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August 4, 2020

By E-Filing

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

Re: FD No. 36398, *Brookhaven Rail LLC – Construction and
Operation Exemption – Suffolk County, New York*

Dear Ms. Brown:

Accompanying this letter for filing on behalf of Brookhaven Rail LLC are (1) a Motion for Leave to File a Response to the Reply of Sills Road Realty LLC, Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC; and (2) the proffered Response to the Reply of Sills Road Realty LLC, Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC.

Please do not hesitate to call me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Thomas W. Wilcox
Attorney for Brookhaven Rail LLC

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36398

**BROOKHAVEN RAIL, LLC – CONSTRUCTION AND OPERATION EXEMPTION
- IN SUFFOLK COUNTY, NEW YORK**

**MOTION FOR LEAVE TO FILE RESPONSE TO THE
REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN
TERMINAL OPERATIONS LLC, AND BROOKHAVEN
RAIL FREIGHT SERVICES LLC**

Brookhaven Rail LLC (“BHR”) respectfully requests leave to file the attached Response to the Reply of Sills Road Realty LLC, Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC (“the Sills Parties”) to the Petition for Exemption (“Rail Petition”) filed in this docket on July 15, 2020 (“Reply”).

Although the Board’s rules do not permit the submission of a reply to a reply as a matter of right, 49 C.F.R § 1104.13(c), the Board has waived this restriction in situations where good cause has been shown in the interest of compiling a full record.¹ Good cause exists here because the Reply contains a number of inaccurate and misleading statements of purported fact, as well as factual omissions that relate to issues that are material to this proceeding.

¹ See, e.g., F.D. 35960, *Petition of Union Pac. R.R. Co. for Declaratory Order* (served Sept. 30, 2016); F.D. 35157, *The City of Alexandria, Virginia – Petition for Declaratory Order* (served Nov. 6, 2008); F.D. 35765, *Wichita Terminal Association, BNSF Railway Company and Union Pacific Railroad Company – Petition for Declaratory Order* (served May 20, 2014). See also 49 C.F.R. §1100.3 (“The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”).

For example, the Reply inaccurately characterizes the “So-Ordered Stipulation of Settlement” (“2016 Settlement”)—the product of litigation in the United States District Court for the Eastern District of New York—as conclusive guidelines for the development of Parcels A, B, C, and D located at the Brookhaven Rail Terminal Site (“BRT”). The Sills Parties go on to assert that BHR’s proposed rail construction project on Parcel D set forth in the Rail Petition is a “repudiation of the 2016 Settlement” because its design varies from conceptual track configurations included in that agreement. The Sills Parties greatly mischaracterize the intent and purpose of the 2016 Settlement. Additionally, the Reply greatly overstates the extent to which the Sills Parties’ views on the 2016 Settlement in relation to development of Parcel D are the subject of current litigation before the Eastern District. The proffered Response explains that this litigation is instead narrowly focused on allegations by the Town of Brookhaven, New York that the Sills Parties violated the 2016 Settlement through their actions on Parcels B and C of the BRT. Indeed, the Sills Parties falsely assert that the issues they raise in their Reply are the subject of court-ordered mediation where BHR is a party.² The proffered Response corrects this falsehood and provides relevant documents that the Sills Parties omitted from their filing.

Similarly, the Sills Parties’ erroneously assert that “BHR is not entitled by law to acquire Parcel D, and NYSO [the current owner of Parcel D] may not legally transfer ownership to Winters [Brothers Waste Systems of Long Island], BHR, or any Winters affiliate.”³ The proffered Response explains how these assertions are wrong, and how they mischaracterize the nature of the transaction and the proposed project. It also explains that the state litigation does not prohibit the sale of Parcel D to Winters Bros. or its affiliate.

² Reply at 11.

³ *Id* at 12.

Finally, BHR's Response addresses multiple erroneous assertions of the Sills Parties associated with the environmental review of the proposed project. These allegations include that BHR has ignored the presence of Conservation Easements on Parcel D, that the rail project may not proceed because of the easements based on the Sills Parties strained interpretation of the 2016 Settlement, and that BHR has not complied with or does not intend to comply with the Board's NEPA review or any conditions the Board imposes on the construction and operation of the proposed railroad lines.

BHR could not have anticipated that the Reply would contain its numerous inaccuracies and misleading statements, many of which touch on material aspects of the Rail Petition. Where a party could not reasonably have anticipated the contentions of an opponent that could be material to the resolution of a case, it has good cause for being granted leave to reply.⁴ BHR therefore states that good cause exists for it supplement the record in response to the Reply so that the Board will have an accurate basis on which to render a decision.

Neither this Motion nor the proposed Response raise any new legal issues or expand the nature of this proceeding. Further, accepting this Response into the record will not prejudice any party because the Board has not yet issued any rulings on the merits of the issues raised in this proceeding. Accordingly, and for the reasons stated above, BHR requests that the Board grant this Motion for leave to file BHR's Response to the Sills Parties' Reply to the Petition for Exemption filed in this proceeding.

⁴ See, e.g., *Delaware & Hudson Ry. Co. v. Consol. Rail Corp. – Reciprocal Switching Agreement*, 9 I.C.C. 2d 989, 990 (1993).

Respectfully submitted,



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August 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of August, 2020, a copy of the foregoing Motion for Leave to file Response to the Reply of Sills Road Realty LLC, Brookhaven Rail Terminal Operations LLC, and Brookhaven Rail Freight Services was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36398

**BROOKHAVEN RAIL, LLC – CONSTRUCTION AND OPERATION EXEMPTION
- IN SUFFOLK COUNTY, NEW YORK**

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

On June 26, 2020, Brookhaven Rail LLC (“BHR”) filed its Petition for Exemption (“Rail Petition”) in this proceeding. On July 15, 2020 Sills Road Realty LLC (“Sills”), Brookhaven Rail Terminal Operations LLC (“BTO”) and Brookhaven Rail Freight Services LLC (“BRFS”) (collectively calling themselves the “Sills Parties”) filed a joint Reply in opposition to the Rail Petition. In their Reply the Sills Parties present a number of baseless allegations and assertions about BHR, the Rail Petition, and the proposed rail construction project. They also grossly mischaracterize the ongoing litigation between Sills, BTO and others in New York federal and state courts. These mischaracterizations include the patently false statement that when the Rail Petition was filed the issues the Sills Parties raise in their Reply about the rail construction project described in the Rail Petition and the development of Parcel D, and their relation to the 2016 Settlement¹ were the subject of ongoing court-ordered mediation in the pending federal district

¹ See page 11 of the Petition, which identifies the “2016 Settlement” as the “So-Ordered Stipulation of Settlement” entered by the court on March 17, 2016 in *Town of Brookhaven v. 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*

court case involving the latest of numerous disputes between the Town of Brookhaven, New York (the “Town”) and the Sills Parties and their affiliates. This is false. In the current case, the Town has alleged that Sills, BTO, Sills Expressway Associates, Watral Brothers Inc. and Pratt Brothers Inc. (this subset of the original defendants is referred to by the Court as the “Sills Road Defendants”) violated the terms of the 2016 Settlement through actions on Parcels B and C of the Brookhaven Rail Terminal Site (“BRT”). In this Response BHR refutes the Sills Parties’ allegations and provides the Board with critical factual information that the Sills Parties omitted from their filing in their zeal to mislead the Board and introduce issues into this proceeding that are unrelated to the Rail Petition and the proposed project.

A. The Rail Petition is not Premature or Incomplete

The first assertion by the Sills Parties that the Rail Petition is premature and incomplete is easily disposed of by the current record. Specifically, the Sills Parties wrongly claim that the Rail Petition is premature because they wrongly characterize it as entirely dependent on whether the Board decides to exempt BHR from a Town zoning law that would otherwise prevent construction of a solid waste rail transfer facility on Parcel D, which the Rail Petition specifically states would be the subject of another Petition for Exemption to be filed in Docket No. FD 36399. This “premature” argument has been mooted by BHR filing on July 27, 2020 in that docket a Petition for Exemption from Requirements of §10909 (referred to herein as the “Land-Use Petition”). Moreover, the Rail Petition is *not* completely dependent on the Board’s granting of the preemption and accompanying authority sought in Docket No. FD 36399. The Rail Petition clearly states in several places that the construction and operating authority it seeks is for new lines of railroad that

Pratt Brothers, Inc., Docket No. 14-cv-02286, U.S. District Court for the Eastern District of New York.

will not only serve the proposed solid waste rail transfer facility, but will also serve other industries and shippers as they locate on Parcel D and require and request common carrier rail service.² The Rail Petition is therefore not entirely dependent on the approval of the land use exemption sought in Docket No. FD 36399, but rather is a stand-alone request for construction and operating authority for tracks that will entail the development of all of Parcel D, not just the solid waste rail transfer facility.

Nor is the Rail Petition incomplete. Contrary to the Sills Reply, it is not necessary that a construction exemption petition filed pursuant to 49 U.S.C. §10502, in addition to correctly and accurately conveying the facts, must also “demonstrate[] that business and contractual prerequisites to the transaction have been met or will soon be completed, and . . . [it] is not contingent upon the resolution of issues contested in other venues.”³ Only *one* rail construction and operation case is cited in the Reply for alleged support of this proposition, and in that case the railroad seeking construction and operating authority *sought to hold its own petition in abeyance* because the project was for a coal mine which was not going to receive its mining permit and its owners were in bankruptcy.⁴ The Board denied the request and dismissed the petition without protest because keeping the docket open “would serve no purpose.”⁵ In reality, the Board does not apply the strict standard the Sills Parties espouse to construction exemption petitions submitted pursuant to 49 U.S.C. §10502. Rather, the general rule is that

The Board’s grant of authority to construct a line (whether under § 10901 or by exemption under § 10502) is permissive, not mandatory—that is, the Board does not require that an approved line be built. As a result, the Board has repeatedly recognized that the decision to go forward with an approved project ultimately is

² Rail Petition at 4, 5, 7, and 10.

³ Sills Reply at 5.

⁴ STB Docket No. FD 30186, *Tongue River Railroad Company, Inc. – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties, Montana* (served April 26, 2016).

⁵ *Id.* at 3.

in the hands of the applicant and its potential investors (whether public or private) and not this agency. *Accordingly, the Board may grant authority to construct a line even if all outstanding issues related to the proposed construction have not yet been resolved or if factors beyond the Board's control (such as the outcome of pending litigation in the California courts related to funding or Proposition 1A) might ultimately prevent consummation of the proposed construction.*⁶

As discussed in this Response, the Sills Parties' claims concerning the alleged inability of BHR, the Town and other parties to modify the BRT rail track expansion proposed in the 2016 Settlement, Voluntary Environmental Impact Statement ("VDEIS") and Negative Declaration⁷ to construct the rail lines proposed in the Rail Petition are unsupported and unfounded. Also baseless are the Sills Parties' statements about the alleged inability of Winters Brothers Waste Systems of Long Island LLC ("Winters Brothers") or an affiliated company to acquire Parcel D. There is therefore no basis for concluding the Rail Petition is "incomplete." But in any event such allegations are largely irrelevant to the Board's consideration of whether the proposed project meets the requirements of 49 U.S.C. §10502, and its conducting of the required analysis under National Environmental Policy Act ("NEPA") to determine any potential environmental impacts of the conceptual rail construction project that has been proposed in the Rail Petition.

⁶ Docket No. FD 35724 (Sub-No. 1), *California High-Speed Rail Authority—Construction Exemption—In Fresno, Kings, Tulare, and Kern Counties, Cal.* (served August 12, 2014)(emphasis supplied); accord Docket No. FD 35724, *California High-Speed Rail Authority—Construction Exemption—In Merced, Madera and Fresno Counties, Cal.* (served June 13, 2013); see also FD No. 33407, *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin* (served February 15, 2006)("The authority that we grant to DM&E here to construct this line is permissive. DM&E is not required to build the line. It will have to acquire the necessary right-of-way, secure financing, and obtain approvals from certain cooperating agencies before it can construct the new line.")

⁷ See Rail Petition at 12.

B. The 2016 Settlement Does not Prevent BHR from Proceeding with the Project

In Section II of their Reply the Sills Parties present a series of mischaracterizations of the Rail Petition, the 2016 Settlement terms, the current litigation in federal court between the Town and the Sills Road Defendants alleging their non-compliance with the 2016 Settlement for activities on Parcels B and C of the BRT, and the relevance of VDEIS and Negative Declaration to the Board's environmental review of the project proposed in the Rail Petition.⁸ BHR briefly responds to these baseless statements and arguments.

1. The Reply Grossly Mischaracterizes BHR's View of the 2016 Settlement

In the first place, *nowhere* in the Rail Petition does it state or even imply (and the Sills Parties' do not cite any page of the Rail Petition) that "the 2016 Settlement contemplates or otherwise provides for a [solid] waste management facility to be developed on Parcel D."⁹ The fact that a solid waste rail transfer facility was *not* contemplated by the 2016 Settlement is the reason that it was necessary for BHR to submit the Land-Use Petition asking the Board to preempt the Town's zoning law to permit such a facility to be constructed on Parcel D. This being said, as explained in the Rail Petition the conceptual plans for Parcel D in the 2016 Settlement do contemplate rail construction similar to that which is proposed in the Rail Petition, and the 2016 Settlement, VDEIS and Negative Declaration also contemplated rail transload facilities and activities on Parcel D for commodities other than solid waste. BHR has designed its rail lines to closely follow the conceptual rail construction plans and development of Parcel D proposed in the 2016 Settlement and assessed in the VDEIS, with some variations as noted in the Rail Petition.

⁸ Rail Petition at 10-13.

⁹ Reply at 11.

The Rail Petition expressly recognizes, as it must, that the Board will conduct a separate environmental analysis pursuant to NEPA of the proposed rail construction project, and that the 2016 Settlement contemplated rail transload facilities and activities other than solid waste rail transfer facilities. BHR further understands that the Board's Office of Environmental Analysis' ("OEA") NEPA review is covering both the rail construction project and the proposed solid waste rail transfer facility. As the Rail Petition clearly states, copies of the VDEIS, 2016 Settlement, and the Negative Declaration were all provided to the OEA to supplement that process, not replace it. BHR fully recognizes that the relevance and usefulness of those documents to the STB's independent NEPA analysis is the decision of the OEA and the Board. All of these points have been expanded upon and reinforced in the Land-Use Petition in Docket No. FD 36399.

2. The Claims of Sills and BTO Regarding the Interpretation of the 2016 Settlement Are Wrong and Are Not Pending Before any Court

The Sills Parties nevertheless argue that the Rail Petition cannot be processed by the Board because the proposed project deviates from the conceptual rail construction plans for Parcel D discussed in the 2016 Settlement, BHR is a signatory to that document, and that agreement binds *all* of the parties who signed it to *every single* component of that agreement unless *all* parties to the settlement consent to the change.¹⁰ Stated another way, under this restrictive and unsupported view of the 2016 Settlement *one* signatory to the agreement has the absolute right to veto *any* change to the BRT conceptual track expansion plans discussed therein. This interpretation of the 2016 Agreement is one that only Sills and its affiliates¹¹ appear to hold. They have adopted this overly restrictive and self-serving view of the 2016 Settlement to try to prevent an owner of Parcel

¹⁰ Reply at 8-9.

¹¹ Other Sills-related entities and affiliates are signatories to the 2016 Settlement, but only Sills and BTO are included in the Sills Parties who filed the Reply.

D and BHR from establishing rail access and service to shippers on Parcel D via a direct connection to the main line of the Long Island Rail Road (“LIRR”) instead of waiting on Sills and its affiliates to construct track from Parcel A over to Parcels B and C, and then connect Parcels C and D via a tunnel. The tunnel would require a significant amount of soil excavation, vegetation removal, and other environmental harm on Parcels C and D.¹² This connection was included in the conceptual plans for rail construction on Parcels C and D but the current owner of Parcel D, New York Site Operations, LLC (“NYSO”)¹³ decided it would no longer allow the tunnel to access Parcel D in contemplation of the sale of Parcel D to Winters Brothers or its designee.¹⁴ The Town supports the elimination of the tunnel and the resulting alleviation of significant environmental harm.¹⁵

Despite the Sills Parties’ implication in their Reply to the contrary,¹⁶ there are no issues concerning the 2016 Settlement’s application to the development of Parcel D presently before the U.S. District Court for the Eastern District. On the contrary, the current litigation before that court is a specific “Notice of Default” and “Stop Work Order” action brought by the Town primarily

¹² Notwithstanding that the Sills Parties and their fellow Sills Road Defendants fight in every forum that there must be a tunnel, to date they have taken no action to design, obtain approvals for, construct or evidence their ability to pay for such a tunnel. Rather, they focus their efforts on excavating tons of sand and soil on Parcels B and C, which they sell for a profit. Notably, the 2016 Settlement is silent on exactly who is responsible, if anyone, for the construction of the tunnel, including the excavation. The Sills Road Defendants have and continue to be the beneficiaries of pointing toward the tunnel because it provides a need to excavate the volume of material they have excavated from Parcels B and C, which they have done over the strong objection of the Town. See July 31, 2020 Letter from Robert Calica to Honorable Joan M. Azrack, District Court Judge, and relevant attachments thereto, attached as Exhibit A.

¹³ BHR acknowledges that the Rail Petition incorrectly stated that NYSO’s affiliate Oakland is the current owner of Parcel D.

¹⁴ See March 27, 2020 Letter from William B. Clifford, counsel for Oakland and NYSO to Andrew Kaufman, President of Sills Road Realty, LLC., attached as Exhibit B.

¹⁵ See Exhibit A at 2, objecting to the continued excavation of “additional one-half million cubic yards of sand and soil from these environmentally vulnerable and protected properties in order to *“build a tunnel to nowhere.”* (emphasis in original).

¹⁶ Reply at 8.

against the Sills Road Defendants¹⁷ alleging that they violated the terms of the 2016 Settlement and Negative Declaration by (1) conducting environmentally harmful “sand mining” excavation on Parcels B and C and (2) refusing to follow through with any of the planned rail construction on those two parcels as first proposed by them in 2014. In a nutshell, since 2016 the Sills Parties have been excavating and selling sand but not constructing any rail tracks pursuant to the 2016 Settlement, and so *there is no track on Parcel C to connect to any tracks (via a theoretical tunnel or otherwise) to be constructed on Parcel D*, and there is no indication that any tracks will be constructed on Parcel C for the foreseeable future.

Nothing in the Town’s Notice of Default and Stop Work Order action pertains to any rail construction or operations on Parcel D. Accordingly, the Sills Parties’ statement that the 2016 Settlement “actually relates to ongoing litigation before the [Eastern District],” Reply at 8, is simply is not true as to the proposed rail construction covered by the Rail Petition or any other development of Parcel D planned by BHR and Winters Brothers or its designee.¹⁸ Despite the unsuccessful efforts by Sills and BTO to drag issues concerning Parcel D and their interpretation of the 2016 Settlement into that present dispute there are no such issues currently before the District Court.¹⁹

¹⁷ As shown in Footnote 1 the Town’s lawsuit was originally filed against Sills, BTO, BHR, Oakland Transportation Holdings, LLC (“Oakland”), Sills Expressway Associates, Watral Brothers, Inc., and Pratt Brothers Inc. In a later filing, the Town withdrew its Notice of Default as to BHR and Oakland, leaving the Sills Road Defendants. See Interim Stipulation, attached as Exhibit C, at Note 1.

¹⁸ Among the numerous errors in the Reply is the statement that the plan is for BHR to acquire fee title to Parcel D. Reply at 5. This is stated nowhere in the Petition because it is not true. There are no plans for BHR to acquire fee title to Parcel D.

¹⁹ The latest attempt by Sills and its affiliates to introduce its 2016 Settlement interpretation issues into the Town’s case is a letter submitted to the court on July 30, 2020, by which Sills states it intends to supplement its pending filings in that case in response to the filing of the Petition, among other things. Exhibit D. The Town submitted its objection to this latest attempt the next day. Exhibit A.

BHR is a signatory to the 2016 Agreement but it does not agree with the Sills Parties' overly restrictive, self-serving, and unsupported interpretation of it. Nor apparently does the Town, which made no reference to the "all must consent to any change" interpretation of the 2016 Settlement in the March 31, 2020 letter to the court attached to the Reply as Exhibit F. In that letter the Town discussed possible changes to its environmental review process under the 2016 Settlement in reaction to NYSO's March 27, 2020 letter informing the Sills Parties and their affiliates that it would not allow for the connection of Parcels C and D by way of a tunnel under the LIRR. Nowhere in the Town's letter does it state that the consent of all parties to the settlement would be required to make that change to the conceptual plans presented in the 2016 Stipulation.²⁰ Nor does NYSO, which was not a signatory to the 2016 Settlement, interpret the 2016 Settlement in this manner.²¹ The Town's attorney's most recent letter filed on July 31, 2020 also rejects the argument that the 2016 Settlement, as respects the installation of the tunnel and track, must be adhered to despite the fact that Sills and its affiliates have been unable to reach agreement with the Long Island Power Authority ("LIPA") to use its property in conjunction with track to be constructed on Parcels B and C.²² Related to this recent development, the actions of the Sills Parties themselves regarding track construction on Parcels B and C are contrary to their restrictive view of the 2016 Settlement, as they have proposed an alternative track configuration that is different from the two plans referenced in the 2016 Settlement in an attempt to resolve their dispute

²⁰ Nor was any reference to this requirement made in another July 31, 2020 letter from the Town to OEA cited at page 11 of this Reply.

²¹ See Exhibit E, which is an April 6, 2020 letter to the court replying to the Town's March 31, 2020 letter.

²² Exhibit A at 2.

with LIPA.²³ They have not sought the consent of BHR for this significant change to the 2016 Agreement terms.

Because the Parcel D issues the Sills Parties raise in their Reply are not before the Eastern District in the pending dispute, the Sills Parties' statement to the Board that "the parties are currently mediating" the issues regarding Parcel D raised in the Reply is patently false.²⁴ The Minute Court entry attached to the Reply that ordered BHR, Oakland and NYSO to participate in mediation was dated May 1, 2020. However, the Sills Parties did not disclose that on May 13, 2020 BHR, Oakland, and NYSO submitted a letter to the Magistrate appointed to conduct the mediation asserting that there was no reason for them to be included in a mediation because the only issue before the court that could be subject to mediation was the Notice of Default and Stop Work Order issued by the Town, and the Sills Road Defendants' Order to Show Cause for a Temporary Restraining Order seeking to vacate the Town's Stop Work Order.²⁵ BHR and the other parties vigorously argued that the mediation should not include any of the issues related to Parcel D that Sills had tried to introduce into that proceeding in various letters.²⁶ In addition to not disclosing these responses to the May 1 Minute Order, the Sills Parties also did not disclose to the Board that the court *agreed* that the Parcel D issues should *not* be part of the mediation, and on May 28, 2020 issued a Scheduling Order which ruled that the mediation would thenceforth be between only the Sills Road Defendants and LIPA and would only concern their disputes over

²³ Exhibit F is an excerpt from a document filed in the Eastern District showing that in February 2020 the Sills Parties submitted a proposed site plan for tracks on Parcel C to the Town that differs from both of the track configurations agreed to by all signatories to the 2016 Settlement and attached as Exhibit A to that document. These configurations are also reproduced as attachments to Exhibit A.

²⁴ Reply at 11.

²⁵ Exhibit G.

²⁶ *Id.* at 3.

potential rail construction on Parcels B and C which encroached on LIPA's property.²⁷ BHR has not been involved in any mediation ordered by the court, and so was not involved in any mediation when or since the Rail Petition was filed. In point of fact, the judicially circumscribed mediation proceeding was terminated on July 30 because the Sills Road Defendants were unable to reach any agreement with LIPA. Indeed, LIPA is now taking the position that neither Track Plan for Parcels B and C included as exhibits to the 2016 Settlement are possible given the LIPA land, rights-of-way easements, and existing assets.²⁸

3. The Conservation Easement is Fully Accounted for in the Rail Petition

As part of their general mischaracterization and misunderstanding of the nature and scope of the environmental review process being conducted by OEA pursuant to its responsibilities under NEPA, the Sills Parties wrongly state that BHR's Rail Petition "disregards and repudiates the location of the agreed-upon and recorded location of a Conservation Easement."²⁹ This is simply incorrect. BHR is of course fully aware of the presence of the Conservation Easement covering 62 acres of Parcel D and it is working with the Town to obtain its consent to modify the Conservation Easement to permit the proposed track alignment as presented in the Rail Petition and subject of a request to the LIRR. It is BHR's understanding that the OEA is also taking the Conservation Easement into account in its discussions with the Town and other stakeholders. The Sills Parties' allegation that they may veto any change to the Conservation Easement based on their aforementioned interpretation of the 2016 Settlement is not correct. In contrast, in a July 31, 2020 letter from the Town to the OEA, the Town stated that "the conservation easements on Parcel D . . . are pursuant to the [2016] Stipulation of Settlement. These conservation easements

²⁷ See Exhibit H.

²⁸ See Exhibit A at 2.

²⁹ Reply at 10.

have been closed and recorded in the Suffolk County Clerk's Office and cannot be utilized for the proposed rail alignment without *approval from the Town.*"³⁰ Thus, how the proposed construction set out in the Rail Petition may co-exist with the Conservation Easements is clearly being evaluated. BHR has been and continues to be in communication with the Town respecting the modification of the Conservation Easement to accommodate the switch on the LIRR mainline and southern turnout directly on to Parcel D. The Town has expressed support for this approach as it would eliminate the need for significant excavation on Parcel D, ultimately resulting in an expansion of the Conservation Easement and allow the construction and operation of rail and development on Parcel D at the earliest possible time, rather than waiting on when, or if, the Sills Parties and their affiliates actually ever construct any track on Parcels B and Parcel C or the tunnel.

C. Sills Misunderstands or Misconstrues the Rights of BHR and its Affiliates to Own Parcel D and Conduct Rail Operations on It

The Reply asserts that BHR "is not entitled by law to acquire Parcel D." Reply at 12. This assertion is not supported by any citation of authority because there is none. It is merely a misleading statement of opinion of the Sills Parties. As stated above, the contract vendee for Parcel D is *not* BHR but its affiliate Winters Brothers or its designee. There is no intent for BHR to acquire the fee title to Parcel D, and the Rail Petition does not so state. The sale of Parcel D to Winters Brothers or its designated affiliate is expected to be consummated later in 2020. While the Sills Parties complain that BHR has not submitted the purchase agreement with its Rail Petition or noted a specific closing date,³¹ there is no requirement that such information be included in a

³⁰ July 31, 2020 letter from Peter Fountaine to Diana Wood of OEA at page 5 (emphasis supplied).

³¹ Reply at 12.

Petition for Exemption filed pursuant to §10502 and the Sills Parties cite no authority supporting this notion. The Sills Parties also argue that Winters Brothers may not purchase Parcel D either, because the Sills Parties have filed a lawsuit in state court in which they seek to enjoin Winters Brothers or any of its affiliates from purchasing Parcel D. To briefly summarize that lawsuit, it was commenced by an Order to Show Cause seeking a Temporary Restraining Order to enjoin Winters Brothers or any of its affiliates from purchasing the membership interests of BHR and the land comprising Parcel D. The court rejected Sills' request for a Temporary Restraining Order, at which point Winters Brothers' affiliate, Shamrock Rail LLC, went forward and closed on the purchase of 100% of the membership interests of BHR. The Sills Parties have made further application to the court to advance their motion for permanent injunctive relief. However, the court has set a date in mid-October to hear the motion, rebuking the Sills Parties' purported urgency for an injunction and specifically rejecting their request that the motion be argued earlier. Winters Brothers or its affiliate designee are proceeding on the closing on the purchase of Parcel D in the near future.

D. BHR Has and will Continue to Fully Comply with the Board's NEPA Review and any Conditions it imposes on the Construction and Operation of the Railroad Line

Finally, the Sills Parties' allegations in Sections IV and V of their Reply that BHR is attempting to circumvent the Board's NEPA process are frivolous. As the Rail Petition states, the interaction and dialogue between Winters Brothers, BHR, and Board staff, including members of the OEA, began in October of 2019. That dialogue has been continuing and it is ongoing, even with the engagement by BHR of ICF as a Third Party Consultant to work with the OEA staff to prepare the appropriate NEPA document for the rail construction project covered by the Rail Petition and the solid waste rail transfer facility that is described in the Land-Use Petition. This

ongoing interaction has included monthly meetings between representatives of BHR, OEA and ICF to discuss the projects and the ongoing NEPA review. Contrary to the statements in the Reply, these discussions have included topics such as BHR's efforts to work with local, state, and federal authorities to ensure compliance with any applicable local laws and address their concerns.³² As stated previously, BHR fully understands that the extent to which the 2016 Settlement, VDEIS, and Negative Declaration supplement the Board's independent NEPA review of the proposed rail construction and solid waste rail transfer facility is entirely the decision of OEA and the Board. Additionally, merely because BHR has stated reasonable grounds for the Board to bifurcate its consideration of the Rail Petitions whereby the merits would be decided pending completion of the environmental review does not mean that any aspect of the Board's NEPA review will be shortened or limited. For these reasons, the Reply's claims that BHR is attempting in any way to shortcut or circumvent the environmental review of the proposed projects are flatly wrong.

E. Conclusion

In summary the Sills Parties have mischaracterized the Rail Petition, the proposed rail construction project, ongoing litigation created over their own and their affiliates activities on Parcels B and C, as well as the legal rights of BHR to construct and operated the lines of rail described in the Rail Petition. The Board should reject the Sills Parties' arguments that the Rail Petition is in any way premature or incomplete, and it should proceed to process the Rail Petition and approve it through a bifurcated process that rules on the merits of the Rail Petition pending

³² Reply at 15.

completion of the OEA's NEPA process.

Respectfully submitted,



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Attorneys for Brookhaven Rail LLC

August 4, 2020

EXHIBIT A

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Partner

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July 31, 2020

VIA ECF

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
United States District Court : Eastern District of New York (14-CV-02286)

Dear Judge Azrack:

We are attorneys for plaintiff Town of Brookhaven, New York ("Town") as Special Counsel to Brookhaven Town Attorney Annette Eaderesto, Esq. This letter opposes the unmerited and environmentally destructive TRO request contained in the July 30, 2020 letter of Jonathan C. Sullivan, Esq., attorney for the "Sills Road" parties (herein "BRT/Sills"¹) in which:

a. BRT/Sills seeks to continue to excavate, remove and sell sand and soils from Parcels B and C ("Native Materials") notwithstanding that there is now neither a Counterclockwise nor Clockwise Track Plan feasible by reason of BRT/Sills' failure to reach agreement with the Long Island Power Authority ("LIPA") to the use of LIPA owned parcels indispensably required for the Counterclockwise Track Plan and LIPA's objections to BRT/Sills' obstruction of LIPA's important rights of way/easements and interference with its transmission facilities under the Clockwise Track Plan; and

b. BRT/Sills seeks to massively excavate and remove Native Materials in order to lower grades across the entire 93-acre site in furtherance of a tunnel/underpass access to Parcel D which has now been formally "eliminated" by the Parcel D ownership interests².

¹ The BRT/Sills Defendants include Brookhaven Terminal Operations, Sills Road Realty LLC, Sills Expressway Associates, Watral Brothers Inc. and Pratt Brothers Inc.

² In its recently filed Petition to the US Surface Transportation Board ("STB"), Brookhaven Rail Holdings ("BHR") which is now owned by Winters Bros., state that:

The exception to the conceptual plans considered in the 2016 Agreement and related documents is the elimination by BHR of a track to connect tracks on Parcel D with tracks on Parcel C by means of the construction

July 31, 2020

Page 2

The parties and non-party LIPA participated in a 90-day Court-recommended Mediation before Magistrate Judge Anne Y. Shields whose Order dated July 29, 2020 reported that *“in light of the multiple mediation sessions already held by this Court, the Court finds that settlement is not possible in this action at this time. Accordingly, further mediation sessions would not be fruitful and, therefore, will not be scheduled”*. Upon the Court’s recommendation, BRT/Sills had been permitted to excavate and remove Native Materials at 50% of the “historic rate” during the Mediation Period which has now ended. Accordingly, under the terms of the Second Interim Stipulation (ECF Doc. 144) between the Town and BRT/Sills, the previously issued Stop Work Order is now reinstated.

Because the 2016 Stipulation flatly prohibits excavation and removal of Native Materials except *“solely as may actually be required to implement the proposed new BRT track plans”* (*id.*, para. 16a) and requires the BRT/Sills to *“commence the installation, construction or laying of track (the ‘Track Installation’) as regrading, excavation, filling or site preparation thereof progresses”* (*id.*, para. 16d), these two intervening and indisputable developments mandate the denial of BRT/Sills’ TRO application.

Despite having no Track Plan to construct and no tunnel/underpass to connect such Track to, BRT/Sills has already excavated, removed and sold more than one-half million cubic yards of Native Materials (precisely 547,819,15 cubic yards according to Mr. Sullivan’s letter). Yet, BRT/Sills claims entitlement to excavate and remove up to 1,150,000 cubic yards by means of lowering grades across the entire 93-acre Parcels B and C and thus removing an additional one-half million cubic yards of sand and soil from these environmentally vulnerable and protected properties in order to *“build a tunnel to nowhere”*.

BRT/Sills cannot excavate any further because: (a) in the absence of the required consent of LIPA to use LIPA-owned property and interfere with LIPA rights of way/easements and transmissions lines, neither the Counterclockwise nor Clockwise Track Plans can proceed; and (b) according to VHB Engineering, the elimination of the tunnel/underpass *“would substantially reduce and potentially eliminate the need for additional material removal from the site”*. For these intervening reasons, the Town served its Second Supplement/Addendum to Notice of Default dated July 30, 2020 which is attached (Ex. A hereto) [the “Third Notice of Default”]. According to the Report of the Town’s Engineering Consultant, VHB Engineering, (ECF Doc. 160-4), the substantially lowered grades authorized in the prior SEQRA proceedings and Negative Declaration were *“driven”* by the need to accommodate access to the now eliminated tunnel. Since the 2016 Stipulation expressly provides that

of an underpass and tunnel under the tracks of the LIRR.³¹ For a number of reasons, including the fact that no tracks have ever been constructed on Parcel C and it is unknown when and if such construction will occur, BHR and Winters Bros. determined that a more efficient configuration would be to have the new tracks on Parcel D come directly off of the LIRR tracks via a turnout and interchange.” (emphasis supplied)

July 31, 2020

Page 3

the “grading process will re-use native soil on site for fill purposes to the maximum extent feasible with the goal of minimizing the need to export native sand”, the elimination of the tunnel/underpass from Parcel C to Parcel D by reason of the changed plans of the current Parcel D owners “would substantially reduce and potentially eliminate the need for additional material removal from the site”. Thus, no further excavation or removal of Native Materials should be permitted.

The intervening LIPA/PSEG developments are an equally compelling reason to deny BRT/Sills’ TRO request to continue excavation and removal of Native Materials. Not only has the proposed Counterclockwise Track Plan been rendered impossible by reason of BRT/Sills Defendants’ failure to reach an agreement with LIPA to purchase or gain access over the LIPA-owned property on Parcel C, LIPA reports that the Clockwise Track Plan is also impermissible because it, according to LIPA:

“...would require (a) traversing over LIPA’s easement and right of way (“ROW”) commonly known as Old Town Road (depicted on the overlay marked Exhibit A, attached hereto and made a part hereof); (b) elevating LIPA’s 69kv Line traversing diagonally on LIPA’s easement ROW (depicted and identified as wood poles #160-168 on Exhibit B, attached hereto and made a part hereof); (c) replacing and elevating such wood poles with steel poles; (d) redesigning, elevating and regrading LIPA’s easement and ROW to allow LIPA’s construction vehicles accessibility to traverse on, over, above LIPA’s easement and ROW to maintain, repair, replace the 69kV Transmission Line; and (e) allowing PSEGLI and LIPA unfettered access to LIPA fee simple owned lots respectively known as Lot Number 8 and 226, as depicted on Exhibit A.” (emphasis supplied)

BRT/Sills’ ludicrous suggestion that the Town, a local municipality, should “condemn” the recorded Right of Way Easements and transmission lines of LIPA, a State Authority, is frivolous. The Town has no power to condemn state property (In re Quinlan, 271 NY 396, 401 [1936]) and BRT/Sills cannot misconstrue the provision in the 2016 Stipulation to condemn private rights of way as applying to a state authority.

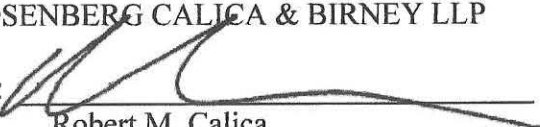
Conclusion

For these reasons, it is respectfully requested that the Court reject the BRT/Sills Defendants’ legally unfounded and environmentally destructive request to continue to “sand mine” these protected and vulnerable properties in the absence of any arguable right to do so any longer.

Respectfully,

ROSENBERG CALICA & BIRNEY LLP

By:


Robert M. Calica

July 31, 2020

Page 4

RMC:ds
Attachment

cc: All Counsel (*via ECF*)
Annette Aederesto, Esq. (*via email*).

EXHIBIT A

EXHIBIT B

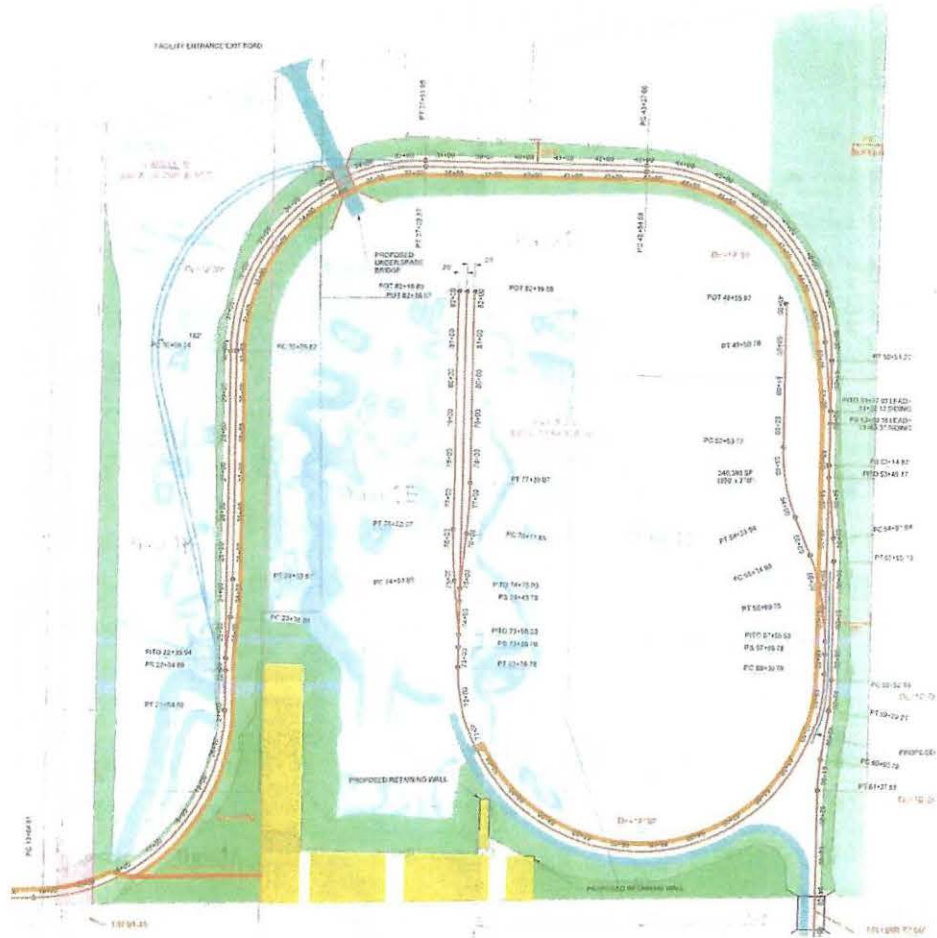


EXHIBIT B

OAKLAND LAW GROUP, PLLC
38955 HILLS TECH DRIVE
FARMINGTON HILLS, MICHIGAN 48331

Via E-Mail Only

March 27, 2020

Andrew Kaufman, President
Sills Road Realty, LLC
205 Sills Road
Yaphank, NY 11980

Re: Status of Tunnel

Dear Andy:

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.

Please contact me at (248) 930-6557 or wclifford@oaklandlawgroup.com with any questions you may have.

Very truly yours,

OAKLAND LAW GROUP, PLLC

/s/ William B. Clifford, Jr.

William B. Clifford, Jr.

cc (via email only): Russell Stern, Ruskin Moscou Faltischek P.C.
Annette Eaderesto, Town of Brookhaven
Ken Hollenbeck, Scarinci Hollenbeck, LLC
Tom Hallin, Oakland Law Group, PLLC

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiffs,

Docket No.: CV-14-02286
(JMA:AYS)

-against-

INTERIM STIPULATION

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.,

Defendants.

-----X

RECITALS:

A. Plaintiff, Town of Brookhaven, New York ("Town") and the Defendants (the "BRT Defendants")¹ are parties to a certain Stipulation of Settlement filed in this action on March 28, 2016 (ECF Doc. 133) over which this Court retained jurisdiction, and otherwise dismissed this action (the "So-Ordered Stipulation");

B. A dispute has arisen between the Town and the BRT Defendants concerning the BRT Defendants' compliance with provisions of the So-Ordered Stipulation and with a certain "*State Environmental Quality Review Act* ('SEQRA') *Negative Declaration*" approved by Town

¹ For purposes of this Interim Stipulation, the "BRT Defendants" shall include the Defendants herein other than Defendants Oakland Transportation Holdings, LLC and Brookhaven Rail LLC f/k/a US Rail New York LLC (the "Other Defendants"), as against which Other Defendants only, the Town's Notice of Default and Supplement/Addendum to Notice of Default is withdrawn. Unless otherwise indicated, all defined terms in the So-Ordered Stipulation apply to this Interim Stipulation.

H. The Town served its "Supplement/Addendum to Notice of Default dated February 6, 2020" to the BRT Defendants on February 13, 2020;

I. The BRT Defendants filed a proposed Order to Show Cause, supporting Declarations and Memorandum of Law (ECF Doc. 150) [the "TRO Application"] upon which a Hearing before the Court (Hon. Joan M. Azrack) was held at 10:30 a.m. on February 19, 2020 (the "TRO Hearing"); and

J. The parties and their counsel have participated in certain discussions and exchanges of documentation in an effort to settle and resolve, on an interim basis, the issues raised by the Stop Work Order, the Notice of Default/Addendum, and the proposed TRO Application, with a full reservation of all rights, claims and contentions of the parties, and subject to, only for the period of time, and only upon the conditions set forth in this Interim Stipulation.

IT IS THEREFORE STIPULATED AND AGREED by and among the undersigned parties and their counsel as follows:

1. Counsel for the parties shall request that the Court adjourn the TRO Hearing to April 1, 2020 or to the earliest date available to the Court thereafter for such purpose (the "TRO Hearing Extension").

2. Not later than seven (7) days following the date of the execution of this Interim Stipulation, time being "*of the essence*", the BRT Defendants shall provide the Town, upon terms provided for below, with a Performance Bond issued by a New York Licensed Surety in the principal amount of \$2,062,500 (the "Bond Amount"), which Bond Amount is calculated as the estimated cost of the obligation of the BRT Defendants to actually construct and install no less than 7,500 linear feet of Track at a cost of \$275 per foot upon those portions of the BRT

linear feet of railway track, or such portion thereof as shall remain unconstructed as of the date of such demand. Notwithstanding the foregoing, during the thirty (30) day Notice to Cure period, the Town shall be authorized, upon a separate five (5) day Notice to the BRT Defendants, to issue a Stop Work Order, with all parties' rights to oppose, enforce, or to seek vacatur of the Stop Work Order before the Court fully preserved, as well as to apply to the Court, upon such shorter Notice as the Court may authorize, for injunctive and additional relief other than enforcement of the Performance Bond.

5. The Performance Bond shall be subject to the following additional obligations of the BRT Defendants as enumerated below:

a. The BRT Defendants must bindingly elect to proceed with either the Counterclockwise Track Plan (or a Town-approved equivalent of it substantially conforming to the Warehouse Track Plan annexed to the Supplement/Addendum to the Notice of Default as Ex. N thereto [ECF Doc. 148-5]), or to proceed with the Clockwise Track Plan (the "Selected Track Plan") by April 1, 2020, time being "*of the essence*";

b. In the event the BRT Defendants elect to proceed with the Counterclockwise Track Plan or the Warehouse Track Plan as the Selected Track Plan, then upon filing such election with the Town on April 1, 2020, the BRT Defendants shall simultaneously provide the Town and with a copy of a written 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");

Declaration, or the Track Construction and Installation obligations of the BRT Defendants to construct no less than 7,500 linear feet of railway track on the portions of Parcels B and C designated as Phases IA-IC pursuant to the Selected Track Plan, then and in such event, the Town shall be authorized to serve a five (5) day Notice to Terminate this Interim Stipulation upon the BRT Defendants, following the expiration of which, this Interim Stipulation shall become null, void and of no further force and effect, any and all rights and entitlements of the parties shall be restored as they existed upon the day and date prior to the execution of this Interim Stipulation including any rights the parties have under the So Ordered Stipulation of Settlement (but with the aforesaid 30-day notice to cure period deemed to have run and expired), the Performance Bond shall be cancelled and returned, and the Stop Work Order shall be immediately reinstated (with all parties' rights to enforce or seek vacatur of the Stop Work Order before the Court preserved);

f. In the event the Town accepts the Track Installation Documents, then this Interim Stipulation shall continue in effect and the Performance Bond shall become irrevocable and shall remain in full force and effect in accordance with the terms of this Interim Stipulation and the So-Ordered Stipulation of Settlement, and subject to those additional Default and enforcement procedures which are enumerated in paragraphs "5g" and "5h" below;

g. In the event the Track Installation Documents are provided to and accepted by the Town, but the BRT Defendants thereafter materially fail to comply therewith without reasonable justification, the Town may serve a thirty (30) day Notice to Cure upon the BRT Defendants, following which, if uncured, the Town may apply to the Court to declare a Default under the Performance Bond upon the terms set forth below;

7. During the TRO Hearing Extension, and conditioned upon the timely filing of the Performance Bond, the Town agrees that the Stop Work Order (the "SWO") shall be lifted and shall be deemed vacated, for such period only, and that the BRT Defendants may, during such period, resume clearing, excavation, grading and removal of native soils from Parcels B and C of the BRT Railway Extension in accordance with the excavation schedules previously provided by the BRT Defendants to VHB Engineering (the "SWO Suspension"), provided that the level and rate of excavation and removal of native soils shall not be materially increased from that level occurring prior to the Stop Work Order.

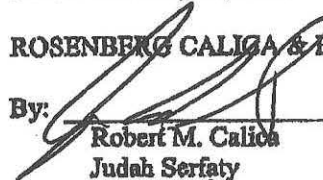
8. The parties agree that during the period of the TRO Hearing Extension and the SWO Suspension: (a) the Notice of Default/Addendum shall continue to be deemed to have been duly served; (b) any Defaults alleged against the BRT Defendants in such Notice of Default/Addendum shall be deemed to be those which existed on February 6, 2020, such that no further excavation, grading or removal of native soils from the BRT Railway Extension occurring during this period shall be deemed to constitute a default or violation or any further default or violation of the So-Ordered Stipulation or Negative Declaration; and (c) all periods to cure pursuant to the Notice of Default/Addendum shall be tolled and extended during the period of the TRO Hearing Extension and the SWO Suspension as provided in Paragraph "10" below (the "Tolling Period").

9. Notwithstanding the foregoing, the BRT Defendants acknowledge that upon any expiration of the Tolling Period, the 30-day "Notice to Cure" period contained in the Notice of Default/Addendum shall be deemed to have expired in accordance with its terms such that the Notice of Default/Addendum shall be deemed to have been timely exercised and may be invoked as of the end of the date of the Tolling Period. The Town acknowledges that nothing contained

13. This Interim Stipulation may be executed in one or more counterparts, and via email or pdf or other electronic means or by facsimile, each of which shall be deemed to constitute an additional original hereof.

Dated: February 25, 2020

ROSENBERG CALICA & BIRNEY LLP

By: 

Robert M. Calica
Judah Serfaty

Attorneys for Town of Brookhaven
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Garden City, New York 11530
(516) 747-7400
rcalica@rcblaw.com
jserfaty@rcblaw.com

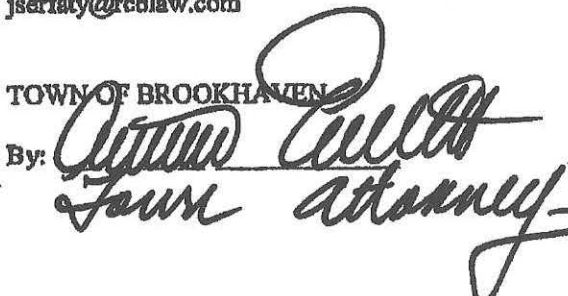
RUSKIN MOSCOU FALTISCHBK, P.C.

By: 

Jonathan C. Sullivan
Joseph R. Harbeson

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jsullivan@rmfpc.com
jharbeson@rmfpc.com

TOWN OF BROOKHAVEN

By: 

Town attorney

SILLS ROAD REALTY LLC

By: 

BROOKHAVEN TERMINAL OPERATIONS

By: 

SILLS EXPRESSWAY ASSOCIATES

By: 

WATRAL BROTHERS, INC.

By: 

PREO.

PRATT BROTHERS, INC.



EXHIBIT D



July 30, 2020

By ECF

The Honorable Joan M. Azrack
United States District Court, EDNY
100 Federal Plaza
Central Islip, New York 11722

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

Dear Judge Azrack:

We represent Sills Road Realty LLC, Brookhaven Terminal Operations, Sills Expressway Associates, Watral Brothers, Inc. and Pratt Brothers, Inc. (collectively "Sills Road"). The purpose of this letter is to advise the Court of recent developments relating to Sills Road's pending application for a TRO and preliminary injunction and to request a pre-motion conference pursuant to Your Honor's Rule IV(B) in anticipation of Sills Road supplementing its pending motion to seek injunctive and/or declaratory relief relating to (i) defendant Oakland Transportation Holding Inc.'s ("Oakland") and non-party New York Site Operations LLC's ("NYSO") recent statements to the Court that NYSO, as the current owner of Parcel D, does not intend to allow the construction of a tunnel between Parcel C and D, in derogation of the March 2016 Stipulation; (ii) non-party Winters Bros. Waste Systems of Long Island, LLC's ("Winters"), the contract vendee for Parcel D, and its affiliate defendant Brookhaven Rail LLC's ("BHR") recent applications to the Surface Transportation Board seeking approval for alternate railway access to Parcel D, including laying railroad track on the previously agreed upon and recorded conservation easement on Parcel D, in derogation of the March 2016 Stipulation;¹ (iii) the Town's planned SEQRA Positive Declaration requiring Sills Road to prepare a supplemental draft environmental impact statement based on the purported elimination of the tunnel between Parcels C and D; and (iv) LIPA/PSEG's purported objections to both a clockwise and counterclockwise track plan.²

Sills Road's pending application for a TRO and preliminary injunction seeks, *inter alia*, an order vacating the Town's February 7, 2020 Stop Work Order ("SWO") purporting to require Sills Road to cease clearing and excavation at the Brookhaven Rail Terminal (the "BRT"). The Town served its SWO this past February because it was purportedly concerned that Sills Road was engaging in improper clearing and excavation on Parcels B and C. The Town's primary complaint was that Sills Road was clearing and excavating without making sufficient progress on the installation of railroad track and the property's development.

¹ Winters is not a party to this action but our planned application will seek relief against Oakland and its successors and assigns including NYSO and Winters.

² The Court has retained jurisdiction to hear these disputes pursuant to ¶¶ 3, 4 and 21 of the March 2016 Stipulation. *See, e.g.*, March 2016 Stipulation at ¶ 4 (retaining jurisdiction to hear disputes concerning, *inter alia*, Administrative SEQRA/Plan Review "upon application and made upon such notice, and in such manner and following such proceedings, as the Court may determine and direct.").

Sills Road has demonstrated that all of the clearing, excavation and grading at the site is: (i) permitted by the March 2016 Stipulation and the Town's prior SEQRA Neg. Dec., and (ii) necessary in order to develop the entire site for rail service, loading and offloading areas and warehousing as contemplated by the SEQRA Neg. Dec. This is particularly true considering that the Town's own environmental consultant, VHB, carefully monitored our clients' activities at the BRT for almost two and one-half years from September 2017 to January 2020 on a bi-weekly basis without any objection by VHB or the Town.³ To be clear, Sills Road has only excavated and exported approximately 547,819.15 cubic yards of native material through July 29, 2020 even though they are permitted to excavate between 960,000 and 1,150,00 cubic yards under the SEQRA Neg. Dec.

The Town, perhaps recognizing that it cannot support the allegations set forth in its Notice of Default and SWO, adopted an entirely new position on clearing and excavation on the eve of the Court's April 1, 2020 hearing on our application. The Town now suggests that it must vacate the SEQRA Neg. Dec. – in place for almost three years – in favor of a Positive Dec. based on a letter received from Oakland on March 27, 2020 indicating that NYSO and its contract vendee, Winters, do not intend to allow the construction of a tunnel between Parcels C and D. The Town claims that Sills Road must now stop all clearing and excavation because the Town's consultant, VHB, told the Town that the whole site may need to be graded to a higher elevation if the tunnel is eliminated. The Town ignores that the parties agreed to grade the site at elevation 50 feet over four years ago in the March 2016 Stipulation for many reasons including, but not limited to, that this elevation is consistent with the surrounding area to the north and east and for engineering reasons related to track installation and loading/offloading requirements. The Town's suggestion that it must conduct a new environmental review, which could take years, is also inconsistent with the Town's purported concerns that the development has been too slow.

The Town's entire argument for a new SEQRA review fails because Oakland and NYSO cannot unilaterally change the terms of the March 2016 Stipulation, which provides for a tunnel, even if they wanted to. This is particularly true because Oakland and NYSO have changed course, essentially withdrawing their March 27th letter by stating that they are not seeking to prohibit future owners, including Winters, from building a tunnel. We suspect that Oakland's, NYSO's and Winters' true position is that they only oppose the tunnel to the extent they can secure alternate railway access to Parcel D, even though such alternate access would require them to breach the March 2016 Stipulation by laying track in the previously agreed upon and recorded conservation easement. The use of the tunnel and the track south of the tunnel (track on Parcel D) were key material elements of the consideration for Sills Road to enter into the March 2016 Stipulation. This is a substantial breach because the Town has taken the position that the elimination of the tunnel, which will facilitate the Town's and Winters' plans for a waste facility, will require Sills Road to (i) immediately stop all site preparation at the BRT, including clearing and excavation; (ii) prepare a supplemental environmental review; and (iii) potentially regrade the entire property to a higher elevation despite years of site work causing significant costs and delay. The Town's position is both absurd, because even if the tunnel is eliminated any such change would not have a negative

³ The Town's sudden objections to our clients' activities follow its recent discussions with Winters to build a waste management facility on Parcel D. The Town and Winters both admit they met on October 28, 2019 (before the Town raised any objections to our client's activities) to discuss the proposed waste facility. The Town desperately needs a new waste facility because of the imminent closure of the Town's landfill on Horseblock Road, located directly across the street from Parcel D. It appears the Town intends to solve this problem by working with Winters behind the scenes to build a facility on Parcel D even though Winters does not yet own the property, all in derogation of their obligations under the March 2016 Stipulation.

impact on the environment, and premature because Oakland, NYSO and Winters have not definitively ruled out a tunnel if they cannot secure alternate rail access to Parcel D.

The parties' dispute concerning the tunnel has become even more urgent based on BHR's recent applications to the STB seeking alternate railway access to Parcel D in order to facilitate the construction of Winters' planned waste facility. BHR's initial application to the STB, filed last month, seeks approval for alternate railway access to Parcel D and the laying of railway track in the stipulated and recorded conservation easement. BHR's most recent application, filed earlier this week, seeks broad federal preemption for the environmental review of the proposed waste facility. BHR, which is a party to the March 2016 Stipulation, claims it planned the design and construction of the waste facility to adhere "closely" to the conceptual plans provided for under the March 2016 Stipulation with, in BHR's own words, "one notable exception" – the elimination of the tunnel between parcels C and D. *See* Brookhaven Rail LLC – Petition for Exemption from Requirements of 49 U.S.C. § 10909 ("STB Petition"), annexed as Exhibit A, at p. 10. BHR's application completely ignores the fact that its plan will require track to be laid in the previously agreed upon conservation easement.⁴

The Town has also recently indicated that Sills Road's planned development cannot go forward at all because LIPA/PSEG now objects to both a clockwise and counterclockwise track plan. Sills Road maintains that LIPA/PSEG has no standing to raise any such objections particularly to the extent that Sills Road is not seeking to use LIPA's property. The Town does not have any basis to object to Sills Road continuing to develop based on LIPA's purported concerns particularly because the Town appears unwilling to condemn the parcels in question, even though it is required to do so under ¶13 of the March 2016 Stipulation.

We believe that a pre-motion conference would be useful to insure that all parties are heard and that these issues are briefed in a uniform manner in accordance with the Court's instructions. We also note that the Sills Road' request for a TRO is still pending before the Court. We therefore respectfully request, in accordance with paragraph 6 of the Second Interim Stipulation, that our request for a TRO be granted while these additional issues are briefed or in the alternative that Sills Road be permitted to continue excavating at 50% of historical levels as recommended in the Court's April 10, 2020 Scheduling order and as subsequently contemplated by the Second Interim Stipulation.

Respectfully submitted,
/s/ Jonathan C. Sullivan
Jonathan C. Sullivan
For the Firm

⁴ BHR's application also states that there has been "a high level of cooperation and collaboration between BHR's affiliated companies [and] the Town" (STB Petition at p. 4) concerning the construction and operation of the waste facility, notwithstanding the Town's repeated claims to the contrary. BHR also claims that it has engaged in an "active and ongoing dialogue with affected parties, most significantly the Town, which acknowledges the need for the Board's intervention to preempt the Town's zoning law and permit the construction and operation of the [waste facility] in these unique circumstances." STB Petition at p. 20. This coordinated effort to fast track approval of the waste facility for the benefit of the Town and Winters will require fundamental changes to the March 2016 Stipulation which are causing significant harm to our clients. Furthermore, the Town's apparent willingness to abdicate its own environmental oversight of Winters' waste facility by punting to the STB and improperly suggesting that it cannot pass legislation regarding the waste facility within three and one-half years from now blatantly belies its purported environmental concerns regarding our clients' continued excavation at the BRT, all of which was approved almost three years ago as part of a comprehensive environmental review.

EXHIBIT E



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April 6, 2020

VIA ECF

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

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

Dear Judge Azrack,

This letter is submitted on behalf of New York Site Operations, LLC ("NYSO"), successor in interest to Oakland Transportation Holdings LLC ("Oakland"), as owner of what is known as Parcel D.¹ NYSO writes in response to the Town of Brookhaven's ("Town") March 31, 2020, letter to clarify and correct certain erroneous statements, including in connection with Parcel D, which NYSO and its contract vendee, Winter Bros. Waste Systems of Long Island, LLC ("Winters"), in collaboration with Brookhaven Rail LLC ("BHR") seek to develop as a rail facility subject to the jurisdiction of the U.S. Surface Transportation Board ("STB") with rail "Support Structures" as defined in the 2016 So- Ordered Stipulation of Settlement.

First, the Town's assertion that the elimination of the tunnel/underpass under the LIRR Tracks between Parcels C and D results in "the elimination of the 229-acre Parcel D" from the project is simply not true. As the Town is aware from the preliminary briefings on Parcel D rail infrastructure development from Winters representatives, the entirety of the developable portion

¹ To assist the Court, provided as Exhibit A hereto is a copy of a "Site Location Map", which is presented at page 3 of Section 2 of the Voluntary Draft Environmental Impact Statement ("VDEIS"). Parcel D is shown outlined in orange, bounded on the north by the LIRR main line and on the south by Horseblock Road at the entrance to the Town of Brookhaven Landfill. Parcel A is outlined in red, Parcel B is outlined in blue and Parcel C is outlined in green. The tunnel, which was proposed by the BRT Defendants which are owners and operators of Parcels A, B and C, would have been located at the most southeast (lower right-hand) corner of Parcel C where Parcel C is bordered on the south by the LIRR main line.

of Parcel D will be developed for rail terminal operations, including the construction of buildings and other infrastructure consistent with the conditions and mitigation measures set forth in the VDEIS, the SEQRA Negative Declaration, and the 2016 So- Ordered Stipulation of Settlement. The development of Parcel D will be undertaken totally independent of the Brookhaven Rail Terminal operations located (or proposed to be located on) Parcels A, B, and C and without any involvement of the BRT Defendants which own and operate on those parcels.

Next, the contention that the elimination of the tunnel between Parcels C and D means that the VDEIS and resulting SEQRA Negative Declaration are no longer valid is simply not accurate as it pertains to Parcel D. Any such assertion also disregards the unambiguously defined scope of the Proposed Action that is the object of both the VDEIS and of the Negative Declaration. Parcel D will be developed in all material respects consistent with the scope of the Proposed Action set forth in the VDEIS and Negative Declaration and the Parcel D Concept Plan, except that the tunnel will be replaced with a southerly turnout off of the LIRR main line onto Parcel D.² As a result, the VDEIS and resulting Negative Declaration remain applicable to Parcel D. Except for the elimination of the need for the tunnel (itself one single element of the Proposed Action) and replacement of that feature with a southerly turnout off of the LIRR main line onto Parcel D, Parcel D will be developed in all material respects consistent with the Parcel D Concept Plan referenced in the VDEIS, the Negative Declaration and the 2016 So-Ordered Stipulation. In lieu of the tunnel, Winters and BHR, the owner and operator of the Class III railroad which serves the Brookhaven Rail Terminal, will continue its consultation with the Town as necessary regarding an adjustment

² The Proposed Action, as defined on page 2 of the Negative Declaration (appended to the Town's letter submission as Exhibit A), consists of:

- Establishing an Undisturbed/Conservation Easement consisting of two (2) parcels, known as Parcel A, consisting of approximately 47.55 acres and Parcel B, consisting of 14.45 acres to be bisected by the proposed railway;
- Preparing Parcels B and C for development;
- Constructing buildings and other infrastructure to support the rail terminal operations on Parcels B and C;
- Clearing and grading of Parcel D;
- Constructing an underpass beneath the LIRR tracks between Parcels C and D;
- Extending the track on to Parcel D;
- Constructing new access ways and on-site roads;
- Pursuant to the 2016 Stipulation of Settlement, right-of-way fencing would be installed around portions of the 62 acre Undisturbed/Conservation Easement on Parcel D that would be established at the onset of the Phase I; and
- Constructing buildings and other infrastructure to support the rail terminal operations on Parcel D.
- The existing facility on Parcel A would not be altered as part of the Proposed Action.

to the Conservation Easement on Parcel D and pursue STB authorization to construct a southerly turnout off the LIRR main line with connection to the Parcel D rail infrastructure.³ As previously discussed with the Town, the construction of the southerly turnout will, in fact, be more protective of the environment by (i) materially reducing, if not eliminating, the need for excavation on Parcel D which would have been required for the tunnel and (ii) expanding the Conservation Easement granted in the 2016 So-Ordered Stipulation.

Finally, the Town's letter is mistaken to the extent it implies that NYSO colluded with the BRT Defendants to deceive the Town regarding the tunnel. To be clear, the decision to eliminate the tunnel was made entirely independent from the BRT Defendants and, only after NYSO and BHR learned in mid-January 2020 that the BRT Defendants had taken steps at the STB to remove BHR as the common carrier service provider at the Brookhaven Rail Terminal. Indeed, the BRT Defendants are pursuing authorization for their own Class III railroad to serve parcels A, B and C. Without BHR operating on Parcels A, B and C, there is no need to have a tunnel to serve Parcel D.

NYSO takes no exception to the Town's additional "hard look" at the excavation and grading of Parcels B and C absent the need for a tunnel. NYSO understands the Town may determine the need for a Supplemental Environmental Impact Statement with a scope limited to those issues on Parcels B and C. But there is no basis for the Town to withdraw or abandon the entirety of its original SEQRA determination as to Parcel D. Notwithstanding the Town's attempt to muddy the waters, the only issue before the Court is the stop work order for the other parcels. The court does not have jurisdiction to act on any other issue.

In view of the foregoing, NYSO is requesting that this Court allow it to appear at the hearing on April 8, 2020,⁴ to answer the Court's questions, if any, regarding Parcel D.

Sincerely,

/s/ Carly Everhardt
Carly Everhardt

cc: Counsel of Record (via ECF)
Attachments

³ Of course, the Town and the public at large, also will have access to an environmental quality review performed for the project under the requirements of the National Environmental Policy Act by an independent third party contractor selected by the STB.

⁴ The Town has indicated it will not object to an NYSO representative attending the hearing.

EXHIBIT A



- | | |
|---|---|
| Parcel A | Parcel C |
| Parcel B | Parcel D |

Site Location Map | Yaphank, NY
Brookhaven Rail Terminal Expansion
South Side of Expressway Drive South
and East Side of Sills Road

VHB Ref. 29771.00

Source: 2016 NYS Digital Ortho-imagery, NYSITS, 2016.

EXHIBIT F

Doreen Salera-Calabrese

From: Rob Calica
Sent: Friday, February 07, 2020 11:50 AM
To: Judah Serfaty
Cc: Doreen Salera-Calabrese; Beth Cyr
Subject: FW: CONFIDENTIAL Memorandum - BRT (Jack Martins Message and Attachments 2/7/20)
Attachments: 1-6-2020-BR lease off-vA2F-sitepoint.pdf; Brookhaven Letter of Agreement (Executed 2.3).pdf; NPD Corporate Profile.pdf; - Track Extension BRT 2-3-2020.pdf; T-2 alignment and grading (002).pdf

From: Annette Eaderesto <aeaderesto@brookhavenny.gov>
Sent: Friday, February 7, 2020 11:18 AM
To: Rob Calica <rob@rcblaw.com>
Subject: FW: CONFIDENTIAL Memorandum - BRT (Jack Martins Message and Attachments 2/7/20)

From: Jack M. Martins <JMartins@HarrisBeach.com>
Sent: Friday, February 07, 2020 11:02 AM
To: Annette Eaderesto <aeaderesto@brookhavenny.gov>; Matt Miner <mminer@brookhavenny.gov>
Subject: RE: CONFIDENTIAL Memorandum - BRT

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Annette –

As a follow-up to my email last week (below) and in advance of our meeting on Tuesday, attached please find particulars regarding the proposed development and developer, NorthPoint Development, including its corporate profile and letter agreement acknowledging NorthPoint's interest. Also, attached please find a site plan from NorthPoint (prepared by SitePoint) for its proposed development showing layout, elevation for the site, and track configuration. The parties are anxious to move forward with this development which is estimated to require an investment of upwards of \$200 million, result in the creation of hundreds of jobs, and remove thousands of trucks from our roads, replaced by rail. Respectfully, this project presents a unique economic development opportunity for the Town in the short term coupled with what has always been a core Town priority, proper environmental stewardship.

To that end, BRT has reworked its schedule, also attached hereto, to address the timeline presented by NorthPoint for development. The timeline contemplates grading to accommodate the proposed development as well as track and warehouse construction. In light of the proposed site plan, BRT has reviewed its grading calculations and has confirmed that it will remain within the limits referenced by the Town in its SEQRA analysis. The total grading to date is approximately 480,000 cu yds, less than half of the projected 1.16 million cu yds referenced in the Town's analysis. For perspective, attached hereto is a topo for the area to the north, including the south service road, showing elevations consistent with the elevations proposed by NorthPoint.

In short, if BRT can get through the Lake Street bottleneck, the proposed redevelopment of the site can begin almost immediately consistent with the schedule attached hereto. Please advance BRT's application for the private road.

I am looking forward to our meeting on Tuesday. Please feel free to call should you have any questions or wish to discuss any of the foregoing.



EXHIBIT G



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May 13, 2020

VIA ECF

Hon. Anne Y. Shields
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

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

Dear Judge Shields,

This position letter is submitted on behalf of defendants, Oakland Transportation Holdings, LLC ("Oakland"), Brookhaven Railroad LLC ("Brookhaven") and non-party, New York Site Operations LLC ("NYSO" with "Oakland" is collectively referred to herein as captioned the "Detroit Entities"), pursuant to the Scheduling Order entered on May 4, 2020, in the above-captioned case.¹

Relevant Procedural Background to This Letter

On May 4, 2020, the Court issued a Scheduling Order directing the parties to submit a joint status letter by May 11, 2020. Accordingly, on Thursday, May 7, I reached out to the Town of

¹ As explained below, as of Monday, May 11, 2020, Brookhaven is now owned by non-party Shamrock Rail LLC. Accordingly, Steven R. Schlesinger of Jaspan Schlessinger LLP has filed an application to be substituted for Foley & Lardner LLP as counsel of record for Brookhaven in this action. Notwithstanding, Brookhaven has reviewed this letter and has consented to its filing.

AUSTIN
BOSTON
CHICAGO
DALLAS
DENVER

DETROIT
HOUSTON
JACKSONVILLE
LOS ANGELES
MADISON

MEXICO CITY
MIAMI
MILWAUKEE
NEW YORK
ORLANDO

SACRAMENTO
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
TALLAHASSEE

TAMPA
WASHINGTON, D.C.
BRUSSELS
TOKYO



FOLEY & LARDNER LLP

May 13, 2020

Page 2

Brookhaven (the “Town”), the Sills Road Defendants,² and LIPA to provide my client’s availability (on May 26 and May 28) and to inquire regarding the status of joint status letter.³ I received no response to my email. Subsequently, on Monday evening at 8:25 p.m., the Town provided a draft of the purported joint letter to me for the first time. Despite providing comments and additions on behalf of Brookhaven and the Detroit Entities the very next day (Tuesday), as well as advising that all of the outstanding membership interests in Brookhaven Rail LLC had been acquired by Shamrock Rail LLC the day before (on May 11, 2020⁴), counsel for the Town and the Sills Road Defendants told us they would need additional time to review our comments and additions and then reached out to the Court to request a one day extension of time to submit the letter, which was granted. Today at 2:40 p.m., the Town advised that Brookhaven’s and the Detroit Entities’ requested revisions and additions were unacceptable. The Town further threatened to unilaterally file the letter unless Brookhaven and the Detroit Entities complied with the Town’s demands for further revisions. Due to the nature of the Town’s requested revisions, Brookhaven and the Detroit Entities could not agree. Regrettably, therefore, Brookhaven and the Detroit Entities are now compelled to submit this letter.⁵

² The “Sills Road Defendants” include Sills Road Realty LLC, Brookhaven Terminal Operations, Sills Expressway Associates, Watral Brother, Inc., and Pratt Brothers, Inc.

³ At the time, Foley & Lardner LLP still represented Brookhaven. Due to the change in ownership control, Jaspan Schlesinger will represent Brookhaven going forward.

⁴ On or about April 6, 2020, the Sills Road Defendants were served with a Notice of Closing of this transaction.

⁵ Unless otherwise noted herein, however, the Detroit Entities have no objection to the Town and the Sills’ Road Defendants’ recitals of the 2016 stipulation in Section I.A. of their letter.



May 13, 2020
Page 3

Scope of Mediation

NYSO, Oakland and Brookhaven were ordered to this Mediation by Judge Azrack. All three parties maintain that the only issue pending before the Court is the Notice of Default Under the 2016 Stipulation, Stop Work Order issued to the Sills Road Defendants by the Town and the Application for the Order to Show Cause filed by the Sills Road Defendants to enjoin enforcement of the Stop Work Order. Further, Brookhaven and the Detroit Entities disagree that this Mediation should include issues related to Parcel D that are not controversies before the Court.

By way of background, based on a letter written by NYSO on March 27, 2020, in which it notified the Sills Road Defendants that neither NYSO or its contract vendee to purchase Parcel D, Winter Bros. Waste Systems of Long Island (“Winter Bros.”) planned to allow the construction of a tunnel under the Long Island Railroad connecting Parcel D with Parcel C, the Town and the Sills Road Defendants raised various issues related to the ownership and development of Parcel D. Specifically, the Sills Road Defendants maintain that the tunnel must proceed and that Winters Bros. should be enjoined from purchasing Parcel D. For its part, the Town maintains that certain environmental analyses must be updated if the tunnel connecting Parcel C to Parcel D is not constructed.

None of these issues is related to the Stop Work Order—which is the only controversy before the Court. And neither the Detroit Entities nor Brookhaven are involved in that issue. In addition, the Sills Road Defendants have filed and are pursuing in New York State Supreme Court, Suffolk County Commercial Division, an action against Oakland, NYSO, Brookhaven and Winters Bros. to enjoin the



FOLEY & LARDNER LLP

May 13, 2020

Page 4

sale of Parcel D and related assets.⁶ Thus, because the Sills Road Defendants elected to assert those claims in the state court that is the forum in which those disputes will be resolved.

Further, because concerns were raised that NYSO was going to burden Parcel D with a restrictive covenant that prevented Parcel D from ever being connected to Parcel C, NYSO has clarified that it did not enter into any type of restrictive covenant preventing future Parcel D owners from developing the property with or without the tunnel. It is NYSO's position that no new or additional environmental analyses is required at this time because it is not preventing any future owners of Parcel D from building a tunnel.⁷

Moreover, NYSO and Brookhaven take the position that nothing in the 2016 Stipulation requires them, or any future owner of Parcel D, to build a tunnel connecting Parcels C and D, and that the 2016 Stipulation does not give the Sills Road Defendants a right to mandate how Parcel D is to be developed. In fact, NYSO is not even a signatory to the 2016 Stipulation. Therefore, there is no open issue in this regard to be resolved through this Mediation. Moreover, NYSO is currently under contract to sell Parcel D. Thus, any concerns the Sills Road Defendants have related to the development of

⁶ The Town is not a party to that litigation. Judge Azrack urged Winters Bros. to participate in this Mediation for that reason. Winters Bros. declined to do so, and the Sills Road Defendants and Oakland, Brookhaven and NYSO were directed by Judge Azrack's Order to advise the State Court of the pending Mediation before this Court. On May 5, 2020, the Sills Road Defendants filed an application for emergency consideration of a temporary restraining order to prevent the sale of Brookhaven to Winters Bros, attaching a copy of Judge Azrack's Order and advising the State Court of same. On May 7, 2020, the State Court heard the Sills Road Defendants' application and denied the temporary restraining order thereby allowing the sale of Brookhaven to go forward. All of the outstanding membership interests in Brookhaven Rail LLC were acquired by Shamrock Rail LLC on May 11, 2020.

⁷ Brookhaven takes no position on this argument.



FOLEY & LARDNER LLP

May 13, 2020

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Parcel D should be addressed with Winters Bros., who was not ordered to attend this Mediation. NYSO and Brookhaven also note again that the development of Parcel D (and, in particular, the construction of a tunnel from Parcel C to Parcel D) is wholly unrelated to the issues in connection with the Stop Work Order – the only issue that they believe is pending before Judge Azrack. In fact, the Stop Work Order was issued over a month before the Town was informed of NYSO's and Winters' respective decisions not to build the tunnel. Therefore, NYSO and Brookhaven take the position that no issue regarding the construction of a tunnel to Parcel D or the development of Parcel D should be mediated at this time.

Finally, insofar as Oakland is no longer the owner of Brookhaven, since all the outstanding membership interests in Brookhaven Rail LLC were acquired by Shamrock Rail LLC on May 11, 2020, Oakland believes its participation in this Mediation is unnecessary and imposes an improper burden and cost on it.⁸ Indeed, Oakland's inclusion as a party to this case was solely based on its status as the owner of Brookhaven and the prior owner of Parcel C.⁹

This letter is submitted for settlement purposes only pursuant to FRE 408 and is not intended to be a full recitation of the Detroit Entities' or Brookhaven's positions, which are set forth more fully in their recent submissions to Judge Azrack (*see* ECF Doc Nos. 161, 162 and 169). The parties expressly reserve all rights and remedies. The Detroit Entities and Brookhaven are available should the Court require further information.

⁸ Brookhaven takes no position on this issue.

⁹ Oakland sold its interest in Parcel C to the Sills Defendants in December 2016.



May 13, 2020
Page 6

Sincerely,

/s/ Carly Everhardt
Carly Everhardt

CE:
cc: Counsel of Record (via ECF)

EXHIBIT H

5/28/2020

SCHEDULING ORDER re [192](#) Letter, filed by Brookhaven Terminal Operations LLC, Pratt Brothers, Inc., Sills Expressway Associates, Sills Road Realty LLC, Watral Brothers, Inc.:
Mediation shall continue between the Sills Road Defendants and LIPA only on May 29, 2020 at 10:30 a.m. Counsel for those entities and their clients shall call the AT&T Teleconference Center at (877) 810-9415 and enter Access Code 9005911 when prompted. Counsel shall also arrange separate conference call-in numbers to enable the Court to communicate with each party and their counsel individually. The conference call-in numbers shall be provided to the Court at the start of the mediation. So Ordered by Magistrate Judge Anne Y. Shields on 5/28/2020. (Minerva, Deanna) (Entered: 05/28/2020)

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of August, 2020, a copy of the foregoing Response to the Reply of Sills Road Realty LLC, Brookhaven Rail Terminal Operations LLC, and Brookhaven Rail Freight Services was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox