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MEMORANDUM

TO: Property Committee
North Coast Railroad Authority

FROM: Christopher J. Neary

DATE: January 29, 2009

RE: Crossing Policy

The Crossing Policy was first considered by the Board of Directors in July 2008, reviewed in October, 2008, reviewed in December 2008, and now comes back to the Property Committee for adoption.

At the December meeting of the Property Committee the Committee ran out of time due to the press of an upcoming Board of Directors meeting. Director Meyers had approximately 25 separate comments regarding the proposed policy which he provided in writing and which the Committee directed staff to consider.

The staff has considered Director Meyers' comments, almost all of which were incorporated. The enclosed draft reflects the changes suggested by Director Meyers as indicated by the attached redlined copy.

The two comments suggested by Director Meyers which were not incorporated are as follows:

At page 5 of the proposed policy, Director Meyer posed the question that the defeasibility period of two years might be too long. Because the holder of the easement will not have the responsibility of maintenance, the failure to maintain will not be an issue. Normally, a defeasibility period is twenty years. We have shorted the defeasibility to two years. As a policy question, this time period could either be shortened or lengthened. If anything, I would recommend that the time period be lengthened rather than shortened, although two years would appear to be acceptable.

The proposed policy requires the consent of the Franchisee Operators. If the Franchisee Operator(s) do not consent, the matter is appealable to the Board of Directors. However, I would find it unlikely that the Board of Directors would overrule the objection of a Franchisee Operator if the Franchisee Operator had the burden to maintain the crossings and the applicant was unwilling to satisfy the Franchisee Operator's maintenance needs. There are various ways in which the applicant could satisfy the Franchisee Operator. The applicant could agree to reimburse the Franchisee Operator as maintenance costs are incurred, but this proposal is likely to be unworkable as the applicant is likely to be the developer who after developing the property is unlikely to have any further involvement or desire to be financially involved.

The second way the maintenance obligation could be satisfied is by having the public agency such as a city or county which is approving the project provide for maintenance in that approval either by a covenant running with the land or some other mechanism.

The third way the applicant may satisfy the Franchisee Operator with maintenance responsibility would be by payment of a lump sum to the Franchisee Operator.

In connection with the proposed crossing at MP 70.85, the NCRA's Operator has estimated that the appropriate compensation using a 5% interest rate and a net present value factor of 18.256 would be \$202,642. This is based upon an annual maintenance cost of \$3,600, plus approximately \$7,500 per year for repair of broken gates, leading to an annual maintenance cost of approximately \$11,100. That calculation could be reduced approximately 65% if the applicant, or the approving agency, insures the gates, in which case the one time cost would be approximately \$70,000.

There is no need for the Property Committee to understand maintenance costs as they will arise on a case-by-case basis. Presumably in most cases the Property Committee and the Board of Directors will not even see an application unless there is an agreement between the Franchisee Operator and the applicant as to these maintenance costs. In rare cases, the applicant will disagree with the Franchisee Operator's calculations and would have the right to appeal that matter to the Board of Directors which can then evaluate the specific question before it.

Director Meyers also suggested that the reserved easement expire in four years if the applicant does not commence construction. This would seem to defeat the purpose of the reserved easement which would be to enable a proposed developer to reserve an easement early in the process. An EIR process can take up to two years in and of itself as seen by NCRA's recent experience with its own EIR. The permitting process can extend well beyond four years. The purpose of the reserved easement to facilitate development by extending to the developer early in the process an assurance that a future Board of NCRA will not reverse fields on it after it has placed a substantial investment in the development permitting process. Defeasibility for circumstances that would be beyond the developer's control would not seem to be fair or appropriate.

Also, on a technical issue, Director Meyers suggested that the policy address the nature of the administrative record for consideration by the Arbitrators. I propose that we just leave that

up to the arbitrators to determine on a case-by-case basis to take into account any number of relevant factors that might then be apparent to the arbitrator. Because we will have a substantial say in the selection of the arbitrators, we should have substantial faith in the judgment of the arbitrators as to the nature of record they would require for decision.

Director Ziedrich raised an issue at the December meeting as to whether or not there was required to be a nexus between the agency's out-of-pocket costs and the fee for the reserved easement. The Mitigation Fee Act applies to fees for approval of a development project. For such fees, Government Code § 66001, *et seq.* provides detailed nexus accounting and nexus limitation procedures. The Reserve Easement Fee is not a fee imposed "as a condition of approval of a development project by a local agency," but rather a transaction fee for transfer of a property interest. The transaction fee is not charged for the purpose of defraying a portion of the cost of the public facilities related to the development project, but rather a fee in return for a property right. While the maintenance fee charged by the Franchisee Operator might fall within the category of a development fee, and I am not sure about that in any case, that would be a transaction between the applicant and the Franchisee Operator. In any case, the Board of Directors would not likely approve a contested maintenance arrangement that required the applicant to pay greater than the cost, or projected cost of maintenance.

Therefore, I do not believe that the Mitigation Fee Act is applicable to a flat fee of \$100,000 for a reserved easement.

WordPerfect Document Compare Summary

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

Revised document: C:\Documents and Settings\Jennifer\My Documents\NCRA\Conversion of Crossing Licenses to Crossing Easements NCRA Policy 1-29-09.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 7 Deletions, 32 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, Prior Consultation with Franchisees and Action by NCRA

- (b) (1) 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 ~~the applicable~~ California Public Utilities Commission Rule, now Rule 3.7, and the applicant submits the written consent of any Franchisee Operator of the Northwestern Pacific Railroad to the proposed crossing. (2) NCRA may act as the Governmental Authority Applicant to

the Public Utilities Commission only if: (i) all Franchisee Operators have consented to the proposal, (ii) there is no Governmental Authority acting as lead agency for compliance with environmental laws and regulations, and (iii) the Board of Directors separately approves the participation of NCRA. When NCRA acts as the Governmental Authority Applicant it shall require reimbursement of expenses including administrative costs 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 but not limited to any agency in which the crossing is located and any agency as to which the crossing is within the sphere of interest of such agency. When the consent of the one or more 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 if granted shall be restricted to the use identified in the proposal and the easement shall become void as to any other use made thereof.

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 with or without conditions 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 for consultation 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 or, the use is 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 with, or without conditions before the Public Utilities Commission, the aApplicant shall make arrangement to the written 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 minimum 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 written 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 not less than 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, which determination shall be appealable to the Board of Directors. As to at-grade crossings the extrapolation of the estimated alternative cost shall be determined by the Agency's Engineer and shall be appealable to the Board of Directors. 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 and a brief stating its factual and legal argument as to why the Applicant disagrees with the NCRA position to which the NCRA shall have twenty (20) days to respond and to which the Applicant shall have ten (10) days to accept or reject in writing. Unless the NCRA position is accepted in writing, NCRA shall nominate its Party-Arbitrator within thirty-fourty-five (~~30~~45) 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 prime 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.

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