

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

301071

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DOCKET NO. FD 36399 AND DOCKET NO. FD 36398

BROOKHAVEN RAIL LLC –

PETITION FOR EXEMPTION FROM REQUIREMENTS OF 49 U.S.C. § 10909

**RESPONSE OF TOWN OF BROOKHAVEN, NEW YORK TO
PETITION OF BROOKHAVEN RAIL LLC FOR EXEMPTION FROM
REQUIREMENTS OF 49 U.S.C. §10909**

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Dated: September 11, 2020

The Town of Brookhaven, New York (“Town”) respectfully responds to the Petition for Exemption (the “Petition”) filed by Brookhaven Rail LLC (“BHR”) on July 27, 2020 seeking an exemption from the Surface Transportation Board (“STB”) in order to obtain a land-use exemption permit (“Land-Use Exemption”) to construct and operate a Solid Waste Rail Transfer Facility (“SWRTF”) upon a 50 acre portion of a 228 acre parcel located in the Town of Brookhaven already planned and previously approved as an expansion of an existing rail transloading facility.

The Town respectfully incorporates herein its prior filings consisting of the July 14, 2020 letter and attachments of Brookhaven Planning Commissioner Beth A. Reilly and the July 31, 2020 letter and attachments of Brookhaven Senior Environmental Analyst Peter E. Fontaine.

As noted in the accompanying letter of the Town’s Special Counsel, Robert M. Calica, Esq. of Rosenberg Calica & Birney LLP:

“The Town’s July 14, 2020 submission stated in part that “the Town is also informed of the STB’s jurisdiction under 49 U.S.C. § 10909 to preempt the Town’s local zoning code, in a proper case. The Town itself takes no position as to whether the Proposed Project involving a SWRTF to transfer Municipal Solid Waste (‘MSW’) and Construction and Demolition Debris (‘C&D’) generated on Long Island to railcars for disposal is such a case, which is to be determined by the STB”. The Town now respectfully reconsiders that position.

* * *

As reflected in the Town’s July 31, 2020 environmental submission, the future development of the entire Brookhaven Rail Terminal Expansion (Parcels B, C and D) and the future development of Parcel D have previously been the subject of extensive environmental engagement and oversight by the Town including the review and approval of a comprehensive Voluntary Draft Environmental Impact Statement (‘VDEIS’) under the New York State Environmental Quality Review Act (“SEQRA”) and a Town-issued Negative Declaration imposing extensive environmental mitigation requirements which remain in effect.

As the Town's accompanying formal response to the BHR Petitions notes, the exercise of local control by municipalities such as the Town of Brookhaven in performing and controlling "*traditional municipal services*" such as "*garbage processing and disposal services*" is a matter uniquely and appropriately reserved for local zoning control. See, SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2nd Circuit 1995) and authorities therein cited including White v. Massachusetts Council of Construction Employers, 460 U.S. 204, 103 Sup. Ct. 1042 (1983). We also respectfully point out that the exercise of the Town's police powers respecting zoning, "*the home rule authority vested in municipalities to regulate land use*", and in particular zoning control over "*the exploitation of any and all natural resources within the Town as a permitted use*" is of overriding importance under well-established New York law. See, Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728 (2014). In the SSC Corp. case, the Second Circuit Court of Appeals ruled that the Town of Smithtown (in a case in which the Town of Brookhaven was an Intervenor) could exercise regulatory control over the disposal of municipal waste in the face of a Commerce Clause challenge. In the Town of Dryden case, the New York Court of Appeals ruled that a local Town could "*ban oil and gas production activities, including hydrofracking within municipal boundaries through the adoption of local zoning laws*", rejecting the argument that such local zoning laws were superseded by New York's State-wide Oil, Gas and Solution Mining Law.

In view of the Town's primary role and jurisdiction over local land-use, zoning and its environmental control over "natural recourses within the Town", should BHR and its affiliates, as Applicant, petition the Town Board for a change of zone or seek other Permits required and appropriate to authorize the Proposed Project including the SWRTF, the Town is prepared to promptly and fully review, consider and take such action concerning local approvals as may be appropriate when presented with such an Application by BHR."

Legal Discussion

The Clean Rails Act of 2008 (CRA) severely limited the STB's jurisdiction over solid waste rail transfer facilities and their compliance with state laws and regulations. It effectively limited the STB's jurisdiction to preempt only those state or local laws affecting the "siting" of such a facility. All other state and local laws were preserved. 49 U.S. Code § 10908 ("Each solid waste rail transfer facility shall be subject to and shall comply with all applicable Federal and State requirements, both substantive and procedural, including judicial and administrative orders and fines, respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar solid waste management facility... that is not owned or operated by or on behalf of a rail carrier, except as provided for in section 10909 of this chapter"). As this Board has observed, "Under the CRA, a solid waste rail transfer facility must comply with all applicable federal and state requirements respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, in the same manner as any similar solid waste management facility not owned or operated by or on behalf of a rail carrier, except for laws affecting the siting of the facility that are covered by the land-use-exemption permit." *Solid Waste Rail Transfer Facilities* 77 FR 69769 (STB published in Federal Register 11/21/12).

Additionally, the Town's review of a proposed waste disposal facility at which municipal waste will be handled, pursuant to an anticipated potential contract, renders BHR's proposed project subject to even lower Commerce Clause concerns. SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995). Even when it comes to facilities serviced by a rail line, state and local bodies retain police powers to protect the public health and safety, so long as the

state and local regulations do not serve to regulate railroad operations or unreasonably interfere with interstate commerce. N.Y. Susquehanna v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); Green Mountain RR Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005). Further, the CRA too (which generally preserves such police power), requires assessment of the burden which the local regulation may have on interstate commerce. 49 U.S. Code § 10908(a); 49 U.S. Code § 10909(a)(1). The Second Circuit in SSC, supra (a case in which the Town of Brookhaven appeared as amicus curia in support of the Town of Smithtown’s application) held that local municipalities have very definite interests in the collection and disposal of municipal solid waste, such functions are traditionally functions done by the municipality itself, and even when done through a municipal contract with a third-party the municipality is acting as a “market participant” and not a “regulator”. Inasmuch as the dormant Commerce Clause only leaves to Congress the “regulat[ion]” of interstate commerce, such a municipal contract is exempt from Commerce Clause limitations. SSC, 66 F.3d at 515-516 (relying on S.-Cent. Timber Dev., Inc. v Wunnicke, 467 US 82, 96 (1984); White v Massachusetts Council of Const. Employers, Inc., 460 US 204, 210 (1983)).

Further, as noted above, the exercise of the Town’s police powers respecting zoning, “*the home rule authority vested in municipalities to regulate land use*”, and in particular zoning control over “*the exploitation of any and all natural resources within the Town as a permitted use*” is of overriding importance under well-established New York law. See, Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728 (2014).

Conclusion

In view of the Town's primary role and jurisdiction over local land-use, zoning and its environmental control over "*natural recourses within the Town*", should BHR and its affiliates, as Applicant, petition the Town Board for a change of zone or seek other Permits required and appropriate to authorize the Proposed Project including the SWRTF, the Town is prepared to promptly and fully review, consider and take such action concerning local approvals as may be appropriate when presented with such an Application by BHR.

Dated: September 11, 2020

ROSENBERG CALICA & BIRNEY LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of September, 2020, I served copies of the foregoing RESPONSE OF TOWN OF BROOKHAVEN, NEW YORK TO PETITION OF BROOKHAVEN RAIL LLC FOR EXEMPTION FROM REQUIREMENTS OF 49 U.S.C. §10909 electronically (via email) upon each the following parties of record:

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Dated: September 11, 2020

//s//JUDAH SERFATY//s//

By: _____
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