

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 36398

BROOKHAVEN RAIL LLC
— CONSTRUCTION AND OPERATION EXEMPTION —
IN SUFFOLK COUNTY, NEW YORK

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

Robert A. Wimbish
Thomas J. Litwiler
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

**ATTORNEYS FOR SILLS ROAD REALTY
LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN
RAIL FREIGHT SERVICES LLC**

Dated: July 15, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

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— CONSTRUCTION AND OPERATION EXEMPTION —
IN SUFFOLK COUNTY, NEW YORK

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

Sills Road Realty LLC (“SRR”), Brookhaven Terminal Operations LLC (“BTO”), and Brookhaven Rail Freight Services LLC (“BRFS”) (collectively, the “Sills Parties”)¹ hereby respond to the Railroad Line Construction Petition for Exemption (the “Petition”) filed in this docket by Brookhaven Rail LLC on June 25, 2020. According to the Petition, BHR seeks Surface Transportation Board (“Board”) authorization to construct and operate roughly 23,680 feet of railroad line (the “Line”), which is intended for the foreseeable future to serve a planned “solid waste rail transfer facility” integral to the project and proposed to be located on what BHR has described as Parcel D. BHR has indicated that it will need to secure a land-use-exemption permit under 49 U.S.C. §10909 to enable it to construct and operate the waste transfer facility, and has stated that it would accompany a request for such relief with the Petition (contemplating concurrent Board consideration of this Petition and a corresponding Section 10909 proceeding), but, to date, no such request for Board action has been filed.

For the reasons discussed below, the Petition should be rejected as premature, incomplete, and materially misleading, among other reasons. Should the Board accept the Petition, it should nevertheless hold this proceeding in abeyance subject to – (1) extensive

¹ SRR is the majority controlling owner of BTO. BTO, in turn, owns BRFS.

supplementation (or re-filing) of the Petition to clarify and address issues raised herein; (2) the filing of a formal request for a Board issued land-use-exemption permit for a solid waste rail transfer facility; (3) full discussion of the project's ramifications on past and present legal proceedings in New York (including the 2016 Settlement, discussed below, arising therefrom); and (4) an explanation of whether or under what circumstances BHR would secure sufficient legal rights apart from this proceeding to construct and operate railroad lines upon Parcel D.

BACKGROUND

This Petition emerges as the latest in a series of complex and contested proceedings before the Board involving the development and operation of railroad lines within parcels of land located in Brookhaven, New York. As the record reflects, the present railroad construction proceeding involves the development of one of four roughly interconnected parcels of land known generally as Parcels A, B, C and D, which, at least until the present Petition, were intended, collectively, to be developed as integral components of a railroad terminal operation known generally as the Brookhaven Rail Terminal ("BRT"). Parcel A is roughly 30 acres, and is the only part of the BRT to possess railroad lines supporting active railroad service. Parcels B and C were the subject of the a fairly recent declaratory order proceeding,² in which the Board concluded, based upon the evidence presented, that the track proposed to be constructed and operated on those parcels as part of an expanded BRT would be ancillary to BHR's Board-authorized operations on Parcel A, and, as such, could be constructed and operated over without the need for advance Board authorization. Although the Board observed in *Brookhaven Declaratory Order* that the petitioners revealed plans to expand BRT track construction and

² *Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order*, FD 35819 (STB served Aug. 30, 2016) ("*Brookhaven Declaratory Order*").

operations to Parcel D, the Board did not rule on the regulatory status of the track that could be constructed there.

The Sills Parties' interest in this proceeding stems from its ownership or control of Parcels A through C, and its plans for the comprehensive development of Parcels A through D as a railroad terminal facility known as the BRT, including the lines that are currently located on Parcel A. Their collective interest also arises out of the 2016 Settlement, and related Negative Declaration issued by the Town of Brookhaven. As parties to the 2016 Settlement, the Sills Parties intend to see BRT development occur in adherence to that agreement, and oppose any attempts to repudiate or deviate from its terms and conditions. BHR's Petition proposes a railroad access and development plan not contemplated or permitted by the 2016 Settlement.

BHR is currently the Board-authorized rail common carrier operating within the extant portion of the BRT located in Parcel A. BHR is the successor to US Rail Corporation, the entity that originally had obtained Board authorization for the construction of, and operations over, the Parcel A trackage. BHR does not own Parcel A or the tracks located on it – SRR owns both. SRR also owns Parcel C and has a long-term lease for Parcel B. BHR operates within the BRT pursuant to an operating agreement ("Operating Agreement") with BRFS.

BHR recently came under the control of Shamrock Rail, LLC ("Shamrock"), a subsidiary of Winters Brothers Waste Systems of Long Island, LLC ("Winters"). The Operating Agreement provides that in the event of a sale of all or substantially all of the assets of BHR or the sale or other transfer of 70% or more of the membership interests of BHR, then BRFS has the right to terminate the Operating Agreement and no termination payment is required to be made to BHR in such event. Accordingly, the transfer of control of BHR to Shamrock allows BRFS to terminate the Operating Agreement without any termination payment being due. BHR has

acknowledged the clear and unequivocal provisions in the Operating Agreement which allows BRFS to terminate the Operating Agreement in general, and in certain circumstances without the requirement of any termination payment, but BHR has claimed that the pertinent provisions are preempted under 49 U.S.C. § 10501(b). See Exhibit A (letter dated May 21, 2020 to BRFS, and BRFS reply letter, dated May 27, 2020). To date, SRR has not pursued enforcement of its termination rights under the Operating Agreement, and has not initiated action intended to have the Board remove its jurisdiction over BHR’s common carrier operations within the BRT.

ARGUMENT

Although BHR has correctly articulated the legal standard for the authorization of a construction petition for exemption under 49 U.S.C. § 10502, it is also the case that BHR must present a complete and fully-formed petition – one that correctly and accurately conveys the facts, demonstrates that business and contractual prerequisites to the transaction have been met or will soon be completed, and one that is not contingent upon the resolution of issues contested in other venues.³ As the Board has stated before: “The exemption process of 49 U.S.C. §

³ *The Great Walton Railroad Company – Petition for Declaratory Order*, AB 1242 (Sub-No. 1) (STB served Jun. 9, 2020) (Board action on the question of whether or not a railroad could reconstruct ancillary track on a parcel of land was premature in light of ongoing court litigation which might establish that the railroad lacked sufficient contract rights to construct the track); *Tongue River Railroad Company, Inc. – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties, Mont.*, FD 30186 (STB served Apr. 26, 2016) (“*Tongue River*”) (dismissing pending railroad line construction proceeding based upon evidence showing that preconditions for construction of the subject railroad might not be achieved); *Missouri Pacific Railroad Company – Abandonment Exemption – In Morris and Dickinson Counties, Kan.*, AB 3 (Sub-No. 121X) (STB served Mar. 4, 2013) (a request for Board action that turns on active dispute over land use issues is premature – such matters should first be adjudicated and resolved in the appropriate court), *ABC&D Recycling, Inc. – Lease and Operation Exemption – a Line of Railroad in Ware, Mass.*, FD 35397 (STB served Jan. 20, 2011), 5 (a filing that gives the “appearance of an entity positioned to commence common carrier operations” but that reveals considerable actual impediments that appear to have been withheld, particularly as bears on issues involving 49 U.S.C. § 10909, may be rejected); *Swanson Rail Transfer LP – Operation Exemption – Olive Investors*, FD 35376 (STB served May 28, 2010) (filings before the Board are

10502, which is designed to minimize regulatory burdens, provides applicants the opportunity to utilize abbreviated entry or exit licensing procedures in appropriate circumstances. However, the Board will not grant an exemption for a specific transaction unless the information provided is sufficient for the Board to find that an exemption is appropriate. It is incumbent upon applicants to provide the Board with the information necessary for an informed decision.” *Union Pacific Railroad Company, et al. – Acquisition and Discontinuance of Service Exemption – In Council Bluffs, Iowa*, FD 35220 (STB served Sep. 22, 2010), 4.

Yet, BHR’s Petition, when considered in its proper context, is incomplete and unsuited for Board action. It is telling that, in filing an underdeveloped case for construction, BHR seeks to deviate from longstanding agency practice and precedent by requesting a conditional determination on the merits, suggesting that BHR hopes by its maneuvers and through its haste to overcome existing legal obstacles to the sale of Parcel D and other barriers to its desired plans. The purpose of the construction is to facilitate the location and operation of a solid waste rail transfer facility within Parcel D, and yet BHR has not filed for a Board-issued land-use-exemption permit under 49 U.S.C. § 10909 and the corresponding Board regulations at 49 C.F.R. § 1155 subpart C, despite acknowledging that such a permit will be necessary. Finally, BHR badly mischaracterizes its ongoing dialogue with other project stakeholders, including the Town of Brookhaven, the State of New York, the Sills Parties and the current litigation before the U.S. District Court for the Eastern District of New York and the New York State Supreme Court, Suffolk County, in a blatant attempt to short-circuit the Board’s environmental analysis for this project.

incomplete if elements of the filing are ambiguous or raise a number of unanswered questions concerning the parties’ ability to enter into the proposed transaction).

I. The Petition Is Incomplete

BHR's proposed Parcel D railroad line construction is intended to facilitate the concurrent development and operation of a solid waste rail transfer facility. The Petition states that "BHR is accompanying this Petition with a Petition for Exemption from the full requirements of 49 U.S.C. § 10909 and 49 C.F.R. Part 1155 in order to obtain an exemption from a local land use and zoning law *that would otherwise prevent such a facility from being constructed on Parcel D.*" Petition at 5 (emphasis added). Setting aside for the moment whether Section 10909 permits for the filing of an individual petition for exemption under 49 U.S.C. § 10502 (or what such a "petition for exemption" proceeding would look like), the foregoing passage establishes that BHR *will* need a land-use-exemption permit to be in a position to construct the waste transfer facility. A perusal of environmental materials posted to the Board's website indicates an uninitiated FD 36399 proceeding attributed to BHR (and perhaps reserved for Section 10909 purposes), but no such "Petition for Exemption from the full requirements of 49 U.S.C. § 10909 and 49 C.F.R. Part 1155" – or anything like it – has been filed to date.

If a Section 10909 proceeding is integral to the Parcel D railroad construction project at hand, then the absence to this point of the presumed "accompanying" petition shows that BHR is unprepared to move ahead with a Board-initiated proceeding. Indeed, barring a Board-issued land-use-exemption permit, Board action on the present BHR Petition, particularly under BHR's request for expedited consideration, would be a waste of time and agency resources. Whatever the reason for the missing solid waste rail transfer facility petition for exemption, the Board must not act on a piecemeal basis to examine and potentially authorize such a complex and issues-sensitive project. If, on the other hand, BHR has determined that a

proceeding for Board issuance of a land use exemption permit under Section 10909 is unnecessary, it has not publicly advised the Board of such a critical development.

II. BHR's Parcel D Development Plans Are Markedly Different Than Those Involved In The 2016 Settlement And Subsequently Evaluated In The VDEIS

As the record in the *Brookhaven Declaratory Order* proceeding shows, BHR and Sills long have planned for the comprehensive development of Parcels A through D into a fully-integrated, and interconnected, rail terminal facility, under the banner of the BRT. Accordingly, BRT's development plans have contemplated that Parcel D would be developed to ensure that its railway access and trackage would be integrated with terminal tracks to be constructed on Parcels B and C by way of a tunnel beneath the right-of-way of the Long Island Rail Road ("LIRR"), which separates Parcels C and D. Moreover, the "2016 Settlement" to which BHR refers in its Petition actually relates to ongoing litigation before the U.S. District Court for the Eastern District of New York⁴ which produced a "So-Ordered Stipulation of Settlement" (the aforementioned 2016 Settlement) entered in that court proceeding on March 28, 2016 (the "2016 Settlement"). See Exhibit B (2016 Settlement). BHR is a party to, and is bound in all regards under, the 2016 Settlement. BHR falsely suggests that the 2016 Settlement contemplates or otherwise provides for a waste management facility to be developed on Parcel D. The 2016 Settlement does not mention, let alone approve, a waste transfer facility, and no such facility was considered or approved in the subsequent VDEIS or the related Town of Brookhaven Negative Declaration. In fact, BHR suggests that the Negative Declaration was predicated upon the

⁴ *Town of Brookhaven v. Sills Road Realty, LLC, Brookhaven Rail LLC f/k/a US. Rail New York, LLC, Brookhaven Terminal Operations, Oakland Transportation Holdings, LLC, Sills Expressway Associates, Watral Brothers, Inc. and Pratt Brothers, Inc.*, Docket No. 14-cv-02286, U.S. District Court for the Eastern District of New York.

Development of Parcel D as set forth in BHR's Petition (see Petition at 11), when that is not the case at all.

To begin with, the 2016 Settlement is based upon the collective input of the parties to the Eastern District of New York litigation concerning the integrated development of Parcels B through D, including plans to connect Parcels C and D by way of the railroad tunnel. The railroad terminal development project underlying the 2016 Settlement contains no plans to connect Parcel D's trackage directly to the LIRR, and the 2016 Settlement does not contemplate that Parcel D would be or should be developed independently of Parcels B and C. Furthermore, nothing in the plans that form the basis of the 2016 Settlement call for the construction and operation of a solid waste railroad transfer facility. Finally, the parties premised the 2016 Settlement upon the establishment and location of a "62-acre Conservation Easement in favor of the Town of Brookhaven" (the "Conservation Easement") on Parcel D (Petition, 3), which easement now exists as reflected by the blue/green shaded areas on the map of Parcel D attached as Exhibit B to the 2016 Settlement. See 2016 Settlement - Map, attached as Exhibit C. But what BHR fails to point out is that its new track configuration for Parcel D – unlike the track plans considered at the time of the 2016 Settlement – calls for the track connection to the LIRR to bisect the agreed-upon Conservation Easement,⁵ an issue that will be revisited in the discussion of BHR's request for a conditional transportation merits decision below.

And, as BHR points out, the 2016 Settlement precipitated the preparation of a Voluntary Draft Environmental Impact Statement ("VDEIS"), prepared pursuant to New York State law. Petition, 11. Of course, that VDEIS examined the development of Parcels B through D as part of a collective and integrated BRT whole, premised upon the rail connection of Parcel

⁵ The plans at the time of the 2016 Settlement entail Parcel D track construction that would completely bypass the Conservation Easement.

C and Parcel D through a tunnel. As with the 2016 Settlement, the VDEIS did not consider the development of Parcel D as an independent railroad operation, presumed no track construction or other development within the confines of the Conservation Easement, and did not examine the impacts of building or operating a solid waste rail transfer facility within Parcel D. While all signs point to BHR's repudiation of the 2016 Settlement and the corresponding irrelevance of the VDEIS as a foundational document for the Board's NEPA-mandated environmental review, BHR seems to want to have it both ways by relying on the VDEIS and a related "Negative Declaration" from the Town of Brookhaven (the virtual equivalent of a finding of no significant impact in an Environmental Impact Statement developed pursuant to NEPA) endorsing the parties' collective railroad terminal developments plans for Parcels B through D.

BHR's Petition is premised upon fundamentally changing the agreed-upon access to Parcel D. BHR's new track plan also disregards and repudiates the location of the agreed-upon and recorded location of the Conservation Easement. The fact that BHR's new access plan will require track to be laid in the conservation easement area provided for under the 2016 Settlement is sufficient by itself to demonstrate that BHR's petition is at best premature. A copy of the conservation easement which was provided following the 2016 Settlement is annexed as Exhibit D (the "Conservation Easement"). The Conservation Easement sets aside 62 acres of property on Parcel D which "shall remain undeveloped and be used as open space." See Conservation Easement Article III(A)(1). The Conservation Easement further provides that "[n]o industrial, mining, or commercial activities, and no residential or other development are permitted on the Protected Property." *Id.* BHR does not explain how it can pursue a track plan contrary to the Conservation Easement it previously agreed to pursuant to the 2016 Settlement.

The agreed-upon location and use of the Conservation Easement in the 2016 Settlement were material components of SRR's determination to enter into the 2016 Settlement. The 2016 Settlement requires the written consent of all of the parties thereto to make any such changes to the 2016 Settlement and the plans provided for thereunder. See 2016 Settlement ¶ 22 ("This Stipulation may not be changed or modified except by the execution of a writing signed by all parties.") SRR has never agreed to any such changes to the 2016 Settlement. Even if SRR agreed to these changes, which it has not, these changes to the Conservation Easement would need to be approved by all of the parties to the 2016 Settlement, including both the Town of Brookhaven, and then by the New York State Legislature.

In light of these facts, BHR's Petition appears to constitute an end-run of otherwise applicable state law processes and protections and an evasion of the federal district court-sanctioned 2016 Settlement. The Eastern District of New York has retained jurisdiction to resolve all disputes under the 2016 Settlement. See 2016 Settlement ¶ 21 ("The District Court shall retain jurisdiction to resolve any dispute under this Stipulation and the 2010 Stipulation, and to enforce any of the provisions thereof.") Judge Azrack recently ordered the parties to the 2016 Settlement, including BHR, to participate in a mediation before Magistrate Judge Shields to mediate their current disputes including BHR's proposed deviation from the agreed-upon 2016 Settlement construction plans. See Order attached as Exhibit E. The parties are currently mediating these issues in accordance with Judge Azrack's Order. We anticipate that these issues will be litigated before Judge Azrack should the parties be unable to reach a mediated resolution.

III. BHR Lacks Sufficient Rights To Construct Its Parcel D Facility

BHR states in its Petition that Oakland Transportation Holdings ("Oakland"), which is not affiliated with BHR, owns Parcel D. Petition, 3. Parcel D is actually owned by

NYSO, an Oakland real estate holding company. BHR (or Winters – the contractual arrangements are unclear) is only a contract vendee to NYSO, and lacks sufficient rights to construct, or to conduct common carrier operations over, a line of railroad on Parcel D itself or through a subsidiary such as BHR. Nevertheless, BHR expects to acquire title to Parcel D later this year, vaguely stating that it has “contracted with Oakland” to purchase Parcel D, and that the “sale is expected to be consummated later in 2020.” BHR leaves out – (1) what sort of contractual arrangement it has with Oakland (it has not offered a copy of that agreement, for example); (2) whether that agreement is a purchase and sale agreement, an agreement in principle, or some contingent arrangement under which the transfer of ownership might not occur; and (3) when it will close on the sale of the real property, or why it cannot provide a date certain by which the sale would occur.

In fact, BHR is not entitled by law to acquire Parcel D, and NYSO may not legally transfer ownership to Winters, BHR, or any Winters affiliate. Specifically, Winters, BHR’s ultimate parent company, entered into a non-disclosure agreement and non-circumvention agreement (“NDA”) with SRR in February of 2019, which, among other things, prohibits Winters (or its successors) from using any of the information given to Winters under the NDA to SRR’s detriment, and it further prevents Winters or its successors from engaging in any type of transaction involving the rail assets and Parcel D without SRR’s consent. SRR has given no such consent. The matter is currently the subject of active state court litigation. Specifically, in *Sills Road Realty LLC v. Winters Bros. Waste Systems of Long Island LLC* (New York State Supreme Court, Index No. 602508), SRR is seeking, among other things, a preliminary injunction barring Winters or any of its affiliates or subsidiaries from purchasing Parcel D. SRR’s request for a preliminary injunction is currently *sub judice*.

Similarly, as indicated above, BHR's railroad line development plans entail track construction within a dedicated Conservation Easement. BHR has not explained what steps it can or will take to address the Conservation Easement issue. But, as matters now stand, the Conservation Easement bars construction in keeping with BHR's plans for Parcel D.

Under the circumstances, BHR simply hasn't assembled – and may never assemble – sufficient legal rights to undertake the proposed construction, to say nothing of its apparent inability to offer a precise time frame by when it can or will possess such rights, if ever. In similar situations, the Board has deemed agency action premature,⁶ and, in keeping with such precedent, should reject the Petition as unripe for agency consideration, or, at a minimum, delay formal action on the Petition barring sufficient evidence that petitioner has or definitely will possess sufficient legal rights to undertake the proposed construction.

IV. BHR Conveniently – And Incorrectly – Glosses Over The Board's Obligations Under NEPA

As the *US Rail*⁷ experience indicates, the environmental impact and mitigation issues triggered by BHR's construction proposal will warrant careful scrutiny by the Board's Office of Environmental Analysis ("OEA") *if and when* a fully-formed Petition is presented. That analysis must include Board consideration of "cumulative impacts" arising out of an as-yet-

⁶ See *Jersey Marine Rail, LLC – Operation Exemption – Lines of Railroad Owned by Consolidated Rail Corporation in the City of Linden, N.J.*, FD 360470 (STB served Jul. 21, 2016) (rejecting an operation exemption based upon insufficient information about the agreements that would need to be reached to undertake the transaction, and whether such agreements would be reached); *Tongue River Railroad Company, Inc. – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties, Mont.*, FD 30186 (STB served Apr. 26, 2016) (dismissing pending railroad line construction proceeding based upon evidence showing that preconditions for construction of the subject railroad might not be achieved).

⁷ *US Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal*, FD 35141 (Served September 9, 2010) ("*US Rail*").

unrequested land-use-exemption permit under Section 10909 and 49 U.S.C. Part 1155.⁸ Sills has no doubt that OEA and this Board would give full and careful consideration of the environmental impacts of the overall project upon the filing of a complete Petition (accounting for the contemporaneous Board review of a request for a land-use-exemption permit), incorporating all applicable federal, state and local mitigation and compliance provisions governing the construction of a solid waste rail transfer facility. But BHR's self-serving contention that the environmental heavy lifting is essentially more than half-way done is plainly incorrect.

The continued validity and applicability of the 2016 Settlement, which was predicated on the comprehensive co-development of Parcels B through D *without* a solid waste rail transfer facility (and which resulted in the establishment of the Parcel D Conservation Easement) is now in doubt. Yet BHR tries invoke the benefits of that document where convenient. BHR claims that, "To the extent that . . . development [of the proposed Parcel D railroad line] occurs, it will be subject to the 2016 Stipulation of Settlement, VDEIS, and Negative Declaration . . ."⁹ although it does not, and cannot, demonstrate that the other parties to the 2016 Settlement (such as SRR and the Town of Brookhaven) agree.¹⁰ BHR also

⁸ See, e.g., *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, Mass.*, FD 34797 (Sub-No. 1) (STB served Sep. 30, 2016), 6, n. 9 ("NEPA requires the Board to consider direct, indirect, and cumulative impacts . . . A cumulative impact is the 'incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non- federal) or person undertakes such other actions.' 40 C.F.R. § 1508.7").

⁹ Petition, 5, n. 12.

¹⁰ The Town of Brookhaven has already indicated that it may withdraw the Negative Declaration stemming from the VDEIS based upon BHR's unilateral action in – (a) modifying its Parcel D construction plans, (b) adding a solid waste transfer component, and (c) divorcing that rail construction project from the concurrent development of Parcels B and C. See Exhibit F (Town of Brookhaven Letter, March 31, 2020).

acknowledges that its solid waste transfer facility is beyond the scope of the 2016 Settlement, VDEIS, and Negative Declaration, and thus will require considerable additional evaluation.

V. BHR's Concealed Opportunism Is No Basis For Bifurcated Decision Making

BHR's argument that its half-baked Petition should be considered and conditionally granted pending the completion of the Board's NEPA analysis is legally unsupported and suggests concealed BHR motivation. Allegedly, conditional approval of BHR's Petition (subject to completion of environmental review and a final decision later) would expedite project delivery, although it is unclear how or why that would be so. BHR cannot begin construction of its railroad lines and solid waste transfer facility, or know what alignments and design specifications to observe, unless or until all applicable environmental review, permits and approvals are in place. Additionally, BHR has disclosed nothing of its efforts to work with local, state and federal authorities to assure that its solid waste transfer facility meets and complies with applicable law, regulations, orders, and other requirements. BHR's under-developed efforts combined with its unsupported bifurcation request place the cart well ahead of the horse.

In any event, Board precedent has all but categorically rejected the idea of such a bifurcated process, as BHR recognizes. Not only did *Alaska R.R. – Constr. & Operation Exemption – Rail Line Between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), Alaska*, FD 34658 (STB served Oct. 4, 2007), to which BHR cites, effectively ban conditional transportation merits approval for construction cases thirteen years ago, but there has not been a single case since where the Board has found “unique or compelling circumstances”

(*id.* at 3) to exist warranting a deviation from this rule.¹¹ BHR’s business interests is not a unique or compelling circumstance to override glaring omissions in the Petition.

BHR’s requests for expedited consideration and a bifurcated review process are not really about timing anyway. Rather, they are about leverage. BHR indirectly admits this, stating that conditional approval would “greatly aid” it in “consummating the acquisition of Parcel D,” and that it would “help facilitate the discussions between NY&A, LIRR and BHR concerning the physical location of the required switch and turnout.” Petition, 18. The latter quotation is peculiar, given NY&A’s written support for the project, included as Exhibits 1 and 2 to the Verified Statement of James Newell attached to the Petition. The statements suggest that BHR’s request for an up-front transportation merits decision is intended to enable BHR to override current legal obstacles to its Parcel D development plans.

For example, how is it that conditional Board approval would aid BHR in acquiring Parcel D? BHR suggests that its acquisition of Parcel D is imminent, and that it has some sort of agreement with NYSO (Oakland) to permit for the sale of the parcel. Yet, as BHR and NYSO well know – and as discussed above – BHR is contractually precluded from acquiring

¹¹ *Six County Association of Governments – Construction and Operation Exemption – A Rail Line Between Levan and Salina, Utah*, FD 34075 (STB served Sep. 3, 2015); *California High-Speed Rail Authority – Construction Exemption – In Fresno, Kings, Tulare, and Kern Counties, Cal.*, FD 35724 (Sub-No. 1) (STB served Dec. 4, 2013), 2 (“Although the Board has sometimes made conditional grants of construction exemption authority in the past, it has not done so in several years. *It has also questioned the benefits to a construction applicant given that the Board must consider the environmental effects of the construction proposal before any final approval can be given and before any construction may begin.* Therefore, in the absence of a showing of some unique or compelling circumstances, it is our policy to determine the transportation merits of a construction proposal based on a complete record, including the environmental record”) (emphasis added); *Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, Tex.*, FD 34284 (STB served Dec. 18, 2008) 2, n. 2; *cf. Texas Railway Exchange – Construction and Operation Exemption – Galveston County Tex.*, FD 36186 (STB served Jan. 17, 2020), 2 (mooting conditional grant request by granting petition after review of environmental impact).

or developing Parcel D without SRR's consent (which consent SRR has not given). One may reasonably conclude that BHR's conditional approval ploy is intended to give BHR leverage under an ICCTA preemption claim to override the state law contractual issue confronting it, in keeping with BHR's ICCTA preemption claims associated with its Operating Agreement as set forth in the correspondence attached as Exhibit A. If so, BHR's subterfuge is no reason at all for conditional approval of the Petition, and is instead reason to reject the request out-of-hand in keeping with precedent.¹²

Similarly, BHR's argument that a bifurcated Board proceeding would help BHR, LIRR and NY&A with issues surrounding the location of the turnout and switch connection makes little sense on its face, until one remembers that BHR's planned track alignment and switch connection are precluded by the 62-acre Conservation Easement. NY&A already is supportive of BHR's Parcel D plans, and there is no reason to know, or believe, that LIRR has any substantive reservation with the installation of a new switch to its main line. Additionally, the record does not suggest that NY&A or LIRR would have any issues with a modified track alignment or switch connection location if warranted. Finally, the issue of track alignment and the switch connection would be resolved as a matter under the Board's environmental analysis, not the transportation merits. As such, the only way that conditional Board approval would bear on the connecting track issue would be if BHR intends here, also, to attempt to use such a conditional merits ruling to invoke ICCTA preemption in an effort to evade its obligations under the 2016 Settlement, and to invalidate the Conservation Easement or to force its way over it. Once again, the Board should not allow its processes to be abused in that fashion.

¹² See, e.g., *US Rail Corporation – Lease and Operation Exemption – Shannon G., A New Jersey Limited Liability Company*, FD 35042 (STB served Oct. 8, 2008); *Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33980 (STB served Feb. 15, 2002).

CONCLUSION

WHEREFORE, the Sills Parties submit that the subject Petition should be rejected as incomplete, or, that the Board suspend action on the Petition pending extensive clarification and supplementation of the Petition, and pending BHR's filing of a full and complete request for Board issuance of a land-use-exemption permit.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish
Thomas J. Litwiler
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, IL 60606-3208
(312) 252-1500

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EXHIBIT A

**BHR AND BRFS LETTERS CONCERNING
OPERATING AGREEMENT AND
ICCTA PREEMPTION**

Brookhaven Rail LLC

120 Nancy Street
West Babylon, NY 11704
(631) 491-4923

May 21, 2020

VIA FEDERAL EXPRESS

Brookhaven Rail Freight Services LLC
205 Sills Road
Yaphank, New York 11980
Attention: Andrew Kaufman, Vice President

Re: Railroad Operating Agreement and Sublicense Agreement

Dear Mr. Kaufman:

On May 11, 2020, Shamrock Rail LLC ("Shamrock") closed on its purchase of all of the outstanding membership interests of Brookhaven Rail, LLC ("BHR") from Oakland Transportation Holdings LLC. BHR provides common carrier rail freight services to Parcel A of the Brookhaven Rail Terminal pursuant to the authority BHR possesses from the United States Surface Transportation Board ("STB") and a Railroad Operating Agreement and Sublicense Agreement with Brookhaven Rail Freight Services LLC ("BRFS"), dated December 19, 2016 ("Agreement").

BHR has reviewed the terms of the Agreement and is aware of Article III, Section 3.4, which states in pertinent part that "the sale, pledge, assignment, transfer or other disposition of seventy percent (70%) or more of the membership interests in a Party" may be considered a "Default" under the Agreement, in which case the "non-defaulting Party" may terminate the Agreement "effective immediately." This letter is to notify BRFS that BHR considers Article III, Section 3.4 as applied to BHR, and particularly the foregoing termination clause (only part of which is quoted above), to be preempted by federal law and of no force and effect. More specifically, pursuant to 49 U.S.C. §10501(b) and well-established precedent interpreting that provision, the STB has exclusive jurisdiction over the use and disposition of railroad tracks constructed and operated pursuant to the STB's authority. Consequently, any state laws, including state contract laws, that unreasonably interfere with that federal operating authority are preempted.

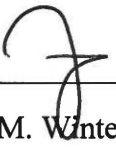
Any attempt by BRFS to invoke Article III, Section 3.4 to terminate BHR's federal rights and obligations to provide common carrier service to Brookhaven Rail Terminal as a result of the sale of its membership interests to Shamrock would clearly fall in the category of federally preempted activity. BHR accordingly advises BRFS that Shamrock and/or BHR will vigorously oppose any attempt by BRFS to terminate the Agreement at a result of Shamrock's purchase of the membership shares of BHR, and both will otherwise act to protect all of their respective rights and

interests, particularly BHR's federal rights to provide common carrier freight service to the Brookhaven Rail Terminal over the tracks on Parcel A.

Sincerely,

BROOKHAVEN RAIL LLC

By: Shamrock Rail LLC, its sole member

By:  _____
Joseph M. Winters, President

cc: Kenneth J. Hollenbeck, Esq. (via e mail transmission)
Thomas W. Wilcox, Esq. (via e mail transmission)

BROOKHAVEN RAIL FREIGHT SERVICES, LLC

205 Sills Road
Yaphank, New York 11980

May 27, 2020

Via Email and Federal Express

Brookhaven Rail LLC
120 Nancy Street
West Babylon, NY 11704

Re: Railroad Operating Agreement and Sublicense Agreement

Dear Mr. Winters:

We are in receipt of your letter dated May 21, 2020 regarding that certain Railroad Operating Agreement and Sublicense Agreement dated December 19, 2016, between Brookhaven Rail, LLC (“BR”) and Brookhaven Rail Freight Services, LLC (“BRFS”) (the “Agreement”). We agree that the recent acquisition of control of Brookhaven Rail, LLC (“BR”) by Shamrock Rail LLC (“Shamrock”) triggers the termination provisions of Article III, Section 3.4 (the “Termination Clause”) of the Agreement. In fact, to be clear, BR is in material default under the terms of the Termination Clause, and we possess the right, at our discretion to terminate the Agreement. We profoundly disagree with you that 49 U.S.C. § 10501(b) somehow nullifies or invalidates the Termination Clause, recognizing as we do that your apparent legal position depends upon a gross and utterly self-serving misreading of Section 10501(b), and completely ignores pertinent ICC Termination Act (“ICCTA”) jurisprudence which contradicts your position.

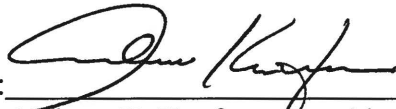
We recognize, as should you, the legal distinction between privately-contracted-for rights and federally-granted common carrier status. We also appreciate the difference between the invocation of our termination rights as against BR and the effectuation of those rights by way of an effort to remove (evict) BR from the Brookhaven Terminal, the latter of which, as we have stated in public documents, would entail BR obtaining federal authorization to end its common carrier status, or for a third party securing such authorization under an adverse process. Your letter reveals that you do not understand that difference or, for that matter, the role of the Surface Transportation Board, which explains why you have jumped to legally-unsupported conclusions concerning the continued validity and enforceability of the Termination Clause, and the appropriate scope of ICCTA preemption.

As we have explained to you on numerous occasions, we will defend vigorously the rights we have secured under the Agreement, including our right (currently at our discretion in light of BR’s ongoing default) to declare that Agreement ended pursuant to the Termination Clause, and we will do the same should you or any other party challenge our rights or attempt to take any action which negatively affects our interests in the Brookhaven Rail Terminal. Accordingly, we are prepared to engage BR and Shamrock in any dispute in which you attempt to advance your unilateral and legally-uninformed position that ICCTA invalidates or nullifies the Agreement’s Termination Clause.

This letter is sent with a full reservation of any and all rights that we have in connection with the matters referred to herein, either under the Agreement, at law, in equity or otherwise.

Very truly yours,

BROOKHAVEN RAIL FREIGHT SERVICES, LLC

By: 

Andrew H. Kaufman, President

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36398

BROOKHAVEN RAIL LLC
— CONSTRUCTION AND OPERATION EXEMPTION —
IN SUFFOLK COUNTY, NEW YORK

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

EXHIBIT B

2016 SETTLEMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiff,

-against-

SILLS ROAD REALTY LLC, BROOKHAVEN
RAIL LLC f/k/a U S RAIL NEW YORK LLC,
BROOKHAVEN TERMINAL OPERATIONS,
OAKLAND TRANSPORTATION HOLDINGS
LLC, SILLS EXPRESSWAY ASSOCIATES,
WATRAL BROTHERS, INC., and PRATT
BROTHERS, INC.,

Defendants.

Index No.: 14-CV-02286 (GRB)
(and Related Case Docket
No. 07-CV-4584)

**SO-ORDERED STIPULATION
OF SETTLEMENT**

-----X

RECITALS:

WHEREAS:

A. Defendants Sills Road Realty LLC, Brookhaven Rail LLC f/k/a U S Rail New York LLC, Brookhaven Terminal Operations (“Brookhaven Rail”), Oakland Transportation Holdings LLC, Watral Brothers, Inc., and Pratt Brothers, Inc. are the owners, developers, operators or contractors of the rail terminal located on an approximately 30 acre parcel at 205 Sills Road, Yaphank, New York (“Parcel A”) now operating as a railway terminal and transloading facility (the “Operating Railway Terminal”) under the jurisdiction of the United States Surface Transportation Board (“STB”).

B. Prior disputes between plaintiff Town of Brookhaven (“Town”) and certain of the Defendants or their predecessors, as the owners, former owners, developers, operators and/or contractors of the then-proposed Operating Railway Terminal resulted in prior litigation before this Court under Docket No. 07-CV-4587, which disputes were resolved pursuant to a certain So-

Ordered Stipulation dated April 22, 2010, which applies solely to the Operating Railway Terminal (the “2010 Stipulation”).

C. Certain of the Defendants, including defendant Sills Expressway Associates (collectively, the “BRT Defendants”), acquired an approximately 93 acre tract of land located to the east of the Operating Railway Terminal, including an approximately 20 acre portion (“Parcel B” owned by Sills Expressway Associates) to the east and immediately abutting a parcel owned by the Long Island Power Authority (“LIPA”) and an approximately 73 acre portion (“Parcel C”) located immediately to the east of Parcel B (the “Parcels B and C”). Oakland Transportation Holdings, LLC became the fee simple owner of a certain parcel of land located to the south of Parcels B and C of approximately 228 acres (“Parcel D” and together with the Operating Railway Terminal and Parcels B and C, the “Rail Facility”) on May 20, 2013 and conveyed Parcel D on that same date to New York Site Operations, LLC.

D. The BRT Defendants previously have conducted site development activities on Parcels B and C, contending that such activities were preparatory to construction of an expansion of the Operating Railway Terminal and further contending that this expansion was pursuant to 49 U.S.C. 10906 and therefore exempt from STB licensing and economic regulation, and not subject to state and local permitting and preclearance requirements due to Federal preemption.

E. As a result and thereafter, the Town:

i. Commenced an action against the BRT Defendants in the Supreme Court of the State of New York, County of Suffolk (Suffolk County Clerk’s Index No. 2014-061613), which proceeding subsequently was removed by the parties to the United States District Court for the Eastern District of New York under case number 14-CV-02286 (GRB) (the “Federal Action”), seeking, *inter alia*, to enjoin the site development activities of the BRT Defendants on

Parcels B and C, to compel restoration of Parcels B and C, to obtain monetary damages, and for other relief; and

ii. Issued a certain Stop Work Order (the “SWO”) and a misdemeanor information and violation information, which are currently pending in *People v. Sills Expressway Associates*, Suffolk County District Court, Docket No. 571-14 (the “Suffolk District Court Action”), respecting the development plans and work undertaken on Parcel B; and

iii. Filed a petition to intervene before the STB to reopen earlier proceedings and obtain certain relief from the STB regarding the Operating Railway Terminal under STB Finance Docket No. 35141; and also filed an opposition to Brookhaven Rail’s petition for a declaratory order regarding status of the track on Parcels B and C, under STB Finance Docket No. 35819 (collectively, the “STB Proceedings”).

F. Following expedited evidentiary proceedings in the Federal Action before the District Court, the Town obtained a preliminary injunction in the Federal Action by Order dated June 23, 2014 (Hon. Gary R. Brown, United States Magistrate Judge) inter alia, enjoining and restraining the BRT Defendants, “...from undertaking any further actions and activities to mine, excavate, sell, grade and/or remove native sand, minerals and vegetation from Parcels B and C, during the pendency of this action and pending further order of the Court” (the “Injunction”).

G. By Order in the Federal Action dated May 6, 2015, the Court (Hon. Gary R. Brown, Magistrate Judge), with the BRT Defendants’ concurrence, referred the issue of identifying and if necessary removing certain non-native materials on Parcels B and C to the New York State Department of Environmental Conservation (“DEC”).

H. By Order on Consent dated July 28, 2015, the DEC and the BRT Defendants acknowledged and agreed that certain of the non-native materials required removal and disposal

pursuant to DEC regulations, which removal and disposal was undertaken and concluded by the BRT Defendants.

I. The Town has moved for partial summary judgment upon certain of its claims in the Federal Action and the BRT Defendants have opposed the motion which is pending decision before the Court.

J. By Order dated September 9, 2015, the Court in the Federal Action directed that the parties to the Federal Action (the “Parties,” and each individually, a “Party”) participate in a Settlement Conference, which Settlement Conference was conducted by the Parties before the Court (Hon. Gary R. Brown, United States Magistrate Judge) on November 13, 2015 (the “Settlement Conference”).

K. In connection with the Settlement Conference, the Parties prepared a certain “Confidential Settlement Document” outlining a “Proposed Settlement Framework” to resolve all claims of the Town against the BRT Defendants in respect to the Rail Facility (the “Settlement Framework”).

L. In furtherance of the Settlement Framework, BRT’s engineers, AECOM, have prepared and BRT has provided to the Town, *inter alia*, a document entitled, “BROOKHAVEN RAIL TERMINAL PROPOSED TRACK FROM PARCEL A TO PARCELS B AND C AND FUTURE LEAD TRACK TO PARCEL D,” dated 2/23/2016, as a current engineering proposed track plan for Parcels B and C, depicting the connection of the rail from the Operating Railway Terminal on Parcel A to Parcels B and C, as well as elevations associated with two alternative proposed track plans presented for Parcels B and C (the “Proposed New BRT Track Plans”) and a further document prepared by AECOM entitled, “BROOKHAVEN RAIL TERMINAL – PARCEL D – GREEN SPACE” dated 2/23/2016 (“Parcel D Conceptual Track Plan”), which

presents a conceptual track plan for Parcel D together with an overlay of areas labeled “GREEN AREA – UNDISTURBED” marked as area “A” (47.55 acres) and area “B” (14.45 acres) for a total of 62 acres of Parcel D (the “Undisturbed/Conservation Easement Area”) as well as certain LIPA easements/assets. See Exhibits A and B annexed hereto.

M. Pursuant to the Settlement Framework, the Proposed New BRT Track Plans and the Parcel D Conceptual Track Plan, the BRT Defendants propose to execute and file a Conservation Easement, encompassing the 62 acre Undisturbed/Conservation Easement Area on Parcel D, such that it will remain permanently undeveloped and as open space/green space in perpetuity, with the exception of the existing LIPA easements/assets as identified on the Parcel D Conceptual Track Plan, and notwithstanding any development, further development or redevelopment of Parcels A, B, C and/or D. The Town agrees that the BRT Defendants shall retain all development rights with respect to the Undisturbed/Conservation Easement Area on Parcel D and may transfer or re-allocate such development rights including, but not limited to, sanitary credits at the BRT Defendants’ sole discretion within Parcels B, C and/or D.

N. By Resolution adopted on November 19, 2015 at a public hearing of the Town Board of the Town, the Town Board resolved as follows:

“RESOLVED, that the Town Board hereby authorizes Annette Eaderesto, Esq., Town Attorney to continue to negotiate with the BRT Defendants and their counsel to arrive at a final and binding settlement of all claims of the Town asserted in the Federal Action and before the STB in respect of the Rail Terminal and Parcels A, B, C and D, incorporating all appropriate and necessary environmental conditions and protections in consultation with the Town’s Environmental Consultant, upon terms to be [reviewed] by, and approved by the Town Board at a future Executive Session.”

NOW, IT IS HEREBY STIPULATED AND AGREED BY AND AMONG the Parties by their counsel of record herein as follows:

1. The Injunction shall be lifted but no further clearing of vegetation, excavation, grading or removal of sand or gravel shall occur on Parcels B and C or upon Parcel D until such time as: (a) the Proposed New BRT Track Plans, the Parcel D Conceptual Track Plan and the Additional Plans (as outlined in Paragraph 2 herein below) have been reviewed by VHB Engineering, Surveying, and Landscape Architecture P.C. (VHB”) as provided for herein; (b) comments, changes or revisions required by VHB have been made to or incorporated into the Proposed New BRT Track Plans, the Parcel D Conceptual Track Plan and the Additional Plans; and (c) the Proposed New BRT Track Plans, the Additional Plans and the Lot D Conceptual Track Plan have been approved by the Brookhaven Town Board in accord with the New York State Environmental Quality Review Act (NY ECL 8-0101 *et seq.*, and its implementing Regulations at 6 NYCRR Part 617 referred to as “SEQRA”), but to be reviewed and considered by the Town Board upon the recommendations of VHB and the Commissioner of the Town Department of Planning, Environment and Land Management pursuant to the expedited/administrative procedure (the “Administrative SEQRA/Plan Review”) to be conducted by the Town with the services of VHB as provided for herein in accord and consistent with applicable and agreed upon review and approval process whereby the Town agrees to apply and consider the Railway Expansion pursuant to the provisions of Section 85-894 of Chapter 85 of the Town Code (“Applicable Town Code Provision”) and without public hearings. The Applicable Town Code Provision shall apply solely to the review and approval process and the Railway Expansion shall not be considered a public use for real property tax assessment purposes. The BRT Defendants reserve the right to submit the Proposed New BRT Track Plans and the Parcel D Conceptual Track Plan, along with the respective Additional Plans for each, in a phased approach whereby the Proposed New BRT Track Plans’ review and approval may

proceed and be completed prior to the review and approval of the Lot D Conceptual Track Plan. While the Proposed New BRT Track Plans are both subject to the Administrative SEQRA/Plan Review process set forth in Paragraphs 1-5 of this Stipulation of Settlement, Alternate No. 2 of the Proposed New BRT Track Plans dated 3/14/2016 is attached to this Stipulation of Settlement as a conceptual track plan which shall not in any manner be deemed to constitute an approval by the Town of Alternate No. 2 in terms of removal of material, grading, or the precise location of the portion of the track situated on Parcel B, all of which shall be finally determined during the Administrative SEQRA/Plan Review process.

2. In conjunction with the Administrative SEQRA/Plan Review, upon entry by the Court of this Stipulation of Settlement, the BRT Defendants shall promptly cause their engineers (whether AECOM, Sidney B. Bowne LLP, or another duly licensed engineer or engineering firm licensed and qualified in New York) to prepare and provide VHB and the Town with the following additional plans (the “Additional Plans”) to be reviewed in accord with the established and agreed process:

a. A preliminary Stormwater Pollution Prevention Plan (SWPPP) for the Operating Railway Terminal expansion onto Parcels B, C and D (the “Railway Expansion”) which addresses stormwater management during and after property development on each of the respective Parcels B, C and D as and when the case may be, in accord with all applicable regulatory requirements.

b. Proposed Grading Plans for the Railway Expansion that include a cut-and-fill analysis. The Grading Plans to implement the Proposed New BRT Track Plans and Lot D Conceptual Track Plan will provide information on all areas to be disturbed/removed for construction including materials to be removed/replaced under the track alignment for

construction (load-bearing purposes). The grading process will re-use native soil onsite for fill purposes to the maximum extent feasible, with the goal of minimizing the need to export native sand or import fill materials. Any fill materials proposed to be imported are to be specified in the Grading Plans and shall not include any solid waste or contaminate as defined by the DEC and prohibited for such use by the DEC. The Grading Plans shall include clear delineation of any limits of disturbance (LOD) during site work to protect the native vegetation outside of the LOD, restoration of any areas outside the LOD that become damaged, any areas of natural vegetation that will remain undisturbed including a calculation of the size of each such area and a demonstration that the natural vegetation areas are preserved to the maximum extent practicable. The LOD shall otherwise conform with paragraph "10" herein below. The Grading Plans shall reflect the location and volume of any removal of native materials from Parcels B, C and D. To the extent that any imported and/or engineered fill is required with respect to the development of Parcels B, C or D, the BRT Defendants will adhere to applicable DEC rules, regulations and guidelines governing the management of such materials.

c. Proposed criteria, applicable standards and systems for stormwater and wastewater management for the Railway Expansion.

3. The Town shall engage the services of VHB to provide engineering, consulting and technical services to the Town in conjunction with the Administrative SEQRA/Plan Review of the Proposed New BRT Track Plans, the Additional Plans, and the Lot D Conceptual Track Plan relating to the Railway Expansion in accordance with and consistent with the Applicable Town Code Provision and to prepare and present findings and recommendations to the Town Board respecting the environmental assessment and site plan review in connection with the Railway Expansion to include: the development of the Proposed New BRT Track Plans,

associated Additional Plans and future site development on Parcels B and C; the Lot D Conceptual Track Plan, associated Additional Plans and future site development on Parcel D; the establishment and management of the Undisturbed/Conservative Easement Area on Parcel D; and, following approval of same by the Town Board, to monitor and supervise compliance with such approval during the development and construction of the Railway Expansion. The BRT Defendants shall be solely responsible for compensating VHB for its services, shall provide the Town with an initial escrow sum and sign an escrow agreement in a form reasonably required by the Town to cover the anticipated costs of VHB's review and supervision, and shall deliver any reasonable additional advance escrow amounts to cover future monitoring and compliance review expenses as may reasonably be required. VHB shall be permitted to access Parcels B, C and D upon reasonable advance notice, without restriction, and as needed to fulfill its duties. The review and approval process for the Railway Expansion shall proceed before the Town Board on an expedited basis under an established and agreed upon process and procedure complying with the Administrative SEQRA/Plan Review process and the Applicable Town Code Provision applicable to resolution of litigated environmental matters, and without public hearings. The Town acknowledges that the BRT Defendants dispute the applicability of Town zoning laws and certain other Town laws and ordinances to the Railway Expansion, and the Town contends that its zoning laws, other Town laws and applicable provisions of other State and local laws, including SEQRA or the National Environmental Policy Act are applicable to the Railway Expansion (the "Environmental Preemption Disputes"). The Town therefore acknowledges and agrees that it is resolving the Environmental Preemption Disputes pursuant to the provisions of this Stipulation and that when approved by the Town Board and "so-ordered" by the District Court, the Parties have agreed to apply, as to the Railway Expansion, only those local laws and

SEQRA requirements and plan review processes which are specifically provided for in this Stipulation as a settlement and resolution of the Environmental Preemption Disputes pursuant to the review and approval process and procedure herein. At the conclusion of the referenced process the Town will approve, disapprove, or specify modifications or additions to the Proposed New BRT Track Plans, the Additional Plans and the Parcel D Conceptual Track Plan and the subsequent site development plans which have been reviewed by VHB and for which VHB has prepared findings and recommendations to the Town. The Parties agree that the resolution of any dispute which may arise in connection with the review and approval process before the Town Board as provided for herein shall remain subject to the jurisdiction and determination of the District Court.

4. No further site development activities for the Railway Expansion shall proceed until such time as the Administrative SEQRA/Plan Review with the findings and recommendations prepared by VHB, is complete, reviewed and approved by the Town Board pursuant to the expedited process and procedure set forth above or, in the event of any dispute among the Parties concerning such Administrative SEQRA/Plan Review and approval and application of the Applicable Town Code Provision, upon determination of any such dispute by the Court in this action, upon application and made upon such notice, and in such manner and following such proceedings, as the Court may determine and direct.

5. Upon completion of the Administrative SEQRA/Plan Review and plan approval the Town will promptly (i) execute and file a Stipulation of Discontinuance of this lawsuit in the form annexed hereto as Exhibit C; (ii) execute and deliver a letter, in the form of Exhibit D annexed hereto, to the STB, withdrawing the Town's October 27, 2015 reply and objection to BRT's Motion to Close the Proceeding in STB Finance Docket No. 35141; (iii) withdraw the

SWO and (iv) will dismiss the Suffolk District Court Action. The Town further acknowledges and does not object that BRT may immediately upon the entry by the Court of this Stipulation of Settlement request that the District Court issue an appropriate inquiry, letter, and/or Order, in a form to be agreed upon by the parties, referring the issue of whether the track area, only, of BRT's short branch line expansion of its rail carrier services of the Operating Railway Terminal on Parcels B, C, and/or D, as depicted in the Proposed New BRT Track Plans (as may ultimately be modified by BRT and the Town in accordance with the planning, engineering and environmental review process set forth herein), falls under 49 U.S.C. § 10906. Notwithstanding the foregoing, the Administrative SEQRA/Plan Review process shall commence upon entry by the Court of this Stipulation of Settlement, and the construction and operation of all buildings and other structural improvements on Parcels B, C and D, including any site plans, building permits and Certificates and Occupancy, shall be governed by the provisions of this Stipulation of Settlement, and the classification of the track under 49 U.S.C. § 10906 shall not in any way limit or abrogate the Town's rights, remedies, and authority under Paragraph 16(c) below.

6. The BRT Defendants shall, at the same time the Town delivers the items set forth in Paragraph 5 above, execute and deliver to the Town a Conservation Easement encompassing the 62 acre Undisturbed/Conservation Area in the form reasonably required by the Town such that it shall remain permanently undeveloped and as open space/green space in perpetuity, with the exception of the existing LIPA easements/assets as identified on the Parcel D Conceptual Track Plan; however, BRT Defendants shall retain all the development rights from the Conservation Easement, including, but not limited to the sanitary credits, which may be utilized in the development and construction of the Railway Expansion at the sole discretion of the BRT Defendants. The BRT Defendants shall pay all title fees and recording fees for the Town

respecting the Conservation Easement and provide surveys of the easement area guaranteed to the Town and Chicago Title Company. The BRT Defendants also agree to install a right of way fence, as approved by the Town, along the north/south line of the eastern boundary of the area of greenspace labeled "A" on the Parcel D Conceptual Track Plan; and along the north/south line of the western boundary of the area of greenspace labeled "B" on the Parcel D Conceptual Track Plan at the time of track installation, as well as along the east/west line of the southern boundary of the area of greenspace labeled "B" on the Parcel D Conceptual Track Plan at the time of development of Lot D. The BRT Defendants shall also, at the same time the Town delivers the items set forth in Paragraph 5 above, execute and deliver to the Town a non-exclusive Easement located on the eastern boundary of Parcel D in the form reasonably required by the Town solely such that the Town can locate, construct and maintain a leachate pipe running to the existing Suffolk County sewage treatment plant, as shown on the Parcel D Conceptual Track Plan (the "Leachate Easement"); however, BRT Defendants shall retain all the development rights from the Leachate Easement, including, but not limited to the sanitary credits, which may be utilized in the development and construction of the Railway Expansion at the sole discretion of the BRT Defendants. The Town shall pay all title fees and recording fees respecting the Leachate Easement. The BRT Defendants shall provide surveys of the Leachate Easement area guaranteed to the Town and Chicago Title Company.

7. The BRT Defendants shall pay the Town the sum of \$500,000.00 by December 31, 2016 in full settlement of any monetary claims that the Town sought or could have sought in this proceeding. Should the BRT Defendants fail to pay this amount within the prescribed time, the Town may apply to the District Court for entry of a monetary judgment for any unpaid

amount due and owing and for reinstatement of the Injunction, which the BRT Defendants acknowledge shall be an appropriate remedy for such non-payment.

8. Upon the termination of the pending judicial proceedings as set forth in Paragraph 5, the BRT Defendants immediately may resume grading, excavation, construction and development activities on Parcels B, C and D of the Rail Facility as approved by the Town Board. The BRT Defendants represent, and the Town agrees that so long as performed in accordance with the Administrative SEQRA/Plan Review and Applicable Town Code Provision and resulting approvals, the grading and excavation activities are being undertaken in connection with the Railway Expansion. The Parties further agree and the BRT Defendants acknowledge and agree that any violation of the terms of this Stipulation of Settlement shall entitle the Town to apply to the District Court for reinstatement of the Injunction, subject to the notice and opportunity to cure provision set forth in Paragraph 21 herein below.

9. VHB shall be present during the grading and excavation of the areas on Parcels B and C where Super Storm Sandy-damaged cars were formerly temporarily stored in order to assure the proper environmental evaluation pursuant to applicable DEC regulations.

10. The BRT Defendants shall provide for a 75' buffer on the easterly border of Parcel C, such buffer to include the LOD area. Defendants will re-vegetate to Town specifications any disturbed area of the buffer.

11. To the greatest extent practicable, the BRT Defendants will employ permeable surfaces and pavements to enhance the stormwater drainage structure capacity of Parcels B, C and D in accord with the VHB review, and provide maximum separation between the discharge surface and the water table as required by applicable law and regulations.

12. The BRT Defendants shall prepare and file all old filed map and paper street abandonment petitions on the Rail Facility with the Town at the BRT Defendants' sole cost and expense. The Town agrees, to the greatest extent feasible, to expedite and give priority to the abandonment of such filed maps and paper streets for the Rail Facility.

13. The Town will enter into a Condemnation Agreement with the BRT Defendants. Such Agreement shall provide that the BRT Defendants shall deposit escrow for all costs to condemn parcels of land on Parcels B and C unowned by the BRT Defendants. The Town will expedite condemnation proceedings concerning the privately-owned parcels on Parcels B and C.

14. The Town and the BRT Defendants shall in good faith enter into a settlement or resolution of all pending certiorari proceedings filed to grieve real estate taxes on the Rail Facility simultaneously with the execution of this Stipulation.

15. To the extent the BRT Defendants intend to resume the transloading of used oil at the Operating Railway Terminal on Parcel A, they shall apply for and obtain any and all appropriate permits as may be required from the DEC and/or the Suffolk County Department of Health Services as a condition thereof.

16. Notwithstanding any contrary provision of this Stipulation of Settlement set forth above, the following "Milestones" and other requirements shall be adhered to by the BRT Defendants at all times in connection with the development and construction on Parcels B, C and D to implement the Railway Expansion, including any excavation, regrading, filling, or removal of native sand or gravel, or importation of material to these parcels:

a. All excavation, grading, removal of vegetation, sand and/or gravel shall be undertaken and performed solely as may actually be required to implement the Proposed New BRT Track Plans, the Parcel D Conceptual Track Plan and the Additional Plans as approved by

the Town in accord with the Administrative SEQRA/ Plan Review process and procedure and in accord and consistent with the Applicable Town Code Provision.

b. The BRT Defendants will adhere to all applicable DEC rules, regulations and guidelines to the extent that any imported and/or engineered fill is required with respect to the development of Parcels B, C and D;

c. The BRT Defendants shall apply for all required site plan approval, building permits and obtain all required certificates of occupancy for any and all non-rail buildings and structural improvements to be constructed on Parcels B, C and D, which are not “Support Structures” as defined herein. To the extent any buildings and structural improvements for the Railway Expansion are purely railway support structures such as fueling, servicing, repair or transloading buildings (the “Support Structures”), such Support Structures shall comply with applicable Town, County, or other fire prevention, health, safety and welfare requirements and, without limitation, all such Support Structures shall comply with all of the construction and fire and safety procedures as provided for in the 2010 Stipulation with respect to the Referenced Site Plan on Parcel A; and

d. The BRT Defendants will commence the installation, construction or laying of track (the “Track Installation”) as regrading, excavation, filling or site preparation thereof progresses in accordance with a schedule to be established by the BRT Defendants and VHB (the “Track Installation Schedule”) in accord with the Administrative SEQRA/Plan Review and Town approval.

17. The Parties shall be entitled to both mandatory and prohibitory injunctive relief to enforce this Stipulation or to enjoin any material violation of the Stipulation.

Miscellaneous Matters

18. The “Effective Date” of this Stipulation shall be the date of entry of this Stipulation of Settlement by the District Court.

19. All notices hereunder shall be transmitted via email and first-class mail to the email and mailing addresses designated for the Parties’ counsel below.

20. The Parties represent and acknowledge that, in entering into this Stipulation, they do not rely upon and have not relied upon any representations or statements beyond those contained in this Stipulation. This Stipulation and the 2010 Stipulation constitute the entire agreement and understanding between the Parties with respect to the matters contained herein and therein, and there are no prior oral or written promises, representations, warranties, conditions, provisions, or terms related thereto other than those set forth in this Stipulation and the 2010 Stipulation. This Stipulation is not intended to replace the 2010 Stipulation, which shall remain in full force and effect, or the authority or jurisdiction of the STB with regard to matters which are not the subject of this Stipulation. To the extent the provisions of this Stipulation expressly modify or conflict with any of the provisions of the 2010 Stipulation, the provisions of this Stipulation shall govern.

21. The District Court shall retain jurisdiction to resolve any dispute under this Stipulation and the 2010 Stipulation, and to enforce any of the provisions thereof. The Party seeking to make such an application shall provide the other Parties with reasonably detailed written notice of any alleged breach(es) and/or violation(s), and the receiving Party or Parties shall have thirty (30) days to cure such alleged breach(es) and/or violation(s) (the “Notice to Cure”). Notwithstanding the Notice to Cure, either party may apply to the District Court for

injunctive or other relief under this paragraph 21 upon such shorter notice as the District Court may entertain upon a good faith showing of exigent circumstances.

22. This Stipulation may not be changed or modified except by the execution of a writing signed by all of the Parties.

23. This Stipulation is intended to, and shall, bind and inure to the benefit of the Parties, and their respective successors, assigns, heirs, and legal representatives.

24. This Stipulation may be executed in counterparts and by telecopier, fax or email, each of which shall be deemed to constitute a duplicate original hereof.

25. All counsel represent that they are authorized to enter into this Stipulation on behalf of the clients for whom they have appeared, and to bind such Parties to the provisions hereof, subject only to the terms hereof.

26. This Stipulation shall be construed in accordance with the laws of the State of New York without regard to its conflicts of laws principles.

27. This Stipulation is a compromise of disputed claims and has been entered into to avoid the time, expense, uncertainty, and inconvenience of contested litigation. This Stipulation does not constitute an adjudication or finding on the merits of any of the Parties' allegations.

28. The Parties hereto participated jointly in the preparation of this Stipulation and each Party has had the opportunity to review, comment upon and revise this Stipulation. Accordingly, it is agreed that no rule of construction shall apply against any Party or in favor of any Party and any uncertainty and ambiguity shall not be interpreted against any party in favor of the other.

29. The Parties shall cooperate to effectuate the purposes of this Stipulation and shall execute reasonable and customary documents and take reasonable and customary actions that may be necessary or appropriate to give full force and effect to the terms of this Stipulation.

30. Each counsel executing this Stipulation represents his, her or its authority to bind such counsel's clients, as the Parties to this action, to the terms, provisions, conditions and obligations of this Stipulation to the same extent as though individually executed by each of them.

31. Each Party to this Stipulation shall execute an additional counterpart thereof within ten (10) business days following the execution of this Stipulation by counsel for the Parties.

32. This Stipulation shall be submitted to Honorable Gary R. Brown, Magistrate Judge to be "So Ordered". It is a condition to the binding effect of this Stipulation that it be "So Ordered" by the Court. In the event the Court declines for any reason, following due application, to "So Order" this Stipulation, then it shall be null, void, and of no further force and effect and all rights created, modified or waived hereby shall be immediately restored as they existed upon the day prior to the date upon which this Stipulation has been executed, unless otherwise agreed to by all Parties and counsel in a subsequent Stipulation or other written agreement.

Date: March 17, 2016

FOLEY & LARDNER LLP

By: 

Yonaton Aronoff
90 Park Avenue
New York, NY 10016-1314
212-682-7474 (Telephone)
yaronoff@foley.com

*Counsel for Sills Road Realty LLC,
Brookhaven Rail LLC f/k/a U S Rail New York
LLC, Brookhaven Terminal Operations,
Oakland Transportation Holdings LLC,
Watral Brothers, Inc., and Pratt Brothers, Inc.*

Date: March 17, 2016

FARRELL FRITZ, P.C.

By: 

Kevin P. Mulry
1320 RXR Plaza
Uniondale, NY 11556-1320
516-227-0620 (Telephone)
kmulry@farrellfritz.com

Counsel for Sills Expressway Associates

Date: March ___, 2016

ROSENBERG CALICA & BIRNEY LLP

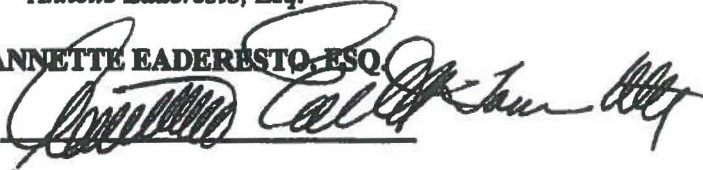
By: 

Robert M. Calica
100 Garden City Plaza
Garden City, NY 11530
516-747-7400 (Telephone)
rob@rcblaw.com

*Special Counsel to Brookhaven Town Attorney
Annette Eaderesto, Esq.*

Date: March 17, 2016

ANNETTE EADERESTO, ESQ.



Brookhaven Town Attorney

Date: March ___, 2016

TOWN OF BROOKHAVEN

By: _____

Date: March ___, 2016

SILLS ROAD REALTY LLC

By: _____

Date: February __, 2016

**BROOKHAVEN RAIL LLC f/k/a U S RAIL
NEW YORK LLC**

By: _____

Date: March __, 2016

BROOKHAVEN TERMINAL OPERATIONS

By: _____

Date: March __, 2016

**OAKLAND TRANSPORTATION
HOLDINGS LLC**

By: _____

Date: March __, 2016

WATRAL BROTHERS, INC.

By: _____

Date: March __, 2016

PRATT BROTHERS, INC.

By: _____

Date: March __, 2016

SILLS EXPRESSWAY ASSOCIATES

By: _____

SO ORDERED:

EXHIBIT A

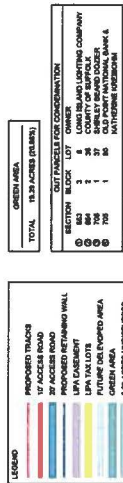




EXHIBIT B

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
TOWN OF BROOKHAVEN,

Plaintiff,

-against-

SILLS ROAD REALTY LLC, BROOKHAVEN RAIL
LLC f/k/a U S RAIL NEW YORK LLC, BROOKHAVEN
TERMINAL OPERATIONS, OAKLAND
TRANSPORTATION HOLDINGS LLC, SILLS
EXPRESSWAY ASSOCIATES, WATRAL
BROTHERS, INC., and PRATT BROTHERS, INC.,

Defendants.
-----X

**STIPULATION OF
VOLUNTARY DISMISSAL
PURSUANT TO F.R.C.P.
41(a)(1)(A)(ii)**

Case No. 14-CV-02286 (GRB)

IT IS HEREBY STIPULATED AND AGREED by and between the parties and/or their respective counsel(s) that the above-captioned action, including all claims and counterclaims, is voluntarily dismissed, with prejudice, in accordance with and subject to the So Ordered Stipulation of Settlement of the parties, pursuant to the Federal Rules of Civil Procedure 41(a)(1)(A)(ii), except that the Court retains jurisdiction to enforce the Stipulation of Settlement pursuant to its terms.

Date: March ____, 2016

FOLEY & LARDNER LLP

By: _____
Yonaton Aronoff
90 Park Avenue
New York, NY 10016-1314
212-682-7474 (Telephone)
yaronoff@foley.com

*Counsel for Sils Road Realty LLC,
Brookhaven Rail LLC f/k/a U S Rail New
York LLC, Brookhaven Terminal
Operations, Oakland Transportation
Holdings LLC, Watral Brothers, Inc., and
Pratt Brothers, Inc.*

Date: March ___, 2016

FARRELL FRITZ, P.C.

By: _____
Kevin P. Mulry
1320 RXR Plaza
Uniondale, NY 11556-1320
516-227-0620 (Telephone)
kmulry@farrellfritz.com

Counsel for Sills Expressway Associates

Date: March ___, 2016

ROSENBERG CALICA & BIRNEY LLP

By: _____
Robert M. Calica
Judah Serfaty
100 Garden City Plaza
Garden City, NY 11530
516-747-7400 (Telephone)
rob@rcblaw.com

*Special Counsel to Brookhaven Town
Attorney Annette Eaderesto, Esq., Counsel
for Town of Brookhaven*

EXHIBIT D

March 17, 2016

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

Re: **Finance Docket Nos. 35819 & 35141:** Withdrawal of
Oppositions to BRT in Finance Docket Nos. 35819 & 35141

Dear Ms. Brown:

We represent the Town of Brookhaven, New York (the “Town”). We write on behalf of the Town to withdraw our “Objections of Town of Brookhaven, New York” filed on October 27, 2015, in opposition to BRT’s “Notification of Compliance with Board’s Remaining Environmental Condition and Motion to Close the Proceeding” filed on October 9, 2015 in Finance Docket No. 35141.

Please contact us if you have any questions.

Respectfully submitted,
ROSENBERG CALICA & BIRNEY LLP
By:

Robert M. Calica
Judah Serfaty

BOSTON
BRUSSELS
CHICAGO
DETROIT

JACKSONVILLE
LOS ANGELES
MADISON
MIAMI

MILWAUKEE
NEW YORK
ORLANDO
SACRAMENTO

SAN DIEGO
SAN FRANCISCO
SHANGHAI
SILICON VALLEY

TALLAHASSEE
TAMPA
TOKYO
WASHINGTON, D.C.

4845-5455-5950.2

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36398

BROOKHAVEN RAIL LLC
— CONSTRUCTION AND OPERATION EXEMPTION —
IN SUFFOLK COUNTY, NEW YORK

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

EXHIBIT C

**MAP OF PARCEL D DEVELOPMENT PLAN
FROM 2016 SETTLEMENT
(DEPICTING LOCATION OF CONSERVATION EASEMENT)**

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36398

BROOKHAVEN RAIL LLC
— CONSTRUCTION AND OPERATION EXEMPTION —
IN SUFFOLK COUNTY, NEW YORK

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

EXHIBIT D

CONSERVATION EASEMENT

Conservation Easement
New York Site Operations, LLC, Grantor
to
Town of Brookhaven, Grantee

THIS GRANT OF CONSERVATION EASEMENT (the "Conservation Easement"), dated as of October 13, 2017, is by and between **NEW YORK SITE OPERATIONS, LLC**, with offices at 38955 Hills Tech Drive, Farmington Hills, Michigan 48331 ("Grantor") and the **TOWN OF BROOKHAVEN**, a municipal corporation of the State of New York with offices at One Independence Hill, Farmingville, New York 11738 ("Grantee").

ARTICLE I. RECITALS AND CONSERVATIONS PURPOSES

A. Grantor is the owner of approximately 228 acres of land lying and being south of the Long Island Railroad, in the hamlet of Yaphank, in the Town of Brookhaven, County of Suffolk and State of New York, hereinafter identified as Suffolk County Tax Map Nos. 0200-815.00-01.00-004.004, 0200-815.00-01.00-006.002, 0200-815.00-01.00-006.003, and part of Old Town Road (collectively, "Parcel D").

B. Grantee is a municipal corporation and has the authority pursuant to Section 247 of the General Municipal Law and Article 49, Title 3 of the New York Environmental Conservation Law (the "ECL") to hold conservation easements. The purpose of the ECL is to conserve, preserve and protect the State's environmental assets and natural and man-made resources, the preservation of open spaces, agricultural and forest lands. The rights conveyed herein are being acquired by the Grantee to carry out the purposes of the ECL.

C. Pursuant to the Grantor's and Grantee's mutual interest in the preservation of open spaces and forest lands (the "Conservation Values"), Grantor and Grantee agreed pursuant to that certain March 17, 2016 Stipulation of Settlement between the Town of Brookhaven and Sills Road Realty LLC, *et al* (the "Stipulated Settlement") to establish a conservation easement over approximately 62 ± acres of Parcel D, more particularly bounded and described in Exhibit "A" and depicted on the survey referenced in Exhibit "B," both attached hereto and made a part hereof by reference (hereinafter referred to as the "Protected Property").

D. The present condition of the Protected Property has been established in the *December 2016 Voluntary Draft Environmental Impact Statement for the Proposed Brookhaven Rail Terminal Expansion* (the "Baseline Documentation"). Grantee and Grantor certify that the Baseline Documentation is an accurate representation of the condition of the Protected Property as of the date of this Conservation Easement, including the location of existing LIPA easements, right-of-ways, and assets (collectively, the "LIPA Assets"). The Baseline Documentation is incorporated by reference herein and will be used to assure that any future changes in the use of the Protected Property are consistent with the terms of this Conservation Easement.

NOW THEREFORE, in consideration of the foregoing purposes and recitals and for the benefit of the general public, the Grantor and Grantee have established this Conservation Easement on, over, and across the Protected Property consisting of the foregoing purposes and recitals and the following terms, covenants, restrictions, and affirmative rights granted to the Grantee. This Conservation Easement shall constitute a servitude upon the Protected Property so encumbered, shall run with the land and shall bind Grantor, its heirs, successors, assigns, lessees, and any other person claiming under them.

ARTICLE II. PURPOSE

It is the purpose of this Conservation Easement to assure the sustained, natural capacity of the Protected Property and to prohibit and prevent any use of the Protected Property that will materially impair or interfere with the Protected Property. This Conservation Easement is established in perpetuity exclusively for conservation purposes consistent with the provisions of New York State General Municipal Law §247, and the Town of Brookhaven Clean Water Open Space Bond Act of 2004.

ARTICLE III. PERMITTED, PROHIBITED, AND RESERVED ACTIVITIES

A. Land Use.

1. **General.** Except for existing LIPA easements and assets, the Protected Property shall remain undeveloped and be used as open space. No industrial, mining, or commercial activities, and no residential or other development, are permitted on the Protected Property.

2. **Prohibited Acts.** Neither party hereto shall perform, or knowingly allow others to perform, any act, including those prohibited or restricted herein, that is inconsistent with the purposes of this Conservation Easement.

3. **Recreational Uses.** Undeveloped recreational uses, such as hiking and bird watching are permitted as long as such uses do not impair the forestland resources, wildlife and habitats, and the other Conservation Values.

B. Structures.

1. **Construction of Buildings or Other Structures.** Construction of new or existing buildings or structures is prohibited; except that the repair, maintenance, or replacement of existing LIPA Assets is permitted. Construction of new structures associated with public utilities (e.g., LIPA) may be permitted on the Protected Property only in the easement area with the Grantee's advance written consent.

2. **Fences.** Grantor must install, maintain and/or relocate boundary markers and fences as necessary for the management and protection of the Protected Property and

not detrimental to the Conservation Values, said boundary fence will be installed prior to any excavation of Parcel D as required pursuant to the Stipulated Settlement.

3. **Signs.** Except for no trespassing signs, and signs identifying the owner of the Protected Property, all other signs, advertisements, and billboards of any nature are prohibited. The Parties agree that Grantee has the right to erect and maintain signs on the Protected Property for the purpose of identifying this Conservation Easement.

4. **Utilities.** The installation or relocation of new public or private utilities, including electric, telephone, or other communications services over the Protected Property, is prohibited without Grantee's advance written consent. Such consent may be given if the Grantee determines that such activities are consistent with the purpose of the Conservation Easement and the ECL. Existing utilities on the Protected Property may be maintained, repaired, removed, or replaced at their current location as identified in the Baseline Documentation.

C. Surface Alterations.

1. **Topography.** Altering the existing topography of the Protected Property by digging, plowing, disking, or otherwise disturbing the surface is prohibited.

2. **Mining.** The surface exploration, development, mining, or extraction of soil, sand, gravel, mineral, oil, gas, or other substance from the surface of the Protected Property is prohibited.

3. **Roads and Impervious Surfaces.** Existing roads may be maintained and repaired in their current condition and within their existing footprint as identified in the Baseline Documentation. Maintenance and repair of existing roads shall not be construed to permit the paving of any existing road not already paved or otherwise covered in an impervious material as of the date of this Conservation Easement.

D. **Waste Disposal.** Dumping, collecting, recycling, accumulating, or storing of trash, refuse, waste, sewage, or other debris is prohibited.

E. **Access.** No public right of access is conveyed by this Conservation Easement. Grantor maintains the right and obligation to prevent trespass and to control access by the public pursuant to Federal and State law, provided that Grantee has the right of ingress and egress to the Protected Property over Grantor's property for the exercise of Grantee's rights under this Conservation Easement. The authorized representatives of Grantee may utilize vehicles and other reasonable modes of transportation for access purposes. Grantee shall make responsible efforts to notify Grantor prior to entry onto any area of the Protected Property.

F. **Quiet Enjoyment.** Grantor reserves for itself and its invitees the right to convey or lease the Protected Property (in whole or in part) and restrict public access.

G. Vehicle Use. The use of motorized vehicles is prohibited, except as necessary to carry out permitted activities on the Protected Property and as necessary to fulfill the purposes of this Conservation Easement.

H. Development Rights. The Protected Property shall not be developed except as expressly permitted by this Conservation Easement. All development rights associated with the Protected Property are vested in Grantor and Grantor may transfer or re-allocate such development rights including, but not limited to, sanitary credits, at Grantor's sole discretion in accordance with the Stipulated Settlement.

I. Subdivision. The Protected Property may be subdivided from the remainder of the tax lot in which it is located without Grantee approval, and further subdivided with prior written approval by Grantee, not to be unreasonably withheld, delayed or conditioned. The terms of this Conservation Easement shall apply to any subdivided parcels.

J. Water Rights. Grantee shall retain the right to use the water rights for the present and future use on the Protected Property. Nothing herein shall be construed to prohibit Grantor from constructing wells on contiguous property owned by Grantor in accordance with all applicable laws, regulations and rules.

K. Restoration. In furthering the conservation purposes of this Conservation Easement, Grantor may restore forestland resources, wildlife and aquatic habitats, and other Conservation Values on the Protected Property if approved in advance and in writing by Grantee. In addition, Grantee shall have the right to enter the Protected Property to undertake, at its own expense or on a cost-share basis with Grantor or other entity, activities to restore, protect, manage, maintain, enhance, and monitor the forestland resources, wildlife and aquatic habitats, and other Conservation Values.

IV. Enforcement

A. General. Grantee has the right to prevent, correct, or require correction of violations of the terms of this Conservation Easement. Upon notification to the Grantor, Grantee or Grantee's agents may enter the Protected Property to inspect for violations of this Conservation Easement. However, notification by Grantee prior to entry is not required when the Grantee believes there may be a violation of the terms of this Conservation Easement. If Grantee finds a violation, Grantee may at its discretion take appropriate legal action in law or equity. Upon discovery of a violation, Grantee shall notify Grantor in writing of the violation. Except when an ongoing or imminent violation could, as determined by Grantee, seriously impair the Conservation Values of the Protected Property, Grantee shall give Grantor written notice of the violation and sixty (60) days to correct it before filing any legal action.

B. Failure to Cure. If Grantor fails to cure the violation within sixty (60) days after receipt of a notice of violation, Grantee may bring an action in law or equity in court to enforce the terms of this Conservation Easement, to enjoin the violation, and to require restoration of the Protected Property to the condition that existed prior to any such injury. Where a court finds that

a violation has occurred, Grantor shall reimburse Grantee for all its expenses incurred in halting and correcting the violation, including but not limited to reasonable attorneys' fees.

C. **No Waiver.** Any delay by Grantee in exercising its rights under this Conservation Easement in the event of any violation of its terms by Grantor shall not be deemed a waiver by Grantee of such rights with respect to that violation. Moreover, any failure by Grantee to discover a violation of this Conservation Easement, or forbearance by Grantee in exercising its rights under this Conservation Easement in the event of any violation of its terms by Grantor, shall not be deemed a waiver by Grantee of such rights with respect to any subsequent violation.

ARTICLE V. ADMINISTRATIVE PROVISIONS

A. Notices.

1. **Means of Notice.** Any notices required by this Conservation Easement shall be in writing by (i) personal delivery, (ii) a nationally-recognized, next-day courier service, or (iii) first-class registered or certified mail, postage prepaid.

2. **Content of Notice.** Any notices required by this Conservation Easement must include, at minimum, sufficient information so as to enable Grantee to determine whether the proposed activities are consistent with the requirements of this Conservation Easement and the purposes hereof. Necessary information may include, but not be limited to, the nature, scope, design, location, and timetable of the proposed activity.

3. **Grantor Notices.** Any notices to Grantor shall be delivered to Grantor's Designee at the following address, or to such other person or address as may be hereafter specified in writing: New York Site Operations, LLC, c/o Oakland Law Group, PLLC, 38955 Hills Tech Drive, Farmington Hills, Michigan, 48331. The approval of, or notice to, Grantor's Designee shall be deemed the approval of, or notice to, Grantor.

4. **Grantee Notices.** Any notices to Grantee shall be delivered to Grantor's designee at the following address, or to such other person or address as may be hereafter specified by notice in writing: Town of Brookhaven, Department of Law, One Independence Hill, Farmingville, NY 11738.

5. **Process of Notice.** Grantor shall provide Grantee written notice not less than sixty (60) days prior to the date Grantor intends to undertake any activity in question. Where Grantee approval is required, Grantee shall grant or withhold its approval within forty-five (45) days of receipt of Grantor's written request thereof. Grantee's approval shall not to be unreasonably withheld, delayed, or conditioned.

6. **Failure to Respond.** If Grantee approval is required under the terms of this Conservation Easement prior to the exercise of a reserved right that is the subject of the notification and request for approval, failure of Grantee to respond within Forty-five (45) days shall be deemed to be approval of any activity specifically prohibited or not inconsistent with the limitations on such activities in this Conservation Easement.

B. Costs and Taxes. Other than as specified herein, this Conservation Easement is not intended to impose any legal or other responsibility on Grantee, or in any way affect any existing obligations of Grantor as the owner of the Protected Property. For example:

1. **Taxes.** Grantor shall continue to be solely responsible for payment of all taxes and assessments levied against the Protected Property.

2. **Upkeep and Maintenance.** Grantor shall continue to be solely responsible for the upkeep and maintenance of the Protected Property.

C. General Indemnification. Grantor shall indemnify and hold harmless Grantee, its employees, agents, and assigns for any and all liabilities, claims, demands, losses, expenses, damages, fines, fees, penalties, suits, proceedings, actions, and costs of actions, sanctions asserted by or on behalf of any person or governmental authority, and other liabilities (whether legal or equitable in nature and including, without limitation, court costs, and reasonable attorneys' fees and attorneys' fees on appeal) to which Grantee may be subject or incur relating to the Protected Property, which may arise from, but is not limited to, Grantor's negligent acts or omissions or Grantor's breach of any representation, warranty, covenant, agreements contained in this Conservation Easement, or violations of any Federal, State, or local laws, including all Environmental Laws.

D. Environmental Warranty. "Environmental Law" or "Environmental Laws" means any and all Federal, State, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, guidelines, policies, or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct (including common law) concerning air, water, solid waste, hazardous materials, worker and community right-to-know, hazard communication, noise, radioactive material, resource protection, subdivision, inland wetlands and watercourses, health protection and similar environmental health, safety, building and land use as may now or at any time hereafter be in effect.

"Hazardous Materials" means any petroleum, petroleum products, fuel oil, waste oils, explosives, reactive materials, ignitable materials, corrosive materials, hazardous chemicals, hazardous wastes, hazardous substances, extremely hazardous substances, toxic substances, toxic chemicals, radioactive materials, infectious materials, and any other element, compound, mixture, solution or substance which may pose a present or potential hazard to human health or the environment.

Grantor warrants that, to the best of Grantor's knowledge, it is in compliance with, and shall remain in compliance with, all applicable Environmental Laws. Grantor warrants that there are no notices by any governmental authority of any violation or alleged violation of, non-compliance or alleged non-compliance with or any liability under any Environmental Law relating to the operations or conditions of the Protected Property. Grantor further warrants that it has no actual knowledge of a release or threatened release of Hazardous Materials, as such substances and wastes are defined by applicable Federal and State law.

Moreover, Grantor hereby promises to indemnify and hold harmless Grantee against all litigation, claims, demands, penalties, and damages, including reasonable attorneys' fees, arising from or connected with the release or threatened release of any Hazardous Materials on, at, beneath, or from the Protected Property, or arising from or connected with a violation of any Environmental Laws by Grantor or any other prior owner of the Protected Property. Grantor's indemnification obligation shall not be affected by any authorizations provided by Grantee to Grantor with respect to the Protected Property or any restoration activities carried out by Grantee at the Protected Property.

ARTICLE VI. GENERAL PROVISIONS

A. Subsequent Liens. No provisions of this Conservation Easement should be construed as impairing the ability of Grantor to use the Protected Property as collateral for a loan, provided that any mortgage or lien associated with the loan is subject to or subordinated to this Conservation Easement. Grantor represents that as of the date of this grant, there are no liens or mortgages outstanding against the Protected Property.

B. Rules of Construction. This Conservation Easement is created pursuant to New York State General Municipal Law §247. This Conservation Easement shall be interpreted under the laws of the State of New York. Any ambiguities in this Conservation Easement and questions as to the validity of any of its specific provisions shall be resolved in favor of Grantee so as to preserve the Conservation Values of the Protected Property and the policy and purpose of General Municipal Law §247, and to give maximum effect to the purposes of this Conservation Easement.

C. No Merger. If Grantee at some future time acquires the underlying fee title in the Protected Property, the interest conveyed by this Conservation Easement will not merge with fee title but will continue to exist and be managed as a separate estate.

D. Rights and Obligations. All provisions of this Conservation Easement apply to Grantor or Grantee and their respective agents, heirs, executors, administrators, assigns, and any other successors. A party's rights and obligations under this Conservation Easement terminate upon transfer of the party's interest in the Conservation Easement or Protected Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

E. Subsequent Conveyances. Grantor agrees to notify Grantee in writing of the names and addresses of any party to whom the Protected Property is to be transferred at or prior to the time the transfer is consummated. Grantor and its successors and assigns shall specifically refer to this Conservation Easement in any subsequent lease, deed, or other instrument by which any interest in the Protected Property is conveyed. Grantor obligations hereunder and or a successor owner of the Protected Property shall be joint and several until such time as such

F. Compliance/Estopper Certificates. Grantee will provide certificates to Grantor or third parties, indicating the extent to which, to Grantee's knowledge after due inquiry, the Protected Property is in compliance with the terms of this grant, after an inspection by Grantee made at Grantor's cost within a reasonable time after Grantor's written request.

G. Amendment and Discretionary Consents. Grantor and Grantee recognize that circumstances could arise which justify amendment of certain of the terms, covenants, or restrictions contained in this Conservation Easement, and that some activities may require the discretionary consent of Grantee. To this end, Grantor and Grantee have the right to agree to amendments and discretionary consents to this Conservation Easement without prior notice to any other party, provided that in the sole and exclusive judgment of the Grantee, such amendment or discretionary consent furthers or is not inconsistent with the purpose of this grant. Amendments will become effective upon recording.

Notwithstanding the foregoing, the Grantee and Grantor have no right or power to consent to any action or agree to any amendment that allows development other than structures for agricultural use and minor structures already allowed in this document, or that would result in the substantial alteration to or destruction of important agricultural and natural resources, or limit the term or result in termination of this Conservation Easement, or adversely affect the qualification of this Conservation Easement or the status of Grantee under applicable laws, including New York State General Municipal Law § 247 and Town of Brookhaven Clean Water Open Space Bond Act of 2004, successor provisions thereof, and regulations issued pursuant thereto.

H. Economic Hardship. In making this grant, Grantor has considered the possibility that uses prohibited by the terms of this Conservation Easement may become more economically valuable than permitted uses, and that nearby properties may in the future be put entirely to such prohibited uses. It is the intent of both Grantor and Grantee that any such changes shall not be deemed to be circumstances justifying the termination or extinguishments of this Conservation Easement. In addition, the inability of Grantor, or its heirs, successors, or assigns, to conduct or implement any or all of the uses permitted under the terms of this Conservation Easement, or the unprofitability of doing so, shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishments.

I. Severability. If any provision of this Conservation Easement is found to be invalid, the remainder of its provisions shall remain in force. Nothing contained herein will result in a forfeiture of this Conservation Easement or reversion to Grantor of any rights conveyed hereby.

J. Captions. The captions used in this Conservation Easement have been inserted solely for convenience of reference. They are not part of this Conservation Easement and shall have no effect upon its interpretation.

K. Acceptance. The signature below of Grantee's authorized representative constitutes acceptance of the rights and responsibilities conveyed by this Conservation Easement to the Town of Brookhaven.

[Signatures on following page.]

IN WITNESS WHEREOF, this agreement has been duly executed by the parties as of this 13th day of OCTOBER, 2017.

NEW YORK SITE OPERATIONS, LLC

By: William B. Clifford, Jr.
William Clifford, Jr., Authorized Agent

TOWN OF BROOKHAVEN

By: Daniel Pardo
Daniel Pardo, Deputy Supervisor

STATE OF MICHIGAN)
) ss:
COUNTY OF OAKLAND)

On this 12th day of October, 2017, before me, the undersigned, personally appeared William B. Clifford, Jr., personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Julie M. Emery
Notary Public: State of Michigan

JULIE M. EMERY
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Sep 1, 2018
ACTING IN COUNTY OF Oakland

STATE OF NEW YORK)
) ss:
COUNTY OF SUFFOLK)

On this 13th day of OCTOBER, 2017, before me, the undersigned, personally appeared Daniel Pardo, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Cesar L. Masters
Notary Public: State of New York

CEsar L. MASTERS
NOTARY PUBLIC, State of New York
No. 01844694984, Suffolk County
Term Expires February 28, 2018

EXHIBIT A**LEGAL DESCRIPTION OF THE PROTECTED PROPERTY****Description of Preservation Areas A and B**

Situate Yaphank
Town of Brookhaven, Suffolk County, New York

Preserved Area B (East of Rail Corridor)

Suffolk County Real Property Tax Service Designation:

District: 0200
Section: 815.00
Block: 01.00
Lots: Part of 006.002

ALL that certain plot, piece or parcel of land, situate, lying and being at Yaphank, Town of Brookhaven, County of Suffolk and State of New York, being bounded and described as follows:

BEGINNING at the southeast corner of the herein described property, said point being more particularly described thus:

COMMENCING at the intersection of the easterly line of Old Town Road with the northerly line of Horse Block Road (Suffolk County Route 16), said point being the southwest corner of property acquired by the County of Suffolk from Decca Navigator Systems, Inc. per Map No. 93 entitled "Map Showing Property to be Acquired from Decca Navigator System, Inc. for County Purposes" County of Suffolk Department of Public Works R.M. Kammerer, Commissioner.

RUNNING THENCE along the northerly line of Horse Block Road (C.R. 16) the following seven courses:

1. South 75 degrees 01 minute 07 seconds East 163.82 feet;
2. Along the arc of a circular curve to the right having a radius of 1,945.86 feet, tangent to the previous course, said curve has a chord which bears South 73 degrees 24 minutes 46 seconds East 109.06 feet, an arc length of 109.07 feet to a point of reverse curvature;
3. Along the arc of a circular curve to the left having a radius of 1,873.86 feet, tangent to the previous curve, said curve has a chord which bears South 73 degrees 24 minutes 46 seconds East 105.02 feet, an arc length of 105.04 feet;

EXHIBIT A (CONT'D)**LEGAL DESCRIPTION OF THE PROTECTED PROPERTY**

4. South 75 degrees 01 minute 07 seconds East, tangent to the previous curve, 79.43 feet;
5. South 05 degrees 32 minutes 27 seconds East 19.19 feet;
6. South 75 degrees 01 minute 07 seconds East 104.97 feet;
7. South 79 degrees 17 minutes 52 seconds East 184.55 feet, to the westerly line of land now or formerly of Rosh, LLC;

THENCE along said westerly line, North 05 degrees 32 minutes 27 seconds West 2,605.87 feet, to the southerly line of land of the County of Suffolk;

THENCE along lands of the County of Suffolk the following eight courses:

1. South 84 degrees 27 minutes 33 seconds West 275.15 feet;
2. North 05 degrees 32 minutes 27 seconds West 1.82 feet;
3. North 05 degrees 23 minutes 40 seconds West 1,890.10 feet;
4. North 03 degrees 49 minutes 20 seconds West 15.25 feet;
5. North 05 degrees 32 minutes 38 seconds West 34.09 feet;
6. North 44 degrees 00 minutes 41 seconds West 312.52 feet;
7. North 49 degrees 00 minutes 49 seconds West 339.27 feet;
8. North 05 degrees 20 minutes 34 seconds West 1,907.87 feet, to the Point of Beginning.

RUNNING THENCE South 84 degrees 32 minutes 29 seconds West 599.29 feet;

THENCE North 05 degrees 27 minutes 31 seconds West 282.03 feet;

THENCE North 15 degrees 27 minutes 31 seconds West 115.18 feet;

THENCE North 05 degrees 27 minutes 31 seconds West 870.03 feet, to the southerly line of the Long Island Railroad;

THENCE along the southerly line of the Long Island Railroad, North 82 degrees 57 minutes 08 seconds East 622.14 feet, to the westerly line of land of the County of Suffolk;

THENCE South 05 degrees 20 minutes 34 seconds East, along said land, 1,288.75 feet, to the Point of BEGINNING.

EXHIBIT A (CONT'D)**LEGAL DESCRIPTION OF THE PROTECTED PROPERTY**Preserve Area A (West of Rail Corridor)

Suffolk County Real Property Tax Service Designation:

District: 0200

Section: 815.00

Block: 01.00

Lots: Part of 004.004, 008.002, Old Town Road

ALL that certain plot, piece or parcel of land, situate, lying and being at Yaphank, Town of Brookhaven, County of Suffolk and State of New York, being bounded and described as follows:

BEGINNING at the northeast corner of the herein described property, said point being more particularly described thus:

COMMENCING at the intersection of the easterly line of Old Town Road with the northerly line of Horse Block Road (Suffolk County Route 16), said point being the southwest corner of property acquired by the County of Suffolk from Decca Navigator Systems, Inc. per Map No. 93 entitled "Map Showing Property to be Acquired from Decca Navigator System, Inc. for County Purposes" County of Suffolk Department of Public Works R.M. Kammerer, Commissioner.

RUNNING THENCE along the northerly line of Horse Block Road (C.R. 16) the following seven courses:

1. South 75 degrees 01 minute 07 second East 163.82 feet;
2. Along the arc of a circular curve to the right having a radius of 1,945.86 feet, tangent to the previous course, said curve has a chord which bears South 73 degrees 24 minute 46 seconds East 109.06 feet, an arc length of 109.07 feet to a point of reverse curvature;
3. Along the arc of a circular curve to the left having a radius of 1,873.88 feet, tangent to the previous curve, said curve has a chord which bears South 73 degrees 24 minutes 46 seconds East 105.02 feet, an arc length of 105.04 feet;
4. South 75 degrees 01 minute 07 seconds East, tangent to the previous curve, 79.43 feet;
5. South 05 degrees 32 minutes 27 seconds East 19.19 feet;
6. South 75 degrees 01 minute 07 seconds East 104.97 feet;
7. South 79 degrees 17 minutes 52 seconds East 184.55 feet, to the westerly line of land now or formerly of Rosh, LLC;

THENCE, along said westerly line, North 05 degrees 32 minutes 27 seconds West 2,605.87 feet, to the southerly line of land of the County of Suffolk;

EXHIBIT A (CONT'D)**LEGAL DESCRIPTION OF THE PROTECTED PROPERTY**

THENCE along lands of the County of Suffolk the following eight courses:

1. South 84 degrees 27 minutes 33 seconds West 275.15 feet;
2. North 05 degrees 32 minutes 27 seconds West 1.82 feet;
3. North 06 degrees 23 minutes 40 seconds West 1,890.10 feet;
4. North 03 degrees 49 minutes 20 seconds West 15.25 feet;
5. North 05 degrees 32 minutes 38 seconds West 34.99 feet;
6. North 44 degrees 00 minutes 41 seconds West 312.52 feet;
7. North 49 degrees 00 minutes 49 seconds West 339.27 feet;
8. North 05 degrees 20 minutes 34 seconds West 3,196.62 feet, to the southerly line of the Long Island Railroad;

THENCE along the southerly line of the Long Island Railroad, South 82 degrees 57 minutes 08 seconds West, 877.24 feet, to the northeast corner of the herein described property at the Point of Beginning;

THENCE South 05 degrees 27 minutes 31 seconds East 2,765.10 feet, to the northerly line of land now or formerly of New York Pyrotechnics;

THENCE along said northerly line, South 84 degrees 19 minutes 38 seconds West 710.58 feet;

THENCE North 04 degrees 46 minutes 00 seconds West 2,749.16 feet, to the southerly line of the Long Island Railroad;

RUNNING THENCE along the southerly line of Long Island Railroad, North 82 degrees 57 minutes 08 seconds East 877.64 feet, to the point or place of BEGINNING.

FF6887700.1

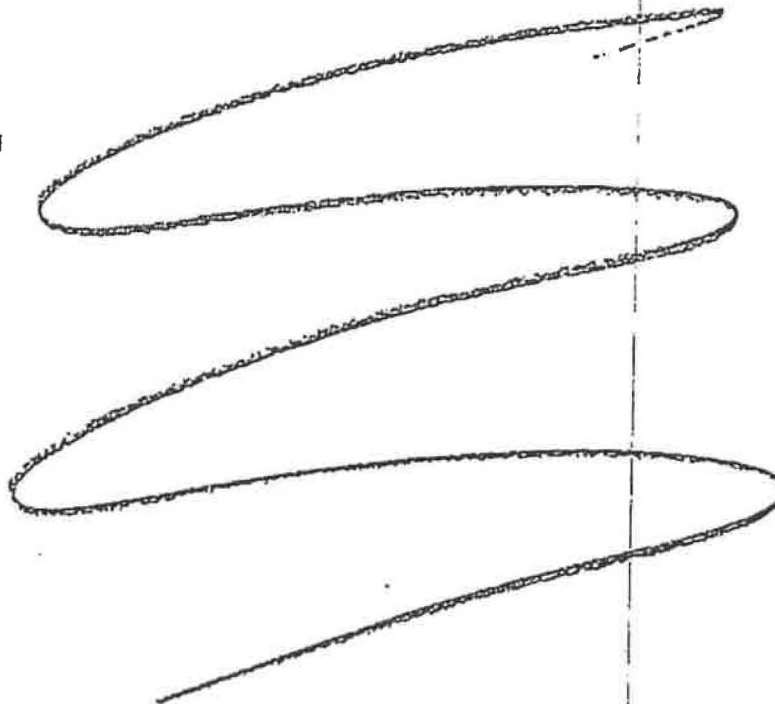
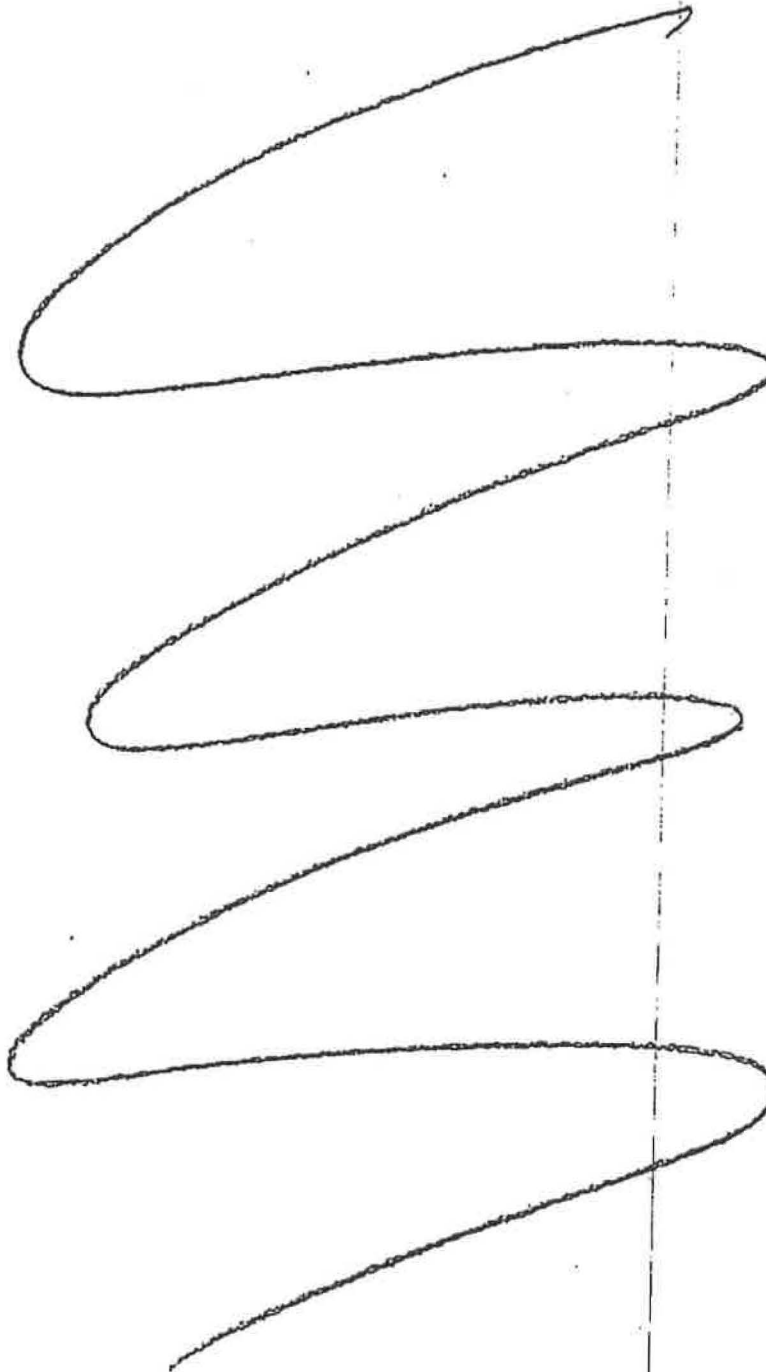
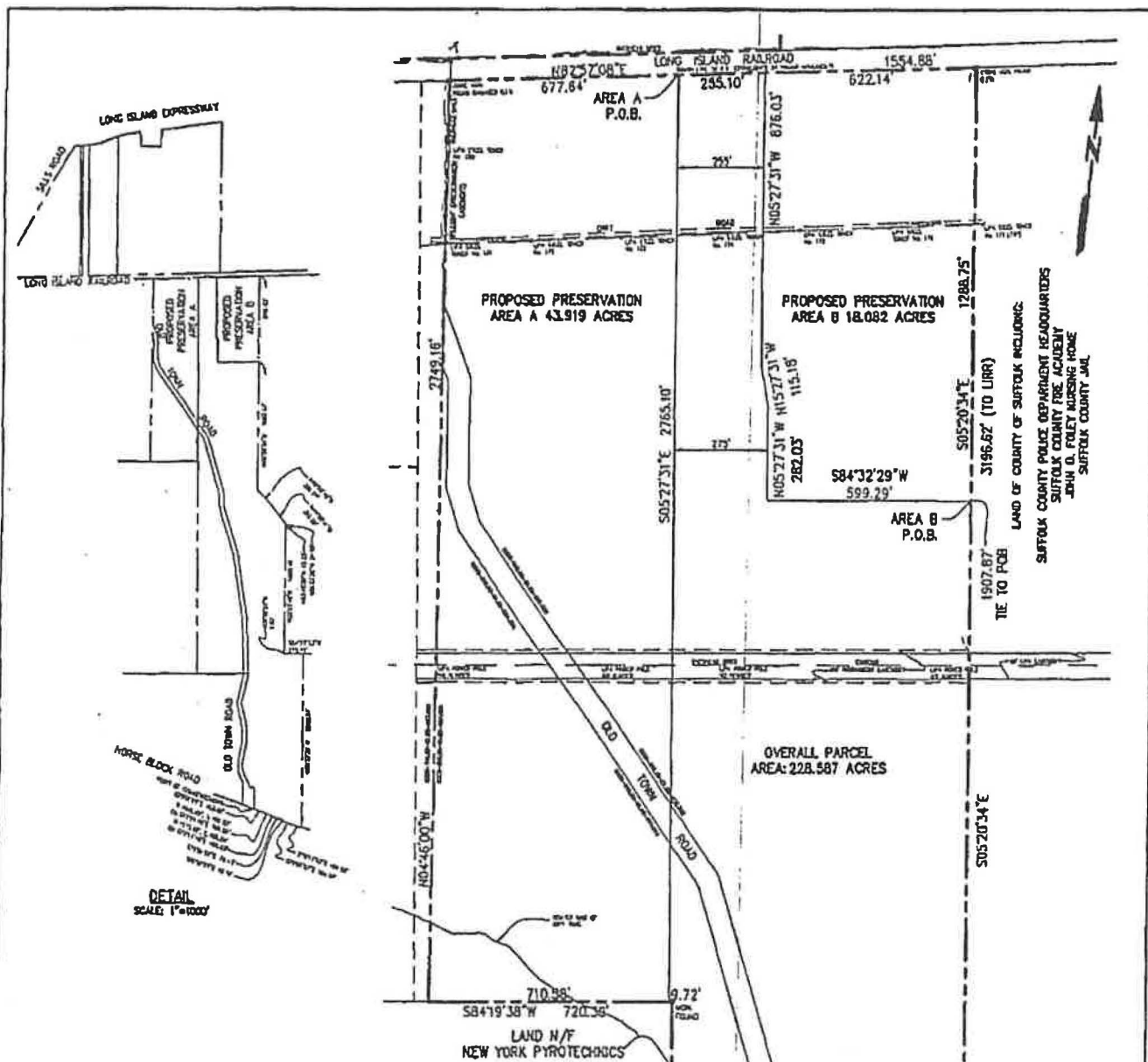


Exhibit B

Survey



FF6882706.2



SUFFOLK COUNTY REAL PROPERTY TAX SERVICE AGENCY DESIGNATION
 DISTRICT: 0200
 SECTION: 815.00
 BLOCK: 01.00
 LOT: PART OF 004.004, 006.002, OLD TOWN ROAD

Underlying filed map lot lines have not depicted.

PRESERVATION AREA A: 43.919 ACRES
 AREA B: 18.082 ACRES
 TOTAL: 62.001 ACRES

Certified to:
 The Town of Brookhaven
 Stewart Title Insurance Company

Unprofessional circulation of sections in the Survey Map is a violation of Section 170 of the New York State Education Law. Copies of this map not bearing the Stamp of the Surveyor's Seal are not valid for any purpose. The Surveyor's Seal is a guarantee of the accuracy of the map and is a requirement of the State Education Law. The Surveyor's Seal is a guarantee of the accuracy of the map and is a requirement of the State Education Law. The Surveyor's Seal is a guarantee of the accuracy of the map and is a requirement of the State Education Law.

NO.	DATE	DESCRIPTION	BY
1	05/20/2020	PREPARED FOR: Oakland Transportation Holdings, LLC MAP OF: Proposed Rail Corridor and Preservation Easements	
LOCATED AT:		Yaphank, Town of Brookhaven	
COUNTY OF:		Suffolk, New York	
CERTIFIED FOR:			
BOWNE ASST GROUP 235 East Jordan Turnpike Alhambra, NY 11501 Phone: 516-261-1111 Fax: 516-261-1112 www.bownegroup.com		SIGNED BY: N/A DRAWN BY: 24 PROJECT NO: 16234.03 SCALE: 1"=200' DATE: July 20 2017	

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36398

BROOKHAVEN RAIL LLC
— CONSTRUCTION AND OPERATION EXEMPTION —
IN SUFFOLK COUNTY, NEW YORK

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

EXHIBIT E

**EASTERN DISTRICT OF NEW YORK
MEDIATION ORDER**

Minute Entry for proceedings held before Judge Joan M. Azrack:

CIVIL CAUSE FOR STATUS CONFERENCE (Tel).

APPEARANCES: For Plaintiff: Robert Calica, Judah Serfaty; For Defendants: Jonathan Sullivan, Carly Everhardt, Christopher DeGennaro; Interested Party PSEG: Janet DeLuca; Interested Party NY Site Operations: Carly Everhardt, Christopher DeGennaro.

Status Conference held on 5/1/2020 at 12:00 PM.

The Court hereby SO ORDERS the Second Interim Stipulation, (ECF No. [177](#)). The Court retains jurisdiction to resolve any dispute or disagreement of the parties concerning the interpretation, effect, enforcement, or breach of any provision or term of the Second Interim Stipulation.

The Court respectfully refers this case to Magistrate Judge Shields for mediation. In conjunction with that referral, the Court orders Brookhaven Rail LLC, Oakland Transportation Holdings LLC, and New York Site Operations, LLC to participate in the mediation before Judge Shields and, if Judge Shields requests, to make available representatives with settlement authority. Winter Bros. Waste Systems of Long Island, LLC is also encouraged to participate in the mediation. Judge Shields will determine the specifics of how the mediation will be conducted. The parties to the state court action are directed to inform the state court about the mediation in federal court and provide the state court with a copy of this minute entry. (Simmons, James) (Entered: 05/02/2020)

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36398

BROOKHAVEN RAIL LLC
— CONSTRUCTION AND OPERATION EXEMPTION —
IN SUFFOLK COUNTY, NEW YORK

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

EXHIBIT F

**TOWN OF BROOKHAVEN LETTER TO THE
EASTERN DISTRICT OF NEW YORK
MARCH 31, 2020**

ROSENBERG CALICA & BIRNEY LLP

ATTORNEYS AND COUNSELORS AT LAW
100 GARDEN CITY PLAZA, SUITE 408
GARDEN CITY, NEW YORK 11530
TELEPHONE (516) 747-7400
FACSIMILE (516) 747-7480
WWW.RCBLAW.COM

March 31, 2020

VIA ECF AND FIRST CLASS MAIL

Hon. Joan M. Azrack, District Court Judge
United States District Court : Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: Town of Brookhaven v. Sills Road Realty LLC, Brookhaven Rail, et al.
Docket No. 14-CV-02286 (JMA:AYS)

Dear Judge Azrack:

We are attorneys (as Special Counsel to Brookhaven Town attorney Annette Eaderesto, Esq.) for plaintiff, Town of Brookhaven ("Town") in this matter. We respectfully write in advance of the Telephone Status Conference scheduled before your Honor for 3:30 p.m. on April 1, 2020 to alert both the Court and the BRT Defendants (previously defined) that the Town plans: (a) to declare the Interim Stipulation dated February 25, 2020 terminated in accordance with its terms for non-compliance; (b) to reinstate the Stop Work Order so as to prevent any further excavation and removal of sand and native soils from the BRT site; and (c) to consider a Resolution at the Town Board's next session (scheduled for April 7, 2020) to issue a Positive Declaration requiring the preparation of a Draft Supplemental Environmental Impact Statement as a result of substantially changed circumstances impacting the Negative Declaration granted by the Town on September 14, 2017.

The foregoing actions are required by reason of both BRT's material non-compliance with the Interim Stipulation and of even greater importance, by reason of a recently ascertained substantial change in the planned Railway Expansion Project as a result of the elimination of the 229-acre Parcel D from project (more than two-thirds of the total). The elimination of Parcel D from the Railway Expansion Project, which was long concealed from the Town by the BRT Defendants, was disclosed to the Town by the Parcel D owner in the last several days. The development eliminates the BRT Defendants' justification for the majority of the ongoing massive excavation and removal of sand and soils which has been occurring for years throughout the site based upon the BRT Defendants' purported need to create a tunnel/underpass under the existing LIRR Tracks between Parcels C and D. Much of the BRT Defendants' justification for

March 31, 2020
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lowering grades throughout the entire site has been the purported need to lower the grades at the southeast corner of Parcel C by an average of approximately 14 feet to accommodate the planned “Tunnel” connecting it to Parcel D. The elimination of the Tunnel renders the current excavation and removal of sand and soils both unnecessary and environmentally destructive.

The BRT Defendants’ legal authority to excavate and remove sand and soils and regrade the site derives exclusively from the environmental approvals under SEQRA which are mandated under the 2016 So Ordered Stipulation (previously defined). The Town’s required environmental review of the BRT Project resulted in the SEQRA “Negative Declaration” granted by the Town on September 14, 2017 (Ex. A) which, inter alia, approved the BRT Defendants’ plans to connect the southeast corner of the 73-acre Parcel C to the 229-acre Parcel D to the south of it by excavating a tunnel/underpass beneath the existing Long Island Railroad Tracks which separates them so as to incorporate Parcel D in the Railway Expansion Project. With the recently ascertained elimination of Parcel D and the Tunnel/Underpass beneath the existing LIRR Tracks to connect it to Parcel C, the entire scale and scope of justifiable regrading and its concomitant excavation and removal of sand and soils for regrading has materially changed.

As a result, and as detailed below, a Supplemental Environmental Impact Statement (“SEIS”) to address the substantial change in the planned Railway Expansion Project will be required both under governing provisions of SEQRA and its Regulations (see, Bronx Committee for Toxic Free Schools v. N.Y. City School Construction Authority, 20 N.Y. 3d 148 [2012]) and a completely new and revised Grading and Excavation Plan for Parcels B and C which does not unnecessarily lower existing (or remaining) grades and vastly reduces the previously allowed level of excavation and removal of sand and soils will be required.

A. The BRT Defendants’ Failure to Comply with the Interim Stipulation

The Town anticipates that the BRT Defendants will fail to meet the multiple April 1, 2020 “*time of the essence*” deadline under the Interim Stipulation. The failure to do so results in the termination of the Interim Stipulation and the automatic restoration of the Town’s Stop Work Order. Specifically, the Interim Stipulation requires that by April 1, 2020, the BRT Defendants must:

a. Bindingly “select” under paragraph “5a” to proceed with either a Counterclockwise Track configuration (the “Counterclockwise Track Plan”) or a Clockwise Track configuration (the “Clockwise Track Plan”). It is to be borne in mind that the BRT Defendants have failed to commit to one or the other Track Plan since the prior SEQRA Negative Declaration was issued on September 14, 2017 (Ex. A). Instead, the BRT Defendants have been regrading the entire site so as to accommodate both Plans;

b. Because the Counterclockwise Track Plan requires the BRT Defendants to construct track across a portion of Parcel B owned by the Long Island Power Authority (“LIPA”)

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on which LIPA's transmission lines, towers and other electrical equipment are located, the Counterclockwise Plan cannot proceed unless the BRT Defendants acquire access rights across, or acquire the LIPA-owned portion of Parcel C entirely. The BRT Defendants claim to have been diligently seeking such rights from LIPA for many years, but LIPA itself refutes that claim and its representatives have sought and obtained leave to participate in the April 1, 2020 Telephone Status Conference with the Court for that reason¹. As a result, no later than April 1, 2020, time being "*of the essence*", the Interim Stipulation mandates that the BRT Defendants must provide a "*Letter of Intent between the BRT Defendants and the Long Island Power Authority ('LIPA') or other suitable written assurance of LIPA to enter into an agreement authorizing the BRT Defendants to construct the portion of railroad track on Parcel C which is located upon and crosses the property owned by LIPA, time being 'of the essence' (the 'LIPA Statement')*" (*id.*, para. "5b");

c. Provide the Town and its Consultant, VHB Engineering "*with a proposed Track Installation Plan and timetable, and Track Grading Plan corresponding to the Selected Track Plan*" which requires "*the installation, construction and laying of track (the 'Track Installation') as regrading, excavation or site preparation thereof progresses*" (*id.*, para. "5c"); and

d. Despite years of excavation, removal of sand and soil and regrading of the site, the BRT Defendants have failed to provide the Town with actual measurements of elevations and grading of the site. As a result, the Interim Stipulation provides that by April 1, 2020, the BRT Defendants will provide the Town with "*an aerial topographic study of the BRT Railway expansion site for the purpose of measuring elevations and grading to date*", despite having reportedly engaged the Engineering Firm of PW Grosser Consulting on February 12, 2020 to "*report current site elevations and the extent of grading to date in a commercially reasonable manner and using best professional practices*" (*id.*, para. "6"). Despite the lifting of the Stop Work Order for nearly five weeks during which the BRT Defendants have continued to excavate the site and remove and sell sand and soils (with essentially no Track construction having ever occurred), the BRT Defendants have not even honored so rudimentary an obligation as to provide the Town and its Engineers, VHB Consulting with a "*Report [of] current site elevations and the extent of grading to date*" (*id.*, para. "6").

¹ LIPA has advised the Town that the BRT Defendants caused in excess of \$1 million of damage to LIPA transmission equipment as a result of prior sand mining the LIPA-owned areas of the site since 2014 and have thus far failed and refused to reimburse LIPA for these damages. The BRT Defendants' deep excavations on both sides of the LIPA transmission lines and equipment are clearly shown in the aerial photographs attached to the Town's prior submissions to this Court (see Preliminary Injunction Hearing Ex. 16, Ex. C hereto).

March 31, 2020

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Upon the expiration of the foregoing April 1, 2020 “*time of the essence*” deadlines, the Interim Stipulation provides that the Stop Work Order is to be reinstated (*id.*, paras. “5a”, “9 and 10”).

B. The Elimination of the 229-Acre Parcel D and the Planned Tunnel/Underpass to Connect Parcel D with the Remainder of the Site Substantially Reduces/Eliminates the Volume of Permissible Excavation and Removal of Sand and Soils and Requires an SEIS

BRT and its counsel failed to disclose that the owner of the 229-acre Parcel D, New York Site Operations LLC/Oakland Transportation (“NYSO/Oakland”), apparently determined long ago that Parcel D would not become a part of the planned Railway Expansion Project. We learned of this only recently when contacted by the firm of Jaspan Schlessinger LLP as attorneys for Winter Bros. Waste Systems of Long Island LLC (“Winter Bros.”), the contract vendee of Parcel D that NYSO/Oakland had determined to “*pull out of the deal*” with BRT, remove Parcel D from the Project entirely, and instead sell it to Winter Bros. as a waste transfer facility. We learned, at the same time, that BRT was actually suing to enjoin the sale. The final “*nail in the coffin*” occurred late this past Friday when NYSO/Oakland provided Town Attorney Annette Eaderesto, Esq. with a copy of its March 27, 2020 (Ex. B) letter advising that:

“This letter is sent on behalf of New York Site Operations, LLC (“NYSO”). This letter shall serve as written confirmation that NYSO has no intention of allowing for the connection of Parcel D and Parcel C by way of a tunnel under the Long Island Railroad under any circumstances. We have discussed NYSO’s position on the tunnel issue with the contract vendee for Parcel D, Winters Bros. Waste Systems of Long Island, LLC, and they have responded noting that they similarly have no intention to ever allow for a tunnel connection between Parcels C and D.”

The Town has been advised by its Consultants, VHB Engineering (Ex. D), that the elimination of the 229-acre Parcel D and the elimination of the planned Tunnel/Underpass to connect it with the 73-acre Parcel C would result in a vast reduction in the necessary and permissible grading of Parcel C (which was to be lowered by an average of approximately 14 feet in the southeast corner to accommodate the Tunnel/Underpass) and vastly reduce the amount of sand and soils required or permitted to be removed from the site under the prior SEQRA Negative Declaration. The previous engineering and environmental justification for allowing the excavation and removal of between 960,000-1.15 million cubic yards of sand and soil from the site in order to accommodate lower grades needed for Track to gradually enter the Tunnel/Underpass has been eliminated.

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Under well-settled SEQRA principles established by the New York Court of Appeals in Bronx Committee for Toxic Free Schools, (supra) and under SEQRA and its Regulations, a Supplemental Environmental Impact Statement (“SEIS”) is mandated whenever “(a) *changes proposed for the project*; (b) *newly discovered information*; or (c) *a change in circumstances related to the project...are of sufficient importance and relevance to warrant preparation of a Supplemental EIS*”. See, 6 NYCRR Section 617.9(a)(7).

By reason of this recently “*discovered information*”, “*change in the project*” and the far-ranging “*changes in circumstance*” that will necessarily substantially impact the environment and the Town’s prior environmental assessment of the Project, the Town will consider at its next Town Board session scheduled for April 7, 2020 requiring the preparation of an appropriate SEIS, pending the submission and consideration of which the project will be without SEQRA approval and cannot proceed.

Conclusion

It is anticipated that the Interim Stipulation will become terminated in accordance with its terms for non-compliance on April 1, 2020 when the Telephone Status Conference with the Court is scheduled to occur. At such time, the Stop Work Order will automatically be reinstated, as the parties have agreed in the Interim Stipulation.

In the event the BRT Defendants exercise their reserved right under the Interim Stipulation to challenge the Stop Work Order or revive their Application for Preliminary Injunctive Relief, the Town will request that the Court establish an appropriate Briefing Schedule and deny the BRT Defendants’ pending Application for a Temporary Restraining Order.

We thank the Court for its attention and consideration.

Respectfully,

ROSENBERG CALICA & BIRNEY LLP

By: //s//Robert M. Calica//s//
Robert M. Calica
Judah Serfaty

RMC:ds
cc: Counsel of Record (*via ECF*)

Attachments

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of July, 2020, I served copies of the foregoing Reply electronically (via email) upon each the following party of record:

Thomas W. Wilcox
Counsel for Brookhaven Rail LLC
twilcox@gkglaw.com

/s/ *R. A. Wimbish*

Robert A. Wimbish