

RCB | ROSENBERG CALICA & BIRNEY LLP

100 Garden City Plaza, Suite 408, Garden City, New York 11530 TELEPHONE 516-747-7400

Robert M. Calica
Partner

DIRECT DIAL: (516) 747-7400 (Ext. 307)

FAX: (516) 747-7480

EMAIL ADDRESS: rcalica@rcblaw.com 301308

November 23, 2020

ENTERED
Office of Proceedings
November 23, 2020
Part of Public Record

VIA E-FILING

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

Re: Docket No. FD 36399, Brookhaven Rail LLC-Petition for Exemption from
Requirements of 49 U.S.C. §10909

Dear Ms. Brown:

On behalf of the Town of Brookhaven ("Town"), we respectfully submit this letter in response to the untimely November 18, 2020 letter-objection of counsel for Sills Road Realty LLC and affiliates ("Sills Parties") to the "*October 22, 2020...Town and Brookhaven Rail jointly filed...request for Board sponsored mediation, stating that petition for exemption in [Docket No. FD 36399] raises a number of complex issues and questions and that they hope mediation would provide clarity and mutual agreement on some of these matters*" (STB Decision dated October 23, 2020).

Notwithstanding the Decision's observation that "*the Board favors resolution of disputes through mediation in lieu of formal Board proceedings wherever possible*", and inviting "*the Town and Brookhaven Rail [to] inform the Board whether they would like to seek Board-sponsored mediation in Docket No. FD 36398*" (since jointly requested), the Sills Parties, like the Citizens Campaign for the Environment ("CCE") in its November 16, 2020 letter, "objects" to Mediation between the Town and Brookhaven Rail LLC ("BHR") or requests to "*participate*" therein.

The Sills Parties, who are committed opponents of the Petitions now before the Board (despite having no discernable interest in Parcel D which will now be owned and developed by entities unaffiliated with the Sills Parties), do not suggest that their participation in Mediation

would do anything other than assure the failure of good faith efforts on the part of the Town and BHR to reach a “*partial resolution*” of some of the thorny jurisdictional issues in this case. First and foremost, these include the Town obtaining assurance that the environmental mitigation and development restrictions previously imposed on Parcel D under the So-Ordered 2016 Stipulation in the Federal Court (defined) and the Town’s SEQRA Negative Declaration dated September 14, 2017 are expressly imposed upon BHR and Winters Bros. in the event the STB grants the Petitions. This is a matter of overriding environmental concern to the Town and a clear and explicit resolution of this matter via Mediation is one of the important reasons that the Town seeks it.

On the other hand, the Sills Parties offer nothing but interference and stalemate.

The Sills Parties’ contention that Mediation “*would deprive the Sills parties and CCE of due process*”, which mirrors the CCE objection, ignores indisputable provisions of New York law cited in the Town’s November 13, 2020 letter-filing that:

“Further, CCE’s concerns about some ‘*secret arrangement*’ being reached between the Town and BHR is unmerited. It ignores the express requirements of New York statutory law including the Town Law, the Brookhaven Town Code, and the Open Meetings Law (Public Officers Law Section 103) that the Town Board must publicly consider, before approving any “*partial resolution*” resulting from a “*partial Mediation*” between the Town and BHR, if any¹.

It is also to be remembered that the Town, as the STB Decision recognizes, principally seeks ‘*clarity*’ of ‘*a number of complex questions and issues*’ and that even if any ‘*partial agreement*’ is reached, the case continues and the Sills Road Parties, the CCE and any others will continue to litigate their vigorous objections to the undecided Petitions that are currently pending before the Board.”

The Sills Parties’ statement that the Town and BHR “*cannot...explain why alternative dispute resolution before the federal district court is unsuitable compared to Board-sponsored mediation*” is worse than misleading, it is outright frivolous. “*Meditation*” in the Federal District Court with the Sills Parties, the Town, BHR and Winters Bros. already took place for a 90-day period before United States Magistrate Judge Anne Y. Shields pursuant to Order of United States District Court Judge Joan Azrack, but was ultimately unsuccessful (see Orders, attached).

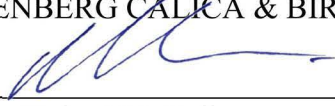
¹These explicit requirements under New York Statutory Law render any contention of “*exclusion*” or deprivation of “*due process*” nothing more than hollow rhetoric.

Further, the Town is currently moving for judgment as a matter of law in the Federal District Court against the Sills Parties as to Parcels B and C concerning their years' long excavation and "sand-mining" of more than 500,000 cubic yards of sand and soil ("Native Materials") from the environmentally vulnerable and protected Parcels B and C, despite having failed to construct a single foot of track (as explicitly mandated by the 2016 Stipulation) out of the agreed upon 25,000 linear feet. The sole exception constructed by them consists of a short "stub" of track of only a few hundred feet ending abruptly at a 60-foot deep pit-excavation illegally dug by the Sills Parties in the southeast corner of Parcel B. As to that "pit" area, the Sills Parties entered into a Consent Decree with the New York State Department of Environmental Conservation acknowledging that they were engaged at the in illegal dumping of imported, hazardous and prohibited materials and agreed to remove them and pay a substantial fine.

It is respectfully requested that the Sills Parties' request for "*rejection*" of the requested Mediation between the Town and BHR and its alternative request to "*participate*" in such "*partial Mediation*" be denied.

Very truly yours,

ROSENBERG CALICA & BIRNEY LLP

By: 
Robert M. Calica

RMC:ds

cc: Counsel and Parties of Record

5-14-20 ENotice - Scheduling Order of Magistrate Judge Shields

Doreen Salera-Calabrese

From: ecf_bounces@nyed.uscourts.gov
Sent: Thursday, May 14, 2020 10:39 AM
To: nobody@nyed.uscourts.gov
Subject: Activity in Case 2:14-cv-02286-JMA-AYS Town of Brookhaven v. Sills Road Realty LLC et al Scheduling Order

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U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 5/14/2020 at 10:38 AM EDT and filed on 5/14/2020

Case Name: Town of Brookhaven v. Sills Road Realty LLC et al

Case Number: 2:14-cv-02286-JMA-AYS

Filer:

WARNING: CASE CLOSED on 04/19/2016

Document Number: No document attached

Docket Text:

SCHEDULING ORDER: A telephonic settlement conference will be held on May 26, 2020 at 10:30 a.m. All counsel and their clients are directed to call the AT&T Audio-Conferencing Center at (877) 810-9415 and to enter Access Code 9005911 when prompted. Each party shall also arrange separate call-in numbers for the Court to communicate individually with each party and their counsel. The call-in numbers shall be provided to the Court with the party's Settlement Statement. Counsel are directed to consult and comply with this Court's Individual Rules with respect to the submission of Settlement Statements, which shall be provided to the Court no later than May 22, 2020. So Ordered by Magistrate Judge Anne Y. Shields on 5/14/2020. (Minerva, Deanna)

2:14-cv-02286-JMA-AYS Notice has been electronically mailed to:

Joseph R. Harbeson jharbeson@rmfpc.com

Robert M. Calica rcalica@rcblaw.com, doreen@rcblaw.com, eross@rcblaw.com

Steven R. Schlesinger sschlesinger@jshllp.com

Judah Serfaty jserfaty@rcblaw.com

Janet P. DeLuca janet.deluca@pseg.com, janetdeluca4@gmail.com

Jonathan C. Sullivan jsullivan@rmfpc.com

Jillian Lee McNeil jmcneil@jaspanllp.com, cimrie@jaspanllp.com, smionis@jaspanllp.com

Alisha L. McCarthy (Terminated) amccarthy@foley.com, amccarthy@phillipsnizer.com, docket@phillipsnizer.com

Avery Nathaniel Maron avery@rcblaw.com

Christopher Albert Degennaro (Terminated) cdegennaro@foley.com

Carly Everhardt (Terminated) ceverhardt@foley.com

2:14-cv-02286-JMA-AYS Notice will not be electronically mailed to:

Yonaton Aronoff
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016

7-29-20 ENotice - Scheduling Order of Magistrate Judge Shields

Doreen Salera-Calabrese

From: ecf_bounces@nyed.uscourts.gov
Sent: Wednesday, July 29, 2020 11:55 AM
To: nobody@nyed.uscourts.gov
Subject: Activity in Case 2:14-cv-02286-JMA-AYS Town of Brookhaven v. Sills Road Realty LLC et al Scheduling Order

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U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 7/29/2020 at 11:55 AM EDT and filed on 7/29/2020

Case Name: Town of Brookhaven v. Sills Road Realty LLC et al

Case Number: 2:14-cv-02286-JMA-AYS

Filer:

WARNING: CASE CLOSED on 04/19/2016

Document Number: No document attached

Docket Text:

SCHEDULING ORDER re [203] Letter filed by Town of Brookhaven: Based upon the Town's representation that they are not agreeable to extending the Second Interim Stipulation, and 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. So Ordered by Magistrate Judge Anne Y. Shields on 7/29/2020. (Minerva, Deanna)

2:14-cv-02286-JMA-AYS Notice has been electronically mailed to:

Joseph R. Harbeson jharbeson@rmfpc.com

Robert M. Calica rcalica@rcblaw.com, doreen@rcblaw.com, eross@rcblaw.com

Steven R. Schlesinger sschlesinger@jshllp.com

Judah Serfaty jserfaty@rcblaw.com

Janet P. DeLuca janet.deluca@pseg.com, janetdeluca4@gmail.com

Jonathan C. Sullivan jsullivan@rmfpc.com

Jillian Lee McNeil jmcneil@jaspanllp.com, cimrie@jaspanllp.com, smionis@jaspanllp.com

Alisha L. McCarthy (Terminated) amccarthy@foley.com, amccarthy@phillipsnizer.com, docket@phillipsnizer.com

Avery Nathaniel Maron avery@rcblaw.com

Christopher Albert Degennaro (Terminated) cdegennaro@foley.com

Carly Everhardt (Terminated) ceverhardt@foley.com

2:14-cv-02286-JMA-AYS Notice will not be electronically mailed to:

Yonaton Aronoff
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of November, 2020, I served copies of the foregoing Letter and enclosures electronically (via email) upon each the following parties of record:

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

Robert D. Rosenberg
rdr@slowerandloftus.com

Robert A. Wimbish
Fletcher & Sippel LLC
Counsel for Sills Road Realty LLC, Brookhaven Terminal Operations LLC and Brookhaven Rail Freight Services LLC
rwimbish@fletcher-sippel.com



Judah Serfaty