



# CITY OF CONCORD

## REPORT TO MAYOR AND THE CITY COUNCIL

**FROM:** Matthew R. Walsh, Director of Redevelopment, Downtown Services, and Special Projects

**DATE:** April 11, 2022

**SUBJECT:** Memorandum of Agreement with NH Department of Transportation Acquisition of Northern Main Railroad (Horseshoe Pond Lane to Contoocook River) for Merrimack River Greenway Trail (CIP #543)

### **Recommendation:**

- 1) Accept the following report; and,
- 2) Set the attached resolution authorizing the City Manager to execute a Memorandum of Agreement (“MOA”) with the NH Department of Transportation concerning acquisition of discontinued portions of the Northern Main Railroad located between Horseshoe Pond Lane and the Contoocook River for the purposes of developing the Merrimack River Greenway Trail (CIP #543) for public hearing on May 9, 2022.

### **Background:**

- 1) Merrimack River Greenway Trail (MRGT): The MRGT is a regional multi-modal pathway that currently extends from Salem, New Hampshire to Terrill Park in Concord. For years, the community, as documented in a variety of City master plans, has desired to extent the MRGT north to the Northern Rail Trail located in Boscawen. When completed, approximately 12.7 miles of the MRGT will be located in Concord, as detailed on the map included herein.

To implement this vision, this City established CIP #543 “Merrimack River Greenway Trail Project” within the City’s Capital Improvement Program (CIP). Over the past decade or so, the City, working with the Friends of the MRGT, have secured grant funds to design and construct limited portions of the trail within the vicinity of Terrill Park and Loudon Road. Those efforts are ongoing.

In order to bring the MRGT to fruition, the City, working with others, will need to acquire various properties, or easements thereon. The majority of property required is associated with the Northern Main Line railroad, which is a subsidiary of Pan Am Systems, Inc.

When completed, the MGRT will create significant benefits for Concord residents, including, but not limited to, improved livability, quality of life, intermodal connectivity of neighborhoods, as well as preservation and access to open space. In addition, the trail will likely result in new economic development opportunities for the community.

- 2) Acquisition of the Northern Main Line Railroad: The Northern Main Line Railroad extends from Boston to Concord and is owned by a subsidiary of Pan Am Systems, Inc.

On October 11, 2000, the U.S. Department of Transportation Federal Railroad Administration designated a high-speed rail corridor linking Boston, Massachusetts to Montreal, Canada. The highspeed corridor includes those sections of the Northern Main Line located in Concord.

On March 22, 2017, the segments of the Northern Main Line located north of Horseshoe Pond Lane were formally discontinued by the U.S. Surface Transportation Board at the request of Pan Am Systems. Although discontinued, these portions of the Northern Main Line remain subject to the aforementioned high-speed rail corridor designation.

In 2018, Pan Am Systems commissioned a real estate appraisal of the discontinued portions of the Northern Main Line located in Concord and Boscawen to assist with preparation of the property for divestment.

In April 2019, the City began formal negotiations with Pan Am to acquire the discontinued portion of the Northern Railroad located between Horseshoe Pond Lane and the Contoocook River to facilitate development of the Merrimack River Greenway Trail. Simultaneously, the Friends of the Northern Rail Trail entered into negotiations with Pan Am Systems to acquire those portions of the Northern Main Line located in Boscawen.

On June 14, 2021, the City Council approved Resolution #9379, which authorized the City Manager to enter into a Purchase and Sale Agreement to acquire a 5.68 mile segment of the Northern Main Line located between Horseshoe Pond Lane and the Contoocook River from Pan Am for the sum of \$431,500 for the purposes of extending the MRGT. The property is approximately 72.5 acres in size. The Agreement, which was signed on July 7, 2021, was expressly subject to the State of New Hampshire's Right of First Refusal (ROFR) for the property, in accordance with RSA 228:60-a.

On October 18, 2021, the NH Department of Transportation, in accordance with RSA 228:60-a, invoked its Right of First Refusal (ROFR) to acquire the property in order to protect the State's long-term interests relative to potential future high-speed rail. The State's actions automatically terminated the City's Purchase and Sale Agreement with Pan Am.

On March 11, 2022, the NH Department of Transportation, in partnership with the Town of Boscawen and Friends of the Northern Rail Trail, acquired those portions of the Northern Main Line located between the Contoocook River and the terminus of the Northern Rail Trail at Commercial Street in Boscawen for the sum of \$110,000. The purchase was financed by donations from the Friends of the Northern Rail Trail. In exchange for the donation, the State entered into an Agreement with the Friends of the Northern Rail Trail, which tees up future extension of the rail trail south into Concord.

## Discussion:

- 1) Memorandum of Agreement with NHDOT to Acquire Northern Main Line: Immediately following the State's decision to enact its ROFR, the City and NHDOT entered into negotiations to establish a partnership, as permitted by RSA 228:60-b, II, to acquire that portion of the Northern Main Line corridor located between Horseshoe Pond Lane and the Contoocook River. These negotiations were successful and have resulted in the attached Memorandum of Agreement (MOA).

In accordance with terms and conditions of the MOA, the NHDOT and City shall jointly negotiate a new Purchase and Sale Agreement with Pan Am Systems for that portion of the Northern Main Line located between Horseshoe Pond Lane and the Contoocook River. The terms and conditions of the new Purchase and Sale Agreement shall be materially identical to the previous Agreement the City had executed with Pan Am on July 7, 2021. A draft of the proposed Purchase and Sale Agreement is attached to this report.

Once finalized and approved by Governor and Executive Council, as well as Pan Am, the NHDOT shall execute the new Purchase and Sale Agreement and immediately assign it to the City. Once assigned, the City shall resume and complete its pre-purchase due diligence activities, which were previously suspended in October 2021 due to the State's ROFR. The City shall complete its due diligence at its sole expense.

Should the results of due diligence be acceptable, the City shall close on the acquisition of the property using City funds.

Upon closing, the City shall solely hold title to the property. Upon acquisition of the property, the City, in accordance with the MOA, shall have the unilateral authority to develop a rail trail at the property, as well as the exclusive right to regulate, operate and manage the premises as it so desires.

Based upon due diligence completed to date, City Administration has not identified any significant items of concern that could, at this juncture, derail the City's purchase. However, if the results of the due diligence are unacceptable, the City may re-assign the Purchase and Sale Agreement back to the NHDOT, who, in turn, may complete the purchase using State funds, or terminate acquisition of the property.

- 2) Special Considerations: The proposed Memorandum of Agreement with the State of New Hampshire includes the following special provisions:
  - a. Scenic RailRiders Lease: On June 7, 2019, Pan Am Systems entered into a lease agreement with the Scenic RailRiders concerning the establishment of a pedal car operation on portions of the Northern Main Line. The lease agreement encumbers real estate to be acquired by the City, as well as other segments of the railroad, as acquired by the State on March 11, 2022.

When the State acquired its segments of the rail corridor, it entered into a revenue sharing agreement with Pan Am Systems whereby rental revenues associated with the Scenic RailRiders lease are pro-rated between the parties in accordance with how much of the leased premises is located on their respective properties. Under

this arrangement, the State receives 18.7% of the rental income. The remaining 81.3% is retained by Pan Am.

The base rent for the property is currently \$37,000. This figure excludes certain other expenses which the lessee is also obligated to pay.

Per the terms of the MOA, the City, as successor to Pan Am, shall continue to honor this arrangement until the lease expires on June 6, 2024.

- b. Covenant to the State: Under the terms of the MOA, the City, upon closing, shall grant to the State a Covenant to protect its long-term interests associated with rail corridor in accordance with RSA 228:60-b, II. The Covenant shall run with the land in perpetuity.

Specifically, in accordance with the aforementioned statute, the State shall have the ability to acquire all or a portion of the former rail corridor from the City when or if the property becomes “*needed for transportation of goods or services of any kind or for any other purpose deemed necessary*” by the Commissioner of the NH Department of Transportation.

In accordance with RSA 228:60-b, II, should the State desire to acquire any portion of the corridor from the City, the City shall be entitled to either a “refund of contribution” or “replacement of land”.

As set forth in the attached Covenant, “refund of contribution” shall be the fair market value of the City’s real estate at the time of purchase by the State. “Replacement land” shall be new real estate, which is secured and improved by the State, as to preserve and maintain the Merrimack River Greenway Trail network. Said replacement land would then be exchanged with the City for its real estate.

Per the terms of the Covenant, the City and the State agree that the preferred form of compensation to be paid to the City shall be “replacement land”. The Covenant also establishes a process and time frame for the identification, selection, improvement and exchange of the “replacement land” with the City.

In the event the parties cannot reach agreement on suitable “replacement land”, the Covenant provides a mechanism whereby the parties may transition to the “refund of contribution” concept. The same mechanism also establishes a process to determine the fair market value of the City’s real estate to be acquired by the State.

Please see the proposed Covenant included in Exhibit 2 of the attached Memorandum of Agreement for more information.

- c. State Easement for Access and Maintenance of State Owned Rail Corridor North of the Contoocook River: Simultaneously with acquisition of the rail corridor, the City shall provide the State with an easement over the City’s property which shall allow the State to access, maintain, repair, and replace a certain railroad trestle located over the southern confluence of the Merrimack and Contoocook Rivers.

Per the terms of the easement, the State shall be required to indemnify the City, provide insurance, and restore the property once trestle maintenance is completed. The easement shall run with the land in perpetuity.

- d. Salvage Rights: In accordance with the terms of the MOA, in the event the City intends to remove rails at the premises, the City shall provide the NHDOT a 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) Schedule: The tentative schedule for this transaction is as follows:
- a. May 9, 2022: City Council public hearing on the proposed Memorandum of Agreement.
  - b. June 29, 2022: Governor and Executive Council vote on the proposed Memorandum of Agreement, as well as State's Purchase and Sale Agreement with Pan Am Systems.
  - c. Week of July 11, 2022: City and NHDOT execute the MOA. NHDOT executes the new Purchase and Sale Agreement with Pan Am Systems. NHDOT assigns the State's Purchase and Sale Agreement to the City, following which the City resumes due diligence, which was suspended in October 2021.
  - d. September 13, 2022: City completes due diligence activities and determines whether to proceed to Closing, or reassign the Purchase and Sale Agreement back to State.
  - e. September 30, 2022: Closing date.
- 4) Budget: On June 14, 2021, the City Council approved Resolution #9380, which appropriated the sum of \$700,000 to finance acquisition of this segment of the Northern Line, and related expenses. Currently \$526,500+/- remains available. This amount is sufficient to cover the \$431,500 purchase price, remaining due diligence activities, and closing costs.
- 5) Benefits of Proposed Memorandum of Agreement and Property Acquisition: In summary, the proposed Memorandum of Agreement and associated property acquisition would have the following benefits:
- a. City Benefits:
    - i. Allows the City to proceed with acquisition of the Northern Railroad to develop the Merrimack River Greenway Trail, as originally planned, at no additional cost to the City's taxpayers.
    - ii. Affords the City sole control over future development of the MRGT, as well as operation and management of the property once acquired.
    - iii. In the event the State desires to acquire any portion of the City's property in the future, the Covenant associated therewith adequately protects the

City taxpayers' interests to ensure that: 1) the MRGT - as it may exist at the time - is preserved and replaced at no cost to the City, or 2) that the City receives fair market value for its property from the State.

- iv. Future extension of the Merrimack River Greenway Trail will:
  - 1. Facilitate connectivity with, and access to, 395+/- acres of conservation land, 330+/- acres of City owned property (including the Beaver Meadow Golf Course), as well as 339+/- acres of other State owned property.
  - 2. Enhance intermodal connectivity between Downtown Concord, Penacook Village and the Heights.
  - 3. Expand recreational opportunities for all City residents.
  - 4. Generate economic development opportunities and benefits for the City.

b. State Benefits:

- i. This segment of the Northern Railroad is acquired by a friendly party at no cost to the State.
- ii. The State's rights and long-term interests in the rail corridor concerning future high-speed rail or other transportation uses, as articulated in RSA 228:60-b, II, are preserved and protected.