this petition with the Board, and stayed its proceedings pending Board action, retained jurisdiction over the litigation, and stayed its proceeding pending Board action. A declaratory order is appropriate and necessary to assist the Court and to make clear that the Town's continued attempts to use state and local law and regulations to stop the development and operation of legitimate rail transportation facilities are preempted.

II. A Declaratory Order Is Appropriate and Required to Eliminate Controversy

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. There is an actual controversy between GURR and Hopedale concerning Hopedale's attempt to use state eminent domain law and local permitting regulations to preclude the use of approximately 130 acres of GURR's property that is currently being developed for rail transportation facilities to serve rail customers. GURR continues to incur substantial costs and delays to the development of its new rail transloading facility that will support its customers

and promote growth in rail transportation in Massachusetts and the nation. Moreover, the Board should issue the requested declaratory order to assist the United States District Court for the District of Massachusetts, to eliminate the controversy, and to put an end to this long-running saga in which the Town continues to attempt to thwart interstate commerce by rail.

III. Factual Background

GURR is an industrious and entrepreneurial Class III rail carrier that has been in continuous operation to serve customers since its incorporation in 1873. GURR owns and operates a 16.5 mile rail line that runs in a north-south direction between a connection with CSX in North Grafton, Massachusetts, and Milford, Massachusetts. That line bisects the property at issue at 364 West Street in the Town of Hopedale. GURR also operates a CSX-owned 8.4 mile extension of GURR's original line between Milford and Franklin. Priscoli VS at ¶ 3.

GURR has experienced significant freight rail growth in recent years. In 2008, GURR handled approximately 40 rail carloads, but by 2020 the number of cars was approximately 3000 (more than 70 times the volume in 12 years). Priscoli VS at ¶ 5. Since 2008, GURR's year- over-year growth has averaged between ten and fifteen percent per year, and 2022 was no exception as new customers and increased demand with new products will exceed previous years' growth based on known projected volumes for recently added new customers. *Id.*

GURR anticipates continued steady growth in its business, and this projection is consistent with the expectations and estimates of the Commonwealth of Massachusetts. A 2018 State Rail Plan produced by the Massachusetts Department of Transportation projected that by 2040 the rail system in Massachusetts will need to accommodate approximately 19 million more tons of originating freight per year, 25 million more tons of terminating freight and 34 million more tons of rail freight traffic moving within the State. The plan recognizes that a well utilized rail network has many benefits for the state and its residents, including the reduction of greenhouse gases, less

motor vehicle congestion, reduced wear and tear on the highways, travel time savings and economic development. Priscoli VS at 7; *see* 2018 State Rail Plan *available at https://www.mass.gov/files/documents/2018/01/26/2018PubComm_1.pdf.*

Over the last ten years, GURR has invested millions of dollars to meet current and anticipated future business opportunities where GURR competes head-to-head with long-haul trucking, but more is needed. Priscoli VS at ¶ 5-8.

The rail transportation facilities at issue here will help meet the increases in demand. GURR has begun to develop its property at 364 West Street into rail transportation facilities. Priscoli VS at ¶¶ 10-13. All of the track, buildings and other facilities will be controlled and operated by GURR. Priscoli VS at ¶ 18. When completed, the entire facility will be used for rail transloading, temporary storage, services related to transloading or temporary storage, and whatever additional rail activities are necessary or required in order to support the rail business that currently exists and is anticipated in the future, such as repairs to rail related equipment and the construction and operation of switching tracks, storage tracks, yard tracks to relieve congestion and facilitate service. Priscoli VS at 20. GURR has secured private financing that could be in jeopardy as result of the potential actions by the Town and the Commission and the attendant delays caused by these actions. Priscoli VS at ¶ 19.

In addition, GURR has had multiple inquiries from customers who are waiting for GURR to be able to meet their additional needs for new transloading facilities. Priscoli VS at ¶ 23. These customers have needs for transloading services that will present a potential of over 1,000 new rail cars to GURR annually in a wide range of commodities. These new rail transportation facilities will have a positive impact on national supply chain issues that have been adversely affecting the local, state and national economy over the past few years. Priscoli VS at ¶ 5-8, 23. In spite of past delays, GURR had hoped to have this rail facility open by the Spring or Summer of 2023, but now

expects, assuming no further delays, to be able to open its rail transportation facilities at 364 West Street by the Spring or Summer of 2024.

Substantial progress has already been made by GURR in the development of the property. Approximately 102 acres of trees have been cleared, and the initial grading work has commenced so that the construction of sidetracks and other rail facilities can begin. Priscoli VS at ¶ 21 and at Exhibit D (photographs of the site under construction). Efforts that have also already been underway include water exploration and testing in coordination with governmental agencies, including the U.S. Army Corp. of Engineers. Priscoli VS at ¶ 21. Recognizing that the property does not currently have access to public water, GURR has initiated planning and engineering for wells and water treatment systems, including storm waste basins and ensuring sufficient water pressure in order to address any fire suppression issues. *Id.* In short, GURR continues to comply with generally applicable health and safety regulations and cooperate fully with local, state or federal authorities.

Despite all the benefits to rail transportation and the public interest, including increased tax revenues for the Town, the Town continues with its efforts to stop the construction and operation of rail transportation facilities. As demonstrated below, the Town's efforts are contrary to law.

IV. Procedural Background

As the Board is aware, in 2020, the Town attempted to use state and local law in a lawsuit initiated by the Town in state land court in Massachusetts to block GURR's use of the same 130 acre parcel that is the subject of the Town's current attempt and to seize ownership from GURR. In response, GURR filed a petition for a declaratory order with the Board. FD 36464, *Grafton and Upton Railroad Company – Petition for Declaratory Order* (filed November 23, 2020). The Town and GURR settled that lawsuit and the Petition for Declaratory Order in February 2021.

Now, the Town is reneging on the settlement agreement that arose from the state land court action, and in unprecedented speed, has taken steps to take the very same 130-acre parcel by

eminent domain. In July 2022, a Special Town Meeting was convened at which the Town voted to authorize the Selectboard to use eminent domain to take ~130 acres of GURR-owned land at 364 West Street. Priscoli VS at ¶ 14. Within weeks, the Selectboard subsequently voted to take the 130 acres by eminent domain, but has been enjoined by temporary restraining orders and now a preliminary injunction issued by the federal court, from recording the Order of Taking.[3] The ~130 acres that the Town voted to take is a substantial and critical part of GURR's ~198 acres and are needed for the development and operation of rail transportation facilities at 364 West Street. Priscoli VS at ¶ 15-18 & 20.

Concurrently with the Town's attempt to use eminent domain, the Commission issued and has sought to enforce a cease and desist order that would prohibit GURR from developing and operating the rail transportation facility without preclearance from the Commission. The Commission alleges that GURR engaged in development activities "without permit or prior notification to the Commission", and it further alleges that GURR placed fill in certain areas "for which no permit was issued, or notice of exempt work received." Priscoli VS at ¶ 17 and Exhibit C. The Commission then issued a "finding" that GURR acted "without approval," subjecting GURR to substantial fined and penalties. Lastly, it issued an order requiring GURR to file a restoration plan with the Commission on or before October 3, 2022. *Id.*

Faced with the imminent prospect of losing title to its property or the ability to use it for rail transportation facilities due to the cease and desist order of the Commission, GURR was forced to take legal action. GURR filed suit in the United States District Court for the District of Massachusetts on July 18, 2022, and moved on an emergency basis for a temporary restraining order ("TRO") against the Town and the Commission. *See Grafton & Upton Railroad Company et*

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[3] Under the Massachusetts eminent domain statute, G.L.c. 79, title to property is immediately transferred upon the recording of the Order of Taking at the county Registry of Deeds.

al v. Town of Hopedale et al, Docket No. 22-cv-40080MRG. GURR's request for injunctive relief was supported by two affidavits from Michael Milanoski, which are attached hereto as Exhibit 3 and Exhibit 4, which includes at paragraph 28 a map showing the massive scope of the proposed taking. On July 19, 2022, a TRO was granted to restrain the Town from recording an Order of Taking for the property at 364 West Street. The Town and GURR agreed to the entry of an amended temporary restraining order that would maintain the restraining order in effect until the federal court decided GURR's request for preliminary injunction. The TRO remained in effect until the April 3, 2023, issuance of the Decision, which converted it to a Preliminary Injunction.

The United States District Court for the District of Massachusetts issued a memorandum and order on April 3, 2023, in which it found that it had jurisdiction over GURR's preemption claims and found that GURR had established likelihood of success on its preemption claims against the Town and Commission. The court enjoined the Town, its Selectmen, and the Commission from "(1) recording any notice of taking of any portion of GURR's property at 364 West Street, Hopedale, Massachusetts or (2) taking any action to enforce the Commission's Enforcement Order." The Court also ordered GURR to file this petition with the Board, and stayed its proceedings pending Board action. Decision, Exhibit 2.

Notably, the Court found that GURR was likely to succeed on the merits of its argument that the Town and Commission's actions were preempted by 49 U.S.C. § 10501(b). Decision at 20-23. The Court found that "because GURR has plans for developing 364 West Street as a logistics and transloading facility, has already begun to develop the land to support that use, and has invested substantial capital in said development, the property falls under the ICCTA's definition of transportation." Decision at 23.

GURR has been a good neighbor and good corporate citizen – indeed it is the fourth largest tax payer in Town. Priscoli VS at ¶ 27-30. The Town of Hopedale now seeks to condemn property and use its Commission to thwart the development of an important rail transportation facility. By

contrast, GURR has lived up to its obligations and has openly communicated and worked with the Town, which has been noted by the Town repeatedly. Priscoli VS at ¶ 28-29.

The Town of Hopedale knows well that its actions are preempted. It had been advised by its legal counsel as early as 2013 that "local control over railroad operations is significantly limited by federal law, which 'preempts' both state and municipal regulation of rail transportation." Priscoli VS at ¶ 15. Nevertheless, the Town continues to attempt to use prohibited means to frustrate the development and operation of rail transportation facilities.

V. Argument—ICCTA Clearly Preempts the Town of Hopedale's Actions.

GURR seeks a declaratory order that the Town of Hopedale's efforts to use state eminent domain laws to condemn railroad property and the Commission's attempts to use local permitting regulations to frustrate a rail transportation project are preempted by 49 U.S.C. § 10501. Given the Town's history of attempting to thwart legitimate rail projects, GURR respectfully requests the Board to deliver a clear message to the Town that it must discontinue its repeated attempts in violation of 49 U.S.C. § 10501 to stymie GURR's development of much needed rail facilities to move rail commerce and serve the public interest.

a. ICCTA Preemption Is Broad and Applies to State and Local Regulation of Railroad Property.

The Town's attempt to condemn railroad property is precisely the type of state or local activity that, if allowed, thwarts rail transportation and that Congress preempted. The express terms of ICCTA demonstrate that Congress adopted an expansive preemption provision and intended ICCTA to preempt state law broadly. The Act provides, in pertinent part:

> (b) The jurisdiction of the [STB] 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).

Courts interpreting ICCTA have held that its language and legislative history dictate a broad preemptive reach. One Court observed that it "is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." *City of Auburn,*, 154 F.3d at 1030 (quoting *CSX Transp., Inc. v. Georgia Pub, Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga 1996). The Court further explained that "it is clear to the Court that Congress intended the preemptive net of the [ICCTA] to be broad by extending jurisdiction to the STB for anything included within the general and all-inclusive term 'transportation by rail carriers.'" *Id.* at 1582.

GURR is clearly a rail carrier. It is a Class III rail carrier that was incorporated in Massachusetts in 1873 and has been in continuous operation since that time. And the Board has found in the past GURR to be a rail carrier.[4] Moreover, GURR will be the operator of the rail transportation facility on its property. Priscoli VS at ¶ 18.

The real property at issue and the transloading facility under active development at 364 West Street are "transportation" under ICCTA. Congress broadly defined the term "transportation," which expressly includes "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the

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[4] *See e.g., Diana Del Grosso, et al—Petition for Dec. Order, STB Finance Docket No. 35652,* at 2 (Decided July 28, 2017) ("The First Circuit expressly "affirm[ed] the Board's decision that the facility was operated by a 'rail carrier.'"").

movement of passengers or property, or both, by rail". 42 U.S.C. §10102(9). GURR's approximately 198 acres of real property at 364 West Street in question is clearly property. Moreover, transloading and temporary storage have been expressly recognized to constitute "transportation". *Green Mountain R.R.*, 404 F.3d at 642 (holding STB has "wide authority over the transloading and storage facilities undertaken by Green Mountain"); *see also Del Grosso v. STB*, 898 F.3rd 110, 118 (1st Cir.2015) (holding that it is indisputable that intermodal transloading operations and activities involving loading and unloading materials from railcars and temporary storage of materials are part of transportation).[5] Thus, The rail transportation and transloading facilities currently under development on GURR's property that will be operated by GURR are clearly encompassed in the definition of "transportation" and are related to the movement of property by rail.

b. The Taking of GURR's Property Is Preempted, and Taking of GURR's Property Would Prevent or Unreasonably Interfere With Rail Operations.

Courts and the Board have already considered and decided that takings under state eminent domain laws is regulation that is generally preempted by Section 10501(b). Applying that law to the facts here leads to only one conclusion – the Town and Commissions attempts to thwart GURR's development and operation of rail transportation facilities is preempted.

Nothing could be more invasive or a more permanent intrusion on rail property and projects and the preservation of future capacity (in the form of railroad property)[6] than

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[5] *See also e.g.. New York Susquehanna & W. Ry. Corp. v. Jackson, 5*00 F3d 238 (3d Cir. 2007)("transloading qualifies as transportation"); *Del Grosso et al.—Petition for Dec. Order,* FD 35652 (STB served July 28, 2017); *Washington & Idaho Ry.—Petition for Dec. Order*, FD 36017 (STB served March 15, 2017)(rail transload facility can be entitled to preemption).

[6] GURR's rail transportation and transloading facility at 364 West Street is currently under development, and, as described above, the planning, financing, and arrangements with customers for use of the entire property for rail transportation are in place for an orderly transition to full operation. Future transportation plans are equally as important as current use in considering whether the railroad property that is the target of an eminent domain action is rail property entitled

condemnation. "Condemnation can be a form of regulation, and using state eminent domain law to condemn railroad property or facilities for another use that would conflict with the rail use 'is exercising control—the most extreme type of control—over rail transportation as it is defined in [49 U.S.C.] 10102(9).'" *Norfolk S. Ry. Co. and the Alabama Great S. R.R. Co.—Petition for Dec. Order,* FD 35196, at 3 (STB served March 1, 2010) ("*NSR Petition for Dec. Order*") (quoting *Wisconsin Central Ltd. v. City of Marshfield,* 160 F. Supp. 2d 1009, 1013 (W.D. Wisc. 2000) ("The Court holds that condemnation is regulation. . . . The City is impermissibly attempting to subject to state law property that Congress specifically put out of reach"); *see also Union Pac. R.R. Co. v. Chi. Transit Auth.,* Case No. 07-cv-229 (N.D. Ill. Feb. 23, 2009) (N.D. Ill. 2009), *aff'd Union Pac. R.R. Co. v. Chi. Transit Auth*., 647 F.3d 675 (7th Cir. 2011) ("[T]he Court notes that nearly every judicial or STB opinion to have considered the question has concluded that the use of eminent domain power is a preempted form of state regulation."); *City of Lincoln v. STB,* 414 F.3d 858, 862 98th Cir. 2005) ("Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses."). The court in *Buffalo South. R.R. Inc. v. Village of Croton-On-Hudson,* said it succinctly, "there is no question that the Village's intended exercise of its eminent domain power exceeds what is permitted under the ICCTA. The Village is threatening to acquire the entire parcel of land in fee simple." 434 F.Supp.2d 241 (S.D.N.Y. 2006). Courts have similarly held that other attempts to

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to the protection of preemption. Thus, "the Board's practice is to consider both current and future transportation plans in determining whether a railroad has proposed a bona fide rail operation." *NSR Petition for Dec. Order* at fn. 8. *See Riverview Trenton R.R. Co.—Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI,* FD 34040, slip op. at 11 (STB served May 15, 2003), *aff'd, City of Riverview v. STB*, 398 F.3d 434 (6th Cir. 2005) (petition to revoke acquisition and operation exemption denied on grounds that railroad had developed plans for constructing intermodal facility); *Detroit/Wayne County Port Auth, v. ICC,* 59 F.3d 1314 (D.C. Cir. 1995) (recognizing that it is not unusual that, as railroad traffic changes and grows, railroad facilities may need to be upgraded).

take railroad property are also preempted. *See .e.g., Skidmore v. Norfolk South. Ry. Co.,* 1 F.4th 206 (4th Cir. 2002) (state quiet title action preempted); *Jie Ao & Xin Zhou – Petition for Dec. Order*, FD 35539 at *2 (STB decided June 4, 2012) (application of adverse possession of rail property preempted).

As these cases show, the Town's latest gambit of attempting to take approximately 130 acres of GURR's real property through state eminent domain law is clearly preempted, as would any attempt to use state law to prevent GURR from developing and operating rail transportation facilities on the 364 West Street property. As Mr. Milanoski explains and shows, the proposed taking is massive in scope and renders GURR's property of little or no use at all. Milanoski affidavit of July 28, 2022, at paragraph 28. Such a taking by the Town of that acreage would:

- Prevent GURR's from meeting customer needs now and in the future by developing and operating rail transportation facilities at 364 West Street, which would expand rail capacity to promote greater use of and more efficient freight rail transportation. Priscoli VS at 7-8, 23.

- Leave the remainder of GURR's ~198 acre parcel landlocked and of no value. Priscoli VS at 26; Milanoski July 28, 2022 affidavit at paragraph 28.

- Impede and impair GURR's already-underway development of new rail facilities and transloading facilities. Priscoli VS at ¶ 19-20, 25-26; Milanoski July 28, 2022 affidavit at paragraph 22-25.

- Disrupt the work that GURR has already begun for site design and development, which includes clearing and grading approximately 102 acres of the land. Priscoli VS at ¶ 21; Milanoski July 28, 2022 affidavit at paragraph 25.

- Prevent GURR from being ready to use the rail transportation facilities for rail customers as soon as 2024. Priscoli VS at ¶¶ 22 &26.

The law is unequivocal that the Town's attempt to take GURR's property through eminent domain is preempted.[7]

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[7] The case of *City of Girard v. Youngstown Belt Ry. Co.,* 134 Ohio St. 3d 79 (2012) does not help the Town as it is an outlier decision and factually different. The court there found that the taking would not interfere with the current railroad operations based on railroad testimony and found that contemplated future plans involved a non-railroad operator. Here, it is clear that the

c. The Conservation Commission Order Is a Preclearance Regulation that Is Preempted.

The Commission's Enforcement Order entered on July 14, 2022, alleges that GURR performed rail transportation development work without first obtaining a permit pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, and demands that GURR cease and desist and reverse this work. The Enforcement Order is an explicit local preclearance and permitting regulation which is categorically preempted. Moreover, the Enforcement Order intentionally discriminates against interstate commerce by rail, is intended to unreasonably interfere with GURR's rail transportation, and was issued by the Commission as a pretext to aid and abet the Town's true goal of eliminating any rail transportation at 364 West Street.

State and local environmental regulation of railroad activity is preempted pursuant to 49 USC §10501. *See City of Auburn*, 154 F.3d 1025 (preempting state environmental review process). The Board has "repeatedly held that state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted to the extent that they set up legal processes that could frustrate or defeat railroad operations because they would, of necessity, impinge upon the federal regulation of interstate commerce." *N. San Diego Cnty. Transit Dev. Bd. – Petition For Dec. Order*, FD 34111 at (STB served Aug. 19, 2002) (holding California Coastal Commission regulation of construction and operation of rail siding preempted and collecting STB decisions).[8]

Town's proposed taking would render GURR unable to complete its transload facility, would make the remaining GURR property landlocked. In addition, here it is clear that GURR controls the property and would operate the rail transportation facilities that are under development. Priscoli VS at 18, 26.

[8] *See City of Auburn*, 154 F.3d 1025 (ICCTA preempted state and local environmental permitting laws); *Green Mountain*, 404 F.3d 638 (preconstruction permitting of transload facility necessarily preempted by § 10501(b)). *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010)("[a]lthough the Ordinance and Permit commendably seek to enhance public safety, they unreasonably burden rail carriage and thus cannot escape ICCTA preemption under the police

Moreover, these types of permitting and preclearance requirements are categorically preempted and require no fact-finding. Categorical preemption applies where: (1) local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations, and (2) state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines, are a "per se unreasonable interference with interstate commerce." *American Rocky Mountaineer v. Grand Cty.*, 568 F. Supp. 3d 1231 (D.Utah 2021). Categorical preemption applies to state and local regulation in these two categories "regardless of the context or rationale for the [state or local] action." *Id.* As a result, courts and the Board have not needed to take any evidence or delay a finding of preemption in instances of categorical preemption. *Id.* ("A factual assessment is not required for regulations that are categorically preempted.").

The Enforcement Order is preempted because on its face it is a preclearance and permitting action and because it explicitly targets GURR's rail transportation activities. The Commission complains that a handful of actions were done by GURR "without permit or prior notification to the Commission", and it further alleges that GURR did work "for which no permit

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power exception.")*; see also Petition of Norfolk Southern Ry. Co. and Expedited Declaratory Order*, FD 35949 (STB served Feb 16, 2016) (citing *City of Auburn v. United States Gov't,* 154 F.3d 1025, 1031 (9th Cir. 1998) (environmental and land use permitting categorically preempted);*Soo Line R.R. Cp. – Petition for Dec. Order,* FD 35850 (STB served Dec. 22, 2014) (finding preempted p the environmental and wetlands review and permitting requirements of the State and the City are categorically preempted by § 10501(b) in connection with the project to upgrade the Yard); *Desertxpress Enter., LLC – Petition for Declaratory Order,* FD 34914 (STB served June 25, 2007) (holding that rail transportation project not subject to state and local environmental review and land use and other permitting requirements because of the Federal preemption in 49 U.S.C.10501(b)); *California High-Speed Rail Authority – Petition for Declaratory Order,* FD 35861 (STB served Dec. 12, 2014) holding CEQA is categorically preempted by § 10501(b) in connection with the Line because "CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation").

was issued, or notice of exempt work received." Priscoli VS at ¶ 16 and Exhibit C. The Commission then issued a "finding" that GURR acted "without approval." Lastly, it issued an order requiring GURR to file a "restoration plan" with the Conservation Commission on or before October 3, 2022. *Id.* The Enforcement Order is explicitly a preclearance and permitting regulation because it asserts that GURR acted without a permit or prior approval from the Commission.

The Enforcement Order directly targets GURR's rail transportation activities. The Commission alleges that GURR violated state law by constructing a bridge "to consist of rail ties, then three large boards capable of supporting vehicle traffic…" *Id.* It also complains of nonspecific "work," "excavation activities," and "removal of vegetation." *Id.* All of these alleged violations fit within the ICCTA's definition of "transportation" because they are related to GURR's effort to build a railroad bridge, side tracks, and transloading facilities on GURR's real property. *See e.g., Griffioen v. Cedar Rapids & Iowa City Ry.* Co., 914 N.W.2d 273, 280 (Iowa 2018). GURR's excavation and other activities are encompassed in the definition because they occur on GURR's property and are necessary steps to construction of the rail "facility" and "yard," which are related to the movement of property by rail. 49 U.S.C.S. § 10102(9). Ordering GURR to cease and desist and reverse these activities would have the effect of denying GURR the ability to conduct some part of developing and operating rail transportation facilities and is therefore categorically preempted.

Further, the Enforcement Order (which was served on the same day – July 14, 2022 – that the Town's Selectboard noticed a meeting for July 19, 2022, at which it intended to vote to take GURR's property by eminent domain) is a transparently pretextual effort to aid and abet the

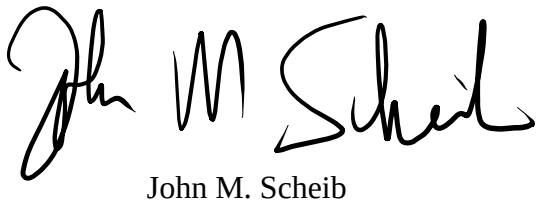
planned taking and prevent further rail transportation development work on GURR's property. Priscoli VS at ¶ 17.[9]

Preemption is not a close question because the Commission's Enforcement Order seeks to impose a permitting and preclearance scheme, seeks to force GURR to stop construction of a rail transportation facilities, requires GURR to reverse and restore its site work, including areas it has prepared for rail tracks and its rail bridge, and unreasonably interferes with GURR's transportation by rail.

VI. Conclusion

GURR has worked with the Town and kept them informed of GURR activities as a matter of course. Priscoli VS at ¶ 28-30. However, GURR's entrepreneurial efforts to develop rail facilities to serve customers in Massachusetts continue to face renewed efforts by the Town in ways that are clearly preempted by Section 10501. To protect rail transportation, GURR respectfully requests that the Board issue a Declaratory Order that the Town's latest efforts – to take by eminent domain the approximately 130 acres of GURR's real property at 364 West Street or to use its Commission to frustrate the project by application of preclearance regulations – are preempted.

Respectfully submitted,



John M. Scheib
Gentry Locke Attorneys

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[9] The court in *Vermont Ry. v. Town of Shelburne*, found preempted a local "Ordinance Regulating the Storage, Handling and Distribution of Hazardous Substances" through which a town sought to impose daily fines on a railway for alleged violations of salt storage and release restrictions. 287 F. Supp. 3d 493, 494-495 (D. Vt. 2017) ("*Vermont Ry*."). The court noted that the "timing of [the ordinance's] enactment, the focus and thresholds included in it, and the severe penalties permitted by it all point toward discrimination against the Railway." *Id.* at 500.

101 West Main Street
Norfolk, VA 23510
757-916-3511

James E. Howard
57 Via Buena Vista
Monterey, CA 93940
831-324-0233 office
617-905-6083 mobile
jim@jehowardlaw.com

Attorneys for Grafton
and Upton Railroad Company

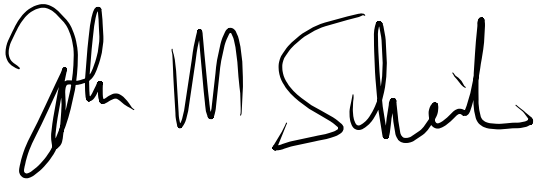
Dated: April 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have served by email a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows:

DAVID S. MACKEY
ANDERSON KREIGER
50 Milk Street, 21st Floor
Boston, MA 02109
dmackey@andersonkreiger.com
T: 617.621.6531

on this 14th day of April, 2023.



John M. Scheib
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511

Attorney for Grafton
and Upton Railroad Company

MORDECAI VERIFIED STATEMENT, ATTACHMENT D

Order of the Massachusetts Land Court (Mar. 27, 2024) (Highlight Added)

Order of the Massachusetts Land Court, March 27, 2024 (Highlighting Added)

From: Jennifer E Noonan <jennifer.noonan@jud.state.ma.us>
Sent: Wednesday, March 27, 2024 9:42 AM
To: Don Keavany <dkeavany@chwmlaw.com>; Harley Racer <hracer@luriefriedman.com>
Cc: dave mackey (dmackey@andersonkreiger.com) <dmackey@AndersonKreiger.com>; sgrammel@andersonkreiger.com; Andrew DiCenzo <adicenzo@chwmlaw.com>
Subject: RE: Town of Hopedale et al v. Grafton & Upton Railroad Company et al; 20 MISC 00467 (DRR)

Good morning, counsel.

Please be advised that the following language has been added to our docket:

March 25, 2024. "Hearing on motion to vacate dismissal and motion to dismiss held in person. Attorney David Mackey and Sean Grammel appeared on behalf of the Town of Hopedale ("Town"), Attorneys Donald Keavany and Andrew DiCenzo appeared on behalf defendants, and Attorneys Harley Racer and David Lurie appeared on behalf of the intervenors, the Hopedale Citizens (the "Citizens"). In addition to the filings listed in the docket of December 12, 2023, Court is in receipt of (1) Hopedale Citizens' Post-Remand Reply Memorandum in Support of their Motion to Vacate Stipulation of Dismissal; (2) Hopedale's Reply in Support of its Renewed Motion to Vacate Stipulation of Dismissal; (3) Sur-Reply of Grafton & Upton Railroad Company and One Hundred Forty Realty Trust in Opposition to the Town of Hopedale's Motion to Vacate Stipulation of Dismissal; (4) Sur Reply of Grafton & Upton Railroad Company and One Hundred Forty Realty Trust in Opposition to the Intervener-Plaintiffs' Motion to Vacate Stipulation of Dismissal; (5) Amended Verified Complaint of Intervenor-Plaintiffs Elizabeth Reilly and Ten Citizens of Hopedale; (6) Hopedale's Answer to the Amended Verified Complaint of Intervenor-Plaintiffs Elizabeth Reilly and Ten Citizens of Hopedale; (7) Motion of Grafton & Upton Railroad Company and One Hundred Forty Realty Trust to Dismiss Interveners' Amended Verified Complaint pursuant to Mass. R. Civ. P 12(b)(1) and 12(b)(6) and the memorandum, appendix, and statement of facts in support thereof; (8) Hopedale Citizens' Opposition to Motion of Grafton & Upton Railroad Company and One Hundred Realty Trust to Dismiss Intervenors' Amended Verified Complaint and the appendix in support thereof; (9) Hopedale Citizens' Response to Statement of Facts in Support of Motion of Grafton & Upton Railroad Company and One Hundred Realty Trust to Dismiss Intervenor's Amended Verified Complaint; (10) Reply of Grafton & Upton Railroad Company and One Hundred Forty Realty Trust in Support of Motion to Dismiss Verified Amended Complaint; and (11) Hopedale Citizens' Sur-Reply in Opposition to Motion of Grafton & Upton Railroad Company and One Hundred Realty Trust to Dismiss Intervenors' Amended Complaint.
THE TOWN'S AND CITIZENS' MOTIONS TO VACATE STIPULATION OF DISMISSAL.

Following colloquy, the Town's and Citizen's motions to vacate the stipulation of dismissal are ALLOWED for the reasons stated on the record and as follows:

In January 2022, this court denied a motion by the Town to vacate the Stipulation of Dismissal with prejudice (the "Stipulation"), that had been filed by the Town and the Defendants after they entered into a settlement agreement. At that time, I concluded that exceptional circumstances were not present to warrant vacatur. Since that time, circumstances have changed, and these motions are now before the court after remand from the Appeals Court, as discussed below. Both the Town and the intervenor Citizens seek to vacate the Stipulation.

After the Citizens prevailed (in part) in a related Worcester Superior Court case (Case No. 2185CV00238), the Appeals Court considered an appeal in that case, as well as the Citizens' appeal of this court's denial of their motion to intervene in this case and remanded this matter for further proceedings consistent with the Appeals Court Decision, including consideration of the Citizens' motion to join the Town's motion to vacate the Stipulation. Reilly v. Hopedale, 102 Mass App. Ct. 367, 385 (2023) (the "Appeals Court Decision"). Thereafter, with the benefit of guidance from the Appeals Court, on October 13, 2023, I allowed the Citizens' motion to intervene and now consider motions by the Citizens and the Town to vacate the Stipulation, pursuant to Mass. R. Civ P. 60(b)(6).

Rule 60(b) states that a court may relieve a party from a final judgment, order or proceeding in certain enumerated circumstances, the last of which is a catch-all, specifically for "any other reasons justifying relief from the operation of the judgment." Rule 60(b) further states such a motion shall be made within a reasonable time. A motion under Rules 60(b) is addressed to the trial judge's discretion. See Reporter's Notes – 1973, citing Farmers Cooperative Elevator Assoc. v. Strand, 382 F.2d. 228 (8th Cir. 1967). The court has the power to vacate judgment whenever such action is appropriate to accomplish justice. Id., citing Klapprott v. United States, 335 U.S. 601, 69 S. Ct. 384 (1949) and Pierra v. Bemuth, Lembueke Co., 20 F.R.D11 (S.N.D.Y 1956). In deciding a Rule 60(b)(6) motion, "the judge may consider whether the movant has a 'meritorious claim or defense,' 'whether extraordinary circumstances warrant relief,' and whether granting the motion would affect 'the substantial rights of the parties.'" Adoption of Yvonne, 99 Mass. App. Ct. 574, 583-584 (1981), quoting Parrell v. Keenan, 289 Mass. 809, 506 (1983); see Bowers v. Board of Appeals, 16 Mass. App. Ct. 29, 33 (1983). Further, "[a]lthough the rule 'vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,'" Id., quoting Klapprott, supra, at 615, relief under rule 60(b)(6) requires a showing of "extraordinary circumstances." Id. (citations omitted).

As discussed below, after hearing and briefing by the parties, and with the benefit of guidance from the Appeals Court, I conclude that the Appeals Court Decision, together with and affirming the Superior Court Decision constitute compelling and extraordinary circumstances that warrant vacating the Stipulation. As explained in the Appeals Court Decision, the Citizens' right to protect the Superior Court judgment is independent of the Town, the Citizens having obtained that right through the exercise of their statutory rights as ten or more taxpayers under G. L. c. 40, § 53. "The citizens' entitlement to enforce that favorable judgment did not depend on whether the Town had the authority to stipulate to the dismissal of its own claims in the Land Court. The stipulation of dismissal did not – and could not – extinguish the citizens' claims or judgment under G. L. c. 40, § 53. See Jarosz v. Palmer, 436 Mass. 526, 529 (2002) (a stipulation of dismissal with prejudice is not the equivalent of a final judgment on the merits for the purpose of issue preclusion)." Reilly, 102 Mass. App. Ct. at 382.

The Appeals Court also provided further observations for the court's consideration on remand. Specifically:

"[W]e recognize 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 citizens have not been given an opportunity to be heard. On remand, the Land Court judge should keep in mind that the Superior Court has determined some of the substantive issues on the merits, that the citizens are entitled to the benefit of those favorable rulings, that the rulings are binding on the town, the railroad, and the trust (all of whom were parties in the Superior Court case and have not appealed), and that those rulings are entitled to full respect and force. The Land Court judge should ensure that her rulings are not inconsistent or unfair in light of rulings that have been made in a sister department of the trial court. These considerations will come into special play when deciding the citizens' motion to vacate the stipulation of dismissal."

Id. at 385.

I am mindful of this guidance, just as I was when allowing the Citizens' motion to intervene after remand, which is now law of the case." City Coal Co. of Springfield v. Noonan, 434 Mass. 709, 712 (2001), citing Lunn & Sweet Co. v. Wolfman, 268 Mass. 345, 349 (1929) ("[R]emand instructions became the governing 'law of the case' and should not have been reconsidered by the remand judge"); Williams v. Bd. of Appeals of Norwell, 100 Mass. App. Ct. 1102 (2021) (Rule 1:28 unpublished opinion), quoting City of Coal, supra, at 712. The doctrine of the law of the case provides that, "once a final judgment is entered, the court may not rule differently on 'an issue or a question of fact or law.'" Kendall v. Hyannis Restorations, Inc., 81 Mass. App. Ct. 1118 (2012) (Rule 1:28 unpublished opinion), quoting Catalano v. First Essex Savings Bank, 37 Mass. App. Ct. 377, 384, 639 N.E.2d 1113 (1994).

In order to ensure the judgment and rulings in the Superior Court case are given full respect and force, I review those rulings. As quoted in the Appeals Court Decision, the Superior Court judge explained the meaning and consequences of her ruling as follows:

"[A]lthough the terms of the [s]ettlement [a]greement are legal (including the [b]oard's agreement to waive the [o]ption), the [b]oard exceeded its authority when it unilaterally entered into that agreement without [t]own [m]eeting approval 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."

Reilly, 102 Mass. App. Ct. at 374.

As noted by the Appeals Court, this aspect of the Superior Court judgment was not appealed. Id. Thus, the Citizens' right to protect the Superior Court judgment encompasses the conclusion that the settlement agreement was not effective. This is all the more so since town meeting rejected a request to fund the purchase of land as provided in the settlement agreement in March 2022.

As noted above, Rule 60(b)(6) is a residual clause for those unique circumstances which do not fall within Rule 60(b)(1)-(5). It permits a court to set aside a final judgment for "any other reason justifying relief from the operation of the judgment." Mass. R. Civ. P. 60 (b) (6). Relief under Rule 60(b)(6) "requires a showing of 'extraordinary' circumstances." Bowers v. Board of Appeals, 16 Mass. App. Ct. at 33, quoting Ackermann v. United States, 340 U.S. 193, 202 (1950).

The reasoning of Judge Kass in Bowers v. Board of Appeals, 16 Mass. App. Ct. 29 (1983), counsels that the circumstances now before the court are precisely the type of extraordinary circumstances that warrant vacating the Stipulation. In that case, several abutters challenged a proposed sewage dumping system in the town of Marshfield pursuant to Chapter 40A, § 17. The board of selectmen intervened, and the parties entered into a settlement agreement whereby the town would cease using six lot adjoining lots the site of the proposed sewage system as a public parking area. An agreement for judgment documented the agreed upon terms and the court entered judgment in accordance with the agreement. That settlement was not popular among the townsfolk. Id. at 31 ("Few events so stir the civic consciousness as the removal of convenient parking.") Several years later, when a newly constituted board of selectmen was elected, they moved to vacate the judgment. In Bowers, the Appeals Court vacated the portion of the judgment which prohibited parking on the adjoining six lots pursuant to Rule 60(b)(6) because "the perpetual encumbrance imposed upon the six lots by the then selectmen was an action which they were powerless to take. The power to alienate and dispose of real estate lies with the inhabitants of the town acting at town meeting." Id. at 32, citing G. L. c. 40, § 3; Ballantine v. Falmouth, 363 Mass. 760, 766 (1973); and Dennis v. Lighthouse Inn, Inc., 6 Mass. App. Ct. 970 (1979).

As Judge Kass explained, "[w]hat makes the instant case exceptional is that a public authority, the selectmen, offered as their part of an agreement for judgment a restriction that they lacked the power to impose." Id. at 33. Further:

"Were it otherwise public officials could bind their governmental agencies to unlawful conduct by ready acquiescence in an agreement for judgment and, thus, circumvent the restrictions on their powers. The same officials, or as is the case here, their successors, face the dilemma of acting in excess of their powers or exposing themselves to a judgment of contempt. In those unusual circumstances, resort may be had to rule 60(b)(6)." Id. at 34 (citations omitted).

In this context, now that it has been established with finality that the settlement agreement between the Town and the Defendants is ineffective, the Hopedale circumstances are coincident with the exceptional circumstances discussed in Bowers. Just like the Board of Selectmen in Bowers, here the Town lacked authority to enter into the Settlement Agreement without the ratification of the town meeting. Since the Town's motion to vacate was last before this court,

the Appeals Court has affirmed this Superior Court ruling. That ruling is binding on not just the Citizens, but also the Town and the Defendants. Id. at 385. The Appeals Court Decision and remand instructions further binds this court as law of the case. These extraordinary circumstances warrant vacating the Stipulation. Doing so is consistent with the guidance of the Appeals Court Decision and will ensure this court "not make toothless the judgment and rulings in the Superior Court case." Id.

DEFENDANTS MOTION TO DISMISS THE CITIZENS' AMENDED COMPLAINT.

I now turn to the Defendant's motion to dismiss the Citizens' Amended Complaint. That Amended Complaint includes three counts: (I) a declaratory judgment under C. 231, §§ 1 and 5, to enforce the Superior Ct judgment and vacate the Stipulation of Dismissal in this LC case; (II) a declaratory judgment under C. 231, §§ 1 and 5, to enforce the Superior Ct judgment and enjoin the Defendants from further land clearing of the Forestland; and (III) a declaratory judgment under G.L. c. 231, §§ 1 and 5, to enforce the Superior Ct judgment, and declaring that the Defendants' harm to the Forestland requires a reduction in the G.L. c. 61 purchase price and restoration of the Forestland. The Defendants seek to dismiss that Amended Complaint for lack of standing under Mass. R. Civ. P. 12(b)(1) and for failure to state a claim under which relief can be granted under Mass. R. Civ. P. 12(b)(6).

I concur with the Defendants that the declaratory judgment statute, G.L. c. 231A does not confer standing to pursue relief without an underlying cognizable basis for that relief. See Reilly, 102 Mass. App. Ct. at 379, quoting Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 607 (2017) ("[T]he citizens have standing under the declaratory judgment statute only if they 'can allege an injury within the area of concern or the statutory or regulatory scheme under which the injurious action occurred.'"). The Appeals Court Decision also makes clear that that the Citizens do not have standing under either Chapter 61, the right of first refusal statute, or under c. 40, § 53. Id. at 378-379. The Superior Court dismissed Count II of the Superior Court complaint, which dismissal was affirmed. As stated in the Appeals Court Decision: "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 G.L. c. 40, § 53, in order to challenge a town's entering into a contract or settlement." Id. at 378 (citations omitted). Among the relief requested by the Citizens in Count II and dismissed was a declaration that that the Defendants be prevented from alienating the Forestland or converting any of it from its current use. However, "[n]one 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 to pursue them." Id. Further, "[i]ndividual taxpayers whose land is not subject to G.L. c. 61 have been given no rights under the statutory scheme." Id. at 379. That requested relief is akin to that now sought by the Citizens in the Amended Complaint.

However, as the Appeals Court made clear, the Citizens did obtain valuable rights as a result of the Superior Court Judgment. This court is mindful of the Appeals Court's guidance that "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." Id. at 385. I am thus mindful of the favorable Superior Court ruling that the settlement agreement was ineffective and that this

ruling is binding on the town, the Defendants and the Citizens. In this context I consider the three counts of the Amended Complaint, each of which would fail for lack of an underlying cognizable statutory basis were it not for the Superior Court Judgment. Count I seeks declaratory judgment under C. 231, §§ 1 and 5, to enforce the Superior Ct judgment and vacate the Stipulation of Dismissal in this case. The relief sought in Count I has been addressed by today's allowance of the Citizens' and the Town's motions to vacate the stipulation of dismissal. In so allowing the Citizens' motion I give effect to the Appeals Court's instruction that the Citizens' right to protect the Superior Court judgment was obtained through the Citizens independent exercise of their statutory rights as ten or more taxpayers under G. L. c. 40, § 53. This court having today vacated the Stipulation of Dismissal, the Town now stands ready and willing to advance its claim to enforce the G.L. c. 61 right of first refusal. Count I of the Amended Complaint is dismissed as moot. The Town has confirmed its intention to do so.

Counts II and II, however, seek relief beyond that contemplated by the Superior Court Judgment. While I note that the Citizens allege practical concerns that the Forestland has been damaged and that the Chapter 61 price for the Forestland should be reduced because of this alleged damage, I find no basis in the Superior Court Judgment or the Appeals Court Decision to expand the Citizens' rights to relief to encompass that sought by Counts II and III of the Amended Complaint. Accordingly, Counts II and III are dismissed for lack of standing and for failure to state a claim upon which relief can be granted. In the future, it may be that the Town will fall short of protecting its right of first refusal in a way that will satisfy the Citizens. For the moment, however, the right to seek to enforce the right of first refusal lies with the Town, and the Town has indicated that intends to amend its complaint to encompass the types of remedies the Citizens wish to seek. If the Town fails to adequately assert its rights, the Citizens will no doubt seek to intervene again, in which case I will remain mindful of the Appeals Court guidance. The Citizens may also seek post-Judgment relief in the Superior Court case. Those matters are not now before the court, and it is now only speculative that the Citizens participation will be required considering the absence of an independent statutory right for the Citizens to pursue.

CASE MANAGEMENT MATTERS.

Following argument and by April 22, 2024, the Town to file an amended complaint. Status conference scheduled for July 16, 2024, at 10:00 A.M, with parties to file a joint status report on July 9, 2024, to include a proposed scheduling order. Court to consider any filings from the Citizens in the nature of a motion to reconsider." (Rubin, J.)

Thank you.

Jennifer Noonan
Sessions Clerk to the Hon. Diane R. Rubin
Land Court
3 Pemberton Square
Room 507
Boston, MA 02108
Phone: 617-788-7513

NOTICE:

ANNOUNCEMENT: As of May 1, 2024, attorney eFiling in Miscellaneous and Permit Session cases is mandatory. Unless an exemption applies, attorneys will no longer be permitted to file documents in MISC or PS cases by paper at the Land Court Recorder's Office or via mail.

https://www.mass.gov/guides/efiling-in-the-land-court