

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ROBERT A. WIMBISH

(312) 252-1504
rwimbish@fletcher-sippel.com

December 1, 2020

301324

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
December 1, 2020
Part of
Public Record

**Re: FD 36398, Brookhaven Rail LLC – Construction and Operation Exemption –
Suffolk County, New York**

CORRECTED VERSION

Dear Ms. Brown:

The Sills Parties¹ hereby seek leave to respond to the sur-reply tendered in the FD 36399 proceeding by the Town of Brookhaven (the “Town”), in which, among a thicket of procedural and substantive missteps, the Town argues that the Sills Parties should be excluded from Surface Transportation Board-sponsored mediation jointly requested on November 6, 2020 by Brookhaven Rail LLC (“BHR”) and the Town. The Town’s sur-reply is not only procedurally defective, but it is replete with misstatements, thus warranting this response. As reflected in its filings, the Town seeks impermissibly through Board-sponsored mediation to adjust the terms of a multi-party settlement (the so-called “2016 Settlement”) resulting from federal district court litigation (and the environmental analysis flowing from that settlement) – and thereby to seek to obtain Board approval of that side agreement. The Town’s plan depends upon a Board-sanctioned bypass of the 2016 Settlement behind the backs of parties to that settlement, notably the Sills Parties.

Following are observations on the Town’s awkward November 23 letter filing:

- The Town has lodged its sur-reply in FD 36399, involving BHR’s failed petition for a land use exemption permit. In its October 23, 2020 decision, the Board denied

¹ Sills Road Realty LLC, Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC (collectively, the “Sills Parties”).

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mediation in FD 36399. Moreover, the Sills Parties replied on November 18, 2020 to the BHR-Town request for mediation in FD 36398. The Town appears to have confused the two proceedings and the procedural status of each, and has filed its November 23 sur-reply in the wrong docket. Accordingly, the present filing focuses exclusively on joint mediation as has been requested in FD 36398.

- The Town wrongly assumes that the Sills Parties' November 18 reply filing was "untimely,"² premised on the Town's mistaken understanding of the status of the FD 36399 proceeding. The Sills Parties (like the Citizens Campaign for the Environment) had replied to the joint BHR-Town request for mediation from November 6th, and not to the joint mediation request filed on October 22, 2020 in the FD 36399 proceeding – as should have been clear to the Town from the caption of the Sills Parties' reply. Because the Sills Parties' reply was filed only 12 days after the joint request was tendered, the reply clearly is timely. *See* 49 C.F.R. § 1104.13(a) (allowing 20 days to respond to a filing such as the joint request for mediation).
- The Town's sur-reply is procedurally defective. The Sills Parties' timely response to the BHR-Town joint request of November 6th for mediation was a reply permitted under 49 C.F.R. § 1104.13(a). The Town's sur-reply to the Sills Parties' reply filing, on the other hand, is a reply to a reply prohibited under 49 C.F.R. § 1104.13(c). At a minimum, if the Town had wished to depart from STB rules of procedure as it did, it should have requested leave to do so and show cause why such relief from the agency's rules would be appropriate.

Beyond those missteps, the Town cannot explain why Board-sponsored mediation is appropriate or why, even if it were warranted, parties such as the Sills Parties should be excluded. There is only one reason – the Town and BHR perceive bilateral, Board-sponsored mediation as a means to collude over issues surrounding the 2016 Settlement, while excluding all other parties to that settlement agreement.

The Town claims that it seeks assurances that the Parcel D environmental mitigation and development restrictions prescribed under the 2016 Settlement and the Town's SEQRA Negative Declaration will be imposed upon BHR and Winters Bros. as a condition to Board authorization of BHR's proposed railroad line construction (and presumably, also, a

² Quotation marks are used here to indicate that the word was used by the Town at page one of its sur-reply filing (without italics) to describe the Sills Parties' reply.

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potential Board-granted land use exemption permit). The Sills Parties are likewise concerned that BHR will not adhere to the 2016 Settlement. This is especially so where a bilateral, mediated agreement could affect – and, indeed, with the Board’s imprimatur, potentially could override – the Sills Parties’ rights under the 2016 Settlement. This is especially concerning since the Town is seeking (ironically) to hold the *Sills Parties* in default under the 2016 Settlement due to *BHR*’s proposed track alignment changes for Parcel D as presented to the Board. These track alignment changes are not permitted under the 2016 Settlement. The Sills Parties would be harmed by a side deal regarding Parcel D track alignment (and altering the 2016 Settlement) if that deal excluded the Sills Parties, and then that deal were to be sanctioned by the Board.

The Town concedes, as it must, that questions about whether BHR and Winters Bros. are bound by the 2016 Settlement are presently being litigated in the federal action. The Town recently filed a Declaration in the federal action describing BHR’s and Winters Bros.’ claim that they are not bound by the 2016 Settlement as “astounding” and “frivolous.” (A copy of the Town’s October 28, 2020 Declaration is annexed as Exhibit A.) The Sills Parties maintain that these issues should be determined by the federal court which has explicitly retained jurisdiction to hear disputes under the 2016 Settlement.

The Town outlandishly claims that favoring federal district court mediation is “misleading” and “frivolous” (sur-reply, 2) because prior efforts in that venue were unsuccessful. This ignores the fact that the court repeatedly has urged the parties to resume settlement efforts there. The Sills Parties are willing to resume mediation in the federal action, as the Town well knows. Added to this is the Town’s self-serving, patronizing claim that allowing the Sills Parties to joint mediation before the Board, would doom settlement efforts. In fact, the Town has offered nothing in its sur-reply showing that the Sills Parties can fairly be blamed for the lack of success of past federal district court mediation. The documents that the Town attached to its sur-reply do not support the Town’s unfounded assertion. Rather, the Town’s protestations only prove that the Town and BHR seek mediation before the Board as a device to exclude the Sills Parties from settlement discussions, which they could not do in the federal action.

The Town’s defense of due process is equally empty. None of the Town’s decisions concerning the federal litigation or issues before the Board have been presented for open discussion as far the Sills Parties were able to discern from the absence of any of these issues in the Town’s public agenda and meeting minutes. Also, the Town has short-circuited the usual public discourse in connection with this proceeding. See Letter on behalf of the Town to Victoria Ruston dated September 11, 2020 at 2. Critically, the vetting process that the Town identifies in the quoted passage at page 2 of its sur-reply conflicts with the general expectations that each of the parties to Board-sponsored mediation will have present at mediation a

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representative that has the authority to bind that party to negotiated terms.³ The Town must explain how it can commit itself to mediation, and yet comply with the protections of due process afforded the public by way of state law and the Brookhaven Town Code.

For purposes of misdirection, the Town opts to muddy the STB proceeding with irrelevant discussion of alleged sand mining on Parcels B and C – issues in the Town’s federal action, but having nothing to do with the Board’s consideration of a petition to build a new railroad line on Parcel D. Suffice here to say the Town’s effort to dredge up scandal is built upon baseless allegations that it will not be able to prove in the federal action. If, on the other hand, the Town believes that excavation on Parcels B and C are relevant to the issues here, that proves either that the Sills Parties must be included in Board-sponsored mediation, or, more to the point, that mediation should take place in the federal action.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish
Attorney for Sills Road Realty LLC, Brookhaven
Terminal Operations LLC, and Brookhaven Rail
Freight Services LLC

RAW:ah

Attachment – Exhibit A

cc: All parties of record

³ See 49 C.F.R. § 1109.3(c). It is unclear what the Town means by its quote from its November 13 letter filing when it refers to “*partial resolution*” and “*partial Mediation*.” See sur-reply, 2. Perhaps the references are intended as qualifications to Town’s obligation to comply with state and local laws, and so it is unclear if the use of quotation marks and italics is simply gratuitous or has deeper significance.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TOWN OF BROOKHAVEN,

Plaintiffs,

Index No.: 14-cv-02286

-against-

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.

**DECLARATION ON BEHALF
OF TOWN OF BROOKHAVEN
IN RESPONSE TO
BROOKHAVEN RAIL LLC,
OAKLAND TRANSPORTATION,
NEW YORK SITE OPERATIONS
LLC AND WINTERS BROS.’
CLAIMS CONCERNING
PARCEL D**

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ROBERT M. CALICA, an attorney duly admitted to practice law before the Courts of the State of New York and a member of the bar of this Court, declares under penalty of perjury pursuant to 28 U.S.C. §1746 as follows:

Parcel D Parties’ Opposition

1. I am a member of the firm of Rosenberg Calica & Birney LLP, attorneys for plaintiff Town of Brookhaven (“Town”) in this matter (as Special Counsel to Town Attorney Annette Eaderesto, Esq., Town Attorney). I respectfully submit this declaration for the limited purpose of responding to the unfounded assertion made in the recent preliminary injunction filings on behalf of defendants Brookhaven Rail LLC (“BHR”), Oakland Transportation Holdings LLC (“Oakland Transportation”), and non-parties New York Site Operations LLC (“NYSO”), and Winters Bros. Waste Systems of Long Island LLC (“Winters Bros.”), that the Parcel D ownership interests are not bound by the provisions of the judicially So-Ordered March 28, 2016 Stipulation (the “2016 Stipulation”).

2. While the Town certainly concurs that the Sills Road Defendants' motion for injunctive relief should be denied, the repudiation and refusal to acknowledge that all of the interested parties remain bound by the So-Ordered 2016 Stipulation are flatly contradicted by the prior judicial filings in this case and directly challenge this Court's jurisdiction over Parcel D.

3. Because these contentions are both completely untenable and go to the core of the 2016 Stipulation's central purpose and approval regime for the development, environmental mitigation measures for, and oversight of Parcel D, we respectfully request that the Court accept this response.

The Ownership of Parcel D

4. As established without contradiction in the Record before this Court, the 228-acre Parcel D (located to the south of the east-west LIRR Tracks separating it from Parcel C) is titled in NYSO, a self-acknowledged "affiliate" of defendant Oakland Transportation. Defendant BHR is the owner of the rail operating rights over Parcel D and Winters Bros., which recently acquired BHR itself, is the contract vendee to purchase the Parcel D fee interest of NYSO (collectively, the "Parcel D Parties").

5. NYSO and Winters Bros. are variously described in their recent preliminary injunction submissions as "non-parties" and "interested parties".

The Parcel D Parties' Contention That They Are Not Bound by the Provisions of the 2016 Stipulation

6. BHR (the owner of the railway operating rights on Parcel D) and Oakland Transportation, the former owner of Parcel D and an original joint developer with the Sills Road Defendants concerning Parcels A, B and C, are signatories to the 2016 Stipulation which comprehensively governs the development and environmental restrictions applicable to Parcel D. Nevertheless, because NYSO (a self-acknowledged "affiliate" of Oakland Transportation) is not

itself a “signatory” to the 2016 Stipulation, the Parcel D Parties argue that neither NYSO nor its contract vendee, Winters Bros. are bound by any of the development and environmental provisions and restrictions contained in the 2016 Stipulation. This contention is both untenable as a matter of law and fact and a shocking affront to the jurisdiction of this Court.

The 2016 Stipulation Binds All of the Parcel D Parties

7. While the thrust of the Parcel D Parties’ arguments are directed toward the Sills Road Defendants to support their position that the Parcel D owners are not required to construct a tunnel under the LIRR tracks or authorize tunnel access to Parcel D from Parcel C via a tunnel (as to which the Town takes no position¹), they unequivocally state to the Court that the Parcel D owners (currently, NYSO and Winters Bros. as contract vendee) are not bound by the 2016 Stipulation as to Parcel D because NYSO (the fee owner since 2013) is not a signatory to the 2016 Stipulation.

8. The Parcel D Parties make this astounding claim notwithstanding that both BHR and Oakland Transportation signed the 2016 Stipulation, agreed to and granted the Town a 62-acre Conservation Easement on Parcel D, and despite the multiple express provisions in the Stipulation signed by Oakland Transportation (and by BHR which owned and still owns the railway rights on Parcel D) agreeing to subject all future “development”, “rail construction” and levels and manner of grading and excavation/removal for Parcel D to Town review, approval and

¹ The Town has never been informed of the precise governance structure of the entities and ownership interests comprising the planned “railway expansion” on Parcels B, C and D and inasmuch as they are obviously in dispute among themselves the Town takes no position as to their rights and obligations among one another. What is relevant is that the Town’s SEQRA review authorized a tunnel, if one is to be built, but does not authorize massive excavation and removal of Native Materials to build a “tunnel to nowhere” if one is not to be built (see, Declaration of Kevin Walsh, P.E. of VHB). Indeed, the law is clear that the Town’s SEQRA approvals listing the tunnel as a permitted use, just as Zoning Ordinances, cannot “*mandate[] the construction of a specific kind of building or amenity*” (Town of Huntington v. Beechwood Carmen Building Corp., 82 A.D.3d 1203 [2d Dept. 2011], citing BLF Associates, LLC v. Town of Hempstead, 59 A.D.3d 51 [2d Dept. 2008]).

oversight under the 2016 Stipulation. Specifically, as party signatories to the 2016 So-Ordered Stipulation, Oakland Transportation and BHR made multiple commitments and undertook extensive obligations concerning the approval and development of Parcel D itself, including commitments to:

(i) Provide a “Parcel D Conceptual Track Plan” and to submit the Parcel D Conceptual Track Plan for review by VHB Engineering and for consideration and approval by the Town for its “Administrative SEQRA/Plan Review” (2016 Stipulation, paras. 1 and 3);

(ii) Provide both “proposed grading plans” and a “preliminary Stormwater Pollution Prevention Plan (SWPPP)” for Parcel D to the Town for review and approval (id., para. 2);

(iii) Comply with specified terms and conditions for the future development, grading, excavation and exporting of material from Parcel D and subject future development of Parcel D to continuing oversight and site review by both VHB Engineering and the Town (id., para. 2[b]);

(iv) Execute and deliver a Conservation Easement for Parcel D, granting the Town a “62 acre Undisturbed/Conservation area [which] shall remain permanently undeveloped and as open space/green space in perpetuity” and grant the Town a “Leachate Easement” on a portion of Parcel D to maintain a pipe running to a Suffolk County Sewage Treatment Plant (id., para. 6). The Conservation Easement was executed on October 13, 2017 as a condition of the SEQRA approvals; and

(v) Perform all “grading, excavation, construction and development activities on Parcels B, C and D of the Rail Facility” only in accordance with Town’s SEQRA Negative Declaration and other Town approvals (*id.*, para. 8) [emphasis supplied].

9. Despite all of this, the Parcel D Parties’ Memorandum of Law baselessly contends that:

a. “[T]he parties to the Stipulation (and to this action), chose not to include NYSO, or any future owner of Parcel D, as a signatory *and imposed no obligations on NYSO as a third-party*” (*id.*, pg. 2) [emphasis supplied];

b. “[A] plain reading of the Stipulation *imposes no obligations on any party (or future owner)* with regards to the construction, payment, or control over the proposed tunnel between Parcels C and D” (*id.*, p. 3) [emphasis supplied];

c. “Even if the Stipulation required its signatories to develop the Parcels comprising the Brookhaven Rail Terminal in a particular way, *which it does not, NYSO—the owner of Parcel D – and Winters Bros. – the proposed future owner of Parcel D -- cannot be bound by this Stipulation since neither is a signatory*” (*id.*, p. 9) [emphasis supplied];

d. “The conveyance [of Parcel D] took place well before the Town [commenced] this action and approximately three years before the suit was resolved by the Stipulation. Because NYSO is not named in the Stipulation, NYSO did not sign the Stipulation, and NYSO was never a party to this lawsuit, the Sills Road Defendants cannot contort the Stipulation to impose obligations on NYSO.... *as NYSO has no obligations under the Stipulation, neither does Winters Bros.*” (*id.*, p. 10) [emphasis supplied];

e. “NYSO is not a subsidiary of Oakland [Oakland Transportation Holdings LLC].

The fact that NYSO is an affiliate of Oakland is of no moment. Nothing in the Stipulation provides for application of its terms to affiliates of signatories” (*id.*, p. 10, fn 9);

f. The “Stipulation requires that *the signatories* submit to, and comply with, the agreed-upon oversight and approval process to the extent they build pursuant to the Proposal” (*id.*, p. 16) [emphasis supplied]; and

g. “Therefore, so long as the owner of Parcel D obtains the necessary approvals, *alteration of the Parcel D Conceptual Track Plan (or any other plan appended to the Stipulation) is permitted*” (*id.*, p. 18) [emphasis supplied].

The Belated Disclosure of NYSO’s Ownership Role

10. It is to be pointed out that when the Town initially commenced this litigation in 2014 in State Court (Suffolk County Clerk’s Index No. 061613-2014), the Town named only those parties previously identified as owners of Parcel A in the Town’s prior 2010 Federal Court Action as defendants inasmuch as the adjacent Parcels were alleged by the defendants themselves and represented to be a “railway extension” and “rail spur” from the operating Parcel A. The Town did not and could not know of the ever-shifting ownership structure among the multiple defendants (which continue to change to this day).

11. When the defendants removed the Town’s State Court Action to this Court, the parties entered into a Stipulation dated April 9, 2014 (Ex. A hereto, NYSECF #4 in State Court) which amended the caption to add Oakland Transportation and to delete certain defendants because it recites, the defendants had “*advised the Town of certain changes in the ownership, operation and control of the railway facilities at issue in the Action which render it appropriate to discontinue the Town's claims against certain parties, to add certain parties, and to*

redesignate or rename certain parties” (the “Joinder Stipulation”). At the time the Joinder Stipulation was filed, there were no then known development plans for Parcel D and as a consequence, they were not addressed therein.

12. The inclusion of Parcel D as part of the proposed “railway extension” became known to the Town years later when the parties were negotiating the 2016 Stipulation. When the defendants added Parcel D as a part of their “railway extension” and “rail spur” originating from Parcel A and running through Parcels B and C, the defendants themselves bound Parcel D to the 2016 Stipulation. As a result, the 2016 Stipulation included parallel (indeed, in many respects, identical) provisions governing the Town development approvals and environmental restrictions for Parcels B, C and Parcel D.

13. While the 2016 Stipulation nevertheless contained multiple provisions by which the Parcel D ownership entities were bound to perform specific obligations relating to Parcel D, its development and oversight, as well as conveying a 62-acre Conservation Easement to the Town, NYSO itself was not added as a party².

14. Whether viewed in accordance with well-established legal principles governing the construction of agreements involving affiliates and parties who are united-in-interest, disclosure, agency, assumption and/or estoppel,³ it is manifest that the Parcel D Parties are bound by the So-Ordered 2016 Stipulation. Indeed, and without limitation, BHR and Oakland

² When the firm of Foley & Lardner, LLP, attorneys for Oakland Transportation and BHR (and then representing the interests of NYSO) opposed the Court’s recommendation to include NYSO as a party to the Mediation recently conducted before Magistrate Judge Shields, my office specifically requested that they specifically confirm and represent the precise relationship between defendant Oakland Transportation and non-party NYSO (see my letter dated May 19, 2020 to Carly Everhardt, Esq., Ex. B) That request was flatly refused (see, Ex. C). The precise relationship of NYSO as an “affiliate” of Oakland Transportation has yet to be disclosed by them or their attorneys, Foley & Lardner. Nevertheless, as shown, Parcel D itself is irrefutably subject to the development and environmental governance of the Town under the 2016 Stipulation.

³ See, e.g., Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349 (2d Cir. 1999); Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060 (2d Cir. 1993).

Transportation directly benefited from the 2016 Stipulation which lifted the preliminary injunction granted by then Magistrate Judge Brown and enabled development of Parcels B, C and D to resume (subject to Town environmental approval and oversight thereof).

The Parcel D Parties Have Fully Performed Under the 2016 Stipulation to Date

15. Numerous provisions of the 2016 Stipulation and the conduct of the BRT Defendants (including the actual granting of the 62-acre Conservation Easement to the Town by NYSO) further make clear that Parcel D, its development, environmental restrictions and oversight, are subject to the 2016 Stipulation despite the above-quoted contrary statements contained in the Memorandum of Law of the Parcel D Parties. Specifically:

a. The “Settlement Framework” reached before the Court and which became detailed and documented in the 2016 Stipulation states that:

“In furtherance of the Settlement Framework, BRT’s engineers...have prepared and BRT has provided to the Town, *inter alia*, a document...entitled, ‘BROOKHAVEN RAIL TERMINAL – PARCEL D – GREENSPACE’ dated 2/23/2016 (‘Parcel D Conceptual Track Plan’) which presents a conceptual track plan for Parcel D together with an overlay of areas labeled ‘GREEN AREA – UNDISTURBED’... for a total of 62 acres of Parcel D...as well as certain LIPA easements/assets” (2016 Stipulation, Recital L);

Thus, the “Parcel D Conceptual Track Plan” and Conservation Easement are both directly applicable to Parcel D.

b. The Stipulation states that the “BRT Defendants [which did not include NYSO] propose to execute and file a Conservation Easement, encompassing a 62 acre undisturbed/Conservation Easement Area on Parcel D, such that it will remain permanently undeveloped and open space/green space...notwithstanding any development, further development or redevelopment of Parcels A, B, C and/or D” (*id.*, Recital M);

c. The 2016 Stipulation provides that the “Parcel D Conceptual Track Plan [may be submitted] in a phased approach whereby the proposed New BRT Track Plans’ review and approval may proceed and be completed *prior to the review and approval of the Lot D Conceptual Track Plan*” (*id.*, para. 1) [emphasis supplied];

d. The 2016 Stipulation provides that the “*Grading Plans to implement the proposed new BRT Track Plans and Lot D Conceptual Track Plan* will provide information on all areas to be disturbed/removed for construction including materials to be removed/replaced under the track alignment for construction (load-bearing purposes)” (*id.*, para. 2b). It also provides that: the “grading process will re-use native soils onsite for fill purposes to the maximum extent feasible” (*id.*); the materials “shall not include any solid waste or contaminate as defined by the DEC” (*id.*); “the Grading Plans shall include clear delineation of any limits of disturbance (LOD) during site work to protect native vegetation” (*id.*); the “*Grading Plan shall reflect the location and volume of any removal of native materials from Parcels B, C and D*”; (*id.*), and that “any imported and/or engineered fill...*required with respect to the development of Parcels B, C or D*...will adhere to applicable DEC rules, regulations and guidelines governing the management of such materials” (*id.*) [emphasis supplied];

e. Under the 2016 Stipulation, the Administrative SEQRA/Plan Review specifically includes:

“the Lot D Conceptual Track Plan relating to the Railway Expansion in accordance with and consistent with Applicable Town Code Provision and to prepare and present findings and recommendations to the Town Board respecting the environmental assessment and site plan review in connection with the Railway Expansion to include...future site development on Parcels B and C; the Lot D Conceptual Track Plan, associated Additional Plans and future site development of Parcel D; the establishment and management of the Undisturbed/Conservative [sic] Easement Area on Parcel D; and following the approval of same by the Town

Board, for [VHB] to monitor and supervise compliance with such approval during the development and construction of the Railway Expansion. (*id.* at para. 3) [emphasis supplied]

f. The 2016 Stipulation further states that the Town’s Environmental Consultant, VHB “shall be permitted *access to Parcels B, C and D* upon reasonable advance notice, without restriction, and as needed to fulfill its duties” (*id.*) [emphasis supplied];

g. The 2016 Stipulation provides that “[n]o further site development activities for the Railway Expansion [i.e., Parcels B, C and Parcel D] shall proceed until such time as the Administrative SEQRA/Plan Review with the findings and recommendations prepared by VHB, is complete, reviewed and approved by the Town Board....” (*id.*, para. 4);

h. The 2016 Stipulation further provides that the “construction and operation of all buildings and other structural improvements *on Parcels B, C and D, including any site plans, building permits and Certificates of Occupancy, shall be governed by the provisions of this Stipulation of Settlement*” (*id.*, para. 5) [emphasis supplied];

i. The 2016 Stipulation requires the BRT Defendants to “install a right of way fence, as approved by the Town, along the north/south line of the eastern boundary of the area of green space labeled ‘A’ *on the Parcel D Conceptual Track Plan*” and “*on the Parcel D Conceptual Track Plan at the time of track installation*” (*id.* at para. 6) [emphasis supplied];

j. The 2016 Stipulation provides that only upon termination of the 2014 action may the “BRT Defendants...*resume grading, excavation, construction and development activities on Parcels B, C and D of the Rail Facility as approved by the Town Board*” (*id.*, para. 8) [emphasis supplied]; and

k. The Stipulation provides that the “BRT Defendants shall apply for all required site plan approval, building permits and obtain all required certificates of occupancy for

any and all non-rail buildings and structural improvements to be constructed on Parcels B, C and D, which are not ‘Support Structures’ as defined herein” (*id.*, para. 16c) [emphasis supplied].

16. In short, the 2016 Stipulation contains multiple express covenants that unequivocally govern the Town environmental and development approvals required for the development of Parcel D, track on Parcel D, buildings and other structures, Limits of Disturbance, fencing, oversight by and physical access by VHB Engineering, and most pivotally, the granting of a Conservation Easement to the Town on 62-acres of Parcel D, notwithstanding that Parcel D was titled in NYSO (a self-acknowledged “affiliate” of Oakland Transportation), and that NYSO was not a signatory. To claim that Parcel D is not even subject to these obligations is frivolous.

17. We finally observe that the Parcel D Parties’ contention that they are not “bound” by the development and environmental approval and oversight conditions of the 2016 Stipulation is an affront to the jurisdiction of this Court. All of the original BRT defendants, including Oakland Transportation (the former owner of Parcel D) and BHR (which owns the railway operating rights on Parcel D) were jointly represented by the law firm of Foley & Lardner LLP, which firm is itself also a signatory to the 2016 Stipulation on behalf of all defendants which it then represented (*id.*, p. 19). The Foley & Lardner firm continues to represent Oakland Transportation, BHR, and NYSO (alleged to be only a “affiliate” but not a “subsidiary” of Oakland Transportation), labeled as “non-party New York Site Operations, LLC” (see signature page of the Parcel D Parties’ Memorandum of Law p. 24). And, without limitation, the firm of Foley & Lardner itself executed a Stipulation binding its clients (all defendants at the time) to convey a 62-acre Conservation/Open Space Easement to the Town of Parcel D and agreed to the multiple express covenants concerning the precise manner in which, and the environmental

mitigation conditions under which, Parcel D itself would be developed pursuant to the 2016 Stipulation (see paras. “a” through “h” above) and submitted it to this Court to be “so ordered”, while now disingenuously contending that the Parcel D ownership interests were in no respect “bound” to observe and perform such obligations at all.

Conclusion

18. We respectfully request that the Court accept and consider the enclosed Declaration and its documentary attachments and references to prior Court filings in response to the Parcel D Parties’ untenable contentions that NYSO and its contract vendee, Winters Bros., are not “bound” by the development restrictions and environmental conditions imposed upon Parcel D.

October 28, 2020



ROBERT M. CALICA