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April 14, 2023

VIA ELECTRONIC FILING

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

ENTERED
Office of Proceedings
April 14, 2023
Part of
Public Record

Re: STB FD 36696- *Grafton and Upton Railroad Company –Petition for Declaratory Order*

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is a request for a declaratory order filed by Grafton and Upton Railroad (“GURR”) and a motion for expedited handling. We respectfully request expedited consideration because the Town of Hopedale, Massachusetts, continues to attempt to impede the development that is underway of a rail transportation facility on GURR’s property, investments are at stake, GURR is actively discussing arrangements with rail customers, and the law governing this case compels a finding that preemption under 49 U.S.C. 10501 applies.

The sum of \$1,400, representing the appropriate fee for this filing, has been tendered electronically via Pay.gov.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

John M. Scheib
Attorney for Grafton
and Upton Railroad Company

FILED
April 14, 2023
SURFACE
TRANSPORTATION BOARD

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FEE RECEIVED
April 14, 2023
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**PETITION OF GRAFTON AND UPTON RAILROAD
COMPANY FOR DECLARATORY ORDER**

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Attorneys for Grafton
and Upton Railroad Company

Dated: April 14, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

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**PETITION OF GRAFTON AND UPTON RAILROAD
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I. Introduction

Grafton and Upton Railroad Company ("GURR") hereby petitions the Surface Transportation Board to issue a declaratory order, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, to the effect that the ongoing efforts permanently to preclude or to otherwise impede the use of GURR's property for rail transportation purposes are preempted pursuant to 49 U.S.C. § 10501.¹ Specifically preempted are (1) the attempt of the Town of Hopedale, Massachusetts, ("Town" or "Hopedale") to take by eminent domain GURR's real property at 364 West Street that GURR is currently developing as a transload facility and other rail transportation facilities (collectively, "rail transportation facilities") and (2) efforts by the Hopedale Conservation Commission to attempt to

¹ Separately, GURR has filed a motion for expedited consideration and request for an expedited procedural schedule given the harm GURR is incurring. Expedited consideration is requested to avoid further delay to the completion of the project, which deprives rail customers of the benefits of the rail transportation facilities at issue.

enforce a cease and desist order that would prohibit GURR from developing and operating the rail transportation facilities without preclearance from the Commission.²

This is a simple, straightforward case of state and local action being preempted. GURR is a rail carrier. GURR has 198 acres of property that includes 130 acres that the Town of Hopedale seeks to acquire by eminent domain. All 198 acres are essential for the planned development of a rail transportation facility, which for ease of reference will be sometimes referred to as “the project.” The Town’s continuing efforts to thwart the project by taking GURR’s real property or by imposing preclearance requirements through the Hopedale Conservation Commission are preempted by 49 U.S.C. § 10501(b).

As demonstrated below, the law is clear that a municipality may not condemn railroad property for other conflicting uses that would make impossible or unreasonably interfere with a railroad’s ability to engage in rail transportation. *See e.g., City of Lincoln—Petition for Declaratory Order*, FD 34425 (STB served Aug. 11, 2004) (“*City of Lincoln*”), *aff’d*, *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858, 862 (8th Cir. 2005). Furthermore, a local authority, such as the Conservation Commission, may not impose preclearance or permitting requirements that would unduly interfere with rail transportation. *See e.g., Green Mt. R.R. v. Vermont*, 404 F.3d 638 (2nd Cir. 2005)(“*Green Mt. R.R.*”); *City of Auburn v. U.S. Gov’t*, 154 F.3d 1025 (9th Cir. 1998)(“*City of Auburn*”).

GURR has worked with the Town in good faith and as a good neighbor for many years, including being open and transparent about various GURR projects, including the rail transportation facilities at 364 West Street. Verified Statement of Jon Delli Priscoli (“Priscoli VS”)

² The terms “Town”, “Hopedale” and “Commission” will for ease of reference in this Petition sometimes simply be referred to as the “Town” or “Hopedale” where the context demonstrates that that the Town of Hopedale, acting through its Board of Selectmen, and the Hopedale Conservation Commission are together or separately trying to accomplish the same result--blocking GURR from developing and operating the rail transportation facilities on its property.

at ¶¶ 27-29, attached as Exhibit 1. However, the Town's unrelenting attempts to disrupt and interfere with GURR's property and rail transportation facilities has left GURR no choice but to seek protection from the United States District Court for the District of Massachusetts, and now action by the Board, to end the Town's obstruction.

This Petition is before the Board as a result of the United States District Court for the District of Massachusetts ordering GURR "to file a Petition for Declaratory Order with the STB for the purpose of the STB issuing a declaratory order regarding the Town's proposed taking and the Commission's Enforcement Order." *Grafton & Upton Railroad, et al. v. Town of Hopedale, et al.*, Case No. 4:22-cv-40080-ADB (D. Mass. Apr. 3, 2023) ("Decision"), attached as Exhibit 2. The Court has preliminarily enjoined the Town both from recording any notice of taking of any portion of GURR's property at 364 West Street, Hopedale, Massachusetts and from taking any action to enforce the Commission's Enforcement Order. The Court also ordered GURR to file this petition with the Board, and stayed its proceedings pending Board action, retained jurisdiction over the litigation, and stayed its proceeding pending Board action. A declaratory order is appropriate and necessary to assist the Court and to make clear that the Town's continued attempts to use state and local law and regulations to stop the development and operation of legitimate rail transportation facilities are preempted.

II. A Declaratory Order Is Appropriate and Required to Eliminate Controversy

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. There is an actual controversy between GURR and Hopedale concerning Hopedale's attempt to use state eminent domain law and local permitting regulations to preclude the use of approximately 130 acres of GURR's property that is currently being developed for rail transportation facilities to serve rail customers. GURR continues to incur substantial costs and delays to the development of its new rail transloading facility that will support its customers

and promote growth in rail transportation in Massachusetts and the nation. Moreover, the Board should issue the requested declaratory order to assist the United States District Court for the District of Massachusetts, to eliminate the controversy, and to put an end to this long-running saga in which the Town continues to attempt to thwart interstate commerce by rail.

III. Factual Background

GURR is an industrious and entrepreneurial Class III rail carrier that has been in continuous operation to serve customers since its incorporation in 1873. GURR owns and operates a 16.5 mile rail line that runs in a north-south direction between a connection with CSX in North Grafton, Massachusetts, and Milford, Massachusetts. That line bisects the property at issue at 364 West Street in the Town of Hopedale. GURR also operates a CSX-owned 8.4 mile extension of GURR's original line between Milford and Franklin. *Priscoli VS* at ¶ 3.

GURR has experienced significant freight rail growth in recent years. In 2008, GURR handled approximately 40 rail carloads, but by 2020 the number of cars was approximately 3000 (more than 70 times the volume in 12 years). *Priscoli VS* at ¶ 5. Since 2008, GURR's year-over-year growth has averaged between ten and fifteen percent per year, and 2022 was no exception as new customers and increased demand with new products will exceed previous years' growth based on known projected volumes for recently added new customers. *Id.*

GURR anticipates continued steady growth in its business, and this projection is consistent with the expectations and estimates of the Commonwealth of Massachusetts. A 2018 State Rail Plan produced by the Massachusetts Department of Transportation projected that by 2040 the rail system in Massachusetts will need to accommodate approximately 19 million more tons of originating freight per year, 25 million more tons of terminating freight and 34 million more tons of rail freight traffic moving within the State. The plan recognizes that a well utilized rail network has many benefits for the state and its residents, including the reduction of greenhouse gases, less

motor vehicle congestion, reduced wear and tear on the highways, travel time savings and economic development. Priscoli VS at 7; *see* 2018 State Rail Plan *available at* https://www.mass.gov/files/documents/2018/01/26/2018PubComm_1.pdf.

Over the last ten years, GURR has invested millions of dollars to meet current and anticipated future business opportunities where GURR competes head-to-head with long-haul trucking, but more is needed. Priscoli VS at ¶ 5-8.

The rail transportation facilities at issue here will help meet the increases in demand. GURR has begun to develop its property at 364 West Street into rail transportation facilities. Priscoli VS at ¶¶ 10-13. All of the track, buildings and other facilities will be controlled and operated by GURR. Priscoli VS at ¶ 18. When completed, the entire facility will be used for rail transloading, temporary storage, services related to transloading or temporary storage, and whatever additional rail activities are necessary or required in order to support the rail business that currently exists and is anticipated in the future, such as repairs to rail related equipment and the construction and operation of switching tracks, storage tracks, yard tracks to relieve congestion and facilitate service. Priscoli VS at 20. GURR has secured private financing that could be in jeopardy as result of the potential actions by the Town and the Commission and the attendant delays caused by these actions. Priscoli VS at ¶ 19.

In addition, GURR has had multiple inquiries from customers who are waiting for GURR to be able to meet their additional needs for new transloading facilities. Priscoli VS at ¶ 23. These customers have needs for transloading services that will present a potential of over 1,000 new rail cars to GURR annually in a wide range of commodities. These new rail transportation facilities will have a positive impact on national supply chain issues that have been adversely affecting the local, state and national economy over the past few years. Priscoli VS at ¶ 5-8, 23. In spite of past delays, GURR had hoped to have this rail facility open by the Spring or Summer of 2023, but now

expects, assuming no further delays, to be able to open its rail transportation facilities at 364 West Street by the Spring or Summer of 2024.

Substantial progress has already been made by GURR in the development of the property. Approximately 102 acres of trees have been cleared, and the initial grading work has commenced so that the construction of sidetracks and other rail facilities can begin. Priscoli VS at ¶ 21 and at Exhibit D (photographs of the site under construction). Efforts that have also already been underway include water exploration and testing in coordination with governmental agencies, including the U.S. Army Corp. of Engineers. Priscoli VS at ¶ 21. Recognizing that the property does not currently have access to public water, GURR has initiated planning and engineering for wells and water treatment systems, including storm waste basins and ensuring sufficient water pressure in order to address any fire suppression issues. *Id.* In short, GURR continues to comply with generally applicable health and safety regulations and cooperate fully with local, state or federal authorities.

Despite all the benefits to rail transportation and the public interest, including increased tax revenues for the Town, the Town continues with its efforts to stop the construction and operation of rail transportation facilities. As demonstrated below, the Town's efforts are contrary to law.

IV. Procedural Background

As the Board is aware, in 2020, the Town attempted to use state and local law in a lawsuit initiated by the Town in state land court in Massachusetts to block GURR's use of the same 130 acre parcel that is the subject of the Town's current attempt and to seize ownership from GURR. In response, GURR filed a petition for a declaratory order with the Board. FD 36464, *Grafton and Upton Railroad Company – Petition for Declaratory Order* (filed November 23, 2020). The Town and GURR settled that lawsuit and the Petition for Declaratory Order in February 2021.

Now, the Town is reneging on the settlement agreement that arose from the state land court action, and in unprecedented speed, has taken steps to take the very same 130-acre parcel by

eminent domain. In July 2022, a Special Town Meeting was convened at which the Town voted to authorize the Selectboard to use eminent domain to take ~130 acres of GURR-owned land at 364 West Street. Priscoli VS at ¶ 14. Within weeks, the Selectboard subsequently voted to take the 130 acres by eminent domain, but has been enjoined by temporary restraining orders and now a preliminary injunction issued by the federal court, from recording the Order of Taking.³ The ~130 acres that the Town voted to take is a substantial and critical part of GURR's ~198 acres and are needed for the development and operation of rail transportation facilities at 364 West Street. Priscoli VS at ¶ 15-18 & 20.

Concurrently with the Town's attempt to use eminent domain, the Commission issued and has sought to enforce a cease and desist order that would prohibit GURR from developing and operating the rail transportation facility without preclearance from the Commission. The Commission alleges that GURR engaged in development activities "without permit or prior notification to the Commission", and it further alleges that GURR placed fill in certain areas "for which no permit was issued, or notice of exempt work received." Priscoli VS at ¶ 17 and Exhibit C. The Commission then issued a "finding" that GURR acted "without approval," subjecting GURR to substantial fines and penalties. Lastly, it issued an order requiring GURR to file a restoration plan with the Commission on or before October 3, 2022. *Id.*

Faced with the imminent prospect of losing title to its property or the ability to use it for rail transportation facilities due to the cease and desist order of the Commission, GURR was forced to take legal action. GURR filed suit in the United States District Court for the District of Massachusetts on July 18, 2022, and moved on an emergency basis for a temporary restraining order ("TRO") against the Town and the Commission. *See Grafton & Upton Railroad Company et*

³ Under the Massachusetts eminent domain statute, G.L.c. 79, title to property is immediately transferred upon the recording of the Order of Taking at the county Registry of Deeds.

al v. Town of Hopedale et al, Docket No. 22-cv-40080MRG. GURR's request for injunctive relief was supported by two affidavits from Michael Milanoski, which are attached hereto as Exhibit 3 and Exhibit 4, which includes at paragraph 28 a map showing the massive scope of the proposed taking. On July 19, 2022, a TRO was granted to restrain the Town from recording an Order of Taking for the property at 364 West Street. The Town and GURR agreed to the entry of an amended temporary restraining order that would maintain the restraining order in effect until the federal court decided GURR's request for preliminary injunction. The TRO remained in effect until the April 3, 2023, issuance of the Decision, which converted it to a Preliminary Injunction.

The United States District Court for the District of Massachusetts issued a memorandum and order on April 3, 2023, in which it found that it had jurisdiction over GURR's preemption claims and found that GURR had established likelihood of success on its preemption claims against the Town and Commission. The court enjoined the Town, its Selectmen, and the Commission from "(1) recording any notice of taking of any portion of GURR's property at 364 West Street, Hopedale, Massachusetts or (2) taking any action to enforce the Commission's Enforcement Order." The Court also ordered GURR to file this petition with the Board, and stayed its proceedings pending Board action. Decision, Exhibit 2.

Notably, the Court found that GURR was likely to succeed on the merits of its argument that the Town and Commission's actions were preempted by 49 U.S.C. § 10501(b). Decision at 20-23. The Court found that "because GURR has plans for developing 364 West Street as a logistics and transloading facility, has already begun to develop the land to support that use, and has invested substantial capital in said development, the property falls under the ICCTA's definition of transportation." Decision at 23.

GURR has been a good neighbor and good corporate citizen – indeed it is the fourth largest tax payer in Town. *Priscoli VS* at ¶ 27-30. The Town of Hopedale now seeks to condemn property and use its Commission to thwart the development of an important rail transportation facility. By

contrast, GURR has lived up to its obligations and has openly communicated and worked with the Town, which has been noted by the Town repeatedly. *Priscoli VS* at ¶ 28-29.

The Town of Hopedale knows well that its actions are preempted. It had been advised by its legal counsel as early as 2013 that “local control over railroad operations is significantly limited by federal law, which ‘preempts’ both state and municipal regulation of rail transportation.” *Priscoli VS* at ¶ 15. Nevertheless, the Town continues to attempt to use prohibited means to frustrate the development and operation of rail transportation facilities.

V. Argument—ICCTA Clearly Preempts the Town of Hopedale’s Actions.

GURR seeks a declaratory order that the Town of Hopedale’s efforts to use state eminent domain laws to condemn railroad property and the Commission’s attempts to use local permitting regulations to frustrate a rail transportation project are preempted by 49 U.S.C. § 10501. Given the Town’s history of attempting to thwart legitimate rail projects, GURR respectfully requests the Board to deliver a clear message to the Town that it must discontinue its repeated attempts in violation of 49 U.S.C. § 10501 to stymie GURR’s development of much needed rail facilities to move rail commerce and serve the public interest.

a. ICCTA Preemption Is Broad and Applies to State and Local Regulation of Railroad Property.

The Town’s attempt to condemn railroad property is precisely the type of state or local activity that, if allowed, thwarts rail transportation and that Congress preempted. The express terms of ICCTA demonstrate that Congress adopted an expansive preemption provision and intended ICCTA to preempt state law broadly. The Act provides, in pertinent part:

(b) The jurisdiction of the [STB] over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules) practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

Courts interpreting ICCTA have held that its language and legislative history dictate a broad preemptive reach. One Court observed that it "is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." *City of Auburn*,, 154 F.3d at 1030 (quoting *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga 1996)). The Court further explained that "it is clear to the Court that Congress intended the preemptive net of the [ICCTA] to be broad by extending jurisdiction to the STB for anything included within the general and all-inclusive term 'transportation by rail carriers.'" *Id.* at 1582.

GURR is clearly a rail carrier. It is a Class III rail carrier that was incorporated in Massachusetts in 1873 and has been in continuous operation since that time. And the Board has found in the past GURR to be a rail carrier.⁴ Moreover, GURR will be the operator of the rail transportation facility on its property. *Priscoli VS* at ¶ 18.

The real property at issue and the transloading facility under active development at 364 West Street are "transportation" under ICCTA. Congress broadly defined the term "transportation," which expressly includes "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the

⁴ See e.g., *Diana Del Grosso, et al—Petition for Dec. Order, STB Finance Docket No. 35652*, at 2 (Decided July 28, 2017) ("The First Circuit expressly "affirm[ed] the Board's decision that the facility was operated by a 'rail carrier.'").

movement of passengers or property, or both, by rail". 42 U.S.C. §10102(9). GURR's approximately 198 acres of real property at 364 West Street in question is clearly property. Moreover, transloading and temporary storage have been expressly recognized to constitute "transportation". *Green Mountain R.R.*, 404 F.3d at 642 (holding STB has "wide authority over the transloading and storage facilities undertaken by Green Mountain"); *see also Del Grosso v. STB*, 898 F.3rd 110, 118 (1st Cir.2015) (holding that it is indisputable that intermodal transloading operations and activities involving loading and unloading materials from railcars and temporary storage of materials are part of transportation).⁵ Thus, The rail transportation and transloading facilities currently under development on GURR's property that will be operated by GURR are clearly encompassed in the definition of "transportation" and are related to the movement of property by rail.

b. The Taking of GURR's Property Is Preempted, and Taking of GURR's Property Would Prevent or Unreasonably Interfere With Rail Operations.

Courts and the Board have already considered and decided that takings under state eminent domain laws is regulation that is generally preempted by Section 10501(b). Applying that law to the facts here leads to only one conclusion – the Town and Commissions attempts to thwart GURR's development and operation of rail transportation facilities is preempted.

Nothing could be more invasive or a more permanent intrusion on rail property and projects and the preservation of future capacity (in the form of railroad property)⁶ than

⁵ *See also e.g., New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F3d 238 (3d Cir. 2007)("transloading qualifies as transportation"); *Del Grosso et al.—Petition for Dec. Order*, FD 35652 (STB served July 28, 2017); *Washington & Idaho Ry.—Petition for Dec. Order*, FD 36017 (STB served March 15, 2017)(rail transload facility can be entitled to preemption).

⁶ GURR's rail transportation and transloading facility at 364 West Street is currently under development, and, as described above, the planning, financing, and arrangements with customers for use of the entire property for rail transportation are in place for an orderly transition to full operation. Future transportation plans are equally as important as current use in considering whether the railroad property that is the target of an eminent domain action is rail property entitled

condemnation. “Condemnation can be a form of regulation, and using state eminent domain law to condemn railroad property or facilities for another use that would conflict with the rail use ‘is exercising control—the most extreme type of control—over rail transportation as it is defined in [49 U.S.C.] 10102(9).’” *Norfolk S. Ry. Co. and the Alabama Great S. R.R. Co.—Petition for Dec. Order*, FD 35196, at 3 (STB served March 1, 2010) (“*NSR Petition for Dec. Order*”) (quoting *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wisc. 2000) (“The Court holds that condemnation is regulation. . . . The City is impermissibly attempting to subject to state law property that Congress specifically put out of reach”)); *see also Union Pac. R.R. Co. v. Chi. Transit Auth.*, Case No. 07-cv-229 (N.D. Ill. Feb. 23, 2009) (N.D. Ill. 2009), *aff’d Union Pac. R.R. Co. v. Chi. Transit Auth.*, 647 F.3d 675 (7th Cir. 2011) (“[T]he Court notes that nearly every judicial or STB opinion to have considered the question has concluded that the use of eminent domain power is a preempted form of state regulation.”); *City of Lincoln v. STB*, 414 F.3d 858, 862 98th Cir. 2005) (“Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses.”). The court in *Buffalo South. R.R. Inc. v. Village of Croton-On-Hudson*, said it succinctly, “there is no question that the Village’s intended exercise of its eminent domain power exceeds what is permitted under the ICCTA. The Village is threatening to acquire the entire parcel of land in fee simple.” 434 F.Supp.2d 241 (S.D.N.Y. 2006). Courts have similarly held that other attempts to

to the protection of preemption. Thus, “the Board’s practice is to consider both current and future transportation plans in determining whether a railroad has proposed a bona fide rail operation.” *NSR Petition for Dec. Order* at fn. 8. *See Riverview Trenton R.R. Co.—Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI*, FD 34040, slip op. at 11 (STB served May 15, 2003), *aff’d, City of Riverview v. STB*, 398 F.3d 434 (6th Cir. 2005) (petition to revoke acquisition and operation exemption denied on grounds that railroad had developed plans for constructing intermodal facility); *Detroit/Wayne County Port Auth. v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995) (recognizing that it is not unusual that, as railroad traffic changes and grows, railroad facilities may need to be upgraded).

take railroad property are also preempted. *See .e.g., Skidmore v. Norfolk South. Ry. Co.*, 1 F.4th 206 (4th Cir. 2002) (state quiet title action preempted); *Jie Ao & Xin Zhou – Petition for Dec. Order*, FD 35539 at *2 (STB decided June 4, 2012) (application of adverse possession of rail property preempted).

As these cases show, the Town’s latest gambit of attempting to take approximately 130 acres of GURR’s real property through state eminent domain law is clearly preempted, as would any attempt to use state law to prevent GURR from developing and operating rail transportation facilities on the 364 West Street property. As Mr. Milanoski explains and shows, the proposed taking is massive in scope and renders GURR’s property of little or no use at all. Milanoski affidavit of July 28, 2022, at paragraph 28. Such a taking by the Town of that acreage would:

- Prevent GURR’s from meeting customer needs now and in the future by developing and operating rail transportation facilities at 364 West Street, which would expand rail capacity to promote greater use of and more efficient freight rail transportation. Priscoli VS at 7-8, 23.
- Leave the remainder of GURR’s ~198 acre parcel landlocked and of no value. Priscoli VS at 26; Milanoski July 28, 2022 affidavit at paragraph 28.
- Impede and impair GURR’s already-underway development of new rail facilities and transloading facilities. Priscoli VS at ¶ 19-20, 25-26; Milanoski July 28, 2022 affidavit at paragraph 22-25.
- Disrupt the work that GURR has already begun for site design and development, which includes clearing and grading approximately 102 acres of the land. Priscoli VS at ¶ 21; Milanoski July 28, 2022 affidavit at paragraph 25.
- Prevent GURR from being ready to use the rail transportation facilities for rail customers as soon as 2024. Priscoli VS at ¶¶ 22 & 26.

The law is unequivocal that the Town’s attempt to take GURR’s property through eminent domain is preempted.⁷

⁷ The case of *City of Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79 (2012) does not help the Town as it is an outlier decision and factually different. The court there found that the taking would not interfere with the current railroad operations based on railroad testimony and found that contemplated future plans involved a non-railroad operator. Here, it is clear that the

c. The Conservation Commission Order Is a Preclearance Regulation that Is Preempted.

The Commission's Enforcement Order entered on July 14, 2022, alleges that GURR performed rail transportation development work without first obtaining a permit pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, and demands that GURR cease and desist and reverse this work. The Enforcement Order is an explicit local preclearance and permitting regulation which is categorically preempted. Moreover, the Enforcement Order intentionally discriminates against interstate commerce by rail, is intended to unreasonably interfere with GURR's rail transportation, and was issued by the Commission as a pretext to aid and abet the Town's true goal of eliminating any rail transportation at 364 West Street.

State and local environmental regulation of railroad activity is preempted pursuant to 49 USC §10501. *See City of Auburn*, 154 F.3d 1025 (preempting state environmental review process). The Board has "repeatedly held that state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted to the extent that they set up legal processes that could frustrate or defeat railroad operations because they would, of necessity, impinge upon the federal regulation of interstate commerce." *N. San Diego Cnty. Transit Dev. Bd. – Petition For Dec. Order*, FD 34111 at (STB served Aug. 19, 2002) (holding California Coastal Commission regulation of construction and operation of rail siding preempted and collecting STB decisions).⁸

Town's proposed taking would render GURR unable to complete its transload facility, would make the remaining GURR property landlocked. In addition, here it is clear that GURR controls the property and would operate the rail transportation facilities that are under development. *Priscoli VS* at 18, 26.

⁸ *See City of Auburn*, 154 F.3d 1025 (ICCTA preempted state and local environmental permitting laws); *Green Mountain*, 404 F.3d 638 (preconstruction permitting of transload facility necessarily preempted by § 10501(b)). *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010)("[a]lthough the Ordinance and Permit commendably seek to enhance public safety, they unreasonably burden rail carriage and thus cannot escape ICCTA preemption under the police

Moreover, these types of permitting and preclearance requirements are categorically preempted and require no fact-finding. Categorical preemption applies where: (1) local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations, and (2) state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines, are a “per se unreasonable interference with interstate commerce.” *American Rocky Mountaineer v. Grand Cty.*, 568 F. Supp. 3d 1231 (D.Utah 2021). Categorical preemption applies to state and local regulation in these two categories “regardless of the context or rationale for the [state or local] action.” *Id.* As a result, courts and the Board have not needed to take any evidence or delay a finding of preemption in instances of categorical preemption. *Id.* (“A factual assessment is not required for regulations that are categorically preempted.”).

The Enforcement Order is preempted because on its face it is a preclearance and permitting action and because it explicitly targets GURR’s rail transportation activities. The Commission complains that a handful of actions were done by GURR “without permit or prior notification to the Commission”, and it further alleges that GURR did work “for which no permit

power exception.”); *see also* *Petition of Norfolk Southern Ry. Co. and Expedited Declaratory Order*, FD 35949 (STB served Feb 16, 2016) (citing *City of Auburn v. United States Gov't*, 154 F.3d 1025, 1031 (9th Cir. 1998) (environmental and land use permitting categorically preempted); *Soo Line R.R. Co. – Petition for Dec. Order*, FD 35850 (STB served Dec. 22, 2014) (finding preempted p the environmental and wetlands review and permitting requirements of the State and the City are categorically preempted by § 10501(b) in connection with the project to upgrade the Yard); *Desertxpress Enter., LLC – Petition for Declaratory Order*, FD 34914 (STB served June 25, 2007) (holding that rail transportation project not subject to state and local environmental review and land use and other permitting requirements because of the Federal preemption in 49 U.S.C.10501(b)); *California High-Speed Rail Authority – Petition for Declaratory Order*, FD 35861 (STB served Dec. 12, 2014) holding CEQA is categorically preempted by § 10501(b) in connection with the Line because “CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation”).

was issued, or notice of exempt work received.” Priscoli VS at ¶ 16 and Exhibit C. The Commission then issued a “finding” that GURR acted “without approval.” Lastly, it issued an order requiring GURR to file a “restoration plan” with the Conservation Commission on or before October 3, 2022. *Id.* The Enforcement Order is explicitly a preclearance and permitting regulation because it asserts that GURR acted without a permit or prior approval from the Commission.

The Enforcement Order directly targets GURR’s rail transportation activities. The Commission alleges that GURR violated state law by constructing a bridge “to consist of rail ties, then three large boards capable of supporting vehicle traffic...” *Id.* It also complains of nonspecific “work,” “excavation activities,” and “removal of vegetation.” *Id.* All of these alleged violations fit within the ICCTA’s definition of “transportation” because they are related to GURR’s effort to build a railroad bridge, side tracks, and transloading facilities on GURR’s real property. *See e.g., Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W.2d 273, 280 (Iowa 2018). GURR’s excavation and other activities are encompassed in the definition because they occur on GURR’s property and are necessary steps to construction of the rail “facility” and “yard,” which are related to the movement of property by rail. 49 U.S.C.S. § 10102(9). Ordering GURR to cease and desist and reverse these activities would have the effect of denying GURR the ability to conduct some part of developing and operating rail transportation facilities and is therefore categorically preempted.

Further, the Enforcement Order (which was served on the same day – July 14, 2022 – that the Town’s Selectboard noticed a meeting for July 19, 2022, at which it intended to vote to take GURR’s property by eminent domain) is a transparently pretextual effort to aid and abet the

planned taking and prevent further rail transportation development work on GURR's property.

Priscoli VS at ¶ 17.⁹

Preemption is not a close question because the Commission's Enforcement Order seeks to impose a permitting and preclearance scheme, seeks to force GURR to stop construction of a rail transportation facilities, requires GURR to reverse and restore its site work, including areas it has prepared for rail tracks and its rail bridge, and unreasonably interferes with GURR's transportation by rail.

VI. Conclusion

GURR has worked with the Town and kept them informed of GURR activities as a matter of course. Priscoli VS at ¶ 28-30. However, GURR's entrepreneurial efforts to develop rail facilities to serve customers in Massachusetts continue to face renewed efforts by the Town in ways that are clearly preempted by Section 10501. To protect rail transportation, GURR respectfully requests that the Board issue a Declaratory Order that the Town's latest efforts – to take by eminent domain the approximately 130 acres of GURR's real property at 364 West Street or to use its Commission to frustrate the project by application of preclearance regulations – are preempted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Scheib" following in a similar style.

John M. Scheib
Gentry Locke Attorneys

⁹ The court in *Vermont Ry. v. Town of Shelburne*, found preempted a local "Ordinance Regulating the Storage, Handling and Distribution of Hazardous Substances" through which a town sought to impose daily fines on a railway for alleged violations of salt storage and release restrictions. 287 F. Supp. 3d 493, 494-495 (D. Vt. 2017) ("*Vermont Ry.*"). The court noted that the "timing of [the ordinance's] enactment, the focus and thresholds included in it, and the severe penalties permitted by it all point toward discrimination against the Railway." *Id.* at 500.

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and Upton Railroad Company

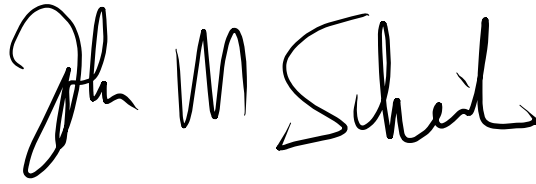
Dated: April 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have served by email a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows:

DAVID S. MACKEY
ANDERSON KREIGER
50 Milk Street, 21st Floor
Boston, MA 02109
dmackey@andersonkreiger.com
T: 617.621.6531

on this 14th day of April, 2023.

A handwritten signature in black ink, reading "John M. Scheib". The signature is fluid and cursive, with the first name "John" being more prominent. Below the signature is a horizontal line.

John M. Scheib
Gentry Locke Attorneys
101 West Main Street
Norfolk, VA 23510
757-916-3511

Attorney for Grafton
and Upton Railroad Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

EXHIBIT 1

Verified Statement of Jon Delli Priscoli

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF JON DELLI PRISCOLI

1. I am Jon Delli Priscoli, sole owner and Chief Executive Officer of Grafton and Upton Railroad Company (“GURR”) since 2008. I have personal knowledge of the facts set forth in this verified statement and in the Petition of Grafton and Upton Railroad Company for Declaratory Order.
2. GURR’s lawsuit filed in the United States District Court for the District of Massachusetts was supported by two affidavits filed by Michael Milanoski, who was President of GURR from May 2017 to February 2023, which are provided as Exhibits 3 and 4 to the Petition for Declaratory Order.
3. GURR is a short-line rail carrier that was incorporated in Massachusetts in 1873 and has been in continuous operation since that time. GURR owns and operates a 16.5-mile rail line that runs between North Grafton, through Upton and Hopedale to Milford, Massachusetts, a portion of which bifurcates and runs through the Property located at 364 West Street in Hopedale. In addition, GURR leases and operates an 8.4-mile line that is owned by CSX between the terminus of the GURR owned line in Franklin and Milford, Massachusetts.
4. GURR is part of the national rail system that is critical to Massachusetts’ economy and the efficient movement of goods by rail throughout North America. GURR’s location is ideal for transloading products that move into and out of the greater Boston area. Transloading offers customers who are not located on rail lines the opportunity to benefit from the environmental and financial savings that transloading offers.
5. 95% of GURR’s business is transloading materials for its customers. Since my ownership in 2008, GURR’s year-over-year growth has averaged between ten and fifteen percent per year, and 2022 (and the first quarter of 2023) is no exception, as new customers and increased demand with new products will exceed previous years’ growth

based on new customer agreements as well as GURR's full logistics solutions, including transloading. In 2008, GURR handled approximately 40 rail carloads, but by 2020 the number of cars was approximately 3000.

6. GURR has invested millions of dollars in recent years to meet the current and anticipated future business where GURR competes head-to-head with long-haul trucking. For example, GURR has invested a substantial amount of capital to upgrade its line and yard facilities to serve a substantial demand for transloading services for commodities that are shipped to Eastern Massachusetts by rail and transloaded into trucks for final delivery.
7. GURR anticipates continued steady growth in its business, and this projection is consistent with the expectations and estimates of Massachusetts. A 2018 State Rail Plan produced by the Massachusetts Department of Transportation projected that by 2040 the rail system in Massachusetts will need to accommodate approximately 19 million more tons of originating freight per year, 25 million more tons of terminating freight and 34 million more tons of rail freight traffic moving within Massachusetts.¹
8. Despite GURR's investment to date, the additional traffic seeking a rail solution today plus the anticipated future growth of traffic on GURR's lines demand additional rail transportation facilities to support and handle efficiently such rail traffic and rail transloading activities. In addition to the development of new facilities for the core GURR business of transferring commodities from railcars to trucks, there is a corresponding need for additional track space to temporarily store rail cars, switch cars moving to and from the trans-loading facilities, and to perform other routine rail transportation activities, such as maintaining locomotives, railcars and maintenance of way equipment.
9. The use of the property by GURR for rail purposes at 364 West Street in the Town of Hopedale is absolutely essential to handle these increasing rail volumes.

GURR's Acquisition and Site Control of the Subject Property – 364 West Street, Hopedale, MA

10. In October 2020, GURR acquired full and complete ownership of the 155-acre+- parcel at 364 West Street. GURR also separately acquired the 20 acre+- parcel across the street at 363 West Street on the same day. In April 2021, GURR acquired approximately 23 acres of land abutting the 364 West Street parcel. Two years prior, in March 2019, GURR had acquired another parcel of approximately 17 acres on Carpenter Road, which also abutted the 364 West Street parcel.
11. As a result of these acquisition, GURR has over 198 acres+- (including the GURR right-of-way land of 4.5 acres, which had been under railroad control since 1873), of

¹ https://www.mass.gov/files/documents/2018/01/26/2018PubComm_1.pdf

contiguous Industrial Use zoned land in the most northern part of Hopedale to meet its current rail transportation operations and expected future growth in business. In June 2021, a Plan of Land was recorded at the Worcester District Registry of Deed Book 957 and Plan 48 showing the assemblage of parcels. A true and accurate copy of this Plan is attached hereto as Exhibit A.

12. A true and accurate copy of the Town of Hopedale's Zoning Map is attached hereto as Exhibit B, which shows the location of the Industrial Zone in the northern-most part of Hopedale. It is my understanding that the 198 acres +- that now comprise the 364 West Street property have always been zoned industrial since Hopedale first adopted zoning in or around 1973.
13. The entire 198 acres is referred herein to as the 364 West Street property. Moreover, the site work related to the construction of its transload and rail transportation facility on GURR's property has been underway.

The Town of Hopedale Commences Hostile Eminent Domain Taking Effort to Prevent GURR from Constructing and Operating Transloading Facility at 364 West Street

14. After the Town attempted to renege on a Settlement Agreement with GURR, which is discussed in Mr. Milanoski's affidavit of July 18, 2022, at paragraph 34-42, the Town voted at a July 2022 Special Town Meeting to authorize the Selectboard to take 130.18 acres of the 364 West Street property that is controlled by GURR. The Selectboard was scheduled to vote on July 19 to take the 130.18 acres at 364 West Street. The Town and its Selectboard was enjoined from recording any Order of Taking after a temporary restraining order was entered against it by Chief Judge Dennis Saylor of the United States District Court for the District of Massachusetts ("TRO Order"). *See Grafton & Upton Railroad Company et al v. Town of Hopedale et al*, Docket No. 22-cv-40080MRG. The TRO remained in effect until April 3, 2023 when it was converted to a Preliminary Injunction.
15. If permitted, the Town's taking by eminent domain of GURR's 364 West Street property would have a significant adverse effect on GURR's current and future rail transportation operations. As described herein, GURR needs the acreage at 364 West Street to meet the needs and handle the business of current customers as well as to handle the expected continuing growth in business.
16. The Town had been advised by its legal counsel as early as 2013 that "local control over railroad operations is significantly limited by federal law, which 'preempts' both state and municipal regulation of rail transportation." Indeed, in 2018, the Town agreed that the construction of silos and scales for rail transportation purposes at GURR's Hopedale

Yard was preempted. Counsel's 2013 opinion and the Town's 2018 letter are attached as Exhibit 2 to Mr. Milanoski's affidavit of July 28, 2022.

The Conservation Commission Issues Preclearance Enforcement Order to Prevent GURR from Constructing and Operating the Planned Transloading Facility.

17. In a parallel effort, on July 14, 2022, the Hopedale Conservation Commission issued an Enforcement Order alleging that GURR undertook the clearing and grading work at the 364 West Street property without a permit, which was, according to the Conservation Commission, required by the Massachusetts Wetlands Protection Act.² GURR received no prior notice or warning from the Commission, and there was no opportunity for any discussions with or information from the Commission prior to the issuance of the Order. The Order demanded that the work cease-and-desist and that the property be restored to its previous condition. A true and correct copy of the Order is attached as Exhibit C. The Commission was subject to the TRO Order, and the April 3, 2023, Preliminary Injunction prevented any action to enforce the Commission's Enforcement Order.

The Proposed Rail Transportation Facility Has Been Conceptually Designed

18. The entirety of GURR's 364 West Street property and all of the track and other facilities will be operated by GURR and used for transloading and other rail transportation purposes.
19. GURR has secured private financing to undertake the initial site improvements for the use of the property for rail purposes and has pending private financing for the full development of roads, rail and other infrastructure for this rail development. This additional financing could be in jeopardy as result of the delay caused by the Town's attempt to take the 364 West Street property by eminent domain and the actions of the Hopedale Conservation Commission.
20. The ~130 acres of the 364 West Street property that the Town of Hopedale seeks to take by eminent domain is a substantial and critical part of the 198 acres needed for rail transportation purposes at 364 West Street. The current site plan, which has been shared and discussed with the Town in various versions as it has been developed over the last several years, and a map showing the relationship of the ~130 acres to the entire site is shown in paragraph 28 of Mr. Milanoski's July 28, 2022 affidavit, and

² The Enforcement Order alleged violations were observed on November 4, 2020, September 15-16, 2021, and May 19, 2022. Yet the Conservation Committee waited until July 14, 2022, to prepare and serve the Enforcement Order and characterized it as a "situation regarding immediate action." July 14, 2022, happens to be the same day that the Town's Selectboard noticed a meeting for July 19, 2022, at which it intended to vote to take GURR's property by eminent domain. It seems obvious that the Conservation Commission served the Enforcement Order in an effort to open a new line of attack on GURR in coordination with the Hopedale Selectboard.

demonstrates the following for the rail development at the 364 West Street property:

- Rail trackage, including switching, storage, repair, and yard tracks to relieve congestion and facilitate service.
- More than 1,500,000 square feet of space for transloading and temporary storage.
- Railroad trucking terminal located next to silos that are piped from rail siding to be transloaded into trucks.
- Railroad support buildings for rail related contractors that work on GURR rail equipment and infrastructure including specialized trades like Positive Train Control installation. <https://railroads.dot.gov/train-control/ptc/positive-train-control-ptc>).
- Areas for temporary railcar storage, switching, building trains, and railcar repair.
- Stormwater detention areas, well locations (no Town water exists to the property) and buffer zones, storage tanks, and sewer treatment/wastewater treatment plant recharge area, and ample land to build stormwater run-off protection.
- Noise buffer zone for abutting residential property.

21. GURR has already spent over a million dollars on site development including survey, engineering, other professional services, water exploration, environmental testing, tree harvesting and stormwater plans and site work as well as other related costs including financing. GURR has removed trees on ~102 acres and performed significant grading work to create an access road and to clear space for the imminent construction of sidetracks into the property for the initial transloading and maintenance operations. GURR also had rail ties delivered to the site. GURR has performed site work and water exploration activities, including water testing for quantity and quality to support the transportation services and facilities in coordination with various governmental entities, including the United States Army Corps of Engineers, and as a courtesy, direct collaboration meetings with Massachusetts Department of Environmental Protection. Photographs of the site that show the clearing work as well as the rail ties that have already been delivered to the site are available in Mr. Milanoski's affidavit of July 28, 2022, at paragraph 25 and in Exhibit D.

22. GURR had expected to be able to open its at 364 West Street transloading facility by the Spring or Summer of 2023. GURR has missed the 2022 construction season. Absent further delay, GURR expects to be able to open its 364 West Street facility by next Spring or Summer (2024).

23. GURR has had multiple inquiries from customers who are waiting for GURR to be able to meet their additional needs for new transloading facilities. These customers represent needs for transloading services that will present a potential of over 1,000 new rail cars to GURR annually in a wide range of commodities.. Exhibit E is an example letter from a customer expressing interest in rail transportation uses of the property.

GURR Needs the Entirety of the ~198 Acres That Comprise 364 West Street for Rail Transportation Purposes

24. The 364 West Street property is a unique, large assemblage of several parcels of undeveloped, industrially zoned land bisected by an operating railroad right of way. The size of the assemblage provides the opportunity for transloading operations in which GURR would unload products from railcars for distribution by truck to destinations in the Boston area, thereby supplementing and making more efficient GURR's current transloading business and anticipated future business.
25. GURR needs the entire ~198 acres (including the ~130 acres the town seeks to take by state eminent domain law) that comprise the 364 West Street property to accommodate the intended rail transportation uses discussed herein. The entirety of 364 West Street property rail transportation facility is currently planned to be used for transloading, temporary storage, services related to transloading or temporary storage, access to the site, and whatever additional rail activities are necessary or required in order to support the rail business that currently exists and is anticipated in the future. The site also accommodates a well protection zone, a wastewater treatment plant recharge area, ample land to protect and build stormwater runoff protection and a noise buffer zone.
26. If the Town is allowed to use state eminent domain law to take the approximately 130 acres, GURR will lose all right, title, control and interest in that acreage of industrially zoned real estate uniquely situated on an operating railroad right of way. A taking also would render GURR's remaining property landlocked and undevelopable. A taking would suspend GURR's ongoing rail transportation development indefinitely, and would cause GURR to lose incalculable revenues, customer relationships, and financing. If the Conservation Commission is not prohibited by reason of preemption from trying to use preclearance and permitting regulations to frustrate the use of the property for rail transportation, the result for GURR would be the same--inability to build and use the facility, and unquantifiable harm in the form of a loss of revenues, customer relationships and financing.

GURR Has Been a Good Citizen and Taxpayer in and to the Town of Hopedale

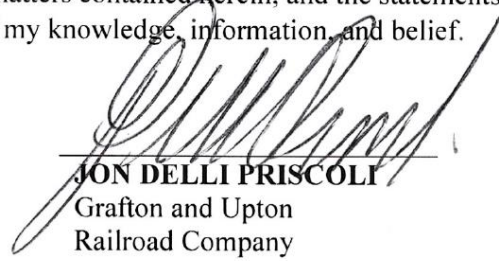
27. On information and belief, GURR is the fourth largest taxpayer in the Town of Hopedale.
28. GURR has worked diligently and in good faith with the Town on projects over the years. GURR has also been transparent and communicative with the Town specifically about the rail transportation uses of the 364 West Street property. GURR representatives have personally met with the Town Administrator and provided plans to the Town and to the Town Water and Sewer Commission. For example, in public comments on July 13, 2020, the Chairman of the Board of Selectmen noted "the collaborative working relationship of the railroad and the leaders of the Town of Hopedale." He noted that he and the Town Administrator had met with GURR about the rail transportation uses of the property. He further noted that GURR "has met with a member or staff of the Conservation Commission, Water and Sewer Department, Park Commission, Board of Health, and

Board of Assessors.” True and correct copies of the Chair’s statement is attached as Exhibit F; *see also*, https://townhallstreams.com/stream.php?location_id=56&id=30890

29. Moreover, GURR is acting as a good citizen and following federal environmental regulations with respect to the rail transportation development. In fact, GURR prepared a 232-page Stormwater Pollution Prevention Plan (“SWPPP”) as it relates to construction activities at 364 West Street.³ The SWPPP was filed with the Environmental Protection Agency in 2021 and courtesy copies of the SWPPP were provided to the Army Corp. of Engineers, the Hopedale Town Administrator, and the Hopedale Water and Sewer Manager. The entire SWPPP process and our development plans and actions have been completely transparent.
30. In addition to serving the public interest by providing efficient rail transportation, the implementation of the plans for the property are anticipated to further promote the public interest by bringing hundreds of new jobs and millions of dollars in tax revenue to Hopedale.

³ The SWPPP requires maintaining stormwater during and after the work is completed. All work being performed at the site is being performed in accordance with the SWPPP including bridge improvements at the site.

I, Jon Delli Priscoli, being duly sworn, state that I am the sole owner of the Grafton and Upton Railroad Company, and that I am duly authorized to execute, verify and file this Verified Statement. I have knowledge of the matters contained herein, and the statements made herein are true and correct to the best of my knowledge, information, and belief.



JON DELLI PRISCOLI
Grafton and Upton
Railroad Company

Dated: April 13, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF JON DELLI PRISCOLI
EXHIBIT A**

Plan of Land was recorded at the Worcester District Registry of Deed Book 957

PLAN OF LAND GRAFTON & UPTON RAILROAD

364 WEST STREET
(WORCESTER COUNTY)
HOPEDALE, MASSACHUSETTS

WORCESTER DISTRICT REGISTRY
OF DEEDS & MAPS
PLAN BOOK 758, PLAN 48
Recording 6/17/21
10.18 m 11
Sheet 1 of 2
Fee \$ 210.00
Attested: [Signature] Register

REGISTRY USE ONLY

OWNER
ONE HUNDRED FORTY REALTY TRUST
42 WESTBORO ROAD
NORTH GRAFTON, MA 01536

DEED REFERENCES
DEED BK 65363 PAGE 85
(TRACTS 1 & 2 & 18 AC. TRACT)

DEED BK 7322 PAGE 181
(TRACTS 3, 4, & 5)

LIBRARY OF CONGRESS PLAN REFERENCES

1904 PLAN OF LAND BY THE PARK
COMMISSIONERS OF HOPEDALE
1870 TOWN MAP OF MILFORD
BY F.W. BEERS & CO.
1857 MAP OF WORCESTER COUNTY
BY H.F. WALLING
1851 TOWN MAP OF MILFORD
BY O. HARRNESS
1851 TOWN MAP OF UPTON
BY H.F. WALLING
1830 TOWN MAP OF MENDON
BY NEWELL NELSON

ASSESSORS REFERENCES

ASSESS. PARCEL ID: 2-5-0
(TRACTS 1, 2, 3, 4, & 5)
ASSESS. PARCEL ID: 3-1-0
(18 AC. TRACT)

WORCESTER COUNTY PLAN REFERENCES

PB 826 PL 85 PB 352 PL 81
PB 817 PL 4 PB 338 PL 92
PB 788 PL 85 PB 226 PL 113
PB 782 PL 3 PB 193 PL 63
PB 674 PL 52 PB 189 PL 46
PB 480 PL 59 PB 13 PL 73

HOPEDALE TOWN RECORD PLAN REFERENCES

1660 HOPEDALE ASSESSOR'S MAP
1849 HOPEDALE TOWN BOUNDARY
PLAN BY R. SMITH-HURST
1915 HOPEDALE ASSESSOR'S MAP

RAILROAD PLAN REFERENCES

1909 GRAFTON & UPTON
RAILROAD PLANS
BY R.E. ALLEN & SON

PARCEL LINE TABLE

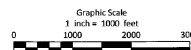
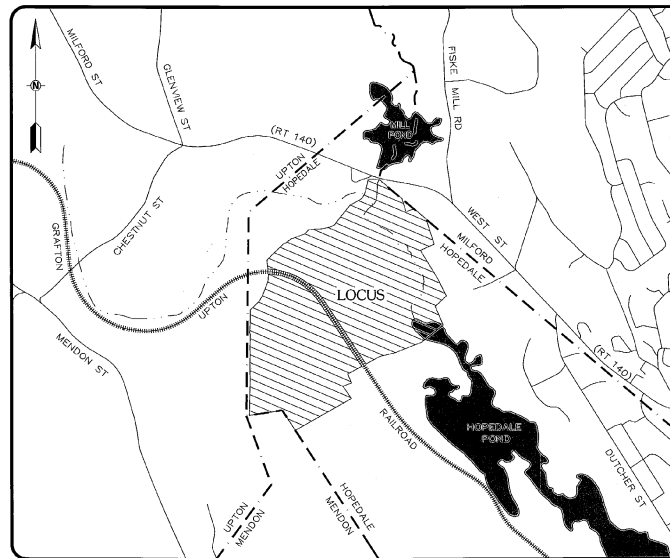
Line #	Length	Direction
L1	611.32	N01° 10' 56"E
L2	190.60	N00° 43' 30"W
L3	86.96	N00° 48' 49"W
L4	121.33	N01° 28' 22"E
L5	156.71	N00° 23' 50"W
L6	207.24	N01° 18' 13"E
L7	73.76	N04° 41' 04"E
L8	137.72	N02° 40' 48"E
L9	180.84	N00° 10' 59"W
L10	213.37	N45° 50' 41"E
L11	104.02	N32° 25' 50"E
L12	42.06	N24° 10' 05"E
L13	39.26	N18° 28' 45"E
L14	93.41	N21° 30' 38"E
L15	75.06	N21° 39' 14"E
L16	14.84	N05° 49' 09"E
L17	93.19	N01° 27' 44"E
L18	83.13	N05° 10' 38"W
L19	146.17	N05° 57' 57"W
L20	47.28	N40° 01' 39"E

PARCEL LINE TABLE

Line #	Length	Direction
L21	88.54	N44° 34' 16"E
L22	257.96	N46° 12' 28"E
L23	36.94	N72° 25' 40"E
L24	113.81	N52° 37' 15"E
L25	27.23	N75° 50' 35"E
L26	225.22	N69° 13' 17"E
L27	75.37	N44° 01' 10"E
L28	34.27	N60° 51' 44"E
L29	94.33	N86° 01' 15"E
L30	122.29	N86° 41' 04"E
L31	110.05	N77° 13' 17"E
L32	42.06	N74° 14' 56"E
L33	68.44	N81° 45' 08"E
L34	66.77	N34° 20' 25"E
L35	85.76	N39° 16' 01"E
L36	270.37	N39° 00' 48"E
L37	102.46	N81° 20' 45"E
L38	55.91	N53° 44' 19"E
L39	73.35	N31° 21' 50"E
L40	85.02	N16° 41' 40"E

PARCEL LINE TABLE

Line #	Length	Direction
L41	115.28	N13° 54' 01"E
L42	58.03	N10° 38' 22"E
L43	38.36	S78° 12' 06"E
L44	24.17	N49° 50' 37"W
L45	271.20	S78° 53' 24"E
L46	236.25	S79° 47' 16"E
L47	286.02	S73° 39' 46"E
L48	66.00	N45° 35' 09"E
L49	232.77	S18° 57' 24"E
L50	109.93	N72° 13' 36"E
L51	41.66	N77° 14' 36"E
L52	29.80	S49° 50' 37"E
L53	34.75	S49° 50' 37"E
L54	52.24	S19° 21' 23"E
L55	209.16	S17° 27' 17"E
L56	187.45	S18° 07' 53"E
L57	14.70	S45° 45' 28"W
L58	82.80	S61° 19' 22"W
L59	165.00	S23° 13' 37"E
L60	157.42	S70° 28' 28"W



PLAN NOTES

- THE PROPERTY LINES AND EXISTING CONDITIONS SHOWN HEREON ARE THE RESULT OF AN ON-THE-GROUND INSTRUMENT SURVEY PERFORMED BY LIGHTHOUSE LAND SURVEYING LLC BETWEEN MARCH AND APRIL 2021.
- SURVEY TRAVERSE POINTS 2, 19, AND 50 WERE OBSERVED WITH A CARLSON BRX+ GPS RECEIVER. STATIC OBSERVATIONS WERE PERFORMED ON MARCH 22, 2021. POSITIONS WERE OBTAINED FROM NGS OPUS SOLUTIONS.
- HORIZONTAL DATUM:
MASSACHUSETTS STATE PLANE - MAINLAND ZONE NAD83 (2011)
EPOCH 2010.00 - US FEET
- VERTICAL DATUM:
NORTH AMERICAN VERTICAL DATUM OF 1988 (GEOID 128) - US FEET
- ALL ON-THE-GROUND OBSERVATIONS WERE PERFORMED USING LEICA TS12 (3") ROBOTIC TOTAL STATIONS.
- THE LEGAL STATUS OF THE STREETS AND/OR WAYS SHOWN HEREON, WHETHER THEY ARE PUBLIC OR PRIVATE, WAS NOT MADE PART OF THIS SURVEY.
- CARPENTER ROAD IS AN ANCIENT WAY OF VARIABLE WIDTH RANGING FROM 1 ROD TO 2 RODS WIDE AND BOUNDED BY INTERMITTENT STONEWALLS ON BOTH SIDES. THE WAY IS DESCRIBED IN DEEDS DATING BACK TO 1844 (SEE DB 387 PG 630) AND ILLUSTRATED ON MAPS AND PLANS DATED BACK TO 1830 (SEE TOWN OF HOPEDALE & LIBRARY OF CONGRESS PLAN REFERENCES).
- OWNERS NAMES SHOWN HEREON ARE BASED UPON ASSESSORS INFORMATION OBTAINED AS OF THE DATE OF THE SURVEY. IT DOES NOT REPRESENT A CERTIFICATION OF TITLE NOR DOES IT GUARANTEE THE OWNERSHIP OF LOCUS OR ABUTTING PROPERTIES.
- SEVERAL FOOTPATHS CROSS THE PROPERTY LINE AT VARIOUS LOCATIONS AS ILLUSTRATED HEREIN. NO EVIDENCE WAS FOUND IN THE PUBLIC RECORD OF ANY RIGHTS OF WAY.

Curve #	Length	Radius	Delta	Chord Direction	Chord Length
C1	157.03	389.39	23° 08' 22"	S89° 45' 17"E	155.971
C2	83.98	389.39	12° 21' 28"	S72° 30' 49"W	83.816
C3	241.01	389.39	30° 27' 43"	N84° 04' 00"E	237.183
C4	11.85	2033.00	0° 20' 03"	S75° 03' 08"E	11.854
C5	130.24	2032.97	3° 40' 15"	S77° 03' 17"E	130.222
C6	391.78	1052.00	21° 20' 16"	S54° 24' 04"E	385.520

I CERTIFY TO THE EXISTENCE OF THE FOLLOWING:

THIS SURVEY AND PLAN WERE PREPARED IN ACCORDANCE WITH THE PROCEDURAL AND TECHNICAL STANDARDS FOR THE PRACTICE OF LAND SURVEYING IN THE COMMONWEALTH OF MASSACHUSETTS, TITLE 250 CMR 6.00.

THE PROPERTY LINES SHOWN ON THIS PLAN ARE THE LINES DIVIDING EXISTING OWNERSHIPS, AND THAT THE LINES OF STREETS AND WAYS ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED, AND THAT NO NEW LINES FOR DIVISION OF EXISTING OWNERSHIP OR FOR NEW WAYS ARE SHOWN.

THIS PLAN HAS BEEN PREPARED IN ACCORDANCE WITH THE RULES AND REGULATIONS OF THE REGISTER OF DEEDS.



Richard W. Reid Jr.
PROFESSIONAL LAND SURVEYOR

JUNE 15, 2021
DATE

REVISIONS:

REV # DATE DESCRIPTION

PREPARED BY:

Engineering Design Consultants, Inc.
32 Turnpike Road
Southborough, Massachusetts
(508) 480-0225

PROJECT:

GRAFTON & UPTON RAILROAD
364 WEST STREET
(WORCESTER COUNTY)
HOPEDALE, MASSACHUSETTS

TITLE:

EXISTING BOUNDARY
PLAN OF LAND
GRAFTON & UPTON RAILROAD COMPANY
42 WESTBORO ROAD
NORTH GRAFTON, MASSACHUSETTS 01536

DATE:

JUNE 15, 2021

1 OF 2

EDC PROJECT NUMBER
3659

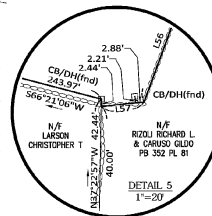
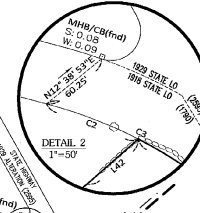
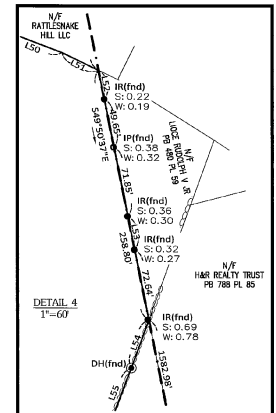
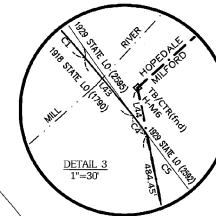
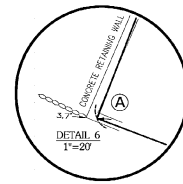
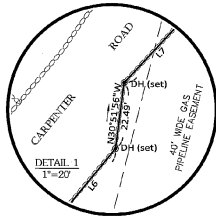
DRAWN BY: ZJB
CHECKED BY: PSB
APPROVED BY: RWS

LEGEND

CE/DH(fnd) CONCRETE BOUND W/ DRILL HOLE FOUND
 CE/RI(fnd) CONCRETE BOUND W/ IRON ROD FOUND
 CE/NL(fnd) CONCRETE BOUND W/ NAIL FOUND
 DH(fnd) DRILL HOLE FOUND
 DH(set) DRILL HOLE SET
 PI(fnd) IRON PIPE FOUND
 RI(fnd) IRON ROD FOUND
 MH(fnd) MASS HIGHWAY BOUND FOUND
 SB/DH(fnd) STONE BOUND W/ DRILL HOLE FOUND
 TB/CTR(fnd) TOWN BOUND CENTER FOUND
 TB/DH(fnd) TOWN BOUND W/ DRILL HOLE FOUND

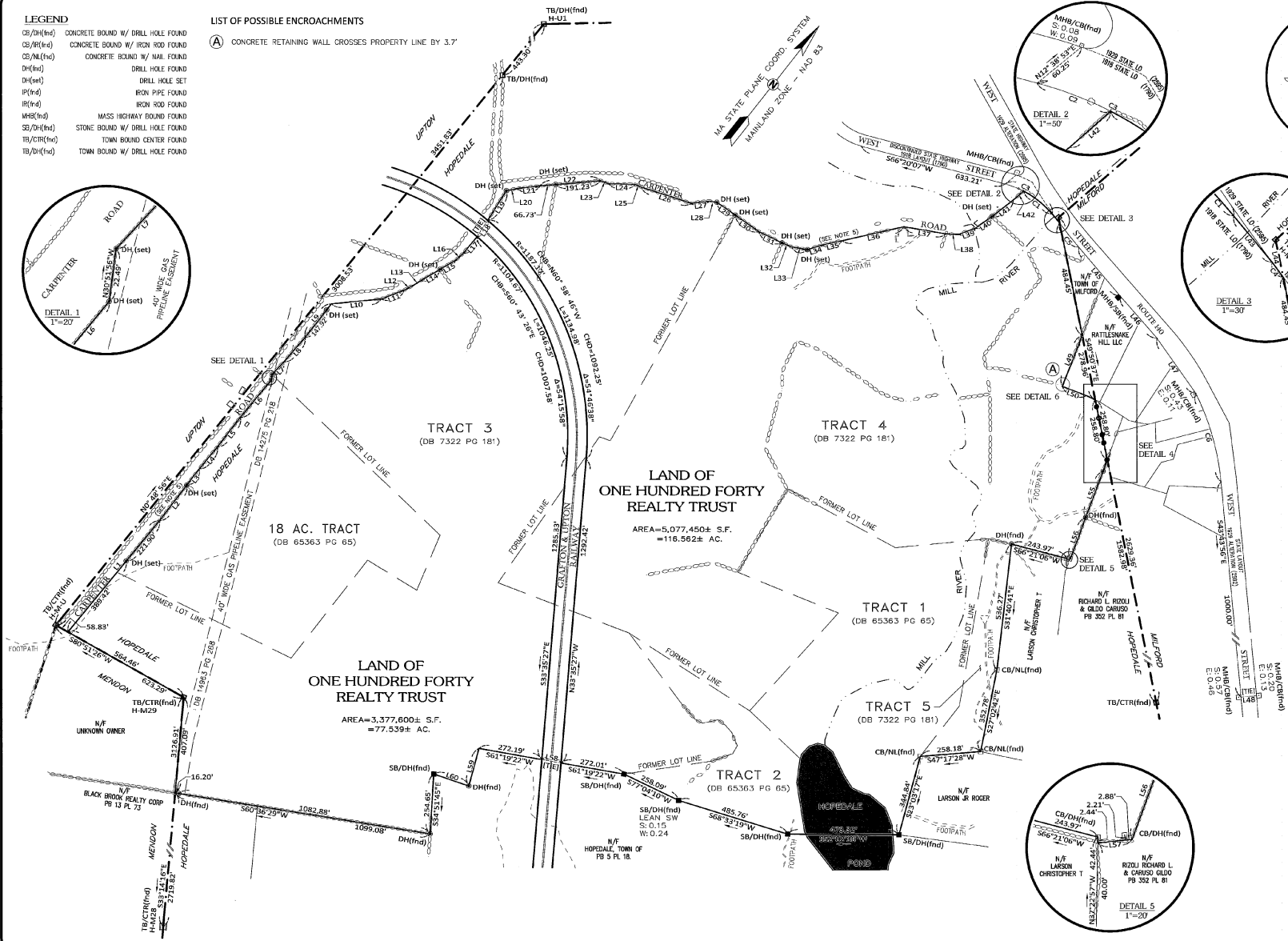
LIST OF POSSIBLE ENCROACHMENTS

(A) CONCRETE RETAINING WALL CROSSES PROPERTY LINE BY 3.7'



PLAN BOOK 957 PLAN 48
SHEET 2 OF 2

REGISTRY USE ONLY



I CERTIFY TO THE EXISTENCE OF THE FOLLOWING:
THIS SURVEY AND PLAN WERE PREPARED IN ACCORDANCE WITH THE PROCEDURAL AND TECHNICAL STANDARDS FOR THE PRACTICE OF LAND SURVEYING IN THE COMMONWEALTH OF MASSACHUSETTS, TITLE 260 CMR 6.00.

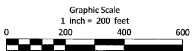
THE PROPERTY LINES SHOWN ON THIS PLAN ARE THE LINES DIVIDING EXISTING OWNERSHIPS, AND THAT THE LINES OF STREETS AND WAYS ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED, AND THAT NO NEW LINES FOR DIVISION OF EXISTING OWNERSHIP OR FOR NEW WAYS ARE SHOWN. THIS PLAN HAS BEEN PREPARED IN ACCORDANCE WITH THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS.



Richard W. Gail, Jr.
PROFESSIONAL LAND SURVEYOR

JUNE 15, 2021
DATE

REVISIONS	DATE	DESCRIPTION
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		



PREPARED BY:
Engineering Design Consultants, Inc.
32 Turnpike Road
Southborough, Massachusetts
(508) 480-0225

PROJECT:
GRAFTON & UPTON RAILROAD
364 WEST STREET
(WORCESTER COUNTY)
HOPEDALE, MASSACHUSETTS

TITLE:
EXISTING BOUNDARY PLAN OF LAND
PREPARED FOR:
Grafton & Upton Railroad Company
42 Westboro Road
North Grafton, Massachusetts 01536

DATE:
JUNE 15, 2021
2 OF 2
E.D.C. PROJECT NUMBER
3659

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

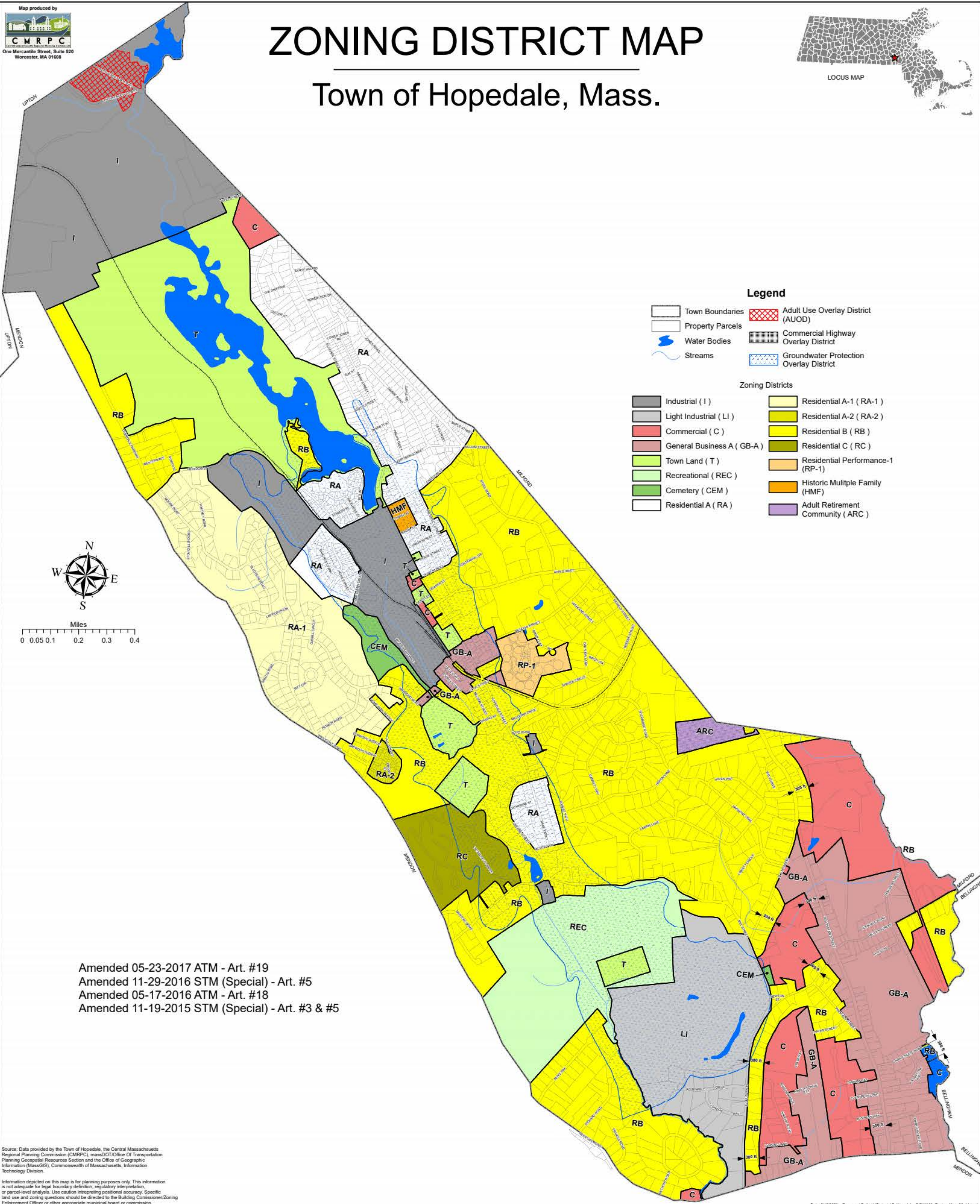
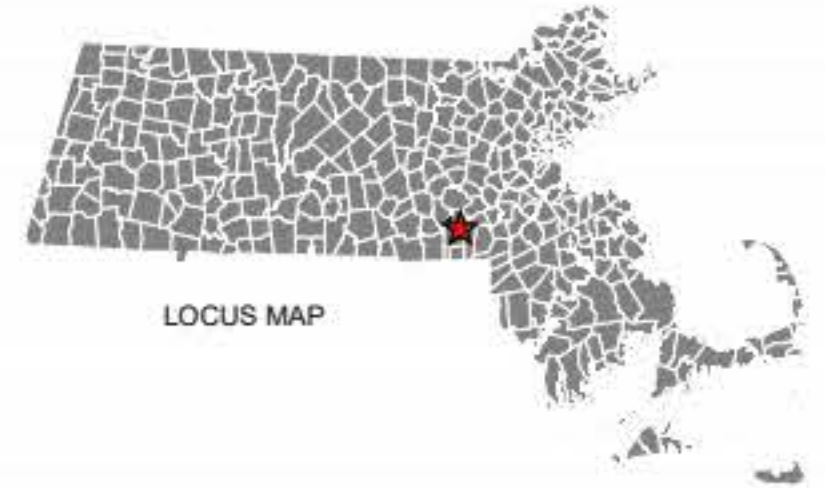
**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF JON DELLI PRISCOLI
EXHIBIT B**

Town of Hopedale's Zoning Map

ZONING DISTRICT MAP

Town of Hopedale, Mass.



Legend

- Town Boundaries
- Property Parcels
- Water Bodies
- Streams
- Adult Use Overlay District (AUOD)
- Commercial Highway Overlay District
- Groundwater Protection Overlay District

Zoning Districts

- Industrial (I)
- Light Industrial (LI)
- Commercial (C)
- General Business A (GB-A)
- Town Land (T)
- Recreational (REC)
- Cemetery (CEM)
- Residential A (RA)
- Residential A-1 (RA-1)
- Residential A-2 (RA-2)
- Residential B (RB)
- Residential C (RC)
- Residential Performance-1 (RP-1)
- Historic Multiple Family (HMF)
- Adult Retirement Community (ARC)



Miles
0 0.05 0.1 0.2 0.3 0.4

Amended 05-23-2017 ATM - Art. #19
Amended 11-29-2016 STM (Special) - Art. #5
Amended 05-17-2016 ATM - Art. #18
Amended 11-19-2015 STM (Special) - Art. #3 & #5

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF JON DELLI PRISCOLI
EXHIBIT C**

July 14, 2022, the Hopedale Conservation Commission issued an Enforcement Order



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 9 – Enforcement Order
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: _____

A. Violation Information

Important:
When filling out
forms on the
computer, use
only the tab
key to move
your cursor -
do not use the
return key.



This Enforcement Order is issued by:

Hopedale
Conservation Commission (Issuing Authority)

7/14/2022
Date

To:

One Hundred Forty Realty Trust, Jon Delli Priscoli and Michael Milanoski, Trustees
Name of Violator
42 Westborough Road, North Grafton, Massachusetts
Address

1. Location of Violation:

One Hundred Forty Realty Trust
Property Owner (if different)
364 West Street
Street Address
Hopedale
City/Town
2
Assessors Map/Plat Number

01747
Zip Code
5
Parcel/Lot Number

2. Extent and Type of Activity (if more space is required, please attach a separate sheet):

The following activities done without permit or prior notification to the Commission citing exemptions, or a valid Determination of Applicability confirming or denying the exemption of such work:

1. Removal of vegetation within the following jurisdictional resource areas: Riverfront Area and Bank associated with the Mill River or its tributaries; Bufferzone associated with Vegetated Wetlands bordering on the Mill River or its tributaries.

2. Work within areas understood to be Bordering Vegetated Wetlands or Buffer Zone of Bordering Vegetated Wetlands which were not delineated prior to work.

3. Fill placed within area known to be wetland which was delineated after the fact, and for which delineations were not confirmed by either the Hopedale Conservation Commission nor MassDEP, and for



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 9 – Enforcement Order
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: _____

which no permit was issued, or notice of exempt work received. The wetland of which borders a tributary to the Mill River, and of which is located shortly past the location of the bridge, where material was brought in and places to allow vehicle traffic.

4. Construction of a Bridge crossing a tributary to the Mill River, affecting Bank, Land Under Water and Waterbodies, and Bordering Vegetated Wetlands. The bridge which originally consisted of a foot bridge of three small planks and one railing, which was changed by the violator to consist of rail ties, then three large boards capable of supporting vehicle traffic, and reported on July 13th, 2022 to the Conservation Commission to be worked on again to create a more permanent structure, which was observed to include work affecting Bank of a tributary to the Mill River.

5. Excavation activities in within areas known to Bordering Vegetated Wetlands or Buffer Zone of Bordering Vegetated Wetlands associated with a tributary to the Mill River, and in the proximity of the bridge.

All work described above was observed during site visits on abutter properties on the dates of November 4, 2020, September 15, 2021; and on the property in question on September 16, 2021 when invited on site by the violator in accompaniment with representatives of MassDEP and the Hopedale Town Administrator; and on May 19th, 2022 as viewed from the property entrance while flagging down an employee for sit access, which was not granted, while in the accompaniment of a representative from MassDEP and representative of the EPA; and observed by photos and videos submitted to the Conservation Commission and/or the Town of Hopedale both by anonymous reports and residents, taken from the road or abutting properties; and by official satellite imagery dated 2021; and by aerial imagery of various dates and times as available through the Town's contract for a GIS system known as Lens provided by Upstream Tech, which provides commercially available aerial and satellite imagery for multiple times in a given year; and by aerial imagery and videos submitted by a resident taken by drone.

B. Findings

The Issuing Authority has determined that the activity described above is in a resource area and/or buffer zone and is in violation of the Wetlands Protection Act (M.G.L. c. 131, § 40) and its Regulations (310 CMR 10.00), because:

- ☒ the activity has been/is being conducted in an area subject to protection under c. 131, § 40 or the buffer zone without approval from the issuing authority (i.e., a valid Order of Conditions or Negative Determination).



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 9 – Enforcement Order
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: _____

B. Findings (cont.)

☐ the activity has been/is being conducted in an area subject to protection under c. 131, § 40 or the buffer zone in violation of an issuing authority approval (i.e., valid Order of Conditions or Negative Determination of Applicability) issued to:

Name _____

Dated _____

File Number _____

Condition number(s) _____

☐ The Order of Conditions expired on (date):

Date _____

☐ The activity violates provisions of the Certificate of Compliance.

☐ The activity is outside the areas subject to protection under MGL c.131 s.40 and the buffer zone, but has altered an area subject to MGL c.131 s.40.

☐ Other (specify): _____

C. Order

The issuing authority hereby orders the following (check all that apply):

- ☒ The property owner, his agents, permittees, and all others shall immediately cease and desist from any activity affecting the Buffer Zone and/or resource areas.
- ☒ Resource area alterations resulting from said activity shall be corrected and the resource areas returned to their original condition.
- ☒ A restoration plan shall be filed with the issuing authority on or before October 3, 2022

Date

for the following:

Restoration of Bank, Riverfront Area, and Bordering Vegetated Wetland altered by the activities listed in this Order.

The restoration shall be completed in accordance with the conditions and timetable established by the issuing authority.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 9 – Enforcement Order
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: _____

C. Order (cont.)

- ☐ Complete the attached Notice of Intent (NOI). The NOI shall be filed with the Issuing Authority on or before:

Date _____

for the following:

No further work shall be performed until a public hearing has been held and an Order of Conditions has been issued to regulate said work.

- ☒ The property owner shall take the following action (e.g., erosion/sedimentation controls) to prevent further violations of the Act:

Attend a Conservation Commission meeting to be held on July 19th at 6:00pm, during which this Order shall be discussed and voted on for ratification.

Failure to comply with this Order may constitute grounds for additional legal action. Massachusetts General Laws Chapter 131, Section 40 provides: "Whoever violates any provision of this section (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both, such fine and imprisonment; or (b) shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation". Each day or portion thereof of continuing violation shall constitute a separate offense.

D. Appeals/Signatures

An Enforcement Order issued by a Conservation Commission cannot be appealed to the Department of Environmental Protection, but may be filed in Superior Court.

Questions regarding this Enforcement Order should be directed to:

Becca Solomon

Name

conservation@hopedale-ma.gov

Phone Number

Thursdays 5:00pm-8:00pm, Fridays 1:00pm-4:00pm

Hours/Days Available

Issued by:

Hopedale

Conservation Commission

Conservation Commission signatures required on following page.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 9 – Enforcement Order
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: _____

D. Appeals/Signatures (cont.)

In a situation regarding immediate action, an Enforcement Order may be signed by a single member or agent of the Commission and ratified by majority of the members at the next scheduled meeting of the Commission.

Signatures:


Signature


Printed Name

Signature

Printed Name

Signature

Printed Name

Signature

Printed Name

Signature

Printed Name

Signature

Printed Name

Signature

Printed Name

Signature

Printed Name

certified mail # 7021 1970 0000 3329 4475
Signature of delivery person or certified mail number

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF JON DELLI PRISCOLI
EXHIBIT D**

364 West Street Photos, Including Delivered Rail Ties









**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF JON DELLI PRISCOLI
EXHIBIT E**

All State Materials Support Letter



**All States
Materials Group®**

PO Box 91
Sunderland, MA 01375
(413) 665-7021

September 13, 2021

John DeWaele, General Manager
Grafton and Upton Railroad
42 Westboro Road
North Grafton, MA 01536

RE: Hopedale Rail Location

Dear John,

Thank you for taking the time to show us your new development in Hopedale and discuss plans for the location. Based on our meeting, we see potential in the site as an option for staging stone that is currently manufactured at our quarry in Deerfield, MA. Presently we purchase approximately 30,000 tons annually (an increase of about 10% from 2019) from vendors for use on construction projects in the area. We have been looking at different options to use our own stone in that area of the state, but to date trucking costs have made it an inefficient option. The ability to move stone by rail to the Hopedale location would not only allow us to use our own stone on more projects but could also potentially open up opportunities for additional sales to new customers.

We appreciate your time and look forward to discussing this potential option further. If you have any questions or would like any additional information, please do not hesitate to contact us.

Sincerely,

Richard J. Miller
President
All States Materials Group

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

**VERIFIED STATEMENT OF JON DELLI PRISCOLI
EXHIBIT F**

Transcript of Chairman Keyes Remarks

Board of Selectmen Remarks

Brian Keyes, Board of Selectmen, Chair

New Hopping Brook Realty Trust (NHBRT) aka Grafton and Upton Railroad Company

NHBRT has agreed to a purchase and sales agreement with the property owner to avoid an eminent domain process for the purchase of now two parcels 363 (Map 2 parcel 8) and 364 (Map 2 Parcel 5) West Street that will be under the Grafton and Upton Railroad (GU) Control in addition to parcel, Map 2 Parcel 1 they already own. The NET purchase price to the seller is \$1,175,000. However, the buyer is responsible for any additional expenses for MGL 61 and unpaid tax liability of ~\$24,000 for 363 West Street to be paid resulting in a higher cost than the purchase price.

If GU was not an active railroad under federal surface transportation act and/or did not have a pending DPU case to acquire the land at fair market value for interstate railroad commerce through the eminent domain process, then the buyer would follow the procedure for “right of first refusal” with Town under

MGL 61. That process has 4 action items that a yes or no vote exclusively by the Board of Selectmen is required. One of those four actions need to take place within 120 days from application submittal. The four options are:

1. Vote to exercise Town's option to buy the property at purchase price.
2. Vote to assign Town's right to purchase to Conservation organization or government.
3. Vote to notify the property owner the town will not exercise its right to purchase.
4. Do nothing, failure to act within 120 days waives town's right of first refusal

Given the collaborative working relationship of the railroad and leaders of the Town of Hopedale, the Chairman of the Select Board and Town Administrator, met with GU and to frame the following 2-part process for the Selectmen's consideration to create a win-win solution. This proposal protects the potential future municipal well locations for the town's water supply, saves the town \$1.2M it does not have and unforeseen additional cost, provides for additional tax revenue to the town for services the residents desire, and expands the

town's parklands to the Upton / Milford town line at Mill Pond (north).

We believe it is in the town's best interest and that of GU to work collaboratively with each other which all parties are attempting to do. GU has met with a member or staff of the Conservation Commission, Water and Sewer Department, Park Commission, Board of Health, and Board of Assessors. Again, the town only has the authority to act on the 4 options listed above that we are calling part one. It is important to re-iterate, the railroad can develop the land for railroad purposes based on federal railroad law.

With the Board's approval, part two will have 4 steps that will eventually require town meeting approval giving the residents a chance to vote on this proposal. **Under part 2 the first step is for the board to negotiate a Memorandum of Agreement (MOA), followed by second step having park commission approve MOA, once this is done the BOS would then put this on a warrant for town meeting (step 3), if town meeting approves the final step will be to go to the state legislature for their approval.**

At our request for the Board's consideration GU has agreed to the following Public Private Partnership Framework (PPP) we are proposing, that will be memorialized in the MOA with the Board's approval.

- Protect the 3 potential well sites identified in the September 25, 2019 study commissioned by the Water & Sewer Commission for new well locations. This protection would not allow any development on those areas until the water commission completes their study within 5 years of MOA to scientifically determine if the site is viable for a new water source. If determined to be viable then a water distribution easement along railroad "right of way" will be included. Short of minor site grading and/or a retaining wall that will not impact the well, the 400-foot radius circle will be protected in anticipation the water source is viable and feasible.
- GU as they have historically stated is willing to partner with the Town and expand the Hopedale Parkland's Corridor area. GU is offering to swap many dozens of acres of natural corridor habitat that GU will put under federal conservation protection.

This would be swapped on a 1.5 to 1 ratio in benefit of the Town resulting in a significant increase in parkland acres and increase in walking trails extending the trails to the Upton/Milford Town Line on Rt. 140 at the Mill Pond (north).

- The Selectmen/Town Administrator and GU would collaboratively work on a solution to fund an open space plan for the parklands that would be led by park commission to determine what the future of the parkland extension should be, building on what Henry Manning developed - a student of Frederick Law Olmstead. This would include additional walking trails to be constructed by GU as well as other upgrades to be given to the Town upon completion. In addition, a new Kayak launch area will be designed for Mill Pond that currently is not accessible by Hopedale residents. Further, the parties would negotiate any roll-back taxes or penalties under MGL 61 to fund these efforts.
- In exchange for GU granting the Water Well Protection and not developing that area, providing railroad easement for water distribution, GU transferring approximately dozens of acres of

corridor resources around the Mill River land including construction additional walking trails, and other items included in the PPP/MOA above we are proposing that some acres west the railroad in the parklands (away from pond) be turned over to GU for economic development to produce jobs and tax revenue for the town's long-term benefit.

The Town Administrator and I, as Chair of the Board of Selectmen, believe it is in the best interest of the town to continue these discussions and develop a MOA and we request your support to waive our right to acquire the property under Part 1 and begin Part 2.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

Exhibit 2

**Memorandum and Order, *Grafton & Upton Railroad, et al. v. Town of Hopedale, et al.*, Case
No. 4:22-cv-40080-ADB (D. Mass. Apr. 3, 2023)**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD
COMPANY, JON DELLI PRISCOLI AND
MICHAEL R. MILANOSKI, AS TRUSTEES
OF ONE HUNDRED FORTY REALTY
TRUST,

Plaintiffs,

v.

TOWN OF HOPEDALE, THE HOPEDALE
SELECT BOARD, BY AND THROUGH ITS
MEMBERS, GLENDA HAZARD,
BERNARD STOCK, AND BRIAN KEYES,
AND THE HOPEDALE CONSERVATION
COMMISSION, BY AND THROUGH ITS
MEMBERS, BECCA SOLOMON, MARCIA
MATTHEWS, AND DAVID GUGLIELMI,

Defendants.

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Civil Action No. 4:22-cv-40080-ADB

MEMORANDUM & ORDER

BURROUGHS, D.J.

I. INTRODUCTION

At its core, this is a dispute between Grafton & Upton Railroad Company (“GURR” or “Plaintiffs”), a Class III rail carrier, and the Town of Hopedale,¹ regarding a portion of property at 364 West Street in Hopedale, Massachusetts. GURR has planned and is working on building a transloading and logistics facility on the property to support its rail operations. Hopedale meanwhile seeks to take by eminent domain a substantial portion of the property and is also

¹ Defendants in this case include the Town of Hopedale (the “Town” or “Hopedale”); the Hopedale Select Board (the “Select Board”); the Select Board’s members, Glenda Hazard, Bernard Stock, and Brian Keyes; the Hopedale Conservation Commission (the “Conservation Commission”); and the Conservation Commission’s members, Becca Solomon, Marcia Matthews, and David Guglielmi.

trying to stop GURR’s development of the property through an Enforcement Order issued by its Conservation Commission. To forestall the taking and any interference with their development plans, Plaintiffs initiated this action and argue, primarily, that both the proposed taking and the Enforcement Order are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10101 *et seq.* Presently before the Court are Defendants’ motion to dismiss the complaint, [ECF No. 51], and Plaintiffs’ motions for a preliminary injunction to enjoin the proposed taking and any actions to carry out the Enforcement Order, [ECF Nos. 26 and 28]. For the reasons set forth below, the motion to dismiss is GRANTED in part and DENIED in part, and the motions for preliminary injunction are ALLOWED.

II. FACTUAL BACKGROUND

A. The Railroad and the Property

GURR is a short-line rail carrier that owns and operates 16.5 miles of rail line that runs in part through Hopedale, Massachusetts. [ECF No. 1 (“Compl.”) ¶ 17]. A portion of that rail line “bifurcates and runs through property located at 364 West Street in Hopedale[,]” [*id.*], which has been “zoned for industrial uses,” [*id.* ¶ 26]. One Hundred Forty Realty Trust (the “Trust”) is the record owner of title to the property at 364 West Street, [Compl. at 1 n.1], and on October 12, 2020, GURR purchased the beneficial interest of the Trust and is the Trust’s sole beneficiary, [*id.* ¶¶ 3, 27].² As a result of this purchase, GURR “became the owner of the 155-acre parcel at 364 West Street including the approximately 130 acres of what was, at that time, forestland.” [*Id.* ¶ 27]. GURR also later acquired additional land parcels such that its total acreage in the area of 364 West Street is currently 198.607 acres. [*Id.* ¶¶ 28–29].

² Plaintiffs Jon Delli Priscoli and Michael R. Milanoski are the trustees of the Trust. [*Id.* ¶ 4].

The “Transloading and Logistics” center that GURR intends to build on the property will include new track, more than 1,500,000 square feet of space for transloading and temporary storage, and necessary infrastructure to support the facility including stormwater detention and basins, as well as sewage treatment. [*Id.* ¶ 31]. As of the filing of this lawsuit, the transloading and logistics center was “under construction.”³ [*Id.* ¶ 33]. GURR further states that it acquired the property, and worked to develop it, “to support rail transportation that will include on the entirety of the site transloading, temporary storage, services related to transloading or temporary storage, and whatever additional rail activities are necessary or required in order to support the rail business that currently exists and is anticipated in the future” [*Id.* ¶ 34].

B. Proposed Taking & Enforcement Order

At a meeting on June 21, 2022, the Hopedale Select Board voted to pursue the taking of approximately 130 acres of real property at 364 West Street by eminent domain, pursuant to Chapter 79 of the Massachusetts General Laws. *See* [Compl. ¶¶ 62, 74]. At that same meeting, the Select Board scheduled a Special Town Meeting for July 11, 2022 to vote on a motion to authorize the Select Board to carry out the proposed taking. [*Id.* ¶ 63]. On that day, the Special Town Meeting voted to authorize the Select Board to take the 130 acres, plus or minus, of real property located at 364 West Street by eminent domain. [*Id.* ¶ 70]. On July 14, 2022, the Select Board noticed a meeting for July 19, 2022, at which they would vote on the taking authorized by the Special Town Meeting. [*Id.* ¶¶ 71–72].

³ GURR’s development of 364 West Street is subject to federal environmental statutes and regulations and is further subject to oversight by the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers. [Compl. ¶¶ 124, 129]. The EPA has inspected the sight on at least one occasion, on May 31, 2022, regarding a general permit for stormwater discharges from construction activities. [Compl. ¶ 124; ECF No. 6-1 at 58–62].

At the earlier July 11, 2022 Select Board meeting, the “Special Town Counsel” stated that the Select Board could record a notice of taking immediately after voting to take the land. [Id. ¶ 75]. Plaintiffs thus allege, on information and belief, that the Select Board intended to record a notice of taking of real property immediately after the scheduled vote on July 19, 2022. [Id. ¶ 76]. Plaintiffs additionally note that under Chapter 79, “the recording of the notice of taking immediately vests title to the property in the municipality.” [Id. ¶ 77]; see also Mass. Gen. Laws ch. 79, § 3 (“Upon the recording of an order of taking under this section, title to the fee of the property taken or to such other interest therein as has been designated in such order shall vest in the body politic or corporate on behalf of which the taking was made . . .”).

Around the same time that the Select Board was moving towards recording a notice of taking of a portion of the property at 364 West Street, the Conservation Commission also acted to interrupt GURR’s development of the property. On July 14, 2022, the Conservation Commission emailed an Enforcement Order to GURR’s president that stated that GURR and the record owner of title of 364 West Street, the Trust, were in violation of the Massachusetts Wetlands Protection Act as a result of the work being done at the property to develop the transloading facility. [Compl. ¶ 126]. The Enforcement Order directed GURR to cease and desist from further development of the facility. [Id. ¶ 127].

III. PROCEDURAL HISTORY

Plaintiffs filed suit on July 18, 2022, see [Compl.], and simultaneously filed emergency motions for preliminary injunctions and temporary restraining orders to (1) stop the Select Board from recording a notice of taking by eminent domain of any portion of GURR’s property at 364 West Street in Hopedale, Massachusetts, and (2) enjoin the Conservation Commission from enforcing its July 14, 2022 Enforcement Order, [ECF Nos. 2 and 4]. Defendants filed a combined opposition to the emergency motions on July 19, 2022, [ECF No. 14], and later that

day the parties appeared before Chief Judge Saylor for a hearing on the motions, see [ECF No. 17]. Following the hearing, Chief Judge Saylor entered a temporary restraining order prohibiting Defendants from recording any notice of taking of property at 364 West Street. [ECF No. 18]. Two days later, the parties appeared telephonically for a status conference before this Court. [ECF No. 20]. At that hearing, the parties each expressed an intent to re-brief the pending motions for preliminary injunction and the oppositions. On July 26, 2022, the Court entered an amended temporary restraining order that extended the order entered by Chief Judge Saylor until this Court issued a ruling on the forthcoming motions for preliminary injunction. [ECF No. 23].

Plaintiffs filed the currently pending motions for preliminary injunction, [ECF Nos. 26 and 28], on July 28, 2022. Defendant filed its combined opposition on August 4, 2022, [ECF No. 32], Plaintiffs replied on August 8, 2022, [ECF No. 40], and Defendants filed a sur-reply on August 9, 2022, [ECF No. 45]. Supplemental briefing eventually followed. [ECF Nos. 62–66].

On August 12, 2022, Defendants moved to dismiss Plaintiffs’ complaint for failing to establish subject matter jurisdiction or to state a claim. [ECF No. 51]. Plaintiffs opposed the motion on August 25, 2022, [ECF No. 53], Defendants replied, [ECF No. 56], and Plaintiffs filed a sur-reply, [ECF No. 57].

Plaintiffs have also filed a motion for clarification of the orders issued by this Court, [ECF No. 59], which Defendants oppose, [ECF No. 60].

IV. MOTION TO DISMISS

A. Motion to Dismiss for Lack of Jurisdiction

i. Legal Standard

“A district court generally has the obligation, when there is any question, to confirm that it has subject matter jurisdiction prior to considering the merits of the underlying controversy.”

Sinapi v. R.I. Bd. of Bar Exam’rs, 910 F.3d 544, 549 (1st Cir. 2018). When evaluating a motion

to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) at the pleading stage, granting such a motion “is appropriate only when the facts alleged in the complaint, taken as true, do not justify the exercise of subject matter jurisdiction.” Muniz-Rivera v. United States, 326 F.3d 8, 11 (1st Cir. 2013). “When a district court considers a 12(b)(1) motion, it must credit the plaintiff’s well-pled factual allegations and draw all reasonable inferences in the plaintiff’s favor.” Merlonghi v. United States, 620 F.3d 50, 54 (1st Cir. 2010). “In deciding the question, [courts] may consider whatever evidence has been submitted in the case.” Acosta-Ramirez v. Banco Popular de P.R., 712 F.3d 14, 18 (1st Cir. 2013) (citing Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996)). “While the court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion,” and attaching exhibits to a Rule 12(b)(1) motion does not convert it to a motion for summary judgment. Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002).

ii. The Court Has Jurisdiction over Plaintiffs’ ICCTA Preemption Claims

Congress passed the ICCTA in 1995, in part, to “substantially deregulate[] the rail and motor carrier industries.” Pejepscot Indus. Park, Inc. v. Me. Cent. Ry. Co., 215 F.3d 195, 197 (1st Cir. 2000) (citing H.R. Rep. No. 104-311, at 95 (1995) (“[C]hanges are made to reflect the direct and complete preemption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907.”)). Consistent with this policy, the ICCTA established the Surface Transportation Board (“STB”) within the Department of Transportation, see Pub. L. 104-88, § 201(a), 109 Stat. 803, 932 (1995) (codified as amended at 49 U.S.C. § 1301), and granted it exclusive regulatory authority over rail transportation. In pertinent part, § 10501(b) of the ICCTA states that the STB’s jurisdiction over

(1) transportation by rail carriers . . . ; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state,

is exclusive.

49 U.S.C. § 10501(b). The ICCTA’s definition of “transportation” sweeps broadly and includes a “yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . . [and] services related to that movement, including receipt, delivery, . . . transfer in transit, . . . handling, and interchange of passengers and property” Id. § 10102(9). The First Circuit has found that transloading facilities fall under the definition of transportation under the ICCTA and that “[i]t is well-established that the preemption of state and local regulation under the ICCTA generally extends to transloading facilities.” Grosso v. Surface Transp. Bd., 804 F.3d 110, 118 (1st Cir. 2015).

Section 10501(b) of the ICCTA further states that “[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). Courts have thus held that the “ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” Island Park, LLC v. CSX Transp., 559 F.3d 96, 102 (2d Cir. 2009) (internal quotation marks omitted) (quoting N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007)). Further, courts have found that the ICCTA preempts takings, or attempted takings, that would unduly interfere with rail transportation, but permits those where, for example, a town seeks to acquire routine, non-conflicting uses. See City of Lincoln v. Surface Transp. Bd., 414 F.3d 858, 858, 861–62 (8th Cir. 2005) (affirming STB’s finding that a city’s proposed taking by eminent

domain of a 20-foot strip of a rail line’s right of way was preempted by § 10501(b) because it interfered with rail transportation); Union Pac. R.R. Co. v. Chi. Transit Auth., 647 F.3d 675, 680–82 (7th Cir. 2011) (attempted condemnation of right of way was federally preempted because it interfered with railroad’s use of the property by, among other things, preventing use of property for additional tracks). Courts have also held it appropriate to consider a railway’s “future plans as well as its current uses” of property to determine whether a proposed taking, or other state regulation, is preempted. City of Lincoln, 414 F.3d at 862.

Defendants argue that because the ICCTA vests exclusive jurisdiction in the STB, and because § 10501(b) is a preemption statute and not a cause of action, the Court lacks jurisdiction. Plaintiffs respond that their claims under § 10501(b) present a federal question and invoke the Court’s equity jurisdiction.

The Court begins by noting that the outcome Defendants propose would appear to be antithetical to Congress’s expressed intent in passing the ICCTA. As noted above, by passing the ICCTA, Congress intended to accomplish the “complete pre-emption of State economic regulation of railroads” and to “extend[] exclusive Federal jurisdiction” over elements of rail transportation that had been “formerly reserved for State jurisdiction.” H.R. Rep. No. 104-311, at 95 (1995). Yet if the Court finds, as Defendants urge, that it lacks jurisdiction over this action, the Town will record the notice of taking and title to the property—on which GURR is constructing a transloading facility—will be immediately transferred to the Town. While the Court sets forth its reasoning more fully below, it seems clear that such a taking reflects the sort of interference that Congress sought to prohibit in passing the ICCTA. With that framing, the Court considers whether it has jurisdiction over Plaintiffs’ preemption claims.

In Shaw v. Delta Airlines, Inc., the Supreme Court stated that “[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights[,]” 463 U.S. 85, 96 n.14 (1983) (citing Ex parte Young, 209 U.S. 123, 160–62 (1908)), and that “[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve[,] id. (citing Smith v. Kan. City Title & Tr. Co., 255 U.S. 180, 199–200 (1921)). Although this case would seem to fall within this description, Defendants contend that jurisdiction is nonetheless foreclosed because the ICCTA explicitly vests “exclusive” jurisdiction in the STB. Defendants further argue that courts sitting in equity are “subject to express and implied statutory limitations” and that by creating the STB and granting it exclusive jurisdiction over “transportation by rail carriers” as well as “the construction . . . of spur, industrial, team, switching, . . . or facilities[,]” 49 U.S.C. § 10501(b), Congress divested federal courts of jurisdiction to hear claims alleging that state regulation of rail transportation is preempted by the ICCTA. See, e.g., [ECF No. 52 at 6 (citing Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320 (2015))].

Defendants analogize this case to Seminole Tribe of Florida v. Florida wherein a tribe brought suit under the Indian Gaming Regulatory Act (“IGRA”) to compel the Governor of Florida to negotiate with the tribe toward a compact regarding gaming activities, as required by Section 2710(d)(3) of the IGRA. 517 U.S. 44, 47 (1996). The tribe argued, in part, that federal jurisdiction was proper under the doctrine of Ex parte Young. Id. at 73. The Supreme Court disagreed. Id. Although the Court acknowledged that it had “often found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order

to ‘end a continuing violation of federal law[.]’” *id.* (quoting Green v. Mansour, 474 U.S. 64, 68 (1985), it nonetheless found the situation presented in Seminole Tribe to be “sufficiently different from . . . the traditional Ex parte Young action so as to preclude the availability of that doctrine,” *id.* There, even though the Governor’s failure to negotiate with the tribe was inconsistent with § 2710(d)(3), the provision requiring such negotiation had to be considered in conjunction with the remedial provision, § 2710(d)(7) which was both intricate and “intended . . . not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3).” *Id.* at 74. The Court concluded that, based on the intricacy of the statute and the limited nature of the remedy,⁴ Congress, through the IGRA, “displayed an intent not to provide the ‘more complete and immediate relief’ that would otherwise be available under Ex parte Young.” Verizon Md., Inc. v. Pub. Serv. Comm’n of Md., 535 U.S. 635, 647 (2002) (citing Seminole Tribe, 517 U.S. at 75) (discussing Seminole Tribe); see also Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 256 n.3 (2011) (explaining that the Court had not permitted cases alleging violation of the IGRA to proceed in equity because doing so would undermine the limited nature of the remedial provision).

The Supreme Court reached a similar conclusion in Armstrong, wherein healthcare providers in Idaho sued state officials under the Medicaid Act seeking a court order requiring the officials to raise reimbursement rates in compliance with the statute. 575 U.S. 323–24. The plaintiffs argued that their suit could proceed in equity, but the Court again disagreed. *Id.* at 328. It found that Congress had intended to foreclose equitable relief because (1) the only remedy the

⁴ “The ‘intricate procedures set forth in [§ 2710(d)(7)]’ prescribed that a court could issue an order directing the State to negotiate, that it could require the State to submit to mediation, and that it could order the Secretary of the Interior be notified.” Verizon Md., Inc. v. Pub. Serv. Comm’n of Md., 535 U.S. 635, 647 (2002) (citing Seminole Tribe, 517 U.S. at 74–75).

statute provided for a State’s breach was the withholding of Medicaid funds, and (2) the statute was “judicially unadministrable[.]” Id. The Supreme Court noted that the fact that Congress had provided a sole remedy “might not, *by itself*, preclude the availability of equitable relief” but the fact of a sole remedy “when combined with the judicially unadministrable nature” of the statute was sufficient to find equity jurisdiction foreclosed. Id. (citing Stewart, 563 U.S. at 256 n.3).

Turning to the instant matter, the Court finds that the Supreme Court’s decisions in Seminole Tribe and Armstrong do not compel the conclusion that the Court lacks jurisdiction here. Perhaps the most distinguishing characteristic is the limited nature of the remedial schemes imposed by the IGRA and Medicaid Act that were at issue in Seminole Tribe and Armstrong, respectively, compared to the broad language of § 10501(b). In Seminole Tribe, the remedy for a violation of § 2710(d)(3) of the IGRA was limited to an order directing state officials to negotiate, submit to mediation, or that the Secretary of the Interior could be notified. Seminole Tribe, 517 U.S. at 74–75. And in Armstrong, the remedy for setting reimbursement rates in a manner inconsistent with § 30A of the Medicaid Act was the withholding of Medicaid funds by the Secretary of Health and Human Services. Armstrong, 575 U.S. at 328–29. In the Supreme Court’s view, such “modest . . . sanctions” displayed Congressional intent “not to provide the ‘more complete and more immediate relief’ that would otherwise be available under Ex parte Young.” Verizon Md., 535 U.S. at 647. In contrast, the “strong language” of the ICCTA’s preemption provision, § 10501(b), is not similarly constrained, reflecting Congress’s intent to proscribe any undue interference with rail transportation by state regulation. See New Eng. Cent. R.R., Inc. v. Springfield Terminal Ry. Co., 415 F. Supp. 2d 20, 23 (D. Mass. 2006); see also Engelhard Corp. v. Springfield Terminal Ry. Co., 193 F. Supp.2d 385, 389 (D. Mass. 2002) (“The concluding sentence of section 10501(b) is an unmistakable statement of Congress’s intent

to preempt state laws touching on the substantive aspects of rail transportation.”). And unlike the IGRA and Medicaid Act, the language of the ICCTA does not indicate Congressional intent to foreclose relief available under Ex parte Young. While permitting the claims in Seminole Tribe and Armstrong to proceed in equity would have allowed for remedies greater than those imagined by the statutes themselves, thereby undermining congressional intent, exercising jurisdiction under Ex parte Young here, for the limited purpose of evaluating preemption, does not similarly run afoul of the statute or congressional intent because determining whether a state regulation should be enjoined as preempted is entirely consistent with the purpose of the ICCTA.⁵

The present situation is further distinguishable from Armstrong because § 10501(b) of the ICCTA, unlike § 30(A) of the Medicaid Act, is not judicially unadministrable. As the parties agree, § 10501(b) is, at least in part, a preemption statute, and federal courts are routinely called upon to make findings regarding the preemptive effect of federal laws. In contrast, the Supreme Court observed that it was “difficult to imagine a requirement broader and less specific” than § 30(A) of the Medicaid Act, which it referred to as a “judgment-laden standard,” Armstrong, 575 U.S. at 328, that benefitted from “the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking,” id. at 328–29 (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in judgment)).

⁵ In their briefing, the parties appear to assume, without discussing, that Defendants qualify as state actors. Because the parties do not dispute this point, and because courts have found that municipalities and local officials are sometimes considered to be acting as an arm of the state or as state actors for purposes of a specific case, see, e.g., McGee v. Cole, 115 F. Supp. 3d 765, 773 (S.D.W. Va. 2015) (collecting cases), the Court accepts, for the purposes of this order, that Defendants, acting under color of state law, qualify as state actors.

Therefore, unlike in Armstrong, the exercise of federal jurisdiction here does not undermine the purpose of the statute nor is the provision at issue judicially unadministrable.

For the foregoing reasons, the Court concludes that it may properly exercise its equity jurisdiction over Plaintiffs' preemption claims.⁶ Defendants' motion to dismiss for lack of jurisdiction is therefore DENIED.

iii. Plaintiffs' § 1983 Claim Fails to the Extent It Is Brought Under the ICCTA

Plaintiffs also bring a claim under 42 U.S.C. § 1983 alleging interference with the federal right to participate in interstate commerce, and purport to bring this claim, in part, pursuant to the ICCTA. Defendants argue that Plaintiffs' § 1983 claim fails under Rule 12(b)(1) to the extent it is brought pursuant to the ICCTA because § 1983 does not create a substantive cause of action

⁶ Because the Court finds that it may properly exercise equity jurisdiction over Plaintiffs' preemption claims, the Court does not reach the issue of whether the preemption claims raise a federal question or, alternatively, if the language of § 10501(b) precludes federal question jurisdiction.

Nonetheless, the Court notes that numerous other federal courts and the STB have found that federal courts do have jurisdiction to determine issues of preemption. See, e.g., Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands, 841 F.3d 1069, 1072 (9th Cir. 2016) (the plaintiff railroad "present[ed] a federal question by alleging that enforcement of the state removal-fill law is preempted by the federal ICCTA; thus the district court had subject matter jurisdiction under 28 U.S.C. § 1331"); Elam v. Kan. City S. Ry. Co., 635 F.3d 796, 810 (5th Cir. 2011) (finding that the ICCTA's "legislative history suggests Congress did not intend § 10501(b) to preclude original (or removal) federal jurisdiction over claims arising under the ICCTA" and "recognizing the STB's primary jurisdiction does not divest the district court of its original subject matter jurisdiction"); Coastal Distrib., LLC v. Town of Babylon, 216 Fed. App'x 97, 103 (2d Cir. 2007) ("The very basis for federal jurisdiction here was the appellees' assertion that the Town and its [Zoning Board of Appeals] were preempted by federal law from taking any action to regulate [a transloading facility operated by Plaintiff] . . ."); Jie Ao & Xin Zhou — Pet. for Declaratory Order, No. FD 35539, 2012 WL 2047726, at *3 (S.T.B. June 4, 2012) (STB decision stating that "issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance"); Brookhaven Rail Terminal and Brookhaven Rail, LLC — Pet. for Declaratory Order, No. FD 35819, 2014 WL 4253048, at *3 (S.T.B. Aug. 26, 2014) (finding similarly that "the Board and courts have concurrent jurisdiction to determine preemption").

by itself and also does not create an individually enforceable right. [ECF No. 52 at 11]. Because the Court agrees that § 10501 does not create an individually enforceable right, Plaintiffs' § 1983 claim fails to the extent it is brought under the ICCTA.

Section 1983 states, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983. Not all federal statutes create rights which are remediable by § 1983, and courts must look to “rights-creating language” and an “individual[] focus” in the statute’s text and structure to determine whether Congress unambiguously intended to create individual rights. Gonzaga, 536 U.S. at 290.

In Gonzaga, the Supreme Court found that the Family Educational Rights and Privacy Act of 1974 (“FERPA”), which provides for the withdrawal of federal funding from educational institutions that impermissibly release student records, does not confer rights to individual students—and thus conferred no rights enforceable under § 1983—because the statute’s nondisclosure provisions “contain no rights-creating language” and “they have an aggregate, not individual focus” 536 U.S. at 290. The same is true of § 10501 of the ICCTA, which merely forbids State and local legislation in the area of rail transportation. Put differently, the statute creates a regulatory scheme which requires State and local authorities to refrain from regulating rail transportation. The statute’s “focus on the person regulated rather than the individuals protected creates ‘no implication of an intent to confer rights on a particular class of persons.’” Id. at 287 (quoting Alexander v. Sandoval, 532 U.S. 275, 289 (2001)). The “person’s regulated,” in § 10501(b) are the State and political subdivisions, insofar as they are forbidden

from promulgating laws related to “transportation by rail carriers, and . . . the construction . . . of spur, industrial, team, switching, or side tracks, or facilities” 49 U.S.C. § 10501(b). Thus, like FERPA, the statute, § 10501(b), regulates the activities of the targeted governmental entities, and does not manifest an intent to grant a specific entitlement to any individuals or entities.

Accordingly, Defendants’ motion to dismiss Plaintiffs’ § 1983 claim is GRANTED to the extent the claim was brought under the ICCTA.

B. Motion to Dismiss for Failure to State a Claim

i. Legal Standard

In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept as true all well-pled facts, analyze those facts in the light most favorable to the plaintiff, and draw all reasonable factual inferences in the plaintiff’s favor. See Gilbert v. City of Chicopee, 915 F.3d 74, 80 (1st Cir. 2019).

“To cross the plausibility threshold a claim does not need to be probable, but it must give rise to more than a mere possibility of liability.” Grajales v. P.R. Ports Auth., 682 F.3d 40, 44–45 (1st Cir. 2012) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). “The plausibility standard invites a two-step pavane.” A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 80 (1st Cir. 2013) (citing Grajales, 682 F.3d at 45). First, the Court “must separate the complaint’s factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).” Id. (quoting Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012)). Second, the Court “must determine whether the remaining factual content allows a ‘reasonable inference that the defendant is liable for the misconduct alleged.’” Id. (quoting Morales-Cruz, 676 F.3d at 224).

ii. Plaintiffs’ § 1983 Claim Asserting Violation of the Dormant Commerce Clause Fails

Defendants argue that Plaintiffs’ § 1983 claim also fails to the extent it is brought under the dormant Commerce Clause because the complaint is “devoid of any specific factual allegations about how the taking would affect the interstate rail transportation network.” [ECF No. 52 at 12]. The Court largely agrees.

The Supreme Court “has long construed the Commerce Clause to be not only an affirmative grant of authority to Congress to regulate interstate commerce but also a negative, ‘self-executing limitation on the power of the states to enact laws that place substantial burdens on interstate commerce.’” Ne. Patients Grp. V. United Cannabis Patients & Caregivers of Me., 45 F.4th 542, 545 (1st Cir. 2022) (internal brackets omitted) (quoting S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984)). The Supreme Court has further stated that the dormant Commerce Clause “prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby ‘impedes free private trade in the national marketplace.’” Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) (citations and internal brackets omitted) (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980)). Put differently, “[i]f a state or local government . . . enacts a law that unduly favors in-state commercial interests over their out-of-state counterparts, that law ‘routinely’ will be defenestrated under the dormant Commerce Clause ‘unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.’” Houlton Citizens’ Coal. v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999) (quoting West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192–93 (1994)).

To determine whether a statute violates the dormant Commerce Clause, we apply one of several levels of analysis, depending on the effect and reach of the legislation.

First, a state statute is a per se violation of the Commerce Clause when it has an “extraterritorial reach.” “[A] statute that directly controls commerce occurring

wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." When a state statute regulates commerce wholly outside the state's borders or when the statute has a practical effect of controlling conduct outside of the state, the statute will be invalid under the dormant Commerce Clause.

...

Second, if a state statute discriminates against interstate commerce, we apply strict scrutiny. It will be scrutinized under a "virtually per se invalid rule," which means that the statute will be invalid unless the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." This level of scrutiny will be applied if the state statute discriminates against interstate commerce on its face or in practical effect. When a state statute "discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."

Third, a lower standard of scrutiny is applied when the state statute regulates evenhandedly and has only incidental effects on interstate commerce. In this situation, a balancing test is applied. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Pharm. Rsch. & Mfrs. Of Am. v. Concannon, 249 F.3d 66, 79–80 (1st Cir. 2001) (citations omitted).

Plaintiffs contend that the Town's intended taking would "unreasonably interfere with GURR's participation in interstate commerce by rail transportation." [Compl. ¶ 102]. Plaintiffs, however, do not allege that the taking has an extraterritorial reach, so the Court moves to the second step and considers whether the taking discriminates against interstate commerce. "Discrimination" in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Or. Waste Sys., Inc. v. Dep't of Env't. Quality of State of Or., 511 U.S. 93, 99 (1994). Here, Plaintiffs allege that GURR, an in-state carrier, is burdened to the extent it cannot ameliorate supply chain issues. But the

inability to ease such issues is not the same as alleging that a state regulation benefits an in-state carrier to the detriment of out-of-state carriers. Thus, the Court finds that Plaintiffs have not alleged that the taking is discriminatory in the context of the dormant Commerce Clause.

The Court therefore proceeds to the third step and applies the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). When a state statute regulates evenhandedly and has only incidental effects on interstate commerce, that statute will be upheld unless the burden on interstate commerce is “clearly excessive in relation to the putative local benefits.” Id. at 142.

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of “direct” and “indirect” effects and burdens.

Id. (citations omitted).

The First Circuit has directed that when applying the Pike balancing test, courts should consider: “(1) the nature of the putative local benefits advanced by the statute; (2) the burden the statute places on interstate commerce; and (3) whether the burden is ‘clearly excessive’ as compared to the putative local benefits.” Concannon, 249 F.3d at 83–84 (quoting Pike, 397 U.S. at 142). “[T]he fact that a law may have ‘devastating economic consequences’ on a particular interstate firm is not sufficient to rise to a Commerce Clause burden.” Id. at 84 (quoting Instructional Sys. v. Comput. Curriculum Corp., 35 F.3d 813, 827 (3d Cir. 1994) (further citation omitted)); see also Exxon Corp. v. Governor of Md., 437 U.S. 117, 127–28 (stating that “the

[Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations”).

Here, the Court finds that Plaintiffs’ § 1983 dormant Commerce Clause claim fails because they have not adequately alleged an adverse effect on interstate commerce. While the taking would likely have a significant impact on GURR, that alone is not sufficient to make out a claim under the Commerce Clause. Concannon, 249 F.3d at 84. Further, although Plaintiffs allege that the taking would hinder a facility that would eventually “have a positive impact on national supply chain issues” that is different in kind from a state or local law or regulation that adversely effects existing interstate commerce. [Compl. ¶ 33]. Because the Court concludes that Plaintiffs have not sufficiently alleged a burden that gives rise to a Commerce Clause claim, Defendants’ motion to dismiss the claim is GRANTED.⁷

iii. State Law Claims

Plaintiffs also bring counts for violations of Mass. Gen. Laws ch. 160, § 7, Mass. Gen. Laws. Ch. 40, §§ 8C, 14, Mass. Gen. Laws ch. 45, §§ 3, 19, and Massachusetts’ prior public use doctrine. Defendants argue that each count fails to state a claim.

Defendants first argue that each of Plaintiffs’ state law claims fails because any challenge to the validity of the proposed taking must be part of a Chapter 79 proceeding because Chapter 79 provides the “exclusive statutory remedy for takings made thereunder.” [ECF No. 52 at 16 (citing Whitehouse v. Town of Sherborn, 419 N.E.2d 293, 297 (Mass. App. Ct. 1981))]. Although Plaintiffs opposed the motion to dismiss their state law claims, they did not offer arguments in response to Defendants’ contention that Chapter 79 provides the exclusive remedy for takings made thereunder. As the First Circuit has repeatedly stated, “district court[s] [are]

⁷ To the extent Plaintiffs brought a § 1983 claim pursuant to the Supremacy Clause, this claim also fails because neither § 1983 nor the Supremacy Clause confer a cause of action.

free to disregard arguments that are not adequately developed” Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 260 (1st Cir. 1999); see also Nikijuluw v. Gonzales, 427 F.3d 115, 120 n.3 (1st Cir. 2005) (“It is well-established that ‘issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.’”); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), cert. denied, 494 U.S. 1082 (1990) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work ‘Judges are not expected to be mindreaders’” (citation omitted)). Because Plaintiffs did not adequately respond to Defendants’ arguments, the motion to dismiss the state law claims (Counts III, IV, and V) is GRANTED.

V. MOTIONS FOR PRELIMINARY INJUNCTION

The Court now turns to Plaintiffs motions for preliminary injunction seeking to (1) enjoin the town from recording notice of the disputed property, [ECF No. 26], and (2) enjoin enforcement of the July 14, 2022 Enforcement Order issued against GURR by Defendant Hopedale Conservation Commission, [ECF No. 28].

A. Legal Standard

In considering whether to grant a request for a preliminary injunction, “a district court is tasked with considering the movant’s likelihood of success on the merits; whether and to what extent the movant will suffer irreparable harm in the absence of preliminary injunctive relief; the balance of relative hardships, that is, the hardship to the nonmovant if enjoined as opposed to the hardship to the movant if no injunction issues; and the effect, if any, that either a preliminary injunction or the absence of one will have on the public interest.” Ryan v. U.S. Immigr. & Customs Enf’t, 974 F.3d 9, 18 (1st Cir. 2020) (citations omitted). “The movant’s likelihood of success on the merits weighs most heavily in the preliminary injunction calculus[,]” and the First Circuit has described that factor “as the ‘sine qua non’ of preliminary injunctive relief.” Id.

(quoting New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002)).

Thus, “if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.” New Comm Wireless Servs., Inc., 287 F.3d at 9. When considering the motions, the Court “may accept as true ‘well-pleaded allegations in the complaint and uncontroverted affidavits.’” Howe v. U.S. Bank Nat’l Ass’n as Tr. for RMAC Tr. Series 2016-CTT, 440 F. Supp. 3d 99, 102–03 (D. Mass. Feb. 13, 2020) (quoting Rohm & Haas Elec. Materials, LLC v. Elec. Cirs., 759 F. Supp. 2d 110, 114 n.2 (D. Mass. 2010)).

B. Motion to Enjoin the Taking

i. Likelihood of Success

Plaintiffs argue that they are likely to succeed on the merits because Hopedale’s proposed taking qualifies as a state or local action that unreasonably interferes with GURR’s railroad operations at 364 West Street and is thus preempted by the ICCTA. [ECF No. 27 at 9].

Under the Supremacy Clause of the United States Constitution, “the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” As the Supreme Court has held, “Where a state statute conflicts with, or frustrates, federal law, the former must give way.”

Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 237 (D. Mass. 2004) (first quoting U.S. Const. art. VI, cl. 2.; and then quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663 (1993)). As touched on above, the ICCTA—and its precursor, the Interstate Commerce Act—reflects Congress’s intent to federalize the regulation of rail transportation in the United States, and to “complete[ly] preempt[] [] State economic regulation of railroads.” H.R. Rep. No. 104-311, at 95. To accomplish this goal, Congress established, through the ICCTA, the STB, which has exclusive jurisdiction over “transportation by rail[,]” including “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities” 49 U.S.C. § 10501(b). And “[f]or more than a century, the

Supreme Court has made it clear that under the U.S. Constitution’s Supremacy Clause (Art. VI, cl. 2), state laws or regulations that are inconsistent with the [STB’s] plenary authority or with the Congressional policy reflected in the [ICCTA] are preempted.” B & S Holdings, LLC v. BNSF Ry. Co., 889 F. Supp. 2d 1252, 1256 (E.D. Wash. 2012) (citing City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998)).

Notwithstanding the ICCTA’s clear and broad preemptive sweep, Defendants argue that the proposed taking is not preempted because (1) the taking will not unreasonably interfere with GURR’s operations and (2) GURR’s development of the transloading facility is not far enough along to allow the conclusion that the construction will “come to fruition.” [ECF No. 32 at 16]. The Court finds that Defendants’ argument is contrary to the language and intent of the ICCTA. “The statutory language indicates an express intent on the part of Congress to preempt the entire field of railroad regulation, including activities related to but not directly involving railroad transportation.” Town of Milford, 337 F. Supp. 2d at 238 (citing 49 U.S.C. § 10102(6)(A), (C)). In particular, the ICCTA defines “transportation” as including a “yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . . [and] services related to that movement, including receipt, delivery, . . . transfer in transit, . . . handling, and interchange of passengers and property” 49 U.S.C. § 10102(9). As noted above, the First Circuit has held that transloading facilities fall within the ICCTA’s definition of transportation, and therefore it is beyond dispute that the taking would be preempted if the facility were fully constructed. See Grosso, 804 F.3d at 118 (“It is well-established that the preemption of state and local regulation under the ICCTA generally extends to transloading facilities.”). The question then is whether the taking is preempted even though the facility is still in the nascent stages of construction. The Court finds that it is.

Federal appellate courts in at least the Seventh, Eighth, and the District of Columbia Circuits, as well as the STB, have held that when determining whether a proposed taking, or other regulation, is preempted, it is appropriate to consider a rail carrier's future plans as well as its current uses. City of Lincoln v. Surface Transp. Bd., 414 F.3d 858, 862 (8th Cir. 2005); Union Pac. R.R. Co. v. Chi. Transit Auth., 647 F.3d 675, 681 (7th Cir. 2011); City of South Bend v. Surface Transp. Bd., 566 F.3d 1166, 1169 (D.C. Cir. 2009); Tri-City R.R. — Pet. for Declaratory Order, No. FD 35915, 2016 WL 5904750, at *7–8 (S.T.B. Sept. 12, 2016); Norfolk S. Ry. Co. — Pet. for Declaratory Order, No. FD 35196, 2010 WL 691256, at *4 (S.T.B. Feb. 26, 2010). Here, Plaintiffs' verified complaint and the second affidavit of Michael R. Milanoski make it clear that GURR intends to use the property at 364 West Street to house a transloading and logistics facility, and that the property has already undergone substantial development to advance the facility's construction. [ECF No. 30 ¶ 22 ("GURR's contractor has now finished harvesting the trees at the site Grading and preparing land adjacent to existing [] rail line has begun. . . . [and] rail ties and plates are on the site and the process of laying these ties and plates has begun."); Compl. ¶ 31 (listing GURR's plan for 364 West Street including development of, among others, new tracks and 1,500,000 square feet for transloading); id. ¶ 33 ("GURR's anticipated transloading and logistics center is under construction")]. And although Defendants contend that the taking would not interfere with GURR's rail operations because the eminent domain authorization forbids the Board from taking land that is "currently in use by the Railroad for railroad operations purposes or transloading facilities," [ECF No. 32 at 16], that argument rings hollow given Hopedale's insistence that property in the process of being developed such purposes does not fall within the ICCTA's definition of transportation. Therefore, the Court finds that because GURR has plans for developing 364 West Street as a

logistics and transloading facility, has already begun to develop the land to support that use, and has invested substantial capital in said development, the property falls under the ICCTA’s definition of transportation. The Court therefore concludes that the Town’s proposed taking is preempted and that Plaintiffs will likely succeed in proving that.

ii. Additional Prerequisites for a Preliminary Injunction

The additional factors—irreparable harm, the balance of hardships, and the effect of an injunction on the public interest—weigh in favor of allowing Plaintiffs’ motion for a preliminary injunction.⁸

First, there is credible evidence that GURR will suffer irreparable harm if the request for a preliminary injunction is denied. Although “economic loss alone does not usually rise to the level of irreparable harm[,]” Suero v. Fed. Home Loan Mortg. Corp., No. 13-cv-13014, 2013 WL 6709001, *7 (D. Mass. Dec. 17, 2013) (citation omitted), “[r]eal estate has long been thought unique, and thus, injuries to real estate qualify as “the type of harm not readily measurable or fully compensable in damages—and for that reason, more likely to be found ‘irreparable[,]’” K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989) (quoting Camel Hair & Cashmere Inst. v. Associated Dry Goods, 799 F.2d 6, 14 (1st Cir. 1986)); see also Ocean Spray Cranberries, Inc. v. PepsiCo, Inc., 160 F.3d 58, 61 (1st Cir. 1998) (stating that injunctive relief is often granted in the context of real property because such property is unique). Here, pursuant to Chapter 79 of the Massachusetts General Laws, the recording of the notice of taking will immediately vest title to the property in the Town. Therefore, if Hopedale is not enjoined from recording notice, GURR will quickly be divested of title to the property and therefore unable to

⁸ The Court considers the final two factors—balancing of the equities and the public interest—together “as they ‘merge when the government is the opposing party.’” Does 1-6 v. Mills, 16 F.4th 20, 37 (1st Cir. 2021) (alteration omitted) (quoting Nken v. Holder, 556 U.S. 418, 435 (2009)).

continue developing its facility. The fact that GURR would be deprived of real property, which is by itself unique and not well suited to economic damages, weighs in favor of finding that GURR would be irreparably harmed. That is especially true here where the property is of heightened value to GURR because it contains several parcels of industrially zoned land bisected by an operating railroad right of way. The Court thus finds that Plaintiffs have met their burden of showing irreparable harm. The Court is not persuaded by Defendants' argument that GURR has an adequate remedy at law under Mass. Gen. Laws ch. 79, § 18. Contrary to Defendants' characterization, Chapter 79, § 18 does not operate as a defense to a proposed taking but only provides a mechanism to invalidate a taking after the fact, a process that could take months, if not years, to resolve. This sort of lengthy process and the resulting impact caused by the delay is what Congress sought to avoid when it enacted the ICCTA.

Second, the combined balance of hardships and public interest factors also weigh in Plaintiffs' favor. As discussed, denying injunctive relief would almost certainly result in GURR losing title to the real property at 364 West Street and, as a result, being unable to take advantage of its unique characteristics, including that it is zoned for industrial use and bisects a railroad right of way. The loss of title would necessarily foreclose GURR's ability to continue developing the property. While the Court is sympathetic to Hopedale's interest in protecting its forest land, as of the submission of the second Milanoski affidavit, much of the forest land they seek to protect has already been harvested. [ECF No. 30 ¶¶ 22, 25]. Without in any way demeaning that interest, the harm the Town seeks to prevent appears to have already occurred, thus diminishing the force of the argument. Moreover, to the extent Defendants argue that GURR's development of the property risks contamination of Hopedale's groundwater, as another session of this Court found in a separate lawsuit involving GURR, "the public interest will be

protected by the enforcement of federal environmental statutes and regulations promulgated thereunder” and further, that “considering the potential for economic development for the region which may arise from the development of the [transloading facility at 364 West Street], the risk of harm is outweighed by the potential benefit.” Town of Milford, 337 F. Supp. 2d at 239. Additionally, the Town appears to acknowledge in its briefing that the potential harm to the Town’s water supply is speculative, as it asserts, in part, that GURR’s development of the land would lead to a “greater risk of contamination.” [ECF No. 32 at 19].

C. Motion to Enjoin the Enforcement Order

In Defendants’ combined opposition to Plaintiffs’ motions for injunctive relief, [ECF No. 32], only passing reference is made to the July 14, 2022 Enforcement Order, and Defendants do not respond to Plaintiffs arguments that the Enforcement Order is a preclearance regulation that is preempted by the ICCTA. Defendants also do not meaningfully respond to Plaintiffs’ arguments regarding the additional preliminary injunction factors. As discussed above, because Defendants failed “to spell out [their] arguments squarely and distinctly” those arguments are deemed waived. Rivera–Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) (quoting Paterson–Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988)).

Even if Defendants had responded, the Court finds that the Enforcement Order is a preclearance regulation that unduly interferes with GURR’s development of its transloading facility and is thus preempted by the ICCTA. Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 16 (1st Cir. 2003) (describing STB preemption analysis of preclearance requirements as “finely crafted” where STB found that “preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities

or conduct operations”). The Enforcement Order is not the kind of environmental regulation that could qualify as a “[n]on-discriminatory . . . requirement[] such as [a] building and electrical code[]” but is instead a pre-construction requirement that gives a local body “the ability to deny the carrier the right to construct facilities or conduct operations” and is therefore preempted. Id. at 16; see also [ECF No. 6-1 at 53–57 (Enforcement Order) (faulting GURR for “activities done without permit or prior notification”)].

Plaintiffs have also met their burden with respect to the remaining preliminary injunction factors. First, Plaintiffs will suffer irreparable harm if the Conservation Commission is permitted to enforce its order. The Enforcement Order would indefinitely bar GURR from developing its transloading facility, which would likely cause GURR to lose “incalculable revenues” and impair customer relationships. See Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 485 (1st Cir. 2009) (noting that the First Circuit has held that the irreparable harm requirement may be met upon a showing that, absent injunctive relief, the party seeking relief “would lose incalculable revenues and sustain harm to its goodwill” (quoting Ross–Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996))). Plaintiffs’ burden of showing irreparable harm is further satisfied because the Enforcement Order threatens a fine of up to \$25,000 or imprisonment for not more than two years, and “the risk . . . of incurring civil and criminal liability constitutes a threat of immediate and irreparable harm.” Hyde Park Partners v. Connolly, 676 F. Supp. 391, 394 (D. Mass. 1987). The Court also finds that the combined balance of hardships and public interest factors weigh in favor of granting the injunction for the same reasons discussed with respect to the motion to enjoin the taking. Moreover, allowing the Order to be enforced would stop GURR’s development of the transloading facility for an indeterminate period of time, stripping GURR of its use of this unique property and causing reputational harm. These harms

would be difficult to mitigate whereas the risk of environmental harm is lessened because the development is subject to federal environmental regulation and oversight. Because each of the factors weighs in favor of granting the injunction, the Court allows Plaintiffs' motion for a preliminary injunction enjoining enforcement of the Conservation Commission's order.

VI. CONCLUSION

For the reasons discussed herein, Defendants' motion to dismiss, [ECF No. 51], is GRANTED in part and DENIED in part and Plaintiffs' motions for preliminary injunction, [ECF Nos. 26 and 28], are ALLOWED. While the Court will retain jurisdiction over this matter, consistent with this Order, the matter will be stayed to permit the STB to consider the matter in full. To accomplish this, the Court ORDERS Plaintiff GURR to file a Petition for Declaratory Order with the STB for the purpose of the STB issuing a declaratory order regarding the Town's proposed taking and the Conservation Commission's Enforcement Order. During the pendency of the STB proceeding, Defendants are hereby enjoined from (1) recording any notice of taking of any portion of GURR's property at 364 West Street, Hopedale, Massachusetts or (2) taking any action to enforce the Conservation Commission's Enforcement Order.⁹

SO ORDERED.

March 31, 2023

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE

⁹ The Court further DENIES as moot GURR's motion for clarification. [ECF No. 59].

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

Exhibit 3

July 18, 2022 Affidavit of Michael Milanoski

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD)
COMPANY, JON DELLI PRISCOLI and)
MICHAEL R. MILANOSKI, as Trustees)
of ONE HUNDRED FORTY REALTY TRUST,)

Plaintiffs)

vs.)

TOWN OF HOPEDALE, THE HOPEDALE)
SELECT BOARD, by and through its members,)
GLENDA HAZARD, BERNARD STOCK,)
and BRIAN KEYES and THE HOPEDALE)
CONSERVATION COMMISSION by and)
through its members, BECCA SOLOMON,)
MARCIA MATTHEWS and DAVID)
GUGLIELMI)

Defendants)

Case No. _____

AFFIDAVIT OF MICHAEL R. MILANOSKI

Now comes Michael R. Milanoski, who on oath deposes and says as follows:

1. I am the President of Grafton & Upton Railroad Company (GURR), a position I have held since approximately May 2017. I have personal knowledge of the facts set forth in this Affidavit.

2. GURR is a short-line rail carrier incorporated in Massachusetts in 1873 and has been in continuous operation since that time. GURR owns and operates a 16.5-mile rail line that runs between North Grafton, through Upton and Hopedale to Franklin, Massachusetts. In addition, GURR leases and operates an 8.4-mile line that is owned by CSX between the terminus of the GURR owned line in Franklin and Milford, Massachusetts. A portion of the GURR rail line bifurcates and runs through property located at 364 West Street in Hopedale.

3. GURR is part of the national rail system that is critical to Massachusetts' economy and the efficient movement of goods by rail throughout North America. GURR's location is ideal for transloading—the transfer of commodities between rail cars and trucks--of products that move into and out of the greater Boston area. For example, the majority of liquid commodities used to support the Massachusetts economy and pharmaceutical industry are transloaded by GURR. GURR fulfills a national and state public purpose by being part of the flow of goods and materials necessary as a critical backbone of the national supply chain.

4. In recent years, GURR has invested a substantial amount of capital in order to upgrade its line and yard facilities in order to serve a substantial demand for transloading services for commodities that are shipped to Eastern Massachusetts by rail and transloaded into trucks for final delivery. GURR has transloading facilities in Upton, Massachusetts, where it handles a variety of chemicals and other bulk commodities, a facility in North Grafton, Massachusetts for the delivery by rail of liquid propane and transloading the propane to trucks for distribution and a facility in Hopedale, Massachusetts where it handles dry bulk materials, such as building materials.

5. GURR has experienced significant freight rail growth in recent years. In 2010, GURR handled approximately 200 rail carloads, but by 2020 the number of cars was approximately 3000 (15 times the volume a decade ago). GURR anticipates that its trans-load and other rail businesses will continue to grow year after year at this same volume growth. For example, the recently acquired line between Milford and Franklin is expected to generate approximately 400 carloads per year, and a new chemical transloading facility at Upton will produce additional business.

6. GURR anticipates continued steady growth in its business, and this projection is consistent with the expectations and estimates of Massachusetts. A 2018 State Rail Plan produced by the Massachusetts Department of Transportation projected that by 2040 the rail system in Massachusetts will need to accommodate approximately 19 million more tons of originating freight per year, 25 million more tons of terminating freight and 34 million more tons of rail freight traffic moving within Massachusetts. The plan recognizes that a well utilized rail network has many benefits for the state and its residents, including the reduction of greenhouse gases, less motor vehicle congestion, reduced wear and tear on the highways, travel time savings and economic development.

7. The additional existing traffic and the anticipated future growth of traffic on the line have created a need for additional yard and track space in order to support and handle efficiently such rail traffic and rail transloading activities. In addition to the development of new facilities for the core GURR business of transferring commodities from railcars to trucks, there is a growing need for track space to temporarily store rail cars, switch cars moving to and from the trans-loading facilities, and to perform other routine rail transportation activities, such as maintaining locomotives, railcars and maintenance of way equipment.

8. Part of the increase in business will be met by the expansion and upgrading of the track and facilities at the small GURR yard in Hopedale. GURR has recently constructed additional yard tracks at Hopedale and has reconfigured other tracks in order to accommodate new business. In addition, GURR is in the process of upgrading its main north-south line at the northern end of the Hopedale yard. Even with all of the expansion and improvement projects already undertaken, it is clear that additional yard and transloading facilities will be required in order to meet the anticipated levels of business.

9. In or around 2010 GURR identified two parcels of Industrial zoned real estate in Hopedale, just north of the existing yard, to expand its rail transportation facilities to meet the current needs of customers and to meet the expected increase in business. In 2018 GURR commissioned independent appraisals for both properties. The parcels were located at 364 West Street, a 155-acre parcel, and 1 Carpenter Road, a land-locked 17.76-acre parcel that is adjacent to the 364 West Street parcel.

10. At the time, 364 West Street was owned by The One Hundred Forty Realty Trust (the "Trust") and 130 acres+- of the 155 acre +- parcel was classified as forest land under Massachusetts G.L.c 61 by the Trust and was under a forest management plan approved by the Commonwealth of Massachusetts Department of Conservation and Recreation. The forestland classification of the 130 acres+- was scheduled to expire in the Fall of 2022.

11. The two parcels (364 West St. and 1 Carpenter Rd) were both zoned for Industrial Uses in the Hopedale Zoning By-laws and likewise the parcels are referenced as Economic Development Assets in the Hopedale Master Plan/Community Development Plan. A true and accurate copy of the Town of Hopedale's Zoning Map is attached hereto as Exhibit 1, which shows the location of the Industrial Zone in the northern-most part of Hopedale.

12. It is my understanding that 364 West Street and 1 Carpenter Road have always been zoned industrial since Hopedale first adopted zoning in or around 1973.

13. Having identified the two parcels it initially hoped to acquire to support its rail operations to meet current customer needs and expected growth, GURR followed its established practice of reaching out to the respective owners to explore a private negotiation and ultimate purchase. While GURR has the ability to petition the Department of Public Utilities (DPU) under Massachusetts G.L.c. 160 to acquire land by the eminent domain process set forth in

Chapter 79, GURR prefers to negotiate in good faith with the owners and also work with the local communities where its rail lines are located.

14. After some inconclusive initial discussions with the Trust regarding the acquisition of 364 West Street, GURR re-initiated communications with the Trust in 2018 regarding acquiring this parcel. GURR also initiated communications with the owners of 1 Carpenter Road.

15. In March 2019, GURR reached agreement to acquire 1 Carpenter Road and acquired the parcel on March 20, 2019.

16. GURR continued to be unsuccessful with respect to acquiring 364 West Street by agreement with the Trust. As a result, in March 2019, GURR filed a Petition with the DPU pursuant to G.L.c. 160 seeking to acquire the 364 West Street parcel by eminent domain, which remains an active and pending case.

17. The Town of Hopedale filed a motion to intervene in the DPU Petition proceeding, which was allowed. Hopedale never mentioned any intention to seek to acquire the 364 West Street parcel at the DPU through Chapter 61, or through any other mechanism.

18. Fully expecting to acquire the 364 West St. parcel either through eminent domain or through a direct private sale, GURR continued private negotiations with the Trust. Again, fully expecting to acquire 364 West Street, GURR also initiated communications with the Town because the Town had expressed its interest in promoting economic development to create tax revenue and to test a portion of the 364 West St. property as a potential future water supply.

19. While GURR was working on the public- private partnership with the Town, we continued private negotiations with the Trust to acquire the 364 West St. parcel.

20. In June 2020, GURR and the Trust reached agreement in principle on the terms of a private sale of the 364 West St. parcel to GURR that also included a separate 20 acre +- parcel across the street at 363 West Street, which was a requirement of the seller.

21. Having a 25-year career in the public sector including serving as Town Manager/CFO among other executive positions for several other towns in Massachusetts including Cohasset and Carver, discussions with the Town of Hopedale were initially very positive and seem to have the potential to create a win-win solution for all parties. The parties framed a public-private partnership with respect to the 364 West St. parcel which was summarized and presented by the Selectboard Chairman on July 13, 2020 at an open and public meeting that was estimated to have a value of \$3,000,000 to the benefit of the town as follows:

- Protect 3 Potential Municipal Well Location from development impacts;
- Provide Water distribution easement along railroad exclusive right-of-way to connect to town water system – an estimated \$2,000,000+ value;
- GU would build an additional 1.5 miles of Parkland Trails to Rt 140 on both sides of pond;
- Partially fund by GU the Park Commission to develop Park/Open Space Plan;
- GU to build a Kayak Launch Area at the Mill Pond-North location for Park Commission;
- GU to repair 3 rock structures including the historic rock “Rustic” bridge on the pond;
- Land Swap 1.5 to 1 (estimated at 30 acres in exchange for 75 new acres to Town Parklands)
- Increasing the Town Parklands to Rt 140 (Mill Pond-North) by 25% more public land;
- The Town would release any rights it may have in the temporary 61B forestry land as part of the PPP and land swap.

22. In accordance with G.L.c. 61, the Trust had sent a Notice of Intent to the Town, notifying the Town of its intentions to sell the 364 West Street parcel to GURR. The Notice of Intent was apparently defective because it did not segregate or allocate the purchase price between the 130 acres+- of forest land and the 25 acres+- of non-forest land according to the Town attorney.

23. The Town's attorney initially sent a letter to the Trust and to GURR stating that the Notice of Intent was defective which led the Trust and GURR to believe that the Notice of Intent process had been terminated. While the Town's attorney subsequently sent a letter claiming that the Notice of Intent was valid despite what he had stated earlier, GURR believed that the initial letter from the Town's attorney invalidated the Notice of Intent.

24. Thereafter, the Trust and its beneficiaries agreed to transfer 100% of the beneficial interest in the Trust to GURR rather than to transfer ownership of the property. As a result of this transfer of beneficial interest, which occurred on October 12, 2000, GURR obtained full and complete ownership of the beneficial interest of the Trust that owned the 155-acre+- parcel at 364 West Street. GURR also separately acquired the 20 acre+- parcel across the street at 363 West Street on the same day.

25. Additionally, in April 2021, GURR acquired approximately 23 acres of land abutting the 364 West Street parcel and the 1 Carpenter Road parcel. As a result of its acquisition of 155 acres at 364 West Street, its acquisition of 17.76 acres at 1 Carpenter Road, the acquisition of 23 acres+- in directly abutting 364 West Street and 1 Carpenter Road, GURR has site control over 198 acres+- (including the GURR right-of-way land of 4.5 acres, which had been under railroad control since 1873), of contiguous Industrial Use zoned land in the most

northern part of Hopedale to meet its current rail transportation operations and expected future growth in business. In June 2021, a Plan of Land was recorded at the Worcester District Registry of Deed Book 957 and Plan 48 showing the assemblage of parcels, a true and accurate copy of this Plan is attached hereto as Exhibit 2.

26. After GURR had acquired controlling interest in 364 West Street, the Town held a Special Town Meeting to vote to authorize the Selectboard to exercise a right of first refusal option under G.L.c 61 that the Town believed it possessed with respect to 130.18 acres at 364 West Street. The Special Town Meeting voted to authorize the Selectboard to exercise the purported right of first refusal option. Days later, the Selectboard filed suit in the Land Court seeking to enforce the right of first refusal option it believed the Town possessed as a result of the October 2020 transfer of beneficial interest in the Trust to GURR. See, Town of Hopedale v. Grafton & Upton Railroad Company, et al, 20 MISC00467(DRR) (the “Land Court Action”)

27. In response to the Town’s Land Court lawsuit, GURR filed a Petition for Declaratory Order with the Surface Transportation Board (STB) seeking a declaration that the Town’s Land Court action was preempted by the Interstate Commerce Act as amended by the Interstate Commerce Commission Termination Act (ICA). The STB Petition noted that GURR is a rail carrier and the Town’s efforts to use Chapter 61 to take the land GURR acquired at 364 West Street would adversely affect the transportation services provided by GURR.

28. The Town moved for a preliminary injunction in the Land Court Action, which the Land Court (Rubin, J.) denied after specifically noting that it did “not appear that the Town's right of first refusal ripened into an option on July 9, 2020” and that as a result she could not “determine whether the [ICA] preempts the Town's right to purchase land which the Defendants contend is land intended for use as transportation by rail.” A copy of the Land Court Docket

entry reflecting Judge Rubin's decision is attached hereto as Exhibit 3. Judge Rubin then ordered the parties to mediation screening.

29. The Town and GURR voluntarily agreed to mediate their dispute and after two days of mediation in January 2021 with retired Land Court Judge Leon Lombardi, the Town and GURR reached a Settlement Agreement in the Land Court Action.

30. The Town later acknowledged that it decided to settle the Land Court Action because it "understood the [Land] Court to be expressing that mediation was advisable as the Town's claims to the 155 acres may not be successful," and because Judge Lombardi "also expressed doubts as to the Town's likelihood of success against the Railroad and encouraged a settlement."

31. As part of the Settlement Agreement, the Town relinquished its contested G.L. c. 61 ROFR claim to acquire all 130+ acres of forestland, in exchange for an uncontested right to acquire 40+- acres of forestland plus an additional 44+- acres of non-forest land. GURR promised to transfer 64+- acres (the "Settlement Parcel") to the Town in consideration of a payment of \$587,500 and further promised to donate an additional 20 acres to the Town. The Selectboard agreed to release and waive the Town's purported c. 61 ROFR.

32. On February 10, 2021, the parties filed a Stipulation of Dismissal With Prejudice of the Land Court Action. A true and accurate copy of the Stipulation of Dismissal With Prejudice is attached hereto as Exhibit 4.

33. On or around February 17, 2021, GURR filed Motion with the STB to dismiss its Petition for Declaratory Order, which was allowed. A true and accurate copy of the Dismissal is attached hereto as Exhibit 5.

34. In March 2021, ten taxpayers of Hopedale filed a Verified Complaint in Massachusetts Superior Court “bringing three counts: (1) to enjoin the Board from making expenditures and entering obligations under the Settlement Agreement; (2) to obtain a declaratory judgment that the Town’s c. 61 rights remain fully enforceable and enforce the same through transfer of title to the Forestland to the Town; (3) a declaratory order that the Forestland is protected under Article 97 and to protect against any change from Article 97 use.” See, Reilly et al v. Grafton & Upton Railroad Company, et al, 2185CV00238D (the “Superior Court Action”).

35. GURR and the Trust moved for Judgment on the Pleadings on the only Count asserted against them in the Superior Court Action: Count II. The ten taxpayers and the Town cross-moved for Judgment on the Pleadings on all claims: Counts I, II and III. The Town asserted in its cross-motion that the decision to exercise or not exercise a G.L.c. 61 right of first refusal is “an executive action whose sole authority resides with the Board of Selectmen...There is nothing Town Meeting or anyone else can do to exercise the right of first refusal in such a case.”

36. On November 10, 2021, the Superior Court (Goodwin, J.) entered Judgment in favor of the ten taxpayers on Count I, in favor of GURR, the Trust and the Town on Count II and in favor of the Town on Count III. A true and accurate copy of this Judgment is attached hereto as Exhibit 6.

37. As a result of the Judgment that entered under Count I in the Superior Court Action, the Town was enjoined from using funds appropriated at the October 2020 Special Town Meeting to purchase the 64 acres+- at 364 West Street described in the Settlement Agreement.

In other words, the Judgment that entered on Count I requires a new Town Meeting vote to appropriate a lesser sum for the acquisition of a parcel that is smaller than 130.18 acres.

38. In December 2021, the Town moved in the Land Court pursuant to Mass. R. Civ. P. 60(b)(6) Motion to Vacate the Judgment that entered through the February 2021 Stipulation of Dismissal with Prejudice filed by the parties.

39. In January 2022, the Land Court (Rubin, J.) denied the Town's Motion to Vacate the February 2021 Judgment. A true and accurate copy of the Land Court's Decision Denying the Town's Motion to Vacate is attached hereto as Exhibit 7.

40. In February 2022, the Town appealed the Land Court's denial of its Rule 60(b)(6) motion and moved for an injunction pending its appeal.

41. In April 2022, a Single Justice of the Appeals Court (Desmond, J.), denied the Town's Motion for Injunction pending appeal, finding that the Town was not likely to succeed on the merits. See, Town of Hopedale v. Grafton & Upton Railroad Company et al, 2022-J-0146. Justice Desmond wrote in part that "the select board was authorized to settle the matter and did so. That the town was unwilling to correctly appropriate the funds to fully recognize the benefit of that agreement does not entitle the town to relief from judgment." A true and accurate copy of this docket entry is attached hereto as Exhibit 8.

42. In May 2022, the Town moved to voluntarily dismiss its appeal, which was allowed by the Land Court.

43. Later in May 2022, a new Selectboard was elected. At the first meeting of the newly constituted Selectboard on May 23, 2022 the newest member, Bernard Stock stated:

"So I'll warn everybody going forward, I am not a friend of the railroad through this process until we see a lot of changes. And I've got an arm's length of them....

See p. 6 of the transcript from the May 23, 2022 Selectboard Meeting, a true and accurate copy of which is attached hereto as Exhibit 9.

44. Mr. Stock later stated at the May 23 meeting that he had not read the Land Court Settlement Agreement (Id., p. 55) but that in spite of his not reading it, he preferred “to open it up again so that I can look at it and have a piece of the action on the thing.” Id., pp. 55-56.

45. On June 16, 2022, the new Selectboard posted the Agenda for its scheduled June 21, 2022 meeting. The posted Agenda included an Executive Session to discuss, inter alia, “the acquisition of real property...” A true and accurate copy of the June 21, 2022 Agenda is attached hereto as Exhibit 10.

46. The Selectboard asserted that Executive Session scheduled for June 21 was appropriate because having a discussion in open session to consider taking real property by eminent domain “may have a detrimental effect on the negotiating position of the public body”, citing to G.L.c. 30A §21(a)(6). Id.

47. It is now clear and confirmed that the new Selectboard intended to discuss the taking of 130 acres of 364 West Street from GURR in its June 21 Executive Session.

48. After returning to open session from its unlawful Executive Session on June 21, 2022, the new Select Board voted to pursue an eminent domain taking of 130 acres of real property at 364 West Street.

49. At its June 21 meeting, the new Selectboard scheduled a Special Town Meeting (STM) for July 11, 2022, less than three weeks from its June 21 meeting.

50. At its June 21 meeting, the new Selectboard voted to open the Warrant for the July 11 STM and include only one article and no opportunity for citizen petitioned articles on that Warrant – an Article to authorize the Selectboard to take 130 acres of 364 West Street from

GURR and to appropriate funds to pay for the eminent domain taking. The Selectboard then immediately voted to close the Warrant. A copy of Article 1 of the July 11 STM is attached hereto as Exhibit 11.

51. Upon information and belief, the Selectboard scheduled the STM for July 11, 2022 even though it had not retained the services of a real estate appraiser for purposes of establishing the fair market value of the real property that was subject of the eminent domain taking article.

52. At its July 6 meeting, the Selectboard announced that its new special counsel had retained the services of a real estate appraiser to provide a fair market value analysis of the real property that the Selectboard was pushing to take by eminent domain from GURR. The Selectboard also announced at its July 6 meeting that an anonymous donor had agreed to pay for the appraisal. One Selectboard member expressed at the meeting that he was not aware that the special town counsel had been authorized to retain a real estate appraiser and that an anonymous donor had agreed to pay for the appraisal, which was confirmed by the Chair.

53. The Selectboard continued to press forward with the July 11 STM even though it had not obtained an appraisal of the property as of 7pm on July 6 and thus, could not share with the town residents the expected cost to take the property from GURR.

54. I went to Hopedale Town Clerks Office on July 11, 2022 to review the 130-acre portion of the 199 acres owned by GURR that the town was attempting to take under Article 1 of the July 11 Warrant. The only plan that was provided to the Town Clerk from the Town Administrator was for 199 acres, which is the same plan GURR recorded in June 2021, a copy of which is attached hereto as Exhibit 2. There was no plan on file for the public to review or GURR, the 5th largest commercial tax payer in the town, to review to see precisely what portion

of our land was being taken. The plan on file at the Town Clerk's office did not delineate or highlight in any way the 130 acres that was subject to Article 1 of the July 11 Warrant.

55. On July 11, 2022, the Selectboard met in open session immediately before the STM and incredibly disclosed that it still did not possess the appraisal for the property that was subject to the eminent domain taking article. The Selectboard disclosed that the appraiser had not completed the appraisal but had verbally conveyed an opinion that the real property was likely worth up to \$3,900,000.

56. The Selectboard then voted to amend the draft motion to move Article 1 to take approximately 130 acres at 364 West Street for the sum of \$3,900,000. Again, the Selectboard voted to amend the motion to reflect an acquisition cost of \$3,900,000 even though it had not received an appraisal and even though the sketch on file at the Town Clerk's office did not identify the 130 acres+- that was subject to Article 1.

57. At the Selectboard meeting on July 11, 2022 I specifically asked about the precise portion of the land that is proposed to be taken and was told the plan was on file with the Town Clerk. However, the plan I reviewed was not the plan of a proposed taking but rather a plan of all 198.607 acres the land that GURR owns at 364 West Street. See Exhibit 2 attached hereto.

58. The Selectboard adjourned from its July 11 meeting and went to the Special Town Meeting even though they had not received an appraisal of the property that was subject to the eminent domain taking article.

59. The Town voted at the July STM to authorize the Selectboard to take 130.18 acres of land at 364 West Street that is owned by GURR.

60. If permitted, the Town's taking by eminent domain of GURR's property at 364 West Street would have a significant adverse effect on GURR's current and future rail

transportation operations. As described above, GURR needs the acreage at 364 West Street to meet the needs and handle the business of current customers as well as to handle the expected continuing growth in business.

61. Since GURR acquired the assemblage of parcels that now make up 364 West Street, GURR has spent hundreds of thousands of dollars on engineering and site development and stormwater plans. GURR has removed trees and done grading work in order to create an access road and to clear space for the imminent construction of sidetracks into the property for the initial transloading and maintenance operations. Recognizing that it must comply with generally applicable local health and safety regulations, GURR has performed site work and water exploration activities, including water testing for quantity and quality to support the transportation services and facilities in coordination with the Massachusetts Department of Environmental Protection, the US Army Corps of Engineers and Federal Railroad Administration as it always does, including as a courtesy, direct collaboration meetings with Massachusetts Department of Environmental Protection.

62. The entire property is owned and controlled by GURR and all of the track and other facilities will be likewise owned and controlled by GURR and used for transloading and other rail transportation purposes. GURR has secured private financing to undertake the initial site improvements for this project and has pending private financing for the full development of roads, rail and other infrastructure for this rail development. This additional financing is in jeopardy as result of the potential condemnation. The attached preliminary plan (Exhibit 12) shows the following for the rail development at 364 West Street:

- All roadways in the property to access the rail facilities

- All the new track development in the property that will provide access directly or indirectly to the buildings and other facilities;
- All the stormwater detention areas to support the facility
- Well location and buffer zone as well as water storage tank on top the property for fire suppression and water pressure for site.
- Sewer treatment plant area and buffer zone
- Stormwater basins for the full development of the infrastructure.
- More than 1,500,000SF of space for transloading and temporary storage broken down into the following categories:
 - Railroad Transloading and Temporary Storage Building (on rail spur)
 - Railroad Temporary Storage Building (off rail spur but near outside rail laydown area)
 - Railroad trucking terminal located next to silos that are piped from rail siding to be transloaded into trucks.
 - Railroad support buildings for rail related contractors that work on GURR rail equipment and infrastructure including specialized trades like Positive Train Control installation. <https://railroads.dot.gov/train-control/ptc/positive-train-control-ptc>).
 - Areas for temporary railcar storage, switching, building trains, and railcar repair

63. Upon information and belief, the Massachusetts Freight Rail Association is working with the State Legislature and the Governor's Office to create regional public/private partnerships for rail logistic hubs to maximize freight hauling efficiency while decreasing carbon emissions and road usage that 364 West Street is uniquely designed for.

64. GURR's anticipated transloading and logistics center is under construction and agreements are being finalized to service current and new customers that are in need of transloading of products. In spite of past delays, GURR expects to be able to open its new facility at 364 West Street by next Spring or Summer (2023), which will have a positive impact on national supply chain issues that have been adversely affecting the local, state and national economy over the past few years.

65. In sum, GURR has been working for an extended period to acquire and develop the property to support rail transportation that will include on the entirety of the site transloading, temporary storage, services related to transloading or temporary storage, and whatever additional rail activities are necessary or required in order to support the rail business that currently exists and is anticipated in the future, such as repairs to rail related equipment and the construction and operation of switching tracks, storage tracks, yard tracks to relieve congestion and facilitate service. In addition, given that no public water or sewer service currently exists on the site, GURR will need to use the entire parcel in order to accommodate the well protection zone, the wastewater treatment plant recharge area, ample land to protect and build stormwater run-off protection, and a noise buffer zone for abutting residential property. Therefore, it is necessary to reserve and plan for the use of all 198 acres+- of the 364 West Street property.

66. The assembled acreage and expected development at 364 West Street will provide GURR the opportunity to provide rail transportation facilities and services in order to meet current customer demand and expected future growth. In addition to serving the public interest by providing efficient rail transportation, the implementation of the plans for the property are anticipated to further promote the public interest by bringing hundreds of new jobs and millions of dollars in tax revenue to Hopedale.

67. Absent an injunction in this case, GURR will immediately lose all right, title and interest in approximately 130 acres of industrially zoned real estate uniquely situated on an operating railroad right of way. A taking also would render GURR's remaining property landlocked and undevelopable. A taking would suspend GURR's ongoing rail transportation development indefinitely, and would cause GURR to lose incalculable revenues, customer relationships, and financing.

68. 364 West Street is a unique large assemblage of several parcels of undeveloped, industrially zoned land bisected by an operating railroad right of way. As such, the property provides the opportunity for an integral hub in the supply chain for propane, lumber, sand, stone and gravel, metals, chemicals and other commodities. The size of the assemblage provides the opportunity for transloading operations in which GURR would unload products from railcars for distribution by truck to destinations in the Boston area, thereby supplementing and making more efficient GURR's current transloading business and anticipated future business. In addition, there is some additional transloading business involving the transfer from trucks to rail cars for movement to destinations throughout North America.

69. A taking by the Town would divest from GURR irreplaceable real estate and with it, a once in a lifetime railroad development opportunity. GURR could not simply take the proceeds from a taking and purchase replacement property similarly sized, zoned, situated, and suited to development as a railroad transloading operation.

70. The planned taking also would impair GURR's rail activities beyond the subject property. GURR would continue to own contiguous parcels, which post-taking would have no frontage on an existing public way, no access to GURR's rail right of way, and no access to any

well water. Thus, even the land remaining to GURR after the proposed taking would be incapable of development for the planned railroad use.

71. On July 14, 2022, I received an email from the Chairperson of the Hopedale Conservation Commission along with a purported Enforcement Order, claiming that GURR was violating the Massachusetts Wetlands Protection Act. A true and accurate copy of this Enforcement Order is attached hereto as Exhibit 13.

72. However, as Hopedale Conservation Commission is well aware, the work being performed at 364 West Street by GURR is not subject to the Massachusetts Wetlands Protection Act, but is instead subject to oversight by the United States Environmental Protection Agency and the United States Army Corp. of Engineers. I have attached hereto as Exhibit 14 a true and accurate copy of the June 2022 Inspection Report completed by EPA's field representative who inspected the 364 West Street site on May 26, 2022.

73. GURR is following all federal environmental regulations with respect to the rail transportation development.

74. In fact, G&U prepared a 232-page Stormwater Pollution Prevention Plan ("SWPPP") as it relates to construction activities at 364 West Street, Hopedale, MA. Excerpts of the SWPPP are attached hereto as Exhibit 15.

75. The SWPPP was filed with the Environmental Protection Agency in 2021 and courtesy copies of the SWPPP were provided to the Army Corp. of Engineers, the Hopedale Town Administrator, and the Hopedale Water and Sewer Manager.

76. The entire SWPPP process and our development plans and actions have been completely transparent.

77. The SWPPP requires maintaining stormwater during and after the work is completed. All work being performed at the site is being performed in accordance with the SWPPP including bridge improvements at the site.

Signed under the penalties of perjury this 18th day of July 2022

A handwritten signature in black ink, appearing to read "MRM", enclosed within an oval shape.

Michael R. Milanoski

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36696

**GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

Exhibit 4

July 28, 2022 Affidavit of Michael Milanoski

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD)
COMPANY, JON DELLI PRISCOLI and)
MICHAEL R. MILANOSKI, as Trustees)
of ONE HUNDRED FORTY REALTY TRUST,)

Plaintiffs)

Case No. 4:22-cv-40080-ADB

vs.)

TOWN OF HOPEDALE, THE HOPEDALE)
SELECT BOARD, by and through its members,)
GLENDA HAZARD, BERNARD STOCK,)
and BRIAN KEYES and THE HOPEDALE)
CONSERVATION COMMISSION by and)
through its members, BECCA SOLOMON,)
MARCIA MATTHEWS and DAVID)
GUGLIELMI)

Defendants)

SECOND AFFIDAVIT OF MICHAEL R. MILANOSKI

Now comes Michael R. Milanoski, who on oath deposes and says as follows:

1. I am the President of Grafton & Upton Railroad Company (GURR), a position I have held since approximately May 2017 while directly growing and managing the tripling of GURR's rail car volume and safe operating record in that timeframe. I have personal knowledge of the facts set forth in this Affidavit.

2. I incorporate herein by reference the content of my Affidavit, dated July 18, 2022.

3. I offer this second Affidavit to expand upon the role of short-line railroads in the United States and GURR's operation as a short-line railroad including our service of customers as a "common carrier.

4. A century ago, trains were powered by steam, there was no interstate highway system, almost every business that manufactured most anything was located adjacent to a railroad line and there was little or no federal oversight. One hundred years later, modern railroading is safer, more sophisticated and diverse and now, with over 600 shortline railroads, like GURR.

5. Short line railroads like GURR are a critical part of the federal freight transportation network. Short line railroad partner with Class 1 railroads, such as CSX, to serve the customer. Short lines most often provide the first or last mile service of a shipment.

6. Because the short line railroads are focused on the first and last mile of delivery many short line railroads engage in transloading to move the product from rail, including temporary warehousing, then to trucks for delivery to the end customer. The short line railroad industry has changed and has adapted to the modern supply chain demands as many users are not located next to active railroads and require transloading to operate sustainable businesses.

7. 95% of GURR's business is transloading materials for over one hundred customers. Transloading, or the transfer of goods from one mode of transportation to another, has become a necessity in order to meet the demand for rail service, which in turn has led to shortline growth, as evidenced by GURR's business volume growth. Since 2017, GURR's year over year growth has averaged approximately twenty percent per year and 2022 is no exception as new customers and increased demand with new products will exceed previous years' growth based on new customer agreements as well as GURR's full logistics solutions. Full logistics solutions include offering customers who are not located on rail lines the opportunity to benefit from the environmental and financial savings that transloading offers, which is often the only way they can operate in today's just-in-time, competitive business climate and due to the challenges of finding and the expense of long-haul truck drivers.

8. GURR's current and anticipated future business includes turnkey solutions where GURR competes head-to-head with long-haul trucking where GURR create Environmental, Social, and Governance Criteria "ESG" savings for businesses but also deliver products cheaper on a per-ton basis while reducing their carbon footprint by using rail. This business line is expected to generate an additional year-over-year growth of 10% annually to GURR and is exemplified in our warehouse / distribution center in our existing small yard in Hopedale (not the yard planned for the property at 364 West Street)¹ where sheet rock arrives by train with each railcar holding about four (4) truck loads, is removed by forklift and placed temporarily inside GURR's

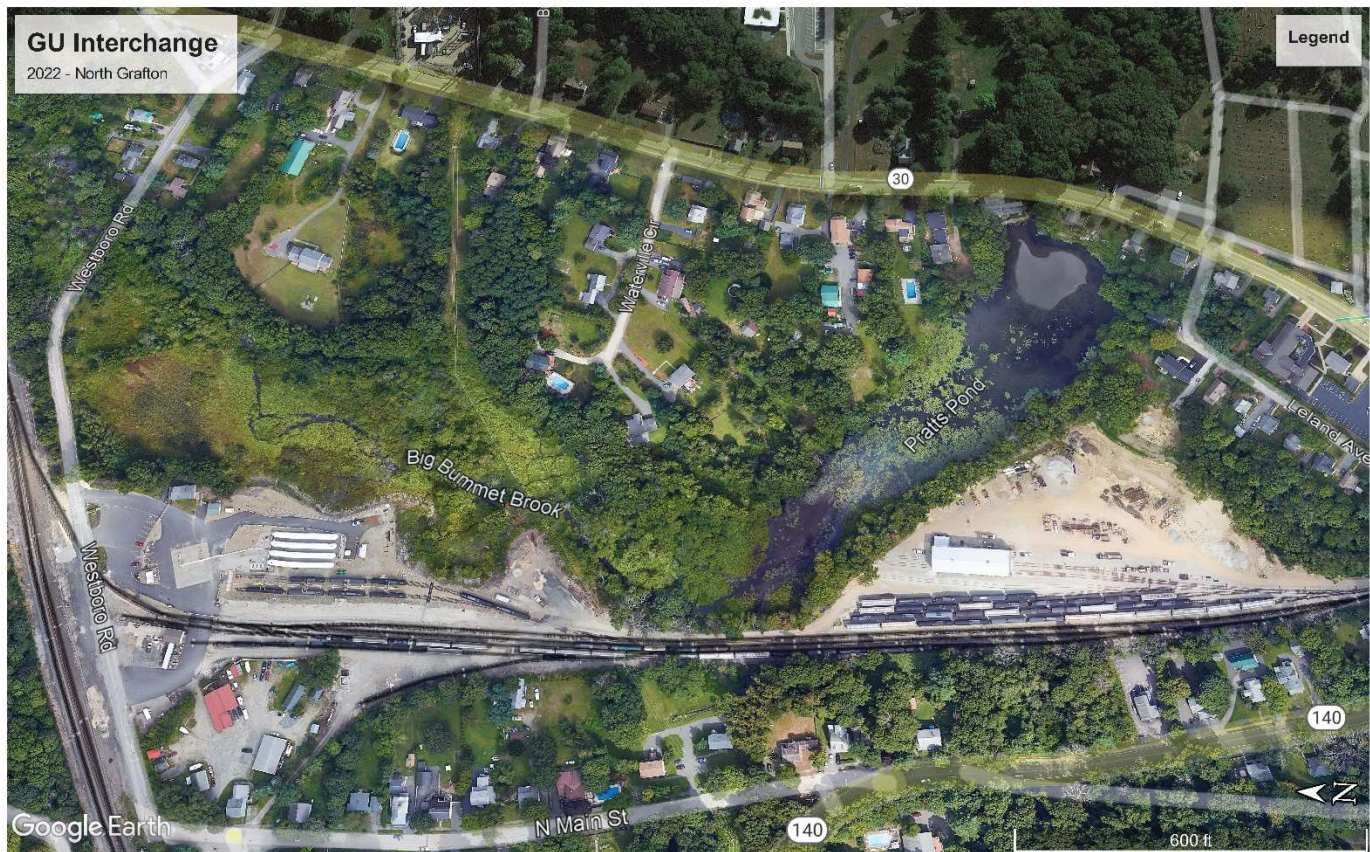
¹ The existing small yard in Hopedale is located on Route 16 and is not subject to the threatened eminent domain taking by the Town.

warehouse to avoid the harsh New England climate, and is then loaded onto trucks for last mile delivery, as arranged by the sheet rock producer, to nearby wholesalers. In addition, the same company produces a specialized sheetrock product line in New Hampshire and sends it to GURR's warehouse / distribution center by truck until there is enough product to load a specialized rail car for export. In both cases, there is temporary storage in GURR's warehouse / distribution center until either is loaded on rail car or truck for last mile delivery.

9. GURR's rapid growth, which has been and will continue to be driven by customer demand, has nearly maxed out all its existing business locations and available real estate, which is why, as a common carrier we continue to expand our transloading facilities and activities to meet these needs. There are obvious needs for this type of industry growth with the national supply chain issues we've faced over the past few years and have been highlighted in the May 2018 Massachusetts State Rail Plan which predicts 29.8% rail growth by 2040. See Exhibit 1 attached hereto. A copy of the Massachusetts State Rail Plan can be found here:

<https://www.mass.gov/doc/final-state-rail-plan-spring-2018/download>.

10. GURR's interchange with CSX, where GURR receives all of its rail cars, is located in Grafton. In 2010 the rail operations in Grafton were limited to 3 yard tracks. Over the next decade GURR built out the site with three major projects which highlights the rapid growth GURR has gone through to satisfy the needs and demands of customers that want rail service. On the following page, I have included a 2010 Google Earth photo, which fairly and accurately reflects the Grafton facility in 2010. Below that photograph, I have included a 2022 Google Earth photo, which fairly and accurately reflects the Grafton facility in 2022 to show how the Grafton facility has expanded to meet the needs of GURR's customers.



11. The first project in Grafton was a major expansion of the interchange railyard to accommodate the increased rail car volume created by the customer demand on GURR's railroad. The project added nine new switches off of the main line with new rail spurs and upgraded the rail to newer, more resilient rail. Second, was the installation of GURR's propane terminal that transloaded over thirty million gallons of propane in 2021, which comprised over 20% of Massachusetts propane demand (69% of Massachusetts propane demand is for the residential market including heating.) Third, is GURR's locomotive and rail car repair facility which helps GURR maintain its fleet of locomotives to federal safety standards, serves as a railcar repair shop to keep the railcars fit for service and provide routine, federally mandated testing and also allows GURR to store locomotives inside during the winter, reducing excessive engine idling and improves fuel conservation (ESG reductions). GURR's repair facility is the only privately owned facility in New England that provides locomotive and rail car repair services, but we need further expansion to keep up with the growing traffic on our short line. This additional expansion for working on fleets of cars for modification and upgrade is programed for the Metrowest Transloading and Logistics Center being developed at 364 West Street.

12. I have included photographs of the Grafton terminal on the next page, which fairly and accurately represent this terminal today, including a photograph of the propane distribution facility and both outside and inside of the repair facility.



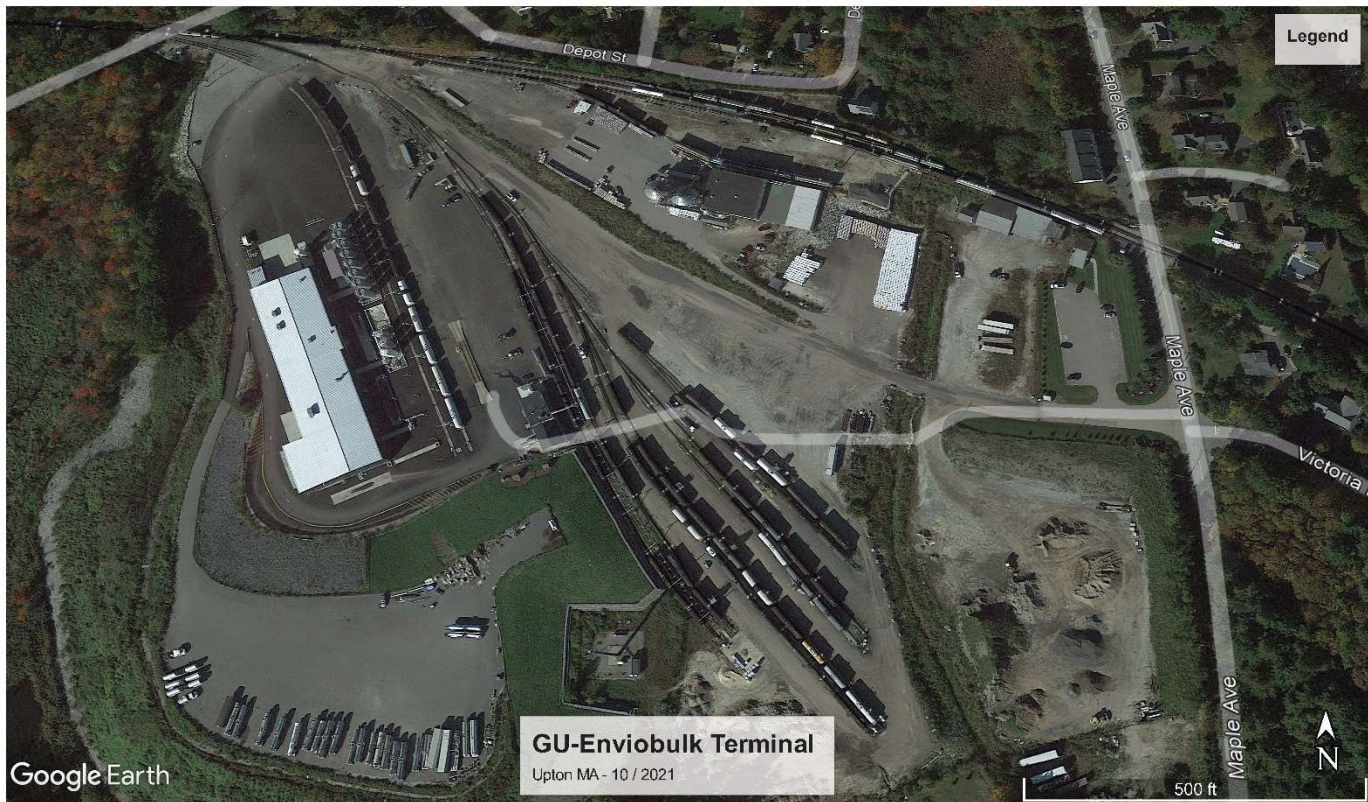


13. With respect to GURR's Upton terminal, in conjunction with the environmental closeout of landfills mandated by the Massachusetts Department of Environmental Protection, GURR began closing out the Upton Town Landfill in 2010 to convert the land into a rail yard and transloading facility that included four major phases. First, the rail yard was created to provide approximately 25 rail car spots that allowed for direct railcar to truck transloading via mobile pumps. Second, was opening up a new product line that required railcars filled with solid material like wax for Yankee Candle and food grade product packaging or asphalt for roads to be liquified with a steam that heats the products in the rail cars into liquid form, adding more railcar spots. Third, was a wood pellet bagging system that transfers high-grade wood pellets shipped from the northwest from railcars into silos, from which the pellets are bagged, palletized and trucked to various locations

for wholesalers. Fourth, was a new facility that pumps liquid products to silos, from which the material is either pumped into tractor trailers for delivery to customers or pumped into 55 gallon or 250-gallon totes for distribution by truck. This removes a redundant leg of transportation that was previously occurring by containerizing the product into more useable sizes for the manufacturing and pharmaceutical industry, improves the efficiency and safety of the facility and achieves more Environmental, Social, and Governance Criteria benefits delivered by the railroad to reduce carbon emissions. In total, and almost at capacity, this rail yard has expanded to hold nearly 100 railcars which supply Massachusetts and New England with many vital commodities.

14. Google Earth photographs of the Upton facility from 2008 and 2022 are included on the next page of my Affidavit, which fairly and accurately depict the Upton facility in those years.





15. I have also included additional photographs on following pages of my affidavit, which fairly and accurately depict the current condition of the Upton facility, including warehouses associated with our transloading rail operation and other rail transportation activities at this facility including warehouse space to support bagging facility, and outside silos that are slated to be replicated at the Metrowest Transloading and Logistics Center being developed at 364 West Street. In addition, there are mobile pumps that connect to railcars, an overview of the liquid facility with goats maintaining the vegetation growing on the capped landfill, and an interior view of the 55 gallon and 250 gallon totes that are to be filled.





16. The Upton facility is nearly at max build-out and GURR has several new customers that want to have their material transloaded by GURR, including companies involved in the pharmaceutical industry, and biofuels. These customers will be accommodated and served by the transloading silos and warehouse /

distribution center space designed into the Metrowest Transloading and Logistics Center being developed at 364 West Street. 364 West Street site offers a unique condition that will allow GURR to use gravity to unload rail cars with biofuels to connected transloading facilities via a piping system to allow product to be stored in silos outside, or inside a warehouse for material that cannot freeze, and then to transload the products into smaller containers or trucks for wholesale delivery. Use of a gravity fed system will also reduce GURR's carbon footprint by not requiring mechanical means to move material.

17. When GURR reestablished rail service in 2010 into a small terminal in Hopedale on Mendon Street (Route 16), the line was overgrown with trees growing between the rail. After the site was prepped and an abandoned building was rehabilitated, several customers sought service from GURR in the terminal. A major expansion of the small Route 16 railyard in Hopedale was completed in 2021, as depicted in the photo on the next page, to accommodate the increased rail car volume by adding a total of 10 new switches with new rail spurs to support the necessary growth to meet the demands of customers. Products transloaded at this yard include sand, limestone, cement, glass cullet, sheetrock, railroad ties, dimensional lumber and specialized overweight products. This facility is maxed out and a new transloading facility at 364 West Street for sheetrock and other commodities is needed to handle customer demand. I have included photographs on the following pages which fairly and accurately depict the current state of the small Hopedale yard on Route 16 including three railcars being filled with glass cullet, which is recycling and reduces the demand on Massachusetts landfills, and shipped by rail. The photograph also shows temporary storage of sheetrock in the background. Also included in the photographs are outside cement transloading silos along with conveyor belts to unload specialized aggregates for local markets.





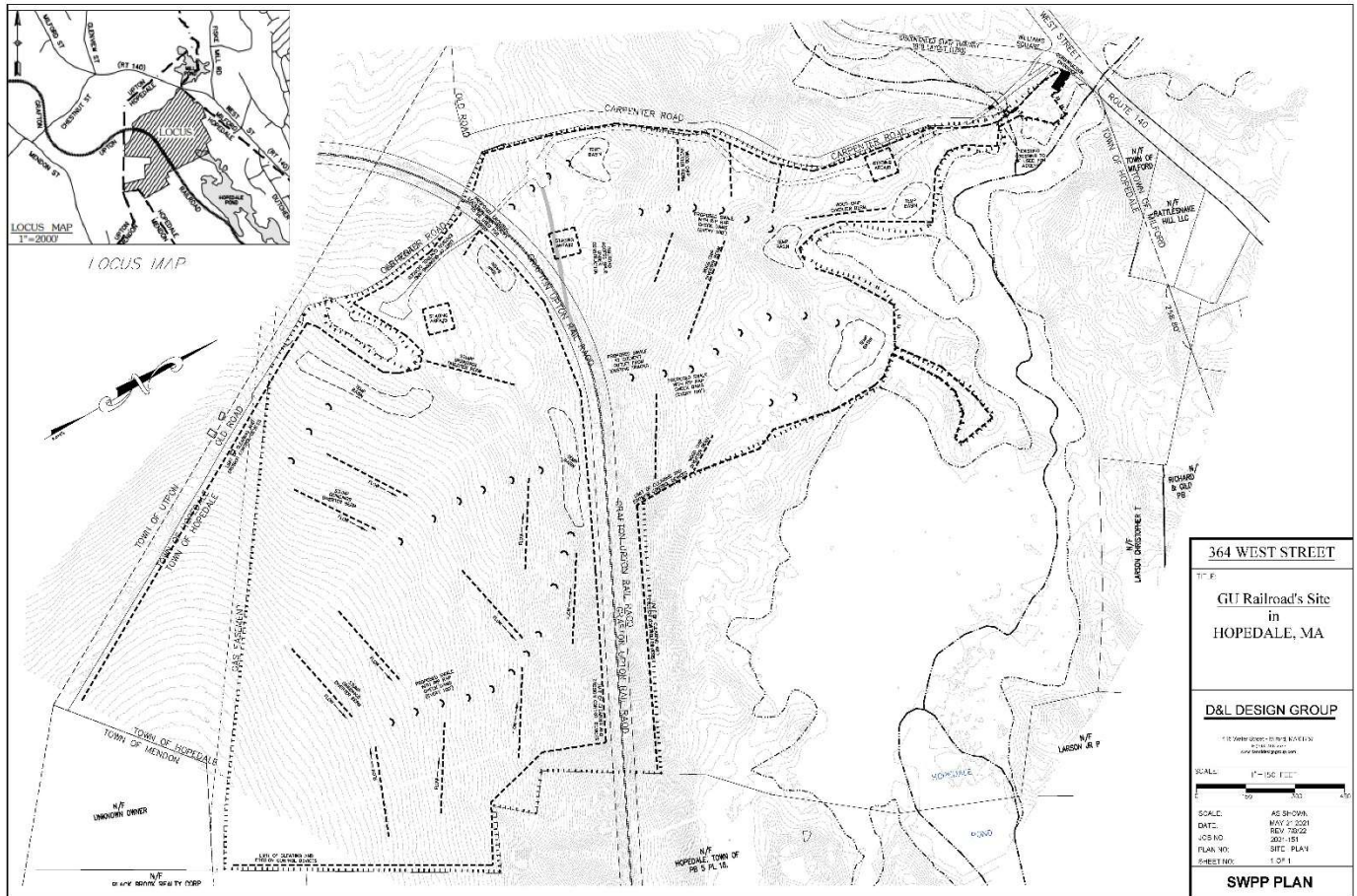
18. As I stated in my July 18 Affidavit and above, GURR has experienced significant growth over the past decade and this growth is expected to continue based on our experience as well as the forecast by the Commonwealth of Massachusetts in its Massachusetts Freight Plan and Massachusetts State Rail Plan. Based on the freight flow data examined, the rail system in Massachusetts and determined it will need to accommodate roughly 19 million more tons of originating freight tonnage, 25 million tons of terminating freight, and 34 million tons of internal freight than it does now. See Exhibit 1. Despite this increase in rail freight demand in Massachusetts hundreds of miles of freight track have been taken out of service in part due to redevelopment of industrial parcels in greater Boston including Harvard Yard and other significant freight tracks in Boston.

19. Additionally, as noted in both the Freight Plan and the Rail Plan, moving property by rail has incredibly benefits to the environment. For example, according to the 2018 Rail Plan (at p. 62), “For long haul distances, freight rail transportation is more energy efficient than trucking or shipping by air. Based on a 2017 study by the Texas Transportation Institute, one gallon of fuel moves one ton of freight by rail 477 miles, compared to 145 miles by truck. Freight delivered by rail is on average four times more fuel efficient than trucks (in terms of ton-miles per gallon), and because greenhouse gas emissions are directly related to fossil fuel consumption, every ton-mile of freight moved by rail instead of truck reduces greenhouse gas emissions by 75 percent.” See Exhibit 1.

20. GURR recently converted long haul trucks to rail which had impactful ESG benefits by removing over 500 long haul trucks from the congested highways between New Orleans and Massachusetts. The ESG savings are in excess of 825 tons of CO2 removed from the atmosphere. The Town of Hopedale’s bad faith and what I would call to be unlawful actions continues to have a significant financial impact on GURR operations and ability to meet customer demands as a common carrier. GURR has customers who have been waiting for GURR to be able to meet their demand for new transloading facilities. These customers include demand for over a million square feet of space for nearly a dozen users that will add over 1,000 new rail cars to GURR annually that will require use of the entire property at 364 West Street. The commodities for these customers range from: food, including beer/wine and produce, building materials including steel and lumber,

aggregates including gravel, sand, and other minerals, appliances and other commodities loaded into box cars, plastic, specialized fluids, biofuels and wood pellets, construction and demolition debris transfer facility to FDA approved liquids for pharmaceutical company; all critical commodities for the continued economic success of the Commonwealth.

21. GURR follows all federal regulations under the Federal Railroad Administration (FRA), Federal Department of Environmental Protection (EPA), US Army Corps of Engineers (ACOE) regulations as well as national building codes. GURR has filed all necessary reports with respective agencies that have jurisdiction over GURR's Metrowest Transloading and Logistics Center at 364 West Street. I previously attached excerpts of the Stormwater Pollution Prevention Plan (SWPPP) that GURR filed with the Environmental Protection Agency as well as a recent Inspection Report from the EPA. On the next page of this Affidavit, I have included a copy of the most recent revision to the SWPPP plan. GURR has meetings set up with EPA and ACOE to discuss next steps now that tree harvesting has been completed. Further GURR continues to have consultation sessions with the Massachusetts Department of Environmental Protection (MassDEP) even though MassDEP has no jurisdiction over this project. In fact, I participated in a conference call this morning, July 28, 2022, with representatives of MassDEP with respect to the transloading and logistics center at 364 West Street for siting of new water supply to serve this logistics center.



22. Due to delays associated with the 2020 lawsuit filed by the Town and the 2021 lawsuit filed by ten taxpayers in the Town, GURR was unable to commence consistent site work until April 2022. As reflected in the photo on the following page, GURR's contractor has now finished harvesting the trees at the site and is now in the process of removing the trees from the site for dimensional lumber, firewood, and co-generation facilities. Harvesting the trees and removing the wood from the site that will be completely removed by late August of 2022. Grading and preparing land adjacent to existing to rail line has begun. In fact, rail ties and plates are on the site and the process of laying these ties and plates has begun.



23. GURR has begun testing the property for proper location for wells to supply the site and will be discussing location and yield with MassDEP consultation. It is important to note that GURR will be creating a public water drinking supply given there are no public utilities on the site (water and sewer) of less than 70 gallons per minute for new source approval that will supply the Metrowest Transloading and Logistics Center site. It is also important to note that as part of any public well development the area of influence around the well needs to be protected and cannot have any active use on the site like a walking path that the town proposes that would prohibit the well development.

24. GURR has already laid out the new rail access on the Metrowest Transloading and Logistics Center site to supply material for construction and remove some of the specialized lumber to be shipped by rail. Stormwater engineering for the site is underway that will enhance the SWPPP.

25. As depicted in the photographs in this paragraph, GURR has already started to grade land adjacent to the existing rail line and has begun placement of ties and plates for the installation of siding tracks. GURR expects to have new siding tracks installed in September.



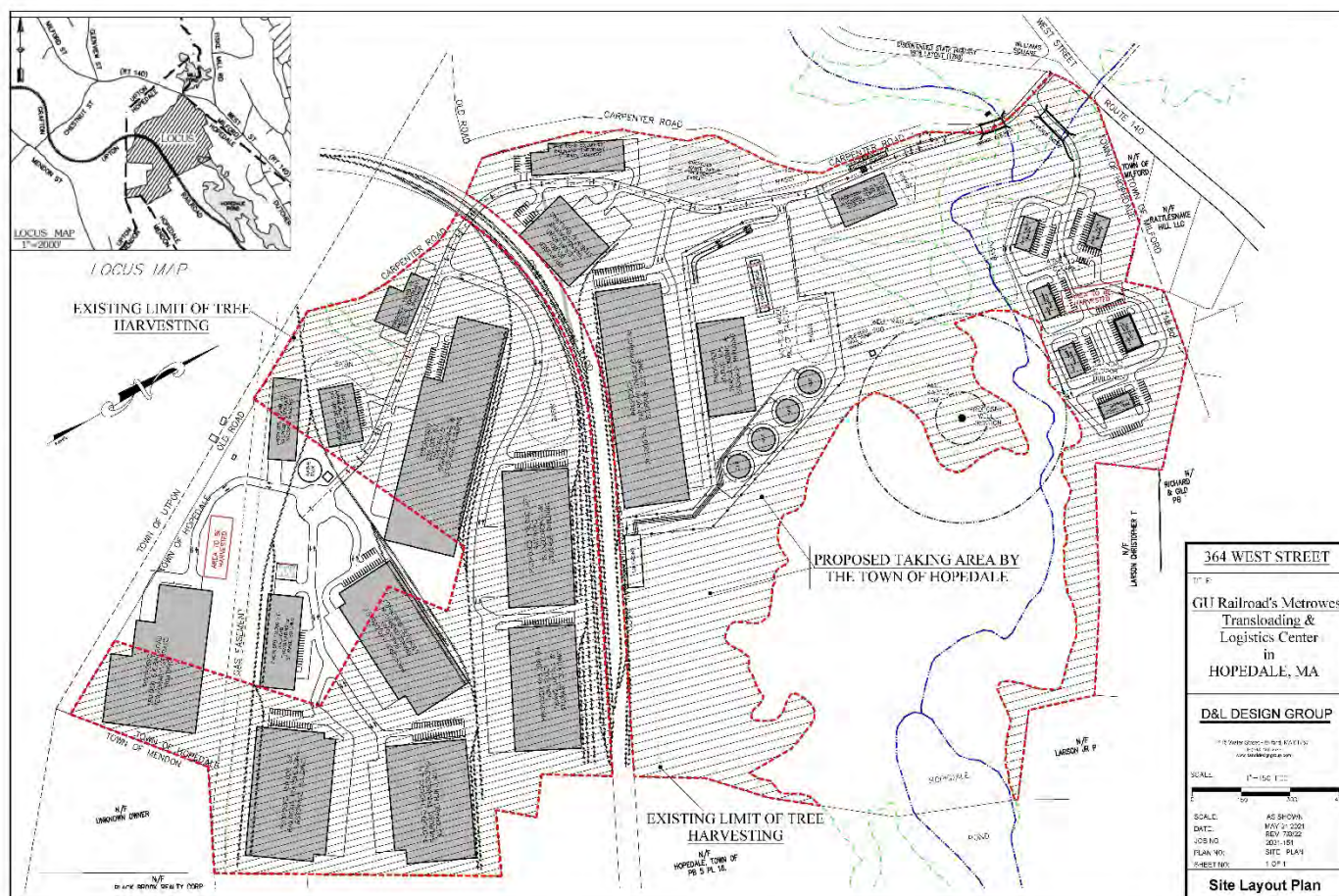


26. Additional rail construction is slated to begin in September once new rail materials are delivered by suppliers which will allow for additional outside transloading areas to be operational by mid-November. Site grading for first five buildings will begin in mid-September. It is anticipated that foundations for the first of these five building would occur as early as November. It is anticipated that first building will be operational by Summer of 2023 and the silo development will be operational by end of 2023.

27. The Town's proposed eminent domain taking is absolutely massive and would eliminate the ability of GURR to conduct rail transportation operations at 364 West Street. Incredibly, the Town initiated this massive eminent domain taking in June 2022, sixteen months after it settled the Land Court lawsuit in February 2021 where it released any claims to this property and subsequently billed GURR for the roll-back taxes associated with this property, which were immediately paid.

28. While the Town has stated its intention to take 130.18 acres at 364 West Street, it has yet to specifically identify the boundaries or legal description of this taking. However, assuming the land the Town is seeking to take is consistent with the land it claimed a Chapter 61 right of first refusal in its Land Court case, I have included on the next page a plan that highlights the approximate scope of this taking as it relates to GURR's ongoing development of its transloading and logistics center. This plan shows the area that trees have been harvested, the delineated wetlands, the location for the well field, roads, rail, and stormwater infrastructure, and location for package treatment plant or septic systems. All 198 acres are to be used to further rail transportation, including buildings for transloading, warehousing, distribution centers, or other rail dependent uses. Also included in the 198 acres are the well location and future locations of other potential wells if issues arise with this well that must be fully protected with no walking paths due to environmental requirements. Included are areas for proper stormwater drainage and storage to comply with federal regulations. There are buffer areas to protect neighbors from noise requirements and these buffers are also necessary for keeping the required impervious to pervious ratios. Given the topography challenges with the site there will the need for additional engineered walls to support the development of buildings, rail, and other infrastructure. Again, all 198 acres are integral to GURR's growth to address customers needs and meet its

obligations as a common carrier in this master plan rail logistics center.



29. Finally, on July 14, the Town's Conservation Commission ordered GURR to cease and desist excavation and rail construction work it commenced without a local permit. This order was inconsistent with the 2013 opinion letter from Hopedale Town Counsel which stated that "the STB and courts have held that railroads cannot be required to obtain a local permit prior to undertaking construction or operational activities," but may in some cases be required to notify a town when undertaking an activity which would otherwise require a permit. As stated above, GURR notified the Town of these activities by providing a copy of the SWPPP plan. Attached as Exhibit 2 is a true and accurate copy of Hopedale Town Counsel's 2013 Opinion Letter.

Signed under the penalties of perjury this 28th day of July 2022.

Michael R. Milanoski

EXHIBIT 1



Prepared by:

HDR

AECOM

Fitzgerald & Halliday, Inc.

HMMH

The Massachusetts State Rail Plan outlines the Commonwealth's 20-year plan for the statewide rail system. The plan describes the policies and planning goals for the State rail network, the existing rail system, future trends, proposed improvements, and the State investment program. It also highlights changes that have been made since the Massachusetts State Rail Plan was developed in 2010. Coordination conducted with stakeholders and the general public is also documented in the plan.

Long-term Vision

Over the past few decades, MassDOT has acquired significant segments of track and right-of-way to leverage investments for freight and passenger rail. MassDOT intends to strategically look for opportunities to leverage these investments to better serve the Commonwealth over the next 20 years. The Commonwealth's vision for rail investment can be summarized as follows:

- **Long-Term Reliability & Resiliency:** Maintain and improve the rail system in Massachusetts to enable efficient and dependable passenger and freight rail operations.
- **Modernize:** Improve existing systems to meet industry standards and Federal regulations to ensure proper operations for both freight and passenger rail services.
- **Optimize:** Pursue opportunities to leverage prior investment to improve service
 - Maximize return on prior investments
 - Leverage partnership opportunities
- **Regional Balance:** Pursue strategies that balance the costs and benefits of rail throughout the Commonwealth.

Context of Massachusetts Rail System

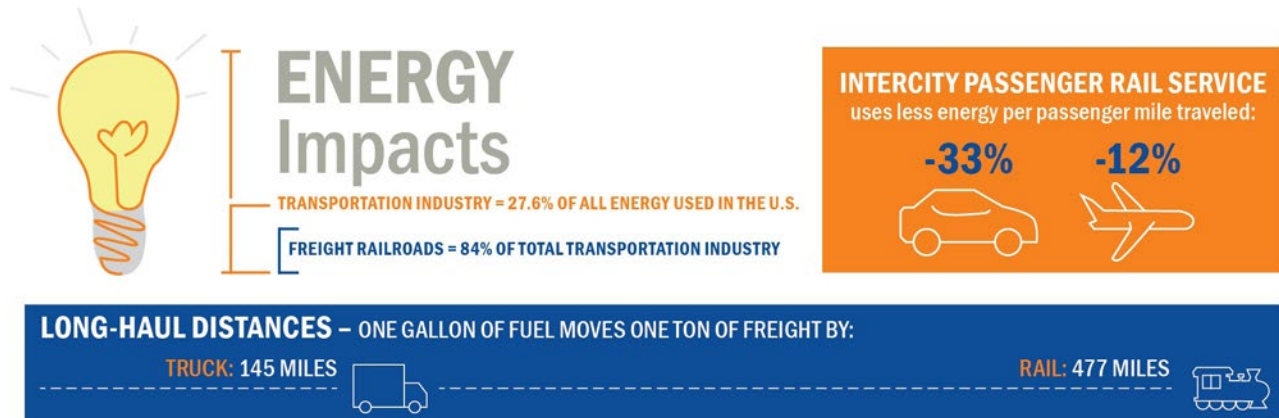
A well utilized rail network of passenger and freight rail can have many benefits for the Commonwealth and its residents — improved connectivity, Greenhouse Gas (GHG) reduction, vehicle congestion reduction, travel time savings, reduced wear and tear on the roadways, individual or firm cost savings, and economic development. The Commonwealth recognizes the benefits of the rail system, and has been working to maximize the public benefit from rail investment in the Commonwealth. The MassDOT owned Rail System is a subset of the larger Massachusetts Rail System and represents 25% of the statewide active route miles for freight, excluding the Massachusetts Bay Transit Authority (MBTA) commuter rail portions of the rail network (shown in Figure ES-3). MassDOT has acquired rail to maintain essential transportation services, facilitate current or future passenger service and/or to be preserved for other transportation uses. MassDOT also provides funding to support certain operations and/or the maintenance of rail lines it does not own, such as through the Industrial Rail Access

Program (IRAP). The following section provides an overview of the rail system in the Commonwealth.

Passenger Rail

The rail system in Massachusetts is a critical part of the transportation network for moving residents and visitors throughout the Commonwealth. Inter-city travel in the State and across the Northeastern United States is provided by Amtrak, which serves nearly three million riders in Massachusetts each year. Amtrak's Northeast Corridor provides an important travel alternative to Logan Airport. The Massachusetts Bay Transportation Authority (MBTA) provides commuter rail service to approximately forty million riders annually. Passenger rail also includes seasonal or tourist rail operations. Currently, the MBTA provides seasonal service to Cape Cod via the Cape Flyer train. While this plan is not focusing on the future of MBTA's transit services and commuter rail, the context of commuter rail is important for the Rail Plan due to lines shared by commuter rail, inter-city rail, tourist service, and freight.

Rail investments in the Commonwealth of Massachusetts reduce environmental impacts by offering shippers and travelers a lower emissions alternative to motor vehicle and air travel. Greater movement of goods, in particular by rail, produce large GHG emission benefits — a 75 percent reduction for every ton-mile shipped by rail versus truck. In addition, passenger rail services can offer similar GHG reduction benefits when train ridership is high.



Energy and Environmental Impacts

According to the most recently available data, in 2014 the transportation industry consumed 27.6 percent of all energy used in the United States.³⁶ Freight railroads comprise 84 percent of the rail industry's energy consumption, but are responsible for a significantly smaller share of emissions than other freight transportation modes.

The energy efficiencies available through the better utilization of railroads in Massachusetts are significant. Inter-city passenger rail service uses 33 percent less energy per passenger mile traveled than automobiles and 12 percent less than airline travel.³⁷ Using the average rate of fuel economy for passenger vehicles and average commuting distance in the State, rail users in Massachusetts save an estimated 693 million pounds of yearly CO₂ emissions.

For long haul distances, freight rail transportation is more energy efficient than trucking or shipping by air. Based on a 2017 study by the Texas Transportation Institute, one gallon of fuel moves one ton of freight by rail 477 miles, compared to 145 miles by truck. Freight delivered by rail is on average four times more fuel efficient than trucks (in terms of ton-miles per gallon), and because greenhouse gas emissions are directly related to fossil fuel consumption, every ton-mile of freight moved by rail instead of truck reduces greenhouse gas emissions by 75 percent.³⁸

Greenhouse gas emissions are recognized as a mobile source of emissions and contributor to global climate change. Massachusetts is committed to reducing total greenhouse gas emissions in all sectors by 80 percent in 2050 from 1990 levels, including emissions from the transportation sector. In Massachusetts, the transportation sector accounted for 39 percent of total GHG emissions in 2014, compared to 27 percent nationally.³⁹ Given the high contribution that transportation has to total emissions in Massachusetts, it is important to achieve reductions within the transportation sector. Freight railroads can play a significant role in reducing GHGs through their fuel efficiency as compared to long-distance trucking. An increase in rail traffic, in terms of modal share, would be beneficial from a GHG emissions perspective.

³⁶ United States Department of Energy, "Transportation Energy Data Book", Edition 34, 2015.

³⁷ United States Department of Energy, "Transportation Energy Data Book", Edition 34, 2015, Table 2.14.

³⁸ Association of American Railroads (AAR), "Freight Railroads Help Reduce Greenhouse Gas Emissions", August 2015.

³⁹ Massachusetts Executive Office of Energy and Environmental Affairs, "MA GHG Emission Trends", 2018. <http://www.mass.gov/eea/air-water-climate-change/climate-change/massachusetts-global-warming-solutions-act/ma-ghg-emission-trends/>

Table 2-12: Rail Traffic Terminated in 2010 and 2013

MASSACHUSETTS FREIGHT MODAL GROWTH, EXCLUDING THROUGH TRAFFIC, 2013- 2040	
MODE	GROWTH 2013-2040
Rail	29.8%
Truck	28.0%
Air	108.4%
Water	-64.9%
TOTAL 31%	

Source: FAF3.6 Provisional Data

As is apparent in Table 2-10 and Table 2-11, the amount of originating tons of intermodal commodities changed dramatically in the past few years. Intermodal increased by 81 percent between 2010 and 2013. This demonstrates the advantage that rail has is primarily from its large hauling capacities and economies of scale, which can substantially undercut the cost of trucking over long distances, and particularly with high volumes. Because of the advantage that rail has over trucking, single-commodity unit trains and intermodal service have both grown rapidly. Intermodal, in particular has grown, as compared to the traditional carload “loose car” service. The traditional carload is more of a niche product, as it is successful where volumes are sufficiently high to leverage the larger capacity of railcars and the origin or destination have direct rail access.

Total Freight Flows Forecast

Freight forecasts from analyzing FAF 3.6 provisional data indicates that air freight will experience the greatest growth in tonnage traffic when compared to truck, rail, and maritime shipping modes. From 2013 to 2040, air freight is expected to grow 108.4 percent. Rail and truck modal growth are expected to grow similarly at 29.8% and 28%, respectively. Overall, the total growth will be 31 percent for all freight.

The largest percent growth in commodities over this time period is in precision instruments, with a growth rate of 581 percent by 2040. Miscellaneous manufacturing products are also expected to grow significantly. Total tonnage for all combined commodities is expected to grow from 290.15 million tons to 378.75 million tons, a growth rate of 31 percent, from 2013 to 2040 or approximately 1.15 percent per year. The State’s rail network is expected to face a similar growth rate in freight tonnage that will require new investments to accommodate this growth.

The only commodity group that is expected to see a decline in freight tonnage over the period is coal. Coal tonnage transported is anticipated to decrease by approximately six percent.

Destination growth is expected to exceed both origin and internal growth. Figure 2-17 represents the projected growth in freight movements by direction in Massachusetts for origin, destination, and internal in terms of total tonnage. All directions show an increase in tonnage from 2013 to 2040. Freight tonnage originating in Massachusetts is forecasted to increase from 56 million tons in 2013 to 75 million tons in 2040. Freight tonnage terminating (indicated as “Destination”) is forecasted to increase from 63 million tons in 2013 to 98 million tons in 2040. Internal freight tonnage is forecasted to grow from 172 million tons in 2013 to 206 million tons in 2040.

Future Freight Flows in Massachusetts

Based on the freight flow data examined, the rail system in Massachusetts will need to accommodate roughly 19 million more tons of originating freight tonnage, 25 million tons of terminating freight, and 34 million tons of internal freight than it does now. The commodities expected to grow the most are precision instruments, miscellaneous manufacturing products, electronics/ machinery, and plastics/rubber. This commodities’ growth and growth in freight tonnage may encounter more capacity constraints if no improvements are made to the State’s rail network.

EXHIBIT 2

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August 19, 2013

Hon. Robert Burns and
Members of the Board of Selectmen
Hopedale Town Hall
P.O. Box 7
Hopedale, MA 01747

Re: Regulation of Railroad Operations

Dear Members of the Board of Selectmen:

You have requested an opinion as to the extent of the Town's authority to regulate operations of a railroad within the Town, including regulation of the materials shipped on the railroad. As explained below, it is my opinion that local control over railroad operations is significantly limited by federal law, which "preempts" both state and municipal regulation of rail transportation. Determining whether a particular activity is subject to the federal preemption is a fact-specific exercise, and not all activities that rely on, or are related to, rail transportation will be preempted from state and local regulation. However, it is my opinion that the movement of freight by a rail carrier is highly likely to be covered by the preemption and to be exempt from local regulation. The federal preemption does not preclude communications between rail operators and municipal officials to provide information on the nature of the shipments or other aspects of the rail carrier's operations, in my opinion, and to the extent that this process is occurring, I encourage you to continue with such communications.

What follows is a summary of the key provisions of the governing federal statute, and of the cases that have applied the statute to determine the permissible extent of local regulation of rail transportation. For brevity's sake, I have omitted case citations.

Railroads are currently subject to regulation by the federal Surface Transportation Board ("STB"), which was created by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). Under 49 U.S.C. § 10501(b), the STB has exclusive jurisdiction over "transportation by rail carriers." A "rail carrier" means: "a person providing common carrier rail transportation for compensation[.]" [49 U.S.C. §10102(5)] The federal statute defines "transportation" broadly to include property, facilities, and equipment related to the movement of passengers or property by rail, as well as "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." [49 U.S.C. § 10102(9)]

Under 49 USC §10501(b), "the remedies provided . . . with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Courts and the STB itself have interpreted these exclusivity provisions to mean that state and local regulation of rail transportation is generally preempted and that rail facilities are not subject to the

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Hon. Robert Burns and
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requirements of local zoning and land use law, because such regulation would give a local body the ability to delay or deny a rail carrier the right to construct facilities or conduct operations. The STB has stated that activities within the preemptive scope of 49 U.S.C. § 10501(b) are those that are "integrally related to the railroad's ability to provide rail transportation services." The STB and the courts have found that transloading activity (i.e., transferring bulk shipments from one mode of transportation to another at a terminal exchange point) comes within the definition of "transportation" under the federal statute and is exempt from local regulation, provided that it is conducted by a rail carrier. In other words, to be subject to the preemptive scope of 49 U.S.C. § 10501(b), an activity must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier.

Based on the ICCTA and the cases that have interpreted it, it is my opinion that municipal regulation of the types of materials being transported by a railroad is, clearly, preempted by the STB's exclusive jurisdiction over "transportation" by a "rail carrier."

Other types of activities that are related to, or dependent upon, rail transportation may or may not be preempted from local regulation, depending on the facts of the case. The STB has rejected the proposition that "any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier. . . . any such activity must be closely related to providing direct rail service." As an example of the fact-specific determination that is required: the STB and the courts have held that the preemption for transloading activity by a rail carrier (i) did apply where the railroad hired a loading company to unload trucks bringing materials to the site, oversee its storage, and load it onto rail cars, but, by contrast, (ii) did not apply to cargo brought by truck to a site and loaded onto rail cars by a shipper that was not a licensed rail carrier and did not have an agency relationship with the rail carrier. Further, in another case, the STB determined that the transportation of construction and demolition debris from construction sites by truck to a truck-to-rail transloading facility was not preempted from local regulation, because the activity was not part of "transportation by rail carrier" or "integrally related to rail transportation services." Similarly, the STB has held that construction of a manufacturing facility on railroad property is not "railroad transportation" and, therefore, is not preempted from local regulation.

While the STB and courts have held that railroads cannot be required to obtain a local permit prior to undertaking construction or operational activities, there are some cases which have held that a railroad must, nonetheless, notify a local government when undertaking an activity that would otherwise require a permit, and can be required to comply with non-discriminatory health and safety regulations, including local fire, plumbing, electrical, and building codes, unless the codes restrict the railroad from conducting its operations or unreasonably burden interstate commerce.

In my opinion, the ICCTA does not preclude railroads from entering into voluntary agreements to follow best management practices and to provide information on their operations. To

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the extent that Town officials are communicating with railroad managers to obtain such information, it is my opinion that this type of communication is not foreclosed by principles of federal preemption and is to be encouraged.

I hope that this opinion will address your immediate questions on this topic. We would be happy to provide the Board of Selectmen and other Town officials with a more detailed review of the case law pertaining to the regulation of rail transportation, and to respond to specific questions that you may have, concerning rail operations in the Town.

Very truly yours,



John J. Goldrosen

JJG/ch
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