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STATE OF NEW HAMPSHIRE
DEPARTMENT of NATURAL and CULTURAL RESOURCES
OFFICE OF THE COMMISSIONER

172 Pembroke Road, Concord, New Hampshire 03301
Phone: 271-2411 Fax: 271-2629
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May 25, 2022

His Excellency, Governor Christopher T. Sununu
And the Honorable Council
State House
Concord, New Hampshire 03301

REQUESTED ACTION

Authorize the Department of Natural and Cultural Resources (“DNCR”) to enter into a Memorandum of Understanding (“MOU”) with The Mount Washington Railway Company (“MWRR”), a state-chartered corporation, Littleton, NH, to execute an amendment to the Right-of-Way (“ROW”) Easement terms that preserves the MWRR’s current operations, clarifies the limitations of its future use, including with respect to development within the summit circle effective upon Governor and Council approval.

Under the MOU, the executed right-of-way easement amendment will be held in escrow until the MWRR receives all necessary approvals to move forward with the construction of MWRR’s Lizzie’s Station project.

EXPLANATION

The MWRR has operated the Cog Railway as an iconic attraction transporting passengers by railway to the summit of Mount Washington since 1869. The DNCR has operated a State Park at the summit of Mount Washington since acquiring the summit circle in 1964, providing recreation and enrichment activities to the public.

The MWRR plans to provide an innovative visitor experience by constructing “Lizzie’s Station” within its fee-owned property immediately below the summit circle and entirely outside the ROW Easement, and further plans not to develop its activities within the ROW Easement beyond its current footprint. The DNCR finds that development of Lizzie’s Station outside the summit circle will facilitate the safe, orderly, and efficient management of the limited park space available within the summit circle by reducing congestion and development pressure within the summit circle. The DNCR will favorably support MWRR’s permit applications for the Lizzie’s Station development as described in the MOU before the Coos County Planning Board.

The amendment to the MWRR’s ROW Easement will preserve the MWRR’s current operations, clarify the limitations of its future use, including with respect to development and activities within the summit circle. The executed amendment will be held by the State in escrow and recorded at such time as the MWRR receives all necessary approvals, including expiration of all appeal periods, to move forward with the construction and operation of MWRR’s Lizzie’s Station.

The easement amendment clarifies existing rights and does not involve the State or MWRR releasing or acquiring rights. It is, therefore, not a “disposal of real estate” under RSA 4:40 and does not require the State to go through the RSA 4:40 process.

The Attorney General’s Office has reviewed and approved the contract as to form, substance and execution.

Respectfully submitted,

Concurred,

Philip A. Bryce
Director
SLS/PAB/MH/ttl-060722

Sarah L. Stewart
Commissioner

(15M)

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE MOUNT WASHINGTON RAILWAY COMPANY

AND

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF NATURAL AND CULTURAL RESOURCES**

This MEMORANDUM OF UNDERSTANDING (“MOU”) is entered into this day of 20 May, 2022 between The Mount Washington Railway Company, a state-chartered corporation having a principal business office at 83 Elm St., Littleton, NH 03561 (“MWRR”), and the STATE OF NEW HAMPSHIRE, DEPARTMENT OF NATURAL AND CULTURAL RESOURCES of 172 Pembroke Road, Concord, New Hampshire 03301 (“State”).

WHEREAS the MWRR has, since completing construction in 1869, operated the Cog Railway as an iconic attraction, transporting passengers by railway to the summit of the tallest peak in New Hampshire;

WHEREAS the State has, since acquiring the summit circle in 1964 operated a State Park at the summit of Mount Washington, providing recreation and enrichment activities to members of the public;

WHEREAS the MWRR owns in fee simple a parcel of land stretching from the base of Mount Washington to the summit circle and owns in fee simple an 80-foot by 200-foot parcel of land in the summit circle known as the “Marshfields, Inc. Property,” as well as a right-of-way easement to operate a railroad over a portion of the summit circle owned by the State (the “ROW Easement”);

WHEREAS the MWRR plans to provide an innovative visitor experience by constructing “Lizzie’s Station” within its fee-owned property immediately below the summit circle and entirely outside of the ROW Easement, and further plans not to develop its activities within the ROW easement beyond their current footprint;

WHEREAS the State finds that development of Lizzie’s Station outside of the summit circle will facilitate the safe, orderly, and efficient management of the limited park space available within the summit circle; and

WHEREAS the MWRR and the State wish to work and plan collaboratively to best utilize the limited available space within the summit circle to provide an excellent visitor experience for present and future visitors to this New Hampshire landmark;

NOW, THEREFORE the parties agree as follows:

1. MWRR and the State agree to reduce congestion and development pressure within the summit circle by executing an amendment to the ROW Easement terms that preserves the MWRR's current operations, clarifies the limitations of its future use, including with respect to development within the summit circle. This amendment is attached to this MOU as Exhibit A. The executed amendment will be held by the State in escrow and recorded at such time as MWRR receives all necessary approvals, including expiration of all appeal periods, to move forward with the construction and operation of Lizzie's Station. This MOU will terminate in the event that MWRR notifies the State in writing that it has determined that it will be unable to obtain all necessary approvals necessary to move forward with the construction and operation of Lizzie's Station. It is understood that the MWRR will continue to provide its regular rail service to the summit until such time as Lizzie's Station is constructed and operational.

2. The parties agree that the MWRR's plan to develop Lizzie's Station will similarly reduce congestion and development pressure within the summit circle. It is understood by both parties that the Lizzie's Station plan includes a switch with two new approximately 500-foot tracks on either side of the existing track with platforms, all to be constructed on MWRR's fee-owned property just below the Summit Circle. It is further understood that the Lizzie's Station development is planned to include power, running water, fiber internet connectivity, shelter coach(es), food and beverage and gift coach(es), bathroom coach(es), support coach(es), sleeper coach(es) and other types of coaches as necessary, such coaches to be designed to travel up and down the mountain and/or to be secured to the tracks during the operating season. Visitors to Lizzie's Station will have access to the summit via MWRR's existing railroad track and via a hiking trail.

3. In recognition of the importance of trail and power line maintenance, MWRR retains the right to maintain the existing trail located on its fee-owned property. This right includes the right to re-bury and otherwise maintain the electric transmission line located on MWRR's fee-owned property that brings electricity service to the summit. Nothing herein is intended to affect the State's existing rights to maintain and use the existing transmission line.

4. MWRR shall be responsible for obtaining all necessary approvals, permits, and licenses necessary for the construction and development of Lizzie's Station.

5. In consideration of the benefits to summit operations that can be achieved through clarification of the ROW Easement and the MWRR's commitment to develop Lizzie's Station outside of the summit circle, the State will favorably support MWRR's permit applications for the Lizzie's Station development as described in this MOU before the Coos County Planning Board. In addition and to the extent such support does not conflict with the State's other legal

obligations, the State will further support MWRR's efforts to obtain other approvals, permits, and licenses necessary for the development, construction and operation of Lizzie's Station.

6. The State shall allow MWRR to connect to existing electrical service for a mutually agreed-upon usage fee. The parties understand that the State is not a public utility and does not sell electrical power for profit. The rate will reflect the costs incurred by the state associated with the provision of electrical power. Prior to connecting to the electrical service, MWRR will obtain at its own expense an assessment of the existing power line's capacity to meet the additional electrical demand of Lizzie's Station. The State will not be obligated to increase the capacity of the existing power line. In the event electrical service is not operational for any reason, the State will have no liability whatsoever to MWRR.

7. To the extent such support does not conflict with the State's other legal obligations, the State agrees to favorably support an application by the MWRR to install up to an eight-inch (8") pipe and any necessary supporting equipment on its fee-owned property to transport wastewater effluent from Lizzie's Station (no solids) to a leach field to be located at the MWRR Base Station.

8. To the extent such support does not conflict with the State's other legal obligations, the State agrees to favorably support an application by the MWRR to drill a private well on its fee-owned property to support the operation of Lizzie's Station. The parties acknowledge that this MOU has no impact on any existing water rights at the summit that either party has or may have.

9. The parties expressly acknowledge MWRR's existing right, as it is laid out in an April 21, 1964 deed from the Trustees of Dartmouth College to Marshfield, Inc. and recorded in the Coos County Registry of Deeds at Book 481, Page 96-97 to cross on foot and by vehicle certain property now owned by the State, and as identified in the aforementioned deed as Tract I and Tract II. The parties further acknowledge that MWRR will need to exercise this right in connection with the development and construction of Lizzie's Station.

10. The parcel of land owned by the MWRR in fee simple in the summit circle known as the "Marshfields, Inc. Property" is independent of and is not subject to the Amended and Restated Easement Deed. Independently of the Lizzie's Station project, the parties will explore the possibility of transferring the Marshfields, Inc. Property to the State via purchase or land exchange.

11. At the point where the Lizzie's Station hiking trail enters the summit circle, MWRR shall pay for and install a sign to be jointly designed by the State and the MWRR evidencing the trail and recognizing guests are entering the Mount Washington State Park.

12. Notwithstanding the limitations on commercial activity within the ROW Easement as clarified by the ROW Easement amendment (Exhibit A), MWRR may apply for a three-year special use permit (SUP) to operate a shelter coach, shopping coach, and/or snack car

when the State's Sherman Adams Building is closed for the season. The State will grant the SUP in accordance with its administrative rules and on terms substantially similar to other SUPs for private commercial activity on public lands. Prior to the expiration of the three-year SUP, the State will seek any necessary approvals for a longer-term permit to operate a shelter coach, shopping coach, and/or snack car at the summit when the Sherman Adams Building is closed for the season. In the event the State decides to keep the Sherman Adams Building open year-round, the parties will negotiate in good faith to reach agreement on the operation of any shelter coach, shopping coach, and/or snack car to be operated within the ROW Easement. Neither the MWRR's application for, nor the State's granting of an SUP pursuant to this paragraph shall be construed as an alteration or admission with respect to the parties' respective rights within the ROW easement prior to the execution and recordation of the attached Easement Amendment.

13. The parties acknowledge that they both retain rights to use the land subject to the ROW Easement, as memorialized therein. MWRR acknowledges the State's right to reasonable enjoyment includes the right to use the State's parking area adjacent to the Stage Office. If, in order to exercise MWRR's own rights under the ROW Easement, MWRR must temporarily occupy this parking area (such as, for example to temporarily store equipment or machinery

enjoyment thereof.

14. Notwithstanding any provision of this MOU to the contrary, all obligations of the State hereunder are contingent upon the availability and continued availability of funds.

15. This MOU shall be construed in accordance with the laws of the State of New Hampshire.

16. In the event any of the provisions of this MOU are held to be contrary to any state or federal law, the remaining provisions of this MOU will remain in full force and effect.

17. This MOU, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire MOU between the parties, and supersedes all prior MOUs relating hereto.

18. Nothing herein shall be construed as a waiver of sovereign immunity, such immunity being hereby specifically preserved.

19. This MOU becomes effective upon approval by the New Hampshire Governor and Executive Council.

SIGNATURE PAGE FOLLOWS

IN WITNESS WHEREOF, the parties hereunto have set their hand on the date herein named:

MOUNT WASHINGTON RAILWAY COMPANY



Wayne Presby, President

Date: 5/20/22

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF NATURAL AND CULTURAL RESOURCES**



Sarah Stewart, Commissioner

Date: 5/20/22

Approved as to form, substance, and execution
by the Attorney General's Office



Michael Haley, Assistant Attorney General

Date: 6/13/2022

Approved by Governor and Council: Date: _____ Item #: _____

Exhibit A

Return to:

The Mount Washington Cog Railway Company
83 Elm Street
Littleton, NH, 03561

**THIS IS A NON-CONTRACTUAL CONVEYANCE
PURSUANT TO NEW HAMPSHIRE RSA 78-B:2, IX
AND IS EXEMPT FROM THE NEW HAMPSHIRE
REAL ESTATE TRANSFER TAX.
THIS TRANSFER IS ALSO EXEMPT FROM THE
LCHIP SURCHARGE PURSUANT TO RSA 478:17-g, II(a)**

AMENDED AND RESTATED EASEMENT DEED

This AMENDED AND RESTATED EASEMENT DEED is made this day of 20 May, 2022, by and between the STATE OF NEW HAMPSHIRE through its Department of Natural and Cultural Resources of 172 Pembroke Road, Concord, New Hampshire 03301 (“GRANTOR”) and the MOUNT WASHINGTON RAILWAY COMPANY, a state-chartered corporation having a principal business office at 83 Elm St., Littleton, NH 03561, its heirs, successors, and assigns (“GRANTEE”).

WHEREAS, the Trustees of Dartmouth College granted to Marshfield, Inc., its heirs, successors and assigns the “perpetual right and easement to operate a railroad” by virtue of a deed dated November 20, 1962 and recorded on November 27, 1962 at Book 474, Page 7 of the Coos County Registry of Deeds, over a portion of property situated at and near the summit of Mount Washington in Sargent’s Purchase, Coos County, State of New Hampshire (the “ROW Easement”), the boundaries of the ROW Easement described in said deed by metes and bounds;

WHEREAS, Marshfield, Inc. transferred said ROW Easement to the Mount Washington Railway Company by virtue of a deed dated November 20, 1962 and recorded on December 11, 1962 at Book 474, Page 58 of the Coos County Registry of Deeds;

WHEREAS, the Trustees of Dartmouth College transferred the parcel encumbered by said ROW Easement to the State of New Hampshire, said transfer subject to the ROW Easement, by virtue of a deed dated April 21, 1964 and recorded on June 4, 1964 at Book 481, Page 209 of the Coos County Registry of Deeds;

WHEREAS, no recorded instrument has further clarified the meaning of the “perpetual right and easement to operate a railroad” granted under the ROW Easement; and

WHEREAS, GRANTEE, the present holder of the ROW Easement, and GRANTOR, the present owner of the parcel encumbered thereby, wish to clarify and amend GRANTEE’s rights under the ROW Easement;

NOW THEREFORE, in consideration of the mutual agreements of the parties, GRANTOR and GRANTEE do hereby clarify and amend GRANTEE’s perpetual right and easement to operate a railroad within the bounds of the ROW Easement as follows:

The right of the GRANTEE to “operate a railroad” means and includes:

- 1. The right to transport passengers via railroad, including the right to load and unload passengers at designated stops;**
- 2. The right to park train engines and cars for such time as reasonably necessary for loading and unloading;**
- 3. The right to repair, maintain, replace, and upgrade railroad tracks, trestles, platforms, and appurtenant equipment (collectively “railroad infrastructure”) necessary to exercise the rights enumerated in paragraphs 1–2 above, such railroad infrastructure to occupy the same footprint as exists at the time this amendment is executed;**
- 4. The right to construct and maintain a walkway and railing adjacent to the railroad track, construction of such walkway subject to the trail approval process of the Department of Natural and Cultural Resources and any other required review and permitting process;**
- 5. The right to transport and store materials, equipment, and machinery necessary to exercise the rights enumerated in paragraphs 1–4 above; and**

6. The right to assurances that the GRANTOR shall not interfere unreasonably with the GRANTEE's exercise of these rights.

Rights reserved by GRANTOR:

Notwithstanding the above, nothing herein shall be construed as conveying to the GRANTEE any right that:

1. Unreasonably interferes with the GRANTOR's use and enjoyment of the encumbered property;
2. Jeopardizes the health and safety of public visitors to the summit;
3. Conduct commercial activity within the ROW Easement area beyond the activities enumerated above; or
4. Obstructs views from the summit to a greater extent or for a longer period than necessary for the GRANTEE to exercise its rights under this easement.

No other use of the ROW Easement by the GRANTEE shall be permitted without the prior written permission of the GRANTOR.

SIGNATURE PAGE FOLLOWS

EXECUTED this ____ day of May 2022.

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF NATURAL AND
CULTURAL RESOURCES**

By: _____
Sarah L. Stewart, Commissioner
Duly Authorized

**STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK, SS**

On this _____ day of May, 2022, before me personally appeared Sarah L, Stewart, Commissioner of the Department of Natural & Cultural Resources of the State of New Hampshire, known to me or satisfactorily proven to be the person described in the foregoing instrument, and acknowledged that she was duly authorized and executed the same in the capacity therein stated and for the purposes therein contained.

Justice of the Peace/Notary Public
My Commission Expires: _____

(seal or stamp)

This conveyance by the State of New Hampshire was authorized by vote of New Hampshire Governor and Executive Council on _____, Agenda Item No. ____.

ACCEPTED: THE MOUNT WASHINGTON RAILWAY COMPANY

By: _____
Wayne Presby
President
Duly Authorized

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK, SS

On this _____ day of May, 2022, before me personally appeared Wayne Presby, President of the Mount Washington Cog Railway, known to me or satisfactorily proven to be the person described in the foregoing instrument, and acknowledged that he was duly authorized and executed the same in the capacity therein stated and for the purposes therein contained.

Justice of the Peace/Notary Public
My Commission Expires: _____

(seal or stamp)

State of New Hampshire

Department of State

CERTIFICATE

I, David M. Scanlan, Secretary of State of the State of New Hampshire, do hereby certify that MOUNT WASHINGTON RAILWAY COMPANY a New Hampshire State Chartered (Legislative) formed to transact business in New Hampshire on June 25, 1858. I further certify that it has paid the fees required by law and has not dissolved.

Business ID: 67434

Certificate Number: 0005790770



IN TESTIMONY WHEREOF,
I hereto set my hand and cause to be affixed
the Seal of the State of New Hampshire,
this 13th day of June A.D. 2022.

A handwritten signature in black ink, appearing to read "D. Scanlan", is written over a faint circular stamp.

David M. Scanlan
Secretary of State

Corporate Resolution

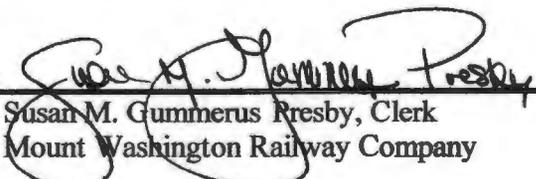
I, Susan M. Gummerus Presby, hereby certify that I am duly elected Clerk of the Mount Washington Railway Company. I hereby certify the following is a true vote taken at a meeting of the Board of Directors, duly called and held on June 15, 2022, at which a quorum of the Board of Directors were present and voting.

Voted: That Wayne W. Presby, President is duly authorized to enter into contracts or agreements on behalf of the Mount Washington Railway Company with the State of New Hampshire and any of its agencies and departments and further is authorized to execute any documents which may in his judgment to be desirable or necessary to affect the purpose of this vote.

I hereby certify that said vote has not been amended or repealed and remains in full force and effect as the date of the contract to which this certificate is attached. This authority shall remain valid for thirty (30) days from the date of this Corporate Resolution. I further certify that it is understood the State of New Hampshire will rely on this certificate as evidence the person(s) listed above currently occupy the position(s) indicated and that they have full authority to bind the corporation. To the extent that there are limits on the authority of any listed individual to bind the corporation in contracts with the State of New Hampshire, all such limitations are expressly stated herein.

DATED: 6-15-22

ATTEST:


Susan M. Gummerus Presby, Clerk
Mount Washington Railway Company