

**MEMORANDUM OF AGREEMENT  
NORTHERN MAIN LINE RAILROAD**

This **MEMORANUDM OF AGREEMENT** (“Agreement”) is made as of the \_\_\_\_\_ day of \_\_\_\_\_, **2022**, becoming effective upon approval by the New Hampshire Governor and Executive Council, by and between the City of Concord, a New Hampshire municipal corporation, with a principal place of business at 41 Green Street, Concord, New Hampshire 03301 (referred to as the “City”) and the State of New Hampshire Department of Transportation, with a principal place of business at 7 Hazen Drive, Concord, New Hampshire 03301 (referred to as “NHDOT”). The City and NHDOT may be referred to individually as a “Party” and collectively as the “Parties.”

**RECITALS**

This Agreement relates to the acquisition, development, operation and management of that portion of the Northern Main Line Railroad located in the City of Concord between Horseshoe Pond Lane and the Contoocook River, as described herein (the “Premises”).

This Agreement is entered into upon the basis of the following facts and intentions of the Parties:

- I. As of the date of this Agreement, the Premises is owned by the Northern Railroad, which is an affiliate of Pan Am Systems, Inc., with a principal place of business at 1700 Iron Horse Park, North Billerica, Massachusetts 01862.
  
- II. The Premises consists of 72.53 +/- acres of land now or formerly known as the Northern Main Line, beginning along the northerly sideline of Horseshoe Pond Lane thence running in a generally northwesterly direction to the southernmost edge of a railroad trestle bridge spanning the Contoocook River at approximate engineering station 351+07.7 as shown on Map 7 of railroad valuation section 32.1, including, but not limited to, City Assessor’s Parcels map-block-lot 743Z /10, 6414 Z/2, 13 P/21, and 053 P/7, as more specifically described on maps prepared by the City Engineering Division as attached to this Agreement as Exhibit 1 (“the Premises”).

The Premises specifically excludes real property known as Hannah Dustin Island, as well as the railroad trestle bridges located between parcel 053P/7 and Hannah Dustin Island.

- III. To the Parties’ belief, the railroad corridor located at the Premises has been discontinued and abandoned in accordance with all applicable laws, rules, and regulations associated with the Surface Transportation Board, the State of New Hampshire, and any other regulatory authority having jurisdiction over the railroad line on the Premises (“Regulatory Authorities”).

- IV. On October 11, 2000, the U.S. Department of Transportation Federal Railroad Administration designated a high-speed rail corridor linking Boston, Massachusetts to Montreal, Province of Quebec, Canada.
- V. The discontinued and abandoned railroad corridor at the Premises is part of the aforementioned high-speed rail corridor.
- VI. On July 7, 2021, the City entered into a Purchase and Sales Agreement to acquire the Premises from the Northern Railroad.
- VII. In accordance with RSA 228:60-b, I, as presently enacted, NHDOT is afforded the right-of-first-refusal ("ROFR") to acquire all railroad property in the State of New Hampshire when offered for sale by a railway corporation.
- VIII. On October 18, 2021, NHDOT invoked its ROFR to acquire the Premises. Consequently, the Purchase and Sales Agreement between the City and Northern Railroad, dated July 7, 2021, automatically terminated.
- IX. RSA 228:60-b, II allows NHDOT and political subdivisions to establish agreements to jointly acquire, develop, repair, maintain, operate, and manage railroad properties.
- X. The City and NHDOT desire to establish an agreement to jointly acquire, develop, repair, maintain, operate, and manage the Premises.

Specifically, the City desires to enter into this Agreement for the purposes of acquiring the Premises in order to develop, maintain, operate, and manage a new multimodal recreational path at the Premises, commonly known as a Rail Trail, in order to extend and connect the Merrimack River Greenway Trail (MRGT) to the Northern Rail Trail. The MRGT is a regional multimodal path running from Salem, New Hampshire to its current terminus at Terrill Park located on Old Turnpike Road in Concord, New Hampshire. The Northern Rail Trail is a regional multimodal path running from Lebanon, New Hampshire to its current terminus at Commercial Street in Boscawen, New Hampshire.

- XI. NHDOT desires to enter into this Agreement to facilitate the City's acquisition of the Premises, while simultaneously protecting and preserving NHDOT's long-term interest in the potential restoration of the rail corridor.
- XII. The Parties signatory to this Agreement agree to proceed with their respective responsibilities set forth within this Agreement, upon the terms and conditions set forth herein.

NOW, THEREFORE, the Parties hereby agree as follows:

1. **NHDOT’S RESPONSIBILITIES**

- 1.1. **Negotiation of Purchase and Sales Agreement with the Northern Railroad for the Premises:** NHDOT, in collaboration with the City, shall negotiate and enter into a Purchase and Sales Agreement for the Premises with the Northern Railroad (the “NHDOT and Northern Railroad P&S Agreement”).

NHDOT shall secure the Concord City Manager’s written approval of the terms of the NHDOT and Northern Railroad P&S Agreement prior to execution of said agreement with the Northern Railroad. Further, the NHDOT and Northern Railroad P&S Agreement shall include a provision authorizing assignment to the City.

- 1.2. **Assignment of NHDOT Purchase and Sales Agreement to the City:** Upon the City’s approval of the NHDOT and Northern Railroad P&S Agreement, as well as NHDOT securing approvals from the Governor and Executive Council for the NHDOT and Northern Railroad P&S Agreement and this Agreement, the NHDOT shall assign the NHDOT and Northern Railroad P&S Agreement to the City in accordance the terms and conditions set forth herein.

2. **CITY’S RESPONSIBILTIES**

- 2.1. **City Acceptance of Assigned NHDOT and Northern Railroad P&S Agreement:** Simultaneously with execution of this Agreement, and in accordance with Section 1.1 of this Agreement, the City shall accept NHDOT’s assignment of the NHDOT and Northern Railroad P&S Agreement.

- 2.2. **Completion of Due Diligence for Acquisition:** Upon acceptance of assignment of the NHDOT and Northern Railroad P&S Agreement, the City shall immediately resume the City’s due diligence activities, which were previously initiated by the City in accordance with its July 7, 2021 Purchase and Sales Agreement, but were subsequently terminated when NHDOT enacted its ROFR on October 18, 2021. The City’s due diligence activities completed under this Agreement shall be funded by the City at its sole expense using qualified professionals selected and engaged by the City.

Due diligence may include, but shall not be limited to:

- a) Boundary surveys;

- b) Title examinations to insure the Premises has good, marketable, and insurable title;
- c) Phase I Environmental Site Assessments; and,
- d) Any other study, evaluation, or assessment of the Premises which the City wishes to complete during the due diligence period defined in the NHDOT P&S Agreement.

The City shall provide NHDOT with copies of all reports, studies, assessments, boundary surveys, and other similar items commissioned by the City as part of the City's due diligence activities. Said documents shall be provided electronically to NHDOT unless otherwise agreed by the Parties.

- 2.1. **Notice of Whether the City Will Acquire the Premises:** Upon completion of the City's due diligence activities, the City shall inform NHDOT whether the City intends to acquire the Premises from Northern Railroad.

The City shall only be obligated to close provided the results of the City's due diligence are acceptable to the City in its sole discretion.

- 2.2. **Event of City Electing Not to Acquire the Premises:** If, upon completion of its due diligence, the City elects to not to proceed with acquiring the Premises, the Parties shall have the following options:

- 1) The City may reassign the NHDOT and Northern Railroad P&S Agreement back to NHDOT, and NHDOT shall have no obligation to accept reassignment of said P&S Agreement. However, should NHDOT accept reassignment, NHDOT may then complete the acquisition of the Premises using NHDOT's own funds.

Following NHDOT's acceptance of reassignment of the NHDOT and Northern Railroad P&S Agreement from the City, this Agreement shall terminate, become null and void, and NHDOT shall have the exclusive right to acquire, develop, operate, and manage the Premises as it desires in accordance with applicable law.

- 2) Alternatively, if NHDOT rejects reassignment of the NHDOT and Northern Railroad P&S Agreement from the City, the City shall terminate the NHDOT and Northern Railroad P&S Agreement and this Agreement.

Upon termination of the NHDOT and Northern Railroad P&S Agreement by the City, this Agreement shall become null and void and the Parties shall have no obligation to each other.

- 2.3. **Event of City Electing to Acquire Premises:** In the event the City elects to proceed with acquisition of the Premises, the City shall pay to Northern Railroad the sale price for the Premises using the City's funds.

Upon payment to Northern Railroad and execution of the release deed from the Northern Railroad to the City, the Parties agree that the City shall be the only holder of fee simple ownership of the Premises.

Once closing between the City and the Northern Railroad has occurred, the Parties shall fulfill all subsequent obligations related to the Premises as set forth within this Agreement.

- 2.4. **City's Intended Use of Premises:** Upon acquisition of the Premises, the City shall use the Premises for the development of a multimodal recreational path ("Rail Trail") for use and enjoyment by the general public.

The City shall have the exclusive right to design, permit, construct, repair, maintain, operate, and manage the Rail Trail located at the Premises within its sole discretion. The City's activities shall be solely funded by the City, unless the City otherwise receives grants, donations, or other governmental transfers for these activities separately from this Agreement. The City's operation and management of the Premises, and associated Rail Trail, shall expressly include the City's exclusive and unilateral right to establish ordinances, rules, and regulations related thereto.

NHDOT shall not have any approval authority over the City's designs, permits, construction activities, repair or maintenance activities, operation or management activities for the Premises. However, the preceding shall not exempt the City from securing all normal and customary permits from State agencies and departments commonly required for the development of real estate. Said normal and customary State permits may include, but shall not be limited to, NH Department of Environmental Services (NHDES) Alteration of Terrain Permits, NHDES Wetlands Dredge and Fill Permits, or NHDES Shoreland Permit, or other similar such permits, as applicable.

- 2.5. **Removal of Railroad Infrastructure:** The City shall have the right to remove and lawfully dispose of all railroad rails, ties, switches, tracks, and related infrastructure at the Premises to facilitate development of the Rail Trail, or other use of the Premises. In the event the City intends to remove rails at the Premises, the City shall provide the NHDOT thirty (30) day written notice of such removal. The State may, at the State's sole expense, salvage and remove said rails from the Premises in accordance with a schedule to be mutually approved by the City and NHDOT.

3. **LEASES, LICENSES, AND COVENANTS:**

- 3.1. Licenses and Leases: In recognition that the City is financing the entire acquisition price of the Premises, and shall be the exclusive fee ownership holder thereof, all revenues generated by the Premises shall solely accrue to the City of Concord without limitation, unless otherwise noted herein.
- 3.2. Scenic RailRiders Lease: The Parties hereby acknowledge that the Premises is subject to a lease agreement between Pan Am Systems and the Scenic RailRiders dated June 7, 2019. Subject to the terms and conditions set forth therein, the Scenic RailRiders Lease expires on June 6, 2024.

The City acknowledges that NHDOT, in conjunction with the separate acquisition of other portions of the Northern Railroad from Pan Am Systems located north of the Premises which is subject to the Scenic RailRiders Lease, has negotiated an agreement with Pan Am whereby revenues from the Scenic RailRiders Lease shall be prorated. Specifically, 18.7% of the Scenic RailRiders Lease rent shall be paid to NHDOT for the NHDOT's real estate. The remaining 81.3% is retained by Pan Am for the Premises.

The Parties agree that, upon acquisition of the Premises by the City, the Parties shall continue to maintain said arrangement concerning proration of rent until expiration or termination of the existing Scenic RailRiders Lease. Although the City shall serve as the Parties' primary point of contact for the Scenic RailRiders, the Parties agree that the NHDOT and the City shall be individually responsible for any landlord related responsibilities associated with the Scenic RailRiders Lease as said responsibilities may pertain to their respective properties.

Upon expiration or termination of the existing Scenic RailRiders Lease, the City and NHDOT may elect to enter into new lease agreements with the Scenic RailRiders. The Parties may use their own form of lease agreement and negotiate their own financial terms for any new lease agreement with the Scenic RailRiders. However, the Parties may endeavor to have the duration (term) of any new lease agreements be materially similar for the convenience of the Scenic RailRiders.

- 3.3. Covenant to NHDOT RSA 228:60-b, II: Simultaneously with the City's closing on the Premises and recording the necessary instruments, the City shall grant a covenant to NHDOT, which shall afford NHDOT the ability to acquire the Premises, or a portion thereof, from the City, as well as its heirs, successors, or assigns, in the event NHDOT determines that all or any part of the Premises is required for the transportation of goods or

services of any kind or for any other purpose deemed necessary by NHDOT, except for a Rail Trail.

Said covenant shall be substantially similar to that included in Exhibit 2 of this Agreement, unless otherwise agreed by the Parties at time of execution. Said covenant shall be recorded at the Merrimack County Registry of Deeds simultaneously with recording any other instruments associated with the acquisition of the Premises.

- 3.4. Easement for Maintenance of NHDOT Owned Bridge Over Contoocook River: Simultaneously with the City's closing on the Premises and recording the necessary instruments, the City shall grant to the NHDOT an easement over and through parcel 053P/7 which shall run with the land in perpetuity to the benefit of the NHDOT concerning the repair, replacement, reconstruction, and maintenance of the bridge located above the Contoocook River, which connects parcel 053P/7 to Hannah Dustin Island located at the confluence of the Merrimack River and Contoocook River. Said bridge was acquired by the NHDOT on March 11, 2022 by deed recorded at the Merrimack County Registry of Deeds at Book 3787 Page 284. The extent of property disturbance and locations of construction staging areas shall be as mutually agreed by the City and NHDOT at the time of said activities. The NHDOT, immediately following any repair, replacement, reconstruction, and maintenance work of the bridge shall restore disturbed portions of parcel 053P/7 to the same condition that existed prior to said activities occurred in a professional workman like manner. Prior to undertaking repair, replacement, reconstruction, and maintenance of the bridge, the NHDOT, as well as any and all contractors whom it retains for the purpose of completing said activities, shall obtain insurance, evidenced by a certificate of insurance to be provided to the City in an amount of not less than \$2 million in the aggregate, \$1 million per occurrence naming the City as an additional insured. The City shall have the right to periodically review and adjust said minimum insurance requirements. Railroad exclusions for such policies shall not be permitted.

#### 4. **REPRESENTATIONS AND WARRANTIES**

- 4.1. **Representations and Warranties of the City**. The City hereby represents and warrants to the best of its knowledge and belief that:

4.1.1. The execution and delivery of this Agreement and the performance of the City's obligations hereunder have been duly authorized by such municipal action as necessary, and this Agreement constitutes the legal, valid and binding agreement of the City, enforceable against the City in accordance with its terms subject only to the conditions set out in this Agreement.

4.1.2. Subject to the conditions set out in this Agreement, neither the execution or delivery by the City of this Agreement, the performance by the City of its obligations herein, nor the fulfillment by the City of the terms or conditions hereof conflicts with, violates or results in a breach of any constitution, law or governmental regulation applicable to the City, or conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which the City is a party or by which the City or any of its properties or assets are bound, or constitutes a default there under.

4.1.3. The Concord City Council, by its approval of Resolution # \_\_\_\_\_ on \_\_\_\_\_, 2022 authorized the City Manager to execute this Agreement.

4.1.4. There is no action, suit or proceeding, at law or in equity, or official investigation before or by any court or Governmental Authority, pending or threatened against the City, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by the City of its obligations hereunder, or which, in any way, may adversely materially affect the validity or enforceability of this Agreement.

4.2. **Representations and Warranties of NHDOT.** NHDOT hereby represents and warrants to the best of its knowledge and belief that:

4.2.1. The execution and delivery of this Agreement and the performance of NHDOT's obligations hereunder have been duly authorized by the Governor and Executive Council, and this Agreement constitutes the legal, valid and binding agreement of NHDOT, enforceable against NHDOT in accordance with its terms subject only to the conditions set out in this Agreement.

4.2.2. Subject to the conditions set out in this Agreement, neither the execution or delivery by NHDOT of this Agreement, the performance by NHDOT of its obligations herein, nor the fulfillment by NHDOT of the terms or conditions hereof conflicts with, violates or results in a breach of any constitution, law or governmental regulation applicable to NHDOT, or conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which NHDOT is a party or by which NHDOT or any of its properties or assets are bound, or constitutes a default there under.



4.2.3. The Executive Council authorized NHDOT to execute this Agreement on \_\_\_\_\_, 2022.

4.2.4. There is no action, suit or proceeding, at law or in equity, or official investigation before or by any court or Governmental Authority, pending or threatened against NHDOT, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by NHDOT of its obligations hereunder, or which, in any way, may adversely materially affect the validity or enforceability of this Agreement.

4.2.5. Nothing in this Agreement shall be deemed to constitute a waiver of NHDOT, or the State's, sovereign immunity and any applicable City immunity.

## 5. **DEFAULT**

5.1. **Default by City.** If the City shall fail to fulfill its obligations hereunder, and such failure continues for thirty (30) days after written notice from NHDOT (or such additional time as may be reasonably required if such failure cannot be cured within said thirty (30) day period provided that City is diligently pursuing said cure) then NHDOT's remedy shall be limited to its rights and remedies as set forth within the specific Article, Section, or Sub-Section of this Agreement for which default has occurred. However, if no rights or remedies are expressly defined within the specific Article, Section, or Sub-Section in which default occurred, then NHDOT shall have the right to terminate this Agreement, upon which neither party shall have any further rights against the other under this Agreement; and/or pursue any and all rights it may have at law and in equity to address any such breach including, without limitation, suit for specific performance. The remedies stated herein shall be cumulative.

5.2. **Default by NHDOT.** If NHDOT shall fail to fulfill its obligations hereunder, and such failure continues for thirty (30) days after written notice from the City (or such additional time as may be reasonable required if such failure cannot be cured within said thirty (30) day period provided that NHDOT is diligently pursuing said cure) then the City's remedy shall be limited to its rights and remedies as set forth within the specific Article, Section, or Sub-Section of this Agreement for which default has occurred. However, if no rights or remedies are expressly defined within the specific Article, Section, or Sub-Section in which default occurred, then the City shall have the right to terminate this Agreement, upon which neither party shall have any further rights against the other under this Agreement; and/or pursue any and all rights it may have at law and in equity to address any such breach including, without limitation, suit for specific performance. The remedies stated herein shall be cumulative.

## 6. **SCHEDULE**

- 6.1. **General:** Attached to this Agreement is Exhibit 3, titled "Schedule," detailing the anticipated date and sequence of various elements of the Project to be completed by the City and NHDOT.

The Parties acknowledge that the Schedule is complex, requiring the coordinated efforts of multiple parties and dependent in many instances on the actions or approvals of third parties.

The Parties agree to use diligent efforts and to cooperate with each other in undertaking their respective responsibilities under this Agreement, including, but not limited to, those events and timelines listed in the Schedule.

## 7. **GENERAL PROVISIONS**

- 7.1. **Cooperation.** The City and NHDOT agree to cooperate with each other in order to achieve the purposes of this Agreement and, in connection therewith, to take such further actions and to execute such further documents as may reasonably be requested by the City, NHDOT, or their representatives, agents, and consultants, whether or not explicitly set forth herein, or as may be necessary in connection with these transactions and/or the implementation of the goals and objectives of this Agreement. Furthermore, no party shall be considered in default under this Agreement and neither party shall exercise any rights and remedies granted to it hereunder until the other party has received written notice of the alleged default and has had a reasonable time (as is appropriate under the conditions existing at that time).
- 7.2. **Entire Agreement; Amendments.** This Agreement embodies the entire agreement and understanding between the Parties hereto relating to the subject matter herein and supersedes all prior agreements and understandings between the Parties. This Agreement may not be changed, modified, waived, discharged, or terminated orally, but only by an instrument in writing signed by each of the Parties hereto or by the Party against which enforcement is sought. Any change, modification, or amendment, which requires the consent or approval of a Governmental Authority, shall be effective only upon receipt of such approval.
- 7.3. **Headings.** The headings to the sections and subsections of this Agreement have been inserted for convenience of reference only and shall not modify, define, limit or expand the express provisions of this Agreement.

- 7.4. **Exhibits.** All exhibits referred to in this Agreement are hereby incorporated by reference and expressly made a part hereof.
- 7.5. **Governing Law.** This Agreement shall in all respects be governed by, and construed and enforced in accordance with, the laws of the State of New Hampshire.
- 7.6. **Enforceability and Severability.** Any provision of this Agreement that is determined to be illegal or unenforceable by a court of competent jurisdiction, shall be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof.
- 7.7. **Consent to Jurisdiction and Venue.** The City and NHDOT submit to the jurisdiction of the courts of the State of New Hampshire and the courts from which an appeal from such trial venue may be taken or other relief may be sought for purposes of any action or proceeding arising out of this Agreement or any related agreement. All legal actions taken by the Parties shall be commenced in Merrimack County New Hampshire Superior Court.
- 7.8. **Independent Parties.** The City and NHDOT are independent Parties under this Agreement, and nothing in this Agreement shall be deemed or construed for any purpose to establish between any of them or among them a relationship of principal and agent, employment, partnership, joint venture, or any other relationship other than independent parties.
- 7.9. **Assignment; Binding Effect.** Neither Party shall have the right to assign this Agreement, or its responsibilities related thereto, unless specifically approved by the other Party in writing. Said approval shall not be unreasonably withheld.
- 7.10. **Survival of Agreement.** The agreements, covenants, indemnities, representations, and warranties contained herein shall survive the execution and delivery of this Agreement.
- 7.11. **Waivers.** Failure on the part of any Party to complain of any action or non-action on the part of the other Party, no matter how long the same may continue, shall not be deemed to be a waiver of any such Party's rights hereunder. No waiver at any time of any provision hereof by any Party shall be construed as a waiver of any other provision hereof or a waiver at any subsequent time of the same provision.
- 7.12. **No Rights Conferred Upon Others.** Except as expressly set out herein, nothing in this Agreement shall be construed as giving any individual, corporation, limited liability company, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or

government, other than the Parties hereto, any right, remedy, or claim under or in respect of this Agreement or any provision hereof.

- 7.13. **Time of the Essence.** The Parties agree that time is of the essence in performance of their respective obligations under this Agreement.
- 7.14. **Good Faith and Fair Dealing.** Unless expressly stated otherwise in this Agreement, whenever a Party's consent or approval is required under this Agreement, or whenever a Party shall have the right to give an instruction or request another party to act or to refrain from acting under this Agreement, or whenever a Party must act or perform before another Party may act or perform under this Agreement, such consent, approval, or instruction, request, act or performance shall be reasonably made or done, or shall not be unreasonably withheld, delayed, or conditioned, as the case may be.
- 7.15. **Municipal Approvals.** The execution of this Agreement does not preempt or supersede the review process or powers of any city or other governmental board, committee, commission, or department, or excuse the Parties from the requirement to apply for and receive all necessary permits and approvals from all applicable governmental boards, committees, commissions, or departments.
- 7.16. **Warranties and Representations:** The City and NHDOT each acknowledge that they have not been influenced to enter into this transaction or relied upon any warranties or representations not specifically set forth or incorporated into this Agreement.
- 7.17. **Notice:**

- 7.17.1. All required or appropriate notices under this Covenant shall be effective if in writing and mailed certified, return receipt requested, as follows:

If to the City:

City of Concord  
City Hall  
41 Green Street  
Concord, NH 03301  
Attn: City Manager  
Tele: (603) 225-8570

If to NHDOT:

New Hampshire Department of Transportation  
7 Hazen Drive  
PO Box 483  
Concord, New Hampshire 03302-0483  
Attn: Commissioner  
Tele: (603) 271-3734

or to such other address as any party shall notify the other parties of in writing.

- 7.17.2. Alternate Methods of Notice. The provision of the foregoing method of notice shall not prevent the use of any other method of delivering actual written notice, including hand delivery or delivery by courier service.
- 7.17.3. Time of Notice. Any notice shall be deemed to be given when mailed in accordance with the preceding subsection or, if delivered by any other method of notice, when received at the party's address specified above
- 7.18. Saving Clause. In the event that any of the terms or provisions of this Agreement are declared invalid or unenforceable by any court of competent jurisdiction or any Federal or State Government Agency having jurisdiction over the subject matter of this Agreement, the remaining terms and provisions that are not affected thereby shall remain in full force and effect.

**[The remainder of this page left blank intentionally]**

## **LIST OF EXHIBITS**

- Exhibit 1     Maps of the Premises
- Exhibit 2     Covenant from the City of Concord to the State of New Hampshire  
Department of Transportation
- Exhibit 3     Project Schedule

**[The remainder of this page left blank intentionally]**

Executed as a sealed instrument this \_\_\_\_\_ day of \_\_\_\_\_ 2022.

**CITY OF CONCORD**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Thomas J. Aspell, Jr., City Manager  
Duly Authorized

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

In \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 2022, before me, personally appeared **THOMAS J. ASPELL, JR.**, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he executed said instrument for the purposes therein contained as his free and voluntary act and deed.

\_\_\_\_\_  
Justice of the Peace/Notary Public

**STATE OF NEW HAMPSHIRE**

**DEPARTMENT OF TRANSPORTATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_

\_\_\_\_\_  
Duly Authorized

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

In \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 2022, before me, personally appeared \_\_\_\_\_, of the State of New Hampshire Department of Transportation known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that she executed said instrument for the purposes therein contained as her free and voluntary act and deed.

\_\_\_\_\_  
Justice of the Peace/Notary Public



**Exhibit #1: Map of the Premises**



Exhibit 1: Map of the Premises (Part 1 of 3)

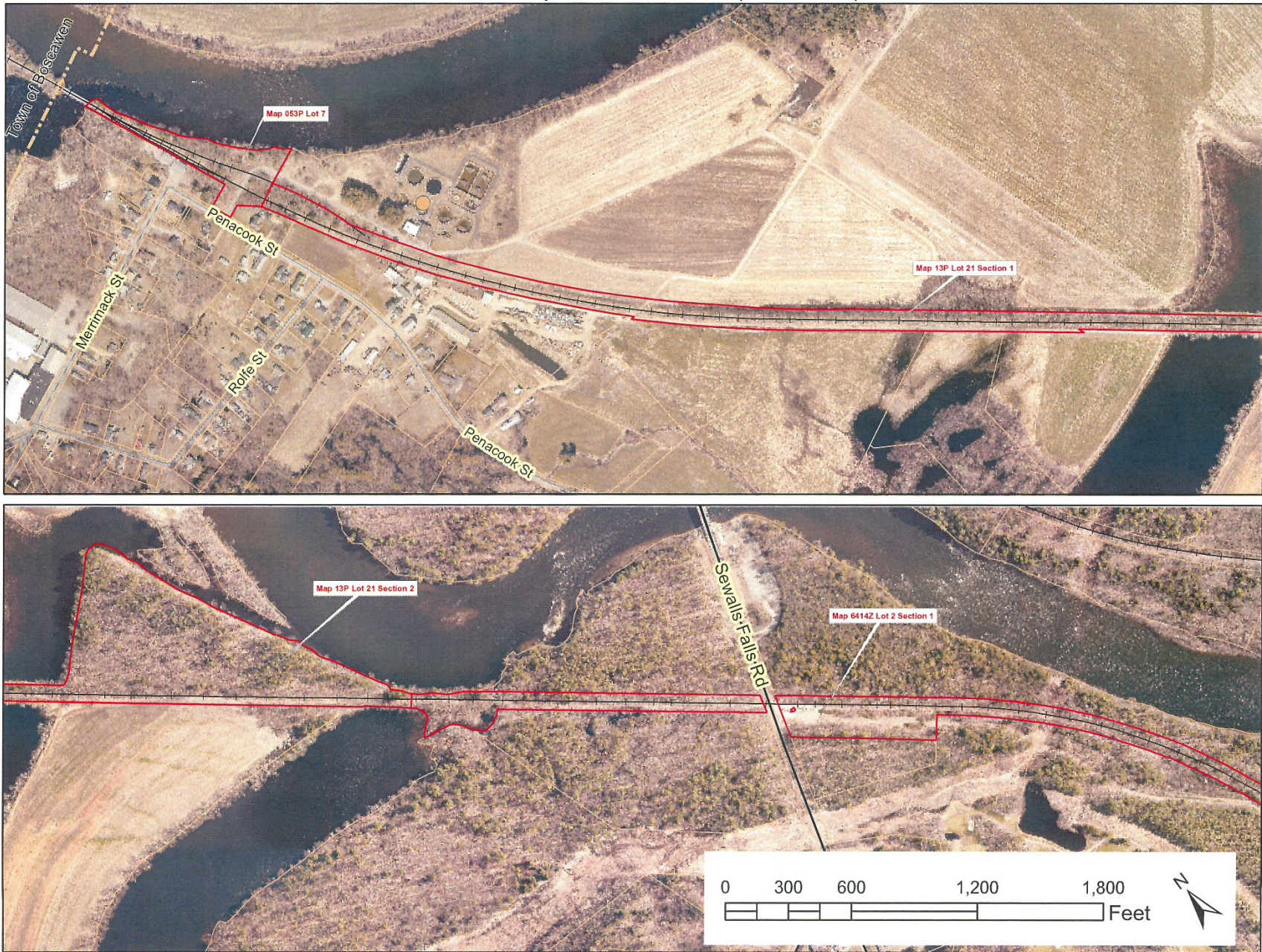




Exhibit 1: Map of Premises (Part 2 of 3)

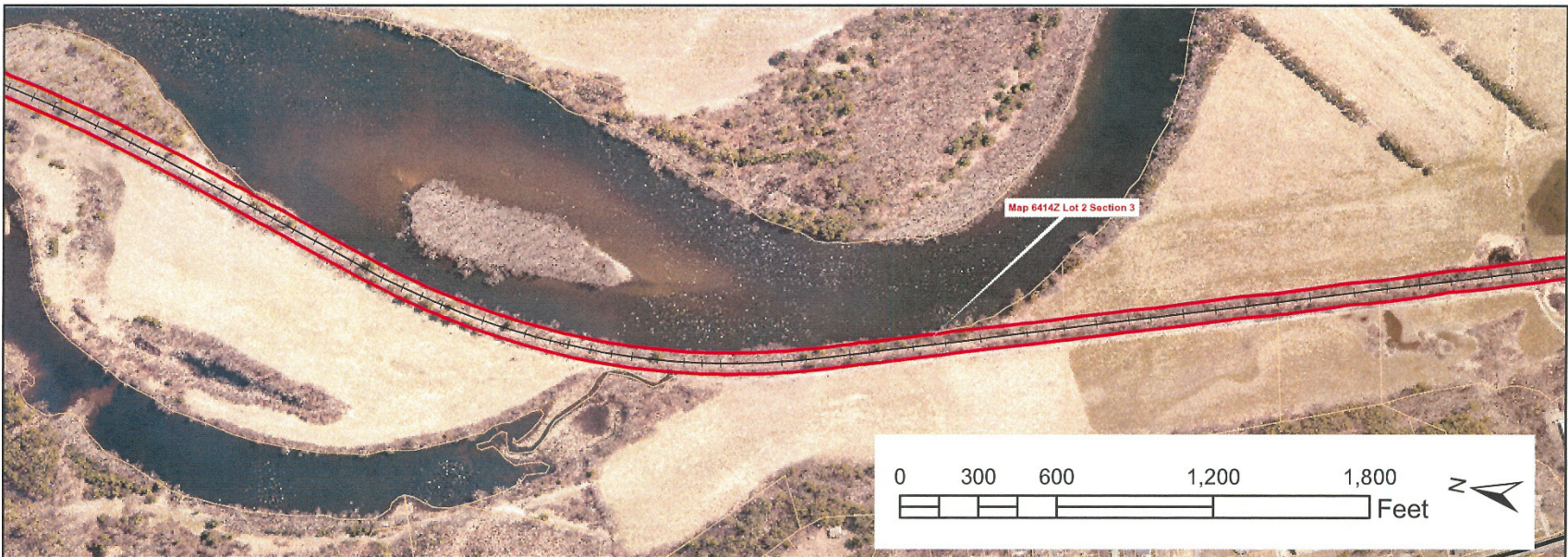
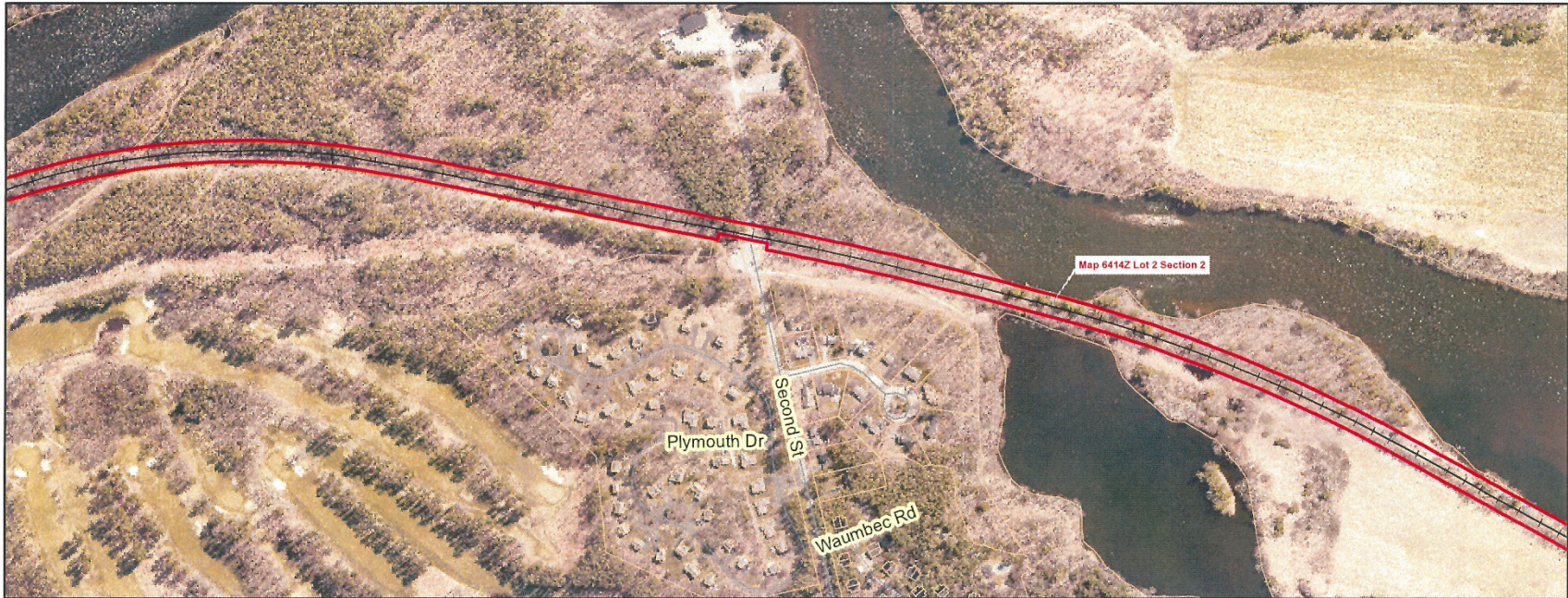
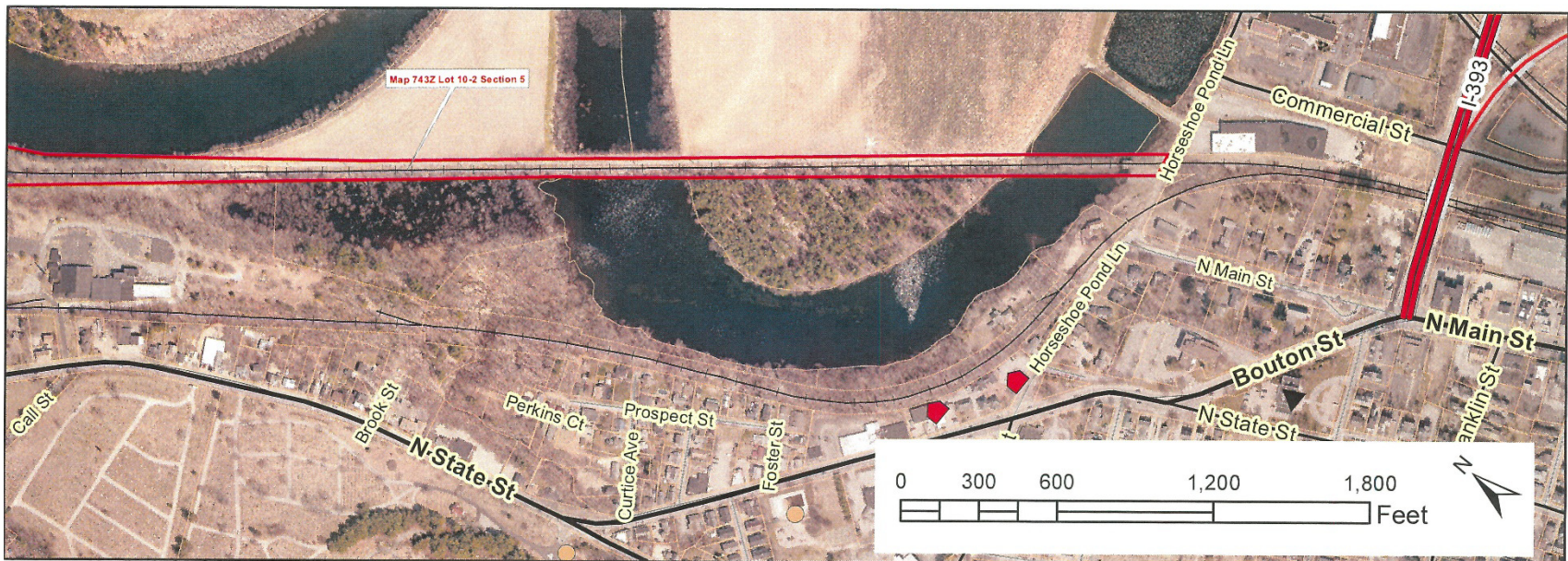
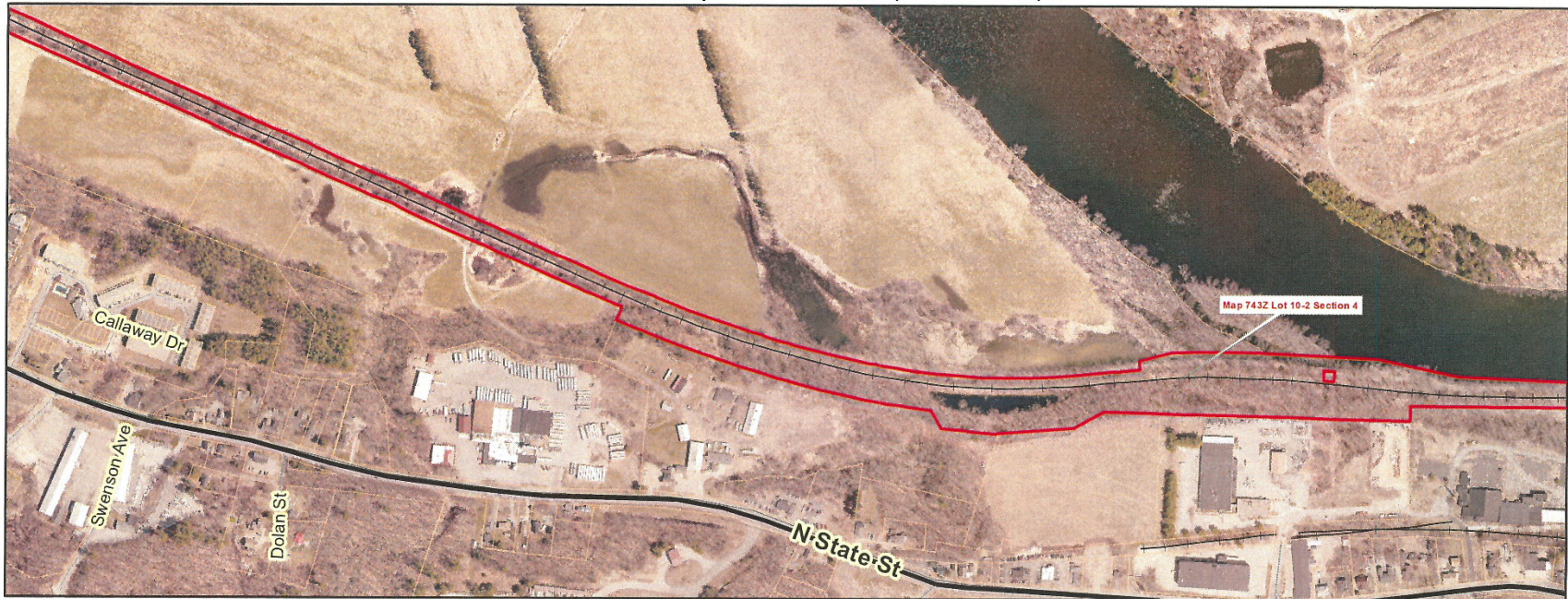




Exhibit 1: Map of Premises (Part 3 of 3)





**Exhibit #2: Covenant between City of Concord and the State of New Hampshire  
Department of Transportation**

**Return to:  
New Hampshire Department of Transportation  
Attn: Bureau of Rail & Transit  
PO Box 483  
Concord, New Hampshire 03302-0483**

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### **DECLARATION OF COVENANTS**

KNOW ALL PERSONS BY THESE PRESENTS that the **CITY OF CONCORD**, a New Hampshire municipal corporation, with a principal place of business at 41 Green Street, Concord, New Hampshire 03301 ("City"), for consideration paid hereby grants the following COVENANT for the benefit of the **STATE OF NEW HAMPSHIRE**, New Hampshire Department of Transportation, with a principal place of business at 7 Hazen Drive, Concord, New Hampshire 03302-0483 ("NHDOT"), referred to individually as "Party" or collectively as "the Parties, as follows:

#### RECITALS

The City is the owner of certain real estate identified by the Assessing Department as map-block-lot 743Z /10, 6414 Z/2, 13 P/21, and 053 P/7, more particularly described on Exhibit A attached hereto, and all improvements now or hereafter constructed thereon (hereinafter collectively the "Premises").

The Premises is a former railroad corridor known as the Northern Main Line, which was abandoned and discontinued prior to the City's ownership. However, the Premises is part of the U.S. Department of Transportation Federal Railroad Administration's high-speed rail corridor linking Boston, Massachusetts to Montreal, Province of Quebec, Canada, as designated by US Secretary of Transportation Rodney E. Slater on October 11, 2000.

The Premises was acquired by the City in a release deed filed on the date hereof. Said acquisition was in accordance with a Purchase and Sales Agreement between NHDOT and the Northern Railroad, which is an affiliate of Pan Am Systems, Inc., assigned to the City under the terms and conditions set forth therein, and governed by a Memorandum of Agreement (MOA) between the City and NHDOT, dated \_\_\_\_\_, 2022. Said acquisition was governed by RSA 228:60-b, as written on the date herein.

In accordance with the terms and conditions of said MOA, the Premises shall be subject to a Covenant, in perpetuity, whereby NHDOT shall have the ability to acquire all, or a portion of, the Premises in the event the Commissioner of NHDOT determines that all, or any part of, the Premises is needed for transportation of goods or services of any kind, or for any other purpose deemed necessary by the Commissioner.

NOW THEREFORE the City, its grantees, successors, and assigns, hereby covenant, for the benefit of NHDOT, as follows:

### **COVENANT**

1. **Intent:** The intent of this Covenant is to memorialize the expectations and process the Parties have agreed to follow in the event NHDOT determines that all, or any part of, the Premises is needed for transportation of goods or services of any kind, or for any other purpose deemed necessary by the Commissioner.
2. **Right to Acquire:** NHDOT, upon 365 days' written notice to the City sent to the address herein, shall have the right to acquire all or a portion of the Premises in the event the Commissioner of NHDOT determines that all, or any part of, the Premises is needed for transportation of goods or services of any kind, or for any other purpose deemed necessary by the Commissioner, in accordance with applicable law.

As part of its notice to the City, NHDOT shall provide a map detailing those portions of the Premises it desires to acquire, as well as estimated acreage related thereto.

When executing its right to acquire, NHDOT may complete due diligence for the Premises. Due diligence may include, but shall not be limited to, title reviews, environmental assessments, feasibility studies, and other similar activities.

3. **Compensation Paid to City; Refund of Contribution or Replacement Land:** In the event NHDOT elects to reacquire the Premises, it may do so through a Refund of Contribution or Replacement Land. Any process by which NHDOT reacquires the Premises shall not be for less than fair market value, as determined at the time NHDOT reacquires.
4. In order to preserve or otherwise facilitate the City's Rail Trail, the Parties hereby agree that the preferred form of compensation to be paid to the City shall be "Replacement Land." In the event that Replacement Land acceptable to the Parties cannot be identified per the procedures and schedule herein, compensation to the City shall be a Refund of Contribution.

5. Replacement Land: NHDOT may acquire fee simple title to all, or a portion of, the Premises from the City by providing the City with fee simple title to Replacement Land using the process set forth within this paragraph.

5.1.1 Definition of Replacement Land: Replacement Land shall mean real estate consisting of land, buildings, and structures, which provide an in-kind replacement of the Premises, or portion thereof, acquired from the City by NHDOT.

5.1.2 Process to Identify Replacement Land: NHDOT shall initiate the process by providing written notice to the City that identifies which portions of the Premises it desires to acquire from the City.

Upon receipt of notice from NHDOT, the City and State shall commence a process whereby the Parties shall endeavor to work together cooperatively and in good faith to identify potential real estate that could serve as the Replacement Land.

The Parties shall have three hundred sixty-five (365) days after the City's receipt of the NHDOT's notice, running concurrently with Section 2 herein, to identify and agree upon potential real estate that could serve as the Replacement Land. The Parties may, upon mutual agreement, modify said time frames.

If the Parties are unable to identify suitable Replacement Land within the allotted time frame, the process shall cease and the Parties shall proceed with a Refund of Contribution, and establish just compensation to be paid to the City for the portion of the Premises to be acquired by NHDOT.

In the event suitable Replacement Land is mutually identified by the Parties, the NHDOT, at its expense, shall proceed with due diligence activities associated therewith. Due diligence activities shall be undertaken by qualified professionals mutually acceptable to the Parties and shall consist of the following activities for the purposes of determining whether the Replacement Land is suitable for use as a Rail Trail. The Parties agree that said qualified professionals may include NHDOT personnel with proper licenses or certifications to perform applicable due diligence activities, in which case the Parties agree that NHDOT shall be permitted to self-perform said applicable due diligence activities. Due diligence activities for the identified Replacement Land shall include:

- Boundary surveys of proposed Replacement Land, to be completed by a licensed land surveyor; and,
- Title reviews to determine that the Replacement Land has good, marketable, insurable title; and,
- Phase I and Phase II Environmental Site Assessments to determine whether the Replacement Land is encumbered by environmental



contamination or hazardous materials, as regulated by applicable state or federal laws, rules, departments and agencies; and,

- Feasibility studies, including, but not limited to, preliminary engineering design, to determine whether a Rail Trail can be reasonably constructed at the Replacement Land given the Replacement Land's unique manmade features and natural characteristics (including, but not limited to, soils, topography, wetlands, waterbodies, flood plains, habitats for threatened or endangered flora and fauna, etc.), as well as associated local, state, and federal laws, ordinances, rules, and regulations related thereto.

The NHDOT shall be solely responsible for the cost of performing said due diligence for the Replacement Land. The NHDOT shall keep the City fully apprised of its due diligence activities, and results thereof once available. Upon completion of said due diligence, NHDOT shall formally offer the Replacement Land to the City.

5.1.3 City Review of NHDOT's Proposed Replacement Land: The City shall review NHDOT's formal offer of Replacement Land upon receipt. The City shall have ninety (90) days to review an offer of Replacement Land from NHDOT. The City shall be required to accept the proposed Replacement Land provided it satisfies the following criteria:

- 1) The Replacement Land is, in the City's sole discretion, suitable for the City's needs;
- 2) The Replacement Land has been, or shall be, improved by the NHDOT, at the NHDOT's sole expense, to a condition which provides a materially similar in-kind replacement to the Premises acquired by the NHDOT from the City.

5.1.4 City's Options for NHDOT's Proposed Replacement Land and Subsequent Steps: Upon receipt of NHDOT's formal offer of the Replacement Land, the City shall, within the 90 day period set forth in Section 5.1.3, respond to NHDOT with an intended course of action. The City may accept the offer of Replacement Land, propose modifications to the offer of Replacement Land, or reject the offer of Replacement Land, at its sole discretion.

6. Refund of Contribution: In the event the Parties are unable to reach agreement on Replacement Land, NHDOT may acquire all, or a portion of, the Premises from the City in exchange for a Refund of Contribution.

The Parties agree that a Refund of Contribution shall be the Fair Market Value, determined at the time of NHDOT's future acquisition, of the portion of the Premises to be acquired by NHDOT.

Fair Market Value shall be established by a real estate appraisal.

Specifically, NHDOT, at its sole expense, shall engage a Real Estate Appraiser whom is licensed in New Hampshire for the purposes of completing a real estate appraisal of the Premises, or portion thereof, in order to establish the Fair Market Value of the Premises to be acquired by the NHDOT. The appraisal shall comport with all applicable standards, requirements, and guidance, governing the valuation of real estate.

The City and NHDOT shall provide the selected Real Estate Appraiser with any and all information which may have a bearing upon the value of the Premises. NHDOT shall promptly provide the City a copy of the appraisal for its review. The City shall have ninety (90) days to review and comment on the appraisal, commencing on the date the appraisal is received by the City from the NHDOT.

If the City is not satisfied with the appraisal, then the City shall have the right to obtain its own appraisal by a Real Estate Appraiser whom is licensed in New Hampshire, at its sole cost and expense. The appraisal shall comport with all applicable standards, requirements, and guidance, governing the valuation of real estate. Should the City elect to commission an appraisal, the City shall promptly provide NHDOT with a copy of the appraisal for its review. NHDOT shall have ninety (90) days to review and comment on the appraisal, commencing on the date the appraisal is received by the NHDOT from the City.

If the parties are unable to agree on a Fair Market Value based on the two appraisals, NHDOT and the City shall mutually select a third appraiser to review the two appraisals (but not conduct its own appraisal) and determine the Fair Market Value, which shall be a final, unappealable determination. In determining Fair Market Value, the third appraiser shall provide a written review of the two previous appraisals obtained by NHDOT and the City, as well as a detailed explanation of how the third appraiser determined the Fair Market Value of the Premises. The cost of the third appraiser shall be divided equally between the City and NHDOT.

The Fair Market Value, as determined herein, shall then be submitted to the appropriate governmental body or bodies for approval.

Following the approval of the transaction by the appropriate governmental body or bodies, the Parties shall work cooperatively to develop a schedule to complete the conveyance of the Premises, or portion thereof, to NHDOT.

7. Notice:

- 7.1 All required or appropriate notices under this Covenant shall be effective if in writing and mailed certified, return receipt requested, as follows:

7.1.1 If to the City:  
City of Concord  
City Hall  
42 Green Street  
Concord, NH 03301  
Attn: City Manager  
Tele: (603) 225-8570

7.1.2 If to NHDOT:  
New Hampshire Department of Transportation  
7 Hazen Drive  
PO Box 483  
Concord, New Hampshire 03302-0483  
Attn: Commissioner  
Tele: (603) 271-3734

Notice may be required to such other address as any Party shall notify the other Parties of in writing.

7.2 Alternate Methods of Notice. The provision of the foregoing method of notice shall not prevent the use of any other method of delivering actual written notice, including hand delivery or delivery by courier service.

7.3 Time of Notice. Any notice shall be deemed to be given when mailed in accordance with the preceding subsection or, if delivered by any other method of notice, when received at the party's address specified above.

8. Runs with the Land; Term: This Covenant shall run with the land in perpetuity.

9. No Assignment: NHDOT may not transfer, assign, or convey the rights afforded to it by this Covenant to any other party. Nothing herein shall preclude NHDOT, or a predecessor State entity, from exercising the rights contemplated by this covenant.

10. Default:

10.1 Default by City. If the City shall fail to fulfill its obligations hereunder, and such failure continues for thirty (30) days after written notice from NHDOT (or such additional time as may be reasonable required if such failure cannot be cured within said thirty (30) day period provided that City is diligently pursuing said cure) then NHDOT's remedy shall be limited to its rights and remedies as set forth within the specific Article, Section, or Sub-Section of this Agreement for which default has occurred. However, if no rights or remedies are expressly defined within the specific Article, Section, or Sub-Section in which default occurred, then NHDOT shall have the right to terminate this Agreement, upon which neither party shall have any further rights against the other under this Agreement; and/or pursue

any and all rights it may have at law and in equity to address any such breach including, without limitation, suit for specific performance. The remedies stated herein shall be cumulative.

10.2 Default by NHDOT. If NHDOT shall fail to fulfill its obligations hereunder, and such failure continues for thirty (30) days after written notice from the City (or such additional time as may be reasonable required if such failure cannot be cured within said thirty (30) day period provided that NHDOT is diligently pursuing said cure) then the City’s remedy shall be limited to its rights and remedies as set forth within the specific Article, Section, or Sub-Section of this Agreement for which default has occurred. However, if no rights or remedies are expressly defined within the specific Article, Section, or Sub-Section in which default occurred, then the City shall have the right to terminate this Agreement, upon which neither party shall have any further rights against the other under this Agreement; and/or pursue any and all rights it may have at law and in equity to address any such breach including, without limitation, suit for specific performance. The remedies stated herein shall be cumulative.

This Covenant was authorized by the Concord City Council by Resolution # \_\_\_\_\_ approved on \_\_\_\_\_, 2022.

This Covenant was authorized by the Governor and Executive Council on \_\_\_\_\_, 2022.

This covenant may not be amended, modified, or terminated without the written consent of the City and State, which shall not be applicable until such consent is recorded at the Merrimack County Registry of Deeds.

**[The remainder of this page intentionally left blank]**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2022

CITY OF CONCORD, NH

By: \_\_\_\_\_

Name: Thomas J. Aspell, Jr.

Title: City Manager

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

Personally appeared before me, the undersigned officer, the above-named \_\_\_\_\_, duly authorized \_\_\_\_\_ of the City of Concord, personally known to me (or satisfactorily proven to be by way of exhibition of a picture driver's license) to be the person whose signature appears above and acknowledged under oath the truth of all statements contained herein and that he signed the above document as his free act and deed to accomplish the purpose of this document.

\_\_\_\_\_  
Justice of the Peace/Notary Public

STATE OF NEW HAMPSHIRE

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: Commissioner, Department of Transportation

STATE OF NEW HAMPSHIRE

COUNTY OF MERRIMACK

Personally appeared before me, the undersigned officer, the above-named \_\_\_\_\_, duly authorized \_\_\_\_\_ of the New Hampshire Department of Transportation, personally known to me (or satisfactorily proven to be by way of exhibition of a picture driver's license) to be the person whose signature appears above and acknowledged under oath the truth of all statements contained herein and that he signed the above document as his free act and deed to accomplish the purpose of this document.

\_\_\_\_\_  
Justice of the Peace/Notary Public

EXHIBIT A

Legal Description of the Premises (to be added upon completion of boundary survey)

**Exhibit #3: Schedule**



### **Exhibit #3: Schedule (dates subject to change)**

1. April 11, 2022: Agreement submitted to Concord City Council; set for public hearing on April 11, 2022.
2. May 9, 2022: Concord City Council public hearing on Memorandum of Agreement with NHDOT.
3. June 29, 2022: Governor and Executive Council hearing on Memorandum of Agreement, Purchase and Sales Agreement between NHDOT and Pan Am Systems.
4. Week of July 11, 2022:
  - 4.1. NHDOT executes P&S Agreement with Northern Line for the Property.
  - 4.2. NHDOT and City execute Memorandum of Agreement
  - 4.3. NHDOT assigns P&S Agreement for the Property to the City of Concord.
  - 4.4. Start of 60 day due diligence period for transaction.
5. September 13, 2022:
  - 5.1. Conclusion of due diligence period. City determines to proceed to Closing, or reassign the Purchase and Sales Agreement back to the NHDOT.
6. September 30, 2022:
  - 6.1. Closing Date: City acquires Property from Northern Railroad.
  - 6.2. City and NHDOT execute and record covenant for the Property.
  - 6.3. City grants NHDOT easement for maintenance of NHDOT bridge over the Contoocook River.