

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. 4:22-cv-40080-ADB

**PLAINTIFF GRAFTON & UPTON RAILROAD COMPANY’S OPPOSITION TO
DEFENDANTS’ MOTION FOR LEAVE TO FILE AFFIDAVIT OF SEAN P.
REARDON, P.E.**

Plaintiff, Grafton & Upton Railroad Company (“GURR”) opposes the Defendants’
Motion for Leave to File an Affidavit from Sean P. Reardon, P.E., for the following reasons:

1. The Proposed Affidavit, which purports to provide expert opinion testimony, is
unfair and prejudicial because GURR does not have sufficient time to obtain responsive expert
testimony before the hearing scheduled for 9:30 a.m. on Wednesday, August 10. Defendants first
notified GURR of their intent to file the Affidavit at approximately 2:30 p.m. on August 8 and
filed the Motion for Leave along with the proposed Affidavit at approximately 5:00 p.m. the
same day. This is the first time that Defendants have articulated a position that some portion of
364 West Street is not buildable due to site topography. Defendants began the taking process on

June 21 and fully intended to vote in favor of an Order of taking on July 19 and immediately record the Order of Taking before they were enjoined by this Court. Presumably Defendants knew or should have known of this purported issue before July 19. They also had an opportunity to submit affidavits along with their Opposition to GURR's Motion for Preliminary Injunction, which they served on August 4. They should not now be permitted to file an affidavit less than 48 hours before this Court's hearing on GURR's Motion for Preliminary Injunction.

2. The Proposed Affidavit is not reliable. Mr. Reardon leads the Proposed Affidavit by insinuating that GURR's engineering firm is not real because he could not access its website and could not reach it by phone. Attached hereto as Exhibit A is the Articles of Organization for D&L Design Group, Inc. along with a screenshot of the licensing information for GURR's professional engineer, Michael Dean. According to the licensing information, Mr. Dean has been licensed as a professional engineer since 2005. Mr. Dean is formerly with the engineering firm of Guerriere & Halnon, Inc. (<https://www.guerriereandhalnon.com/>), a well-respected professional engineering firm in Milford, MA. Mr. Dean served as the Acting Engineer for the Town of Milford (<https://www.milfordma.gov/planning-engineering>). According to the Articles of Organization, D&L Design Group, Inc. was formed in May 2022, which may explain why Defendants' Affiant is not familiar with that legal entity.

3. There are other reliability issues, not least that Mr. Reardon admits he has never actually visited the site.¹ Other reliability issues are apparent from a cursory review of Mr.

Reardon's Proposed Affidavit, for example:

¹ Defendants made no attempt whatsoever to engage with GURR prior to deciding to take GURR's property or indeed prior to July 19 when the defendant Selectboard fully intended to vote to finalize and record the taking without a completed appraisal. This is despite the fact that GURR's President extended an invitation to the Selectboard to visit the property at a May 23, 2022 open meeting, which the Selectboard Chair promptly refused. See Exhibit B. GURR declined Defendants' belated request for access to the property because the Town made clear it planned to take all of GURR's property except for

- a. Mr. Reardon attached specifications from Norfolk Southern Railway Company – a Class I major freight rail carrier – without acknowledging that GURR is a Class III short line railroad, and without explaining whether Class I specifications apply to Class III rail carriers;
 - b. Mr. Reardon does not account for the use of switchbacks to address grading issues;
 - c. Mr. Reardon asserts that he is simply “skeptical” that “the project” shown on GURR’s Site Layout Plan is buildable.
4. The Proposed Affidavit is not relevant to the Court’s consideration of GURR’s Motion for Preliminary Injunction to enjoin Defendants’ planned taking of 130.18 acres of GURR’s property. Defendants argue that the taking is not preempted by the Interstate Commerce Act because it exempts property “currently” in use for railroad purposes. This plainly is not the applicable standard. See, e.g., Skidmore v. Norfolk S. Ry. Co., 1 F.4th 206, 214 (4th Cir. 2021) (ICA preempts "application of state law claims that would take rail property for another, conflicting use, including adverse possession claims that would interfere with rail use, present or future") (emphasis in original) (quoting 14500 Ltd. LLC — Pet. for Declaratory Order, FD 35788, 2014 STB LEXIS 136, 2014 WL 2608812, at *4 (S.T.B. June 4, 2014)). The Proposed Affidavit asserts that the totality of GURR’s Site Layout Plan is unrealistic. It does not say that GURR will be unable to construct any portion of its Plan, or unable to use any portion of the property for railroad purposes. The Town’s wholesale taking of the entire property will still interfere with GURR’s rail transportation activities and is still preempted by the ICA even if, as

what is “currently” in use for rail transportation purposes. Defendants never expressed any willingness to engage with GURR to learn about its ongoing rail transportation development. The intent of the taking is to prohibit further rail development, and as such it is preempted and unlawful.

Defendants contend, the current vision for the site is not completely realized. Put differently, even if Defendants establish that GURR cannot use a specific portion of the property for rail purposes, or that some portion of GURR's plan may not be feasible, any eminent domain taking would be lawful only if the proposed taking was limited to that specific portion, which it clearly is not. Defendants refused to engage in any analysis of the feasibility of GURR's rail development plans before they decided to rush through a wholesale taking of the entire property. They should not be permitted to paper over this refusal at the eleventh hour by submitting the Proposed Affidavit.

GRAFTON & UPTON RAILROAD
COMPANY, JON DELLI PRISCOLI,
AND MICHAEL MILANOSKI, as Trustees
of the ONE HUNDRED FORTY REALTY
TRUST,

By Their Attorneys,

/s/ Andrew P. DiCenzo

Donald C. Keavany, Jr., BBO# 631216

Andrew P. DiCenzo, BBO# 689291

Christopher Hays, Wojcik & Mavricos, LLP

370 Main Street, Suite 970

Worcester, MA 01608

Tel. 508-792-2800

dkeavany@chwmlaw.com

adicenzo@chwmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to counsel of record for all parties on this 8th day of August 2022.

/s/ Andrew P. DiCenzo