

**NORTH COAST RAILROAD AUTHORITY (NCRA)
Property Committee Meeting**

Wednesday, December 10, 2008 ~ 9:45 a.m.
Petaluma Community Center
320 North McDowell Blvd
Petaluma

DRAFT AGENDA

AGENDA NOTE

All items appearing on the agenda are subject to action by the Board of Directors. Staff recommendations are subject to action by the Board of Directors. Staff recommendations are subject to change by the Board.

- A. CALL TO ORDER**
- B. ROLL CALL**
- C. AGENDA APPROVAL**
- D. PUBLIC COMMENT**

Comments will be limited to three minutes per person and not more than ten minutes per subject, so that everyone can be heard. "Public comment" time is limited to matters under the jurisdiction of the Authority that may not have been considered by the Authority previously and are not on the agenda. No action will be taken. Members of the public may also comment during specific agenda items when recognized by the Chair.

- E. CLOSED SESSION**

CONFERENCE WITH REAL PROPERTY NEGOTIATORS.

Government Code § 54956.8

Property: At-Grade Crossing MPM 70.85

Negotiators: C.J. Neary, Mitch Stogner

Under Negotiation: Timing of negotiations, price and terms.

- F. ANNOUNCEMENT OUT OF CLOSED SESSION**

- G. CONDUCT OF BUSINESS**

- 1. Consideration of Proposed Policy for Conversion of Licenses to Crossing Easements and Possible Recommendation to the Board of Directors.**

- H. MATTERS FROM THE COMMITTEE**

- I. ANNOUNCEMENT OF NEXT MEETING**

December 10, 2008
Regular Board of Directors Meeting
Petaluma Community Center
320 North McDowell Blvd

J. ADJOURNMENT

AGENDA NOTE

All items appearing on the agenda are subject to action by the Board of Directors. Staff recommendations are subject to action by the Board of Directors. Staff recommendations are subject to change by the Board.

AMERICAN WITH DISABILITIES ACT (ADA) REQUESTS

To request disability-related modifications or accommodations for accessible locations or meeting materials in alternative formats (as allowed under Section 12132 of the ADA) please contact the NCRA office at 707 463-3280, at least 72 hours before the meeting.

ADDITIONS TO AGENDA

The Brown Act, Section 54954.2, states that the Board may take action on off-agenda items when: a) a majority vote determines that an "emergency situation" exists as defined in Section 54956.5, or b) a two-thirds vote of the body, or a unanimous vote of those present, determines that there is a need to take immediate action and the need for action arose after the agenda was legally posted, or c) the item was continued from a prior, legally posted meeting not more than five calendar days before this meeting.

CLOSED SESSION

If agendaized, NCRA may adjourn to a closed session to consider litigation or personnel matters. Discussion of litigation or pending litigation may be held in closed session by authority of Government Code Section 54956.9; discussion of personnel matters by authority of Government Code Section 54957; to confer with their negotiator regarding real property by authority of Government Code Section 54956.8.

CHRISTOPHER J. NEARY

ATTORNEY AT LAW

**110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490**

**FAX (707) 459 - 3018
cjneary@pacific.net**

(707) 459 - 5551

MEMORANDUM

**TO: Property Committee
North Coast Railroad Authority**

FROM: Christopher J. Neary

DATE: December 2, 2008

RE:

Attached is a revision of the Conversion of Crossing Licenses to Crossing Easements reflective of the comments made by the Committee at its October meeting in Healdsburg. A redlined version is included for your convenience in tracking the changes. I have double spaced the presentation and added headings to make it easier to follow the proposed policy.

We have added subparagraphs (h) and (i) entitled "Reserved Easement," and "Compensation for Reserved Easements" as a result of staff discussions in consultation with NCRA's Operator.

The Reserved Easement procedure would give a developer of a major project the option of reserving an easement by having its review prior to its final land use approval for under crossings the compensation would be fair market value. For at-grade crossings, for which the existing policy is to discourage for railroad operational reasons, the reserved easement would not be negotiated, but would be established at a standard. The proposed standard is one-quarter of the estimated cost of the only alternative which is a non-at-grade crossing. The Black Point compensation was established by reference to the estimated cost of an over-crossing.

At the Committee meeting, it was suggested that the Operator should not have a veto over a crossing. In subparagraph (b) we have added a provision which provides a mechanism for the Board of Directors to overrule the Operator's rejection of a reasonable request, but adds a standard for making such a finding. Keep in mind that NCRA may have multiple operators. For example, we may issue a separate franchise for excursion service if our current operator declines to supervise that process. Conceivably, SMART will be operating on the Cloverdale-Healdsburg Segment. No provision is made for consultation with SMART as none is extended

to NCRA on SMART's owned segment. However, the procedure for reserved easements does not have an operator override provision. This is purely drafter's choice without any particular policy recommendation. The alternatives would be to provide across-the-board operator rejection override; limit overrides to the standard easement procedure; or dispense with operator veto overrides completely.

In drafting this, I considered the fact that the Reserved Easement consideration procedure is likely to be an expedited procedure which would be attractive to major developers. Furthermore, it is these at-grade crossings which are likely to be high-use which would most severely impact the franchisee operators.

We will solicit operator comments concerning the policy and I expect the operator's representatives will present comments directly to the Committee.

Conversion of Crossing Licenses to Crossing Easements

NCRA Policy Manual Section 801.4(2) is amended to add the following:

Approval By Board

- (a) The Conversion of a crossing license to a crossing easement shall require approval of the Board of Directors upon the pre-advice of the NCRA Property Committee.

Timing for Application

- (b) No proposal for a conversion of a crossing license to a crossing easement which is under the jurisdiction of the California Public Utilities Commission shall be accepted unless and until the "Railroad" as defined by the Public Utilities Commission has been served with the application required by California Public Utilities Commission Rule 3.7, and the applicant submits the written consent of any Franchisee Operator of the Northwestern Pacific Railroad to the proposed crossing. NCRA may act as the Governmental Authority Applicant to the Public Utilities Commission only if

all Franchisee Operators have consented to the proposal, there is no Governmental Authority acting as lead agency for compliance with environmental laws and regulations, and the Board of Directors separately approves the participation of NCRA. When NCRA acts as the Governmental Authority Applicant it shall require reimbursement of expenses and secure indemnity for any necessary environmental process from the proposing party. NCRA shall make provision for consultation with any public agencies which might foreseeably be impacted by the approval including any agency in which the crossing is located within the sphere of interest of such agency. When the consent of the Franchisee Operators is required by this paragraph and the applicant certifies that such consent has been sought and unreasonably withheld, the applicant may request the NCRA Board of Directors to dispense with or qualify the requirement of such consent and the Board of Directors shall thereupon consider the

Franchisee Operators' explanation, and the issues of liability, maintenance burden, and safety in making a determination to dispense with such consent.

Use of Easement

- (c) No proposal for a conversion of a crossing license to a crossing easement outside the jurisdiction of the Public Utilities Commission shall be accepted unless and until the applicant has identified the use for such an easement, and the applicant has secured any necessary final land use approval for such use, in which case the easement shall be restricted to the use identified in the proposal and void as to any other use.

Action on PUC Application

- (d) Upon receipt of a proposal in accord with this policy, the NCRA Property Committee shall convene and determine whether to recommend opposition, support, or neutrality as to the application under consideration

by the Public Utilities Commission. Such decision shall be made only by the NCRA Board of Directors.

Protocol for Pending Proposals

- (e) NCRA administrative staff shall not consider any proposal for a conversion of a crossing license to a crossing easement until the NCRA Board has approved a proposal pursuant to this policy. However, at any time the engineering staff of a potential Governmental Authority Applicant may request technical consultation with NCRA engineering staff by written request to the Executive Director, who may approve the request upon adequate provision being made for reimbursement of any and all expenses incurred by NCRA. In such case, the Executive Director shall advise the requesting party that participation in such consultation should not be construed or relied upon as an indication of ultimate NCRA approval. All direct contact between the NCRA administrative or

engineering staff with a private property owner shall be prohibited until such time as the conditions of subparagraph (b) above are satisfied. If there is no Governmental Authority exercising land use approval over the project, all requests for technical consultation shall be referred to the Operator of the Northwestern Pacific Railroad (NWP Co.).

Nature of Easement

- (f) Any easement granted hereunder shall be appurtenant to the property described in the Application, unless such property is public property in which case the easement may be in gross and defeasible for failure to maintain, the use exceeded, or the use ceases for a period in excess of two (2) years.

Indemnification

- (g) In the event that the Property Committee decides to recommend that the agency support the application before the Public Utilities Commission, the

applicant shall make arrangement to the satisfaction of the Executive Director for the reimbursement of any and all expenses for environmental review, whether or not NCRA is the lead agency, and for full indemnification of NCRA, its agents, officers, attorneys, employees, boards, commissions and committees from any claim, action or proceeding brought by anyone, the purpose of which is to attack, set aside, void or annul the approval *vel non* of the application or adoption of the accompanying environmental document. In addition the Executive Director shall collect any application fee which may be set from time to time by the Board of Directors.

Reserved Easements

- (h) To ensure the availability of an easement for the Applicant's planning purposes the NCRA will accept Applications for a reserved easement.

(1) Purpose for Reserved Easements. The goal of the Reserved Easement procedure will be to expedite NCRA's review of the proposal to determine whether or not it will support any necessary application to the Public Utilities Commission; and to determine the easement compensation empirically; and to commit NCRA to approval of the crossing easement subject only to compliance with CEQA by the Lead Agency.

(2) Reserved Fee Applications. Application for a Reserved Easement shall be accompanied by the following: (i) payment of a \$100,000 application fee; (ii) the consent of NCRA's Franchisee Operator(s); (iii) an agreement to pay the crossing application compensation as determined by this subparagraph;

(3) Review of Applications. The Property Committee shall review all applications for Reserved Easements and make recommendation to the Board of Directors.

(i) Compensation for Reserved Easements. The reserved easement compensation shall be established as follows:

(1) Subsurface Non-At-Grade Easements. The compensation for non-at-grade easements such as subsurface horizontal crossings shall be established as being the Fair Market Value utilizing the factors set forth for such determination in subparagraph (h) above.

(2) At-Grade Crossings. The compensation for at-grade crossings for reserved crossing easements shall be one-quarter (1/4) of the estimated cost of a non-at-grade crossing.

(3) Determination of Reserved Easement Compensation. As to subsurface non-at-grade crossings, the Fair Market Value shall be

determined by the Property Committee. As to at-grade crossings the extrapolation of the estimated alternative cost shall be determined by the Agency's Engineer. As to either determination, the Applicant shall have the option for a period of thirty (30) days of either accepting the compensation as established, or having the compensation determined by binding arbitration.

In the event that the Applicant opts for binding arbitration, the Applicant shall pay one-half (1/2) of the expenses for such binding arbitration and agree to be bound by the result. The Applicant's notice of rejection of the compensation established by either (i) or (ii) *supra* shall be accompanied by a nomination of Party-Arbitrator. Thereupon, NCRA shall nominate its Party-Arbitrator within thirty (30) days and the Party-Arbitrators so nominated shall thereafter select a neutral arbitrator who shall be

governed by Canon 6 of the Code of Judicial Ethics. The arbitration shall thereafter be concluded within 120 days.

- (4) Payment of Reserved Easement Compensation.** The Reserved Easement Compensation shall be payable thirty (30) days prior to any construction of the crossing or thirty (30) days following any necessary land use approvals by any local governmental agency, whichever first occurs. In recognition that the payment date may conceivably be several years after the amount of compensation is finalized, the amount of compensation shall not be adjusted for adjustment in construction costs or other factors utilized to make the determination of compensation, but shall be adjusted for interest at the _____ rate in the amount as published in the *Wall Street Journal* from the date of determination.

The Applicant shall be entitled to a credit for 75% of the Reserved
Easement Application fee.

WordPerfect Document Compare Summary

Original document: C:\Documents and Settings\Jennifer\My Documents\NCRA\Conversion of Crossing Licenses to Crossing Easements NCRA Policy 10-10-08.wpd

Revised document: C:\Documents and Settings\Jennifer\My Documents\NCRA\Conversion of Crossing Licenses to Crossing Easements NCRA Policy 12-2-08.wpd

Deletions are shown with the following attributes and color:

~~Strikeout~~, Blue RGB(0,0,255).

Deleted text is shown as full text.

Insertions are shown with the following attributes and color:

Double Underline, Redline, Red RGB(255,0,0).

The document was marked with 12 Deletions, 31 Insertions, 0 Moves.

Conversion of Crossing Licenses to Crossing Easements

NCRA Policy Manual Section 801.4(2) is amended to add the following:

Approval By Board

- (a) The Conversion of a crossing license to a crossing easement shall require approval of the Board of Directors upon the pre-advice of the NCRA Property Committee.

Timing for Application

- (b) No proposal for a conversion of a crossing license to a crossing easement which is under the jurisdiction of the California Public Utilities Commission shall be accepted unless and until the "Railroad" as defined by the Public Utilities Commission has been served with the application required by California Public Utilities Commission Rule 3.7, and the applicant submits the written consent of the any Franchisee Operator of the Northwestern Pacific Railroad (~~NWP Co.~~) to the proposed crossing. NCRA may act as the Governmental Authority Applicant to the Public Utilities Commission only if

the all Franchisee Operators have consented to the proposal, there is no Governmental Authority acting as lead agency for compliance with environmental laws and regulations, and the Board of Directors separately approves the participation of NCRA. When NCRA acts as the Governmental Authority Applicant it shall require reimbursement of expenses and secure indemnity for any necessary environmental process from the proposing party. NCRA shall make provision for consultation with any public agencies which might foreseeably be impacted by the approval including any agency in which the crossing is located within the sphere of interest of such agency. When the consent of the Franchisee Operators is required by this paragraph and the applicant certifies that such consent has been sought and unreasonably withheld, the applicant may request the NCRA Board of Directors to dispense with or qualify the requirement of such consent and the Board of Directors shall thereupon consider the

Franchisee Operators' explanation, and the issues of liability, maintenance burden, and safety in making a determination to dispense with such consent.

Use of Easement

- (c) No proposal for a conversion of a crossing license to a crossing easement outside the jurisdiction of the Public Utilities Commission shall be accepted unless and until the applicant has identified the use for such an easement, and the applicant has secured any necessary final land use approval for such use, in which case the easement shall be restricted to the use identified in the proposal and void as to any other use.

Action on PUC Application

- (d) Upon receipt of a proposal in accord with this policy, the NCRA Property Committee shall convene and determine whether to oppose, recommend, opposition, or support, or neutrality as to the application before, under

consideration by the Public Utilities Commission. Such decision shall be made only by the NCRA Board of Directors.

Protocol for Pending Proposals

- (e) NCRA administrative staff shall not consider any proposal for a conversion of a crossing license to a crossing easement until the NCRA Board has approved a proposal pursuant to this policy. However, at any time the engineering staff of a potential Governmental Authority Applicant may request technical consultation with NCRA engineering staff by written request to the _____ Executive Director, who may approve the request upon adequate provision being made for reimbursement of any and all expenses incurred by NCRA. In such case, the Executive Director shall advise the requesting party that participation in such consultation should not be construed or relied upon as an indication of ultimate NCRA approval. All direct contact between the NCRA administrative or

engineering staff with a private property owner shall be prohibited until such time as the conditions of subparagraph (b) above are satisfied. If there is no Governmental Authority exercising land use approval over the project, all requests for technical consultation shall be referred to the Operator of the Northwestern Pacific Railroad (NWP Co.).

Nature of Easement

- (f) Any easement granted hereunder shall be appurtenant to the property described in the Application, unless such property is public property in which case the easement may be in gross and defeasible for failure to maintain, the use exceeded, or the use ceases for a period in excess of two (2) years.

Indemnification

- (g) In the event that the Property Committee ~~determines~~decides to recommend that the agency support the application before the Public

Utilities Commission, the applicant shall make arrangement to the satisfaction of the Executive Director for the reimbursement of any and all expenses for environmental review, ——— whether or not NCRA is the lead agency, and therefor full indemnification of NCRA, its agents, officers, attorneys, employees, boards, commissions and committees from any claim, action or proceeding brought by anyone, the purpose of which is to attack, set aside, void or annul the approval vel non of the application or adoption of the accompanying environmental document. In addition the Executive Director shall collect any application fee which may be set from time to time by the Board of Directors.

Reserved Easements

- (h) To ensure the availability of an easement for the Applicant's planning purposes the NCRA will accept Applications for a reserved easement.

(1) Purpose for Reserved Easements. The goal of the Reserved Easement procedure will be to expedite NCRA's review of the proposal to determine whether or not it will support any necessary application to the Public Utilities Commission; and to determine the easement compensation empirically; and to commit NCRA to approval of the crossing easement subject only to compliance with CEQA by the Lead Agency.

(2) Reserved Fee Applications. Application for a Reserved Easement shall be accompanied by the following: (i) payment of a \$100,000 application fee; (ii) the consent of NCRA's Franchisee Operator(s); (iii) an agreement to pay the crossing application compensation as determined by this subparagraph.

(3) Review of Applications. The Property Committee shall review all applications for Reserved Easements and make recommendation to the Board of Directors.

(i) Compensation for Reserved Easements. The reserved easement compensation shall be established as follows:

(1) Subsurface Non-At-Grade Easements. The compensation for non-at-grade easements such as subsurface horizontal crossings shall be established as being the Fair Market Value utilizing the factors set forth for such determination in subparagraph (h) above.

(2) At-Grade Crossings. The compensation for at-grade crossings for reserved crossing easements shall be one-quarter (1/4) of the estimated cost of a non-at-grade crossing.

(3) Determination of Reserved Easement Compensation. As to subsurface non-at-grade crossings, the Fair Market Value shall be

determined by the Property Committee. As to at-grade crossings
the extrapolation of the estimated alternative cost shall be
determined by the Agency's Engineer. As to either determination,
the Applicant shall have the option for a period of thirty (30) days
of either accepting the compensation as established, or having the
compensation determined by binding arbitration.

In the event that the Applicant opts for binding arbitration,
the Applicant shall pay one-half (1/2) of the expenses for such
binding arbitration and agree to be bound by the result. The
Applicant's notice of rejection of the compensation established by
either (i) or (ii) *supra* shall be accompanied by a nomination of
Party-Arbitrator. Thereupon, NCRA shall nominate its Party-
Arbitrator within thirty (30) days and the Party-Arbitrators so
nominated shall thereafter select a neutral arbitrator who shall be

governed by Canon 6 of the Code of Judicial Ethics. The

arbitration shall thereafter be concluded within 120 days.

(4) Payment of Reserved Easement Compensation. The

Reserved Easement Compensation shall be payable thirty (30) days

prior to any construction of the crossing or thirty (30) days

following any necessary land use approvals by any local

governmental agency, whichever first occurs. In recognition that

the payment date may conceivably be several years after the

amount of compensation is finalized, the amount of compensation

shall not be adjusted for adjustment in construction costs or other

factors utilized to make the determination of compensation, but

shall be adjusted for interest at the rate in the amount as

published in the *Wall Street Journal* from the date of determination.

The Applicant shall be entitled to a credit for 75% of the Reserved

Easement Application fee.