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February 11, 2020

300364

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
February 11, 2020
Part of
Public Record

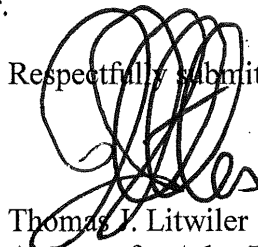
Re: **Docket No. FD 36380**
Atlas Land and Building Corporation and Atlas Materials
Recycling Corporation – Petition for Declaratory Order –
Industry Spur Track in Pittsburgh, PA

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is a **Petition for Declaratory Order**, dated February 11, 2020. The sum of \$1,400, representing the appropriate fee for this filing, has been tendered electronically via Pay.gov.

Should any questions arise regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Atlas Land and Building Corporation
and Atlas Materials Recycling Corporation

FILED
February 11, 2020
SURFACE
TRANSPORTATION BOARD

TJL:tl

Attachment

cc: Parties on Certificate of Service

FEE RECEIVED
February 11, 2020
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36380

ATLAS LAND AND BUILDING CORPORATION AND
ATLAS MATERIALS RECYCLING CORPORATION
– PETITION FOR DECLARATORY ORDER –
INDUSTRY SPUR TRACK IN PITTSBURGH, PA

PETITION FOR DECLARATORY ORDER

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**ATTORNEYS FOR ATLAS LAND AND
BUILDING CORPORATION and ATLAS
MATERIALS RECYCLING CORPORATION**

Dated: February 11, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36380

ATLAS LAND AND BUILDING CORPORATION AND
ATLAS MATERIALS RECYCLING CORPORATION
– PETITION FOR DECLARATORY ORDER –
INDUSTRY SPUR TRACK IN PITTSBURGH, PA

PETITION FOR DECLARATORY ORDER

Petitioners Atlas Land and Building Corporation (“Atlas Land”) and Atlas Materials Recycling Corporation (“Atlas Recycling” and, collectively with Atlas Land, “Atlas”) hereby file this Petition for Declaratory Order¹ seeking the issuance of an order removing the jurisdiction of the Surface Transportation Board (“STB” or “Board”) from an approximately 400-foot stub-ended section of ancillary track (the “Spur”) that previously served Atlas’ paper recycling warehouse (the “Warehouse”) in Pittsburgh, Pennsylvania.² An aerial view of the Spur, Warehouse and adjacent area is attached as Exhibit A, and photographs of the Spur are attached as Exhibit B. The Warehouse closed in November 2017, and no request for rail service on the Spur has been made by Atlas (the only party that could be served from the Spur) since that time. Atlas has executed a contract to sell the land on which the Spur sits, along with the

¹ The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate a controversy or remove uncertainty. *Delegation of Auth. – Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989). As discussed further below, the Board has specifically directed that a declaratory order proceeding is the proper vehicle for the type of relief that Atlas seeks here. *Pinelawn Cemetery – Petition for Declaratory Order*, Docket No. FD 35468, slip op. at 11, n.31 (STB served Apr. 21, 2015).

² The Spur extends from the eastern edge of South 23rd Street eastward over Atlas’ property along the length of the Warehouse, within several feet of the Warehouse’s north wall, to a bumper post immediately adjacent to the Warehouse.

Warehouse and adjacent parcels owned by Atlas (collectively, the “Atlas Property”), to Greystar GP II, LLC (“Greystar”), which plans to remove the unused, vacant Warehouse and construct a new residential development. Greystar’s plans do not include any need for rail service.³

The Spur’s occupation of a small portion of the Atlas Property was governed by an easement held by CSX Transportation, Inc (“CSXT”). CSXT previously utilized the Spur solely to provide rail service to the Atlas Warehouse, until it closed more than two years ago. Atlas believes that CSXT is the owner of the rail, ties, and other track materials comprising the Spur.

In order to facilitate the sale of the Atlas Property to Greystar for the purpose of constructing modern residential units, Atlas contacted CSXT’s in-house counsel in June 2019, seeking removal of the unused Spur and confirmation that the easement had terminated by its terms through lack of use. When that effort was unjustifiably rebuffed, Atlas and Greystar traveled to CSXT’s headquarters in Jacksonville, Florida on August 28, 2019 to discuss the issue further. At that meeting, Atlas and Greystar made clear that the intended reuse of the property would not require rail service on the unused Spur, and in fact, the sale of the premises to Greystar could not occur unless the Spur was removed and termination of the easement was confirmed. Nevertheless, CSXT still refused to acknowledge that the easement had terminated. Instead, shortly after the August 2019 meeting, CSXT coincidentally and suddenly found the need to use the Spur for parking on-track maintenance of way equipment – uses that Atlas never witnessed either before or after the Warehouse closed in November 2017, and indeed that would have interfered with rail service to the Warehouse while it was open. CSXT also

³ See Verified Statement of John Clarkson, Greystar’s Managing Director of Development, attached as Exhibit C.

began placing stacks of railroad ties on the Atlas Property adjacent to the Spur and outside the area of the Spur easement.

Given these facts, there is no need for the Board to retain jurisdiction over the Spur. The totality of the circumstances make clear that the Spur has not been needed for any legitimate freight rail purpose for more than two years, and the intended future use of the Atlas Property will not require any rail service. The Board should disregard CSXT's recent and purely pretextual placement of maintenance of way equipment and other materials on the Atlas Property, determine that there is no reason to retain jurisdiction over the Spur, and declare its jurisdiction over the Spur ended.

FACTUAL BACKGROUND

Atlas Land and Atlas Recycling are Pennsylvania corporations with headquarters in Pittsburgh, Pennsylvania. Atlas owns property in Pittsburgh that for many years was the site of the paper recycling Warehouse, with a street address of 2329 Wharton Street. The property sits on a bluff overlooking the Monongahela River and the Three Rivers Heritage Trail, approximately 1.5 miles southeast of the downtown area. Atlas Recycling, the parent company of Atlas Land, was the operator of the Warehouse. In November of 2017, the Warehouse was shuttered, and it has remained vacant ever since.

When operational, the Warehouse was served by rail from the Spur, which constitutes the last 400 feet of an approximately 1,600-foot track connected to a main line track operated by CSXT.⁴ To Atlas' knowledge, the Warehouse was the only rail-served customer on the Spur from the time Atlas' operations began at that location in 1948 through the closing of the

⁴ The remaining 1,200 feet of ancillary track that connects the Spur to CSXT's main line is referred to herein as the "Connecting Track." Atlas in this Petition seeks vacation of the Board's jurisdiction only with respect to the Spur, and does not seek relief regarding the Connecting Track.

Warehouse in 2017. The Spur and Connecting Track are comprised of a single track, and there are no turnouts or other side tracks between the Warehouse and the connection to the CSXT main line. The Spur, extending from the eastern edge of South 23rd Street to the end of track adjacent to the Warehouse, is situated on real property owned by Atlas Land pursuant to an easement. Specifically, The Pittsburgh and Lake Erie Railroad Company (“P&LE”), as landowner and grantor, and the Three Rivers Railway Company (“Three Rivers”), as grantee, entered into an easement deed dated September 11, 1992 whereby, *inter alia*, P&LE granted an easement to Three Rivers over the property for placement and operation of the Spur. The easement deed is attached hereto as Exhibit D.⁵

Atlas Land bought the property from P&LE on August 3, 1993 and is thus the successor to P&LE’s fee ownership in the property. CSXT merged with Three Rivers in 2016 (*CSX Transportation, Inc. – Corporate Family Merger Exemption – The Three Rivers Railway Company*, Docket No. FD 36056 (STB served Aug 26, 2016)), and therefore holds as successor whatever easement rights remain to the Spur.

In November 2017, Atlas closed the Warehouse, and all rail shipping to and from the Warehouse ceased. The Spur was neither used nor maintained by CSXT for at least a year and a half thereafter, as evidenced in photographs from May 2019, demonstrating heavy weed growth. See Exhibit B. After its closure of the Warehouse, Atlas contracted with Greystar to convey the Atlas Property, including that portion referenced in the easement, to Greystar. Because of the presence of the Spur track and un-relinquished easement rights on the property, Atlas and Greystar agreed in the sales contract that before the sale could close, Atlas needed to

⁵ The easement document reflects a grant of easement rights on several non-contiguous parcels. Only those rights reflected in Section “B” of the easement deed are relevant to the Spur.

secure CSXT's written confirmation that the easement had terminated. The absence of any rail activity for over one and one-half years, the absence of any maintenance or other use by CSXT on the Spur, and the absence of any future need for rail service on the Spur seemed to Atlas to make CSXT's confirmation of the termination of the easement *pro forma*. However, that proved not to be the case. In response to a letter sent by Atlas in June 2019, CSXT's in-house counsel stated – without factual or legal basis – that the easement “...continues to be used for freight rail purposes...as such, the Easement...shall remain in full force and effect.” See Exhibit E.

Stunned by CSXT's refusal to acknowledge that the unused Spur held no potential for servicing any rail customers, and indeed had sat unused for over one and one-half years, Atlas and Greystar arranged a meeting with CSXT at CSXT's headquarters in Jacksonville, Florida on August 28, 2019. During the meeting, the parties made clear to CSXT that (i) the Warehouse was closed and would not reopen in any manner requiring rail service; (ii) CSXT had not used or maintained the Spur since the closure of the Warehouse; (iii) Atlas intends to sell the Atlas Property to Greystar; (iv) Greystar intends to redevelop the Atlas Property for residential (i.e., non-rail) purposes; and (v) confirmation of the termination of CSXT's easement rights, and removal of the Spur, were critical events to the closure of the sale and redevelopment of the Atlas Property. Despite this presentation, CSXT held fast to its baseless stance that the Spur was necessary for rail freight service.

Shortly after the August 28, 2019 meeting in Jacksonville, now armed with clear knowledge of the value that elimination of the easement and removal of the Spur held to Atlas and Greystar, CSXT coincidentally found a need to use the Spur (the very last 400 feet of a 1,600-foot ancillary track) for the first time in almost two years, to park on-track maintenance of way equipment. Additionally, CSXT placed hundreds of railroad ties on the Atlas Property

adjacent to the Spur. Despite CSXT's receipt of a cease and desist letter from Atlas' counsel, CSXT's contrived use of the Spur and adjacent Atlas property continued for several months.

CSXT's sudden realization of a need to park maintenance of way equipment on the very end of this ancillary track is even more suspect considering the nearby alternative locations at CSXT's disposal. CSXT operates significant yard facilities in the Pittsburgh area, where maintenance of way equipment and related materials could be stored, without resort to the use of the Spur. CSXT's Demmler Yard, described on CSXT's web site as a "major rail yard," is located roughly 15 rail miles southeast of the Atlas Property. See Exhibit F. CSXT's Pittsburgh Intermodal Rail Terminal is also a significant rail facility, located roughly six (6) rail miles northwest of the Atlas Property.

CSXT's ruse in parking maintenance of way equipment on the Spur is clearly not designed to serve any request or need for freight rail service on the Spur. However, CSXT's intransigence in refusing to acknowledge the termination of the easement beneath the Spur is hampering redevelopment of the Atlas Property, which is having a significantly adverse effect on more than just Atlas and Greystar. Attached as Exhibit G are letters from representatives of the Pennsylvania House of Representatives, the Pittsburgh City Council, and Allegheny County, all directed to CSXT and all seeking CSXT's cooperation in acknowledging the termination of the easement and redevelopment of the property.

Concurrent with the filing of this Petition, Atlas is initiating litigation against CSXT in Pennsylvania state court. *Atlas Land and Building Corporation and Atlas Materials Recycling Corporation f/k/a Atlas Waste Paper Corporation v. CSX Transportation, Inc.*, No. GD 20-0022878, Court of Common Pleas of Allegheny County, Pennsylvania (complaint filed February 11, 2020). In that litigation, Atlas seeks multiple forms of relief, including a

declaration that the easement on the Atlas Property is terminated. To be clear, Atlas anticipates that the state court will be able to resolve all disputes between the parties relating to the apparent termination of CSXT's easement rights on the Atlas Property, and Atlas does not seek the Board's involvement in the resolution of the state law easement or deed issues. *E.g., Holland Park Owner, LLC – Petition for Declaratory Order*, Docket No. FD 36308, slip op. at 3 (STB served Jan. 6, 2020) ("The determination of the scope of the easement and whether the easement still exists would involve question of state property law and is the type of issue best left to the courts."). Rather, Atlas seeks the Board's determination that the Spur as it is no longer needed for any legitimate rail purpose. As explained below, Atlas is filing this Petition for purposes of establishing the absence of any actual need or basis for the Board to continue to retain jurisdiction over the Spur. Both the state court and the STB will need to rule on the related but separate issues placed before them by Atlas, but elimination of STB jurisdiction over the Spur is necessary for the court to have the authority to remove CSXT from the Atlas Property.

ARGUMENT

I. THE SPUR IS ANCILLARY TRACK GOVERNED BY 49 U.S.C. § 10906, OVER WHICH THE BOARD HAS EXCLUSIVE JURISDICTION BUT LACKS LICENSING AUTHORITY.

As is amply demonstrated in the above factual recitation, the Spur and the Connecting Track qualify as "ancillary track" subject to 49 U.S.C. § 10501(b)(2) (describing the Board's exclusive jurisdiction over "spur, industrial, team, switching, or side tracks"). The Spur and Connecting Track satisfy the elements of the Board's standard tests for determining whether a track is a regulated line of rail (under 49 U.S.C. § 10901) or ancillary track. Ancillary track remains subject to the STB's jurisdiction under Section 10501, although it is beyond the agency's licensing authority, as provided in 49 U.S.C. § 10906.

In determining whether a track is a railroad line or ancillary track, the Board has adopted a case-by-case approach that analyzes the track's intended use, its physical characteristics, and its relationship to the rail system. *Tri-City Railroad – Petition for Declaratory Order*, Docket No. FD 36037, slip op. at 4 (STB served Jun. 1, 2017). With respect to the “intended use” aspect of the test, the Board has looked to whether the track will be used for certain ancillary operations (*e.g.*, switching, loading, and unloading); whether it serves more than one shipper; whether the shipper is located at the end of the track; whether there are stations on the track; whether there is regularly scheduled service; who owns and maintains the track; and the volume of traffic moving over the track. *Oakland Global Rail Enterprise – Petition for Declaratory Order*, Docket No. FD 36168, slip op. at 8, (STB served Mar. 15, 2019) (“*Oakland*”). In this instance, the Spur has been used only for loading and unloading railcars at the Warehouse, and the sole function of the Connecting Track has been to access the Spur. No other customer was ever been served from the Spur. The only customer on either the Spur or Connecting Track – Atlas – is located at the end of the Connecting Track, immediately adjacent to the Spur. Atlas does not believe that CSXT ever had stations on the Spur or Connecting Track, or had regularly scheduled service to the Warehouse (although even something as customary as, for example, a “weekday afternoon” switch would not convert such track to regulated main line track). CSXT is believed to own the track, and maintenance has been virtually non-existent in recent years. As for traffic volumes, no freight traffic has moved over the Spur in over two years (since the Warehouse closed in November 2017), and volumes before that to the Warehouse were intermittent and small. Thus, virtually every one of these factors points to the Spur and the Connecting Track being classified as ancillary track.

With respect to the “physical characteristics” of the Spur, the Board looks to “the length of the track; whether it is stub-ended; and whether the track was constructed with light-weight rail.” *Oakland*, slip op at 8. Here, the entire Spur and Connecting Track are only 1,600 feet in total length, and the Spur (the only segment subject to this Petition) measures a mere 400 feet. The Spur is stub-ended at the Atlas Warehouse. Both of these facts favor a finding that the Spur constitutes ancillary track under Section 10501. The weight of rail is not known to Atlas.

The Board’s third and last category of facts relevant to the regulatory status of rail trackage is the relationship of the track to the rail system, which typically looks at whether the tracks were built to extend into a new market, which would be indicative of a regulated Section 10901 line. *See Oakland*, citing *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.*, Docket No. FD 36168, slip op. at 15 (STB served Jan. 31, 2018); *JGB Properties. LLC – Petition for Declaratory Order*, Docket No. FD 35817, slip op. at 8 (STB served Dec. 10, 2015); *see also Texas & Pac. Ry. Co v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 278 (1926). The Atlas Property is directly adjacent to the CSXT main line, and the Warehouse is approximately 200 feet south of that main line. A former Pennsylvania Railroad (now Norfolk Southern Railway Company) rail line is located approximately 2,000 feet south of the Warehouse, on a hillside at a higher elevation and separated by nearly ten blocks of largely residential neighborhood. No other rail lines exist in the area. The Atlas facility plainly was “naturally tributary” to what is now the CSXT main line, and it is apparent that no other railroad’s territory was invaded through construction of a single 1,600-foot track to serve a single industry located adjacent to an existing main line track.

Whether considered collectively or individually, all three of the Board’s standard guideposts for determining the regulatory status of a railroad track (the track's intended use, its

physical characteristics, and its relationship to the rail system) point to the Connecting Track and Spur being classified as ancillary track pursuant to Sections 10501 and 10906. Atlas is unaware of any facts that would support an argument that the Connecting Track or Spur constitute Section 10901 regulated main line track.

Prior to 1995, there may have been some question over the extent of the agency's jurisdiction over ancillary track, but any doubt was resolved with passage by Congress of the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (1995). In ICCTA, Congress made clear that "(t)he jurisdiction of the Board over... the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive." 49 U.S.C. § 10501(b)(2). In Section 10501(b), Congress unequivocally declared that state and local laws, rules and regulations were not to apply to tracks qualifying as ancillary track, as jurisdiction over virtually all aspects of ancillary tracks was firmly and exclusively vested in the STB. With that vesting, however, came an equally firm prohibition on the exercise of the Board's licensing authority over ancillary track. In Section 10906, Congress established that "(t)he Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."⁶ See, e.g., *Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (Section 10906 precludes all regulation of industrial or spur tracks); *United Transp. Union-III*.

⁶ The Spur and Connecting Track would not qualify as "private track" outside of the Board's jurisdiction, as they are not owned and operated by Atlas. Private track is generally owned by a rail shipper. See *Devens Recycling Center – Petition for Declaratory Order*, Docket No. FD 34952 (STB served Jan. 10, 2007); cf. 49 C.F.R. § 171.8 (Private track is defined in part as "(t)rack located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way.>").

Legis. Bd. v. STB, 183 F.3d 602, 612 (7th Cir. 1999) (“The § 10906 no-authority language means no *authority*, not no *jurisdiction*.” (emphasis in original)).

In summary, the Spur and Connecting Track are clearly ancillary track, governed by Sections 10501 and 10906, and thus subject to the exclusive jurisdiction of the Board, but not subject to its regulatory authority.

II. THE BOARD’S JURISDICTION OVER THE SPUR IS PROPERLY REMOVED THROUGH THE GRANT OF A PETITION FOR DECLARATORY ORDER AFTER A REVIEW OF THE “TOTALITY OF THE CIRCUMSTANCES.”

The status of the Spur and Connecting Track as ancillary track previously created a potential regulatory quandary. On the one hand, Section 10501(b)(2) firmly sets forth the exclusive jurisdiction of the STB over such track, restricting access to other federal, state or local remedies for a party aggrieved by a rail carrier’s use or operation of the track. Ordinarily, for regulated lines of railroad, the Board can remove its preemptive federal jurisdiction in appropriate circumstances through a request for “adverse” abandonment by a third party under 49 U.S.C. § 10903. *See, e.g., Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. 969 (1981); *Western Stock Show Assn. – Aban. Exemption – In Denver, CO*, 1 S.T.B. 113 (1996). Under Section 10906, however, the Board has no regulatory authority pursuant to Section 10903 over the abandonment or discontinuance of ancillary track. So, presuming that ancillary tracks are not subject to *broader* federal preemption protection than regulated lines of railroad, how would the Board withdraw its jurisdiction over ancillary track that is no longer needed or used for rail service?

The direction out of this potential quandary was established in *Pinelawn Cemetery – Petition for Declaratory Order*, Docket No. FD 35468 (STB served Apr. 21, 2015) (“*Pinelawn*”). In *Pinelawn*, a cemetery owner sought to remove several rail operators from

cemetery property used as a rail yard after the operators' lease to the property allegedly expired. The STB rejected the cemetery's claim that the yard tracks on cemetery property were private, non-jurisdictional tracks, and held that the tracks were excepted, or ancillary, tracks, subject to the Board's jurisdiction, even if the Board's licensing authority was inapplicable. *Pinelawn*, slip op. at 6-7. Board action, therefore, was required for the Board to remove its jurisdiction over Section 10906 track. And in order to secure removal of the Board's jurisdiction, the Board directed that a petition for declaratory order be the vehicle. *Pinelawn*, slip op. at 11 n.31.

Pinelawn also considered, perhaps less precisely, the standards that the Board would use to determine when it would be appropriate for the Board's jurisdiction over ancillary track to be lifted. The cemetery argued that the railroads had evinced an intent to abandon rail service by failing to renew the lease. The Board found that the railroads had not demonstrated a desire to abandon the property, as was readily evident from the continued daily use of the yard tracks by the railroads. Notably, the Board did not dismiss the notion that allowing the lease to lapse, if properly established, could be sufficient to allow the Board to lift its jurisdiction. More broadly, however, the Board framed the basic test for removal of jurisdiction over ancillary track as whether the track "is no longer needed for the interstate rail system." *Pinelawn*, slip op at 11. The Board explained that "(a) rail carrier's intent to abandon § 10906 track cannot be determined by a single act, or failure to act, when there is *overwhelming evidence* that a carrier intends the opposite outcome." *Id.* (emphasis added). "The key consideration here is whether or not the carrier has continued to exhibit a *fixed and continuing intent* to hold out to provide common carrier rail service to the public." *Id.* at 10 (emphasis added). More recently, the Board has summarized that "the key factor in determining whether the Board's jurisdiction over [ancillary track] has terminated is whether [the railroad] exhibited a continuing intent to provide common

carrier service to the public on that track.” *Holland Park Owner, LLC – Petition for Declaratory Order*, Docket No. FD 36308, slip op. at 4 (STB served Jan. 6, 2020) (“*Holland Park*”).

Pinelawn and similar cases have looked to the “totality of the circumstances” in determining whether it is appropriate to withdraw the Board’s jurisdiction over ancillary track. For example, in *NewVistas Property Holdings, LLC – Petition for Declaratory Order*, Docket No. FD 36040 (STB served Mar. 17, 2017) (“*NewVistas*”), in applying the “no longer needed for the interstate rail system” standard from *Pinelawn*, the Board conducted a fact-specific analysis of the “totality of the circumstances” to examine the need for continued jurisdiction over excepted track. *NewVistas*, slip op. at 2 n.3 (citing *Beaufort Railroad – Modified Rail Certificate*, Docket No. FD 34943, slip op. at 6-8 (STB served Mar. 19, 2008)). In *NewVistas*, the railroad established through uncontroverted evidence that the ancillary track at issue was used by 4.9 trains per day to connect two railroad subdivisions, leading the Board to conclude that the segment of track at issue “is needed for the interstate rail system.” *NewVistas*, slip op at 4.

Similarly, in *JGB Properties, LLC – Petition for Declaratory Order*, Docket No. FD 35817 (STB served May 22, 2015) (“*JGB*”), the Board examined the preemptive effect of its jurisdiction over a civil judgment against a landowner for removing track from its property that accessed several third parties. The track was protected by easement rights. In finding that the Board’s jurisdiction did not preempt the state court from imposing damages against the unlawful removal committed by the landowner, the Board noted that if the track were found to be ancillary track, the Board would not find it to be abandoned, despite a general absence of maintenance, as *Pinelawn* (decided a month earlier) had as a key element the finding of a “fixed and continuing intent” to provide common carrier rail service on the track. *JGB*, slip op. at 8. Because the rail

carrier and the property owner were both taking efforts to find rail shippers for the landowner's property, no abandonment of rail purpose was found.

Several key concepts can be derived from *Pinelawn*, *Holland Park*, *NewVistas*, and *JGB*. First, in determining whether to retain jurisdiction over the track, the Board will look to whether there is a "need" for the track to provide service in the interstate rail system. Purported convenience of the rail carrier is not the touchstone here; a showing of need for the track as an element of its rail system is required. Second, the railroad must demonstrate a "fixed and continuing intent" to use the ancillary track as an element of its provision of rail service. A lack of rail operations and maintenance plainly provides evidence of an intent to abandon an ancillary track, which could be overcome by credible indications of an ongoing effort to incorporate the track into the future provision of rail service. Finally, in the face of facts indicative of an intent to abandon the ancillary track, "overwhelming evidence" demonstrating a contrary intent can prevail.

While they help to focus the Board's standards for inquiry in this case, the situations considered in *Pinelawn*, *NewVistas* and *JGB* stand in stark contrast to the circumstances presented here. *Pinelawn* involved a track that was still in use, and had seen a variety of uses over the years. By contrast, the Spur was used solely to provide freight rail service to the Atlas Warehouse, and has not been used in over two years (until CSXT's very recent and transparent efforts to conjure a new use for the Spur). Unlike *NewVistas*, there are no freight movements on the Spur or Connecting Track (and have not been, for over two years, with no marketing, plans or possibility for future rail service). And unlike the circumstances in *JGB*, no entity is actively seeking rail customers to be served on the Spur. Indeed, the very reason for

initiation of this proceeding is that no rail service will ever be sought by the current or anticipated future owners of the property previously served from the Spur.

**III. FAIRLY VIEWED, THE TOTALITY OF THE CIRCUMSTANCES
CLEARLY WARRANT REMOVAL OF THE BOARD'S JURISDICTION
OVER THE SPUR.**

**A. THE SPUR IS NO LONGER NEEDED FOR FREIGHT
TRANSPORTATION SERVICES.**

As the record in this Petition clearly establishes, providing rail service to the Atlas Warehouse was the only reason for the existence of the Spur. No other entity or facility could ever receive rail service from the Spur, as Atlas owns all the land beneath the Spur and surrounding three sides of the Spur (the fourth side, at the western end of the Spur, abuts a public road). See Exhibit A. The sole purpose for keeping the Spur operational ended over two years ago, when Atlas determined to cease operation of its paper recycling business and the Warehouse. No freight rail service has been requested on the Spur since that time, and no freight rail service has since been provided.

Moreover, Atlas has no plans to reactivate the Warehouse, or to find a purchaser to operate some form of freight rail-served facility from the property. Industrial development at the site is simply not contemplated. In short, the rail shipping need for the Spur has ceased.

**B. AFTER SALE OF THE ATLAS PROPERTY TO GREYSTAR,
THERE WILL BE NO NEED FOR RAIL SERVICE.**

After closure of the Warehouse, Atlas sought out purchasers for the Atlas Property. The most attractive offer for the property came from Greystar, and Atlas and Greystar have executed a sales contract. Greystar plans to remove the Warehouse and other existing buildings and construct a residential development on the property. The open market has thus determined that the highest and best use of the Atlas Property is as residential housing.

Residential developments obviously do not require or utilize freight rail service, and redevelopment of the Atlas Property – which literally envelopes the entire length of the Spur on both sides – will preclude use of the Spur to serve any other hypothetical shipper. Greystar’s lack of interest in having rail service on the Atlas Property is confirmed by the fact that its obligation to close on the sales agreement is contingent on the removal of the Spur and associated easement from the Atlas Property.

There has been no need or request for rail service on the Spur for over two years. No need for rail service will arise in the future. The Spur is plainly no longer needed for the interstate rail system. *Pinelawn*, slip op. at 11. As is the case in the analogous adverse abandonment context, the Board “will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce.” *Modern Handcraft*, 363 I.C.C. at 972; see, e.g., *Stewartstown Railroad Company – Adverse Abandonment – In York County, PA*, Docket No. AB-1071, slip op. at 4-5 (STB served Nov. 16, 2012) [2012 WL 5828750, *3].

C. CSXT’S FAILURE TO USE OR MAINTAIN THE SPUR AFTER CLOSURE OF THE WAREHOUSE INDICATES THE ABSENCE OF ANY NEED FOR USE OF THE SPUR TO SUPPORT CSXT’S OPERATIONS.

Upon closure of the Warehouse, CSXT found no reason to use the Spur for rail purposes for over eighteen months. For its part, Atlas had no reason to request CSXT service on the Spur or to anticipate any CSXT operations on the track. As amply demonstrated in the photographs attached as Exhibit B, the Spur fell into a state of disrepair, with the overgrown vegetation visually demonstrating the absence of any rail activity. As the sole purpose for the existence of the Spur had ended, so too did any efforts by CSXT to use or maintain it.

The differences in this situation presented here and *JGB* – where an absence of maintenance on the ancillary track at issue did not carry the day – are instructive. In *JGB*, both the railroad and the entity served by the track were actively seeking out new rail-served customers in need of the railroad’s services. Thus, although the immediate situation presented no need to maintain the track, anticipation of a future freight customer overrode the physical deterioration of the rail line and persuaded the Board that the railroad did not intend to relinquish service over the ancillary track. Here, by contrast, the current owner of the property is not seeking new operators for the shuttered Warehouse, or for any other use of the Atlas Property that would generate rail freight traffic. The prospective purchaser is insisting that the Spur and easement be removed before it will assume ownership of the property. CSXT has no ability to serve other rail freight customers via the Spur, which is completely surrounded by the Atlas Property. There is no basis to anticipate a future need for the Spur to serve rail customers.⁷

**D. CSXT’S USE OF THE SPUR AND ADJACENT PROPERTY FOR
MAINTENANCE OF WAY EQUIPMENT STORAGE PURPOSES
IS PURELY PRETEXTUAL.**

As previously discussed, when Atlas’ efforts to secure CSXT’s release of the easement and removal of the Spur from the Atlas Property via letter were unsuccessful, Atlas arranged a meeting with CSXT officials at Jacksonville, Florida in late August, 2019. Atlas was accompanied to the meeting by officials from Greystar. Atlas sought the meeting to make clear to CSXT that the unused Spur was causing an impediment to redevelopment of the property. As

⁷ The Board in *JGB* did not dismiss the evidence presented of an absence of maintenance as irrelevant. Rather, it found that the evidence of marketing efforts undertaken by both the railroad and the owner of the property served by the ancillary track carried more weight, and therefore the Board found no intent to abandon the spur track. No such marketing is present here, and any marketing for future rail service would be wholly inconsistent with both Atlas’ and Greystar’s plans for the Atlas Property.

a result of that meeting, CSXT clearly understood that the purchase agreement with Greystar could not close if the issues regarding the unused Spur were not resolved.

Rather than acknowledge what the preceding eighteen months had already made clear – that the Spur no longer held any purpose – CSXT sought to invent one. Shortly after its August meeting with Atlas and Greystar, CSXT occupied the Spur with a variety of on-track maintenance of way equipment and vehicles.

Atlas believes CSXT *never* used the Spur for the storage or movement of maintenance of way equipment prior to September of 2019. Indeed, any such storage of equipment on the Spur would have been wholly incompatible with the rail service that CSXT provided to the Warehouse until November of 2017. But *Pinelawn* and similar cases make clear that CSXT’s last-minute efforts to find some rail use of the Spur are unavailing. The 18-month delay between closure of the Warehouse and CSXT’s occupation of the Spur track hardly shows the “fixed and continuing intent” to use the track required by *Pinelawn*. And the presence of several nearby CSXT’s yard facilities for staging of maintenance of way equipment demonstrates the absence of “need” for using the Spur for that purpose. Simply stated, CSXT’s hastily-arranged parking of maintenance of way equipment on the Spur cannot come close to the “overwhelming evidence” needed to overturn the absence of use, maintenance, or service plans on the Spur.

Given the absence of any prior usage of the Spur to park maintenance of way equipment, coupled with the availability of local CSXT yards and the opportunistic timing of the placement of such equipment on the Spur so shortly after the Jacksonville meeting, it can only be concluded that CSXT saw a chance to invent a use – any use – for the Spur, in order to leverage its position with Atlas and Greystar. The Board should not give credence to CSXT’s *post-facto*

efforts to justify preemptive Board jurisdiction over an ancillary track that has no legitimate rail purpose.

CONCLUSION

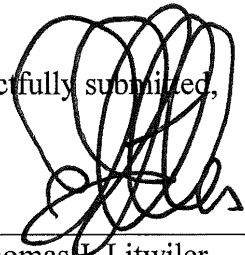
It is clear from a review of the totality of the circumstances that there is no longer any need for the Board to retain jurisdiction over the Spur. The sole reason for the existence of the Spur – the Warehouse – was closed over two years ago. No freight rail service has been requested since that time, and the Spur is not needed and could not be utilized for freight service to any other shipper. Atlas, the current owner of the Warehouse and the land beneath the Spur, has made clear that it has no intention of requesting rail service. The potential purchaser of the land and Warehouse, Greystar, plans a residential development that not only will not need rail service, but that is itself incompatible with the retention of the Spur and underlying easement.

CSXT has demonstrated the absence of any need for the Spur through the one and a half years that it did not use or maintain the Spur. Further, it was only after Atlas and Greystar brought their project to CSXT's headquarters that CSXT undertook to invent a function for the unused and useless Spur and easement, and maintenance of way equipment suddenly appeared on the Spur. CSXT should not be allowed to leverage its position as a regulated carrier against a landowner that no longer requires or wants CSXT's services through the expedient of parking non-freight equipment on an otherwise unused spur track, particularly where two separate yards exist within fifteen rail miles of that location to park that equipment. In stark contrast to the facts in *Pinelawn*, *NewVistas*, and *JGB*, there is no legitimate need for use of the Spur as part of the freight rail network, nor any legitimate prospect for future rail customers on the Spur. CSXT's actions in parking maintenance of way equipment on the Spur must be seen for what they are – a

sham designed to leverage an otherwise useless asset. The Board should not continence the manipulation of its jurisdiction to advance such gamesmanship.

Atlas requests that the Board institute a declaratory order proceeding pursuant to *Pinelawn*, to be heard under the modified procedures of 49 C.F.R. § 1112 with this Petition considered to be Atlas' opening statement and a schedule established for 1) discovery by the parties, as needed; 2) a supplemental filing by Atlas to its opening statement; 3) a reply filing by CSXT; and 4) a rebuttal filing by Atlas. This would be broadly consistent with the approach taken in *NewVistas, supra*, to address the removal of the Board's jurisdiction over ancillary trackage in accordance with *Pinelawn*.

WHEREFORE, for all the foregoing reasons, Atlas respectfully requests that the Board institute a declaratory order proceeding and issue an order declaring its jurisdiction over the Spur to be terminated.

Respectfully submitted,

By: _____
Thomas J. Litwiler
Thomas J. Healey
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

**ATTORNEYS FOR ATLAS LAND AND
BUILDING CORPORATION and ATLAS
MATERIALS RECYCLING CORPORATION**

Dated: February 11, 2020

EXHIBIT A

AERIAL VIEW OF SPUR



CSXT Main Line

Crosshatching indicates
Atlas property

Connecting
Track

Spur

EXHIBIT B

PHOTOGRAPHS OF SPUR FROM MAY 2019







EXHIBIT C

VERIFIED STATEMENT OF JOHN CLARKSON

VERIFIED STATEMENT OF JOHN CLARKSON

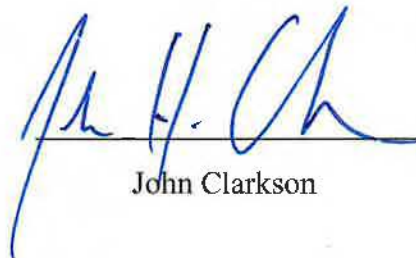
1. My name is John Clarkson. I am employed by Greystar GP II, LLC ("Greystar") as Managing Director of Development. I have been employed by Greystar in this position since May, 2019 and am responsible for developing multifamily apartment buildings, student housing and senior housing in the Mid-Atlantic Division, which includes Pennsylvania, New Jersey, Delaware, Virginia and the District of Columbia.
2. I make this verified statement from my own knowledge, from a review of Greystar's corporate records, and from conversations with other Greystar employees.
3. Greystar's business includes constructing, developing, owning and operating large scale residential multifamily apartment buildings.
4. In my position at Greystar, I am familiar with the negotiations for purchase by Greystar of real property located at 2329 Wharton Street, Pittsburgh Pa. (the "Property") from Atlas Land and Building Corporation and Atlas Materials Recycling Corporation (collectively "Atlas"), and the contents of the contract for sale subsequently executed by the parties for that Property.
5. Greystar believed (and continues to believe) that the Property is well positioned to support a new multifamily residential development, once the existing and unused industrial facilities are removed. The Property is conveniently located close to downtown Pittsburgh, and sits adjacent to the Three Rivers Heritage Trail and the Monongahela River.
6. Based on its assessment of the redevelopment potential of the Property, Greystar negotiated a contract to purchase the Property from Atlas with the intent to demolish the vacant warehouses currently located on the Property and construct a large scale multifamily apartment building.

7. During due diligence on the transaction, Greystar identified an easement for railroad service on the property believed to be held currently by CSX Transportation, Inc. ("CSXT").

8. Greystar's vision of repurposing the Property toward a residential function does not include a need for rail service of any kind on the Property. Indeed, the presence of an unused, 400' segment of railroad track on the Property makes it impossible for us to proceed with the residential development of the Property. The contract for sale includes a provision requiring the removal of the easement from the Property before the transaction may close.

9. On August 28, 2019, a representative of Greystar attended a meeting at CSXT's headquarters in Jacksonville, Florida, along with representatives of Atlas. At that meeting, the representatives of Atlas and Greystar discussed with CSXT the potential sale of the parcel, the contemplated redevelopment and the need for removal of the easement and railroad track from the Property in order for the transaction and development to proceed. It was made clear to CSXT that Greystar's redevelopment plans for the Property do not include any need for rail service.

10. The statements contained herein are true and correct to the best of my knowledge.



John Clarkson

Dated: February 4, 2020

EXHIBIT D

EASEMENT DEED

ALLEGHENY
COUNTY (B)

THIS EASEMENT DEED, made this 11th day of September, 1992, between THE
PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a Delaware corporation, whose mailing
address is Commerce Court, 4 Station Square, Pittsburgh, Pennsylvania 15219, hereinafter called
"Grantor", and THE THREE RIVERS RAILWAY COMPANY, a Pennsylvania corporation, whose
mailing address is 500 Water Street, Jacksonville, Florida 32202, hereinafter called "Grantee",
WITNESSETH:

(Wherever used herein, the terms "Grantor" and "Grantee" may
be construed in the singular or plural as the context may require or
admit, and for purposes of exceptions, reservations and/or covenants,
shall include the successors and assigns of corporations.)

THAT Grantor, for and in consideration of the sum of TEN AND NO/100 DOLLARS
(\$10.00) and other good and valuable consideration in hand paid by Grantee, the receipt of which is
hereby acknowledged, and as a portion of a conveyance of a line of operated railway from
McKeesport, Pennsylvania to West Pittsburg, Pennsylvania, does hereby GRANT, without warranty
of title, unto Grantee, its successors and assigns, certain RAIL ACCESS OPERATING EASEMENTS
for the continued placement, usage and maintenance of railroad tracks and facilities, and access
thereto, in, on and over that certain parcel of land of Grantor, situate, lying and being in Allegheny
County, Pennsylvania, as more particularly described as follows:

(A) In the Borough of Coraopolis and Robinson Township, Allegheny County, situated
within that tract of land identified as Excepted Parcel S-2 in that deed between Grantor and CSX
Transportation, Inc., dated as of July 18, 1991, recorded in Deed Book 8525, Page 28 among the
land records of Allegheny County, BEGINNING at a line at right angles to the P&LE Monumented
Base Line (MBL) at Survey Station 626+00 (Rail Mile Post 9.172); THENCE extending in a
generally northwesterly direction a distance of 2,400 feet, more or less, to a point in a line at right
angles to the P&LE MBL Survey Station 602+00 (Rail Mile Post 9.26); ALL as shown on Fragment
Print of Railroad Valuation Section Map V-1, Sheet 13, attached hereto as Exhibit A-10; BEING
within an area limited by a plane 23 feet above the top of each rail, and being 30 feet wide, 15 feet
on each side of the centerline of each track within the Easement; INCLUDING the use of all tracks,
trackage, rail and track support facilities, bridges and supports within and on such Easement; ALL as
shown in detail on Grantor's Railroad Valuation Section Map V-1, Sheet SL-13, incorporated herein
by reference.

(B) In the City of Pittsburgh, Allegheny County, situated on that tract of land identified as
Excepted Parcel B-15 in the aforesaid deed dated as of July 18, 1991, BEGINNING at the

southeasterly line of South 23rd Street, at the intersection of said Street with the P&LE Monumented Base Line (MBL) at Survey Station 20+00 (Rail Mile Post PLF 1.76), and with the northerly line of lands of Atlas Waste Paper Company; THENCE extending in a generally easterly direction a distance of 400 feet, more or less, to a point in the property line of Atlas Waste Paper Company; ALL as shown on Fragment Print of Railroad Valuation Section Map V-1, Sheet 1, attached hereto as Exhibit A-11; BEING within an area limited by a plane 23 feet above the top of each rail and being 30 feet wide, 15 feet on each side of the centerline of each track on said Easement; INCLUDING the use of all tracks, trackage, rail and track support facilities, bridges and supports within and on each Easement; ALL as shown in detail on Grantor's Railroad Valuation Section Map V-1, Sheet SL-1, incorporated herein by reference.

(C) In the Township of Stowe, Allegheny County, BEGINNING at a point in the northeasterly line of a tract of land identified as "Segment B" in deed to CSX Transportation, Inc. dated as of July 18, 1991, recorded as aforesaid, such point being 2,570 feet, more or less, southeast of the Fleming Park Highway Bridge, as measured along said northeasterly property line of CSX Transportation, Inc. at the P&LE Monumented Base Line of Survey (MBL) Station 388+10; THENCE in an easterly direction, with the U.S. Harbor Line, a distance of 260 feet, more or less, to a point in Grantor's northerly property line; THENCE in a southeasterly direction along said northerly property line a distance of 270 feet, more or less, to a point which is 28 feet, more or less, northeast of the northeasterly property line of CSX Transportation, Inc. at Survey Station 383+00; THENCE in a westerly direction a distance of 215 feet, more or less, to a point in said northeasterly line opposite Survey Station 385+00; THENCE in a northwesterly direction along said northeasterly property line a distance of 320 feet, more or less, to the POINT OF BEGINNING; ALL as shown generally on Combined Fragment Print of Railroad Valuation Section Map V-1, Sheets 8 and 9, attached hereto as Exhibit A-12; INCLUDING the exclusive use of all tracks, trackage, rail and track support facilities, bridges and supports within and on such Easement; ALL as shown in detail on Grantee's Railroad Valuation Section Maps V-1, Sheets SL-8 and SL-9, incorporated herein by reference.

THE AFOREGOING EASEMENT(S) being part of the same property acquired by Grantor or a predecessor of Grantor as set out in the deed books and pages recorded in the Office of Public Records of Allegheny County, Pennsylvania, set forth on Exhibits A-10, A-11 and A-12 attached hereto and incorporated herein; the corporate history of Grantor and its predecessor railroads being described in Exhibit B-2, also attached hereto and incorporated herein.

TO HAVE AND TO HOLD the aforesaid Rail Access Operating Easement(s) unto the proper

use, benefit and enjoyment of Grantee, Grantee's successors and assigns, forever. However, if said Easement(s) or right-of-way, or any portion thereof, shall be abandoned (receipt of official authority to cease rail use or service) or the use thereof completely discontinued by Grantee, its successor(s) or assign(s), then said Easement(s) and right-of-way, or abandoned or unused portion thereof, shall terminate, and title to such abandoned or unused parcel(s) shall revert to Grantor, its successors and assigns, in fee; provided, however, should the use of said Easement(s) and right-of-way, or portion thereof, be abandoned or completely discontinued as above, then Grantee, its successor(s) or assign(s), shall have the full and free right, without cost or charge, for a period of one (1) year after such abandonment or discontinuance, to remove from said Easement(s) or right-of-way area, or portion thereof abandoned or discontinued, any and all track(s), signals, poles, wires, rails, ties, ballast, other track material and/or equipment placed thereof by or belonging to Grantee, its successor(s) or assign(s).

TOGETHER with all rights and privilege to use such additional land(s) that adjoin(s) the described Easement(s) as may be required for slopes, cuts and fills or in connection with the operation and maintenance of Grantee's tracks and appurtenant railroad facilities.

Grantor RESERVES for itself, its successors, and assigns, the right, at its or their own cost or expense, to build, construct, operate, maintain and remove, above or under the surface of the aforesaid Easement(s), at such point(s) as Grantor may deem to be necessary, convenient or expedient, underground pipelines or overhead power lines, or other lines ("Crossings"); but it is expressly stipulated and agreed that Grantor, its successors, or assigns, will exercise none of the Crossing privileges reserved herein without first submitting the plan(s) for said Crossing(s) to the Chief Engineer or other designated officer of Grantee and receiving written approval for said plan(s). Grantee agrees to promptly review plan(s) so submitted and to approve same, provided that the construction, maintenance and operation of such Crossings or other structures will not materially interfere with the use by Grantee of the Easement(s) herein granted. Title to all such property or improvements placed over or under said Easement(s) by Grantor, its lessees, successors, or assigns, is and shall also be forever excepted and reserved unto Grantor, its successors and assigns.

NOTICE - THIS DOCUMENT MAY NOT SELL, CONVEY, TRANSFER, INCLUDE OR INSURE THE TITLE TO THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED OR REFERRED TO HEREIN, AND THE OWNER(S) OF SUCH COAL MAY HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL AND, IN THAT CONNECTION, DAMAGE MAY RESULT TO THE SURFACE OF THE LAND AND ANY HOUSE, BUILDING OR OTHER STRUCTURE ON OR IN SUCH LAND. THE INCLUSION OF THIS NOTICE DOES NOT ENLARGE OR RESTRICT OR MODIFY ANY LEGAL RIGHTS OR ESTATES OTHERWISE CREATED, TRANSFERRED, EXCEPTED OR RESERVED BY THIS INSTRUMENT. THIS NOTICE IS SET FORTH IN THE MANNER PROVIDED IN SECTION 1, ACT OF JULY 17, 1957, P.L. 984, AS AMENDED (TITLE 52, SECTION 1551, P.S.A.), AND IS NOT INTENDED AS A NOTICE OF ANY UNRECORDED INSTRUMENTS.

NOTICE - THE UNDERSIGNED, AS EVIDENCED BY THE SIGNATURE(S) TO THIS NOTICE AND THE ACCEPTANCE AND RECORDING OF THIS DEED, (IS, ARE) FULLY COGNIZANT OF THE FACT THAT THE UNDERSIGNED MAY NOT BE OBTAINING THE RIGHT OF PROTECTION AGAINST SUBSIDENCE, AS TO THE PROPERTY HEREIN CONVEYED, RESULTING FROM COAL MINING OPERATIONS AND THAT THE PURCHASED PROPERTY, HEREIN CONVEYED, MAY BE PROTECTED FROM DAMAGE DUE TO MINE SUBSIDENCE BY A PRIVATE CONTRACT WITH THE OWNERS OF THE ECONOMIC INTEREST IN THE COAL. THIS NOTICE IS INSERTED HEREIN TO COMPLY WITH THE BITUMINOUS MINE SUBSIDENCE AND LAND CONSERVATION ACT OF 1966.

WITNESS:

Robert W. Kleinman
ROBERT W. KLEINMAN

Grantee:

THE THREE RIVERS RAILWAY COMPANY

By:

Pete J. Shultz
Title: AUTHORIZED AGENT

IN WITNESS WHEREOF, THE PITTSBURGH AND LAKE ERIE COMPANY, pursuant to due corporate authority and a resolution duly adopted by its Board of Directors, has caused this Deed to be executed and subscribed by its officers hereunto duly authorized, and its corporate seal, duly attested, to be hereunto affixed.

Signed, sealed and delivered

THE PITTSBURGH AND LAKE ERIE
RAILROAD COMPANY

Susan Lichtenfeld
Susan Lichtenfeld

By Gordon E. Neuenschwander
Gordon E. Neuenschwander
President

Attest Richard A. Porach (SEAL)
Name Richard A. Porach
Asst. Secretary

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY) SS.

On this 11th day of September, 1992, before me, a Notary Public, in and for the County and Commonwealth aforesaid, personally appeared Gordon E. Neuenschwander and Richard A. Porach, personally known to me to be the President and Assistant Secretary, respectively, of The Pittsburgh and Lake Erie Railroad Company, a Delaware corporation, and personally known to me to be the persons whose names are subscribed to the foregoing instrument, who severally acknowledged that, as such President and Assistant Secretary of said corporation and being authorized to do so, they executed the foregoing instrument for the purposes therein contained, and caused the corporate seal of said corporation to be affixed thereto, as their free and voluntary act, and as the free and voluntary act and deed of said corporation, all pursuant to authority given by the Board of Directors of said corporation.

IN WITNESS WHEREOF, I hereunto set my hand and official seal the day and date written above.

Daniel J. DeLa (SEAL)
Notary Public

My Commission Expires:

This deed prepared by and/or under the supervision of:

Richard C. Keene
Richard C. Keene
Senior Counsel
Attorney for Grantee
Law Department
500 Water Street
Jacksonville, FL 32202
(904) 359-1253

Notarized Seal
Daniel J. DeLa
Notary Public
Pittsburgh, Allegheny County
My Commission Expires Sept. 23, 1995
Notary, Pennsylvania Association of Notaries

V-1
13

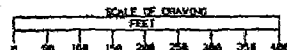
MAP	PARCEL	GRANTOR	DATE	RECORDATION
VS-1, SL-12	13	HOWARD R. TURNER	01-02-1914	1829-35
	20	HARRY R. SECTZ	02-13-1914	1797-512
	21	HARRY R. SECTZ	06-04-1915	1787-589
	22	JAMES S. TAYLOR	06-20-1916	---
	23	JAMES S. TAYLOR	12-13-1918	1829-37
VS-1, SL-13	24(PART)	WILLIAM O. ALEXANDER	05-27-1916	1830-472
	25-45	ALL	ALL INSTRUMENTS	---
	46(PART)	LEWIS FORDHOFF & MACHINE COMPANY	11-09-1909	1781-84
	58(PART)	PITTSBURGH COAL CO.	01-22-1907	1992-221

P. & L. E. R. R.

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BOROUGH OF COROAPOLIS
ROBINSON TOWNSHIP
ALLEGHENY COUNTY
PENNSYLVANIA

NOTHING IN THIS PLAT SHALL BE TAKEN
OR DEEMED TO BE A DEDICATION OF ANY
LANDS, STREETS, OR ROADWAYS, OR THE
USE THEREOF, TO THE GENERAL PUBLIC.



N

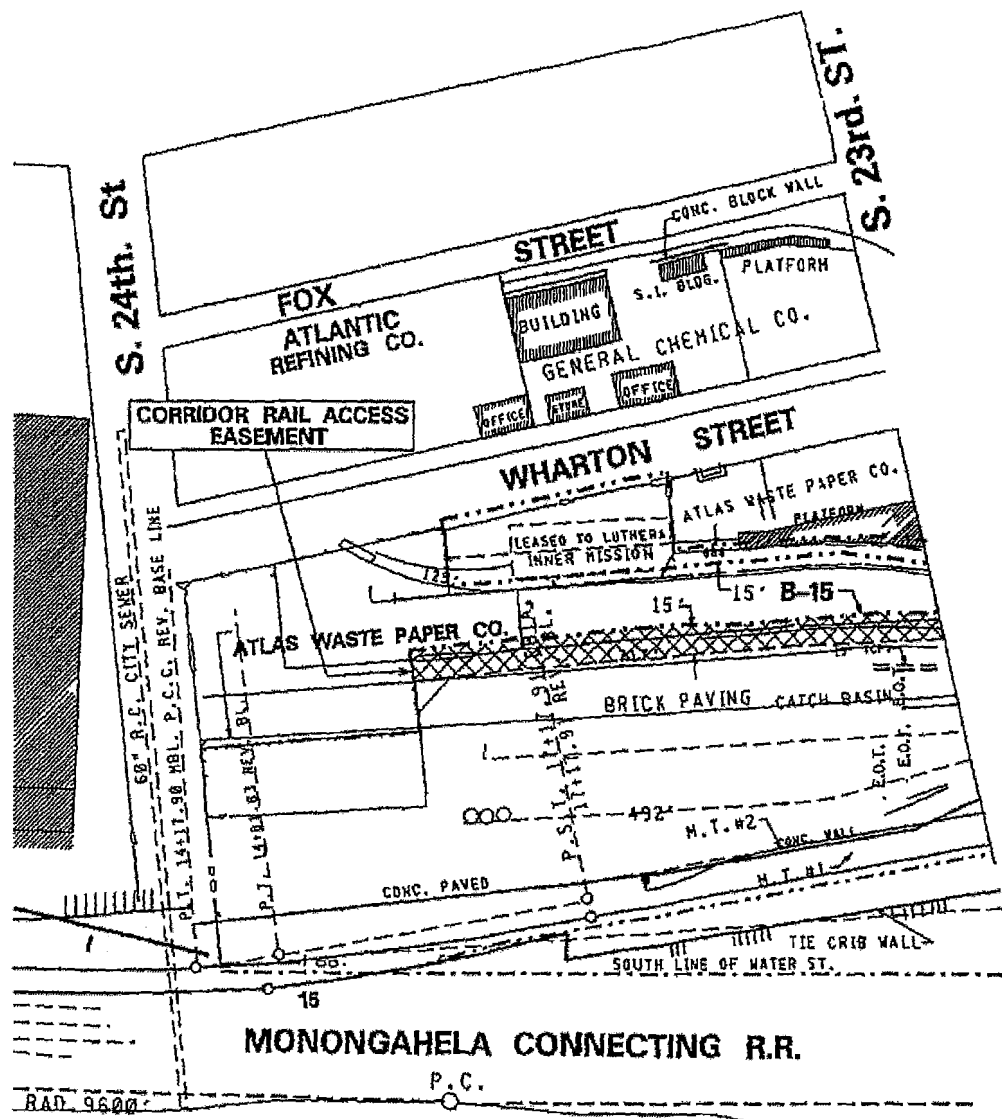
OHIO RIVER → BACK CHANNEL

POB STA. 626+00
N.P. PLE 9.172

END STA. 602+00
N.P. PLE 9.26

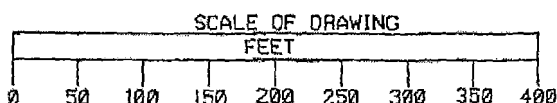
EXHIBIT A-10
ALLEGHENY COUNTY

MAP	PARCEL	GRANTOR	DATE	RECORDATION
V-6, SL-1	7(PART)	JOHN O. PHILLIPS.	12-28-1888	641-381
	11(PART)	SALLIE O. PHILLIPS	12-28-1888	634-545
	12(PART)	JOSEPH O. PHILLIPS	12-28-1888	634-547



MONONGAHELA RIVER

PITTSBURGH
ALLEGHENY COUNTY
PENNSYLVANIA



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EXHIBIT A-11
ALLEGHENY COUNTY

V-1
1

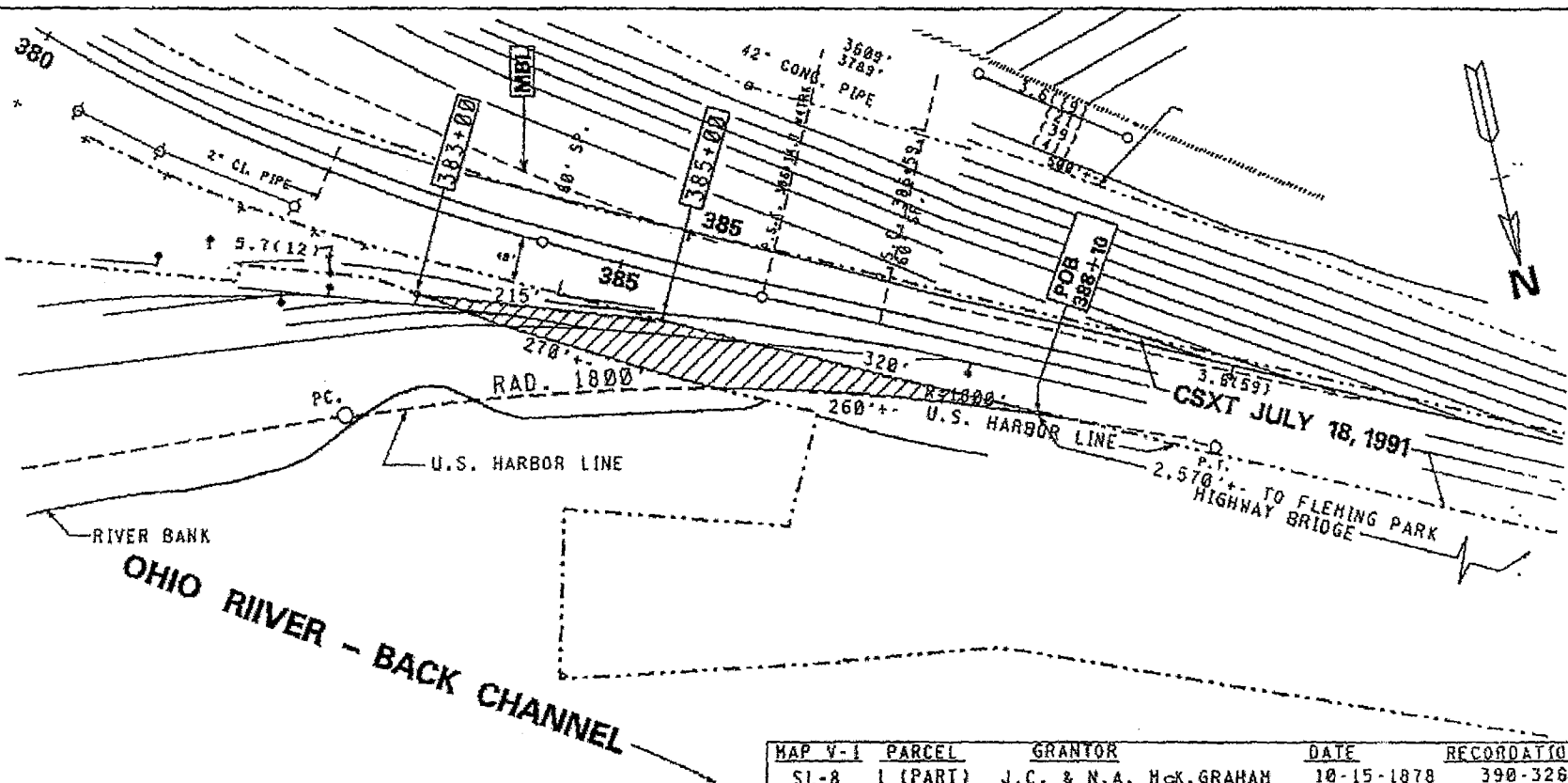
V-2
8

V-2
9

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EXHIBIT A-12
ALLEGHENY COUNTY



STOWE TOWNSHIP
ALLEGHENY COUNTY
PENNSYLVANIA

MAP V-1	PARCEL	GRANTOR	DATE	RECORDATION
SL-8	1 (PART)	J.C. & N.A. MCK. GRAHAM	10-15-1878	390-326
SL-9	10 (PART)	PITTSBURGH, NEVILLE ISLAND & CORAOPOLIS Rwy.	06-24-1937	2593-172

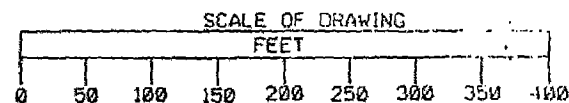


EXHIBIT B-2 (Allegheny County)

CORPORATE AND MERGER HISTORY
OF
THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY (P&LE)

May 11, 1875	Articles of Incorporation of The Pittsburgh and Lake Erie Railroad Company (P&LE) filed with the Commonwealth of Pennsylvania
May 7, 1878	Youngstown & Pittsburgh Railroad (an Ohio corp.) merged into P&LE (now an Ohio & Penn. corp.)
March 12, 1880	Pittsburgh & Becks Run Railroad (P&BR), a Pennsylvania corporation, consolidated with P&LE
1881	Pittsburgh, Chartiers & Youghiogheny Railway Co. (PC&Y) formed as a Pennsylvania corporation from consolidation of Chartiers & Mansfield Valley Railway (C&MVR) and McLaughlin's & Saw Mill Run Railroad (M&SMR)
Oct. 1883	Pittsburgh, McKeesport & Youghiogheny Railroad (a Penn. corp. owned equally by P&LE and NYC) (PMcK&Y) completed and leased to P&LE for 999 years.
1890	McKeesport & Belle Vernon Railroad (a Penn. corp.) (M&BV) acquired by P&LE and merged into PMcK&Y
Nov. 1894	Mahoning State Line Railroad Company (MSLR) incorporated in Ohio (Nov. 7th) and Pennsylvania (Nov. 9th).
Nov 26, 1985	Ninety-nine year lease and operating agreement from MSLR to P&LE.

1901	Monongahela Railway Company (MON) (a Pennsylvania and West Virginia Corporation) acquired jointly by P&LE and Pennsylvania Railroad (PRR)
June 1912	Lake Erie & Eastern Railroad (LE&E) incorporated in Ohio
1916	Beaver & Ellwood City Railroad (B&EC) merged into P&LE
Aug. 27, 1917	Montour Railroad Company (MRC) incorporated as a Pennsylvania corporation
Dec. 23, 1946	Montour Land Company (MLC) incorporated in Pennsylvania
Dec. 26, 1946	MRC and Youngstown & Southern Railway (Y&SR), an Ohio corporation, acquired from Consolidated Coal Co., by Pennsylvania Railroad, New York Central and P&LE. (Youngstown & Southern incorporated as Youngstown & Suburban Railway. Name changed to Youngstown & Southern Railway on June 8, 1944.) Pittsburgh, Lisbon & Western Ry. (Ohio corp.) merged into Y&S, 11/27/44)
Jan. 31, 1965	P&LE (Ohio and Penn. corp.) merged into P&LE, a Delaware corporation
Feb. 28, 1965	PMcK&Y merged into P&LE.
March 1975	P&LE acquired PRR's one-half interest in MON from Penn Central Railroad Trustees (Successor to PRR).
Aug. 30, 1979	P&LE re-incorporated as a Delaware corporation.
Feb. 7, 1984	MLC merged into P&LE
Sept. 30, 1984	LE&E merged into P&LE

Page 1 of 2

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AGENTS/TRUSTEES, for Acquisition for The Pittsburgh & Lake Erie Railroad Company; later conveyed (or to be conveyed) into P&LE

WM. LYON - 1880-1884 - 1 transaction

W. C. QUINCY - 1881-1882 - 3 transactions

D. HOSTETTER - 1878 - 4 transactions

JAMES D. REED - 1890-1896 - 2 transactions

J. M. SCHOONMAKER - 1893 to 1917 - 14 transactions (reconveyed last parcels to P&LE in 1924)

AGENTS/TRUSTEES, for Acquisition for The Pittsburgh & McKeesport & Youghiogheny Railroad Company; later conveyed (or to be conveyed) into P.McK&Y

J. H. DRAKE - 1888-1889 - 18 transactions

JAMES REED - 1894-1895 - 2 transactions

J. C. GROOMS - 1905-1915 - 7 transactions

J. M. SCHOONMAKER - 1882 to 1917 - 16 transactions (reconveyed last parcels to P.McK&Y in 1924)

SEP 11 1992 153712

Conveyance - Return to

EASEMENT

FROM

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
a Delaware corporation

TO

THE THREE RIVERS RAILWAY COMPANY,
a Pennsylvania corporation

24.55!

MAIL TO: *HD 114*

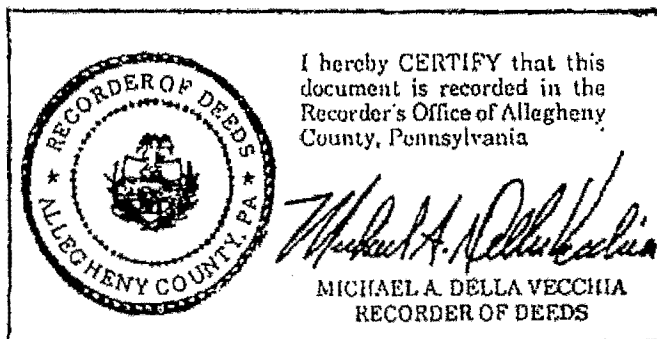
STATE TITLE SERVICES, INC.

P.O. Box 85355

LINCOLN, NE 68501-5355

ATTN: CHUCK LUCZYNSKI

RECORDER OF DEEDS
ALLEGHENY COUNTY, PA
SEP 11 3 36 PM '92



VOL. 8806 PAGE 443

EXHIBIT E

CSXT CORRESPONDENCE

From: Bongiovanni, Kim
Sent: Tuesday, June 11, 2019 1:54 PM
To: 'lafe.metz@bibc.com' <lafe.metz@bibc.com>
Subject: FW: Atlas Land and Building Corporation, et al ("Atlas")

Dear Mr. Metz,

I have been asked to respond to your June 6, 2019 letter to Michael Burns and others at CSX Transportation, Inc. ("CSXT"). First, I was somewhat surprised by the tone of and position taken in your letter given your firm's prior and quite possibly current representation of CSXT and its affiliates.

Nonetheless, I will respond. Relative the Private Side Track Agreement dated May 5, 1967 by and between The Pittsburgh and Lake Erie Railroad Company ("P&LE") and Atlas, CSXT, as a P&LE successor, accepts Atlas' election to terminate effective July 6, 2019. The September 11, 1992 Easement Deed from P&LE to The Three Rivers Railway Company ("TRRC"), also a CSXT predecessor, (the "Easement"), continues to be used for freight rail purposes, the purpose of the original Easement grant; as such, the Easement, including the Rail Access Operating Easement area, shall remain in full force and effect. At such time as CSXT decides to discontinue use of the Easement area, obtains an abandonment from the Surface Transportation Board, as required, and physically manifests its intent by track removal or other indicia, we will be in a position to discuss an Easement termination.

Kindly contact me should you desire to further discuss. Kim

Kim Rice Bongiovanni

Assistant General Counsel

CSX Transportation, Inc., 500 Water Street, J150, Jacksonville, FL 32202

☎ Phone: 904-359-1233 | 📠 Fax: 904-357-7660 | ✉ E-Mail: kim_bongiovanni@csx.com

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EXHIBIT F

CSXT IN PENNSYLVANIA

CSX IN PENNSYLVANIA



CSX Operations in Pennsylvania

- Operates and maintains more than 2,000 miles of track*
- Maintains nearly 540 public and private grade crossings
- Handled nearly 2.1 million carloads of freight on the state's rail network
- At the end of 2015, CSX employed nearly 950 people
- Throughout 2015, CSX reported more than \$87.3 million in compensation for employees**
- In 2015, CSX invested more than \$102 million in its Pennsylvania network. In addition, the company invested more than \$1 billion in freight cars and other rolling assets to serve customers throughout its rail system.
- CSX carries a variety of commodities important to our economy and way of life, including consumer products, automobiles, food and agriculture products, and coal. Major commodities produced or consumed within the state include containerized consumer goods, coal, petroleum products, light trucks, and aggregates.

CSX Facilities in Pennsylvania

- Major rail yards in Philadelphia (Greenwich) and Pittsburgh (Demler)
- Intermodal terminals in Chambersburg and Philadelphia
- TRANSFLO terminals in Butler, Chester, Philadelphia (two) and Pittsburgh
- Automotive distribution center in Aston (Twin Oaks)

Investment Projects

National Gateway

- The National Gateway is an approximately \$850 million, multi-state, public-private infrastructure project to improve the flow of freight between the Mid-Atlantic and the Midwest by clearing key freight corridors for double-stack rail service. The National Gateway has received considerable state and federal funding and CSX is investing approximately \$575 million in the project.
- The first phase of the National Gateway, which clears the way for double-stack intermodal service between CSX's existing terminal in Chambersburg, Pa., and its state-of-the-art hub facility in Northwest Ohio, was completed on time and on budget in September 2013. The project is currently in its second phase, which will double-stack clear the CSX corridor between Chambersburg and mid-Atlantic ports.

Trenton Subdivision Clearances (Philadelphia)

- By eliminating 16 clearance impediments, this project delivers more direct access to Philadelphia for CSX intermodal trains. Construction was completed in 2014. The project includes funding from the Commonwealth of Pennsylvania, two federal sources and CSX.

CSX OPERATING FACILITIES: PENNSYLVANIA



CSX and the Pennsylvania Community

- In partnership with state and local economic development agencies, Pennsylvania businesses invested nearly \$70.6 million in new or expanded rail-served facilities on CSX or its connecting regional and short lines in 2015. These investments will generate approximately 30 new jobs at those businesses.
- In 2015, CSX sponsored a Trees for Tracks service day in Philadelphia. Through its Trees for Tracks program, CSX is delivering on its promise to plant 42,000 trees, two for each mile of track in its 23-state service network.
- In 2015, CSX contributed nearly \$438,000 to organizations in Pennsylvania, including the Bridge Educational Foundation, United Way of Franklin County, Greater Pittsburgh Community Food Bank, Empowered Community Development Corporation, and Pennsylvania Operation Lifesaver.

* Miles of track includes single main track, other main track, yard tracks and sidings as of December 31, 2015.

** This figure includes current and former employees.



Nearby CSXT Yards

CSXT
Intermodal
Yard.

Atlas Property

CSXT
Demmler Yard

Google Earth

© 2019 Google
© 2019 Europa Technologies

Bethel Park Bethel Park

5 mi

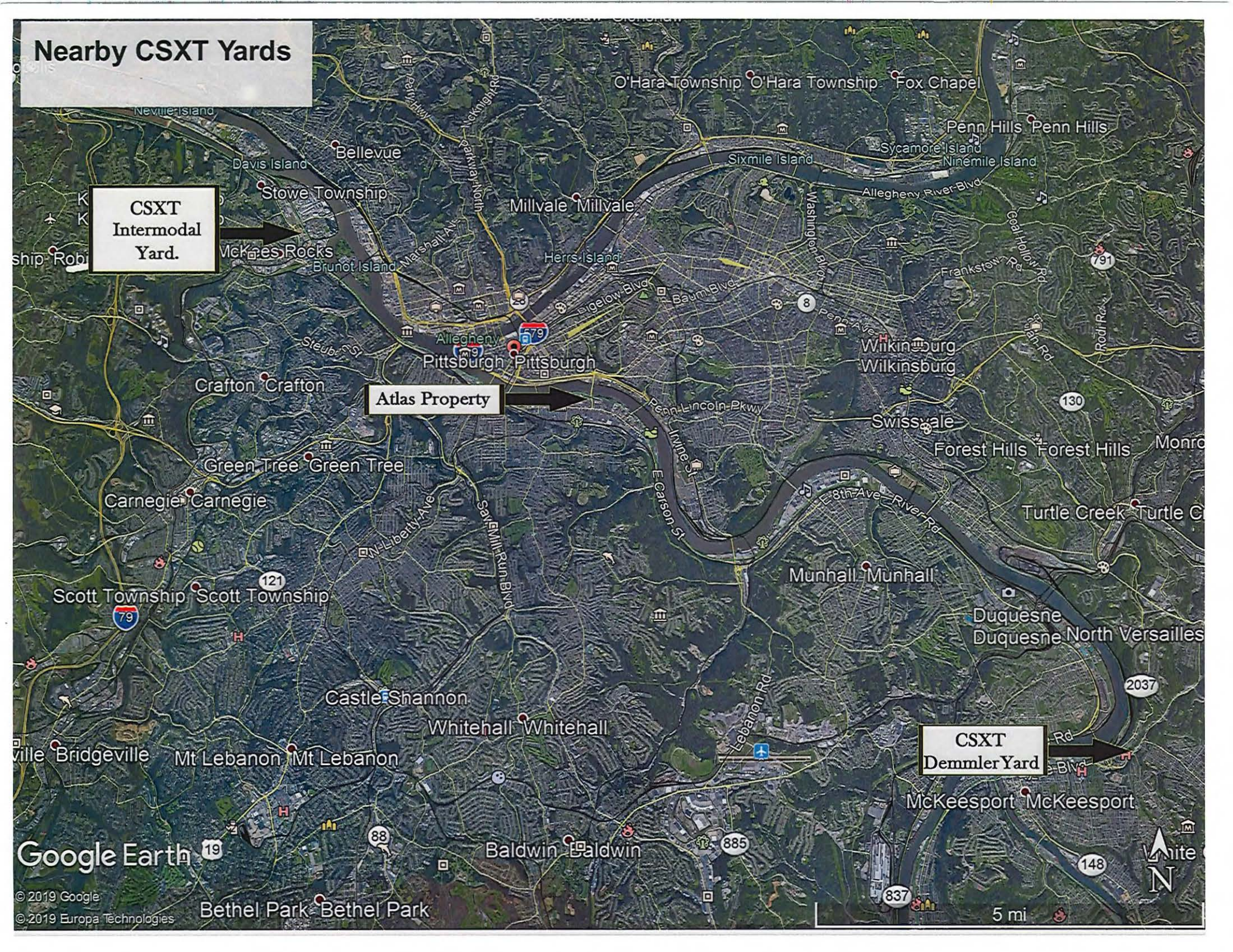


EXHIBIT G

LETTERS TO CSXT

COUNTY OF



ALLEGHENY

RICH FITZGERALD
COUNTY EXECUTIVE

February 3, 2020

Rodney J. Oglesby
Resident Vice President, PA-NJ-NYC
CSX Transportation
45 E. City Avenue #326
Bala Cynwyd, PA 19004

Re: Atlas Materials Recycling/Greystar

Dear Mr. Oglesby:

A new residential development is being planned at the now vacant Atlas Materials Recycling Corporation facility in the City of Pittsburgh. Apparently, there are railroad tracks along one side of the building which are the last 400 feet of a 1600-foot spur previously used by the railroad to deliver box cars for the loading/unloading of materials exclusively to Atlas. It is my understanding that the 400' dead-end portion of the track that terminates at Atlas's building has never been used for any purpose other than the loading/unloading of rail cars for Atlas's now closed business. I'm told CSX made a perfunctory use of the tracks for a few days in September, 2019 in an effort to revive its claim to use the abandoned tracks and have since parked cars on the tracks from time to time.

Allegheny County is very interested in seeing the vacant industrial site redeveloped and my understanding is that the rail easement is the only barrier to this development. The \$70 million project that will provide a substantial economic benefit to the City of Pittsburgh and the region including construction jobs, enhanced tax base with over \$3 million in sales tax during construction and \$1.6 million in annual real estate tax, increased urban density with approximately 500 residents paying the 3.07% state income tax and 3% City income tax in addition to federal income tax, and heightened customer base for local businesses. In order for the Greystar project to begin, CSX must acknowledge that its easement on the property has terminated by its terms. It is our hope that you will look into this matter as soon as possible and let us know how the easement issue can be quickly resolved so that the project can move forward.

Sincerely,

Rich Fitzgerald, Allegheny County Executive

OFFICE OF THE COUNTY EXECUTIVE
101 COURTHOUSE • 436 GRANT STREET • PITTSBURGH, PA 15219
PHONE (412) 350-6500 • FAX (412) 350-6512
WWW.ALLEGHENYCOUNTY.US

HARRY A. READSHAW, MEMBER

☐ 221 IRVIS OFFICE BUILDING
P.O. BOX 202036
HARRISBURG, PENNSYLVANIA 17120-2036
PHONE: (717) 783-0411
FAX: (717) 705-2007

☒ 1917 BROWNSVILLE ROAD
PITTSBURGH, PENNSYLVANIA 15210
PHONE: (412) 881-4208
FAX: (412) 886-2077



COMMITTEE:

PROFESSIONAL LICENSURE
DEMOCRATIC CHAIRMAN

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

October 31, 2019

CSX Transportation
500 Water Street
Jacksonville Florida 32202

RE: Atlas Materials Recycling/Greystar

Dear Sir or Madam:

It is our understanding that a new residential development is being planned at the former Atlas Materials Recycling Corporation (currently vacant) on the Southside of the City of Pittsburgh. With regard to how this development relates to CSX, there are railroad tracks along one side of the building which are the last 400 feet of a 1600-foot spur previously used by the railroad to deliver box cars for the loading/unloading of materials. Atlas materials had been in operation from the 1940's to 2017, when it sold and closed its facility. Rail service was initially provided to the facility by the Pittsburgh & Lake Erie RR and then beginning in 1992 by CSX. The portion of the track next to the building has never been used for any purpose other than the loading/unloading of rail cars for the now closed business and there has been no use of those tracks since 2017.

With this as background, Atlas has an agreement to sell its property to a real estate developer, which plans to demolish the warehouse and construct apartments. In order for the project to begin CSX must terminate an easement on the property which you currently hold. Unless the matter related to the easement is resolved the residential development cannot begin.

As you may be aware, the Southside neighborhood of Pittsburgh is a growing area and the need for housing is significant to complement ongoing economic investments. It is our hope that you will look into this matter as soon as possible and let us know how CSX proposes that the easement issue can be quickly resolved so that the project can move forward. Thank you for your immediate attention to this matter.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "Harry Readshaw", with a long horizontal flourish extending to the left.

Harry Readshaw
Chairman, Professional Licensure
36th Legislative District
Commonwealth of Pennsylvania



COREY O'CONNOR

Councilman, City of Pittsburgh - District 5

CSX Transportation
500 Water Street
Jacksonville, FL. 32202

November 14, 2019

To Whom It May Concern:

It is my understanding that a new residential development is being planned on the site of the former Atlas Materials Recycling Corporation on the South Side of the City of Pittsburgh. There are currently railroad tracks along one side of the building which have not been used since 2017 when Atlas Materials sold and closed its facility. In order for this significant project to move forward, this situation must be resolved

Atlas has an agreement to sell its property to a real estate developer with plans to demolish the warehouse and construct apartments. Before the developer can begin construction, CSX must terminate the easement on the property which you currently hold.

As you may be aware, the South Side neighborhood of Pittsburgh is a rapidly growing area and the need for housing is imperative considering ongoing economic investments. It is my hope that you will look into this matter as soon as possible and let us know how the easement issue can be quickly resolved.

I am happy to speak to you about any concerns you might have. Please do not hesitate to contact me by phone at 412-255-8965 or by email at corey.oconnor@pittsburghpa.gov.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Corey O'Connor".

Corey O'Connor
Pittsburgh City Council

7

VERIFICATION

I, Lester Parker, verify under penalty of perjury that I am the President of Atlas Land and Building Corporation and Atlas Materials Recycling Corporation (collectively, Atlas), that I have read the foregoing Petition for Declaratory Order and know the facts asserted therein with respect to Atlas, and that the same are true as stated.



Lester Parker

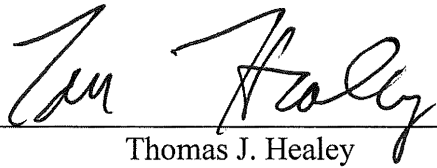
Dated: February 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2020, a copy of the foregoing

Petition for Declaratory Order was served by overnight delivery upon the following:

Kim R. Bongiovanni
CSX Transportation, Inc.
500 Water St # J-150
Jacksonville, FL 32202-4423



Thomas J. Healey