

LAW OFFICES
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1919 M Street, NW (7th fl.)
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November 7, 2013

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

235055
ENTERED
Office of Proceedings
November 7, 2013
Part of the Public Record

re: Docket No. FD 35779, Grafton & Upton Railroad Company
--Petition for Declaratory Order

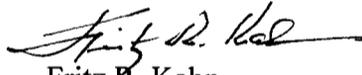
Dear Ms. Brown:

Attached is the Reply of the Town of Grafton, Massachusetts, to the Petition for Declaratory Order filed by the Grafton & Upton Railroad Company on October 25, 2013.

If you have any question concerning this filing or I otherwise can be of assistance, please let me know.

This letter and its attachment have been served upon each party of record.

Sincerely yours,


Fritz R. Kahn

att.

cc: James E. Howard, Esq.
Linda J. Morgan, Esq.
Keith T. Borman, Esq.

SURFACE TRANSPORTATION BOARD

Docket No. FD 35779

**GRAFTON & UPTON RAILROAD COMPANY
--PETITION FOR DECLARATORY ORDER**

**REPLY OF
THE TOWN OF GRAFTON, MASSACHUSETTS**

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Attorneys for:

TOWN OF GRAFTON

Dated: November 7, 2013

SURFACE TRANSPORTATION BOARD

Docket No. FD 35779

**GRAFTON & UPTON RAILROAD COMPANY
--PETITION FOR DECLARATORY ORDER**

**REPLY OF
THE TOWN OF GRAFTON, MASSACHUSETTS**

Respondent, the Town of Grafton, Massachusetts ("Grafton") replies to the Petition for Declaratory Order of the Grafton & Upton Railroad Company ("G&U"), filed October 25, 2013. In its Petition, G&U seeks the "immediate entry" of an "interim order" authorizing G&U to continue construction, which it states is "necessary and appropriate in order to ensure that" the Town does not attempt to prevent G&U from providing essential transportation services.

As set forth below, no order by this Board—immediate, interim, or otherwise—is necessary, because the Town is taking no action to stop or hamper the railroad's construction, a fact that was communicated to G&U's counsel on October 18, 2013, and even reported in the newspaper on October 23, 2013, two days before G&U filed its petition. In fact, it is clear that G&U filed its petition in a transparent attempt to prejudice the Board with respect to the already pending proceedings—Docket No. FD 35752—and is attempting to use the Town's legitimate and responsible inquiry into the possible environmental impacts of the G&U's sudden and aggressive earth removal activities to do so. The Board should reject this attempt and dismiss this petition as moot.

STATEMENT OF THE FACTS

On or about Monday, October 7, 2013, members of the Board of Selectmen and the Town Administrator received several reports that many truckloads of earth and gravel were removed during the previous weekend from G&U owned property located at 72 Rear North Main Street (“the Site”), which is located in the Town’s Water Supply Protection Overlay District, abuts Pratt’s Mill Pond and is adjacent to Big Bummett Brook. The Town was unaware of any planned activity at this site and was concerned, given the environmentally sensitive receptors, that the excavation could potentially pose threats to the Town’s aquifer, the pond, and/or the brook. As a result, the Town directed its counsel to contact Attorney John Mavricos, local counsel for G&U, to ask about the activities being undertaken by G&U and whether measures had been taken to protect the environmental resources. Town Counsel made that phone call on October 7, 2013, and Attorney Mavricos assisted in arranging a site visit by the Building Inspector for the following morning. The Building Inspector visited the Site on the morning of October 8, 2013. He observed that substantial grading of the land had taken place, that there were large piles of dirt and rocks, and that there was a large hole in the ground. He was instructed not to take any pictures.

By letter to Attorney Mavricos dated October 15, 2013, Town Counsel requested more information about the work being undertaken in order to make clear that the activities were indeed covered by preemption. *See* G&U Petition, Exh. D. The letter plainly acknowledges that while the Town may not be able to require permits, it was still entitled to some level of information about the activities being undertaken. Id. The letter sought assurance that the aquifer and the abutting water bodies were not being threatened, since G&U had provided almost no information to the town about the details and scope of the project, which would ordinarily not

be permitted in that location. Id. Thus, the Town requested that railroad voluntarily provide it with information so that the Town could be assured that neither its water supply nor its natural resources were under threat. In fact, the word “request” was used in that letter five times, and nowhere in that letter did the Town state that it was planning to issue a cease and desist order or in any other way seek to interfere with the railroad’s project.

Subsequently, a representative from the Massachusetts Department of Environmental Protection went to the Site and concluded that there was no threat to the pond or brook, but made no reference to the aquifer. Attorney Mavricos, however, indicated that the railroad would have a hydrogeologist inspect the Site with respect to concerns about the aquifer and would provide a copy of that report to the Town. By telephone call on October 18, 2013, Town Counsel informed Attorney Mavricos that the Town was taking no action against the railroad, but wanted to make sure there was no threat to the aquifer. On October 23, 2013, the local paper, the Grafton News, ran an article on the front page that quoted Town Counsel as stating that the town had no grounds for a cease and desist order. Exh. 1. Nonetheless, two days later, G&U filed the instant petition, seeking “immediate” relief because of the Town’s “threat” to enjoin G&U’s activities. G&U Petition at 1-2. Since the factual premise upon which the request for relief is simply false, the G&U’s petition should be dismissed as moot.

ARGUMENT

The Town has acknowledged and continues to acknowledge that it has no right to assert any preclearance requirements against G&U where the railroad is undertaking an activity that constitutes transportation. However, as this Board and several courts have concluded, that does not mean that the Town is entitled to no information whatsoever concerning G&U’s projects and activities. To the contrary, although the Town may not be able to “require permits prior to

construction, the courts have found that a railroad can be required to notify the local government 'when it is undertaking an activity for which another entity would require a permit' and to furnish its site plan to the local government." Docket No. FD 33971, Joint Petition for Declaratory Order - Boston and Maine Corporation and Town of Ayer, Mass., served May 1, 2001, slip op. at p. 9, *citing Village of Ridgefield Park v. New York Susquehanna & Western Railway*, 750 A.2d 57 (N.J. 2000) . *See also* Docket No. FD 34797, New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway--Construction, Acquisition and Operation Exemption--In Wilmington and Woburn, Mass., served July 10, 2007, slip op. at p. 9. ("States and localities also can require a railroad to allow the locality to inspect the facility and notify the locality of when the railroad is undertaking an activity for which a non-railroad entity would require a permit [footnote omitted]."). Although G&U filed a "Topographic Plan of Land" with the Conservation Commission in 2011, *see* Exh. 2, that document does not respond to any and all valid questions that the Town may have.

In this case, the Board of Selectmen has the duty to ensure the integrity of the Town's water supply, and has been endeavoring to discharge that duty, not by attempting to stop the railroad's construction activities, but by requesting that G&U provide it with basic information so it can assure Town residents that their water supply is not being threatened. The discharge of that responsibility is not a valid basis for a Petition for Declaratory Judgment. Therefore, the instant Petition should be dismissed as moot.

Respectfully submitted,

THE TOWN OF GRAFTON,
MASSACHUSETTS

By its attorneys,


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Dated: November 7, 2013

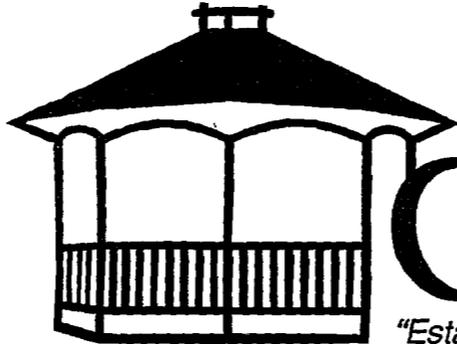
CERTIFICATE OF SERVICE

I certify that I this day served the foregoing Reply upon the Grafton & Upton Railroad Company by e-mailing copies to its counsel at jim@jehowardlaw.com and lmorgan@nossaman.com and upon ASLRRRA by e-mailing a copy to kborman@aslrrra.

Dated at Washington, DC, the 7th day of November 2013.


Fritz R. Kahn

EXHIBIT 1



The Grafton News

"Established to Help Foster the Civic, Cultural and Economic Life of the Area Since 1958"

Grafton, Massachusetts

www.thegrafftonnews.com

VOLUME 55 – NUMBER 33

Wednesday, October 23, 2013

50 CENTS PER COPY

DU Railroad Responds to Questions on North Grafton Earth Removal

The attorney for the Grafton & Upton Railroad responded to the Town's questions about its earth removal operations in North Grafton last Friday, avoiding a possible cease-and-desist order threatened by Selectmen at their meeting last Friday Oct. 15.

"It does not appear at this time that the Town has grounds for a cease-and-desist" said Grafton Town Counsel Ginny Sinkel Kremer on October 23.

Writing at the behest of the Board of Selectmen, Kremer asked the railroad of its plans for the railroad-owned property where earth removal had been taking place recently. She also questioned what

effect the earth removal operations would have on the Water Protection Overlay District and the aquifer.

The earth removal was done on railroad property separate from where a propane distribution facility has been proposed.

John Mavricos, the Attorney for the Railroad, responded that the property is for transportation use and that neither the Water Protection Overlay District nor the aquifer are threatened.

"Pre-emption applies on the railroad property," said Kremer, because of the transportation use.

The Railroad has sent a

Earth Removal

Continued from page 1

hydrologist to the property to see if the earth removal had left the site the required minimum of five feet above the water table, according to Kremer. A report from the hydrologist is expected this week. The Town may send it's own hydrologist to inspect if it disagrees with the findings.

Kremer had asked the Railroad to pay for the clean up of houses and vehicles in the area caused by the vehicles

involved in the earth removal but has not yet received a response.

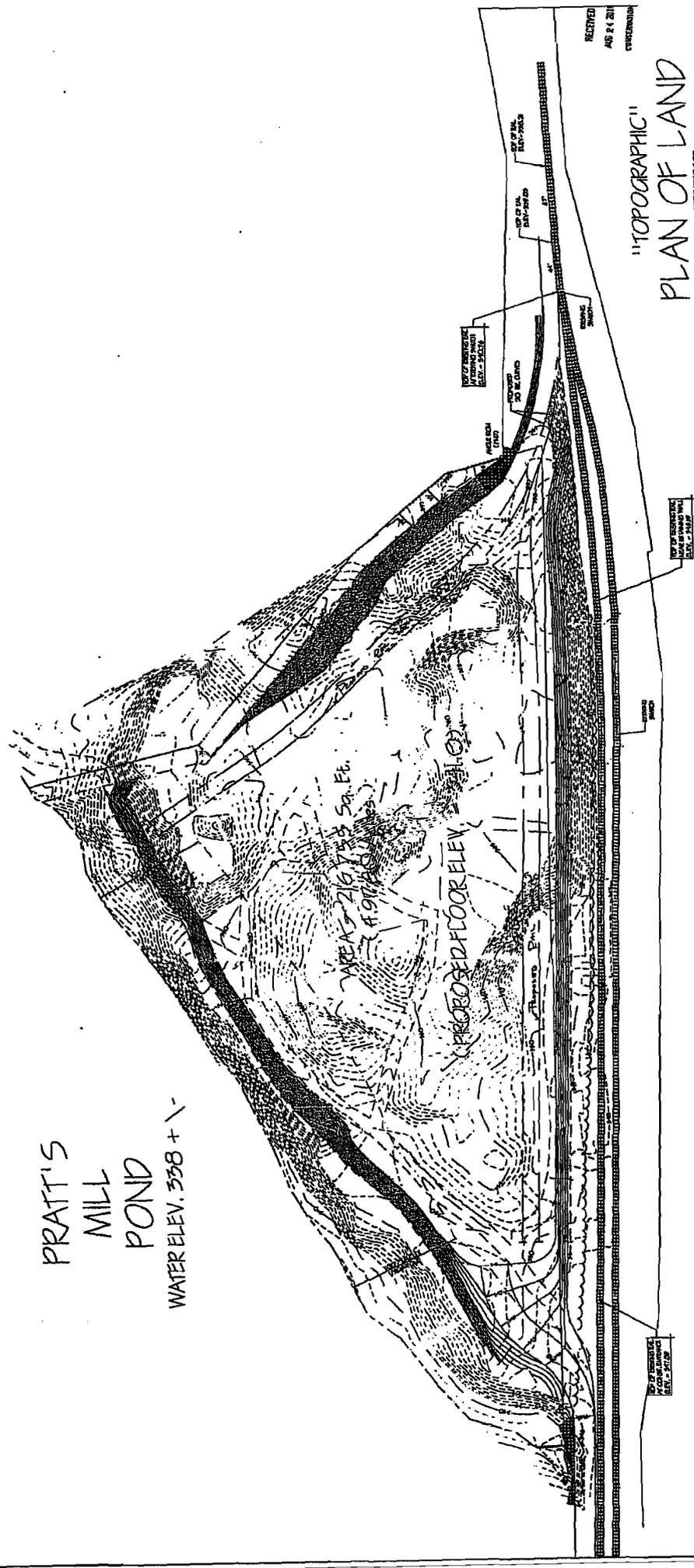
Town Administrator Timothy McInerney said two representatives from the Department of Environmental Protection had inspected the site late last week and would be submitting a report. In the meantime, he'd been told that the Railroad was complying with erosion controls; the Water Protection Overlay District was a Grafton issue.

Continued on page 14

EXHIBIT 2



PRATT'S
MILL
POND
WATER ELEV. 338 +/-



RECEIVED
AUG 24 2010
CONSTRUCTION

"TOPOGRAPHIC"
PLAN OF LAND
PREPARED FOR
GRAFTON & UPTON RAILROAD
LOCATED IN
No. GRAFTON, MASSACHUSETTS
SCALE: 1" = 40'
NOVEMBER 10, 2010
Arthur F. Borden & Associates, Inc.
Professional Land Surveyors & Civil Engineers
302 Broadway, 11th Fl. - Framingham, Massachusetts 01767
(508) 880-9199



NOTES:
1. EXISTING SITE CONDITIONS TO BE GRADDED TO PROVIDE A GROUND ELEVATION OF 341.0
2. UPON COMPLETION OF GROUND ELEVATION, RAIL STILES ARE TO BE INSTALLED FOR
PROPOSED TRANSFORMING FACILITIES.

DATE	BY	REVISIONS