

November 22, 1999

D.T.E. 98-105

Petition of Grafton and Upton Railroad Company for approval by the Department of Telecommunications and Energy for an exemption from the Zoning By-laws of the Town of Grafton, pursuant to G.L. c. 40A, § 3.

APPEARANCES: T. Philip Leader, Esq.

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446 Main Street

Worcester, Massachusetts 01608

FOR: GRAFTON AND UPTON RAILROAD

COMPANY

Petitioner

Chris K. Gaffney

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Grafton, Massachusetts 01519

FOR: TOWN OF GRAFTON

Intervenor Pro Se

I. INTRODUCTION

On October 9, 1998, Grafton and Upton Railroad Company ("Grafton & Upton" or "Petitioner") filed a petition with the Department of Telecommunications and Energy ("DTE" or "Department") for an exemption from certain sections of the Zoning Ordinance of the Town of Grafton ("Town") pursuant to the provisions of G.L. c. 40A, § 3. Grafton & Upton has requested a zoning exemption in order to construct a freight dock at North Main Street, North Grafton, on land owned by Grafton & Upton.

Grafton & Upton is requesting the exemption because the land is zoned R-20, a residential zoning district that does not permit a freight dock (Exhs. Petition-B; Town-4).

Grafton & Upton's application for a building permit was denied by the building inspector for Grafton on April 9, 1998, and the denial was upheld by the Grafton Board of Appeals on August 25, 1998 (Exhs. Petition-B, C). Grafton and Upton applied to the Department for a zoning exemption as a public service company⁽¹⁾ under the provisions of G.L. c. 40, § 3.

II. PROCEDURAL HISTORY

The Department docketed the petition as D.T.E. 98-105. Pursuant to notice duly issued, the Department conducted a public hearing in Grafton on February 10, 1999 to afford interested persons an opportunity to be heard, and an evidentiary hearing at the Department's offices on April 21, 1999. The Department received a timely petition to intervene from the Chair of the Grafton Board of Selectmen on behalf of the Board. Grafton & Upton did not oppose the petition to intervene and the Department duly allowed the petition. Chris K. Gaffney, Town Administrator ⁽²⁾, spoke on behalf of the Board of Selectmen at the February public hearing. Representative George Peterson, of the Ninth Worcester District also participated at the hearing in Grafton. Florence Sairs, an employee of Grafton and Upton, was recognized by the Hearing Officer to respond to questions. Three Grafton residents offered unsworn testimony. At the April hearing, the Petitioner sponsored the testimony of two witnesses in support of its petition: Miriam Lucey, president of Grafton and Upton, and Cornelius J. Lucey, a director of Grafton and Upton. The Petitioner entered thirteen exhibits into evidence and the Town entered five exhibits into the record.

III. STANDARD OF REVIEW

In its petition, Grafton and Upton seeks approval under G.L. c. 40A, § 3, which provides:

Land or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation the Department of Telecommunications and Energy shall, after notice ... and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public

In determining whether a proposed use which a public service corporation plans is reasonably necessary for the convenience or welfare of the public, the Department must balance the interest of the general public against the particular local interest. Save The Bay, 366 Mass. 667 (1974); Town of Truro v. Department of Public Utilities, 365 Mass. 407 (1974). When reviewing a petition for a zoning exemption, the Department is required to consider the public effects of the requested exemption in the State as a whole and upon the territory served by the applicant. New York Central Railroad v. Department of Public Utilities, 347 Mass. 586 (1964).

With respect to the particular site chosen by a petitioner, G.L. c. 40A, § 3 does not require a petitioner to demonstrate that the preferred site is the best possible alternative, nor does the statute require the Department to consider and reject every possible alternative site presented. Rather, the availability of alternative sites, the efforts necessary to secure them, and the relative advantages and disadvantages of those sites are matters of fact bearing solely upon the main issue of whether the proposed site is reasonably necessary for the convenience or welfare of the public. Martorano v. Department of Public Utilities, 401 Mass. 257; New York Central Railroad, *supra*. Therefore, in order to determine whether a proposed use is reasonably necessary for the public convenience or welfare, the Department examines the need for, or public benefits of, the proposed use at the preferred location, the present or proposed use and any alternative identified, and the environmental impacts or any other impacts of the proposed use. Massachusetts Electric Company, D.P.U. 95-57 (1995); New England Power Company, D.P.U. 92-278/279/280 (1994); Tennessee Gas Pipeline Company, D.P.U. 85-205 (1986).

After examining these issues, the Department balances the interest of the general public against the local interest and determines whether the proposed use is reasonably necessary for the convenience or welfare of the public.⁽³⁾

IV. DESCRIPTION

A. Site

The site of the proposed freight dock in North Grafton is on land that has been owned by Grafton and Upton since 1873 (*id.* at 58). The present shareholders have operated the railroad since 1979 (*id.* at 111). The site is adjacent to railroad track which runs for 15.5⁽⁴⁾ miles between North Grafton and Hopedale, Massachusetts (*id.* at 6, 58). At the

North Grafton terminus of the track, the track crosses Westborough Road where it connects to the main line of the Consolidated Rail Corporation ("Conrail").⁽⁵⁾

The proposed freight dock site is on the westerly or North Main Street side of the Petitioner's property, approximately 100 feet into the Petitioner's property from Westborough Road (Petitioner's Exhs. Petition-A, 1, Grafton-1, 5; Tr. at 8).

The nearest abutter to the proposed site of the freight dock on the Grafton and Upton property is a septic tank cleaning and storage tank construction business (Tr. at 68). The business uses large pumping trucks in its operations, and garages these trucks on its premises (*id.*). A passenger station which existed for 100 years on Westborough Road, opposite the site of the proposed dock, was demolished in 1990 (*id.* at 67). A freight dock and a coal yard where coal hoppers filled coal trucks operated to the east of the Petitioner's property (*id.* at 120-122). There is only one residence in the vicinity, at 42 Westborough Road, which has occupied the land to the east of the Petitioner's land for several decades (*id.* at 69). Access to the residence is by way of a 200 foot driveway from Westborough Road. There is no road to this residence from the Grafton and Upton property (*id.* at 46, 104-106).

B. Proposed Structure

The proposed freight dock would consist of a metal structure approximately 80 feet long and 22 feet wide resting on a concrete foundation (*id.* at 9, 62). The structure is designed to be level with a freight box-car to off-load on one side of the dock. The other side of the dock is designed to be level with a truck bed to on-load cargo (*id.* at 83).

C. Need for the Proposed Project

With the construction of the proposed freight dock the Petitioner states that it hopes to attract new customers (Tr. at 12, 61). These new customers would off-load freight at the Petitioner's dock for subsequent pick-up by motor vehicles for transportation to an ultimate destination (*id.* at 62-64).

D. Volume of Traffic

At the present time, the volume of rail traffic carried by Grafton and Upton is no more than 350⁽⁶⁾ freight cars a year (*id.* at 10). The average number of train movements each week is three (*id.* at 15, 61). Deliveries are made to three customers located along the Grafton and Upton rail line who have dock facilities on their premises (*id.* at 60, 87). No deliveries are made to these customers after dark (*id.* at 27). The Petitioner's one locomotive engineer ends his work day between 3:00 and 4:00 p.m. (*id.*). The Petitioner estimates that, with the proposed freight dock, rail traffic could increase by one train movement each week, but notes that the additional movements would not run the length of the line, but only between the freight dock and the CSX main line switch, a distance of approximately 100 feet across Westborough Road (*id.* at 6, 8, 11).

V. POSITION OF THE PARTIES

A. Grafton and Upton

The Petitioner states that the proposed dock is an appropriate use for the land and necessary for the railroad to obtain more business (id. at 12). The Petitioner testified that potential customers were lost because the Petitioner lacked a loading dock (id. at 89).

The Petitioner contends that it was unaware that in 1986 the railroad property had been

rezoned as residential (id. at 111-112). The Petitioner cites the fact that the use of the property has not changed for over one hundred years, and that prior owners and abutters had only used the area for railroad or other business purposes. (Tr. at 119, 120, 122-123).

B. Town of Grafton

The Town holds the position that, because the Town Meeting of 1986 voted the by-law change, the Petitioners should propose a reversion to the site's original industry classification at a subsequent town meeting (id. at 33). The Town believes that, in the meantime the Town should not circumvent the zoning by-laws it has in place in order to allow an industrial use in a neighborhood zoned as residential (Tr. at 33, 44). The Town Administrator noted that the Town is "supposed to consider the extent of the usefulness of a proposed facility to shippers, manufacturers, motor vehicle distributors and consumers", but that it is "difficult to ascertain that this site is integrally involved with the proper functioning of the railroad" (id. at 30-31).

VI. ANALYSIS AND FINDINGS

As a preliminary matter, we note that in 1986 when the Town's by-laws were amended, the Petitioner was operating as a short line railroad over the site that was reclassified as residential. It is not within the jurisdiction of the Department in this proceeding to decide whether or not the Petitioner's failure, in 1986, to appeal the classification results in lack of standing to do so now. Nevertheless, the Petitioner, as a railroad, is a public service corporation entitled to request a zoning by-law exemption pursuant to G.L. c. 40 § 3.

In the context of this proceeding, it is evident that although the 1986 amendments zoned the Petitioner's land as residential, there has been no residential development. Thirteen years after the area was zoned residential, the Town can only comment that it "really is going to be a residential neighborhood" (id. at 31). However, the Petitioner's exhibits and an examination of the site by the Department demonstrate that there is continuing business and railroad usage in the vicinity of the proposed dock, but no increase in residential usage (Exhs. Pet.-A, 2). Land, including the Petitioner's property, to the east, west and south of the Petitioner's track is designated on the Town's Zoning Map as

"Neighborhood Business" (Exh. Grafton-5). Only the north segment of the Petitioner's property, despite the Zoning Map's clear labeling of the Petitioner's track running the length of the Petitioner's property, has been reclassified as residential (Exh. Grafton-5).

The Petitioner's proposed site is well situated for use as a loading dock, and comports with the standards set forth in G.L. c. 40 § 3. The proposed site has always been part of the railroad's property. It lies within 100 feet of a major freight line's main line switch, and is the least intrusive site for a loading dock on the Petitioner's short rail line, and on the Petitioner's property. The dock site is immediately accessible to major highways, and within a few miles of major truck terminals (Tr. at 65). Thus, notwithstanding the town's contrary assertion, use of this site for a loading dock would indeed be integral to the proper functioning of the railroad.

Lastly, in determining whether the proposed project is reasonably necessary for the convenience or welfare of the public, the Department relies on the legislative intent of G.L.

c. 161C § 1 which states

It is hereby declared that rail transportation offers economic and environmental

advantages with respect to land use, air, and noise pollution, energy efficiency, safety and costs per ton mile of movement to the extent that the preservation, development and maintenance of such service is a public purpose and in the public interest; that essential rail transportation service for the movement of passengers and freight are threatened with cessation or significant curtailment because of the deterioration or inadequacy of rail rights of way earlier acquired for a public purpose, or because of the insufficiency or inadequacy of rail facilities ... and because of the inability of private railroad companies to provide such services ... it is the intent of the general court ... to carry out steps necessary to acquire, preserve, develop and construct when necessary on land not formerly owned or used by a railroad, which insures the maintenance and operation of, adequate and efficient rail rights of way, related facilities or equipment, and rail services.

Accordingly, the Department finds that the public interest requires the construction of the proposed loading dock on the Petitioner's property.

VII. ORDER

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: That the petition of the Grafton and Upton Railroad Company for approval by the Department of Telecommunications and Energy for an exemption from the zoning

by-laws of the Town of Grafton, pursuant to G.L. c. 40A, § 3, be and is hereby GRANTED; and it is

FURTHER ORDERED: That the secretary of the Department shall transmit a certified copy of this Order to the Clerk of the Town of Grafton within five business days of its issuance.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Paul B. Vasington, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. Under the standard set forth in Save The Bay. v. Department of Public Utilities, 366 Mass. 667 (1975), a private entity qualifies as a public service corporation if it is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public, is subject to a requisite degree of control and regulation, and makes a public benefit available through its service. Grafton and Upton is a Massachusetts corporation operating a railroad. G.L. c. 3, § 5 includes railroads as public service corporations.

2. Mr. Gaffney no longer serves as Town Administrator.

3. In addition to considering the interest of the public, local interest, and public convenience, the Massachusetts Environmental Policy Act ("MEPA") requires that a "determination made by an agency of the Commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize the environmental impact." G.L. c. 30 §

61. Pursuant to 301 C.M.R. § 11.01(3), such findings are needed when an Environmental Impact Report ("EIR") must be submitted by a petitioner to the Executive Office of Environmental Affairs. Where an EIR is not required, § 61 findings are not necessary.

The instant project does not meet or exceed the review thresholds of 301 C.M.R.

§ 1.03 (6)(a)-(b) for transportation projects, and therefore, findings are not required.

4. Between North Grafton and West Upton seven miles of track is operable (Tr. at 58). The middle portion of track between West Upton and Hopedale is not in good repair, and therefore, only a portion of the track is operable (id.). Although three tracks exist at the North Grafton terminus, only one track is used (Tr. at 17).

5. Conrail has been acquired by CSX Corporation and is now known as CSX (Tr. at 6).

6. During the February hearing, the Petitioner stated that the rail car traffic was no more than 325-350 cars annually (Tr. at 10). At the April hearing the Petitioner testified that the traffic was 250 cars annually (Tr. at 61, 89).