

ENTERED
Office of Proceedings
December 13, 2021
Part of
Public Record

CONTAINS COLOR IMAGES

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36398

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

DOCKET NO. FD 36399

BROOKHAVEN RAIL LLC - PETITION FOR EXEMPTION FROM
REQUIREMENTS OF 49 U.S.C. §10909

DOCKET NO. FD 35141

U.S. RAIL CORP. - LLC – CONSTRUCTION AND OPERATION EXEMPTION -
BROOKHAVEN RAIL TERMINAL

DOCKET NO. FD 36376

SPECTRUM RAILROAD HOLDINGS, LLC – OPERATION EXEMPTION – RAILROAD
LINE IN THE TOWN OF BROOKHAVEN, NY

DOCKET NO. FD 36384

SILLS ROAD REALTY LLC – ACQUISITION EXEMPTION
- RAILROAD LINE IN THE TOWN OF BROOKHAVEN, NY

DOCKET NO. FD 36385

SPECTRUM RAILROAD HOLDINGS, LLC – ACQUISITION AND OPERATION
EXEMPTION –LINE OF SILLS ROAD REALTY LLC, IN THE TOWN OF
BROOKHAVEN, NY

**REPLY TO PETITION FOR DECLARATORY ORDER
AND/OR AN ORDER TO SHOW CAUSE AND SUSPEND**

Brookhaven Rail LLC (“Brookhaven Rail”) hereby replies to the Petition for Declaratory Order and/or An Order to Show Cause and Suspend (“Petition”) filed by Citizens Campaign for the Environment (“CCE”) in the captioned dockets¹ on November 23, 2021. For all the reasons set forth in this Reply, CCE’s Petition should be summarily denied. CCE has presented no valid grounds for the Surface Transportation Board (“Board” or “STB”) to commence a declaratory order proceeding on any matter related to Brookhaven Rail’s proposed projects before the Board, or to take any of the other actions described in the Petition. The yarn that CCE has spun in support of the three multipart “declarations” it would have this Board make is based on innuendo and allegations that are unsupported by any actual evidence, as well as blatant misstatements of fact and mischaracterizations of unambiguous language in Board decisions and letters from the Acting Director of the Office of Environmental Analysis (“OEA”). CCE has also fallen far short of meeting any of the well-established standards for reopening prior decisions pursuant to 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4. In this Reply Brookhaven Rail exposes the Petition for what

¹ As a threshold procedural point, filing the Petition in Docket Nos. FD 36376, FD 36384, and FD 36385 was a meaningless and wasteful exercise. These three dockets contain no grants of authority that can be reopened or reconsidered and have long been closed. By a Decision served June 16, 2020, the Director of the Office of Proceedings (1) rejected verified notices of exemption filed in Docket Nos. FD 36384 and FD 36385 by Sills Road Realty LLC (“Sills”) and Spectrum RR Holdings, LLC (“Spectrum”); and (2) granted the motion of Spectrum to withdraw its verified notice of exemption in Docket No. FD 36376 (“*June 16 2020 Decision*”). Subsequently, as “part of settlements with various parties” Sills and Spectrum moved to “withdraw with prejudice all of their past filings tendered” in these dockets (and Docket Nos. FD 36398 and FD 36399) even though they realized that such an action was “likely unnecessary (and moot), given the status of the FD 36376, FD 36384, and 36385 proceedings.” *See*, Letter to Cynthia T. Brown from Robert A. Wimbish, dated October 22, 2021, filed in all five dockets mentioned in this footnote. The Petition cannot, and therefore it does not, specifically ask the Board to reopen or reconsider any decisions in these three dockets. It appears to have been filed in them solely for dramatic effect.

it is: yet another strained and baseless attempt by CCE to advance its goal of opposing the rail construction project and solid waste rail transfer facility that Brookhaven Rail has proposed to construct on so-called “Parcel D” of the former Brookhaven Rail Terminal (“BRT”).²

A. Introduction

The flaws in CCE’s Petition are many, but foremost among them are the underlying erroneous premises that (1) Brookhaven Rail is an affiliate of NP/Winters Long Island Industrial, LLC (“NP/Winters”) - the owner of Parcels B and C of the BRT³ - and (2) that Brookhaven Rail has any control over the development of Parcel B and/or C. Brookhaven Rail has explained in correspondence to OEA going back to July 5, 2021 (often in response to allegations made by CCE) that it is not an affiliate of NP/Winters and Brookhaven Rail does not have any contractual rights or plans to construct any railroad tracks on Parcels B and C. This correspondence is attached to the Reply to November 10, 2021 Filing of CCE submitted by Brookhaven Rail in Docket Nos. 36398 and 36399 on November 30, 2021 (“November 30 Reply”), where Brookhaven Rail set out in detail the various parties involved in the development of Parcels B, C, and D and their relationships. Brookhaven Rail incorporates that filing by reference into this Reply.

Nevertheless, the Petition continues to erroneously tie Brookhaven Rail to NP/Winters to try to advance CCE’s overall narrative and objectives. For instance, CCE asserts that “on July 5, 2021, BHR/Winters sent a letter to OEA (EI -30903) informing OEA that its initial construction plans had changed, and affiliates of Northpoint Development, Winters Bros., and BHR

² In May 2021 “Parcel D” was renamed the Winters Rail Terminal. <https://wintersrailterminal.com/> However, Brookhaven Rail refers to Parcel D in this Reply for the Board’s convenience and to avoid any confusion.

³ See Petition at 3 (map showing Parcels A, B, C, and D, which was first attached to Brookhaven Rail’s Petition for Exemption in Docket No. FD 36398).

(collectively “NP/Winters”) had acquired the entirety of the 228-acre Parcel D on which BHR/Winters proposed to construct and operate its new SWRTF.”⁴ This is wrong. The letter clearly explained NP/Winters purchased only 178-acres of Parcel D, and the approximately 50 remaining acres of Parcel D were acquired by Winters Brothers Shamrock Rail Realty, LLC (“Shamrock Rail Realty”), which is also not affiliated with NP/Winters (said tract hereinafter referred to as the “Shamrock Rail Realty Tract”). CCE also tries to expand the scope of Brookhaven Rail’s “Project.” Specifically, after initially correctly defining the Project as the proposals in Docket Nos. FD 36398 and 36399 (and eventually 36399 (Sub – No. 1)),⁵ the Petition later tries to expand Brookhaven Rail’s “Project” to include the warehousing and distribution facilities to be developed by NP/Winters.⁶ These and other, similar statements in the Petition are false. Brookhaven Rail is not an affiliate of NP/Winters, and it has no control over the actions or decisions of NP/Winters.

Additionally, as explained in the November 30 Reply and the correspondence attached thereto, Brookhaven Rail has endeavored in good faith to keep OEA and the Board apprised of developments concerning the acquisition, sale and planned development of Parcels B, C, and the 178-acre portion of Parcel D by NP/Winters over the past six months. In furtherance of that effort, Brookhaven Rail reports in this Reply that on December 8, 2021 the Industrial Development Agency (“Brookhaven IDA”) of the Town of Brookhaven, New York (the “Town”) held a public hearing and then a meeting to take comments and rule on, respectively, an IDA Application submitted by NP/Winters, a version of which is attached to the Petition.⁷ By unanimous vote,

⁴ Petition at 8 (emphasis).

⁵ *Id.* at 4.

⁶ *Id.* at 9.

⁷ See, <https://brookhavenida.org/blog/2nd-notice-of-public-hearing-np-winters-long-island-industrial-llc>. This link includes additional links to the full application and other documents.

the five-member Brookhaven IDA approved the application of NP/Winters' for financial assistance for the development of rail-contiguous warehouse and distribution facilities on Parcels B and C, and NP/Winters' 178-acre portion of Parcel D. In terms of the effect of this decision on Brookhaven Rail's proposed projects on Parcel D, under applicable law the Brookhaven IDA will acquire a leasehold interest in the 178 acres and will lease it back to NP/Winters. The intention is that Brookhaven Rail will still lease an approximately 18.5-acre portion of the property needed for the rail corridor from NP/Winters, which will now necessarily be in the form of a sublease.

With the foregoing introduction, Brookhaven Rail replies to the allegations and requests in the Petition, and why it should be summarily denied.

B. There is No Need for the Board to Issue a Second Declaratory Order Regarding the Jurisdictional Status of Railroad Tracks That Might Be Constructed on Parcels B and C of the BRT

On pages 1 and 16 of its Petition CCE asks the Board to "issue an order declaring" a number of things grouped into three paragraphs. In Paragraph (1) CCE first asks the Board to declare that the conceptual plans of NP/Winters to construct railroad tracks on Parcels B and C that Brookhaven Rail submitted to OEA with its July 5, 2021 letter would be lines of railroad requiring licensing authority from the Board pursuant to 49 U.S.C. §10901.⁸ CCE makes the related request, which is dependent on the first request having any validity (which it does not), that the rail construction on Parcels B and C should be considered "as a connected project" to Brookhaven Rail's proposed rail construction project and proposed solid waste rail transfer facility.⁹ CCE's

⁸ *Id.* at 1, paragraph (1).

⁹ *Id.*

requests are meritless for numerous reasons, starting with the fact they are based on the aforementioned erroneous premises that Brookhaven Rail is an affiliated company of NP/Winters and it has any control over the development of Parcels B or C. As discussed above and in the November 30 Reply and attachments thereto, Brookhaven Rail has not proposed to construct any tracks on Parcel B or C, it has no ownership or leasehold rights to either of those Parcels, and it has no plans or commitments to construct any tracks on them. While Brookhaven Rail has certain contractual rights to be the rail operator of tracks that may eventually be constructed on Parcels B and C, the development of rail-served industry on those tracts (or the decision to not develop them) is entirely under the control of NP/Winters.

Tellingly, CCE barely mentions that the Board has already issued a declaratory order concerning the jurisdictional status of rail tracks to be constructed and operated on Parcels B and C in STB Docket No. FD 35819.¹⁰ The *FD 35919 Decision* was issued after over two years of federal court litigation and Board evidentiary proceedings. The litigation, which was started by the Town in response to the Petition for Declaratory Order filed in Docket No. FD 35819,¹¹ culminated in an extensive and detailed So-Ordered Stipulation of Settlement dated March 17, 2016 (“2016 Stipulation”),¹² in which the Town, the then-owners of Parcels B, C, and D, Brookhaven Rail, and other parties set out numerous provisions governing the development of

¹⁰ STB Docket No. FD 35819, *Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order* (Served August 30, 2016)(“*FD 35819 Decision*”).

¹¹ *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 Pratt Brothers, Inc.*, Docket No. 14-cv-02286, U.S. District Court for the Eastern District of New York. The case was originally filed in state court but was removed to the U.S. District Court for the Eastern District of New York. *Decision* at 2.

¹² The 2016 Stipulation was attached as Exhibit C to the Petition for Exemption filed in Docket No. FD 36399 and is attached as Reply Exhibit A for the Board’s convenience and ready reference.

these parcels for rail-served industry. These included conceptual plans for track construction on Parcels B, C, and to some extent Parcel D.¹³ In the *FD 35819 Decision*, after reviewing the information from the parties concerning the 2016 Stipulation and planned rail construction on Parcels B and C,¹⁴ the Board declared that “we find that the intended use and physical characteristics of the Track are typical for those associated with a spur track. We therefore will grant Petitioners’ request for a declaratory order to confirm that the Track constitutes spur track under 49 U.S.C. 10906.”¹⁵ The Board also stated that because other issues in the Petitioners request were moot “this proceeding will be closed.”¹⁶

As Brookhaven Rail summarized in its Petitions for Exemption filed in Docket Nos. FD 36398 and 36399, the 2016 Stipulation and the *FD 35918 Decision* were followed by the preparation of a Voluntary Draft Environmental Impact Statement (the “2017 VDEIS”) and then a Negative Declaration and Notice of Determination of Significance Finding (“Negative Declaration”) in September 2017, both of which contained extensive provisions regarding the construction and operation of railroad spur tracks and rail-served industries on Parcels B and C.¹⁷

CCE, by omitting the foregoing highly relevant information of which it is obviously well aware, tries to gloss over the fact that for the Board to grant the relief CCE now seeks in Paragraph

¹³ See Exhibits A and B to Reply Exhibit A.

¹⁴ In conjunction with the 2016 Stipulation, the Town submitted a letter in Docket No. FD 35819 on April 14, 2016 that withdrew its opposition to the Petition for Declaratory order and informed the Board that the Town did not object to the tracks proposed to be constructed on Parcels B and C being classified as §10906 tracks.

¹⁵ The *FD 35819 Decision* was expressly limited to a determination of the jurisdictional status of tracks on Parcels B and C.

¹⁶ *FD 35819 Decision* at 4.

¹⁷ Petition for Exemption in Docket No. FD 36398 at 10, 14-16; Petition for Exemption in Docket No. FD 36399 at 10-12. The Negative Declaration was Exhibit D to the Petition for Exemption in FD 36399 and is also attached as Reply Exhibit B. The 2017 VDEIS was furnished to OEA in June 2020.

(1) of its Petition, CCE must demonstrate that sufficient evidence exists to warrant reopening the *FD 35819 Decision* and changing the Board’s conclusion that the tracks to be constructed on Parcels B and C are to be classified spur tracks falling under 49 U.S.C. §10906. Yet, to the extent the Petition can generously be construed as even trying to meet the Board’s well-established standards for reopening past proceedings, it falls far short for this or any other of the strident claims CCE makes that the Board should reopen and reconsider past decisions. Those standards were recently restated by the Board in Docket No. FD 35068, *Soo Line Railroad Co. d/b/a Canadian Pacific Railway – Acquisition and Operation Exemption – BNSF Railway Company* (Served December 29, 2020)(“*Soo Line Railroad*”), and establish that

under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may only reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected for reopening to be granted. In addition, an exemption may be revoked, in whole or in part, if the Board finds that regulation of the transaction is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. When, as in this proceeding, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and will be granted only if the petition presents new evidence, substantially changed circumstances, or material error in the decision being challenged.¹⁸

CCE gives lip service to these standards, but the Petition makes no real attempt to meet them. Rather, the Petition is replete with only vague assertions about alleged “incomplete, misleading or no longer operative facts,”¹⁹ or “different and substantial new facts,” and similar statements. CCE never alleges what those specific facts actually are, let alone whether they constitute “new evidence” of sufficient import to warrant the extraordinary relief CCE has asked for in Paragraph (1) and elsewhere in its Petition. Nor does CCE try to explain with any specificity

¹⁸ *Soo Line Railroad* at 4.

¹⁹ Petition at 15.

how the Board may have committed “material error” or if there are “substantially changed circumstances.”

Moreover, to the very limited extent CCE even acknowledges the *FD 35819 Decision*, it grossly mischaracterizes it, stating broadly, without any citation or evidence, that the Board issued it “based on BHR’s representations that BHR was constructing a spur to its existing common carrier track, and that the operations were in furtherance of the terminal’s existing operations.”²⁰ This statement is flatly contradicted by the *FD 35819 Decision*’s plain language. First, the Board ruled that “[u]nder the circumstances here, we find that the Track is excepted track under §10906. Petitioners state that the intended use of the Track is to load, reload, store and switch ‘rail cars incidental to the receipt and delivery of shipments for existing *and similarly situated customers in the same regional market not served by BRT’s existing terminal facilities.*’”²¹ The Board’s ruling was not, therefore, limited to only Parcel A’s existing terminal operations. Second, the *FD 35918 Decision* was plainly not based on Brookhaven Rail’s “representations that BHR was constructing a spur.” On the contrary, Brookhaven Rail did not represent in that proceeding that it alone would construct the tracks at issue, and the *FD 35819 Decision* reflects that the Board recognized this would not be the case.²²

The Board also stated that “the physical characteristics of the Track are those of excepted track. Brookhaven Rail currently cannot ‘provide short or long-haul common carrier services’

²⁰ *Id.*

²¹ *FD 35819 Decision* at 4 (emphasis added).

²² *See Id.* at 1 (stating that the entity Brookhaven Rail Terminal (which the Board deemed “BRT”) and Brookhaven Rail sought a declaratory order “finding that 12,500 feet of rail track (the Track) that *BRT* proposes to construct and operate over in Yaphank, Suffolk County, N.Y. is excepted from the Board’s licensing requirements under 49 U.S.C. 10906.” (emphasis supplied). That Brookhaven Rail would not solely construct the track is also reflected in the use of the word “Petitioners” rather than “Brookhaven Rail” throughout the decision.

over the track connecting to Parcel A The Track is approximately 12,500 feet in length (less than 2.5 miles) and consists of a stub-ended loop ‘with transloading and terminal facilities located along the stub-end of the track.’ Brookhaven Rail has no regularly scheduled-service: the service on the Track will consist of ‘as-needed’ transloading and terminal services.’”²³ As Brookhaven Rail has stated previously to OEA, and which NP/Winters confirmed in its application to the Brookhaven IDA, NP/Winters is developing Parcels B and C to be rail-served warehousing and distribution facilities.²⁴ Such facilities necessarily entail rail transloading and terminal facilities.

It is further Brookhaven Rail’s understanding that NP/Winters is working in close coordination with the Town to ensure that the railroad tracks and the warehouse and distribution facilities are consistent with the *FD 35819 Decision*, the 2016 Stipulation, the 2017 VDEIS , and the Negative Declaration. Indeed, it is particularly significant that the Town, which was a Party of Record in Docket No. 35819 and is a Party of Record in Docket Nos. FD 36398 and 36399, has not provided any indication that it agrees with or supports CCE’s efforts to reclassify the tracks NP/Winters has conceptually proposed to construct. On the contrary, every indication – the most recent being the December 8, 2021 approval of NP/Winters’ application by the Brookhaven IDA - is that the Town is satisfied that the plans of NP/Winters to develop Parcels B and C are comporting with the 2016 Stipulation, the 2017 VDEIS, the Negative Declaration, and the *FD 35819 Decision* in all respects.

In short, CCE has not presented any evidence that any of the efforts being undertaken by NP/Winters or the Town on Parcels B and C are inconsistent with the Board’s declaration in the *FD 35819 Decision* that railroad tracks to be constructed on Parcels B and C constitute spur tracks

²³ *Id.* (citations omitted).

²⁴ See Attachment A to Petition at PDF pages 34, 36; *Id.* at PDF page 59 (Letter attached to application referencing “rail contiguous warehouse and distribution facilities”).

under 49 U.S.C. §10906. Instead, CCE weakly tries to manufacture a so-called “real, present dispute”²⁵ entirely from CCE’s unsupported speculation that it is NP/Winters’ intention to construct “new common carrier track . . . to serve brand new shippers” on Parcels B and C.²⁶

Finally, contrary to still more misstatements from CCE, OEA did not in any way “instruct[] the parties” or issue “specific instructions that the parties seek a rail line regulatory status determination from the Board”²⁷ in OEA’s September 17, 2021 letter to counsel for CCE.²⁸ This gross mischaracterization is revealed by CCE’s own Petition, which reproduces the relevant passage from the OEA’s letter. First, OEA made no reference to “the parties.”²⁹ After introducing this term that OEA did not use, CCE offers no clue as to who “the parties” might be that OEA allegedly specifically instructed. For instance, does CCE maintain that OEA specifically instructed the Town to also seek this determination? OEA’s letter did not instruct any party to do anything. Rather, OEA merely summarized for CCE counsel a legal principle that should have been well known to it: that OEA may only conduct environmental reviews of projects for which a rail carrier has sought or will seek authority from the Board; that no carrier had sought such authority for the conceptual design of tracks on Parcels B and C; and so if “*a party* believes such authority is required for the proposed NP/Winters project, it *may* seek a determination from the Board”³⁰ CCE’s baseless request for a “declaration and determination” as to the status of

²⁵ Petition at 11.

²⁶ *Id.* at 15.

²⁷ *Id.* at 12.

²⁸ CCE’s allegations about Parcels B and C were only a small aspect of OEA’s letter, which primarily rejected CCE’s baseless attempt to protest the approval of Henningson, Durham and Richardson Architecture & Engineering (“HDR”) as the third-party consultant retained to assist OEA in performing its duties pursuant to the National Environmental Policy Act and the Board’s regulations.

²⁹ Petition at 10.

³⁰ *Id.* (emphasis supplied).

tracks NP/Winters may decide to construct on Parcels B and C is therefore not based on any direction from OEA; it is merely an attempt by CCE to use this passage in OEA's letter as a pretext to advance CCE's efforts to try to thwart Brookhaven Rail's attempts to lawfully and appropriately seek authority from the STB to construct and operate lines of railroad on a portion of Parcel D, and to construct and operate a solid waste rail transfer facility on the Shamrock Rail Realty Tract.

In summary, CCE has provided no evidence whatsoever to justify the Board reopening and modifying any aspect of its *FD 35819 Decision*. On the contrary, all the available facts demonstrate that the tracks NP/Winters conceptually has proposed to be constructed on Parcels B and C and their usage are entirely consistent with the representations and expectations of all of the parties in that proceeding and the accompanying litigation, and the factual determinations made by the Board to reach its legal conclusions in the Decision. Moreover, because Brookhaven Rail has not proposed to construct any tracks on Parcel B or C, there is no basis for concluding that construction is "connected" to Brookhaven Rail's proposed lines of railroad to be constructed on Parcel D.

C. There Are No Grounds for Directing Brookhaven Rail or its Affiliated Companies to Cease and Desist Any Activities Because They are Not Doing any of the Activities CCE Alleges

CCE next asks the Board to take the extraordinarily broad step of declaring that "any initiatives by interested parties to construct, acquire, operate, or use such lines, or any new lines on any of the four Parcels denominated Parcels A, B, C, or D (collectively, "Parcels), absent agency approval . . . should cease and desist and are subject to further proceedings and investigation, and are subject to further proceedings and investigation, including continuing civil

penalties for each day the violations continue under 49 U.S.C. §11901.”³¹ This request is absurd and overreaching on many levels. It is also totally unwarranted and unnecessary. First, Brookhaven Rail has demonstrated above that CCE’s vague request that the Board reconsider its findings and legal conclusions in Docket No. FD 35819 has no basis in fact or law, and so it follows that there is no basis for NP/Winters and the Town to cease their efforts to develop those parcels.

Second, read literally, Paragraph (2) would require the Board to direct Brookhaven Rail to “cease and desist” “operat[ing]” the “lines” it currently uses on Parcel A to provide common carrier rail services to its customers.³² Why the Board should do so, CCE does not say, and it even states it is not asking the Board to take this precipitous and totally unnecessary action,³³ which has no basis in fact or law in any event. The lines of railroad and common carrier operations by Brookhaven Rail on Parcel A have been established since 2010. There are no proposals to construct new lines of rail on that Parcel by Brookhaven Rail or any of its affiliates,³⁴ and so there are no plans to clear any land for that purpose. CCE’s “cease and desist” request as to Parcel A is therefore baseless and overreaching.

Third, there is no need for the Board to declare that Brookhaven Rail should “cease and desist” any activities on Parcel D. Brookhaven Rail is indisputably not conducting any “initiatives” related to (1) its Petition for Exemption in FD 36398 because it is pending before the Board, (2) Brookhaven Rail has not yet even filed an Application for a Land-Use Exemption

³¹ Petition at 1, Paragraph (2).

³² *Id.* at 1.

³³ *Id.* at Footnote 1.

³⁴ Brookhaven Rail notes that the conceptual plans for spur tracks on Parcels B and C have always contemplated a connection to the existing tracks on Parcel A to provide the means for the warehouse and distribution facilities to reach the mainline of the Long Island Railroad, which is operated by the New York & Atlantic Railway.

Permit in Docket No. FD 36399 (Sub – No. 1) to pursue the construction and operation of a solid waste rail transfer facility on the Shamrock Rail Realty Tract, and (3) the environmental impacts of both projects are being reviewed by OEA (although its review was suspended on October 20, 2021 by decision of the Acting Director of OEA).

Fourth, the main target of CCE’s ire in Paragraph (2) as to Parcel D seems to be the recent announcement of NP/Winters that it desires to begin clearing the trees on portions of Parcel D in anticipation of beginning construction of its warehouse and distribution facilities. Such tree clearing would occur on portions of the 178-acre tract purchased by NP/Winters and area for an access road on the Shamrock Rail Realty Tract. As explained in the November 30 Reply, Brookhaven Rail has endeavored in good faith to keep OEA apprised of these developments because they may affect OEA’s work, although to date OEA has not responded to or otherwise provided any reaction to the information Brookhaven Rail has provided it.

In its Petition, CCE, without a shred of supporting evidence, unequivocally states that these clearing activities proposed by NP/Winters should be halted by the Board because “such activities would benefit and be in support of BHR’s proposed rail line construction project on Parcel D,”³⁵ and CCE breathlessly adds for good measure – again without a shred of evidentiary support – that Brookhaven Rail has “candidly admit[ted] that major components of construction [of its rail line] including massive tree and forest clearcutting *are being made without STB authorization*, and far in advance of the Board’s substantive project and environmental review as required under 49 U.S.C. 10901 and 10909.”³⁶ CCE’s allegations are wrong, and simply ignore previous

³⁵ Petition at 11.

³⁶ *Id.* (emphasis in original).

correspondence and record evidence. To reiterate, and to further respond, Brookhaven Rail states as follows:

1. The NP/Winters Tract of Parcel D

Brookhaven Rail remains only the intended lessee (now sublessee) of approximately 18.5 acres of the 178-acre tract of Parcel D acquired by NP/Winters. Upon learning of NP/Winters' plans to seek authority from the Town to clear the trees from certain portions of this tract to facilitate NP/Winters' development and construction of rail-served warehousing facilities, Brookhaven Rail not only informed OEA, it and representatives of its affiliate Winters Brothers Waste Systems of Long Island, LLC (Winters Bros.) engaged in discussions with NorthPoint Development Corporation and NP/Winters to ensure that NP/Winters' clearing application to the Town took into account the pending construction application and related environmental review by OEA in Docket No. FD 36398. This included endeavoring to establish a mutual understanding of the distinction between activities which the Board permits to be undertaken because they are considered typical "landowner" activities outside its jurisdiction, and activities that might determined to be part of commencing rail construction prior to Board authorization, such as grading or clearing,³⁷ and therefore subject to Board intervention. Brookhaven Rail and Winters

³⁷ Docket No. FD 35036, *Suffolk & Southern Rail Road – Lease and Operation Exemption – Sills Road Realty, LLC* (Served August 27, 2008). In that decision, which involved the construction of rail on Parcel A of the BRT, the Board determined that certain "activities any landowner could perform, consistent with applicable state law," could be undertaken on Parcel A without Board approval or oversight, namely (1) installation of electric utilities; (2) installation of surveillance cameras, security equipment, and communications equipment; (3) installation of lighting; (4) installation of new, and maintenance of existing, fencing; and (5) using the site for temporary structures such as trailers. The Board further that whether "grading and removal of uneven mounds and pits" were subject to its oversight and jurisdiction would depend on the purpose of the grading, and that grading in preparation of rail construction activities would be. See decision at 4.

Bros. also insisted on the insertion of language into the clearing applications that specifically referenced the pending rail construction petition and ongoing OEA NEPA review. Brookhaven Rail and Winters Bros even asked the construction design engineer for the rail construction project - Cameron Engineering & Associates - to create a map delineating the rail corridor on Parcel D that should be excluded from any tree clearing or any activities that might be construed as commencing rail construction.³⁸ Brookhaven Rail supplied this map to NP/Winters and believes that it was included in the final application submitted to the Town. In short, Brookhaven Rail has acted in good faith to try to ensure that no activities – particularly tree clearing activities – are undertaken by NP/Winters or parties under its control that could be construed as beginning rail track construction prior to Board authorization.

2. The Shamrock Rail Realty Tract

Unlike the 178-acre portion of Parcel D, the Shamrock Rail Realty Tract on which Brookhaven Rail's proposed solid waste rail transfer facility would be constructed is owned by an affiliated company of Brookhaven Rail. As Brookhaven Rail explained to OEA, the clearing applications by NP/Winters included a 150-foot wide section on the eastern side of the approximately 50-acre tract running due north of Horseblock Road.³⁹ NP/Winters intends to apply for permission from the Town to clear this section in order to construct an access road to the southernmost warehouse and distribution facility. As Brookhaven Rail further explained to OEA, even though Brookhaven Rail has not yet filed its Application for Land-Use Exemption Permit and remains the intended lessee of the Shamrock Rail Realty Tract, Brookhaven Rail and

³⁸ See correspondence and map attached as Reply Exhibit C.

³⁹ The clearing for the road is shown on Reply Exhibit D, which is excerpted from the NP/Winter clearing application for the Shamrock Rail Realty Tract.

Shamrock Rail Realty engaged in discussions with NP/Winters about the need to be aware of the impending application and OEA's ongoing NEPA review of Brookhaven Rail's projects. This being said, Brookhaven Rail provides the following additional information demonstrating that the clearing on the Shamrock Rail Realty Tract is not part of Brookhaven Rail's proposed projects:

As an obvious first point, the access road in question is nowhere near the proposed rail lines covered by Docket No. FD 36398. Thus, clearing for a road right-of-way at the designated location cannot physically be "a major component[] of construction for a project in FD 36398."⁴⁰ Second, to the extent clearing trees to construct the access road might potentially be construed to be related to the proposed solid waste rail transfer facility to be located the Shamrock Rail Realty Tract (something CCE only barely hints at⁴¹ and again offers zero evidence in support of), Brookhaven Rail submits that Shamrock Rail Realty, LLC is contractually obligated to NP/Winters to provide road access to the warehouse facilities over the Shamrock Rail Realty Tract. Brookhaven Rail further submits that the access road must be provided regardless of whether the solid waste rail transfer facility is ever constructed. Finally, Brookhaven Rail adds that the construction of an access road extending from Horseblock Road to rail-served facilities on Parcel D was a key aspect of the agreement by the County of Suffolk to sell Parcel D to Oakland Transportation Holdings, LLC (which assigned the tract to New York Site Operations, LLC), and Section 4.2 of that agreement requires the access road to ultimately be available for public use offered for dedication to the Town of Brookhaven.⁴²

⁴⁰ Petition at 11.

⁴¹ *Id.*

⁴² Reply Exhibit E.

In summary, there is absolutely no basis for the Board to take any of the actions in Paragraph (2) of CCE's Petition.

D. There is no Reason for the Board to Revisit Any Other Past Decisions or Stay Further Action on Brookhaven Rail's Proposals

CCE's final request, in Paragraph (3) of its broad requests on Page 1 of the Petition is (a) for the Board to issue an order declaring that unspecified "earlier decisions" in the dockets the Petition was filed in "were based on misrepresentations by the rail carrier and/or made in error, and must be reopened, revoked and rescinded"⁴³ and (b) that further Board actions in Dockets No. FD 36398 and 36399 (Sub – No. 1) "should be stayed or held in abeyance until the matters raised in this Petition are fully and finally resolved." CCE does not specify in Paragraph (3) which "earlier decisions" were based on "misrepresentations" and who made them, "and/or" which were based on "error" (which falls short of the requirement that a party demonstrate there is *material error* and meet the other applicable standards before a decision can be reopened). CCE also doesn't specify which "earlier decisions" should be "revoked," which should be "reopened," or which should be "rescinded."

To the extent Paragraph (3) refers to the *FD 35819 Decision*, Brookhaven Rail has already explained in detail why there is no reason for the Board to reopen that proceeding and consider issuing a second declaratory order.

There are also no grounds for reopening any decisions in Docket No. FD 35141. CCE's new tack of trying to tag Brookhaven Rail and current owners of its membership shares with knowledge of and responsibility for the actions of the owners of Parcel A taken over a decade ago

⁴³ Petition at 1.

smacks of desperation and is also patently unfair. As CCE well knows, the current owners of Brookhaven Rail's membership shares had nothing to do with the actions of the prior owner of Parcel A that were the subject of proceedings and decisions issued in Docket No. FD 35141. The prior owner and Brookhaven Rail were also represented by different counsel in their actions before the Board in that docket. Moreover, the filings in Docket Nos. FD 36376, 36384 and 36385 demonstrate very clearly that in late 2019 and early 2020 Brookhaven Rail aggressively defended the rights its predecessor U.S. Rail Corporation ("U.S. Rail") was granted by the Board in Docket No. FD 35141 to provide common carrier service on the tracks constructed on Parcel A independent of the owner of Parcel A and its affiliated companies.⁴⁴ These efforts to protect its rights coincided with Oakland Transportation Holdings, LLC seeking to sell its ownership interests in Brookhaven Rail and the contemporaneous interest of Winters Bros. in developing Parcel D for rail-served industry independently from the activities being conducted on Parcel A.⁴⁵ In any event, CCE yet again misstates critical facts by wrongly asserting that "facts known to date show" U.S. Rail had "no intention of engaging in construction activities"⁴⁶ on Parcel A in 2010. On the contrary, the *June 16, 2020 Decision* specifically noted that Brookhaven Rail "disagree[d] with Sills Road's assertion that U S Rail had no role in overseeing or managing the construction of the Line and its assertion that Sills Road alone constructed all of the track."⁴⁷ As with its other vague allegations that "earlier decisions" should be reopened, CCE falls well short of demonstrating that there is any new evidence, substantially changed circumstances, or material error justifying reopening

⁴⁴ See, e.g., Reply of Brookhaven Rail, LLC filed March 3, 2020, in Docket Nos. FD 36384 and 36385.

⁴⁵ *Id.* at 7.

⁴⁶ Petition at 13.

⁴⁷ *June 16, 2020 Decision* at 3; quoting Reply of Brookhaven Rail, LLC *supra*, note 45, at 4.

and revoking the exemption granted to U.S. Rail in Docket No. 35141. CCE also makes no claim that reopening that decision is warranted because regulation of the transaction more than 10 years after the fact is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101.⁴⁸

Finally, Brookhaven Rail reiterates that there were no grants of any authority or other substantive Board action taken in Docket Nos. FD 36376, 36384, and 36385 that could be reopened, revoked, or rescinded. CCE's broad assertion that Brookhaven Rail should be required to answer the questions posed to Sills Road and Spectrum by the Director of the Office of Proceedings in the *June 16, 2020 Decision* is flawed and misplaced,⁴⁹ as Brookhaven Rail had nothing to do with the authority being sought by those two entities. Further, CCE's complaint about to whom the Director's questions were directed is essentially an extremely untimely and therefor improper appeal⁵⁰ of that decision from a party who would have lacked standing to appeal it in the first place since CCE was not a party of record in any of those proceedings.

CCE's broad claim that "earlier decisions" should be reopened is groundless, and so consequently there is no basis for the Board to stay or hold in abeyance the Board's consideration of Brookhaven Rail's rail construction project proposed in Docket No. FD 36398 or its Application for Land Use-Exemption Permit once it is filed in Docket No FD 36399 (Sub – No. 1).

E. CCE's Other Allegations and Requests Have No Merit

For all the foregoing reasons all three of CCE's broad requests for declaratory orders, cease and desist orders, and other relief are utterly without merit. They are each based on combinations

⁴⁸ *Soo Line Railroad* at 4.

⁴⁹ Petition at 16.

⁵⁰ See 49 C.F.R. §1011.2(a)(7), which requires all appeals of Decisions of the Director of the Office of Proceedings to be filed within 10 days of the date of the decision.

of flawed premises, misstatements of fact and gross mischaracterizations of Board decisions and parties' filings which have tested, if not crossed in some cases, the boundaries of being candid or fair.⁵¹ They also seek to wrongly attribute to Winters Bros., Shamrock Rail, and Brookhaven Rail the actions and motivations of third parties that took place long before any Winters Bros. entity acquired any interest in Parcel D or the membership interests of Brookhaven Rail. Because its three broad requests for declaratory relief must be rejected, all of the other requests and demands CCE makes in support of its allegations are also without merit and also must be rejected. Especially absurd are CCE's requests that Brookhaven Rail be directed to "provide" broad categories of documents and agreements between it and its affiliates, and CCE's suggestion that there are sufficient grounds contained in its bare-bones Petition for the Board to expend the considerable resources that would be required to launch the first-ever investigation pursuant to 49 U.S.C. §11701 against Brookhaven Rail, a Class III carrier that currently operates on less than five miles of track subject to the Board's jurisdiction.

F. Conclusion

For all the reasons set forth hereinabove, CCE has provided no valid grounds for the Board to exercise its discretionary authority under 5 U.S.C. §554 (e) and 49 U.S.C. §1321 to terminate a controversy or remove uncertainty. Nor is there any basis for granting any of the other relief

⁵¹ See 49 C.F.R. §1103.27(b).

requested in the Petition. The Petition should be denied in all respects.

Respectfully submitted,



Law Office of Thomas W. Wilcox, LLC
1629 K. Street NW
Suite 300
Washington D.C. 20006
(202) 508-1065
tom@twilcoxlaw.com

Attorney for Brookhaven Rail LLC

December 13, 2021

REPLY EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
TOWN OF BROOKHAVEN,

Plaintiff,

-against-

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

Defendants.
-----X

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

**SO-ORDERED STIPULATION
OF SETTLEMENT**

RECITALS:

WHEREAS:

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

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

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

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

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

E. As a result and thereafter, the Town:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Miscellaneous Matters

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

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

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

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

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

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

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

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

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

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

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

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

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

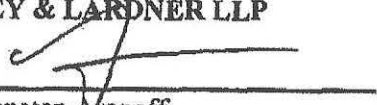
30. Each counsel executing this Stipulation represents his, her or its authority to bind such counsel's clients, as the Parties to this action, to the terms, provisions, conditions and obligations of this Stipulation to the same extent as though individually executed by each of them.

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

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

Date: March 17, 2016

FOLEY & LARDNER LLP

By: 

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

EXHIBIT A

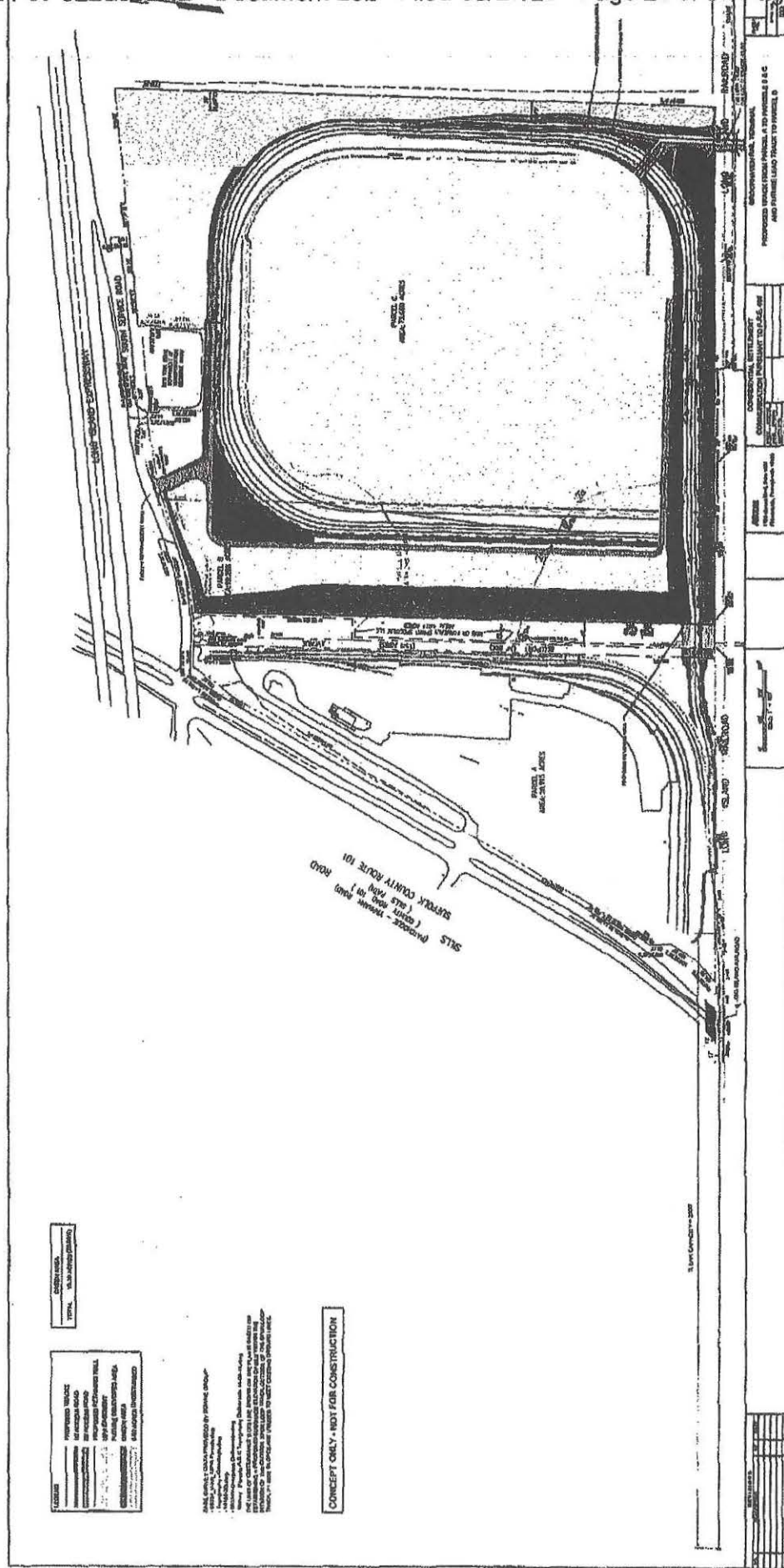


EXHIBIT B

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
TOWN OF BROOKHAVEN,

Plaintiff,

-against-

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

Defendants.
-----X

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

Case No. 14-CV-02286 (GRB)

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

Date: March ____, 2016

FOLEY & LARDNER LLP

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

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

Date: March __, 2016

FARRELL FRITZ, P.C.

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

Counsel for Sills Expressway Associates

Date: March __, 2016

ROSENBERG CALICA & BIRNEY LLP

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

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

EXHIBIT D

March 17, 2016

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

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

Dear Ms. Brown:

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

Please contact us if you have any questions.

Respectfully submitted,
ROSENBERG CALICA & BIRNEY LLP
By:

Robert M. Calica
Judah Serfaty

BOSTON
BRUSSELS
CHICAGO
DETROIT

JACKSONVILLE
LOS ANGELES
MADISON
MIAMI

MILWAUKEE
NEW YORK
ORLANDO
SACRAMENTO

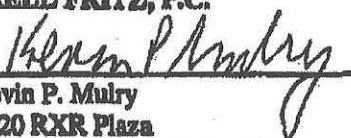
SAN DIEGO
SAN FRANCISCO
SHANGHAI
SILICON VALLEY

TALLAHASSEE
TAMPA
TOKYO
WASHINGTON, D.C.

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

Date: March 17, 2016

FARRELL FRITZ, P.C.

By: 

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

Counsel for Sills Expressway Associates

Date: March , 2016

ROSENBERG CALICA & BURNEY LLP

By: 

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

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

Date: March 17, 2016

ANNETTE EADERESTO, ESQ.

Brookhaven Town Attorney

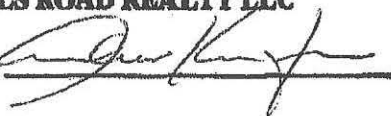
Date: March 18, 2016

TOWN OF BROOKHAVEN

By: _____

Date: March 18, 2016

SILLS ROAD REALTY LLC

By: 

REPLY EXHIBIT B

Resolution Submission Form

MEETING OF: SEPTEMBER 14, 2017

RESOLUTION NO. 2017-0709

MOVED BY COUNCILMEMBER: MICHAEL LOGUERCIO JR.

REVISION SEPTEMBER 12, 2017 4:37 PM

SHORT TITLE: ADOPTION OF THE SEQRA NEGATIVE DECLARATION IN
CONNECTION WITH THE PROPOSED BROOKHAVEN RAIL
TERMINAL (BRT) EXPANSION

DEPARTMENT: PLANNING

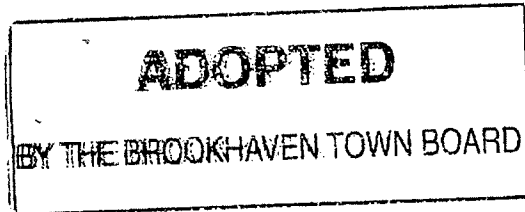
REASON: Resolution of adoption of the SEQRA Negative Declaration for the Proposed
Brookhaven Rail Terminal Expansion at Yaphank pursuant to the March 2016 So-Ordered Stipulation of Settlement

Financial Impact:
No Fiscal Impact to the Town

SEQRA REQUIRED: YES

PERMISSIVE REFERENDUM: NO

Present	Absent		Motion	Aye	No	Abstain	Not Voting
		Councilmember Cartright					
		Councilmember Bonner					
		Councilmember LaValle					
		Councilmember Loguercio	1				
		Councilmember Foley	2				
	✓	Councilmember Panico					
		Supervisor Romaine					



RESOLUTION NO. 2017-0709
MEETING: SEPTEMBER 14, 2017

ADOPTION OF THE SEQRA NEGATIVE
DECLARATION IN CONNECTION
WITH THE PROPOSED BROOKHAVEN
RAIL TERMINAL (BRT) EXPANSION

WHEREAS, the Town of Brookhaven, pursuant to the State Environmental Quality Review Act (SEQRA) is the Lead Agency for the proposed Action; and

WHEREAS, pursuant to a So-Ordered Stipulation of Settlement dated March 17, 2016, between the Town of Brookhaven and Sills Road Realty, LLC., et al., a Voluntary Draft Environmental Impact Statement (VDEIS) has been prepared and submitted in connection with the proposed Brookhaven Rail Terminal (BRT) Expansion; and

WHEREAS, pursuant to 6 NYCRR §617.6(a)(4), the Lead Agency may waive the requirement for an Environmental Assessment Form (EAF) if a draft EIS is prepared. The draft EIS may be treated as an EAF for the purpose of determining significance; and

WHEREAS, the Division of Environmental Protection has reviewed the VDEIS and has submitted recommendations to the Town Board for its consideration and review;

NOW, THEREFORE, BE IT RESOLVED, by the Town Board of the Town of Brookhaven that based upon the Town Board's examination of the Voluntary Draft Environmental Impact Statement (VDEIS) and recommendations, and the appropriate criteria for determination of significance, the proposed action is a Type I which will not have a "significant impact" on the environment; and be it further

RESOLVED that this resolution constitutes a "negative declaration" pursuant to SEQRA and that this Board's Findings and Notice of this determination (as set forth in the notice of determination attached hereto) shall be filed to the extent required by the State Environmental Quality Review Act or as deemed necessary by this Town Board.

**SEQR
NEGATIVE DECLARATION
NOTICE OF DETERMINATION OF SIGNIFICANCE**

Lead Agency: The Town Board of the Town of Brookhaven
One Independence Hill
Farmingville, NY 11738

Title of Action: Proposed Brookhaven Rail Terminal (BRT) Expansion

Applicant: Brookhaven Rail LLC f/k/a U.S. Rail New York LLC
Brookhaven Terminal Operations
205 Sills Road
Yaphank, New York 11980

SEQRA Status: Type I

Project: Administrative SEQRA/Plan Review
in accordance with the March 17,
2016 Stipulation of Settlement

Location: 350± acres situated at 205 Sills Road, on the east side of Sills Road and south side of the Long Island Expressway South Service Road, Yaphank, Town of Brookhaven, Suffolk County, New York

SCTM #: Numerous tax parcels on the Suffolk County Tax Map Section 663, 664, 704, 705, 741, 778, 815, and 845, and is bounded on the north by the LIE South Service Road and on the south by Horseblock Road

This notice is issued pursuant to Part 617 of the implementing regulations pertaining to Article 8 (State Environmental Quality Review) of the Environmental Conservation Law.

The Lead Agency has determined that the proposed action described above will not have a significant effect on the environment.

This determination has been made in consideration of the criteria for determining environmental significance outlined in SEQR Part 617.7 using the information available and comparing it with thresholds set forth in section 617.4 and 617.5.

Description of Action:

The overall subject property is approximately 350 acres, of which, approximately 29 acres, identified as Parcel A, are currently developed and utilized. The proposed action involves the expansion of the existing Brookhaven Rail Terminal (BRT) facility onto approximately 321 acres of currently undeveloped property immediately east and southeast of the existing operations, known as Parcels B, C, and D.

Within the approximate 240-acre potential development area, BRT is proposing to extend the existing spur track system from Parcel A with approximately 25,000 additional track feet, generally parallel to the LIRR tracks, across the southern portion of Parcels B and C, and then creating a generally circular track in a counterclockwise direction. To accomplish this counterclockwise track configuration, BRT would have to acquire approximately 2.39 acres in the southern portion of Parcel C currently owned by LIPA. If for some reason, BRT and LIPA

cannot come to an agreement on the sale of the LIPA parcels to BRT, BRT will implement an alternative track layout in a clockwise configuration.

The Proposed Action 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 onto 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 1; 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.

Pursuant to the 2016 Stipulation of Settlement,

“The [SEQRA] review and approval process for the Railway Expansion shall proceed before the Town Board on an expedited basis under an established and agreed upon process and procedure complying with the Administrative SEQRA/Plan Review process and Applicable Town Code Provision application to resolution of litigated environmental matters, and without public hearings.”

The existing operation is currently subject to a Stipulation of Settlement with the New York State Department of Environmental Conservation (NYSDEC), dated June 26, 2013. The SEQRA compliance for the proposed action has been conducted as an Administrative SEQRA/Plan Review in accordance with the March 17, 2016 Stipulation of Settlement with the Town of Brookhaven.

Reasons Supporting Determination:

Pursuant to a March 17, 2016 Stipulation of Settlement with the Town of Brookhaven, a Voluntary Draft Environmental Impact Statement (VDEIS) has been prepared for the above-mentioned action and submitted to the Town for review on December 19, 2016. In accordance with the with the State Environmental Quality Review Act (SEQRA) and its implementing regulations at 6 New York Codes, Rules and Regulations (NYCRR) Part 617, the VDEIS was prepared in accordance with 6 NYCRR §617.6(a)(4), which states, “[a]n agency may waive the requirement for an EAF [Environmental Assessment Form] if a draft EIS is prepared or submitted. The draft EIS may be treated as an EAF for the purpose of determining significance.”

The action was considered a Type I action and coordinated to interested and involved agencies on January 9, 2017 to satisfy the SEQRA requirements for the establishment of Lead Agency.

Comments were received from the NYSDEC, Suffolk County Department of Public Works, PSEG Long Island, and the Town and a meeting was held at the NYSDEC on June 19, 2017 that resulted in additional mitigation measures and subsequent changes to the plan and therefore the VDEIS/EAF. The revised VDEIS/EAF was resubmitted on August 31, 2017.

Potential significant adverse impacts associated with implementation of the proposed action have been evaluated and mitigation measures have been provided for impacts identified as significant and adverse and alternatives to the proposed action have been evaluated. Two alternatives to the Proposed Action were examined, as follows:

- SEQRA-Mandated No-Action Alternative (the Subject Property would remain as it currently exists)
- Alternative Track and Site Design

Since variations between the Proposed Action and the Alternative Track and Site Design would be minimal, many of the associated impacts would be similar, as all other aspects of this alternative would be the same as those associated with implementation of the proposed action (i.e., ecological resources; water resources; land use and zoning; transportation; socioeconomics; noise and vibration; air quality; and aesthetics, community character, and cultural resources).

To minimize potential adverse impacts to land use and zoning, any non-rail support structures/uses would be required to comply with Town land use and zoning regulations.

The following ecological resource mitigation measures are proposed as part of the proposed action and would support minimization and/or avoidance of adverse impacts to ensure the proposed action would not have a significant adverse impact on ecological resources:

- 62 acres of the facility expansion area would be established as an Undisturbed/Conservation Easement on Parcel D and would remain permanently undeveloped as open space/green space in perpetuity. The Undisturbed/Conservation Easement will consist of two parcels, identified as Conservation Parcel A (43.9 acres) and Conservation Parcel B (18.1 acres) to be bisected by the proposed railway, resulting in a non-contiguous conservation easement. The conservation easement comprises two Pitch Pine-Oak Forest habitat blocks, separated by the proposed Parcel D spur track, that would be contiguous with adjoining Pitch Pine Oak Forest communities to the east and west of Parcel D. The 62 acres of coniferous and mixed-deciduous forest to be preserved represent habitat for the existing wildlife fauna that currently occurs within these on-site communities.
- Preservation of Pitch Pine Oak Forest would occur as part of the establishment of 19.39± acres of green areas at portions of Parcels B and C, including preservation of existing forest along the eastern portion of Parcel C. The green areas would occur primarily in areas adjacent to the spur track extension, along the eastern boundary of Parcel C, and along the southern boundary of Parcels B and C.
- The two proposed drainage reserve areas at Parcels B and C and the two recharge basins proposed for Parcel D would be planted with and/or be colonized by herbaceous plants and shrubs representative of the ECNYS Successional Old Field community, providing additional vegetated habitat at the Subject Property.

- To avoid or minimize potential impacts to the eastern box turtle, the following mitigation measures would be employed prior to clearing, excavation, and development activities on the Subject Property:
 - Conducting wildlife sweeps by trained personnel prior to clearing activities, to identify the most likely habitat areas. If any observed eastern box turtles are found within the targeted areas would be relocated to safe areas.
 - Erosion control barriers containing plastic or wire mesh have been documented as ensnaring turtles and other reptiles. Thus, non-mesh silt fencing would be used to minimize the potential for turtle mortality.
 - Removing of erosion control barriers as soon as work is complete or once stabilization has occurred on the Subject Property, so as not to impede turtle movement.
- To avoid potential adverse impacts to northern-long eared bat, no clearing or excavation activities would be conducted on Parcel D during the summer roosting period. Clearing and/or excavation on Parcel D would take place between November 1 and March 31.
- The periodic maintenance of wild indigo along LIPA property, assets and easements will likely be beneficial to the success of wild indigo and the Persius duskywings' necessary habitat type. Moreover, as the north-south LIPA property located between Conservation Parcels A and B would not be relocated, and the LIPA corridors on Parcel D would not be disturbed, no impacts to the multiple occurrences of wild indigo observed within the LIPA property, assets, or easements would occur because of the proposed action.

The analysis of water resources focused on groundwater, water supply, sewage generation, stormwater management, and wetlands and waterbodies. The following mitigation measures will be employed to ensure that potential impacts to water resources would be avoided and/or minimized.

- Pursuant to the 2016 Stipulation of Settlement, drainage plans have been prepared by BRT to manage stormwater on the subject property. The proposed stormwater management plans prepared by BRT include the construction of multiple drainage reserve areas and recharge basins, which would necessitate the removal of material. As users are identified for the subject property, specific site drainage will be designed for those uses.
- BRT had previously received a Storm Water Pollution Prevention Plan (SWPPP) waiver from the Town for the development of Parcel A. BRT has indicated that it would seek similar relief for Parcels B, C and D to that granted for Parcel A. Notwithstanding this, the 2016 Stipulation of Settlement requires that a preliminary SWPPP be prepared for Parcels B, C and D. Drainage and erosion and sedimentation control plans have been prepared to address this requirement; BRT will implement these protective stormwater management measures to protect groundwater resources and facilitate stormwater recharge.
- As feasible given ultimate end users on the site, BRT will install permeable pavement and maintain permeable surfaces to facilitate infiltration of runoff.
- To ensure the protection of groundwater associated with the installation and operation of on-site sanitary systems, BRT will comply with the applicable requirements of Article 6 of the Suffolk County Sanitary Code.

- To further protect groundwater impacts associated with sanitary discharge, Parcel D will connect to the Suffolk County Yaphank County Center Sewage Treatment Plant (Yaphank Sewage Treatment Plant). As feasible, given available capacity, the uses developed on Parcels B and C may ultimately be connected to the municipal treatment system.
- As end users have not yet been determined, it is not possible to calculate precise future water use. As users are identified, BRT will consult with the Suffolk County Water Authority (SCWA) to ensure water availability.
- If any future uses on the site will have cause to store or handle hazardous materials, BRT would comply with applicable regulations, such as Articles 7 and 12 of the Suffolk County Sanitary Code, Chemical and/or Petroleum Bulk Storage regulations of the NYSDEC, and any other state or federal requirements.
- Given documented groundwater contamination with VOCs from an off-site source, soil vapor testing should be conducted on Parcel D to ensure that there are no health and safety concerns for workers or ultimate site occupants. If soil vapors are detected, then proper measures should be developed and employed to protect health and safety.

Overall, implementation of the Proposed Action is not expected to result in significant adverse impacts on the traffic flow or operations on the surrounding roadway network. Although, at the time that Parcel D is developed and operational, the intersection of CR 21 and Glover Drive will be evaluated to determine the need for a traffic signal, based on actual operations at Parcel D and the other facilities that use Glover Drive at CR 21. According to NYSDEC guidelines, there would be no significant noise impact at residences on Yaphank Road and no need for mitigation due to potential increases in traffic noise.

With respect to passenger and freight operations, the following measures would be employed as part of the Proposed Action to minimize and/or avoid potential impacts:

- NYA and BRT would work closely with LIRR and maintain consistent lines of communication to minimize any potential impacts.
- Construction of the underpass to connect Parcels C and D would take place in off-peak passenger operation hours, minimizing or potentially eliminating any disruption to service on the LIRR system.

It is anticipated that the proposed action would have no significant adverse impacts on community services and facilities. In total, upon implementation of the Proposed Action, BRT would generate approximately \$5,912,030 in annual property taxes (approximately \$5,084,611 more than under current conditions) to all the taxing jurisdictions, which would benefit those jurisdictions and likely assist in off-setting the cost associated with any potential increased need for services from the various providers. In addition, the following measures would further reduce potential for adverse impacts to community services:

- On-site security would be provided during and after construction, to include one or more of the following.
 - CCTV cameras
 - Security offices constructed at all access points to the Subject Property.

- A security guard would be stationed at each security office 24 hours a day, 7 days a week. Starting at 6:00 p.m. at least one additional security guard would patrol the subject property until 6:00 a.m.
- Security rovers to patrol the subject property during the evenings and overnight hours.
- Exterior lighting would be provided throughout the subject property to allow adequate visibility and increase security on the subject property.
- Future buildings would be constructed to the latest National Fire Protection Association Codes and Standards.
- BRT would consult with the Yaphank Fire Department prior to additional construction as part of the Proposed Action to ensure that suitable fire hydrants are installed to protect the subject property in the event of a fire.
- With respect to access to the subject property, the proposed action includes three additional access points/driveways: one along LIE South Service Road (for Parcels B and C), one along Horseblock Road (for Parcel D), and one from Glover Road (for Parcel D). An easement along the northern portion of the LIPA property (east of Parcel A) would be established to allow circulation among Parcels A, B, and C. This would provide multiple access options in the case of a situation where emergency vehicles would need to enter the site.
- As potential development projects (e.g., the current proposals for relocation/expansion of the rebar transloading and preparation facility, and a fuel cell project) are confirmed and finalized, BRT will contact the SCWA to confirm water availability for each new development on the subject property.
- Parcel D would be connected to Suffolk County's Yaphank Sewage Treatment Plant, pursuant to the 2012 Agreement of Sale for Parcel D. If capacity is available, Parcels B and C could be connected to the municipal system in the future.
- On-site sanitary systems would be installed in accordance with Article 6 of the Suffolk County Sanitary Code.

From a regional perspective, it is anticipated that the proposed action may benefit regional air quality as it has the potential to replace less efficient truck deliveries with rail transportation. To ensure that no significant adverse localized air quality impacts result from implementation of the proposed action, the following mitigation measures will be employed:

- Maintain use of anti-freeze in locomotives to reduce idling on cold days
- Continue use of an environmentally friendly switching locomotive to move cars efficiently
- Ensure proper emission controls for construction vehicles, including, as appropriate, proper maintenance of all motor vehicles, machinery, and equipment associated with construction activities, maintenance of manufacturer's muffler equipment or other regulatory required emissions control devices
- Limit idling of construction vehicles and equipment on site

- Employ appropriate methods of dust control, including, as necessary, the application of water, the use of stone in construction entrances and roads, and regular sweeping of the pavement and adjacent roadway surfaces during construction.
- Based on the noise and vibration impact assessment, there would be no significant adverse noise impact, and no mitigation measures are required to reduce noise or vibration.

While the Proposed Action is not expected to result in significant adverse impacts on visual resources or cultural resources, the eastern boundary of Parcel C will contain a 75-foot wide vegetated buffer between the construction and the western boundary of the Suffolk County farm fields, creating a physical and visual buffer between the farm and proposed construction and allowing for the continuation of the tree lines that currently mark the fields' outer boundaries.

Implementation of the proposed action will require cut and fill of existing soils, thus altering topography at the subject property. However, with implementation of the following measures potential impacts will be minimized.

- Clearing, excavation and grading of the subject property would occur in phases to reduce the level and intensity of impacts as compared to grading the entire subject property all at once.
- Native soils excavated from the Subject Property would be reused on-site to the maximum extent practicable. This will be achieved by using excavated soils as on site fill material, both for initial grading purposes in Phase 1 (Parcels B and C) and Phase 2 (Parcel D) and for additional grading in Phase 2 associated with the development of buildings, roads, etc. on the subject property.
- Exported soils will be removed from the subject property using a combination of rail and truck transport to reduce potential traffic impacts associated with removal of soils only by trucks.
- The grading concept proposed by BRT, which would require removal of over 3.9 million CY of material, will be redesigned in accordance with the grading concepts presented in the VDEIS and documented in the VHB memorandum, Brookhaven Rail Terminal Expansion Grading Analysis, August 2, 2017, and contained as Appendix X of the VDEIS. This will result in a significant reduction in the amount of material removal from the subject property, such that approximately 960,000 to 1,150,000 CY of material would be removed, thereby reducing the quantity of net export by approximately 2.7 to 2.9 million CY.
- To the extent practicable, pervious materials shall be installed to facilitate stormwater recharge.
- Pursuant to the 2016 Stipulation of Settlement, when excavation and grading activities are conducted in the area where Superstorm Sandy-damaged cars were stored, this area shall be monitored by VHB. If visual or olfactory evidence of contamination is noted, soil sampling must be performed in accordance with applicable requirements.
- The Undisturbed/Conservation Easement on Parcel D will preserve soils and topography in this area, ensuring soils in this area remain undisturbed and stabilized.

- In total, 19.39± acres of green space would be provided on Parcels B and C, including 6.6 acres of currently vegetated land along the eastern border of Parcel C, which would be undisturbed. This will maintain existing topography along the eastern border of Parcel C and help stabilize soils on Parcels B and C.
- Construction activities will adhere to the erosion control plan established for the Proposed Action, including,
 - Limits of clearing and grading will be established and construction fencing will be installed along the limits. Existing vegetation to remain will be protected and remain undisturbed during construction. The limits of the 62- acre Undisturbed/Conservation easement will be fenced pursuant to the 2016 Stipulation of Settlement as part of Phase 2 of development. Fencing types and locations are depicted on the erosion control plan.
 - Sediment barriers (silt fences and stockpiles) will be installed in critical areas for erosion control purposes.
 - In addition to the erosion control measures listed above, Best Management Practices would be implemented to further reduce the potential for erosion and sedimentation due to construction activity, including:
 - A stabilized construction entrance will be maintained to prevent soil and loose debris from being tracked onto adjacent roadways. The construction entrance will be maintained until the subject property is permanently stabilized.
 - Clearing and grading will be scheduled to minimize the size of exposed areas and the length of time areas are exposed. Cleared areas and stockpiles will be kept stabilized.
 - Dust control will be instituted to prevent surface and air movement of dust from disturbed soil surfaces.
 - Drainage inlets will be protected using sediment barriers and traps as required.
 - Sediment barriers and other erosion control measures will remain in place until disturbed areas are permanently stabilized.
- Documented groundwater plumes exist that are contaminated with VOCs in the area of Parcel D, and soil vapor associated with this contamination is a concern for the onsite workers, both during site redevelopment excavation activities and post development within enclosed structures. Accordingly, soil vapor sampling should be conducted after the clearing of Parcel D, but prior to excavation activities. If soil vapor impacts are detected, appropriate health and safety precautions for on-site construction workers should be developed and implemented. Further, appropriate building designs (e.g., soil vapor barriers, sub-slab depressurization systems, etc.) should be provided to mitigate VOC concerns within occupied structures, if necessary.
- Although no significant on-site soil concerns were identified during the review of the prior environmental assessments, scattered non-hazardous debris typical of illegal dumping at undeveloped parcels and illegal trespassing and discharges of shotguns were reported. The reported non-hazardous debris should be segregated from cleared trees, brush and soils, and disposed separately.

The Proposed Action would result in a net positive impact for the numerous taxing districts, including Suffolk County, the Town of Brookhaven, Longwood Central School District, and South Country Central School District. The proposed action is anticipated to generate a combined total of \$5,912,030 in annual property taxes, which is more than \$5 million greater than

the current taxes generated by development of the proposed action. The proposed action is expected to create approximately 650 new permanent jobs, as well as 579 short-term jobs per year during construction. Furthermore, the proposed action is anticipated to result in indirect economic growth to the surrounding area.

The industrial-nature of the proposed action will be consistent with various other development near the subject property, as well as the zoning for the majority of the subject property. The proposed action will also be consistent with various Comprehensive Plans and other planning documents, and in many cases, will help to achieve planning goals such as, the increased use of freight rail, reduction of traffic and emissions from 40,000 trucks annually, industrial development along the LIE, economic growth, and sustainable transportation. The proposed action is not expected to have a significant adverse impact on socioeconomics or significant cumulative impacts from the BRT expansion and other pending projects in the immediate area.

While environmental impacts will occur as a result of the proposed activity, no significant impact is expected to occur to: air, land, aesthetics, ground water, surface water, wetlands, cultural, open space, recreational, transportation or energy resources.

The Town Board of the Town of Brookhaven, as Lead Agency for the action contemplated herein, and after due deliberation, review and analysis of the so-ordered stipulation of settlement, the VDEIS/EAF, supporting information, recommendations and conclusions of Comprehensive Plans and other planning documents, and the criteria set forth in 6 NYCRR § 617.7 determines that the proposed action will not result in significant impacts to the environment.

Review Agency: The Town Board of the Town of Brookhaven
Contact Person: Peter E. Fountaine, Division of Environmental Protection
Address: One Independence Hill, Farmingville, NY 11738
Phone: (631) 451-6455

Copies of this notice sent to:

ENB

Sheref Fathi, P.E., Regional Environmental Manager, New York State Department of Transportation

Mark Carrara, Deputy Permit Administrator, New York State Department of Environmental Conservation

DJ Evans, Director, New York State Department of Environmental Conservation, New York Natural Heritage Program

Michelle Gibbons, Regional Wildlife Manager, New York State Department of Environmental Conservation

Ruth L. Pierpont, Director, New York State Office of Parks, Recreation, and Historical Preservation

Andrew P. Freleng, Chief Planner, Suffolk County Department of Planning

Gilbert Anderson, P.E., Commissioner, Suffolk County Department of Public Works

James L. Tomarken, MD, Commissioner, Suffolk County Department of Health Services

Sarah Lansdale, Director, Suffolk County Farmland Committee

Veronica King, Stormwater Manager, Town of Brookhaven Highway Department

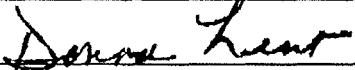
John Lessler, Town of Brookhaven, Division of Land Management/Open Space and Farmland Acquisition Advisory Committee

Keith Williams, Fire Marshal, Town of Brookhaven Division of Fire Prevention

Germaine Ortiz, Assistant Town Engineer, Town of Brookhaven Division of Engineering

Vincent E. Pascale, Chairperson, Town of Brookhaven Planning Board
Allen Logalbo, Deputy Director of Acquisition and Leasing, MTA, Long Island Railroad
Ralph V. Suozzi, Chairman, Long Island Power Authority Board of Trustees
David M. Daly, President and COO, PSEG Long Island
Judith Enck, Regional Administrator, U.S. Environmental Protection Agency, Region 2 Office
Applicant: Brookhaven Rail LLC f/k/a U.S. Rail New York LLC
Brookhaven Terminal Operations
205 Sills Road
Yaphank, New York 11980

This determination is not authorized and complete until signed and dated as follows:



Donna Lent, Brookhaven Town Clerk

Date Resolution Adopted: 9-14-17



**Department of
Environmental
Conservation**

ENB - Region 1 Notices 9/27/2017

Negative Declaration

Suffolk County - The Town of Brookhaven Town Board, as lead agency, has determined that the proposed Brookhaven Rail Terminal (BRT) Expansion will not have a significant adverse environmental impact. The action involves an overall property of approximately 350 acres, of which, approximately 29 acres, identified as Parcel A, are currently developed and utilized. The proposed action involves the expansion of the existing Brookhaven Rail Terminal (BRT) facility onto approximately 321 acres of currently undeveloped property immediately east and southeast of the existing operations, known as Parcels B, C, and D.

The Proposed Action 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 onto Parcel D, constructing new access ways and on-site roads, 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.

The existing operation is currently subject to a Stipulation of Settlement with the New York State Department of Environmental Conservation (NYS DEC), dated June 26, 2013. The SEQRA compliance for the proposed action has been conducted as an Administrative SEQRA/Plan Review in accordance with the March 17, 2016, United States District Court Eastern District of New York, Case Number 2:14-cv-02286, Stipulation of Settlement with the Town of Brookhaven.

The project is located at 205 Sills Road, on the east side of Sills Road and south side of the Long Island Expressway South Service Road, Yaphank, Town of Brookhaven, New York.

Contact: Peter E. Fountaine, Town of Brookhaven, One Independence Hill, Farmingville, NY 11738, Phone: (631) 451-6455, E-mail: pfountaine@brookhavenny.gov.

REPLY EXHIBIT C

From: Michael White
Sent: Friday, October 29, 2021 2:15 PM
To: Grant Polley <gpolley@northpointkc.com>; Tom Wilcox <tom@twilcoxlaw.com>
Cc: Evan Fitts <efitts@northpointkc.com>
Subject: RE: [EXTERNAL] Tree Clearing Discussion

Grant ,

Attached is the diagram Cameron prepared showing the approximate extent of the rail corridor. We would propose the purple/pink area be put on the P.W.Grosser tree clearing survey—to show that the rail corridor area would not be subject clearing—the clearing would at this point only be the area subject to the warehouse development. I am good for a call on Tuesday. Would suggest we have the call before you submit, as we will also need to see the modified SEAF and now a modified tree clearing survey before submittal.

Michael

From: Grant Polley <gpolley@northpointkc.com>
Sent: Friday, October 29, 2021 1:57 PM
To: Michael White <mwhite@wintersbros.com>; Tom Wilcox <tom@twilcoxlaw.com>
Cc: Evan Fitts <efitts@northpointkc.com>
Subject: [EXTERNAL] Tree Clearing Discussion

Michael and Tom,

How does 12 EST next Tuesday work for you? Do we think we can submit our application in the interim with the reduced scope as will be shown in the Cameron exhibit and then withdraw it if our conversation on Tuesday raises more concerns?

Thanks,

--

Grant Polley | Development Manager
d: 816-381-2214 | c: 316-680-9938
4825 NW 41st Street, Suite 500 | Riverside, MO 64150
www.beyondthecontract.com



From: Michael White

Sent: Tuesday, November 2, 2021 10:09 AM

To: Grant Polley <gpolley@northpointkc.com>

Cc: Rebecca Morrow <rmorrow@pwgrosser.com>; Will Flower <WFlower@wintersbros.com>; Tammy <tammyc@pwgrosser.com>; Charlie Bartha <cbartha@pwgrosser.com>; Kim Gennaro <kgennaro@pwgrosser.com>; Tom Wilcox <tom@twilcoxlaw.com>; Chris Chancellor <cchancellor@northpointkc.com>

Subject: RE: [EXTERNAL] Tree Clearing - SEAF

Attached is a plot of the "rail corridor" For all of Parcel D, along with associated acreage.

From: Grant Polley <gpolley@northpointkc.com>

Sent: Tuesday, November 2, 2021 10:04 AM

To: Michael White <mwhite@wintersbros.com>

Cc: Rebecca Morrow <rmorrow@pwgrosser.com>; Will Flower <WFlower@wintersbros.com>; Tammy <tammyc@pwgrosser.com>; Charlie Bartha <cbartha@pwgrosser.com>; Kim Gennaro <kgennaro@pwgrosser.com>; Tom Wilcox <tom@twilcoxlaw.com>; Chris Chancellor <cchancellor@northpointkc.com>

Subject: Re: [EXTERNAL] Tree Clearing - SEAF

Thanks Michael - We're only going to be allowed to clear up to the LIPA ROW at this time.

On Tue, Nov 2, 2021 at 8:53 AM Michael White <mwhite@wintersbros.com> wrote:

Thank You Grant. We are still looking to exclude the Rail Corridor from the clearing on NP/Winters Parcel on D. I will give you the acreage. Should it include acreage up to the LIRR mainline or are you clearing only to the LIPA ROW?

Michael



REPLY EXHIBIT D

REPLY EXHIBIT E

Agreement of Sale

This Land Sale Contract ("Contract") entered into as of this ____ day of July, 2012 is between the

County of Suffolk ("Seller"), a municipal corporation of the State of New York, acting through its duly constituted Division of Real Property Acquisition and Management of the Department of Economic Development and Planning ("Department"), located at 100 Veterans Memorial Highway, Hauppauge, New York 11788:

and

Oakland Transportation Holdings, LLC ("Buyer"), a Michigan limited liability company authorized to do business in the State of New York, with its principal place of business located at 38955 Hills Tech Drive, Farmington Hills, MI 48331;

The purpose of this Contract is to provide for the following transaction:

1. Seller's sale and Buyer's purchase of the land designated on the Tax Maps of Suffolk County as lots 0200, 815.00, 01.00, 006.003 and 0200, 815.00, 01.00, 004.004, and 0200, 815.00, 01.00, 006.002 as well as the portion of the right of way shown on the underlying existing tax map known as Old Town Road on such map which crosses through the aforesaid lots ("Premises"), together with certain easements for access thereto. The legal description of the Premises is attached hereto as Exhibit 1. A survey of the Premises is attached hereto as Exhibit 2. The legal descriptions of the easements are attached hereto as Exhibit 3;
2. The processing of all applications to obtain all necessary zoning changes or waivers, site-plan approvals, building and other permits, and approvals and variances, and
3. Establishing the payment terms of the purchase price.

- iv. execute any and all necessary easements and irrevocable offers of dedication required by the County Sewer Agency and, if necessary, the Suffolk County Water Authority;
- v. execute all contracts required by the County Sewer Agency and comply with all standard requirements for sewer connection or construction, including posting of security and bonds;
- vi. if connecting to the existing plant, pay all usage fees for waste water disposal as may be imposed by the County Sewer Agency or Sewer District;
- vii. if constructing a new sewage plant, transfer ownership to the County Sewer Agency upon completion of construction, and thereafter pay all usage fees for waste water disposal as may be imposed by the County Sewer Agency or Sewer District; and
- viii. prior to the date Buyer connects to a sewage treatment plant as contemplated in this subsection b., Buyer shall dispose of its sewage in compliance with all applicable municipal laws, rules and regulations.

The provisions of this section shall survive the closing of title.

Section 4-2. Roads. All roads connecting to public roads or to easements conveyed herein to the Buyer shall be open for public use. All roads constructed by Buyer which connect to public roads shall be offered for dedication to the Town.

Section 4-3 Other Easements. The parties agree to grant to each other, and Buyer agrees to accept the Premises subject to, such other easements to maintain existing utilities and access across and through the property of the other as shall be reasonably required. Seller shall grant to Buyer an easement for vehicle traffic across Glover Avenue, which is a County right-of-way but not a dedicated road, as well as an extension thereof as may be required to provide access to the Premises from Yaphank Avenue. Improvement of the unpaved portion of such easement shall be at the sole cost and expense of Buyer. Seller reserves the right to dedicate the entirety of such easement as a public road in the future, in Seller's discretion. Buyer shall grant to Seller an exclusive easement across that portion of the Premises which currently contains the southwest corner of the grounds surrounding the minimum security facility to the east of the Premises. The form of the easements is annexed hereto as Exhibit 6. The easements are shown on the aerial map attached hereto as Exhibit 7.

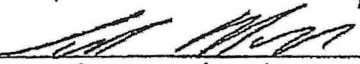
Section 4-4. Cooperation Between Seller and Buyer. Seller and Buyer shall, throughout the process of obtaining any necessary Regulatory Matter approvals, consents determinations and waivers and State, Town, or County approvals (collectively "Regulatory Approvals"), coordinate and cooperate in a reasonable manner with respect to the planning, preparation and pursuit of such approvals, including the prompt execution of any documents requiring a party's signature, and shall share information on a timely basis. Seller shall also cooperate with Buyer in (a)

IN WITNESS WHEREOF, the Buyer and the Seller have caused this Agreement to be signed as of the date that appears in its first paragraph.

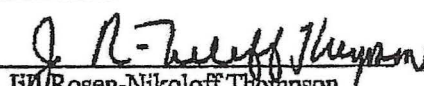
COUNTY OF SUFFOLK

OAKLAND TRANSPORTATION
HOLDINGS, LLC

By: 
Name: Steven Bellone
Date: May 6, 2013
Title: County Executive

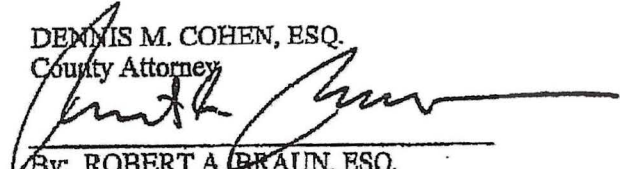
By: 
Name: TED MILLS
Date: 9-26-12
Title: Member

SUFFOLK COUNTY DEPARTMENT OF
ECONOMIC DEVELOPMENT AND
PLANNING, DIVISION OF REAL
PROPERTY ACQUISITION AND
MANAGEMENT

By: 
Name: Jim Rosen-Nikoloff Thompson
Title: Director
Date: 10/4/12

Approved as to Legality:

DENNIS M. COHEN, ESQ.
County Attorney

By: 
By: ROBERT A. BRAUN, ESQ.
Title: Deputy Bureau Chief
Real Estate/Condemnation Bureau
Department of Law
Date: 10/3/12

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of December 2021, a copy of the foregoing Reply to the Petition for Declaratory Order and/or An Order to Show Cause and Suspend was served by email on all parties on the official Service Lists for Dockets No. FD 36398, Docket No. FD 36399, Docket No. FD 35819, Docket No. FD 36384, Docket No. FD 36376, and Docket No. 36385

/ss/ Thomas W. Wilcox