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May 10, 2021

**VIA EMAIL [kerimodekon@gmail.com](mailto:kerimodekon@gmail.com)**

Kerim Odekon, M.D.  
Brookhaven Hamlet  
Brookhaven Landfill Action  
and Remediation Group (“BLARG”)

Re: Your 5/6/21 Email Letter on Behalf of BLARG to Councilmember Michael A. Loguercio, Jr.

Dear Dr. Odekon:

The law firm of Rosenberg Calica & Birney LLP (“RCB”) is Special Counsel to Brookhaven Town Attorney Annette Eaderesto, Esq. in connection with the long-pending legal proceedings before the United States District Court, Eastern District of New York concerning development of Parcels B and C of the Brookhaven Rail Terminal, and related proceedings before the United States Surface Transportation Board (“STB”) concerning the future development of Parcel D.

In that capacity, we have been requested to respond to your email message dated May 6, 2021 on behalf of BLARG to Brookhaven Councilmember Loguercio.

Your letter reflects a number of important misunderstandings concerning the nature of the legal proceedings ongoing before the Federal Court concerning the development of all three Parcels, as well as the STB proceedings which are presently the subject of a Mediation including the Town and the current Parcel D owners/operators, Brookhaven Rail LLC and Shamrock Rail LLC (an affiliate/subsidiary of Winters Bros Recycling).

First and foremost, the subject of the STB proceeding is a 50 acre (and not a 230 acre) potential Solid Waste Rail Transfer Facility (“SWRTF”) which the Parcel D owners/operators are seeking federal authorization to develop upon a small portion of Parcel D which comprises nearly 250 acres in total. Currently, 62 acres of Parcel D is subject to a Conservation Easement in favor of the Town preserving it as Open Space (which will shortly be increased to 65 acres). The remainder of this industrially zoned property was previously approved for rail-supported warehousing and other industrial uses pursuant to a judicially approved Stipulation reached in the federal litigation in 2016 and followed by extensive environmental proceedings under SEQRA overseen by the Town’s prominent Environmental Engineering Consultants, VHB Engineering and Environmental Services.

Your comment to Councilmember Loguercio regarding the “confidential” nature of the Mediation misunderstands that Mediation proceedings, whether before Courts, administrative bodies, governmental agencies, and in other forums are by statutory and regulatory design confidential proceedings whose goal is to facilitate the resolution of contested legal disputes and to avoid a winner takes all/loser takes none outcome. In this case, with its unpredictable, Federal pre-emption issues at stake, it is the Town’s goal to minimize such a risk of potential of complete pre-emption by the STB as not being in the public interest. Neither the Town’s participation in the Mediation nor the interim Memorandum of Understanding bind any party whose formal agreements in accordance with all legal requirements must follow. It is not some sort of “secret” process and is no more unusual than litigation settlement negotiations that proceed confidentially until a formal agreement is reached and then publicly ratified.

Additional information is provided below concerning the agreement reached only “*in principle*” between the Town and the Parcel D operators in which a “*new switch on the LIRR main line with a southern turnout*” to Parcel D will result in the elimination of a previously planned access tunnel/underpass from Parcel C to Parcel D. The tunnel/underpass would have required in the excavation and removal of an additional 500,000 cubic yards of previously authorized excavation, grading and removal of native soils from Parcels B, C and D. To accommodate the direct LIRR turnout in lieu of a connection tunnel/underpass, a small (3-acre) corner portion of the 62-acre Conservation Easement would be substituted by replacing it with 6 additional contiguous acres of Conservation Easement area, thereby avoiding previously approved lowering of grades on Parcels B and C to accommodate a rail approach to the tunnel/underpass.

Specifically, the conceptual agreement between the Town and the Parcel D operators reached only “*in principle*” thus far is as follows:

1. The Town will increase the Conservation Easement on Parcel D from 62 to 65 acres and the additional acreage is contiguous to the existing Conservation Easement;
2. By accommodating the “southern turnout” from the existing LIRR tracks across a 3-acre corner of the 62-acre Conservation Easement area to provide rail access to Parcel D, both Brookhaven Rail LLC and the Parcel B and C owners/operators will agree in exchange to eliminate the tunnel/underpass originally planned (and approved) to connect Parcels B and C with Parcel D which will result in the elimination of approximately 500,000 cubic yards (one-half of the total) of previously planned excavation, grading and removal of native soils and materials from Parcels B, C and D;
3. As a result, the permitted grades on Parcels B and C, previously authorized by the Negative Declaration as part of the extensive SEQRA process will now be materially higher (and thus more protective of the groundwater in this Hydrological III Zone) and no further excavation will occur on Parcels B and C except as required to “balance” the site using existing, onsite materials;
4. We remind you that the existing Negative Declaration, based upon a comprehensive Voluntary Draft Environmental Impact Statement (“VDEIS”) prepared by the Town’s

highly qualified engineering consultants, VHB Engineering, already evaluated and approved the industrial development of Parcel D which will consist of rail supported warehousing and other industrial facilities specifically intended to eliminate truck pollution and truck traffic on Long Island's crowded roadways and represents the most beneficial type of development attainable given the industrial zoning of Parcel D;

5. All that has occurred to date in the Mediation is an agreement "in principle" to lessen the environmental impact of this already extensively evaluated project (as detailed in the publicly filed and publicly approved VDEIS); and

6. Despite the potential that the STB could exercise its Federal Pre-emption authority concerning the SRWTF which Brookhaven Rail LLC/Shamrock Rail is seeking STB authorization to construct, the Town's agreement in principle with the owners is that Parcel D would nevertheless remain subject to all of the strict Environmental Mitigation measures the Town insisted on and imposed on Parcel D under the 2016 So Ordered Stipulation and its 2017 SEQRA Approvals, even in the event the STB ultimately acts so as to pre-empt the Town's environmental oversight and approval jurisdiction.

Any binding Agreements, if reached by the Town with the Parcels B, C and D developers as a result of the STB Mediation will be public ones.

Because of the statutorily required confidentiality of Mediation proceedings, Town Representatives are not able or authorized to participate in the requested meetings with BLARG proposed in your message to Councilmember Loguercio.

The Town has and continues to act in the most environmentally responsible manner conceivable with the public interest and welfare keenly in mind.

Rest assured that all required public disclosures and public authorizations of the Town required by law will occur in the event an agreement to these environmental mitigation/improvement measures is reached.

Very truly yours,

**ROSENBERG CALICA & BIRNEY LLP**

By:

  
Robert M. Calica

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