

CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936
FAX: (206) 546-3739

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Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Consolidated Rail Corporation – Abandonment
Exemption – in Hudson County, NJ, AB 167 (Sub-no.
1189X) and related cases AB 55 (Sub-no. 686X) (CSX
discontinuance exemption) and AB 290 (Sub-no. 306X)
(NS discontinuance exemption)

Dear Ms. Brown:

On behalf of City of Jersey City (“City”), Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (“Coalition”) and Rails to Trails Conservancy (“RTC”) (collectively, “City et al.”), I am submitting herewith City et al.’s memorandum explaining Harim’s why Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc. (“CSX”), and Norfolk Southern Railway Company (“NS”) must be found to have engaged in an unlawful de facto abandonment/discontinuance in violation of (inter alia) 49 U.S.C. 10903 and Section 110(k) of the National Historic Preservation Act (“NHPA”), 54 U.S.C. 306113. In order to protect the agency’s jurisdiction as well as to meet the requirements of Section 110(k), the abandonment authority sought by Conrail and the discontinuance authority sought by its parents must be denied. The memorandum is supported by a volume of exhibits (“Appendices”) also submitted herewith.

As a housekeeping matter, attached to this letter please find an electronic copy of the verification of Mr. Day’s Verified Statement (Appendix I in our volume of Appendices).

By my signature below, I certify service by posting a copy of this pleading with USPS on the date of this letter by e-service (to email addressed on the agency's docket) or by USPS, postage pre-paid, first class (or equivalent) addressed to all individuals described as "parties" on the agency's docket appearing on the agency's website.

Thank you for your assistance in this matter.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'C. Montange', with a stylized flourish extending to the right.

Charles Montange
for North Coast Rail Authority

Att: memorandum, Appendices, verification for Mr. Day's statement

cc (all with attachments): all parties per STB service list

BEFORE THE SURFACE TRANSPORTATION BOARD

Consolidated Rail Corporation –)
Abandonment Exemption –) AB 167 (Sub-no. 1189X)
In Hudson County, NJ)

CSX Transportation, Inc. –)
Disc. Ex. –) AB 55 (Sub-no. 686X)
In Hudson County, NJ)

Norfolk Southern Railway Co. --)
Disc. Ex. --) AB 290 (Sub-no. 306X)
In Hudson County, NJ)

Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc.
 (“CSX”) and
Norfolk Southern Railway Company (“NS”) Must Be Found
in Violation of Section 110(k)
of the National Historic Preservation Act

Introduction

City of Jersey City (“City”), Rails to Trails Conservancy (“RTC”), and
Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition
 (“Coalition”) (collectively “City et al.”) collectively make this response to the
decision by the Surface Transportation Board (“STB”), served May 19, 2021, in
these proceedings. That decision calls for opening “Submissions” by June 18,
2021, relating to the application of Section 110(k) of the National Historic
Preservation Act (“NHPA”), 54 U.S.C. 306113, to the unlawful de facto

abandonment engineered by Consolidated Rail Corporation (“Conrail”) ¹ in connection with the Harsimus Branch in Jersey City, New Jersey.

According to STB, the agency is now addressing Section 110(k) because the Advisory Council of Historic Preservation (“ACHP”) “has requested that the Board determine whether Conrail violated Section 110(k) and, if necessary, consult with ACHP regarding Section 110(k), before completing the Section 106 process.” Dec. at 2-3.² City et al. strongly supported ACHP’s request.³

¹ Conrail is owned by CSX and NS, and the officers of CSX and NS in the past have comprised the Conrail board. STB would not permit discovery on this issue. CSX and NS are seeking STB discontinuance licensing in these proceedings. City et al. shall use the term “Conrail” to apply to CSX and NS as well as Conrail unless the context makes clear that only Conrail itself is intended.

² The May 19 Decision intimates that parties raised the question of 110(k) only during the section 106 consultation process. That is incorrect. City raised section 110(k) at the inception of the AB 167-1189X proceeding. E.g., Letter, C. Montange to A. Quinlan, et al., AB 167-1189X and related proceedings, dated/filed Jan 20/21, 2009 (link to STB website copy --<https://dcms-external.s3.amazonaws.com/MPD/78432/85257CA7006C955B8525754500721622/224371.pdf>

and Exhibits thereto (link to STB website copy -- <https://dcms-external.s3.amazonaws.com/MPD/78432/85257CA7006C955B8525754500737084/224372.pdf>

The New Jersey State Historic Preservation Officer similar raised 110(k) concerns. Letter, D. Saunders to A. Quinlan, “consultation comments” in AB 167-1189-X, dated/filed Jan. 26, 2009, at p.2 (link to STB website copy -- <https://dcms-external.s3.amazonaws.com/MPD/78432/85257CA7006C955B8525754A0079D744/224414.PDF>) .

³ The agency’s environmental and historic preservation staff has informed City et al. that it was not empowered or equipped to investigate/examine section 110(k) issues. The agency’s Office of Environmental Analysis (“OEA”) has also repeatedly taken the position that it cannot afford any meaningful relief under Section 106 against Conrail for the railroad’s unlawful de facto abandonment and

Notwithstanding multiple inquiries and requests (dating back at least 17 years), STB has never itself investigated Conrail's unlawful de facto abandonment to collect information on relevant issues. City et al. therefore arranged for two experienced rail attorneys (Stephen Day and Thomas McFarland), the first of whom is a former Interstate Commerce Commission ("ICC") enforcement attorney who handled similar situations for the ICC, to examine the record. Both conclude that based on the record, Conrail knowingly (intentionally) engaged in an unlawful de facto abandonment. That is the only reasonable and supportable conclusion in the circumstances. Conrail's knowing and intentional unlawful abandonment encompassed intentionally, significantly, and adversely impacting historic assets prior to compliance with Section 106. This is a blatant violation of Section 110(k). The agency is therefore obligated to deny abandonment authority and to dismiss this abandonment proceeding. If the Board wishes to pursue the abandonment

destruction of historic assets. City et al. accordingly have repeatedly objected to STB's failure to apply Section 110(k) in this proceeding. As will be discussed herein, STB has ample remedies available (including but not limited to denial of abandonment authorization) available to enforce Section 106 and protect its regulatory jurisdiction. The agency's approach has burdened the parties (and the agency) due to its de facto refusal to acknowledge any remedial authority other than documentation of what remains of the Branch after Conrail has destroyed or adversely impacted most of it, and therefore is totally unrelated to any meaningful mitigation or relief from the unlawful de facto abandonment. The OEA's limited view well illustrates why the whole Section 106 process will be largely meaningless if relief in the form of denying the abandonment license is appropriate against Conrail under Section 110(k).

license, it must comply with the requirements of 36 C.F.R. 800.9(c)(2) in consultation with ACHP. As indicated herein, such further consultation must conclude with STB imposing conditions on any effective abandonment that reasonably restore the Harsimus Branch to its status quo before the unlawful de facto abandonment and especially before Conrail's purported sale of portions of the Harsimus Branch, including historic assets, to third parties. Otherwise, the license should be denied.

I. Background

A. Section 110(k) and Applicable Implementing Regulations

In general, a federal license application such as a railroad abandonment license cannot be granted prior to compliance with NHPA Section 106, 54 U.S.C. 306108.⁴ Section 106 requires, inter alia, every federal agency to consider the impacts of its licensing actions on historic property before granting the license, in consultation with the State Historic Preservation Officer ("SHPO") and the federal ACHP. Section 106 is thus an integral part of all federal rail licensing processes,

⁴ Section 106 provides as follows: "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking."

especially in respect to abandonments, including statutory abandonments under 49 U.S.C. 10903, petitions for exemption under 49 U.S.C. 10502, and class exemptions under 49 C.F.R. 1152.50 (involved here).

Because license applicants attempted to evade Section 106 by destroying or alienating historic assets prior to applying for a federal license that might otherwise impact them, Congress adopted Section 110(k) of the NHPA, 54 U.S.C. 306113. Section 110(k) requires agencies to deny any license where the applicant has intentionally evaded Section 106 by significantly adversely affecting historic property in advance of seeking a license, a phenomenon sometimes called “anticipatory demolition.” If the agency nonetheless wishes to consider granting a license in a case involving an anticipatory demolition, it must consult with ACHP on whether circumstances justify that action. Section 110(k) provides as follows:

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of [section 306108 of this title](#) [i.e., “Section 106”], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.

The consultation process is governed by an ACHP regulation codified at 36 C.F.R. 800.9(c)(2). That regulation states as follows:

When an [agency](#) official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the [agency](#) official shall notify the [Council](#) and provide documentation specifying the circumstances under which the adverse [effects](#) to the [historic property](#) occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty [days](#) of receiving the [agency](#) official's notification, unless otherwise agreed to by the [agency](#) official, the [Council](#) shall provide the [agency](#) official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The [agency](#) official shall consider the [Council](#)'s opinion in making a decision on whether to grant assistance to the applicant, and shall notify the [Council](#), the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

B. Knowledge/Intentionality in a Corporation

Section 110(k) speaks of “intentional” avoidance of NHPA section 106 requirements, and “intentional” adverse effects on historic property. An action is intentional either (a) when the actor acts with a purpose of producing a consequence, or (b) the actor acts knowing that the consequence is substantially certain to result. Knowing conduct includes conduct undertaken by the actor in “willful blindness” to the consequences of the conduct (i.e., the actor ignores or is indifferent to the consequences).⁵ Thus, in the case of a corporate actor, if it

⁵ Compare Crump, What Does Intent Mean?, 38 Hofstra L. Rev. 1059, 1064 (2010) with United States v. Jewell, 532 F.2d 697 (leading case on willful blindness in

knows (or should have known) that an action is unlawful and will bring a range of harms, it has intentionally caused those harms if it nonetheless takes the action.⁶

It is well-established that knowledge of a corporation is the sum of the knowledge of all of its employees, and the totality of what all of the employees know (or should have known) within the scope of their employment.⁷ The ignorance of one employee or officer does not excuse a corporation if others within the corporation knew or should have known better.

Contrary to Conrail's past representations, this railroad is not a novice or unsophisticated actor that inadvertently destroyed an historic artifact. Conrail is owned by two Class I railroads (NS and CSX), and both NS and CSX are directly involved in seeking discontinuance authority in tandem with the abandonment authority sought by Conrail. All are managed by experienced railroad employees. All know their companies operate in an industry in which entry, exit and transfers

criminal law) and In re Aimster, 334 F.3d 643, 650 (7th Cir. 2003) (civil law). Willful blindness (sometimes called ignorance of law or contrived ignorance) is a term used to describe a situation in which a person seeks to avoid civil or criminal liability for a wrongful act by intentionally keeping him or herself (or in the case of a corporation itself) unaware of facts that would render him, her, or it liable or implicated. It is especially hard for corporations to pretend to lack of knowledge given the "collective knowledge" doctrine. See text p. 6 and note 6.

⁶ E.g., 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm, section 1 cmt. C, illus 2-3 (intentional action by company even if it claims it wanted to make money and regretted the harms its actions produced).

⁷ See Appendix I, Stephen Day Verified Statement, at 12 [**Appendices ("App.")** at 013), citing United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

of property are subject to regulation; all are advised by regulatory counsel. None can assert purported ignorance of railroad law. None credibly claim unawareness of the presence of historic assets, or of the status of the Harsimus Branch as a line. Conrail knew (or should have known) that rail abandonment authority was required for lines, and that it could not arbitrarily re-classify a line into spur status and on that ruse sell it without first seeking STB abandonment licensing. Moreover, Conrail unquestionably knew the line contained historic assets and that it was therefore evading Section 106 by its unlawful de facto abandonment of the Harsimus Branch.

II. Summary of Position of City et al.

1. Since acquisition of the property via a deed recorded in 1978, Conrail knew or should have known the Harsimus Branch was a line of railroad subject to STB abandonment authority, an integral part of which was compliance with NHPA Section 106. Thus, Conrail knew or should have known that removal of infrastructure and sale of the line prior to completion of an ICC or STB abandonment licensing proceeding and prior to completion of the Section 106 process was unlawful at all relevant times.

2. Conrail knew or should have known that the only way to convert a line (the abandonment of which is regulated) to spur status (the abandonment of which is

not regulated) is by successfully completing an ICC or STB abandonment proceeding.

3. Conrail knew or should have known that there were historic assets on the Harsimus Branch or adjacent to the Branch protected under Section 106, and that destruction of infrastructure and sale of historic assets for development would significantly adversely impact historic assets in and adjacent to the Branch.

4. Knowing (1), (2), and (3) above, Conrail nonetheless evidently unilaterally purported to abandon the line without any legal authority in 1994, removed infrastructure in or around 1996, and then sold eight blocks of the Branch containing the historic six-block-long Harsimus Embankment in 2005, all without compliance with Section 106. Conrail's declared motivation was to enhance "real estate value" by evasion of historic regulation. The Embankment by the time of the sale was specifically listed on the State Register, and determined eligible for the National Register of Historic Places, and thus specifically protected by Section 106. The developer (Steven Hyman d/b/a 212 Marin Boulevard LLC, et al.) to whom Conrail sold the Branch immediately began the process of ripping out further historic structure from the Branch and consistently evidenced an intention to significantly adverse impact the Embankment and adjoining historic districts and sites. Loss of federal jurisdiction itself will therefore have such a result given the sale.

5. These facts establish that Conrail committed a clear and classic violation of Section 110(k). Accordingly, absent a finding of circumstances that – after consultation with ACHP -- nonetheless justify granting an abandonment license, Conrail’s application for abandonment must be denied or dismissed with prejudice.

There are no circumstances that justify granting Conrail an abandonment license notwithstanding its violation of Section 110(k).

However, STB could re-establish status quo before Conrail’s illegal actions by voiding all Conrail’s deeds out, as a pre-condition to abandonment effectiveness.⁸

⁸ If the abandonment were so conditioned and a public use condition were so issued, then City would have an unburdened opportunity to employ 48 N.J.S.A. 12-125.1 to acquire the property from Conrail at the price Conrail agreed to accept from the developer, and otherwise eminent domain parcels as appropriate. Conrail and/or the developer in the past have claimed that both remedies are preempted. But City proposes to employ section 12-125.1 and state law eminent domain remedies post-abandonment, and both are thus fully constitutional under Hayfield N. R. Co. v. Chicago & N.W., 467 U.S. 622 (1984) and Chicago & N.W. Transp. Co. v. Kalo Brick & Tile, 450 U.S. 311 (1981). 48 N.J.S.A. 12-125.1 affords state and local governments a right of first refusal and to match contracts with developers once the property is no longer subject to federal preemption. Such rights are particularly appropriate when used to acquire property, such as otherwise-to-be abandoned railroad corridors, which offer “unique pathways” in and between cities, and which tend to fragment on STB-authorized abandonment. Note, Public Rights of First Refusal, 129 Yale L.J. 812, 834 (2020) (the Note references 48 N.J.S.A. 12-125.1). Jersey City has sufficient funds dedicated to the purchase of the line under 48 N.J.S.A. 12-125.1 (same price as the developer paid). It is also noteworthy that Jersey City authorized eminent domain against Conrail for the embankment parcels prior to Conrail’s unlawful sale of those parcels to the developer. The City has not yet filed any eminent domain or similar proceedings because the line was never authorized for abandonment and remains under the Board’s preemptive regulatory authority pursuant to 49 USC 10501(b). See Kalo Brick, supra.

If STB conditioned abandonment authority on a restoration of the property to its status quo before Conrail's unlawful de facto abandonment, and imposed a public use condition barring transfer of the property to non-public interest entities for 180 days post-abandonment effectiveness pursuant to 49 U.S.C. 10905,⁹ then the abandonment license need not be denied. The Section 106 process could move forward, and upon completion, City et al. could avail themselves of the state and federal preservation remedies that Conrail unlawfully evaded and subverted. If an abandonment authorization were so conditioned, then the consequences of Conrail's unlawful action would have been at least partially mitigated,¹⁰ and

⁹ 49 U.S.C. 10905 provides as follows: "When the [Board](#) approves an application to abandon or discontinue under section 10903, the [Board](#) shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass [transportation](#), conservation, energy production or transmission, or recreation. If the [Board](#) finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the [Board](#). The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes."

¹⁰ Full mitigation would require actual transfer of the historic properties to the City for uses consistent with historic preservation, or require the historic properties to be covered by covenants that otherwise ensure preservation of the property. In addition, full mitigation would address Conrail's unlawful removal of infrastructure in or around 1996, insofar as that structure was potentially historic or was part of a historic district or eligible historic district (as it now clearly is and was) and could have been acquired by the City for preservation as a historic site, future park, trail, or light rail).

proceeding with an abandonment authorization subject to those terms may be justified. Without a return to status quo, there is simply no mitigation at all and abandonment authority must be denied.

III. Conrail Violated Section 110(k)

A. Conrail Knew or Should Have Known the Harsimus Branch Was a Line of Railroad under STB Abandonment Jurisdiction

Conrail has stipulated that it will not contest the fact that the Harsimus Branch is a line of railroad subject to STB abandonment jurisdiction.¹¹ In all events, that fact has been conclusively established in summary judgment proceedings.¹²

¹¹ See City of Jersey City v. Consolidated Rail Corporation, 968 F.Supp.2d 302 (2013), summarily affirmed, D.C. Cir. No. 13-7175, filed Feb. 19, 2014, 2014 U.S.App. Lexis 3067, 2014 WL 1378306.

¹² Id. City et al. have repeatedly explained that all available evidence has conclusively demonstrated that the Harsimus Branch was a line of railroad for which abandonment must be pre-authorized under 49 USC 10903(d), and not some forgotten track serving one or two shippers on some byway, that could constitute a “spur” outside this agency’s abandonment jurisdiction per 49 USC 10906. To take some of the more recent examples, see City et al.’s Comments filed in this proceeding (AB 167-1189X) on September 25, 2014 [link to STB filings website: <https://dcms-external.s3.amazonaws.com/MPD/17248/9ABB0D6FE1CB9E8085257D5E007284B7/236736.pdf>]; Objections to STB’s CREAR filed Dec. 4, 2019 at 14-15 [link to STB environmental filings website: <https://dcms-external.s3.amazonaws.com/MPD/74980/D3A7B2BE301DF7B5852584C600633BE0/Jersey%20--%20comments%20on%20CREAR%20Addendum%20Dec%204.pdf>] . All documents so linked are incorporated herein. See also Comments and Exhibits referenced in note 2, *supra*, already incorporated herein. Key documents are set forth in the **Appendices** filed herewith.

The only question for purposes of Section 110(k) is whether Conrail is chargeable with knowledge that the line was a line when it unlawfully engaged in a de facto abandonment. Because STB has not provided for any investigation of that issue, City et al., in response to this Board's May 19 Decision, arranged for a former ICC enforcement attorney (Stephen Day) who was familiar with investigations of unlawful de facto abandonments¹³ to review the record in this case and in effect to investigate the matter for the agency based on the record to date.¹⁴ Mr. Day's Verified Statement is attached as Appendix I (**App.** at 001, et seq.).

Mr. Day began by observing that it is "axiomatic" that once a line of railroad is devoted to common carrier service, it remains a line of railroad until authorized for abandonment. Day V.S. at 5, **App.** 006). Mr. Day explained that that an investigator would first look to see if an abandonment proceeding had been completed for the property at STB. None had. Day V.S. at 6, **App.** at 007. Mr. Day does not have to hypothesize what an investigator would conclude as to line

¹³ For example, Mr. Day was a key STB enforcement officer in Rails to Trails Conservancy – Petition for Declaratory Order, F.D. 31292 (June 21, 1988). That proceeding involved an unlawful de facto abandonment under the guise of a spur designation, as here.

¹⁴ Mr. Day subsequently worked in private practice in rail and other transportation cases, ultimately serving as general counsel and then president at American Fast Freight, Inc. He is now retired. City et al. is submitting his Verified Statement as an expert opinion on the matters discussed therein.

status, because STB not only concluded the line is a line but also so have the Courts based in part on Conrail's own stipulation. In particular, although the developer (and Conrail) contrived a jurisdictional dispute over whether STB (versus the "Special Court") had power to determine status of Conrail lines,¹⁵ the issue of line status is now moot for the line has been determined conclusively to be a line (and Conrail has stipulated it will not contest that status). Day V.S. at 6-7 (**App.** at 007-8), citing City of Jersey City v. Consolidated Rail Corp., *supra*, 968 F.Supp. 2d 302 (2013). Mr. Day indicates that the remaining question is whether Conrail intentionally engaged in an unlawful de facto abandonment, which an ICC/STB investigator would address for purposes of evaluating enforcement action (both civil and criminal). Day V.S. at 8 (**App.** at 009). Mr. Day states that an investigator based on the record to date would conclude that Conrail acted with

¹⁵ This agency twice determined the Harsimus Branch was a line (Decisions in F.D. 34818, served Aug. 9, 2007 and Dec. 19, 2007, but this determination was vacated on jurisdictional grounds by the D.C. Cir. at 571 F.3d 13 (2009). In the "Special Court" (now the USDC for DC), the developer and Conrail attempted to dismiss the concerns of City et al. on ground that City et al. lacked standing because they claimed City et al. had suffered no "injury." This further ruse was thwarted by the D.C. Circuit in City of Jersey City v. Conrail, 668 F.3d 741 (D.C. Cir. 2012) (City et al. were injured and have standing). When the case returned to "Special Court," the developer indicated concurrence that the Harsimus Branch was a line of railroad. The parties then stipulated that the line was subject to STB abandonment jurisdiction, and developer also sought to amend its pleadings to accuse Conrail of fraudulent misrepresentation to the developer, STB, City and the Courts insofar as Conrail claimed the Harsimus Branch was a mere "spur." See Appendix VII (developer's allegations). The court granted summary judgment to City et al. See note 11.

knowledge. Mr. Day summarizes as follows (Day V.S. at pp. 9-10) (**App.** at 010-11):

“The following evidence bearing on corporate or individual knowledge I believe is most telling:

1. The line of railroad at issue was the former Pennsylvania RR main line until its transfer to Conrail.

2. The line of railroad at issue was conveyed to Conrail by the ‘Fairfax Leary’ deed which describes the property as ‘a line of railroad’. Attached as VSDAY Exhibit 1 [**App.** at 015 et seq.]

3. Conrail operated the line as a line of railroad and not as a spur or other non-ICC/STB jurisdictional track, and enjoyed substantial traffic over the line until about 1984.

4. Conrail Memorandum dated January 15, 1988 from J.W. Dietz addressing ‘Passaic & Harsimus Branch/Hudson St. Industrial’ which reviews declining traffic over the subject lines. It also states, as to the Harsimus Branch: ‘This suggests that an expedited abandonment may be possible if the remaining active customer(s) discontinue rail service.’ Attached as VSDAY Exhibit 2 [**App.** at 018 et seq.].

5. Conrail made an internal reclassification of the use of the Harsimus branch from a line of railroad to a ‘spur’ on April 14, 1994 (JC Op. Appendix I).

6. Transcript of a 2003 appearance before the Jersey City Council by Conrail’s Director of Real Estate, Robert W. Ryan and an attorney who admitted in their testimony that the Harsimus line had been used by Conrail for rail purposes and had not been sitting idle forever. VSDAY Exhibit 5, excerpts, at pp. 124-25 [**App.** at 048].

“I would also note [...] the statement made by Conrail President and CEO Timothy T. O’Toole in a letter to the New Jersey Department of Environmental Practices dated June 4 1999. (Copy in Appendix 3, Additional Supplemental Comments filed by the City and a copy is attached hereto for convenience as VSDAY Exhibit 3 [**App.** at 020 et seq.]). In this

letter Conrail's president gives the motive for Conrail's treatment of this line of railroad where he states: 'Because these properties no longer have a railroad purpose, Conrail wishes to realize their real estate value.'" [App. at 022.]

Mr. Day then explains that on the basis of this evidence and the law, he "would have made a recommendation for referral for criminal prosecution..." Day V.S. at 12 (App. at 013).

Mr. Day concludes (Day V.S. at 12-13, App. at 013-14):

"it is my opinion that Conrail (the corporation) knew or should have reasonably known – at all relevant times that the Harsimus Embankment was a railroad line; that it was subject to the Surface Transportation Board's abandonment authority; that part of that authority required compliance with NEPA and NHPA as part of the abandonment process prior to alienation of the line for non-rail purposes, and that an internal clerical designation could not defeat or evade the STB's jurisdiction. The evidence of record further indicates that Conrail evaded the agency's abandonment authority due to frustration that the historic nature of some of the property was conflicting with the railroad's efforts to maximize real estate values."¹⁶

B. Conrail Knew or Should Have Known It Could Not Evade STB
Abandonment Regulation Via Arbitrary Assertion

Conrail has a legal department, operates in a regulated industry, and must be charged with knowledge of railroad law and therefore that a line once a line remains a line until authorized for abandonment by this Board.

¹⁶ Mr. Day elsewhere notes that it is understandable that a CEO of a for-profit entity would wish to maximize real estate values from non-performing assets, but observes that this does not justify evasion of STB regulation and public interest statutes. Day V.S. at 10-11 (App. at 011-12).

A “line of railroad” cannot lawfully be recategorized a spur by a railroad and abandoned on that basis. It forever requires prior abandonment authority before it may be converted to non-rail use, even if rail use has stopped and facilities removed. E.g., Oregon Shortline Abandonment, 267 ICC 633, 635 (1947); Old Colony Railroad Co. et al. Trustees Abandonment, 224 ICC 681, 682-83 (1938); Chelsea Property Owners – Aband. – Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in NY, NY, 8 ICC2d 773 (1992), aff’d sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994). See also Phillips v. Denver & R.G. RR, 97 F.3d 1375 (10th Cir. 1996) (no de facto abandonment). Another way to view the matter is that the only way to convert a line into an unregulated spur is to abandon it. Conrail must be charged with knowledge of that legal principle.

Conrail at its inception received the Harsimus Branch as a “line of railroad.” **App.** at 006 (excerpt of Leary deed, recorded Oct. 12, 1978). It knew or should have known that the Harsimus Branch was a line since acquisition. It has thus known all along it needed an abandonment authorization to convert it into “real estate value,” which was Conrail president O’Toole’s stated objective.

City et al. supply herewith an expert Verified Statement of Thomas F. McFarland (Appendix II, **App.** at 058 et seq.), previously submitted as part of an environmental comment in this proceeding on October 16, 2017. Mr. McFarland

had been practicing rail abandonment law for 52 years at that point, and had handled over 100 cases, and had experience distinguishing spurs from lines. Mr. McFarland notes that ICC decided that “Highline case” (Chelsea Property Owners, *supra*) in 1992. He quoted language in the decision indicating that “a carrier cannot escape our abandonment jurisdiction simply by terminating service or removing track...” McFarland V.S. at 5, **App.** 063. He explained that

“[i]t would not be credible for Conrail to contend that it was not aware of the determination that the Highline is a railroad line when it conveyed the Embankment to the LLCs. That determination was made in regard to a Conrail property located in the same general territory as the Embankment in a proceeding in which Conrail was an active party. Like the Embankment proceeding, the Highline case generated widespread publicity because it involved an intense dispute over a potentially expensive removal of an elevated Conrail right-of-way.... It is my understanding that Conrail’s General Counsel, Jonathan Broder, and Conrail’s outside railroad counsel, John Fiorilla, both held similar positions in 1992 when the Highline case was decided and when the Embankment was conveyed to the LLCs.”

McFarland V.S. at 5 & 6 (**App.** at 063-64). Mr. McFarland specifically reviewed Mr. Fiorilla’s allegations that the Harsimus Branch was a spur as made to the LLCs. Mr. McFarland stated:

“No legal authority nor reasoning was provided by Mr. Fiorilla in support of the allegation. Mr. Fiorilla is a longtime railroad attorney and representative of Conrail. He was surely familiar with the principle of ‘once a railroad line, always a railroad line’ that was applied in the Highline decision, a case with which he was undoubtedly familiar. Mr. Fiorilla surely knew, or had good reason to know that his allegation, that the Embankment was a spur, was false.”

Id. at 6 (**App.** at 064) (emphasis in the original). Mr. McFarland dismisses all Conrail’s other self-serving assertions on similar grounds, as well as Conrail’s reliance (in environmental filings) on language in a deeply flawed state court decision involving Conrail and the developer’s title insurance company (the state court *inter alia* was evidently was utterly unaware of the once a line, always a line principle of federal railroad law). *McFarland V.S.* at 6 & 7 (**App.** at 064-65). Mr. McFarland concludes that

“I strongly believe that when Conrail conveyed the Embankment to the LLCs in 2005, Conrail knew or had good reason to believe that the Embankment was every bit as much a railroad line as its Highline was determined to be only a short time earlier.”

Id. at 8 (**App.** at 066).

In all events, this agency has specifically stated that dismantling a line pre-abandonment is unlawful. See STB Policy Statement on Consummation of Rail Line Abandonments..., Ex Parte 678, served April 23, 2008, slip at 4 (“2008 Policy Statement”): “In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful.” (Emphasis added.)

Conrail thus knowingly engaged in conduct that has significantly adversely affected historic assets, and this Board has determined that such conduct is unlawful.

C. Conrail Knew or Should Have Known that the Harsimus Branch Contained the Historic Embankment and Was Surrounded by Sites and Districts Protected under Section 106

Embankment. Had Conrail acted pursuant to Rule of Law (i.e., initiated an abandonment proceeding before destroying or attempting to destroy the Harsimus Branch to obtain “real estate value”), the historic nature of the Embankment would have been immediately identified by interested parties and confirmed by NJ SHPO in the section 106 process.

Even given Conrail’ evasion, NJ SHPO informed Conrail that the Harsimus Embankment was listed on the State Register of Historic Places by letter in 1999. State listing is equivalent to National Register eligibility. Assets so designated are protected under Section 106. Conrail’s president O’Toole acknowledged that the assets had been so designated by objecting in the same year that the historic designation interfered with Conrail’s efforts to maximize real estate values from them. See Day VS Exhibit 3 (**App.** at 021-22). Conrail thus clearly had knowledge of the historic nature of the six-block-long Embankment long before it purported to sell same to a developer in 2005. Indeed, Conrail argued that it had demolished enough structure relating to the Embankment so it should not be

deemed historic. Conrail's president stated to NJ SHPO that "[i]n or about 1996, Conrail removed the steel bridges, tracks and ancillary structures and equipment" such that the Embankment parcels were no longer physically connected. He expressed the opinion that the Embankment no longer "served [any] railroad purpose or other practical or useful function." He stated that Conrail wished to "realize [the] real estate value" of the Embankment. Conrail complained that the State Register listing interfered with its efforts to sell the property to the Jersey City Redevelopment Agency (JCRA) because no government entity could alter a listed site without approval from the New Jersey Commissioner of Environmental Protection, and this would "substantially reduc[e] [the Embankment's] present value." **App.** at 021-22. In short, he explained Conrail was demolishing (significantly adversely affecting) historic assets without STB abandonment authorization in order to make more money, and Conrail viewed historic designation as interfering with that goal. This is not just an admission of significant adverse impact by Conrail, but an admission of an intent to evade Section 106. It is hard to imagine how it could be more clearly expressed.

Surrounding historic districts/sites. The Harsimus Branch is surrounded by "historic districts" listed on the National Register of Historic Places and therefore covered by Section 106 (namely Hamilton Park Historic District, listed 1/25/1979, and Harsimus Cove Historic District, listed 12/9/1987). Other historic districts

listed on the National Register are nearby (e.g., Paulus Hook Historic District, listed 6/21/1982; Van Horst Park Historic District, listed 3/5/1980). See https://en.wikipedia.org/wiki/National_Register_of_Historic_Places_listings_in_Hudson_County,_New_Jersey. Conrail thus knew or should have known at all relevant times that its unlawful de facto abandonment of the Harsimus Branch would implicate and likely significantly and adversely impact historic districts and other historic assets. In any event, in the same transcript in which Mr. Day notes that Conrail's Ryan and outside attorney Fiorilla told the Jersey City Council (in January 2003) that the Harsimus Branch had been actively used for rail purposes by Conrail (thus demonstrating that Conrail knew or should have known the Harsimus Branch was a line not a spur), there is also ample evidence that Conrail was informed about not just the Embankment but also historic districts surrounding the Branch that would be adversely impacted by abandonment. See VS Day Exhibit 5 (**App.** at 037 et seq): p. 89, **App.** at 039 (Embankment "irreplaceable"); p. 95, **App.** at 041 (allusion to Hamilton Park and Harsimus Cove historic districts on both sides of the Embankment); p. 97, **App.** at 041 (Harsimus Cove); p. 98, **App.** at 042 (Embankment is between two historic districts); p. 99, **App.** at 042 (historic buildings); pp. 104-05, **App.** at 043 (Mr. Ryan for Conrail acknowledges that Conrail is successor to the Pennsylvania Railroad "whose history is trying to be protected here"). But there is more. The Conrail agents reaffirm (104-05, **App.**

at 043) O'Toole's point in 1999 that historic landmark designation "takes too much property away" and that Conrail's goal is to "put it back into productive use." Ryan indicates that to this end Conrail has sought "to work with developers". At p. 106, **App.** at 044, Mr. Ryan complains that historic designations have interfered with working with developers and turned the City away from "making redevelopments on the property". At p. 107, **App.** at 044, Mr. Ryan reiterates that "Conrail's interest is ... trying to realize the value of the real estate, turn this property back to the community, let it become a source of tax revenues...." At p. 110, **App.** at 045, Conrail attorney Fiorilla expresses concern those historic designations have "greatly reduced" the value of the property. There are additional statements but Conrail's knowledge, intent, motive and purpose is clear from the above.¹⁷

¹⁷ In addition to Conrail's admission that historic designations were getting in the way of its business interests, and that it felt that it had substantially adversely impacted the historic assets enough so they should be regarded in effect as destroyed and no longer historic, the record has additional expert opinion that loss of federal jurisdiction in this case will have substantial adverse impacts on historic assets involved herein. See, e.g., Comments by City et al. on CREER, AB 167-1189X, filed April 25, 2019, annexing expert Verified Statements by Kaese/Zakalak/Kratz (**App.** at 153 et seq.) and Wrieden/O'Neill, website pages 78 et seq) [link to STB website -- <https://dcms-external.s3.amazonaws.com/MPD/74980/75B75A43656C30B9852583F50074A837/EI-26475.pdf>]. City et al. hereby incorporate this filing herein and attach the Kaese, et al. V.S. as Appendix XI (**App.** at 153 et seq.) for the convenience of the Board.

Under the applicable “collective knowledge” doctrine (United States v. Bank of New England, supra), Conrail thus clearly knew of the historic nature of the Embankment and its environs before intentionally selling off the key historic asset in the line without any abandonment authorization. The foregoing evidence conclusively demonstrates that Conrail subverted STB regulation and Section 106 compliance in a quest for more profit from real estate sales to developers. It also conclusively demonstrates that Conrail thought it had sufficiently significantly adversely affected historic assets to the point they should no longer even be deemed historic.

D. The License Must Be Denied

In light of the clear violation of Section 110(k), STB may not authorize abandonment of this line. There are currently no ameliorating circumstances to alter this conclusion. As Mr. Day indicates, the railroad should have behaved in accordance with rail law and is charged with knowledge of that law but failed to act in accordance therewith.

Exacerbating matters, Conrail was specifically on notice of the City’s request for proof of abandonment authority or that none was required at the time of the sale. Compare Letter, J. Curley to J. Fiorilla, June 7, 2005 (requests evidence of an abandonment license) (**App.** at 147) with Letter, J. Middleton to J. Fiorilla, June 28, 2005 (seeks proof that no abandonment license was required when Conrail

claimed to have abandoned the line in 1994 “pursuant to federal law” not requiring a license) (**App.** at 150).¹⁸ Conrail’s attorney Fiorilla advised Mr. Curley in response to his June 7 letter that Conrail had abandoned the property in 1994 without STB authority. **App.** at 149. In response to the City’s follow-up letter asking for proof that no abandonment authority was required, Conrail instead rushed the unlawful sale to the developer. By letter dated July 18, 2005, Fiorilla for Conrail informed Mr. Curley (the City’s eminent domain attorney) that Conrail had sold the properties on July 13, 2005 and “no longer has any interest actual or equitable in those properties.” Conrail never provided any proof that no abandonment authority was required. **App.** at 151-52. (The relevant correspondence is attached to Mr. Curley’s Certification contained in Appendix X (**App.** at 136, et seq.), and was originally submitted to STB with City et al.’s Comments filed Sept. 25, 2014.)

¹⁸ The City’s request for proof of abandonment authority or proof that none is required is not only an entirely reasonable request but also mandated under New Jersey title practice as provided in L. Fineberg, Handbook of New Jersey Title Practice, 2d ed. 2000, pp. 98-4 to 6; *id.* 3d ed., 2005, pp. 98-1 to 6, previously filed with STB and attached hereto as Appendix V, **App.** at 84, et seq. Furthermore, it is also necessary information in light of the fact that there are innumerable cases holding that state law eminent domain is preempted until a rail line is lawfully abandoned. *E.g., City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) (upholding STB preemption determination).

In the circumstances, this exchange of letters exhibits a failure on the part of Conrail's Ryan and Fiorilla to examine the status of the Harsimus Branch, despite the request of the City, corroborating that Conrail acted with knowledge or at least willful blindness to STB abandonment jurisdiction over the line. This further constitutes additional proof of intentional anticipatory demolition.

Conrail's conduct subsequent to the destruction of infrastructure and unlawful alienation of the Embankment has been devoid of any effort to remediate its misdeeds. The railroad instead signed an agreement (long kept secret) with the developer pledging to take all measures to secure the Embankment properties to the developer notwithstanding any subsequent STB proceedings.¹⁹ The railroad,

¹⁹ Memorandum of Understanding ("MOU") dated October 12, 2007 (a copy is attached as Appendix III, **App.** at 075-76), between Conrail and the developer, requiring Conrail to effectuate/confirm sale of property to developer, decline all public use or trail use conditions, and cooperate with the developer on "any necessary applications or reapplications with government authorities to develop the [Embankment]." The agreement was designed on its face to "maintain the benefit of the 2005 sale of the [Embankment]" for Conrail and the developer. Under the MOU, Conrail in essence contracted itself out to the developer to secure demolition of the Embankment only two months after this Board had found the Branch was a line requiring abandonment authorization (Decision, F.D. 34818, served August 8, 1977), and before Conrail even sought, much less obtained, such authorization. (A copy of the secret MOU was filed on 11/08/2012 by the developer in City of Jersey City v. Conrail, U.S.D.C. for D.C. 09-cv-01900 as an exhibit to a Declaration by the developer's counsel Daniel Horgan, and is part of Appendix IV of the Additional Supplemental Comments filed by City et al on Sept. 25, 2014 in AB 167-1189X.)

acting through its Vice President and General Counsel, joined in six demolition permit requests for all six blocks of the historic Embankment.²⁰

In response to a Conrail inquiry in a February 2008 letter associated with this abandonment proceeding, City formally advised Conrail that the City wishes lawfully to acquire the Harsimus Branch for mass transit and greenway purposes. See Letter, J. Healy (then Mayor) to J. Enright (then Conrail Associate General Counsel), dated March 4, 2008 (Appendix XIV, **App.** 209 et seq.). Conrail since that time has continued to thwart that objective. STB through its Office of General Counsel and Office of Environmental Analysis encouraged the parties to reach a negotiated solution, but in December 2020, Conrail abruptly and without explanation pulled out of settlement negotiations even after essentially all major issues had been resolved consistent with a term sheet Conrail had executed.

Nor can the developer plea that it is some sort of innocent purchaser who should be protected by STB. To the contrary, the developer knew from at least 1999 onward that he was pursuing an historic asset (the Embankment). Moreover, he at all relevant times was represented by New Jersey legal counsel. New Jersey attorneys dealing with real estate are charged with knowledge of New Jersey land title practice. For the benefit of title examiners and the public, that practice is

²⁰ Copies are attached as Appendix IV, **App.** 078-83. (These were originally supplied as Exhibits to Letter, City et al to STB, dated April 25, 2008.)

published. The applicable Manual requires title examiners prior to closing to obtain proof that Conrail property has received an abandonment authorization, or proof that none is required.²¹ The record indicates that rather than seeking proof of abandonment authority or that none was required, the developer and his agents instead elected to rely on Conrail's representation that the line was a "spur." The record is bereft of any indication the developer or his agents sought any evidence of an abandonment authorization (the only lawful way this line could be converted to spur status), or proof of spur status otherwise.

The developer subsequently confirmed that he was at least willfully blind in relying on Conrail's contrived spur representation. After the ruling in favor of Jersey City et al. in the D.C. Circuit in 2012 (see note 15), the developer, claiming to rely on research his attorney belatedly undertook,²² repudiated the contention

²¹ See Appendix V, **App.** 085-95 (L. Fineberg, Handbook of New Jersey Title Practice, 2d ed. 2000, pp. 98-4 to 6; *id.* 3d ed., 2005, pp. 98-1 to 6). (These were originally supplied in Appendix I to City et al.'s Comments filed September 25, 2014).

²² A copy of the explanation furnished by developer's counsel for his belated conclusion that the Harsimus Branch was a line is attached as Appendix VI, **App.** 97-106) (previously filed with STB). Mr. Horgan states that when he finally examined the issue for the developer, he agreed that Conrail should have known all along that the Harsimus Branch was a line of railroad. Mr. Horgan cites evidence for that conclusion that was available to Conrail and the LLCs prior to the developer acquiring the property in 2005. That evidence is supplementary to and/or corroborates evidence relied on by City et al. and STB in concluding the line was a line. City et al. otherwise do not indorse any of Mr. Horgan's excuses for the developer's lack of knowledge until his advent on the scene. Those are all

that the Harsimus Branch was a spur. The developer instead claimed that Conrail knew or must have known that the Harsimus Branch was a line, not a spur, and that Conrail thus made a fraudulent misrepresentation to the developer, STB, the Courts and the City in its claims as to spur status.²³

City et al. of course agree with the developer that Conrail's claims that the Harsimus Branch was a mere spur were knowingly false for the reasons previously stated. However, the point is that the developer should also have (and by its own admission could have) ascertained this before he acquired the property. This, in retrospect, is a clear case of "willful blindness" on the part of the developer. He must therefore be viewed as complicit (in conspiracy) with Conrail in subverting STB abandonment jurisdiction and Section 106 in an effort, along with Conrail, to maximize real estate values.

To compound matters, and evidently as part of his strategy to maximize real estate values at the expense of historic preservation regulation, the developer launched a literal barrage of state lawsuits against City et al., including their attorneys, and including the undersigned. These lawsuits, known as SLAPP suits (Strategic Lawsuits Against Public Participation), were all aimed to make public

self-serving, erroneous, and ignore the willful blindness characterizing the actions of the developer and his then-counselors and agents.

²³ The developer's claim is set forth in Appendix VII, **App.** 108-17. (The claims were originally filed with STB in this proceeding in City et al.'s Notice filed Nov. 22, 2013, indicating relevance on Section 110(k) issues.)

advocacy too time-consuming and expensive to the public entities involved to sustain.²⁴ Meanwhile, the developer required his title insurance company (which had itself evidently failed to comply with New Jersey title practice requiring evidence of abandonment or proof that none was required) to pay the developer's litigation expenses (these payments are said to have equaled or exceeded \$5 million). In further evidence of his destructive intent, the developer demolished an historic stanchion even as City et al. were approaching this Board for relief. See V.S. of John J. Curley, Jan. 21, 2006, in STB F.D. 34818, attached as Appendix XII, **App.** 195-200, esp. 197-98. And in 2013 he offered the Embankment (both the stone walls and the fill) to Hoboken for flood protection purposes. See Stephen Marks V.S. executed June 10, 2014 and Rebuild by Design download dated 2/13/2014 attached as Appendix XIII, **App.** 201-08, esp. 203 & 206-08.

As Mr. Day indicates in his Verified Statement, there is nothing wrong with seeking to maximize real estate values relating to inactive rail property, so long as one does so in compliance with STB abandonment regulations, which are carefully crafted to protect not just shipper and railroad interests, but also the public interest in historic preservation, environmental protection, and alternative public uses for that property. However, in their effort to maximize real estate value, Conrail's

²⁴ The developer admitted to use of litigation for this purpose in his testimony quoted in Appendix VIII (use litigation "to bankrupt you all personally"), at **App.** at 121-22.

officers, employees and agents (including by their own statements Messrs. O'Toole, Ryan and Fiorilla) as well as the developer (Steven Hyman) knowingly ignored the law. Under the applicable "collective knowledge" doctrine, Conrail and the developer's various corporate entities have all acted with an intent to evade Section 106 and to significantly adversely impact (among other historic assets) the Section 106-protected Embankment. The public has been seeking relief from the unlawful de facto abandonment for at least 15 years before this agency. The unlawful result that Conrail and the developer sought to engineer through anticipatory demolition and frivolous SLAPP litigation should not be rubberstamped at the further expense of the public.

City et al. have also supplied evidence that the historic assets are better preserved if abandonment authority is denied than if Conrail's unlawful actions are rubberstamped by an effective abandonment authorization. See expert Verified Statements referenced and incorporated herein at note 17, esp. Kaese et al V.S. at 20-21, **App.** at 173-74 (STB OEA "no-action" alternative is not adverse impact of demolition by neglect) and Wrieden et al V.S. at 2. As the developer's actions unquestionably demonstrate, the developer sought to demolish the Embankment for private development purposes.

Simply allowing Conrail and the developer to proceed would permit Conrail's chosen developer to implement plans to demolish the Embankment to achieve

maximum profit. It would certainly remove any federal impediment to that goal, and undercut state and local remedies that were forged on the assumption the federal government would enforce federal abandonment law. Moreover, rubberstamping the unlawful de facto abandonment here would encourage railroads and developers to engage in further de facto abandonments and further anticipatory demolition, especially wherever there are or may be historic assets on a line.

E. In the Event of Further Consultation with ACHP

The plain language and the purpose of Section 110(k) require STB to decline to authorize abandonment in this case. That outcome is superior to destruction of the historic line and Embankment and adverse impacts on adjacent historic assets that would result from the developer's demolition and redevelopment plans. However, City et al. wish to acquire the line for public use (light rail, greenway, trail, and other uses), all of which are consistent with historic preservation. For the City to acquire the property for these purposes without further debilitating litigation and uncertainty, the Board must (1) return ownership of the line to the status quo prior to Conrail's unlawful de facto abandonment, and (2) impose a "public use condition" (49 U.S.C. 10905) barring Conrail from selling the line other than for public purposes for 180 days post-effectiveness of an abandonment authorization. Then City would be afforded an opportunity to acquire the eight blocks containing

the Embankment as anticipated by New Jersey state law (embodied in 48 NJSA 12-125.1), which is based on the assumption that STB will enforce compliance with its own jurisdiction and not foster unlawful de facto abandonments. Parcels also may then be acquired from Conrail by eminent domain [as City had been anticipating prior to Conrail's unlawful sale to the developer, cf. **App.** at 136-52 (affidavit of John Curley, City's eminent domain counsel, attaching relevant correspondence with Conrail in 2005)]. This is the minimum mitigation that should be imposed for Conrail's unlawful actions. To this end, STB should void all Conrail's deeds issued prior to the effectiveness of the abandonment in AB 167 (Sub-no. 1189X).²⁵ This not only restores status quo ante the railroad's unlawful

²⁵ STB has ample power to void the deeds given the unlawful de facto abandonment in the face of STB jurisdiction in which Conrail engaged. See Appendix VIII (summary of authority), **App.** at 118 et seq. City et al. have considered whether the Board in the alternative could mitigate Conrail's unlawful de facto abandonment by conditioning effectiveness of abandonment on Conrail first re-acquiring all properties that it unlawfully sold in evasion of agency jurisdiction. (A version of this approach is to impose criminal and civil penalties on Conrail unless it reacquires the property. As Mr. Day suggests, the record supports a criminal referral.) If Conrail simply reacquired the properties, the status quo ante would be restored. However, requiring Conrail to re-acquire is deficient for two reasons: first, Conrail has entered into an agreement (see note 18) with the developer Conrail requiring the railroad basically to ensure that the developer gets the property. It is unclear how Conrail can avoid breaching that contract in a bona fide re-acquisition, rendering re-acquisition unlikely to occur. Second, the reacquisition process would require cooperation of the developer and possibly others who may refuse to participate, and is otherwise subject to litigation, delay, and uncertainty. At this point, STB should either deny the abandonment license or mitigate Conrail's unlawful de facto abandonment with bona fide relief, and voiding the deeds would do that.

actions, but also protects STB's abandonment jurisdiction from knowing evasion. It also signals to the regulated industry that railroads and their chosen developers cannot get away with anticipatory demolitions and unlawful de facto abandonments. The City has funds reserved to match the price paid by the developer and to acquire the property as provided in 48 NJSA 12-125.1.

Unless STB in consultation with ACHP determines to allow abandonment only if so conditioned to restore the status quo to the ownership conditions prior to Conrail's unlawful de facto abandonment (and thus allow the City the full benefits of 49 U.S.C. 10905 and other federal and state statutes like 48 N.J.S.A. 12-125.1 otherwise applicable upon a lawful abandonment), abandonment authority must be denied.

IV. STB's Positions with ACHP

STB through its Office of Environmental Analysis (which City et al. has been told is not involved on Section 110(k)) initially attempted to conclude the Section 106 process without first addressing Conrail's violation of Section 110(k). As a result, the draft Memorandum of Agreement circulated for review and approval to the consulting parties failed to propose any measures to mitigate adverse effects of the abandonment or preserve any historic assets (either destroyed already or about

to be destroyed) on the Harsimus Branch.²⁶ Moreover, in correspondence with ACHP on the applicability of Section 110(k), STB's Office of Environmental Analysis per former Director Rutson has evidently taken the position to ACHP that the Board has no role to play in preventing anticipatory demolitions unless a shipper is impacted. Ms. Rutson states that

“the Board cannot prevent a railroad from demolishing or altering rail-related structures of a rail line within its jurisdiction, so long as doing so does not result in depriving shippers of adequate rail service on lines that have not been authorized for abandonment or discontinuance.”

See Letter, Victoria Rutson to Jaime Loichinger (ACHP), dated Feb. 19, 2020, at p. 3, filed as outgoing “environmental correspondence” in AB 167-1189X at some unknown point. The former OEA Director is incorrect, totally overlooking the law applicable to “inactive” lines (lines without shippers but still subject to federal railroad regulatory jurisdiction). The ICC undertook enforcement against unlawful de facto abandonments of inactive lines. Removing rail infrastructure is an act of de facto abandonment on inactive lines, and de facto abandonment is unlawful.

See sources cited herein. If a railroad could evade NEPA and NHPA reviews by

²⁶ Because OEA is not supposed to be involved, City et al. are not discussing statements by OEA concerning Section 110(k) as originally issued in this proceeding in 2009 because they are no longer applicable. If they were to have some applicability, they are all based on misleading and self-serving statements by Conrail and misapprehend the law.

ripping out its structures in advance and selling off the line, they all would do so on inactive lines as quickly as possible before seeking (much less obtaining) an STB abandonment license to ensure that any environmental or Section 106 review does not require any meaningful mitigation.

In any event, the ICCTA abandonment provisions include remedies designed to protect the public interest, including 49 U.S.C. 10905 (public use conditioning) and 49 U.S.C. 10904 (“offers of financial assistance”). These are all rendered meaningless if the agency invites and then rewards anticipatory demolition of those lines in the fashion proclaimed in the Ms. Rutson’s letter. For example, it is impossible to OFA a line for rail service if the line has been destroyed before the railroad seeks an abandonment authorization.²⁷ Public use conditioning is impossible if the line is already gone before the railroad seeks abandonment authority. Anticipatory demolition as invited by Ms. Rutson’s letter (except if a shipper is impacted) also ignores concern for “rural and community development” (49 U.S.C. 10903(d)), the federal policies referenced in the first and second sentences of 16 U.S.C. 1247(d), and declared federal rail transportation policy at, inter alia, 49 U.S.C. 10101(9) (honest management) and 10101(14) (energy conservation).

²⁷ It is ironic that the leading case on “OFA’s” did not involve “protection” of any shipper but instead securing a moribund freight rail line for commuter rail service. C&NW Transp. v. ICC, 678 F.2d 665 (7th Cir. 1982).

Moreover, the former OEA Director's views are internally inconsistent. Ms. Rutson notes in a footnote that a railroad once it files for abandonment may not rip out structures until the Section 106 process is completed. Letter, supra at 3 n. 5. However, it makes no logical difference for Section 106 purposes whether a historic structure is ripped out while the licensing process is underway if it can be ripped out before hand with impunity, as the Director contends. Instead, the former Director's statements to ACHP encourage exactly the kind of anticipatory demolition that Section 110(k) forbids; Ms. Rutson's letter actually appears to invite railroads to engage in abuse of the regulatory process. This Letter not only subverts Section 110(k) but also invites railroads to foreclose any meaningful comment by ACHP (or anyone else) under Section 106 before an STB abandonment license is sought.

Finally, the former Director's letter is directly contrary to STB's "2008 Policy Statement," supra, that removal of Section 106 assets prior to invoking the STB licensing process is "unlawful."

ACHP's "Policy Statement on Anticipatory Demolition" (June 22, 1987) provided that

"[f]ederal agencies should ensure that anticipatory demolition does not occur in connection with projects they undertake, and do everything feasible to discourage it with respect to projects in which Federal ... permits may be directly or indirectly involved."

In support of the ACHP Policy Statement, ACHP's Executive Director explained that

“[w]here an agency takes the position that it has nothing to do with a project until it receives a formal application, and that it cannot consider actions taken by an applicant before submitting the application, such a position invites anticipatory demolition.

“We believe that an agency's adopting a policy of declining to act favorably on any application when [the agency] had knowledge of anticipatory demolition would discourage applicants from premature actions.”

Memo to ACHP Council Members from Executive Director, regarding Anticipatory Demolition, June 12, 1987. We cannot find any repeal of this policy statement, which is now codified in Section 110(k) and further embodied in 36 C.F.R. 800.9. The original admonition and the rationale behind it as articulated above remain sound today. They squarely call for STB to deny Conrail's abandonment application for the Harsimus Branch at issue here.

V. Section 110(k) Issues in Unlawful De Facto Abandonments Must Be Appropriately and Seriously Examined

As this agency has acknowledged in its 2008 Policy Statement, supra, and as Mr. Day in his Verified Statement briefly discusses, the agency does not typically find out about unlawful de facto abandonments of inactive lines except by means of a whistleblower after the fact. The ICC had field staff who would follow up on such after-the-fact whistleblower complaints (as happened in ICC docket 31292, which resulted in a settlement that preserved the rail corridor that is now a key part

of Seattle's extremely popular Burke-Gilman Trail). The field staff had the power to interview witnesses, review railroad documents, and otherwise investigate a case with great efficiency. STB retains investigative powers, but no longer has any field staff. It of course could designate staff out of one of its offices to investigate, but for one reason or another (we conjecture that the agency faces staff limitations and limited travel budgets) it has not done so here. This, however, does not relieve it of its statutory responsibility to enforce all of federal abandonment law and to sanction against anticipatory demolitions. If the agency is low on resources, it should discourage its regulated activity from unlawful de facto abandonments and anticipatory demolitions by strong sanctions, and not by discouraging whistleblowing by proposing no remedies.

It is worth noting that whistleblowers began contacting STB inquiring into evidence of abandonment in the early 2000's. The Embankment Preservation Coalition in fact retained a consultant (Andrew Strauss) who sought such evidence from STB and other sources in 2004. There was none.²⁸ When City requested Conrail's attorney Mr. Fiorilla to supply evidence of abandonment or proof none

²⁸ The consultant's report, filed in F.D. 34818, is attached as Appendix IX, **App.** 125-135. Conrail claimed that STB still had jurisdiction over the line in a meeting attended by Strauss in 2004, which implied no abandonment had been authorized. But the railroad was pursuing a sale to a developer as if it had abandonment authority. So, Mr. Strauss undertook a research project to determine if Conrail had abandonment authority. He found none.

was required (**App.** at 147), he received nothing more than Conrail’s “spur” assertion. See App. at 149. Despite specific request, Conrail at no point furnished proof that no abandonment authorization was required. See Appendix X, App. at 136-52. Conrail has never produced a contemporaneous legal opinion or determination that this line was a spur. Accord, *McFarland V.S.* at 6, **App.** at 064. Anything Conrail subsequently generated is self-serving or lawyer’s ex post facto rationalizations, and, in any event, now moot due to the stipulation by the developer that the line is a line, and by Conrail that the railroad will not contest the fact that the line is a line.²⁹

²⁹ When the undersigned was retained by City et al. to pursue the matter after Conrail illegally sold the Embankment parcels, the undersigned felt there had been some oversight: either Conrail had an abandonment authorization but City et al. had not found it, or Conrail had made a mistake and as a responsible corporate citizen would take corrective measures immediately. The undersigned immediately checked internet sources and called what is now STB’s Office of Public Assistance on the matter. The situation was evidently well known to STB, for the attorney-advisor immediately stated to the undersigned that the agency had received many calls on this issue, there was no known evidence of abandonment, and at least the Public Assistance personnel were pleased someone with rail experience was finally involved for the whistleblowers. The STB attorney-advisor asked if City et al. were planning to force Conrail into an abandonment proceeding and then use the OFA remedy to secure the property for the price paid by the developer (\$ 3 million). STB’s suggestion of the OFA remedy is certainly one route to relief consistent with Section 106. Accordingly, City of Jersey City has filed a timely notice of intent to OFA, as has CNJ Railroad. The City and Coalition for years have indicated that the line is appropriate for a light rail link from Jersey City’s urban core to Journal Square (and from both the core and the Square on to Secaucus, a major transportation hub). This Board has indicated that OFA’s are appropriate in such circumstances. This agency in general does not grant late-filed notices of intent to OFA, but made an exception for another party

One of the grounds offered by STB OEA to ACHP, and by the Board in its May 19 decision, for delay in dealing with Section 110(k) was that there was ongoing discovery on the matter. See Decision in this proceeding served May 19, 2021, at p. 2, citing Letter, V. Rutson to C. Vaughn (EO-2861), dated Sept. 21, 2016. Since the Board has itself taken no action to investigate the unlawful de facto abandonment, meaningful discovery on the issue should have been made available by the Board. Unfortunately, it was not.

The first problem with “discovery” in this abandonment proceeding is that due to appeals and machinations by the developer and Conrail, it could not effectively commence until 2015, more than a decade after whistleblowers first brought the matter to the agency’s attention, and approximately two decades after Conrail arbitrarily, secretly, and unlawfully purported to designate its line to spur status for regulatory purposes.

The second problem is that STB discovery procedures in general allow railroads to decline to respond to discovery requests, without penalty. To actually receive a response, one must file a motion to compel. That motion must be argued,

(James Riffin), whom City et al. believed was in league with the developer. Riffin’s notice of intent to OFA was dismissed for disobedience with ALJ discovery orders. See Riffin v. STB, D.C. Cir. No. 17-1161, Jan. 10, 2018 (summary denial of pet. rev.), pet. for rehearing en banc denied, D.C. Cir. No. 17-1161, April 9, 2018.

and the Board then (usually months later) issues a decision stating what it has decided the railroad must address (if anything).

The third problem is that there generally is no discovery at all in abandonment proceedings. STB grants it reluctantly and only on the basis of a very constrictive “relevance and need” showing. Ind. Sw. Ry Co. – Ab. Ex, AB 1065X, slip at 4, served Feb. 11, 2011. As a result, STB discovery in an abandonment proceeding, if available at all, is very time consuming, costly, and constrained, and certainly no substitute for a true agency investigation. STB discovery is thus a poor substitute for a true investigation, especially of an anticipatory demolition.

In the proceeding here (AB 167-1189X), the process was certainly time-consuming, costly, and of limited utility. The process never got beyond document efforts to obtain documents. City et al. first sought relevant documents in May 2014. Conrail refused response on the ground that STB had not lifted the abeyance order in the proceeding. City et al tried again on or about August 11, 2014. Conrail filed blanket objections. On Sept. 18, 2014, City et al. moved to compel responses, noting among other things the relevancy of its requests to Section 110(k). Conrail replied in opposition on October 7, claiming inter alia that STB had already resolved Section 110(k) in the railroad’s favor.

By decision served May 15, 2015, a little over a year after City et al attempted to initiate a discovery process, STB agreed to compel discovery, but declined to

authorize discovery into many categories of documents or subject matter under its “relevance and need” constraint, including but not limited to documents relevant to regulatory status of line, historic nature of the line, and sale of the line, documents relating to Ryan and Fiorilla in 2005, documents sufficient to identify potential witnesses, relevant drafts of final agreements, and so forth. City et al. were even denied any discovery of Conrail’s procedures for approving real estate sales. Discovery against Conrail’s chosen developer (and co-conspirator) was similarly curtailed. City et al. basically were deprived of any real opportunity to secure documents relating to the knowledge and intent of Conrail and the developer, issues relevant under Section 110(k). Conrail basically responded to STB’s order by indicating it had no relevant documents falling within the limited categories and time frames specified by the agency, other than those City already had from research conducted for the declaratory proceeding (F.D. 34818).³⁰ Suffice it to say that after about the middle of 2015, there has been no discovery involving Conrail, for the Board’s May 15, 2015 decision basically hobbled it as inappropriate for an abandonment proceeding. As a result, there has been no

³⁰ The City also subsequently sought discovery against Riffin, but that was not related to Section 110(k). Instead, it was related to Riffin’s ties to developer Hyman. The agency assigned administration of the Riffin discovery to a FERC Administrative Law Judge (ALJ), who, on Riffin’s failure to obey discovery orders, sanctioned him with a dismissal and then issued an order served Jan. 4, 2017, closing all discovery.

impediment arising from on-going discovery to the Board's investigating Section 110(k) issues in this case for the past roughly six years.

Ironically, in City et al.'s Motion to Compel filed September 18, 2014, at p. 29, City et al. acknowledged that STB lacks field staff and relies on voluntary compliance, but in light of Conrail's obvious unlawful de facto abandonment, City et al. nonetheless specifically stated that City et al. would "much prefer" that STB delegate its own specialists to conduct interviews and examine documents first hand (i.e., conduct an investigation of Conrail), thus relieving City of at least some of burden of seeking discovery. City et al. still believe a meaningful agency investigation should have been conducted of Conrail's unlawful actions, with full consideration of Section 110(k) issues and possible civil and criminal sanctions. As Mr. Day observes in his Verified Statement (App. at 006), the agency has summary inspection authority under 49 U.S.C. 11144(b), and an agency investigation if timely would be far superior to what is available to private parties in STB abandonment proceedings, as described above. The Board has general power to investigate under 49 U.S.C. 11701.³¹

³¹ There is another irony here. The agency has never considered Section 110(k), but the agency's Decision served May 19, 2021 gives City et al. and the public only 30-days' notice to present the case for applicability of Section 110(k), with submissions due June 18. The agency through its Office of Public Assistance has advised City et al. that the agency will only consider "filings" (by which it intends to exclude "environmental comments" even though these are part of the record in the NEPA and NHPA process) and intimates that all "evidence" should be

Despite the lack of any form of STB investigation or of meaningful discovery, the evidence in the record (much of which was developed in F.D. 34818 in 2006) as previously discussed compels the conclusion that Conrail intentionally engaged in an unlawful de facto abandonment with an intent to adversely and significantly adversely impact historic assets. Conrail president O'Toole admits (in a sworn statement in 1999) to the destruction, indicates an intent to significantly and adversely impact property designated as historic to the point that it should no longer be eligible for historic designation, and explains tht Conrail's objective is to make more money in that regard. **App.** at 021-22. The Ryan/Fiorilla testimony in early 2003 to the Jersey City Council also amounts to an admission Conrail acted with knowledge of line status and with animus to historic regulation. Conrail knew or should have known the law, and the law says a line is a line until authorized for

presented with the "submissions" rather than incorporated by reference even if previously submitted to the agency. City et al. object to all these constraints. They are unrealistic on 30 days' notice, and, in any event, contrary to the Administrative Procedure Act which generally requires the agency to consider the entire record in a case such as this. City et al. thus reserve all rights to rely on anything in the record for purposes of judicial review. Moreover, City et al. is concerned that Section 110(k) be treated seriously and not as a matter the agency anticipates brushing off without a thorough and fair examination, especially in the face of no investigation by the agency at all, despite whistleblower complaints dating back to the early 2000's concerning an unlawful de facto abandonment of a line containing historic assets which is sought by City for a variety of purposes, all consistent with historic preservation.

abandonment, and Section 106 should be completed before historic assets involved in an abandonment proceeding are intentionally and significantly adversely affected. As former ICC enforcement attorney Stephen Day indicates, he would have recommended a criminal referral. **App.** at 12.

City et al. end by observing that the Harsimus Branch was not the only unlawful de facto abandonment in Jersey City. This Board in fact instituted an inquiry to Conrail arising out of another independent instance of an unlawful abandonment within the City.³² The inquiry sought information on other unlawful sales without abandonment authority. Based on Conrail's claim that it examined its files and that it had made no other unlawful sales (except as related to this case), STB terminated the inquiry.³³ However, during settlement negotiations in this case, Conrail (before it abandoned the negotiation) appeared to acknowledge additional alienation of the Harsimus Branch, including some that may include trackage for which Conrail has not yet sought abandonment authority, although some of these sales may predate STB's Ex Parte 695 (supra) 1996 cut-off date for Conrail disclosure of unlawful sales without STB abandonment authority.

³² Consolidated Rail Corporation's Sales and Discontinuances, Ex Parte 695, served May 17, 2010, which arose out of another unlawful de facto abandonment of a main line [see Conrail – Ab. Ex. – in Hudson County, AB 167-1190X (Lehigh Valley Main Line)].

³³ Conrail's Sales and Discontinuances, Ex Parte 695, served Jan. 31, 2011.

Conclusion

The record shows the Conrail knew or should have known that it engaged in an unlawful de facto abandonment at all times relevant in this proceeding, and that the railroad acted out of animus to historic regulation, thus exposing (among other historic assets) the Embankment to significant adverse impacts. Indeed, Conrail's own president argued to NJ SHPO in 1999 that further historic protection of the Embankment was inappropriate because the railroad had already so significantly and adversely impacted it, and designation would interfere with Conrail's realizing the value of the property as real estate. Both in order to comply with Section 110(k) and to protect its own abandonment licensing jurisdiction (49 U.S.C. 10903 and related statutes) from wholesale abuse, STB must deny Conrail's request for an effective abandonment of the Harsimus Branch, at least unless after consultation with ACHP, the agency conditions the abandonment to restore the property to its status quo ante the unlawful sale of the Embankment, imposes a public use condition barring any sale other than for public purposes for 180 days post-abandonment effectiveness, and otherwise meaningfully takes into account the public interest.

Respectfully submitted,

Charles H. Montange
Law Offices of Charles H. Montange
426 NW 162nd St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739
c.montange@frontier.com
for City of Jersey City, Rails to Trails
Conservancy, and Pennsylvania Railroad
Harsimus Stem Preservation Coalition

Andrea Ferster
General Counsel
Rails to Trails Conservancy
The Duke Ellington Bldg.
2121 Ward Court, NW, Fifth Floor
Washington, D.C. 20037

For filing: June 18, 2021

Certificate of Service

By my signature below, I attest service of this entire Submission by electronic transmission or by posting with USPS for first class or equivalent delivery as appropriate on all parties on the Board's service list for this proceeding on or by the filing date above.

s/Charles H. Montange

Charles H. Montange

Appendices
(submitted/attached in a separate volume)

I – Stephen Day Verified Statement

Exhibit 1: Fairfax Leary Deed (excerpts)

Exhibit 2: Conrail document dated Jan.15, 1988 with shipper figures and
Indication that an “expedited abandonment” is not yet possible

Exhibit 3: Letter, Conrail Pres. O’Toole to Ms. D. Guzzo, NJ DEP, June 4,
1999

Exhibit 4: Bringing Criminal Proceedings Against Corporations

Exhibit 5: Transcript of Proceedings before the Jersey City Council,
Jan. 22, 2003 (excerpts dealing with Embankment)

II— Thomas McFarland Verified Statement

TFM-1 Fiorilla to McLaughlin, July 11, 2005 (spur claim to developer)

TRM-2 Fiorilla to Alampi, Oct. 4, 2005 (reiteration to developer)

TRM-3 “Spur Decisions Made by Law Department” (dated 9/4/97, but
Allegedly made as to Line Code 1420 on 4/14/94)

TFM-4 – Letter from R. Jenkins (for Conrail) to V. Rutson (STB OEA),
Dated Sept. 8, 2017

III -- Memorandum of Understanding (“MOU”) dated October 12, 2007,
between Conrail and the developer

IV – Conrail Demolition Joinders, Exhibits to Letter, City et al to STB, dated
April 25, 2008

V – NJ Title Manual standards for Conrail properties

VI -- Attorney Horgan’s statement concerning his discovery of
information indicating Conrail committed fraudulent misrepresentations

VII – Developer’s pleading arguing that Conrail engaged in
fraudulent misrepresentations to the developer, STB, City and courts

VIII – STB Power to Void Deeds

IX—Coalition consultant’s statement concerning efforts to ascertain
regulatory status of Harsimus Branch

- X – Certification of John J. Curley in 212 Marin v. City of Jersey City, HUD-L-4908, dated Nov. 3, 2005, setting forth Conrail evasion of City informational requests, including especially
Letter, Curley to Fiorilla, June 7, 2005, asking for “proof of abandonment of the rail use through Surface Transportation Board or other similar administrative procedures”;
Letter, Fiorilla to Curley, June 17, 2005, stating that “the Conrail Harsimus Branch ... was abandoned in April 1994 without application to the Interstate Commerce Commission pursuant to federal law that does not require formal ICC (now Surface Transportation Board) approval”;
Letter, Middleton (Curley’s Office) to Fiorilla, June 28, 2005, asking for “proof that Surface Transportation Board approval is not required”;
Letter, Fiorilla to Curley, July 18, 2005 responding to Middleton letter by stating that Conrail had sold the property to the developer on July 13, 2005
- XI – Kaese et al V.S. (expert opinion on various adverse impacts),
as set forth in Environmental Comments filed April 25, 2019,
in this proceeding
- XII—Verified Statement of John J. Curley, Jan. 21, 2006 in STB F.D. 34818
(developer destruction of historic assets)
- XIII – Stephen Marks V.S. executed June 10, 2014
and Rebuild by Design download of 2/23/2014
(developer offers to donate the Embankment walls and fill for storm fill)
- XIV -- Letter, then-Mayor Healy to Conrail Associate G.C. Enright, March 4, 2008

BEFORE THE SURFACE TRANSPORTATION BOARD

Consolidated Rail Corporation –)
Abandonment Exemption –) AB 167 (Sub-no. 1189X)
In Hudson County, NJ)

CSX Transportation, Inc. –)
Disc. Ex. –) AB 55 (Sub-no. 686X)
In Hudson County, NJ)

Norfolk Southern Railway Co. --)
Disc. Ex. --) AB 290 (Sub-no. 306X)
In Hudson County, NJ)

Consolidated Rail Corporation (“Conrail”), CSX Transportation, Inc.
 (“CSX”) and
Norfolk Southern Railway Company (“NS”) Must Be Found
in Violation of Section 110(k)
of the National Historic Preservation Act

Appendices

Charles H. Montange
Law Offices of Charles H. Montange
426 NW 162nd St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739
c.montange@frontier.com
for City of Jersey City, Rails to Trails
Conservancy, and Pennsylvania Railroad
Harsimus Stem Preservation Coalition

Andrea Ferster
General Counsel
Rails to Trails Conservancy
The Duke Ellington Bldg.
2121 Ward Court, NW, Fifth Floor
Washington, D.C. 20037

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STB Docket No. AB-167 (Sub-No. 1189X)
Consolidated Rail Corporation – Abandonment Exemption—
In Hudson County, NJ

VERIFIED STATEMENT OF STEPHEN L. DAY

My name is STEPHEN L. DAY. I am an attorney currently employed in an in-house capacity with an office at Northwest Builders Finance, LLC 7900 SE 28th Street, Suite 412, Mercer Island, WA 98040. I am not currently engaged in the private practice of law.

I have been requested by the City of Jersey City, N.J., Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively referred to as City) to provide an expert opinion on whether or not Conrail knew or reasonably should have known when it conveyed the Harsimus Embankment Property to a group of limited liability companies for nonrail use in July, 2005, that the Embankment was a "railroad line"¹ within the meaning of that term in 49 U.S.C. § 10903(d), rather than a "spur, industrial, team, switching or side track" as those terms appear in 49 U.S.C. § 10906.

¹ The term "line of railroad" was the original statutory language and a term of art used in transportation law and the statutory language was changed to "railroad line" during recodification of the Interstate Commerce Act (Pub. Law 95-473) without any substantive change in its meaning, Chicago and NW Tr. Co. v. Kalo Brick & Tile Co., 450 U.S. 31 (1981),

As explained in this statement, my opinion is that Conrail knew and that certain Conrail officials and representative knew and others should have reasonably known at all relevant times that the Harsimus Embankment was a railroad line and that it was subject to the Surface Transportation Board's abandonment authority.

I am qualified to render this opinion by virtue of 42 years of experience in transportation law, including experience with railroad abandonment law, and differentiating between railroad lines and spurs in an abandonment context.

I was graduated from Washburn School of law in 1974 and became first employed that year by the Interstate Commerce Commission (ICC), the predecessor agency to the Surface Transportation Board (STB). My posting at the ICC was at its headquarters, 12th and Constitution Avenue, Washington, D.C. as an Attorney Advisor in its Office of Proceedings. In that same year I was transferred to the ICC's Bureau of Enforcement, Rail Branch, as a Trial Attorney. In 1975 I was transferred to the ICC's regional office in Atlanta GA which covered the Southeastern 13 contiguous states as a Trial Attorney in the Bureau of Enforcement. My duties included reviewing investigation reports, recommending prosecution actions and conducting enforcement actions in administrative proceedings before the ICC, as well as both federal civil and criminal enforcement actions.

In 1978 I was transferred to the ICC office in Seattle, WA as a Senior Trial Attorney in what was the Western Region of the ICC. This region covered the

western 11 contiguous states plus Hawaii and Alaska. My duties were to advise Railroad Service Agents, and District Supervisors relating to their carrier audit and oversight duties and to advise and assist Special Agents in conducting investigations of Interstate Commerce Act and ICC regulation violations by carriers. I reviewed investigation reports and made recommendations for enforcement actions. I conducted enforcement actions in administrative proceedings before the ICC, as well as civil penalty collection actions and federal civil actions. As an appointed Special Assistant U.S. Attorney in various districts, I carried out criminal enforcement actions arising from ICC referrals to the Department of Justice. See, e.g., U.S. v. Jones, 712 F.2d 1316 (9th Cir.), cert. denied, 464 U.S. 986 (1983). I continued to serve as an enforcement attorney for the ICC as an Assistant Regional Counsel, Regional Counsel and a year as Regional Director in the ICC's Western Region until September 1995, when I retired from Federal Service. During my service with the ICC, I was often called upon to render opinions on whether a particular railroad right-of-way and track constituted a railroad line or a spur. I have also been involved in litigation with regard to that issue. One example is ICC Finance Docket No. 31292, Rails to Trails Conservancy et.al. Petition For Declaratory Order (Decision, June 21, 1988), 1988 ICC Lexis 196.

In September 1995 I entered private law practice with the 35 member law firm of Betts Patterson & Mines as a Director, and founding Chair of the firm's Transportation and Logistics Practice Group. I became CEO of the firm in 2001. I had the privilege of representing a number of short line railroads in a broad range of legal

issues, including railroad abandonment. Examples are: STB Docket No. AB-771X Mount Vernon Terminal Railway Company LLC. —Abandonment Exemption—In Skagit County, WA, decided April 21, 2005; The Adventure Trail dba Sea Lion Acquisition, F.D. 33486 (STB decision 29280); Sea Lion Abandonment (AB 544X) (STB decision 29280 (same)); , FD 33594 (STB decision 30038); Ballard Terminal Acq. Meeker Southern Operation (F.D. 33959) (STB decision 31425); and City of Yelm, F.D. 33961.

I have been active in several transportation law organizations including the Association for Transportation, Law, Logistic and Policy (ATLLP), serving as the national president 1999-2000, vice chairman for the 1997 ATLLP meeting, and co-chair for the joint ATLLP and Transportation Lawyers Association annual meeting. I was one of the authors of the bi-monthly *Motor Carrier* column for the ATLLP *Association Highlights*, reviewing developing legal issues involving motor carriage from 1995 to 2005. I also served as president of the Pacific Northwest Association of Rail Shippers (PNWARS.) I was also a member of the Transportation Lawyers Association, serving two terms on its board, the Conference of Freight Counsel, and the Seattle Transportation Club (serving on the board of directors and was named "Transportation Person of the Year" for 2004 by the Club. I was a long-time member of the National Industrial Traffic League and the National Association of Railroad Trial Counsel.

In June 2005 I left private practice to take an in-house position with American Fast Freight, Inc. (AFF) as their General Counsel. AFF is an intermodal carrier and it holds motor carrier and freight forwarder licenses issued originally by the ICC. I served in several roles within AFF including General Counsel, Chief Operating Officer, President

and Chief Executive Officer. While president, the company enjoyed annual revenues in excess of \$150 million. I retired from AFF in June of 2014.

I continued to stay involved in transportation law and taught "Logistics and the Law" at Lake Washington Institute of Technology in their 4 year Bachelor of Applied Science in Transportation, Logistics and Supply Chain Management program (2006 and 2007).

City has asked that I explain how, as an ICC enforcement employee, I would have approached an investigation of an alleged unlawful abandonment and what, if anything, I would do if such investigation indicated that Conrail had, in fact, illegally abandoned the Harsimus Stem Embankment. Of course the STB, the ICC successor agency, has no field compliance and enforcement staff, but I will outline what ICC field staff ² would have done had they have been in existence at the time of these events.

Investigations of this type would typically have resulted from an ICC Railroad Service Agent compliance review, a shipper or public complaint, or an informant or whistleblower tip. For our purposes here I will assume that some complaint was received in or after 1994 (probably after trestles had been removed and track torn up on the Harsimus Embankment) that the line had alleged been illegally abandoned. As others have cited in this proceeding –and it is axiomatic in railroad law – once a line of railroad is dedicated to common carriage and thus within the jurisdiction of the former ICC and now STB, only an abandonment proceeding

² The ICC Field staff was eliminated as the result of the ICC Termination Act of 1995, Pub. Law 104-88. That Act amended the Interstate Commerce Act, and I will use the amended statutory references in this statement.

before the ICC or now STB can lawfully allow abandonment of that line.

The first step in an illegal abandonment investigation would be to determine if the line in question was ever a line of railroad within the jurisdiction of the agency under 49 USC 10903(d) or was exempt from jurisdiction under 49 USC 10906. The agent would look to see if any abandonment proceeding had been instituted and completed at the agency (ICC or STB). There were none completed in this case.

Evidence would then have been obtained from Conrail by an ICC Special Agent under agency summary inspection authority, codified at 49 USC 11144(b). The Agent would have reviewed and copied relevant operations and real estate files, determined how Conrail designated the line in their own accounts, reviewed historical usage of the line, noted shippers located along or served by the line and studied the level and type of traffic moving over the line historically

I have read the STB Declaratory Order finding that the Harsimus Embankment was in fact a line of railroad subject to the STB's abandonment jurisdiction. City of Jersey City — Petition for Declaratory Order, STB Fin. Docket No. 34818, (Aug. 9, 2007), *recons. denied*, Docket No. 34818, (Dec. 19, 2007) ("STB Recons. Order"). However, I was surprised that the DC Circuit Court subsequently ruled that the STB did not have authority to determine whether a railroad track is a line or a spur for purposes of abandonment. Consol. Rail Corp. v. Surface Transportation Board 571 F. 3d D.C. Cir. 2009). I have successfully argued in U.S. District Courts and the 9th Circuit Court that the ICC had the absolute and exclusive jurisdiction to determine its own jurisdiction. E.g., I.C.C. v. Peninsula Shippers Assn 789 F.2nd 1401

(9th Cir. 1986, citing ICC v. Gould, 629 F.2d 847, 851 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). Other courts have made the same observation. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209, (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507-09, (1943); EEOC v. Children's Hospital Medical Center, 719 F.2d 1426, 1430-31 (9th Cir. 1983) (en banc); FTC v. Texaco, Inc., 555 F.2d 862, 879 (D.C.Cir.) (en banc), *cert. denied, sub. nom. Standard Oil Co. of California v. FTC*, 431 U.S. 974, (1977). I had thought the U.S. Supreme Court had made this definitive in Chevron v. Natural Resources Defense Council, Inc., 467 US 837 (1984) where they stated:

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, ^[citation omitted] and the principle of deference to administrative interpretations...

In any regard, this point is now moot since "[o]n July 10, 2012, the parties filed a joint stipulation in which plaintiffs and intervenor-defendants stipulated that the Harsimus Branch was conveyed to Conrail as a line subject to the STB's abandonment jurisdiction" ("Joint Stipulation"). City of Jersey City v. Consolidated Rail Corp., 968 F. Supp. 2d 302 (2013). For this statement I will assume that my hypothetical Special Agent did find sufficient evidence to support that the line in issue had been used in common carrier rail transportation and that it was a "line of railroad such that the ICC (STB) abandonment authority applied.

Our next investigative step would have been to determine whether the unlawful abandonment and attempted sale of the line constituted mere error or was an intentional and concerted effort to by-pass the ICC (STB) abandonment process.

This knowledge and intent determination would be critical to informing me in making prosecutorial recommendations and proposing remedies. At this point the Special Agent would have prepared a report with evidence and submitted it for review. Normally the Agent's facts would allow reviewing attorneys to recommend appropriate enforcement actions based upon the scale of culpability and public harm. Certainly, intentionally avoiding the agency's carefully crafted and balanced abandonment process would be viewed as warranting harsher treatment.

The enforcement choices are generally found today at Chapter 117 of the ICC Termination Act. They include enforcement by the Board (§ 11702), enforcement by the Attorney General (§11703) and by injured parties bringing a civil action in U.S. District Court (§11704). An intentional effort to evade the ICC (STB) abandonment jurisdiction and the environmental, historical resources and public interest remedies administered by the ICC (Board) would have warranted contemplation of: 1) a civil penalty against any Conrail officers or managers involved in this illegal activity under 49 USC 11901 (c); or 2) a criminal prosecution referral to the Department of justice against culpable individuals and/or the corporation. Any false statements made to the agency in furtherance of any such an evasion scheme could be similarly referred for prosecution under 18 U.S.C. 1001.

Since there is no actual Special Agent in this matter, the parties would have to use, and have used, discovery to determine relevant facts relating to what Conrail and its officers and managers knew and when they knew it relating to their decisions to tear up tracks and trestles on the line and to pursue a private sale of the relevant railroad

line. I understand that discovery is not generally allowed in abandonment proceedings, and although there has been a limited amount of discovery in this proceeding to date, it does not seem to have entailed any witness depositions/interviews or even document production by Conrail from the entirety of the relevant period (which includes 1976 through 2005). See decision in AB 167-1189X, decided May 21, 2015 (limiting scope of discovery against Conrail).

It was not atypical in ICC investigations to have carrier officials assert reliance on legal advice to show no intentional bad acts. Of course these officials have to make their own decisions and stand for them, but the intent behind such decisions may be moderated by reliance upon incorrect legal advice. In order to weigh the impact of such an opinion on decisions by officers and managers we looked behind the opinion to determine if such an opinion was relied upon or was merely ginned up as "cover" for an operational decision. Here, the issue is corporate and individual knowledge and I note there are no indications that any official relied upon a reasoned legal opinion that the line at issue was exempt from ICC/SB jurisdiction.

The following evidence bearing on corporate or individual knowledge I believe is most telling:

1. The line of railroad at issue was the former Pennsylvania RR main line until its transfer to Conrail.
2. The line of railroad at issue was conveyed to Conrail by the "Fairfax Leary" deed which describes the property as "a line of railroad". Attached as VSDAY Exhibit 1
3. Conrail operated the line as a line of railroad and not as a spur or other non-

ICC/STB jurisdictional track, and enjoyed substantial traffic over the line until about 1984.

4. Conrail Memorandum dated January 15, 1988 from J.W. Dietz addressing "Passaic& Harsimus Branch/Hudson St. Industrial" which reviews declining traffic over the subject lines. It also states, as to the Harsimus Branch: "This suggests that an expedited abandonment may be possible if the remaining active customer(s) discontinue rail service." Attached as VSDAY Exhibit 2
5. Conrail made an internal reclassification of the use of the Harsimus branch from a line of railroad to a "spur" on April 14, 1994 (JC Op. Appendix I).
6. Transcript of a 2003 appearance before the Jersey City Council by Conrail's Director of Real Estate, Robert W. Ryan and an attorney who admitted in their testimony that the Harsimus line had been used by Conrail for rail purposes and had not been sitting idle forever. VSDAY Exhibit 5, excerpts, at pp. 124-25.

I would also note that the statement made by Conrail President and CEO Timothy T. O'Toole in a letter to the New Jersey Department of Environmental Practices dated June 4 1999. (Copy in Appendix 3, Additional Supplemental Comments filed by the City and a copy is attached hereto for convenience as VSDAY Exhibit 3). In this letter Conrail's president gives the motive for Conrail's treatment of this line of railroad where he states: "Because these properties no longer have a railroad purpose, Conrail wishes to realize their real estate value."

One can understand the CEO of a regulated corporation wanting to sell off non-revenue producing assets. One of the purposes of the 1980 Rail Staggers Act was to

make it easier for railroads to shed low density lines as an aid to improving profitability. However, Congress intended an orderly process – an abandonment proceeding before the ICC/STB.³ By this process the railroad's needs could be balanced against the public convenience and necessity as well as certain national policies such as those expressed in the National Environmental Policy Act, the Trail System Act, and The National Historic Preservation Act.

I will assume that our hypothetical Special Agent would have found all the evidence of record in this case and especially those outlined directly above. Also, I am sure that our Special Agent would have thoroughly reviewed all of Conrail's real estate files and focused on those belonging to or created by Conrail's Director of Real Estate, Robert W. Ryan where additional evidence would be discovered. The Agent would also have thoroughly reviewed the files including notes and underlying research done by Conrail's J.W. Dietz as well as those of J.F Betak, the recipient of the Dietz memorandum mentioned in 4, above. Typically the Agent would have interview Dietz, Betak, Ryan and O'Toole. I believe the Agent would have focused on authorship and meaning of the handwritten notes on the Dietz memo, including who the initials "WAM", "JPB" and "MRF" represented and what role those people played in reviewing the memo. These files and interviews would likely have provided additional supporting evidence.

³ The amendment of the Interstate Commerce Act by the ICC Termination Act of 1995 continued the statutory abandonment process, renumbering the statutes of Chapter 109, and substituted the newly created Surface Transportation Board as the decisional body. Former ICC headquarters staff were transferred to the STB, and by the Section 204 Savings Provision, the ICC's regulations including its abandonment regulations were continued in force "until modified."

In determining that Conrail had knowledge of the STB's continuing jurisdiction over the Harsimus line I would apply the corporate legal doctrine of "Collective Knowledge." That doctrine is well expressed in the First Circuit decision United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987). The doctrine is that the knowledge of a corporation is the sum of the knowledge of all of its employees, and totality of what all of the employees know within the scope of their employment.

Based on the evidence I have, I would have made a recommendation for referral for criminal prosecution and would have applied the guidelines of the U.S. Department of Justice's for "Federal Prosecution of Corporations." Copy attached as VSDAY Exhibit 4.

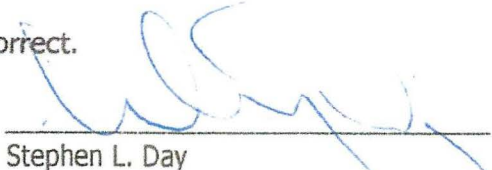
However, the Interstate Commerce Act, has and always has had its own statutory standards for corporate knowledge. See. 49 USC §§ 11906 and 11907. There is also an old and long line of cases holding ICC regulated corporate entities liable for knowledge of their employees and agents. See e.g. New York Central and Hudson River Railroad Co. v. United States 212 U.S. 481 (1909). See also, Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951); Riss & Company v. United States, 262 F.2d 245 (8th Circuit 1958); Steere Tank Lines, Inc. v. United States, 330 F.2d 719, (5th Cir. 1963); and, United States v. Sawyer Transport, Inc., 463 F.2d 175 (8th Circuit.1972).

In sum, and based on the above, it is my opinion that Conrail (the corporation) knew -- and that certain Conrail officials and representative knew and others should have reasonably known -- at all relevant times that the Harsimus

Embankment was a railroad line; that it was subject to the Surface Transportation Board's abandonment authority; that part of that authority required compliance with NEPA and NHPA as part of the abandonment process prior to alienation of the line for non-rail purposes, and that an internal clerical designation could not defeat or evade the STB's abandonment jurisdiction. The evidence of record further indicates that Conrail evaded the agency's abandonment authority due to frustration that the historic nature of some of the property was conflicting with the railroad's efforts to maximize real estate values.

VERIFICATION

STEPHEN L. DAY being duly sworn, states that he has knowledge of the factual assertions set forth in this Verified Statement; and that all of those assertions are true and correct.


Stephen L. Day

Dated: June 8, 2021

STATE OF WASHINGTON)
) S.S:
COUNTY OF KING)

SUBSCRIBED and SWORN to before me this 8th day of June 2021.


Notary Public

My Commission expires: 04-30-2023

TONYA CAUDLE
Notary Public
State of Washington
Commission # 178519
My Comm. Expires Apr 30, 2023

VSDAY EXHIBIT 1

EXHIBIT A

TO THE DEED BY AND BETWEEN

FAIRFAX LEARY,

AS TRUSTEE OF THE PROPERTY OF

THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY, DEBTOR

AND

CONSOLIDATED RAIL CORPORATION

**DESCRIPTION OF REAL PROPERTY
LOCATED IN**County of Hudson, State of New Jersey**FILED AND RECORDED**
OCT 12 1978
DONALD LAN
SECRETARY OF STATE

For the purpose of each description contained in this Exhibit A (and solely by way of illustration and not by way of limiting the generality of the term "adjacent"), adjacency shall be deemed to exist without regard to the existence of any public or private street, highway, alley or other way between one part of the Grantor's real property and another.

This Exhibit A consists of the following pages only: A-1, A-2, A-3, A-4, A-5, A-7, A-8, A-9, A-10, A-11.

LINE 3286 - 761

0093

Document No.

UNJ-CRC-RP-4

Situates in the County of Hudson, State of New Jersey, and being The United New Jersey Railroad and Canal Company's line of railroad known as the Penn Central Harsimus Branch and being all the real property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County at Harsimus Cove, passes through Journal Square, and terminates in the County near the junction with the Penn Central New York-Philadelphia Main Line, west of the New Jersey Turnpike Overhead Bridge.

The line of railroad described herein is identified as Line Code 1420 in the records of the United States Railway Association.

FILED AND RECORDED
OCT 12 1978
DONALD LAM
SECRETARY OF STATE

3286 - 762

-6-

VSDAY EXHIBIT 2

ONRAIL

MEMORANDUM

1-4C New 12-82

*JFB -
Yes - MRF
is pulling together info.
which we will review w/ WAM.
SA 1-20-88
cc WAM, JPB, MRF*

0 50-22

DATE: January 15, 1988
TO: *EG* T. Batak
FROM: J. W. Dietz
SUBJECT: Line Screening Summaries - New Jersey

LOCATION: L-1012
LOCATION: P-920

Attached are the line screening summaries for the State of New Jersey. In regard to this report, we have the following comments:

1-R-88
WAM/Do you
SEN/convinc?

* Passaic & Harrison Branch / Hudson St. Industrial

This line generated 437 carloads in 1986, but Colgate-Palmolive, which plans to close this plant in 1988, generated 82 percent (523 carloads) of the total volume. A review of 1987 data indicates that only 6 non-Colgate-Palmolive carloads were handled. This suggests that an expedited abandonment may be possible if the remaining active customer(s) discontinues rail service or relocates.

* Elizabeth Secondary (M.P. 11.1 - M.P. 15.0)

An expedited abandonment of this line is possible. One carload was reported for Roselle Paper in 1986. There are no other active customers.

* Sayreville Running Track (M.P. 12.0 - M.P. 12.3)

This line was eliminated from the monitoring list because an expedited abandonment is currently being prepared.

* Manufacturer's Extension Ind. Trk. (M.P. 0.0 - M.P. 0.9)

Poor economics of this line are the result of high volume, but low revenue, scrap paper from Woodbridge, NJ. Average revenue for 413 carloads of this traffic amounted to \$378 per carload but COSAC LTV costs average \$610 per carload.

Please contact me if you have any questions regarding this report.

LEO/gmw

Attachments

VSDAY EXHIBIT 3

CONRAIL

THOMAS W. O'DONNELL
PRESIDENT AND
CHIEF EXECUTIVE OFFICER

June 4, 1999

Ms. Dorothy P. Guzzo, Administrator
State of New Jersey
Department of Environmental Protection
Historic Preservation Office
P. O. Box 404
Trenton, NJ 086025-0404

Re: Pennsylvania Railroad Harbors Branch Embankment
163-351 Sixth Street
June 9th State Review Board Meeting

Dear Administrator Guzzo:

Conrail, the owner of the Pennsylvania Railroad Harbors Branch Embankment, objects to the listing of the Embankment on the New Jersey and National Registers of Historic Places. Conrail is a joint subsidiary of CSX Corporation and Norfolk Southern Corporation. The railroad occupies Block 21; Block 249, Lot 50A; Block 280, Lot 50A; Block 317.7; Block 345.1 and Block 388.1.

When originally constructed, the Embankment was part of a unified railroad structure that carried freight trains to the Jersey City waterfront. The unified railroad structure consisted not only of the presently existing embankment walls and fill, but steel bridges connecting each individual embankment, tracks on rail, and auxiliary structures and equipment.

Conrail ceased freight operations along the Embankment years ago. In or about 1996, Conrail removed the steel bridges, tracks and auxiliary structures and equipment. Since then, the individual embankment properties have not been physically connected to each another and have served no railroad or other practical or useful function.

Administrative Document
June 4, 1999
Page 2

Because these properties no longer have a railroad purpose, Conrail wishes to realize their real estate value. The Company also wishes to be released of its obligations as owner of these properties, which includes tax liabilities, the costs of maintenance and any potential liabilities to or caused by third person trespassers or vandals. As a result, it has been our intention to sell all the embankment properties and we are in the process of negotiating a sale of these parcels to the Jersey City Redevelopment Agency (JCRA).

It is our understanding that if a government agency owns a site that has been listed on the New Jersey Register of Historic Places, that agency cannot alter the site without approval from the New Jersey Commissioner of Environmental Protection. Imposition of such a condition on the embankment properties will have the effect of substantially reducing their present value.

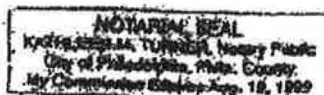
For all these reasons, Conrail, as owner of the Embankment, object to its listing on the New Jersey and National Registers of Historic Places. Please be advised that CSX Corporation and Norfolk Southern Corporation, the joint owners of Conrail, are in agreement with and support this statement of objections.

Sincerely,


Timothy T. O'Toole

Sworn to and subscribed before
me this 4th day June, 1999


Kathleen M. Turner
Notary Public



VSDAY EXHIBIT 4



[Signed on June 16, 1999]

MEMORANDUM

TO: All Component Heads and United States Attorneys

FROM: THE DEPUTY ATTORNEY GENERAL

SUBJECT: Bringing Criminal Charges Against Corporations

More and more often, federal prosecutors are faced with criminal conduct committed by or on behalf of corporations. The Department is committed to prosecuting both the culpable individuals and, when appropriate, the corporation on whose behalf they acted.

The attached document, Federal Prosecution of Corporations, provides guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case. I believe these factors provide a useful framework in which prosecutors can analyze their cases and provide a common vocabulary for them to discuss their decision with fellow prosecutors, supervisors, and defense counsel. These factors are, however, not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision.

The factors and the commentary were developed through the hard work of an *ad hoc* working group coordinated by the Fraud Section of the Criminal Division and made up of representatives of United States Attorneys' Offices, the Executive Office of United States Attorneys, and Divisions of the Department with criminal law enforcement responsibilities. Experience with these guidelines may lead to changes or adjustments in the text and commentary. Therefore, please forward any comments about the guidelines, as well as instances in which the factors proved useful or not useful in specific cases to Shirah Neiman, Deputy United States Attorney, Southern District of New York, and Philip Urofsky, Trial Attorney, Fraud Section, Criminal Division. I look forward to hearing comments from the field as to the application of these factors in practice.

Encl.

Federal Prosecution of Corporations

I. Charging Corporations: General

- A. *General Principle:* Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent,

discover, and punish white collar crime.

- B. *Comment:* In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Further, imposition of individual criminal liability on such individuals provides a strong deterrent against future corporate wrongdoing.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To be held liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. Thus, in *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the court affirmed the corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "Partucci was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Similarly, in *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982), the court held, "criminal liability may be imposed on the corporation only where the agent is acting within the scope of his employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated -- at least in part -- by an intent to benefit the corporation." Applying this test, the court upheld the corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name. As the court concluded, "Mystic--not the individual defendants--was making money by selling oil that it had not paid for."

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

[B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which be inimical to the interests of the corporation or which may have been undertaken *solely* to advance the interests of that agent or of a party other than the corporation.

Id. at 407 (emphasis added; quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945)).

II. Charging Corporations -- Factors to Be Considered

A. *General Principle:* Generally, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* U.S.A.M. § 9-27.220, *et seq.* Thus, the prosecutor should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative, and other consequences of conviction, and the adequacy of non-criminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (*see* section III, *infra*);
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (*see* section IV, *infra*);
3. The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (*see* section V, *infra*);
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges (*see* section VI, *infra*);
5. The existence and adequacy of the corporation's compliance program (*see* section VII, *infra*);
6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (*see* section VIII, *infra*);
7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable (*see* section IX, *infra*); and
8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions (*see* section X, *infra*).

B. *Comment:* As with the factors relevant to charging natural persons, the foregoing factors are intended to provide guidance rather than to mandate a particular result. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of Federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate

"person."

III. Charging a Corporation: Special Policy Concerns

- A. *General Principle:* The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.
- B. *Comment:* In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* § 9-27.230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*, voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors should consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

IV. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

- A. *General Principle:* A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.
- B. *Comment:* Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding

of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

U.S.S.G. § 8C2.5, comment. (n. 4).

V. Charging the Corporation: The Corporation's Past History

- A. *General Principle:* Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.
- B. *Comment:* A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and yet it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, *e.g.*, subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* U.S.S.G. § 8C2.5(c) & comment. (n. 6).

VI. Charging the Corporation: Cooperation and Voluntary Disclosure

- A. *General Principle:* In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.
- B. *Comment:* In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence.

In some circumstances, therefore, granting a corporation immunity or amnesty may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. Specifically, these principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. *See* USAM § 9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the SEC and the EPA, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions.⁽¹¹⁾ Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances.⁽¹²⁾ The Department does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation.

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees,⁽¹³⁾ through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, one that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VII. Charging a Corporation: Corporate Compliance Programs

- A. *General Principle:* Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents.

Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program. In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

- B. Comment. A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of respondeat superior. See *United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) ("a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions."). Thus, in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, *even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors*. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act."⁽⁴⁾ It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." See also *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and] "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program, the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct, and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.⁽⁵⁾ Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation.

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective

compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

VIII. Charging the Corporation: Restitution and Remediation

- A. *General Principle:* Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so, as well as other remedial actions such as implementing an effective corporate compliance program, improving an existing one, and disciplining wrongdoers, in determining whether to charge the corporation.
- B. *Comment:* In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution.⁽⁶⁾ A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be seen to be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.
- Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. However, while corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should satisfy himself or herself that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

IX. Charging the Corporation: Collateral consequences

- A. *General Principle:* Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.
- B. *Comment:* One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Further, prosecutors should also be aware of non-penal sanctions that may accompany a criminal charges, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs should also be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

X. Charging a Corporation: Non-Criminal Alternatives

- A. *General Principle:* Although non-criminal alternatives to prosecution often exist, prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, e.g., civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:
 - 1. The sanctions available under the alternative means of disposition;
 - 2. the likelihood that an effective sanction will be imposed; and
 - 3. the effect of non-criminal disposition on Federal law enforcement interests.
- B. *Comment.* The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals

may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution, i.e., the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action, the probable sanction if the regulatory authority's enforcement action is upheld, and the effect of a non-criminal disposition on Federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

XI. Charging a Corporation: Selecting Charges

- A. *General Principle:* Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.
- B. *Comment:* Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

XII. Plea Agreements with Corporations

- A. *General Principle:* In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.
- B. *Comment:* Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government consider, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. In addition, corporations should be made to realize that pleading guilty to criminal charges constitutes an admission of *guilt* and not merely a resolution of an inconvenient distraction from its business. Thus, as with natural persons,

pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain certain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* U.S.S.G. §§ 8B1.1, 8C2.1, *et seq.* In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Generally, prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. *See* section VII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive the attorney-client and work product privileges, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. *See generally* section VIII, *supra*.

Footnotes

1. In addition, the Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* U.S.S.G. § 8C2.5(g).

2. This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.

3. Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.

4. Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the *Hilton* case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n.4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated that *Basic Construction* states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust rules."

5. For a detailed review of these and other factors concerning corporate compliance programs, see United States Sentencing Commission, **Guidelines Manual**, § 8A1.2, comment. (n. 3(k)) (Nov. 1997). See also U.S.S.G. § 8C2.5(f).

6. For example, the Antitrust Division's amnesty policy specifically requires that "[w]here possible, the corporation [make] restitution to injured parties"

VSDAY EXHIBIT 5

1 STATE OF NEW JERSEY
2 CITY OF JERSEY CITY
3 MUNICIPAL COUNCIL
4
5 TRANSCRIPT OF
6 PROCEEDINGS
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8 - - - - -
9
10 City of Jersey City Municipal Council
11 280 Grove Street
12 Jersey City, New Jersey 07306
13 January 22, 2003
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16
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18
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20 SCHULMAN, WIEGMANN & ASSOCIATES
21 CERTIFIED SHORTHAND REPORTERS
22 216 STELTON ROAD
23 SUITE C-1
24 PISCATAWAY, NEW JERSEY 08854
25 (732) - 752 - 7800

2 1 BEFORE: 2 3 MUNICIPAL COUNCIL 4 5 L. HARVEY SMITH, Council President 6 MARIANO VEGA, JR., Councilman-At-Large 7 WILLIAM A. GAUGHAN, Councilman 8 STEVE LIPSKI, Councilman 9 JERRAMIAH HEALY, Councilman 10 PETER M. BRENNAN, Councilman 11 E. JUNIOR MALDONADO, Councilman 12 VIOLA RICHARDSON, Councilwoman 13 14 ROBERT BYRNE, City Clerk 15 ALEXANDER BOOTH, ESQ., Corporation Counsel 16 CARLTON MCGEE, Business Administrator 17 18 TRACEY R. SZCZUBELEK, C.S.R. 19 LICENSE NO. XIO1983 20 21 22 23 24 25	4 1 MR. BYRNE: He is absent until I 2 see him. Councilman Vega? 3 MR. VEGA: Here. 4 MR. BYRNE: No, we were talking 5 about Councilman Healy. Council President 6 Smith? 7 MR. SMITH: Here. 8 MR. BYRNE: We have seven members 9 in attendance. Would someone in the back of the 10 room tell people in the hallway we are going to 11 observe a moment of silence? Would everyone 12 stand? 13 MS. RICHARDSON: Robert, a moment 14 of silence for Dotty Stack who just passed. 15 MR. BRENNAN: Robert, Mikalina 16 Brown, Mike Brown's mom, just passed away 17 yesterday. 18 MR. SMITH: I would like to 19 dedicate this moment of silence to Tony 20 Capiello -- Capelli, who worked at Dickinson 21 High School for last nine to ten years. 22 (Whereupon, a moment of silence is 23 observed and the flag salute.) 24 MR. BYRNE: Thank you very much. 25 On behalf of Council President Smith, in
3 1 MR. BYRNE: Good evening, 2 everyone. This is a regular meeting of the 3 Jersey City Municipal Council. Today is 4 Wednesday, the 22nd day of January in the year 5 2003. We had a six p.m. scheduled start. It's 6 6:58 p.m. May we have a roll call for the 7 commencement of this meeting, Councilman 8 Brennan? 9 MR. BRENNAN: Here. 10 MR. BYRNE: Councilwoman Donnelly 11 had surgery yesterday and will not be in 12 attendance at this meeting. Councilman Lipski? 13 MR. LIPSKI: Here. 14 MR. BYRNE: Councilman Gaughan? 15 MR. GAUGHAN: Present. 16 MR. BYRNE: Councilman Maldonado? 17 MR. MALDONADO: Present. 18 MR. BYRNE: Councilwoman 19 Richardson? 20 MS. RICHARDSON: Here. 21 MR. BYRNE: Councilman Healy is 22 absent. Councilman Vega? 23 MR. VEGA: Here. 24 MR. BRENNAN: He is in the 25 building.	5 1 accordance with the New Jersey Public Laws of 2 1975, Chapter 231, the Open Public Meetings Act, 3 also known as the Sunshine Law, adequate notice 4 of this meeting has been provided by mail and/or 5 facsimile to the Jersey City Reporter, the 6 Jersey Journal, the Daily Challenge and the El 7 Especialito. 8 Additionally, the annual notice 9 was posted on the bulletin board of the first 10 floor of City Hall and filed in the office of 11 the City Clerk on Tuesday, November 26, 12 indicating the schedule of meetings and caucuses 13 of the Municipal Council for the calendar year 14 2003. 15 In addition, at the time of its 16 preparation, the agenda of this meeting was 17 similarly disseminated on Thursday, the 16th day 18 of January at four p.m. to the Jersey City 19 Reporter, the Jersey Journal, the Daily 20 Challenge and El Especialito. 21 Council Members and members of 22 the public, first order of business of the 23 Municipal Council is the First Reading 24 Ordinances. We have just three on the agenda 25 this evening. Allow me to read their titles

1 MS. BELL: I also would like to
2 take this opportunity to thank the Council
3 members because you also made this an easier
4 process, as well too, because you certainly made
5 yourself accessible and available to meet with
6 me and to discuss anything. So I really thank
7 you for your continued cooperation in this
8 process, as well too. And I have to say I thank
9 Mayor Glenn Cunningham because he certainly made
10 this happen, as well too. Thank you.

11 MR. SMITH: We thank him also.
12 Should we break briefly, Robert?

13 MR. BYRNE: I'm sorry?

14 MR. SMITH: Should we break
15 briefly?

16 MR. BYRNE: If you want, just take
17 in-seat recess, just so the room clears a little
18 bit.

19 (Whereupon, a brief recess is
20 taken.)

21 MR. BYRNE: We are back on the
22 record, Council Members. Before we took our
23 little recess there was some talk about moving
24 around the order of business.

25 MR. MALDONADO: I want to defer,

1 on the motion to defer.

2 MR. SMITH: We are deferring to
3 ordinance --

4 MR. BYRNE: Come on back now.

5 MR. SMITH: -- Ordinance i.

6 MR. BYRNE: To defer.

7 MR. SMITH: Second Reading
8 Ordinance.

9 MR. LIPSKI: Aye.

10 MR. BYRNE: Councilman Gaughan?

11 MR. GAUGHAN: Present, here,
12 whatever.

13 MR. BYRNE: Aye?

14 MR. GAUGHAN: Aye.

15 MR. BYRNE: Councilman Maldonado?

16 MR. MALDONADO: Aye.

17 MR. BYRNE: Councilwoman
18 Richardson?

19 MS. RICHARDSON: Aye.

20 MR. BYRNE: Councilman Healy?

21 MR. HEALY: Aye.

22 MR. BYRNE: Councilman Vega?

23 MR. VEGA: Aye.

24 MR. BYRNE: Council President?

25 MR. SMITH: Aye.

1 Robert, to item i on the Second Reading
2 Ordinances.

3 MR. SMITH: I have a motion.

4 MR. BYRNE: By Councilman
5 Maldonado.

6 MR. MALDONADO: Motion.

7 MR. SMITH: Can we get a second on
8 the motion?

9 MR. BRENNAN: Motion, second.

10 MR. BYRNE: We have a second by
11 Councilman Brennan, and it's to defer to item
12 4i. 4i is City Ordinance 03-010. It's an
13 ordinance of the Municipal Council of the City
14 of Jersey City adopting amendments to the City
15 Code Chapter 345, Land Development Ordinance,
16 Article 30, historic preservation. This regards
17 the 6th Street embankment. Councilman Brennan,
18 on the motion?

19 MR. BRENNAN: Aye.

20 MR. BYRNE: Councilwoman Donnelly
21 is absent. Councilman Lipski?

22 MR. SMITH: Steve, Steve.

23 MR. BYRNE: Councilman Lipski?

24 MR. SMITH: We have a motion.

25 MR. BYRNE: Hello. You are voting

1 MR. BYRNE: We have an eight-zero
2 vote to defer to 4i. Again, 4i is an ordinance
3 of the Municipal Council of the City of Jersey
4 City adopting amendments to the City Code,
5 Chapter 345, Land Development Ordinance, Article
6 30, historic preservation, the 6th Street
7 embankment.

8 This is a public hearing on the
9 ordinance. Are there any members of the public
10 wishing to be heard? In some order. Why don't
11 you take a seat and just come up in some orderly
12 fashion? Young lady, you're up.

13 MS. CROWLEY: My name is Maureen
14 Crowley. I am president of the Harsimus Stem
15 Embankment Preservation Coalition. It seems to
16 me that two questions should be asked about
17 landmarking the embankment. Is the embankment a
18 significant historic resource? And is it in the
19 public interest to landmark it? And I think
20 that the answer to those questions could only be
21 yes.

22 Anyone who has read Rick James'
23 detailed history can have no doubts that this
24 structure is irreplaceable. It's significant
25 for its architecture, its engineering and its

1 economic social and political history. The New
2 Jersey State Board for Historic Sites, which is
3 made up of professionals in architecture,
4 history, architectural history, archeology and
5 landscape architecture unanimously agreed with
6 Rick's assessment. So have our City's Historic
7 Preservation Commission and our Planning Board.

8 Is it in the public interest? I
9 think it's absolutely clear that landmarking the
10 embankment is in the public interest. We want
11 oversight by our historic preservation officer
12 and our Historic Preservation Commission of what
13 happens at the boundary between two national
14 historic districts. You know, how could anyone
15 vote against that?

16 I thought this hearing should
17 only consider those two questions, but ConRail
18 has muddled the waters by suggesting that you
19 consider what developers might do on the site.
20 So I want to tell you what our organization sees
21 as the best use of the site. Preservation of
22 the structure, preservation of the right-of-way
23 and use of the top as a nature preserve and
24 massive park.

25 With the green -- green

1 streetscape linking the interior of the Downtown
2 to the Hudson River waterfront, we believe the
3 climate is right for making this happen. In the
4 State of the State address last week Governor
5 McGreevey pledged more State resources to urban
6 green space; and he promised two new State parks
7 and the creation or improvement of 200 local
8 parks. He showed up yesterday in Hoboken to --
9 at the groundbreaking of a park there.

10 As the fastest growing City in
11 the State, soon to be the largest, and with the
12 least park space of any City in the nation, I
13 think we should hold his feet to the fire. We
14 should insist on our share of green space.

15 Our organization has researched
16 funds that are potentially available for
17 historic preservation in green space. We have
18 worked with waterfront developers to ensure good
19 public access from 6th Street to the waterfront
20 walkway. We have requested a meeting with
21 ConRail. We have approached elected officials
22 at all levels of government to get the ball
23 rolling. It's going to take ConRail's
24 cooperation and political will on all levels of
25 government to make our plan happen. And we

1 think it's time for all interested parties to
2 come to the table.

3 With knowledge, however, that
4 people have other plans for the site, what we
5 insist upon is whosever ideas win out, we want
6 any development to be sensitive to the
7 structure, itself and to the historic districts.
8 In his speech last week Governor McGreevey
9 proposed putting more tools into the hands of
10 municipalities to fight inappropriate
11 overdevelopment. Yet what ConRail is asking you
12 to do is to set aside a tool you already have,
13 municipal landmark designation, and further
14 weaken the public's influence on sound
15 development. I think that's absolutely
16 something that you should reject.

17 The process that brought this
18 nomination to you is an extraordinary --
19 extraordinarily democratic one. It has required
20 a commitment from ordinary citizens that has
21 been rare and has been sustained. It's
22 important that you stand with us and with
23 Councilman Maldonado, who represents the
24 embankment area. Please vote yes on municipal
25 landmark designation. Thank you.

1 MS. KOSDAN: I also am Karen
2 Kosdan. I live on 6th Street, have for a long
3 time now.

4 MR. BYRNE: Karen, please spell
5 your last name.

6 MS. KOSDAN: K-o-s-d-a-n. I guess
7 I am speaking to the Council people, as well as
8 the ConRail because it's very hard for us to get
9 in touch with them and discuss certain things
10 with them that we have tried to cooperate.
11 Jersey City has always been very generous to the
12 railroads. They have history of blighting
13 properties so that they can have their space and
14 they can have this wonderful property that they
15 now own.

16 They have been forgiven taxes
17 after Penn -- when Penn Rail went bankrupt,
18 millions of dollars in taxes. They always paid
19 low taxes. We have been very nice to ConRail.
20 We have cleaned up their properties for them and
21 didn't get compensated for it. ConRail hasn't
22 been so nice to us. And I think it's time that
23 ConRail give a little back to the community. It
24 would be nice, and it would be very good --

25 MR. BYRNE: Speak this way, young

1 lady.

2 MS. KOSDAN: -- very good public
3 relations for them, considering that they have
4 taken our community for a ride on a lot of
5 issues. And a lot of money has gone to them.
6 And now they want more money for an area that's
7 very small and very congested. And instead of
8 giving us open space, they are giving us a hard
9 time, wanting to and do more development on an
10 area that's already been historically
11 designated, both sections that surround it, as
12 well as by the State.

13 So I think that it's time for
14 ConRail to donate something back to our City,
15 give us that property as -- as what we deserve.
16 It's not like we are asking for something that
17 we haven't given to them over the years. And
18 that's why I am also asking this Council that
19 you should go by what we have done -- a lot of
20 work has been put into this -- and vote yes on
21 that resolution tonight. Thank you.

22 MR. GUCCIARDO: My name is Steven
23 Gucciardo. I am vice president of the Hamilton
24 Park Neighborhood Association. We are here
25 tonight to discuss the landmarking of the 6th

1 It still can be sold. It just needs to be a
2 accountable to historic guidelines that will
3 protect the neighbors that surround it.

4 You know, you have Hamilton Park
5 and Harsimus Cove on -- on the north and south
6 sides of this embankment, and those -- those
7 neighbors have been asked to meet certain
8 guidelines when they considered developing their
9 properties. What we are asking is that this
10 parcel be something that knits the two
11 neighborhoods together and is also required to
12 meet historic guidelines. We think that makes
13 sense.

14 If you vote no, well, then we are
15 up for grabs and we are back to where we were
16 five years ago, when there was an attempt by the
17 developer and by the administration to tear the
18 embankment down and build the type of buildings
19 that would not be appropriate to the area. We
20 were fortunate enough to win that battle.

21 I appeal to you because we have a
22 lot of experts who have looked at this and --
23 and deemed this property worthy. If you were to
24 vote no, you would be basically saying the
25 Planning Board doesn't know what they're talking

1 Street embankment, whether it deserves to be
2 landmarked.

3 I am just going to read you a
4 list of supporters, starting with Mayor
5 Cunningham, the State Historic Preservation
6 Office, Congressman Menendez, Senator Kenney,
7 Ward E Councilman Maldonado, the Embankment
8 Preservation Coalition, the Jersey City
9 Landmarks Conservancy, the Hamilton Park
10 Neighborhood Association, the Harsimus Cove
11 Neighborhood Association, the Van Vorst
12 Neighborhood Association, the Paulus Hook
13 Neighborhood Association, the Jersey City
14 Historic Preservation Commission, the Jersey
15 City Planning Board and hundreds of citizens who
16 have pledged their support.

17 If listed -- if listed, this site
18 will enjoy the protections afforded to the
19 Downtown historic districts, including sensitive
20 guidelines for development. The issue here
21 tonight is not whether or not development should
22 take place. It's whether or not the 6th Street
23 embankment deserves the protection of landmark
24 status. If it does, indeed, get landmark status
25 by the Council vote, it still can be developed.

1 about, that the Historic Preservation Commission
2 doesn't know what it's talking about, that the
3 State doesn't know what it's talking about and
4 that the neighbors who live around this
5 embankment, they don't deserve to have this
6 protection. And I think it would be a great
7 mistake if -- if you overconsidered the rights
8 of developers to develop this property without
9 restrictions.

10 I ask you to vote yes, and I ask
11 you to not postpone it to your next meeting.
12 The embankment is going to be no less deserving
13 in a couple of weeks. The neighbors are going
14 to be no less deserving of protection in a
15 couple of weeks. So why not just move business
16 along? We're at the second reading. I ask you
17 to vote yes on the embankment tonight. Thank
18 you very much.

19 MR. ROTELLI: Hello. My name is
20 Mark Rotelli. I am vice president of Harsimus
21 Cove Neighborhood Association, and I represent
22 the association. The embankment is the northern
23 boundary of our neighborhood. We consider it
24 one of the key landmarks that characterizes
25 Jersey City's unique historic urban fabric and

1 urge City Council to support the listing. This
2 will not only reinforce on the local level the
3 historic significance of the embankment as
4 already recognized on the State level, but also
5 for the historic resource and means of
6 protection from reckless development.

7 Official recognition of the
8 embankment is one of Jersey City's irreplaceable
9 but threatened landmarks would represent the
10 City's commitment to growth, one that recognizes
11 the value of our history, as well as one that
12 encourages a sensitive approach to
13 redevelopment. So I encourage a vote to -- a
14 yes vote to tonight's landmark embankment.

15 MR. SMITH: Excuse me.

16 MS. MUNSON: Janice Munson,
17 M-u-n-s-o-n. I am speaking officially from the
18 Hamilton Park Neighborhood Association. As the
19 other speakers have mentioned, we strongly
20 support your designation of the embankment as a
21 historic -- with your historic preservation.
22 Okay. It's very important because of the --
23 where it's located, between two historic
24 districts, you know, that we have the integrity
25 of the both the historic districts maintained

1 Now they have a nice place to
2 live, a nice place where they can go outside and
3 not be harassed. And it's peaceable. It's
4 quiet. They can park their cars. I would hate
5 to have anything disrupt their life. And I
6 think if there was something done to those -- to
7 the embankment, it would have a negative impact
8 on their life. And that would really be
9 offensive.

10 And the last thing, in terms of
11 a, I guess, a private citizen, I am sure all of
12 you in your life have lived next to a bad
13 neighbor. And the best thing about a bad
14 neighbor is when they move out. And all the
15 years that I lived in Downtown ConRail has been
16 a bad neighbor. I am sure that you guys
17 remember the bridges that used to go over all
18 the streets. I am sure that you remember it was
19 a place, if you wanted to get mugged, could walk
20 around the ConRail bridges because there were no
21 lights, there was broken glass, there were no
22 sidewalks. For years and years and years -- am
23 I lying when I say that ConRail was a bad
24 neighbor?

25 ConRail is still a bad neighbor.

1 through the -- you know, through that
2 embankment. Anything that is going to be built
3 on that would have a profound effect on those
4 neighborhoods.

5 And if you go driving through
6 right now -- one of the things I love to do is
7 to tell my students that those things were
8 built, all those buildings were built at the
9 same time that there was a Civil War and that
10 there used to be horses and stuff like that
11 because they never really believe that. And I
12 would look really stupid in the middle of that
13 to have a bunch of brand new buildings sticking
14 up in the middle of nowhere. So I think
15 that continuity is very important.

16 The other Padua housing, which is
17 a building built on the corner of 6th and
18 Brunswick, that block is kind of a sacred block.
19 It has a number of churches. It has Holy
20 Rosary. It has St. Anthony's. It has
21 rectories, and has a senior citizens building.
22 That is a very serene place for a lot of people
23 who have, you know, given the best years of
24 their life in Jersey City, working to build

1 ConRail doesn't do anything to put sidewalks
2 next to that, so people have to walk in the
3 street. ConRail has been and will continue to
4 be, as long as they own property in Jersey City,
5 a bad neighbor. And the best thing we can do is
6 have them move out. Thank you.

7 MR. YOST: I am Leon Yost. I have
8 a letter of support from the Van Vorst Park
9 Association for the preservation. It's
10 addressed to Council President Smith. I am not
11 going to read the letter; I will just hand it to
12 you.

13 MR. SMITH: Thank you.

14 MR. YOST: And to keep my
15 presentation under my goal of 60 seconds, I will
16 just make a quick personal comment to add to it.
17 By the way, it's a pleasure to be in front of
18 the Council tonight. You have great patience.
19 Fortunately, it's a cool evening, so we are all
20 a little bit comfortable.

21 MR. HEALY: That is an
22 understatement. Thank you.

23 MR. YOST: In Rome there are
24 2000-year-old aqueducts, but they don't carry

1 bridges across time. Tourists seek them out and
2 are amazed by the remnants that remain. In
3 Jersey City we have a hundred-year-old
4 embankment that no longer carries trains, but it
5 also is becoming a bridge across time. The
6 thing about history is before it can become 2000
7 years old, it first has to become a hundred
8 years old. So I personally support the
9 preservation. We have made just about a hundred
10 years, and with your help we are going to make
11 2000 years. Thank you very much.

12 MR. GUCCIARDO: Hello. I am Sam
13 Pesin. I want to first commend the Council for
14 all your hard and effective work these past many
15 months. I do want to support the resolution and
16 say that my late father, Morris Pesin, when he
17 was councilman, was also one of the early
18 chairmen of the Historic District Commission.
19 And I know if he was here tonight he would
20 certainly be for -- be in favor of your voting
21 tonight without delay for the landmark status.

22 And my father worked closely with
23 the great Ted Conrad, the father of historic
24 preservation in Jersey City. And if he was
25 here, he would be urging you tonight to do this.

1 My father also worked closely and admired Owen
2 Grundy. And if Owen was here tonight, he would
3 be in favor of this action. Owen Grundy once
4 said, "The railroads have walled off Jersey City
5 from our waterfront for decades. And now that
6 we are getting some of it back, we must stand up
7 and not let power brokers prevent us from
8 enjoying our parks and creating new parks."

9 And he said we must really fight
10 for these quality of life issues. And the idea
11 of the embankment, which can be partly the
12 greenways linked to Liberty Park, as I know
13 Councilman Vega is working on greenways on the
14 Hackensack River, all would make a great public
15 resource for the citizens of Jersey City.

16 And I would say that it seems
17 that ConRail wants to sell this land with no
18 strings attached, with no restrictions of this
19 historic designation. But certainly I think we
20 all feel that the day of railroads dominating
21 our lives must be over. They really have
22 made -- as someone said, they have made enough
23 easy money off of Jersey City. So I feel this
24 is a quality of life issue. I do urge you to
25 please listen to the Embankment Preservation

1 Coalition and please vote yes tonight. Thank
2 you very much.

3 MR. RYAN: Good evening,
4 Mr. President, Members of the Council. My name
5 is Bob Ryan. I am director of real estate for
6 ConRail.

7 AUDIENCE MEMBER: We can't hear
8 you.

9 MR. RYAN: I said, good evening,
10 Mr. President, Members of the Council. My name
11 is Bob Ryan. I am Director of real estate for
12 ConRail.

13 MR. SMITH: Good evening.

14 MR. RYAN: Good evening. Thank
15 you for the opportunity to speak here this
16 evening on this issue. ConRail is a successor
17 in interest to the Pennsylvania Railroad, whose
18 history is trying to be protected here, as well
19 as many other railroads who have contributed to
20 the history of Jersey City. We are not opposed
21 to recognition of our contributions and our
22 properties and their contribution to the
23 communities. However, we are opposed to this
24 particular landmark designation because we think
25 it overreaches and takes too much property away

1 from potential uses for the public.

2 ConRail and its predecessors are,
3 first and foremost, a railroad. We are not
4 property developers. Many of our properties and
5 our predecessor's properties have been turned
6 into -- have been developed and are now
7 producing tax revenues and have been turned into
8 productive uses within the community.

9 Our goal since this particular
10 stretch of railroad no longer served the
11 railroad purposes has been to turn it back to
12 the community and again put it back into
13 productive use. Since this -- since we removed
14 the bridges and some of the hazards in
15 cooperation with the City back in 1966, we have
16 been working to -- with developers who also work
17 with the City to try to turn this property back
18 to productive use.

19 We objected in 1999 when it went
20 onto the State register. The State put it on
21 the register, despite our objections. The
22 Federal Register did not, however. And now the
23 City is again attempting to put it on landmark
24 status.

25 We came to the -- we have been

1 working with a number of developers over the
2 past few years. We were working with Jersey
3 City's Redevelopment Agency the last time this
4 issue came -- came forward, and it was put onto
5 the State register. As a result of that
6 designation many of those developers and the
7 City itself lost interest in making it -- making
8 redevelopments on the property.

9 We have been working since then
10 to try to overcome those objections and again
11 solicit the aid of developers to take the
12 property and put it into productive uses.
13 Again, understanding that in any -- any
14 development that would take place on the
15 property, it would have to be done in
16 cooperation with Zoning and Planning Board, as
17 well as the groups, the State historic groups,
18 to try to make the -- the whatever developments
19 take place work in conjunction with the
20 designation.

21 In doing this we put forth a
22 package to those parties who have been
23 interested, including the City, including the
24 Land for Public Trusts, including the Coalition
25 for Preservation of the Embankment, as well as a

1 number of other developers. ConRail's interest,
2 again, is trying to realize the value of the
3 real estate, turn this property back to the
4 community, let it become a source of tax
5 revenues and -- and part of the community.

6 Our package, unfortunately, did
7 not coincide with the timing of the
8 recommendations to put this on the -- designate
9 it as a landmark. We objected to the Planning
10 Board back in December. The recommendation is
11 coming before the Council now to vote on that
12 recommendation, again over our objections.

13 We came on January 8th to the
14 Council meeting at the first reading of this
15 proposed ordinance, and we asked for some time
16 to at least receive the proposals from the
17 developers who were interested in the property,
18 as well as the City, if they were interested, or
19 the Embankment Coalition, if they were
20 interested, and allow us some time to review the
21 proposals that came in and postpone this public
22 hearing until February 11th.

23 MR. BYRNE: One second. And
24 postpone this hearing until February 11th, did
25 you say?

1 MR. RYAN: Yes, I did. And since
2 the deadlines for the bids was January 21st,
3 yesterday, we did receive a number of responses.
4 But because of the City's actions, many of the
5 developers, not wanting to get into legal
6 battles or entanglements or lose favor with the
7 City, have decided not to enter -- to enter a
8 bid at this time. We did receive, however, a
9 number of responses indicating that they would
10 be happy to or willing to sit down and work with
11 us, as well as work with the City and the
12 Coalition to try to reach a solution that would
13 be win-win for everyone here.

14 And we're asking the Council not
15 to vote on this tonight but to again postpone
16 vote until February 11th to give us time to sit
17 down and discuss this with the people who have
18 sent in their responses, including the
19 Coalition, and come back here on February 11th
20 and tell you what alternatives we have been able
21 to come up with. We feel that if you put the
22 landmark status on it by a vote tonight, it will
23 hamper those efforts and will result in
24 permanent consequences which will affect the
25 value of the potential use of this property.

1 Thank you.

2 MR. SMITH: Thank you.

3 MR. FIORILLA: Mr. President,
4 members of the Council, my name is John
5 Fiorilla. I am from the firm of Watson,
6 Stevens, Fiorilla & Rutter, and I am counsel for
7 Consolidated Rail Corporation.

8 I wanted you to know that we did
9 receive and I received personally a number of
10 phone calls from people we had sent our bid
11 packages to. And I can confirm what Mr. Ryan
12 said. A lot of them don't want to deal with the
13 City, but they all have ideas about development.
14 Some of them are here tonight. And the -- the
15 problem you have with the designation before you
16 could hear them out is that it is very difficult
17 for people to even want to get involved, if they
18 feel they are going to have to fight their way
19 through.

20 Now, quite frankly, some of these
21 development plans may very well not be in
22 opposition to what a lot of the people who have
23 spoken here tonight have said. First of all, we
24 would be glad to sell this for a park, if
25 somebody would offer us some money. I also

1 suggest if the aqueducts of Rome were owned by
2 private parties, Rome would have to buy them;
3 they wouldn't just get them.

4 And I think the situation is that
5 if, in fact -- and our client has asked me to
6 let you know if, in fact, at the end of the
7 situation, if we can show that -- and I don't
8 think it's going to be very difficult with the
9 types of letters and calls which we are getting,
10 which we did not solicit but which we are
11 getting -- the value of our property is greatly
12 reduced by the fact that it has a historical
13 designation on it, that the railroad would not
14 just go quietly into the night.

15 I think that if, in fact,
16 however, that the City can sit and discuss this
17 with everybody -- and we'll discuss it with the
18 Historical Society. We received a letter from
19 them asking to meet with us. We received that
20 letter yesterday. And we -- we intend to
21 respond to it and meet with them. I have no
22 objection to Miss Crowley's idea that the State
23 come up with the money for the land to be a
24 park. If that is a reasonable way to develop
25 the property, it should be looked into. But

1 people are afraid of of waiting for another
2 meeting. I think it's reasonable for the City
3 to hear what's on the table before it makes its
4 determinations. Some of the developers -- they
5 all have different ideas, from what I can see.
6 I have heard a number of them. I am not going
7 to tell you what they are. They are going to
8 have to tell you themselves. But just from what
9 they have told me, some of them will develop all
10 the property, some will develop some of the
11 property. They all have different ideas.

12 As Mr. Ryan said, the railroad is
13 not a developer. We don't develop our
14 properties. We haven't up to now, and we are
15 not going to start now. We have been asked to
16 become partners in -- to develop this property,
17 and we have said no to that request. That is
18 not what we do. We are trying to sell the
19 property.

20 We have removed the bridges,
21 which were a problem; and we had them removed.
22 And now is the time for this to be returned
23 and -- and sold at fair market value. And
24 that's what we're asking for, a fair market
25 appraised value.

1 these are all the type of things that have to be
2 looked into.

3 And I think the problems we have
4 with making this a historical designation is
5 that it would take the wind out of the sails of
6 a lot of people who may have good ideas which
7 the City may really want to enter into. When we
8 came to the caucus meeting not for this meeting
9 but the previous Council meeting, I explained at
10 that time that we needed some time; and we did
11 request until February 11th for this hearing
12 because we really do need to, first of all, talk
13 to the people who submitted a response as to our
14 bid package.

15 We haven't been able to reach
16 them all by phone yet. We didn't get some of
17 these until early this morning. And most of
18 these came in after 3:30 yesterday afternoon.
19 So it's very difficult to reach these people,
20 talk to them about what their ideas are and try
21 to get them together with people. And we think
22 that's something that the Council should look at
23 before it makes this a historic site because
24 then it will have all the cards on the table.

25 I don't see what the embankment

1 It's interesting to note that the
2 people who have submitted bid packages back have
3 no problem with the asking price for this
4 property. Nobody suggested that the asking
5 price was too high. And in fact, some people
6 have been higher than the asking price. So we
7 don't feel our -- our -- you know, what we're
8 asking for is out of line. I discussed this
9 once with Miss Crowley; and her feelings were
10 that the asking price in our bid package, which
11 was \$3 million, was not exorbitant, not at all
12 exorbitant for the property.

13 So this is the type of thing that
14 is out there and we think that you, as a
15 Council, should consider before you make this --
16 vote on this designation of the embankment
17 property as a historic site. And we would be
18 glad to answer any questions, myself and
19 Mr. Ryan, that you may have of us today or any
20 other time. I will meet with any of you or any
21 of your committee regarding this situation. I
22 would also like to know who we should be
23 bringing some of these ideas to, specifically on
24 the Council, who the Council is going to
25 designate as the people to be discuss this with.

1 MR. SMITH: With all due respect,
2 I set up a committee. I believe I asked Judge
3 Healy and Councilman Maldonado to review the
4 RFP. Have you received an RFP?

5 MR. MALDONADO: I got a copy.

6 MR. FIORILLA: We sent RFP to
7 Mr. Booth sometime ago.

8 MR. MALDONADO: Alex reviewed it.

9 MR. BOOTH: I have the RFP, but I
10 think what you really want to see are the
11 responses to the RFP.

12 MR. MALDONADO: Well, let me ask
13 you a question, sir. Would you label the
14 receipt of the bids that came in yesterday as a
15 success for ConRail?

16 MR. FIORILLA: As a what?

17 MR. MALDONADO: Success. Did you
18 get the number of bids that you were looking
19 for, more, less?

20 MR. FIORILLA: No, in fact, we got
21 less. And people wrote us letters telling us
22 that the -- that the fact that the Council was
23 prepared to vote on historic designation tonight
24 was the reason they didn't bid. We actually had
25 people tell us that. And I can suggest to you

1 MR. FIORILLA: Yes.

2 MR. MALDONADO: At that time there
3 was some talk of development. That -- that went
4 by the wayside because of that designation.

5 MR. FIORILLA: That is because --

6 MR. MALDONADO: That is what
7 Mr. Ryan said.

8 MR. FIORILLA: That is because the
9 City couldn't develop it.

10 MR. MALDONADO: A few years later
11 we find ourselves today, bids with people who
12 are interested in developing. So obviously,
13 being put on the State register was not a
14 deterrent. It was not a hindrance for what
15 ultimately came out to be this reception of
16 certain bids for that property yesterday. And
17 I -- and I suggest to you that in a few years
18 the same thing will happen with the local
19 designation.

20 MR. FIORILLA: Councilman, I would
21 like to address that. Councilman, let me
22 address that, please. The fact that the
23 property was put on the State Historic Registry
24 did not prohibit development by private
25 developers. However, what it did do is stop the

1 that we did put the people on notice about this.
2 We felt we had to do that. I mean, obviously,
3 in our bid package the fact that this Council
4 was going to vote on this was not included, so
5 we did send out, as -- Mr. President, as you
6 know, we did send out to all the people who got
7 bid packages a letter; and we sent a copy of
8 that to the City alerting them to that fact
9 because, obviously, we don't want people bidding
10 not knowing all the facts to the property and
11 obviously --

12 MR. MALDONADO: You mentioned
13 that -- that you got bids back and that nobody
14 complained about the -- the price.

15 MR. FIORILLA: That's right.

16 MR. MALDONADO: Everybody was
17 comfortable with that?

18 MR. FIORILLA: Yes, but they all
19 had a lot of conditions on them, which is why
20 I'm going through them --

21 MR. MALDONADO: If you allow me to
22 finish.

23 MR. FIORILLA: Yes, go ahead.

24 MR. MALDONADO: A few years ago
25 the site was put on State register.

1 discussions that the railroad had with the City
2 of Jersey City because the City of Jersey City
3 found it didn't want or the Jersey City
4 Redevelopment Agency found that they did not
5 want to go and try to develop this property
6 because of that situation. And under the law,
7 they couldn't do that. However, private
8 developers could do that under that.

9 MR. SMITH: With all due
10 respect --

11 MR. FIORILLA: Yes.

12 MR. SMITH: -- I was chairman of
13 the Redevelopment Agency at that time when that
14 came in. And one of the objections that I noted
15 was the way the community responded to what was
16 being put out at that time. And as the
17 chairman, I suggested that we have a further
18 review of it because of what the community was
19 saying to me, as a Council person, as well as
20 Redevelopment commissioner.

21 So I was the one that kind of
22 pulled it or changed the direction at that time.
23 I am not -- because I didn't think that it was
24 appropriate in the manner in which it was being
25 put out there and marketed. The developer who

1 was looking at the property went ahead and
2 wanted to -- went to the community, who came
3 back to me and we decided at that time that that
4 was not the direction we wanted to go. With all
5 due respect to your information.

6 MR. FIORILLA: Well, I -- I'm sure
7 that's what happened, Mr. President. But you
8 know, when I said regarding the problems that
9 the City had -- would have with developing the
10 property -- on that property is also the law.
11 And I am sure you are aware of it. I am also
12 aware of the fact that private developers are
13 not affected the same way by the historic
14 designation.

15 As Mr. Ryan said, there has never
16 been any implication here that the Planning
17 Board in the City of Jersey City, Board of
18 Adjustment will not have to pass on any
19 development from this property by anybody else,
20 that certainly there is no way that's being
21 skipped over or any way avoided. The City would
22 have an awful lot to say about anything that's
23 developed on this property in the normal course.
24 We would just like to not have additional
25 problems placed on our property so that it

1 whether the City would support it. But in the
2 meantime I have come to realize through your --
3 your conversation with me earlier where you
4 pretty much threatened us to go to court if we
5 proceeded in this. That -- I don't take kindly
6 to threats.

7 MR. FIORILLA: I understand that.
8 I don't think that's a threat. I think it's
9 important that any ordinance -- any ordinance
10 that's proposed, there is a provision that says
11 this is at no cost to the City. And my client
12 wants you to know --

13 MR. HEALY: What is the last thing
14 you just said, sir? I am -- I didn't hear you.
15 There is a provision that says what?

16 MR. FIORILLA: There is no cost to
17 the City. Okay. It says that in the proposed
18 ordinance here that there is no cost to the
19 City. And the situation is this: If we can't
20 come to some type of an arrangement or
21 agreement, which I think we can, if we can get
22 people to sit down, and we find that -- we are
23 going to take all the efforts we possibly can
24 take, of course, to attempt to sell the
25 property, market the property and so on. But if

1 becomes -- would be unable to really sell the
2 property.

3 There are some people that would
4 like us to move out of town here. We're trying
5 to move out of town, but it's getting more and
6 more difficult.

7 MR. SMITH: We would like you to
8 move out, but there are a few things we would
9 like you to do before you leave.

10 MR. FIORILLA: Give us some time
11 to sit down and talk about it; maybe we can work
12 that out. And I think that's really where we're
13 going. I don't have any problem -- I don't have
14 any problem with that -- with that suggestion,
15 Mr. President. I just think that the --

16 MR. MALDONADO: Mr. --

17 MR. FIORILLA: Yes.

18 MR. MALDONADO: At the last caucus
19 meeting I was -- I was flexible to -- to listen
20 to the possibility of putting it off for a
21 couple of weeks in order to give ConRail the
22 opportunity to look at what bids came in and --
23 and to speculate as to what the -- could
24 possibly go there and to speculate whether the
25 community would support it and to speculate to

1 we get to the point where we can't do that and
2 it appears from the people who we're talking to
3 that the reason is because of the historical
4 designation, then there is a real legal question
5 as to whether or not that designation
6 constitutes a taking. And well, we --

7 MR. MALDONADO: It's a very
8 interesting concept, sir. I am not a legal
9 expert; our attorneys look at that aspect.

10 MR. FIORILLA: I suggest to you
11 that it's one of those types of concepts that,
12 you know, would have to be looked at and looked
13 at to the point where we have to take what
14 appropriate litigation we have to because
15 people -- in effect, it would happen because the
16 City won't talk to us.

17 Now, I don't think that -- that
18 should have to happen. But I -- but I would be,
19 you know -- it wouldn't be right if I didn't
20 come up and tell you that is a possibility and
21 that there are costs that the City is looking
22 at, if they just go ahead and -- and we are
23 going to make every effort -- whether you vote
24 or not we are going to make every effort to tell
25 the property and to get the fair market value of

1 the property. I am not suggesting any other
2 way.
3 But I will suggest this, that
4 without that designation it will be a lot easier
5 to bring people in with plans for the City to
6 look at and to come up with development that
7 everybody can agree to. I can't make any
8 guarantees on it. But see, I am not asking you
9 to make any guarantees either, other than to
10 postpone this, at least, so we can get some of
11 these people in to talk to the City about what
12 they want to do and how they want to do it. And
13 my problem is that if I don't have the City
14 holding up for a relatively short period of
15 time, I may not be able to get those people in.
16 MR. HEALY: Sir, I am sorry, your
17 name is Mr. Fiorino?
18 MR. FIORILLA: Fiorilla.
19 MR. HEALY: Like the old Mayor of
20 New York?
21 MR. FIORILLA: That's right.
22 MR. HEALY: How long has this
23 property been unused by ConRail; 50 years?
24 MR. FIORILLA: No, no, no.
25 MR. HEALY: When did the railroad

1 stop running there?
2 MR. FIORILLA: 1990s.
3 MR. HEALY: 1990? I don't think
4 so.
5 MR. MALDONADO: Absolutely not.
6 MR. HEALY: I would guess 50
7 years. What do you think?
8 MR. FIORILLA: No, no, no.
9 MR. BYRNE: It was -- it was made
10 obsolete by the Marion Junction.
11 MR. FIORILLA: That's right.
12 MR. BYRNE: It was sporadically
13 used. Sporadically used in -- when they
14 concluded the Marion Junction development, which
15 was probably eight or ten years ago.
16 MR. FIORILLA: That's right.
17 MR. BYRNE: It became obsolete.
18 MR. FIORILLA: That's right. And
19 that's when we abandoned it, about 1992, in that
20 area.
21 MR. HEALY: I don't believe that
22 there were trains running down 6th Street eight
23 years ago, ten years ago in Jersey City. There
24 were? On that embankment?
25 AUDIENCE MEMBER: Very

1 sporadically.
2 MR. HEALY: Never seen them.
3 MR. BYRNE: It was a turnaround.
4 It wasn't an active rail line; it was a
5 turnaround. When they ran trains that were too
6 large, the only way they could turn them around
7 and move them out was to back them down the old
8 Harsimus branch.
9 MR. HEALY: So for how long was it
10 then -- it hasn't been used in eight or ten
11 years? How long was it just used sporadically
12 once a week? When did that -- when did it stop
13 being used?
14 MR. MALDONADO: Fully operational.
15 MR. HEALY: As a real branch.
16 MR. FIORILLA: ConRail got it in
17 1976; that's when ConRail started. ConRail
18 inherited 1976. It was in service at that time.
19 MR. HEALY: I don't believe --
20 MR. FIORILLA: It was --
21 unfortunately, they needed it. And ConRail only
22 got, by the way, properties that were used or
23 useful rail transportation pursuant to the
24 Railroad Reorganization Act, which created
25 ConRail, the Federal law that created ConRail.

1 Any other properties which they didn't need
2 would have been retained by the trustees of
3 those properties and sold and developed. And
4 believe me, they were trying to keep as many
5 properties as they could from ConRail.
6 MR. HEALY: For eight or ten years
7 it hasn't been used at all, and ConRail got it
8 in '76 you said, 26 years ago?
9 MR. FIORILLA: That's when we got
10 it, we were using it.
11 MR. HEALY: It was used once a
12 week?
13 MR. FIORILLA: We were using it
14 more than that in '76.
15 MR. HEALY: Twice a week?
16 MR. FIORILLA: It depends on -- on
17 a lot of different things. I can't give you the
18 history right off the hand, but I certainly can
19 go back and look. There was a lot of
20 development of railroad properties, new
21 railroads in this -- in this area, the new
22 junctions, consolidations. You have to remember
23 that ConRail, Consolidated Rail Corporation, was
24 called that because it consolidated the six
25 major railroads.

1 MR. HEALY: If it was used.
 2 MR. FIORILLA: Most of them came
 3 to Jersey City.
 4 MR. HEALY: If it was used at all,
 5 as you're claiming that it has been. I have
 6 been here all my life; I don't remember seeing
 7 trains down there. I have seen the embankment
 8 forever, but I -- I don't remember seeing any
 9 trains running down there.
 10 MR. FIORILLA: Well, unfortunately
 11 we did use it. I can't --
 12 MR. SMITH: Robert, Robert.
 13 MR. BYRNE: Yes, sir.
 14 MR. SMITH: When were the tressels
 15 taken out?
 16 MR. BYRNE: Over the last ten
 17 years.
 18 MR. FIORILLA: '96 is when we took
 19 them out. Now, at that time we were working
 20 with the City. And I think, Mr. President, you
 21 recall that. To try to get to develop this
 22 property in '96, we took the bridges out and
 23 removed the rail from it too.
 24 MR. SMITH: The rails were
 25 removed, but also there was an environmental

1 impact. We wanted to -- we did an environmental
 2 study on it before and would not let the
 3 developer who wanted to do the environmental --
 4 Redevelopment Agency went out and did its own
 5 environmental development -- I mean study --
 6 MR. FIORILLA: Right.
 7 MR. SMITH: -- on it. But the
 8 point is -- right now is that there are several
 9 things that ConRail has not done as a good
 10 neighbor. And I cited a couple of things to you
 11 in regards to what the Port Authority, who we
 12 had a -- didn't have a good neighbor
 13 relationship with and under the new president,
 14 under the new people that we worked with, we
 15 have managed to have certain things done.
 16 It's always been my practice to
 17 stay in touch with the communities who are going
 18 to be impacted by the decisions that we make as
 19 a Council person. Sometimes I might not always
 20 reach full consensus of others, but most of the
 21 time I try to stay in touch. And I keep an open
 22 dialogue. I don't think that ConRail kept the
 23 type of dialogue with Jersey City that would be
 24 conducive for us to have the type of
 25 relationship that we call positive.

1 MR. MALDONADO: On the contrary,
 2 it's been a very negative one.
 3 MR. FIORILLA: As you suggested,
 4 Mr. President, you had that type of relationship
 5 with the Port Authority; and you were able to
 6 change that. Is that a fair statement?
 7 MR. SMITH: Yes, it was benefit to
 8 us.
 9 MR. FIORILLA: Well, I think that
 10 can happen with ConRail too. It has to start
 11 sometime, and now is the time.
 12 MR. SMITH: But you know what
 13 would have been -- it would have been great to
 14 see some cement poured in those -- for those
 15 sidewalks we talked about. That would have
 16 shown step in the right direction. We talked
 17 about sidewalk in that area. We talked about
 18 the fact that the City has to keep that area
 19 clean and clear so that people's quality of life
 20 is not affected by the dumping, by garbage and
 21 debris that is put there.
 22 I think that -- I can't speak for
 23 the rest of my colleagues; but I think that in
 24 all due respect to ConRail, I think they knew
 25 about these various groups that were here and

1 could have spent some time doing public
 2 relations with them before coming here and
 3 having them do public relations with us.
 4 MR. MALDONADO: If I may add,
 5 Council President, Maureen and the organization
 6 has, for at least a year-and-a-half, been
 7 working on this whole embankment. They tried to
 8 get T21 grant monies in order to facilitate a
 9 streetscape program for -- for 6th Street. You
 10 guys knew about it. You knew that there was a
 11 movement for historic designation. I can't
 12 understand why you wait until the 11th hour to
 13 put together RFP package for people to come in
 14 to build.
 15 And it's just a matter of
 16 difference of opinion. You are of the opinion
 17 that historical designation will bring down the
 18 value of the property that you could sell, and I
 19 differ. I think if you look at Harsimus Cove,
 20 Van Vorst Park, Hamilton Park, once those areas
 21 were historically designated, that picked up the
 22 neighborhood, that brought up the values of
 23 those neighborhoods. And it's going to do the
 24 same thing for the embankment.
 25 MR. FIORILLA: Councilman, if you

1 were able to explore some of the people who did
2 submit bids -- because, obviously, they had a
3 different view from the people who said they
4 wouldn't submit bids, right?

5 MR. SMITH: But based on the
6 letter that you sent out, it kind of suggested
7 which direction that they should go when they
8 came down the street towards you.

9 MR. FIORILLA: No, I don't think
10 so, Mr. President. My concern was somebody
11 saying that I misled them about what -- what
12 condition the property was.

13 MR. SMITH: I am not saying you
14 misled them; but I'm thinking what I saw kind of
15 suggested that they speak to not having this
16 designated, which, to me, would imply that it
17 would not be as prudent if it was historic
18 designation as if it weren't.

19 MR. FIORILLA: Well, I think that
20 the -- everybody had a different point of view
21 as to what those letters meant because people
22 did bid. Some bid more than the asking price.
23 But they all wanted opportunity to talk to the
24 City and to see about that. I mean, you know,
25 there could be -- there could be offers here

1 Board and the Historic Preservation Commission
2 considered in having made recommendations.

3 There are people that are
4 informed. There are people that spend time at
5 looking at the narrow issues of what's before
6 them and deciding within the Municipal Land Use
7 what their rights are and what they can
8 exercise.

9 I think it's been brought to our
10 attention and certainly to you that the two
11 historic districts are joined through a spine
12 called the 6th Street embankment and that there
13 is an interest in the community to preserve the
14 history of the railroad, whether it was good for
15 Jersey City or bad for Jersey City, whether it
16 would stifle Jersey City's waterfront
17 development or not. There is an interest in
18 preserving it because the alternatives are
19 unclear of what they might do, what kind of
20 housing they might impose and the thread that
21 unites the historic district may be ruined. The
22 character of the neighborhood may be changed.

23 The fact of the matter is that
24 ConRail has been less than a responsible
25 neighbor. That is a fact. Over the years

1 where some of this is designated historic, some
2 isn't. I am not sure about that. I have a lot
3 of rumors about that.

4 MR. VEGA: What did you say?

5 MR. FIORILLA: Some of this
6 embankment be designated historic site, some of
7 it not be.

8 MR. VEGA: Okay.

9 MR. FIORILLA: I mean, those are
10 some of the things that could come up. Those
11 are the kinds of things that need to be
12 explored, whether it makes any sense.

13 MR. VEGA: Mr. Council President,
14 I would like to speak up and rise at this
15 occasion because I think the issue is not
16 whether a piece of a bread can be made historic;
17 it's the whole loaf. So I don't know where you
18 are coming from with that concept. But let me
19 let me at least -- at least give you my sense of
20 where this is at.

21 I think Maureen did a good job in
22 framing the issues. Is this a significant
23 landmark, and is it in the public interest?
24 Those are very clear, articulated issues that we
25 have to consider and I think that the Planning

1 ConRail and its designated groups before them
2 have been asked to do something in Jersey City.
3 We had to petition just to get lights underneath
4 the trestle when Cucci was the Mayor -- when
5 Cucci was a councilman because I remember that
6 vividly. When -- when the people of the
7 neighborhood asked for, being responsible, for
8 cleaning the property, the sidewalks of snow, of
9 the bluestone that's rising and people are
10 falling, there was no one coming forward or
11 showed interest in the people of Jersey City.

12 ConRail has been less than
13 responsible to our people of Jersey City. And
14 quite frankly, we are elected officials that
15 need to respond to them, not to the property
16 owners that's from the outside that hasn't been
17 responsible to us.

18 In my travels -- in my travels I
19 have seen walls or embankments that have
20 protected cities over time, and those
21 communities have seen a need to preserve those
22 walls for their own reasons. Part of the
23 reasons have been continuity of time, continuity
24 of character of a community.

25 You have mentioned the land for

1 public trust. Maybe ConRail may want to donate
2 that and show that, in fact, it is a good
3 neighbor. I say that some of the things that we
4 might be able to do is look at how Green Acres
5 may be able to create more parks in our -- in
6 our communities. And the top of that embankment
7 could certainly qualify as one.

8 There is an interest in groups
9 From Rails to Trails, that you can create a
10 linear park so that people that come off the
11 Bergen arches can find their way through to our
12 waterfront and give us an access to a corridor.
13 I say to all of you that are here today, support
14 the County Open Space Funding initiative so we
15 can create more parks, more trails so that we
16 can enjoy.

17 You know, you're being asked to
18 be a good neighbor, and you're asking us to let
19 you make \$3 million or more. You know what
20 people fear the most in this community? That
21 the right-of-way still exists for a major
22 highway to come right down our spine and pollute
23 our City further. Those are the things that
24 people have fear of. What people would like to
25 see is let us keep and preserve our community as

1 opportunity. I think it might be some benefit
2 to the City. Regardless whether they like
3 ConRail or not, I don't think that should be the
4 issue. I am not asking for a favor. I am
5 asking for something that might be able to
6 benefit all the parties. And that's why I'm
7 asking for it. So --

8 MR. VEGA: Sir.

9 MR. FIORILLA: I want to reiterate
10 that point, and that's what we're asking for
11 this evening.

12 MR. VEGA: The issue has nothing
13 do with whether we like ConRail or not; that is
14 an irrelevant issue to our discussion.

15 MR. FIORILLA: I didn't bring it
16 up. But I have been told that, you know, my
17 client has not been a good neighbor, so I have
18 to assume that people don't like that, based on
19 what the Council has said and other people have
20 said. And I -- I'm not disputing anything they
21 have said, and I am not disputing how they feel.
22 But I am saying that I would like to go forward
23 from here.

24 I am not arguing with the
25 president, President Smith. And I don't think

1 it is. Whether you have had a good history or
2 bad history, that is part of our history of
3 Jersey City.

4 I believe that the people have
5 spoken tonight. I believe that the people are
6 saying let's preserve our history. Whatever it
7 has been, it's our history. My advice to you is
8 cut your losses, move on and let's move on and
9 let's find ways to preserve the something
10 between us.

11 AUDIENCE MEMBER: ConRail can
12 afford it.

13 MR. SMITH: Excuse me. Excuse me.
14 Sir, when you finish speaking, I would like to
15 ask the Council and Robert to take a vote. But
16 before we do that, if you have anything further
17 you would like to share with us, please do so.

18 MR. FIORILLA: I just wanted to
19 conclude by asking Council consider putting the
20 vote off until February 11th, which would be the
21 next Council meeting. That is the next Council
22 meeting? I was told it was.

23 MR. BYRNE: Tuesday,
24 February 11th.

25 MR. FIORILLA: And give us that

1 there is anything that you have said I disagreed
2 with. And quite frankly, Mr. President, if I
3 did, I would tell you. You understand, but I
4 don't disagree with you. And I haven't
5 disagreed with you.

6 But I would like to go forward.
7 And I think the fact that you brought forward,
8 the fact that times do change and things can
9 change -- and I think, you know, you brought out
10 to everyone here that the City has been doing
11 that with -- with other projects. That's all.

12 And what I'm saying is -- what
13 I'm trying to tell you today is I would like to
14 be able to do that too. And that's what we've
15 been trying to say for the last month on this
16 issue. That's all. And it's really up to the
17 Council to make that kind of determination. But
18 we certainly will schedule meetings right away
19 and rearrange our schedules to make sure that
20 the deadline is met. And that's all we can do.
21 That's what we would intend to do.

22 MR. SMITH: Excuse me,
23 Mr. Gucciardo. You spoke.

24 MR. BYRNE: He and I are
25 communicating.

1 MR. SMITH: I'm sorry.
 2 MR. BYRNE: That's okay.
 3 MR. SMITH: I thought you were
 4 talking to me. I apologize.
 5 MR. FIORILLA: Thank you, Members
 6 of the Council.
 7 MR. BYRNE: Thank you.
 8 MR. FIORILLA: Appreciate your
 9 time.
 10 MR. BYRNE: This is a public
 11 hearing on the ordinance. Is there anyone yet
 12 who hasn't spoken?
 13 MR. SMITH: Can we ask everybody
 14 to allow us to move on? We have been here a
 15 long time. This is an important issue to
 16 everyone. And you know, prior to you all coming
 17 up I normally would have asked to establish four
 18 speakers to come up. We did show our preference
 19 to do this by deferring to it. I would just ask
 20 you to allow us to vote, please, on the issue.
 21 I am not trying to say that your points of view
 22 are not important, but I think we have -- it is
 23 not going anyplace. We would like to move on.
 24 We have a large agenda and a large number of
 25 things that we have to deal with. Please allow

1 MR. VEGA: Aye.
 2 MR. BYRNE: Council President
 3 Smith?
 4 MR. SMITH: Aye.
 5 MR. BYRNE: We have an eight-zero
 6 vote to close the public hearing. To consider
 7 the final adoption of City Ordinance 03-010,
 8 Councilman Brennan?
 9 MR. BRENNAN: Robert, before I
 10 vote I would just like to thank the people who
 11 came out in support of this. There seems to be
 12 a lot of people that are concerned. I am a
 13 fellow Downtown resident myself, St. Michael's
 14 Parish, born on 9th Street, so I know what
 15 they're taking about. And Jerry, you live in
 16 the Heights; the railroad did go through down
 17 there. It did create a lot of problems back in
 18 the '60s, early '60s, when I was a kid growing
 19 up. And yes, it was a hellhole walking through
 20 those streets at night. And railroad just did
 21 walk away from everything. And it's time that
 22 we did stand up and unite with each other. And
 23 I vote aye.
 24 MR. BYRNE: Councilwoman Donnelly
 25 is absent. Councilman Lipski?

1 us to do our voting. Robert.
 2 MR. BYRNE: I still have to say
 3 this is a public hearing. Anyone insisting on
 4 speaking, please come forward.
 5 MR. SMITH: Thank you.
 6 MR. MALDONADO: Move to close.
 7 MR. BRENNAN: Second.
 8 MR. BYRNE: We have a motion by
 9 Councilman Maldonado, seconded by Councilman
 10 Brennan to close the public hearing.
 11 MR. BRENNAN: Aye.
 12 MR. BYRNE: Thank you, Councilman
 13 Brennan. Councilwoman Donnelly is absent.
 14 Councilman Lipski?
 15 MR. LIPSKI: Aye.
 16 MR. BYRNE: Councilman Gaughan?
 17 MR. GAUGHAN: Aye.
 18 MR. BYRNE: Councilman Maldonado?
 19 MR. MALDONADO: Aye.
 20 MR. BYRNE: Councilwoman
 21 Richardson?
 22 MS. RICHARDSON: Aye.
 23 MR. BYRNE: Councilman Healy?
 24 MR. HEALY: Aye.
 25 MR. BYRNE: Councilman Vega?

1 MR. LIPSKI: The last meeting we
 2 voted to introduce this in large part because
 3 the people from ConRail came before us and asked
 4 for an extension to February 11th. And it was a
 5 lot of discussion amongst the Council at the
 6 caucus and at this meeting. I was down at the
 7 embankment when Congressman Menendez and State
 8 Senator Kenny were down there. And this is
 9 prior to it being put on the State Registry, of
 10 which I support.
 11 But in listening to the arguments
 12 at the time of the caucus and at our Council
 13 meeting, I didn't think it was fundamentally
 14 unfair, even though this organization had waited
 15 some seven years before going to this process.
 16 And I didn't think 30 days would make so much of
 17 a difference. But they are here again tonight
 18 petitioning for another two weeks. The
 19 community has spoken loud and clear. There are
 20 historic districts that border this particular
 21 property that, as Councilman Vega has said, if
 22 left to be developed unfettered, I think it, in
 23 essence, would tear at the heart of what the
 24 spirit of what these communities have worked so
 25 hard to achieve.

1 So my role here as a balancing
2 act in -- I don't want to be a hypocrite in that
3 I went down and supported and so forth. But by
4 the same token, we voted to introduce at the
5 last meeting so as to allow this to go to
6 February 11th.

7 I just want to share one other
8 concern. And I know a lot of people are here,
9 and I know how well attentioned you are. I
10 represent Ward C. And certainly see a lot of
11 credence to my colleague from Ward E and also
12 Councilman Vega, his expertise from down this
13 area. But in representing Ward C, we have three
14 parcels up there that are either landmark
15 designated or the desire of the community to
16 have them landmark designated.

17 That is Reservoir Number Three,
18 which is preCivil War, 1856, and has been on the
19 City roles for, you know, 20 years now. And
20 just last year, in 2002, we found a dead body
21 there. We have not come up with the political
22 spirit to take its designation to the next step
23 of making it healthy integral part of my
24 community.

25 Apple Tree House is another one

1 of which you know this goes back hundreds of
2 years. And also Mayor Hague's body was laid out
3 there, certainly a national figure. And just
4 this week our Mayor came to Ward C to talk about
5 its deterioration and its blight in Ward C.

6 Last, but not least, I know
7 number of you are familiar with it, landmark
8 Loews. That's been, you know, in the fight.
9 And it's on the City coffers, and yet we are
10 unable to make it a vibrant part of our
11 community.

12 So those are my concerns in terms
13 of designating something landmark and then just
14 seeing it sit and stagnate and become a blight.
15 And I think maybe if in two weeks this group
16 could muster up the will and take the concerns
17 of this community, certainly I would not vote to
18 take away from the spirit. If they came up with
19 something that was in agreement with the spirit,
20 I would go with it. But if not, then I would
21 vote it down. But at this time I am going to
22 vote no.

23 MR. BYRNE: Councilman Gaughan?

24 MR. GAUGHAN: Yeah, at the caucus,
25 at the first reading I -- I had believed that

1 waiting for the designation seemed reasonable,
2 that -- that, in fact, holding off with the
3 allotted time the railroad asked about seemed
4 reasonable. Having done some research since
5 that time -- and I, like Council President,
6 served at the JCRA.

7 Harvey and I have been here since
8 1983. And when they talked about those bridges,
9 Harvey and I both know that Jerry Nissen, who is
10 our City engineer, had to pull his hair out
11 trying to get ConRail to go along with what were
12 safety issues, what were transportation issues.
13 And they looked the other way. So that I -- I
14 have to admit that I have changed my mind about
15 how I felt about this.

16 I am responsive to the turnout of
17 the people that are here this evening. There is
18 probably 50 or 60 people who live in that
19 neighborhood. I am a kid from the Heights; what
20 I do know about 6th Street? We never leave
21 crossing over Observer Highway. In fact, there
22 is probably no other place but the Heights, as
23 far as, you know -- I'm kidding.

24 The thing is no one knows better
25 than us that have been here what a bad neighbor

1 ConRail has been. And I think they waited a
2 little too long. They were a bad neighbor too
3 long, and they brought this one to our plate a
4 little too late. So I am going to vote aye.

5 MR. BYRNE: Councilman Maldonado?

6 MR. MALDONADO: Yeah, let me start
7 by -- by thanking all the individual community
8 members that are here today. I know it took a
9 lot to be out in this cold, frigid weather.
10 That is an understatement. You have been here
11 for a long time this evening. We apologize. It
12 just happened to be complicated, convoluted
13 meeting where we had the CDBG allocations, and
14 there was a lot of back -- backroom stuff going
15 on in the making sure that the allocations were
16 proper and sufficient for all the groups. So
17 thank you for bearing with us as we do our
18 process and -- and serving as your elected
19 officials.

20 Let me say that an RFP going out
21 to solicit bids for \$3 million, it's an
22 advantage for ConRail. It's an advantage for
23 them to say, "So this is put up, shut up. Take
24 it, no strings attached." But the strings that
25 are left behind are the communities. And this

1 community has been struggling with this
2 embankment for way close to how many years now?
3 I don't remember. Two -- for the last two that
4 I have been -- you know, five for you, two for
5 me.

6 I made a commitment when I was
7 running as a candidate that I supported the
8 concept of historical designation for the
9 embankment. I have continued to work towards
10 that goal. And today we're here. And I
11 continue to put forth on my position that that
12 is the way that we should go. I think that
13 ConRail -- and Councilman Gaughan put it well --
14 has stepped up to the plate too late. Too
15 little too late.

16 You have been a bad neighbor.
17 There have been many properties where our
18 children have played in and have gotten hurt for
19 negligence. There have been many of our youth
20 going in there to use drugs and never came out
21 because they overdose in those properties and
22 were not found for days.

23 Those kind of irresponsible
24 actions has shown me that ConRail is not a good
25 neighbor. And I cannot in good heart and good

1 MR. BYRNE: Councilman Healy?

2 MR. HEALY: I am voting yes. At
3 the caucus a couple weeks ago I had no objection
4 to giving ConRail another 30 days to get their
5 proposals in order. I still don't believe that
6 would do any harm; but all of the folks who came
7 out here -- this is a deliberative process --
8 and made the effort to come down here -- and
9 they were very convincing.

10 And I -- I -- the list of -- you
11 know, it's in the ordinance, itself, the Jersey
12 City Planning Board has heard these arguments.
13 They have approved this designation. The Jersey
14 City Historic District has approved this
15 designation. The State has approved it. And
16 according to Steve, the head of the Hamilton
17 Park Neighborhood Association, even Mayor
18 Cunningham and Congressman Menendez are both on
19 the same side of this issue. So Steve, I don't
20 know; do they each know that the other is --

21 MR. GUCCIARDO: Don't tell them.

22 MR. HEALY: Maybe this is the
23 olive branch everyone has been talking about.
24 But at any rate, the people that came out here
25 tonight were very persuasive; and I -- I'm

1 faith sit here today and say that I will take up
2 the cause for ConRail to have an extension of
3 two weeks or four weeks for something that
4 ultimately, as counsel said, will probably wind
5 up in the courts.

6 So based on that, based on your
7 efforts to lead this challenge, I vote aye for
8 the designation of the 6th Street embankment.

9 MR. BYRNE: Councilwoman
10 Richardson?

11 MS. RICHARDSON: I have heard all
12 that my colleagues have said about ConRail not
13 being a good neighbor. I have quite a few sites
14 in Lafayette that I want designated as
15 historical site. And while I do have some
16 apprehension because of my understanding or
17 my -- my thoughts that we might have made a
18 commitment to do -- do this on the 11th, that is
19 not outweighed by all that has been said. So
20 given that the community came out to support
21 this and with these kind of numbers and it is
22 Council person Maldonado's area -- and I am
23 certainly going to expect his support when it
24 comes out to Lafayette -- I am going to vote
25 yes.

1 voting aye.

2 MR. BYRNE: Councilman Vega?

3 MR. VEGA: I often get amazed of
4 the power of preservation, what it's been able
5 to do for our communities, put people together.
6 What we think about whether it was and where it
7 started, it had quite a different opinion. We
8 see now the emergence of the issue of Ward F
9 wanted to move forward and reap the benefits of
10 what we have known all along. We see now the
11 olive branch, obviously, between Cunningham and
12 Menendez on this one single issue. I believe
13 that historic preservation is the right issue,
14 the right cause at the right time. I cannot sit
15 silent and allow ConRail to further destroy or
16 divide our two historic districts. I therefore
17 vote aye.

18 MR. BYRNE: Council President?

19 MR. SMITH: Before I vote I would
20 like to ask ConRail's representatives --
21 obviously, it's a fait accompli before I even
22 vote, but I would ask you to still reach out to
23 some of the block association presidents to --
24 to work on that idea that you talked about.
25 It's never too late; I believe that. That's how

1 come I keep sending messages through Carlton to
2 the Mayor that we need to work jointly on this
3 budget, as opposed to pointing the finger, when
4 we have to continually show where the shortfalls
5 are.

6 So I believe there is hope. And
7 there may be a way that all of us can come away
8 happy. I know the Council will support that.
9 But at this point I think that you can still
10 save the day by sitting with some of the
11 representatives, irrespective of what the
12 Council voted here tonight, and talking to them,
13 not to continue to thumb your nose at Jersey
14 City, not to treat us as just another small town
15 near New York City, where trains once stopped to
16 unload, to get on the boats, to go across the
17 river.

18 I think that a lot of these
19 people are willing to work where they could have
20 some input. And it's my suggestion -- and I
21 applaud that you follow my suggestion -- just
22 take this opportunity to sit with them
23 irrespective to what is going to happen, whether
24 you go to court or not. I think that we are on
25 pretty solid ground with the State designation

1 councilwoman Donnelly absent.

2 Council Members, how about -- you
3 know, the room is going to empty out. Why don't
4 we take a one minute in our seat.

5 MR. SMITH: No, they are going to
6 stay and listen.

7 MR. GAUGHAN: Robert, can I make a
8 motion to defer to 10z4, so we can let this
9 attorney go home to his family and get off the
10 plot?

11 MR. BYRNE: We have a motion to
12 defer to 10z4 by Councilman Gaughan, seconded
13 by?

14 MR. BRENNAN: Brennan.

15 MR. BYRNE: Thank you. To defer
16 to 10z4, Councilman Brennan?

17 MR. BRENNAN: Aye.

18 MR. BYRNE: Councilman Lipski?

19 MR. LIPSKI: Aye.

20 MR. BYRNE: Councilman Gaughan?

21 MR. GAUGHAN: Aye.

22 MR. BYRNE: Councilman Maldonado?
23 Councilman Maldonado?

24 MR. MALDONADO: Aye.

25 MR. BYRNE: Councilwoman

1 and so forth, that -- all the things you have
2 heard.

3 But I think there is also a
4 window of opportunity here that you can salvage
5 some of this and move forward. There is some
6 people out there that have some great ideas and
7 a lot of skills and a lot of genuine ideas that
8 they could offer you to help move something
9 forward, to help bring green space where there
10 was once railroad tracks, to -- to make what
11 seems like a bad situation a good situation.

12 I think that -- please take my
13 advice and try and arrange with the presidents.
14 Please stand up or step forward. Would the
15 presidents or vice presidents please stand up,
16 who are here, if they didn't leave? Would you
17 please sidebar, if there is a will? I think
18 that we can find a way that everybody can go
19 away happy. And then we can always say that
20 ConRail made some mistakes, like all of us do;
21 but just like Dixon Pencil, who made erasers on
22 his pencil, they erased them. And we can all
23 live happily together. I vote aye.

24 MR. BYRNE: 4i has been adopted
25 seven-one, Councilman Lipski voting no,

1 Richardson?

2 MS. RICHARDSON: Aye.

3 MR. BYRNE: Councilman Healy?

4 MR. HEALY: Aye.

5 MR. BYRNE: Councilman Vega?

6 MR. VEGA: Aye.

7 MR. BYRNE: Council President

8 Smith? Council President?

9 MR. SMITH: Aye.

10 MR. BYRNE: We have an eight-zero

11 vote to defer to 10z4. 10z4 is a resolution
12 authorizing the issuance of refunding bonds of
13 the City of Jersey City authorized by Bond
14 Ordinance Number 02-132 of the City providing
15 for the issuance of not to exceed \$25 million of
16 the City's Pension Obligation Refunding Bonds,
17 Series 2003A, providing for the other details of
18 said bonds and approving the form of a
19 preliminary official statement and a Municipal
20 Bond Insurance Commitment.

21 We have Christopher Walrath here.

22 Chris.

23 If you are leaving, please leave
24 in silence. You are happy, so leave silently.

25 MR. WALRATH: Thank you. The

1 resolution that you have before you is basically
2 the first resolution which authorizes the City
3 to go out to the bond market in order to issue
4 refunding bonds to retire an unfunded pension
5 liability which was -- I'm sorry, it's to refund
6 an unfunded pension liability that the City
7 adopted in 1993 for Early Retirement Incentive
8 Program for the police and firemen.

9 MS. RICHARDSON: Excuse me.

10 MR. BYRNE: One second.

11 MS. RICHARDSON: Yeah.

12 MR. BYRNE: Thank you. Go ahead,
13 Chris.

14 MR. WALRATH: Okay. The Local
15 Finance Board had approved this at the end of
16 last year, and the City and the administration
17 have looked at a plan of doing the refinancing
18 for savings. Right now the plan is going to
19 show that the refunding bonds will go out to the
20 year 2025, which is eight years shorter than the
21 liability you currently have for that retirement
22 program. And it will produce about \$45 million
23 less in cost as a result. I think currently
24 under your liability it's about 90 million over
25 the period of time to 2033. This will shorten

1 it by eight years and also reduce the amount
2 payable by the City by about \$45 million.

3 The program that you have -- of
4 course, the only -- the only caveat to that is
5 the refunding bonds schedule that you are seeing
6 there will be subject to whatever the interest
7 rates are at the time they go to the mark. They
8 plan on going Monday and Tuesday. We don't
9 anticipate -- at least I have been told by
10 underwriters that rates should not jump by that
11 time. So that is the program that they are
12 going to bring before you next Tuesday at a
13 special meeting to ask for your approval to
14 award the bonds.

15 MR. GAUGHAN: If I might, guys,
16 the reason I made this document is because it
17 explains clearly that this schedule is not
18 included in the ordinance because this is their
19 proposed schedule, what they hope to hold by.
20 The reason I gave this to you is because I want
21 to make sure that when we -- when we vote on
22 10z4, that we are doing so on the record with
23 the understanding that after we approve 10z4
24 that that can't change the rate schedule and
25 change the way it's designated.

1 If you might bear with me, on the
2 left the dates from 2003 to 2033 is the way it's
3 currently listed; and it's \$90,000,816. What
4 they are proposing is in the next column, which
5 it says the refunding debt service, they are
6 shortening the time that we will pay those
7 monies by eight years. In other words, instead
8 of going out to the Year 2000 -- 2033, it will
9 terminate in the year 2025.

10 And if you look to the far right
11 column, where it says, "savings," it says,
12 "45 million." What that clearly indicates is
13 that what is presently scheduled as a 90 million
14 816 debt service will be reduced by \$45 million.
15 And although the first item shows that there is
16 nothing there, that means there will be no debt
17 service that would be due in the year 2003.
18 That, again, as we thought about on the last
19 refinancing, that we're allowing the Mayor's
20 office to have enough leverage -- not leverage,
21 but enough relay to try to reconstruct the
22 budget process that will hopefully put us on
23 financial effort going forward.

24 So I think it's important that we
25 pass this only because it's a long-term savings

1 of \$45 million. The fact is that in refunding
2 and allowing to refund this, the State, which I
3 believe -- and you can help me -- it was like
4 8.6 in from --

5 MR. WALRATH: Eight and three
6 quarters.

7 MR. GAUGHAN: When this was done.

8 MR. WALRATH: Correct.

9 MR. GAUGHAN: Plus they were
10 allowed to add on some other interest.

11 MR. McGEE: With increase by
12 9.5 percent each year.

13 MR. GAUGHAN: In refunding -- in
14 attempting to refund this or refinance it, I --
15 I think that it's an important initiative
16 that -- in fact, I honestly thought that what I
17 might see, the fact that maybe the first three
18 or four years would have no debt service and
19 then we would go into a -- a series of -- and I
20 am a little, you know, skeptical. We have a
21 number of years that would be tacked on the end.

22 This is by no -- and we had a
23 conversation earlier. This is by no means
24 front-loaded. I think it's a very conservative
25 way of approaching this initiative, and I think

1 MR. BYRNE: We have a motion by
 2 Councilman Gaughan, seconded by?
 3 MR. SMITH: Robert, would you make
 4 sure that you ask Miss Brown to notify all the
 5 Council people as a reminder of the special
 6 meeting tomorrow, please?
 7 MR. BYRNE: Okay. To adjourn at
 8 11:34 by acclamation.
 9 MR. SMITH: Aye.
 10 MR. BYRNE: Okay. Thank you. We
 11 are out of here.
 12 (Whereupon, the witness is
 13 excused.)
 14 (Whereupon, the proceeding is
 15 concluded at 11:34 p.m.)
 16
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 25

1 CERTIFICATE
 2
 3 I, TRACEY R. SZCZUBELEK, a Certified Shorthand
 4 Reporter and Notary Public of the State of New
 5 Jersey, do hereby certify that the foregoing is
 6 a true and accurate transcript of the
 7 stenographic notes as taken by and before me, on
 8 the date and place hereinbefore set forth.
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 19 TRACEY R. SZCZUBELEK, C.S.R.
 20 LICENSE NO. XI01983
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 22
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 24
 25

Appendix II— Thomas McFarland Verified Statement

TFM-1 Fiorilla to McLaughlin, July 11, 2005 (spur claim to developer)

TRM-2 Fiorilla to Alampi, Oct. 4, 2005 (reiteration to developer)

TRM-3 “Spur Decisions Made by Law Department” (dated 9/4/97, but
Allegedly made as to Line Code 1420 on 4/14/94)

TFM-4 – Letter from R. Jenkins (for Conrail) to V. Rutson (STB OEA),
Dated Sept. 8, 2017

VERIFIED STATEMENT OF THOMAS F. McFARLAND

My name is Thomas F. McFarland. I am an attorney having an office at 208 South LaSalle Street, Suite 1666, Chicago, IL 60604. I am a sole practitioner and sole shareholder of Thomas F. McFarland, PC, a professional corporation.

I have been requested by the City of Jersey City, N.J., Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively referred to as Jersey City, et al.) to provide an expert opinion on whether or not, when Conrail conveyed the Harsimus Embankment Property, (the Embankment) to a group of limited liability companies (LLCs) for nonrail use in July, 2005, Conrail knew or reasonably should have known that the Embankment was a "railroad line" within the meaning of that term in 49 U.S.C. § 10903(d), rather than a "spur, industrial, team, switching or side track" (collectively referred to as a spur) within the meaning of those terms in 49 U.S.C. § 10906.

For the reasons explained in this statement, it is my firm opinion that Conrail knew or reasonably should have known at that time that the Embankment was a railroad line.

I am qualified to render this opinion by virtue of 52 years of experience in railroad law exclusively, with particular focus on railroad abandonment law, including differentiating between railroad lines and spurs in an abandonment context.

Upon graduation from Loyola University School of Law in 1965, I was employed as a Commerce Attorney in the Law Department of Illinois Central Railroad Company at Chicago, IL. My duties in that position included helping to prepare applications to the Interstate Commerce Commission (predecessor of the Surface Transportation Board (STB)) for authority to abandon

railroad lines, and determining whether particular right-of-way and/or trackage was a railroad line or a spur.

In 1970, I became employed by the Chicago law firm of Belnap, Spencer, Hardy & Freeman (Belnap Firm) as an associate attorney. I became a partner in the Belnap Firm in 1977. The Belnap Firm practiced railroad law exclusively. My specialty in that practice was railroad abandonment law.

I remained in the private practice of railroad law for the next 47 years, to date. Over that period, my partners either retired or died, such that since 2001 I have been a sole practitioner as sole survivor of the Belnap Firm.

During my 52 years of railroad practice, I have litigated over 100 railroad abandonments, representing both applicants for abandonment authority and opposing parties. I am reasonably certain that no other attorney in the United States has nearly that much experience in railroad abandonment.

During the course of my career, I have often been called upon to render opinions as to whether particular railroad right-of-way and track constituted a railroad line or a spur. I have also been involved in litigation in regard to that issue. One such example is *Battaglia Distributing Co., Inc. v. Burlington Northern R. Co.*, 2 S.T.B. 323 (1997), *pet. to reopen den.* 1998 WL 857070.

I reviewed the following materials, among others, in order to prepare my testimony in this matter:

1. Decision of the Surface Transportation Board (STB) in its Docket No. F.D. 34818, *City of Jersey City, et. al -- Petition for Declaration Order*, service date August 9, 2007;
2. Decision of the STB in its Docket No. F.D. 34818, *City of Jersey City, et. al -- Petition of Declaratory Order*, service date December 19, 2007;
3. *City of Jersey City, et. al v. Consolidated Rail Corporation*, 968 F.Supp. 2d 302 (USDC, DC, 2013);
4. Decision of the United States Court of Appeals for The DC Cir. No. 13-7175, (unpublished) that summarily affirmed the decision in number 3 above;
5. Decision of the Interstate Commerce Commission (ICC) in *The Atchison, T. & SF Ry. Co. -- Aband. Exempt. -- in Lyon County, KS*, 1991 WL 120344 (ICC Docket No. AB-52 [Sub-No. 71X], decided June 11, 1991);
6. Decision of the STB in *Chelsea Property Owners -- Aband. -- Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track, in New York, NY*, 8 ICC 2d 773 (1992);
7. Decision of the STB in *Battaglia Distrib. Co., Inc. v. Burlington Northern R. Co.*, 2 STB 323 (1997);
8. Decision of the STB denying a petition to reopen the decision in No. 7 above, at 1998 WL 857070;
9. Decision of the Superior Court of New Jersey in its No. HUD-L-5801-09, *212 Marin Boulevard v. Chicago Title Insurance Co.*, filed August 31, 2017;
10. Letter of Robert M. Jenkins, III, Mayer Brown LLP to Victoria Rutson, Director, Office of Environmental Analysis, STB, dated September 8, 2017;
11. Compilation headed "Spur Decisions Made By Law Department", dated 9-4-97;
12. Memorandum dated July 11, 2005, from John K. Fiorilla, Esq. to Bridget McLaughlin re July 13 Sale Embankment Jersey City;
13. Letter dated October 4, 2005 from John K. Fiorilla to Carmine R. Alampi, Esq. re Consolidated Rail Corporation to SLH Holding Company Inc., Our File No. 0476-50485.

I am familiar with the issues involved in Docket No. AB-167 (Sub-No. 1189X) and related proceedings as a result of reviewing the STB's decisions in those matters as they appeared on the STB's website. Because the issues in those cases were of general interest to me, I also read the related Court decision in *City of Jersey City v. Consolidated Rail Corporation*, 968 F.Supp.2d 302 (USDC, DC, 2013).

By virtue of the latter decision, it is judicially settled that the Embankment was conveyed to Conrail in 1976 as a railroad line subject to STB abandonment jurisdiction. Thus, it is clear that in 1976 the Embankment was a railroad line, not a spur. The issue I am to address is whether or not Conrail reasonably could have believed that the Embankment was no longer a railroad line, but instead was a spur, when it conveyed the Embankment to the LLCs in 2005. For the reasons explained below, it is my firm opinion that Conrail could not have reasonably so believed.

There is a widely-known principle in ICC-STB jurisprudence to the effect that "once a line of railroad, always a line of railroad". Thus, where, as here, railroad property has been determined to constitute a railroad line, such property cannot lawfully be treated as a spur at a later time, even though as a result of passage of time the property may have taken on many of the physical characteristics of a spur.

Thus, in *The Atchison, Topeka and Santa Fe Railway Co. -- Abandonment Exemption -- in Lyon County, KS*, 1991 WL 120344 (Docket No. AB-52 [Sub-No. 71X], decided on June 11, 1991) (*Atchison Topeka* case), the ICC said (at *3):

Because this track was clearly part of a rail line at one time, we find that it cannot be converted into an exempt spur and the Commission divested of jurisdiction over it solely through the railroad's unilateral decision to change its use of the track segment over time. To find that this is a spur would be inconsistent with our well-established policy that where a carrier decides to reduce or cease service and/or remove track, the carrier's common carrier obligation remains until appropriate abandonment authority is obtained . . .

Fully in accord with that ruling is the ICC's decision in *Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corporations West 30th Street Secondary Track in New York, NY*, 8 ICC 2d 773, 1992 WL 233599 (Docket No. AB-167 [Sub-No. 1094], decided August 28, 1992) (*the Highline case*). There, the ICC said (8 I.C.C.2d at 791, 1992 WL 233599 at *11):

Given the Highline's history as a regulated rail line, we continue to have jurisdiction over it, even though the track in question now possesses many of the characteristics of a spur. We recently addressed the status of a rail line unused for 15 years. In holding that the track's use as part of a line haul rail operation prior to the unauthorized cessation of service made it a railroad line subject to our abandonment regulation, we stressed the well established principle that a carrier cannot escape our abandonment jurisdiction simply by terminating service or removing track (citing the *Atchison Topeka* case, *supra*). . .

It would not be credible for Conrail to contend that it was not aware of the determination that the Highline is a railroad line when it conveyed the Embankment to the LLCs. That determination was made in regard to a Conrail property located in the same general territory as the Embankment in a proceeding in which Conrail was an active party. Like the Embankment proceeding, *the Highline case* generated widespread publicity because it involved an intense dispute over a potentially expensive removal of an elevated Conrail right-of-way. The finding that the Highline is a railroad line was made not long before the dispute involving the

Embankment. It is likely that a number of key Conrail personnel participated actively in both the Highline and the Embankment disputes. It is my understanding that Conrail's General Counsel, Jonathan Broder, and Conrail's outside railroad counsel, John Fiorilla, both held similar positions in 1992 when the *Highline* case was decided and in 2005 when the Embankment was conveyed to the LLCs.

My expert opinion is not at all changed upon consideration of two allegations by Conrail outside counsel John Fiorilla in 2005 that the Embankment was a spur. The first of such allegations was made virtually on the eve of closing of sale of the Embankment to the LLCs in a memorandum to Ms. Bridget McLaughlin dated July 11, 2005, a copy of which is attached as my Appendix TFM-1. The allegation regarding the spur nature of the Embankment is in numbered paragraph 6 of the memo. No legal authority nor reasoning was provided by Mr. Fiorilla in support of the allegation. Mr. Fiorilla is a longtime railroad attorney and representative of Conrail. He was surely familiar with the principle of "once a railroad line, always a railroad line" that was applied in the *Highline* decision, a case with which he undoubtedly was familiar. Mr. Fiorilla surely knew, or had good reason to know that his allegation, that the Embankment was a spur, was false.

The second such allegation was made in a letter from Mr. Fiorilla to Carmine R. Alampi, Esq., an attorney for the LLCs, dated October 4, 2005, a copy of which is attached as my Appendix TFM-2. That allegation was made in response to an "ICC/STB issue". That allegation, too, was not supported by any citation of legal authority or legal reasoning. For the

same reasons as spelled out in regard to appendix TFM-1, Mr. Fiorilla knew or had good reason to know that the allegation, that the Embankment was a spur, was not true.

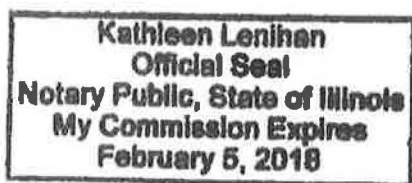
Neither is my expert opinion at all affected by the fact that the Harsimus Branch was characterized as a spur by a member of the Conrail Law Department in a compilation headed “Spur Decisions Made By Law Department” dated September 4, 1997 that appeared in the record in *212 Marin Boulevard v. Chicago Title Insurance Co.*, *supra*. That compilation is attached as my Appendix TFM-3. No legal reasoning of any kind was cited in support of that characterization. That characterization is flatly inconsistent with the determination of the Court in *Jersey City et. al v. Consolidated Rail Corporation*, *supra*, that the Embankment was conveyed to Conrail in 1976 as a railroad line.

The unsupported allegations of Mr. Fiorilla and the unsupported spur characterization of the Conrail Law Department were the purported underpinnings of the State Court’s decision in *212 Marin Boulevard v. Chicago Title Insurance Co.*, Superior Court, N.J., No. HUD-L-5801-09, filed August 31, 2017, that the title insurance company failed to prove that Conrail fraudulently or negligently misrepresented that the Embankment was a spur not requiring STB authority for its abandonment. Jersey City, et. al were not parties in that case. The result surely would have been different if it had been explained to the Court that it is judicially settled that Conrail acquired the Embankment as a rail line, and that under settled ICC-STB precedent, the Embankment remained a railroad line requiring STB authority for its abandonment when it was sold to the LLCs without the requisite abandonment authority.

Attached to my statement as Appendix TMF-4 is a copy of a letter from Robert M. Jenkins, III, Esq., an outside attorney for Conrail, to the Director of the STB's Section of Environmental Assessment, dated September 8, 2017, alleging that the Court's decision in *212 Marin Boulevard v. Chicago Title Insurance Co., supra*, supports a determination that Conrail did not act intentionally or negligently in regard to the sale of the Embankment to the LLCs. I strongly disagree. As I have explained, the Court's decision in the *212 Marin Boulevard* case would surely have been different if it had been explained to the Court that the Embankment was conveyed to Conrail as a railroad line, not a spur, in 1976, and that under settled ICC-STB precedent the Embankment remained a railroad line when it was conveyed to the LLCs in 2005 notwithstanding that as a result of the passage of time it may have taken on some characteristics of a spur. That being the case, I strongly believe that when Conrail conveyed the Embankment to the LLCs in 2005, Conrail knew or had good reason to believe that the Embankment was every bit as much a railroad line as its Highline was determined to be only a short time earlier.

VERIFICATION

THOMAS F. McFARLAND, being duly sworn, states that he has knowledge of the factual assertions set forth in this Verified Statement; and that all of those assertions are true and correct.



Thomas F. McFarland

THOMAS F. McFARLAND

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

SUBSCRIBED and SWORN to before me
this 27th day of September, 2017.

Kathleen Lenihan

Notary Public

My Commission expires: 2/5/2018



0 60

John K. Fiorilla
856.814.2054
jfiorilla@capehart.com

October 4, 2005

10/16
10/17/05

Via Fax and Regular Mail

Carmine R. Alampi, Esq.
Carmine R. Alampi, L.L.C.
Suite 404
1 University Plaza
Hackensack, NJ 07601

Re: Consolidated Rail Corporation - Jersey City Railroad Embankment
Consolidated Rail Corporation to S.L.H. Holding Company, Inc.
Our File No. 0476.50485

Dear Carmine:

Recently, I met with our clients and reviewed with them the status of the abandonment of the line that formerly traversed the Jersey City Embankment parcels. Based upon this review, the line at issue was reviewed and we continue to be confident that it was properly abandoned under the governing criteria for Spur Lines under the applicable federal statute and that no filing was required before the Interstate Commerce Commission at that time (nor would there be any requirement to file before the Surface Transportation Board at this time).

In any event, since the City of Jersey City and the State of New Jersey were given the opportunity to purchase the parcels and specifically decided NOT to purchase same, the sale to your client should not be disturbed. Neither the City, nor the State has been disadvantaged in any way by Conrail's abandonment of the property. It was offered for sale to the City and the City chose not to bid. The City still has the right to legally condemn the property should it so choose. Accordingly, the ICC/STB issue, we respectfully submit, is a red herring.

Please call me if you have any further questions.

Sincerely,
CAPEHART & SCATCHARD, P.A.

John K. Fiorilla

JKF/ajd
cc: Jonathan M. Broder, Esq.
Mr. Robert W. Ryan
AJD/S08696

0.59

From: John K. Florilla [mailto:jflorilla@capehart.com]
Sent: Monday, July 11, 2005 1:27 PM
To: Bridget McLaughlin
Cc: Ryan, Bob; calampi@calampi-law.com
Subject: July 13 Sale Enbankment Jersey City

Bridget: I spoke to Carmine this morning and after consultation with my client I would appreciate if you would let him know the following:

1. Real Estate transfer tax is NOT exempt from payment since this is not active railroad property. However our agreement with your client indicates that the buyer will pay this tax regardless of what the local custom is.
2. Regarding real estate tax adjustments, we are working on these and should have them by the end of the day.
3. Regarding the tax declarations faxed to us they appear to apply only to individuals and not corporations. Our client indicated that they recently checked the box regarding the fact that it was not an individual, estate or trust and was exempt. I note that we would sign both that form and the non residency form but there is no withholding.
4. We are obtaining copy of that tax bill for Block 446 Lot 18a as Carmine requested.
5. Conrail will NOT provide an affidavit of title since the deeds involved are quitclaim deeds and this is mentioned in the contract for sale.
6. The properties abandoned constituted "Spur tracks" over which the STB and previously the ICC had no authority pursuant to 49 USC§ 10906. Therefore no formal abandonment of the property was ever filed. (I have attached a copy of that section of the 49 USC to this email).
7. Regarding the payment of the moneys owed, we have sent the info regarding wiring the funds to our account. Later this week we will wire to your account \$ 1,000,000 from our client Conrail to your trust account on behalf of Steve Hyman reflecting option funds held by our client Conrail in this matter. Please confirm that we can send a letter with wording like this later in the week. We will also send a check for the amount of the real estate transfer tax which will have been sent to us along with the \$ 3,000,000 from the bank so that your firm can pay those charges on behalf of the buyers pursuant to the agreement of sale.

Let me know if you have any comments regarding this.

John K. Florilla, Esq.
Capehart & Scatchard P.A.
8000 Midlantic Drive, Suite 300
Mount Laurel, NJ 08054

*****Confidentiality Note*****

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Thank you.

Spur Decisions Made by Law Department
(DO NOT REQUIRE ITC/STB FILING)

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Line Name	Type	LC	MP 1	MP 2	Rt. ML	Att'y	Decision Date	Requested by
Arlington Ave. I.T. (Indianapolis, IN)	Line	60-8342	-0.80	0.70	1.60	JJP	5/1/85	F. R. Stapleton
Athol Br. (Athol, MA)	Spur	unknown				JJP	8/24/83	R. C. Krafty
Avonmore I.T. (Avonmore, PA)	Spur				1.90	JJP	11/16/85	F.B. Gossic
Axle Works I.T. (Homestead, PA)	Spur				0.80	JJP	11/1/89	M. A. Hutchinson
Beaver I. T. (Lovett, PA)	Spur	20-2144				JJP	5/1/83	J. W. Fallon
Bena Creek (Portage Dump Trk)	Spur	20-2149	0.00	0.88	0.88	JJP	4/28/83	J. W. Fallon (04/12/83)
Bloodgood Br. (Union County, NJ)	Spur	10-0632	19.91	20.05	0.14	JJP	5/8/84	Z. Drzewiecki
Bloomfield / Belleville, NJ	Spur	unknown				JJP	5/12/83	Z. J. Drzewiecki
C-A-P Br. (Scranton, PA)	Spur				0.00	JJP	11/7/86	G. Smith
Claremont R.T. (Baltimore, MD)	Spur	20-			1.10	JKE	11/7/85	G. Cornstock
Dad's Dog Food Lead (Meadville, PA)	Line	40-8501			0.50	JJP	5/10/86	F. B. Gossic
Dillsburg Br.	Spur				0.60	JJP	8/16/85	J. Ahonen
Edgemoor I. T. (Edgemoor, DE)	Spur	10-1262	0.00	1.00	1.00	JJP	8/2/83	M. C. Rosamilla
Englewood I. T. (Phila, PA)	Spur	10-1183	0.00	0.30	0.30	JJP	8/4/83	Richard Croes
Enola Branch (Marysville, PA)	Jt. Project	20-1326	74.00	74.40	0.40	JJP	8/8/86	A. T. Bankson
Exon Lead (Sharonville Yard Lead)	Spur	60-8211	0.00	0.67	0.67	JJP	1/4/86	F. R. Stapleton
Former Beech Creek	Spur	unknown				JJP	5/12/83	J. W. Fallon
Fort Wayne, Ind. Lead	Spur	unknown				JJP	8/24/83	R. D. Threlkeld (land sale)
Frankford St. I. T. (Trenton Ave. Ln)	Spur	10-1174				JJP	8/24/85	N. J. Prosperi (track lease)
Franklin I. T. (Franklin, OH)	Spur	60-8268	3.60	4.20	0.60	JJP	5/7/83	M.S. Scime
Gettysburg I. T. (Carlisle, PA)	Spur	20-0315	0.00	0.80	0.80	JJP	11/4/83	J. W. Fallon
Grand Jct. (East Boston I. T.)	Spur	30-4132	7.67	8.50	1.83	JJP	10/8/85	J. H. Ahonen
Greencastle I. T.	Spur	unknown				JJP	8/3/83	J. W. Fallon
Harsimus Br. (Jersey City, NJ)	Spur	10-1420	0.00	1.36	1.36	JJP	4/14/84	J. R. Beard (02/18/84)
Hastings Branch (Hastings Jct., PA)	Spur	20-xxxx	0.00	2.60	2.60	JJP	8/2/83	J. W. Fallon
Herkimer Spur (Herkimer, NY)	Spur				0.00	JKE	10/28/85	J. Hindman
Hudson Sec. (Maybrook, NY)	Spur	30-0101	0.00	2.10	2.10	unknown	no letter on file	
Hudson St. I. T. (Jersey City, NJ)	Spur	10-1440	0.00	1.30	1.30	JJP	4/29/83	T. P. Dwyer
Hurley Lumber Ld (Perth Amboy)	Spur	unknown				JJP	1/20/83	Z. J. Drzewiecki (12/15/82)
Indian Run Ind. Track (Kensington, PA)	Spur	40-2288	1.10	1.30	0.20	JJP	11/9/84	F. B. Gossic
Johnstown I.T. Johnstown, PA)	Line		1.10	1.60	0.50	JKE	11/10/86	G. R. Cornstock
Kalamazoo Br. (Grand Rapids, MI)	Spur	50-6341	94.00	94.45	0.45	JJP	5/15/86	J. Kelly
Kennedy Valve Spur (Elmira, NY)	Spur	30-8304	248.90	249.10	2.20	JJP	8/12/88 - JJP	
Lancaster Mills I. T.	Spur	30-4182	0.60	1.50	0.90	JJP	5/14/83	M. G. Peterson
Langhorne Team Track / Ind. Lead	Spur	unknown				JJP	12/16/83	M. C. Rosamilla (land sale)
Mardella I. T. (Salisbury, MD)	Spur	10-1239	39.40	40.80	1.40	unknown	no letter on file	
Marginal Branch	Spur	40-22JJ			0.48	JJP	8/27/87	Brian Harrison
Middle Canal/Lumber (Williamsport, PA)	Spur	20-2316	217.90	218.10	0.20	JJP	11/22/84	A. K. Robbins / G. L. Smith
Millbrook Sliding (Elmira, NY)	Spur	unknown				JJP	8/2/83	M. B. Phillips (land sale)
Muncy Br. (Muncy, PA)	Spur	unknown	0.00	0.60	0.60	JJP	2/23/85	C. A. Archer (Fallon, 02/02/84)

Spur Decisions Made by Law Department

0 49

Line Name	Type	LC	MP 1	MP 2	RL ML	Attr	Decision Date	Requested by
Niles IT (South Bend, IN)	Spur	50-5348	9.90	10.80	0.70	JJP	7/30/97	R. Dietz (Asset Opt. Dept.)
Oberlin Ind. Lead (Harrisburg, PA)	Spur	unknown	0.00	1.04	1.04	JJP	3/19/98	K. Robbins (Harrisburg Div.)
Pappas Lead (Washington, DC)	Spur	unknown				RSN	1/27/95	Donald Shappel
Perth Amboy Br.	Spur	10-0510	17.00	18.00	1.00	JJP	4/28/93	Z. J. Drzewiecki (04/13/93)
Red Key I.T. (Sweetser, IN)	Line	xx-3107	162.05	163.20	1.15	JJP	5/14/92	W. Schoelwer
S. Canton Br. (Canton, OH)	Spur	40-2402			0.00	JJP	10/6/95	F. Gosalo
S. Chester Tk. (Marcus Hook, PA)	Exempt	unknown	Market St.	Green St.		JJP	4/26/94	P. Killian
Speedway I.T. (Indianapolis, IN)	Spur	80-8584	4.18	4.70	0.52	JJP	5/31/94	
Thoroughfare Track (Phila, PA)	Spur	unknown				JJP	7/2/93	P. H. Killian
Toms River I. T. (Toms River, NJ)	Spur	10-0219	4.82	5.00	0.38	JJP	8/24/93	M. C. Rosamilla
Union Belt (Marion, OH)	Spur	unknown				JJP	11/4/93	W. A. Schoelwer (request to remove track)
Walton Secondary (Collier, WV)	Line		36.70	38.40	2.70	JKE	2/28/98	F. B. Gosalo
Westland Br. (Houston, PA)	Spur	40-	0.00	0.97	0.97	JJP	11/9/94	F. Gosalo

Appendix TFM-4

September 8, 2017

Victoria Rutson
Director, Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

Robert M. Jenkins, III
Direct Tel +1 202 263 3281
Direct Fax +1 202 263 5261
rmjenkins@mayerbrown.com

Re: STB Docket No. AB 167 (1189X) and associated
dockets

Dear Ms. Rutson:

Consolidated Rail Corporation ("Conrail") wishes to bring the attached court decision to your attention. The decision was issued on August 31, 2017 by the Superior Court of New Jersey (hereinafter, "the Court") and addresses claims against Conrail brought by Chicago Title Insurance Company, the title insurer for the Harsimus Embankment properties at issue in AB 167 (1189X) and associated dockets. Chicago Title alleged that Conrail fraudulently or negligently misrepresented the jurisdictional status of the Embankments when Conrail sold them to the LLCs. Conrail had stated that the Embankments were non-jurisdictional track for which STB abandonment authority was not required. Following a two-day non-jury trial in which the Court heard live witnesses and considered various documentary evidence, the Court concluded that Conrail's statements were neither fraudulent nor even negligent.

The Court stated that "Chicago Title has failed to provide any evidence that the statements made by Conrail were fraudulent. . . . [T]here was no credible proof . . . that Conrail made a false representation about the nature of the Embankment that detrimentally and prejudicially induced Chicago Title to rely on those statements." Slip op. at 17-18; *see also id.* at 19 (stating that "no credible proof exists" that Conrail witnesses Ryan and Fiorilla, who testified at trial and were Conrail's representatives for the sale, "knew that the parcel was a designated rail line and, nevertheless, represented otherwise"). "Chicago Title has not proven by clear and convincing evidence that the statement, that it characterizes as a representation, was anything other than a reasoned and informed opinion as to the belief that the parcel was a spur track. . . . Despite the arguments advanced by Chicago Title that there was nefarious purpose in making these statements with the knowledge of their falsity, the record simply does not support this conclusion." *Id.* at 21.

The Court also found that "Chicago Title has similarly failed to provide this Court with evidence of negligence on the part of Conrail when it made the statements about the nature of the Embankment." *Id.* at 23. "The record does not bear out the contentions that Conrail's representatives failed to act properly in their determinations." *Id.* at 24.

Victoria Rutson
September 8, 2017
Page 2

This decision (which, as noted, followed a two-day trial in which live testimony and documentary evidence were presented) is consistent with, and provides further support for, the Board's rejection of the allegations by the City of Jersey City and other commenters that Conrail intentionally violated Section 110(k)—allegations that the City and others have made repeatedly since at least 2008 and continue to make to this day. Specifically, the Court's decision buttresses the Board's conclusion in the March 2009 Environmental Assessment that there is no evidence of "any intent on Conrail's part to harm historic sites or structures." Environmental Assessment, slip op. at 14 (served Mar. 23, 2009). Thus, the City, the New Jersey State Historic Preservation Office, and a financially-motivated title insurer have all failed to show that, in selling the property without first seeking abandonment authority, Conrail intentionally acted to evade legal duties (or even acted negligently, for that matter).

As Conrail demonstrated in its June 29, 2017 letter to you, the City and other commenters have had abundant opportunities to find support for their baseless Section 110(k) allegations. That they have not been able to has not stopped them from continuing to beat the drum. The attached decision provides conclusive, judicial support for a finding that "there is no there there."

Sincerely,

Robert M. Jenkins III^{/acs}

Robert M. Jenkins III
Enclosure

cc: Consulting and Interested Parties
Charles H. Montange
Eric Strohmeier

Appendix III -- Memorandum of Understanding (“MOU”) dated October 12, 2007,
between Conrail and the developer

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made this 12th day of October, 2007, between Consolidated Rail Corporation ("Conrail"), a Pennsylvania corporation, with its principal offices at Two Commerce Square, 2001 Market Street, Philadelphia, Pennsylvania 19103, SLH Holding Co., LLC ("SLH"), having a mailing address c/o Carmine Alampi, Esq., One University Plaza, Suite 404, Hackensack, New Jersey 07601, and 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Coles Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC and 446 Newark Avenue, LLC (collectively referred to as "LLCs"), "Conrail", "SLH" and "LLCs" collectively referred to as "Parties".

Whereas, Conrail and SLH entered into an Agreement of Sale dated June 24, 2003, with respect to 6.2 acres of property ("Property") in Jersey City, New Jersey, which Agreement was amended by letters dated September 22, 2003, May 7, 2004 and September 15, 2004 and by Amendment to Agreement of Sale dated October 27, 2004 (collectively referred to as "Agreement"); and

Whereas, SLH assigned its rights under the Agreement to the LLCs; and

Whereas, on July 13, 2005 Conrail conveyed title to the Property to the LLCs; and

Whereas, after the sale, LLCs obtained a number of approvals for development of the Property from local governmental authorities; and

Whereas, on August 9, 2007, the Surface Transportation Board ("STB") issued a decision finding that the Property sold to LLCs remains part of the national rail system until appropriate abandonment authority is obtained.

Whereas, Conrail, SLH and the LLCs desire to maintain the benefit of the 2005 sale of the Property for all Parties.

NOW, THEREFORE, Conrail, SLH and the LLCs agree, this 12th date of October, 2007, as follows:

1. Conrail will seek approval from the STB for abandonment of rail service over the Property. Conrail will decline any public use or trail use conditions and, as soon as practicable, upon the effective date of the abandonment, execute any such documents as may be required to effectuate and/or confirm the 2005 sale of the Property.
2. If any governmental entity commences condemnation proceedings with respect to the Property Conrail will assign to LLCs its rights to defend any condemnation proceedings and to receive all monies obtained either by final settlement or condemnation award or judgment.



3. Conrail will cooperate with the LLCs on any necessary applications or reapplications with government authorities to secure all necessary approvals to develop the Property.

4. The Parties agree to file timely appeals of the STB's August 9 decision pursuant to 28 U.S.C. § 2321(a).

5. Conrail agrees that if the proceedings in Docket No. HUD-L-4908-05 in the Superior Court of New Jersey are not dismissed, Conrail will not in that or any other proceeding claim that SLH's or the LLC's failure to seek relief against Conrail precludes them from seeking relief against Conrail in any other proceeding.

6. The Parties agree that implementation and enforcement of the foregoing terms is subject to negotiation of any mutually agreeable documents as are necessary to carry out the terms of this Memorandum of Understanding, and its approval by Conrail's Board of Directors.

CONSOLIDATED RAIL CORPORATION

By: Jonathan M. Broder

Title: VP - General Counsel

Date: Oct. 12, 2007

SLH HOLDING CO., LLC

By: SLH

Title: member

Date: Oct. 12 2007

Appendix IV – Conrail Demolition Joinders, Exhibits to Letter, City et al to STB,
dated April 25, 2008

JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 212 MARIN BOULEVARD, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Becker
Consolidated Rail Corporation
VP + General Counsel

JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 389 MONMOUTH STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Peadar
Consolidated Rail Corporation
VP + General Counsel

JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 354 COLE STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/02
Date

Jonathan M. Parker
Consolidated Rail Corporation
VP + General Counsel

JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 280 ERIE STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date


Consolidated Rail Corporation
VP + General Counsel

CONSENT TO FILING APPLICATION

The undersigned hereby joins in and consents to the pending application of 317 JERSEY AVENUE, LLC for Certificate of Appropriateness and a Certificate of Economic Hardship for Demolition of portion of the Sixth Street Embankment on this tract, and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Bender
Consolidated Rail Corporation
VP + Gen. Counsel

JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION

The undersigned hereby joins in and consents to the pending application of 247 MANILA AVENUE, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Beck
Consolidated Rail Corporation

Appendix V – NJ Title Manual standards for Conrail properties

**HANDBOOK OF
NEW JERSEY TITLE PRACTICE**

**Second Edition
2000**

**A Treatise Concerning the Examination and Insurance
of Real Estate Titles in the State of New Jersey**

by

**LAWRENCE JOEL FINEBERG, A.B., J.D., CTP
of the New Jersey and New York Bars**

**with the assistance of the Editorial Board of the
New Jersey Land Title Institute**

VOLUME II

Published by the

NEW JERSEY LAND TITLE INSTITUTE

**First Edition published in 1992 and revised in 1994, 1995 & 1997
Second Edition published in 2000**

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statute did *not* apply to New Jersey Class II railroad taxes assessed *before* the effective date of the exemption statute (August 13, 1981) and imposed pursuant to statute.¹ The case did *not* discuss whether ConRail is exempt from railroad *franchise* taxes and imposed pursuant to different sections of the statute.² Accordingly, ConRail is *exempt* from railroad taxes imposed *subsequent* to 1981, but not prior thereto.³ New Jersey Transit, as a government agency, is tax exempt.

§9806. Conveyances from ConRail; etc. In order to insure a conveyance from a railroad, one should require:

- 1) Recording of a certified copy of the deed (originally filed in the Secretary of State's Office) pursuant to N.J.S.A. 46:16-4.3, with the County Clerk or Register, pursuant to N.J.S.A. 46:16-4.2.
- 2) Proof that said deed includes the subject premises.
- 3) Approval by the Department of Transportation or the Board of Regulatory Commissioners pursuant to N.J.S.A. 48:2-1 *et seq.*⁴, or, in the alternative, proof that such approval is not required.
- 4) Approval by the STB pursuant to 49 U.S.C. §§1 *et seq.*, or, in the alternative, proof that such approval is not required.⁵
- 5) If STB approval is required, proof of compliance with the ninety (90) day notice provisions of N.J.S.A. 48:12-125.1

¹⁰(...continued)
R.R.R.A. 1988).

¹N.J.S.A. 54:29A-7.

²N.J.S.A. 54:29A-13 & -14.

³See *N.J. Transit Corp. v. Somerville*, 273 N.J. Super. 171 (App. Div. 1994).

⁴See N.J.S.A. 48:3-7; 48:12-23.1.

⁵With respect to abandonments, see 49 U.S.C. §10903.

et seq. with respect to the State of New Jersey, the County of _____, and the [municipality] of _____.

- 6) Proof of payment of Railroad Property Taxes pursuant to N.J.S.A. 54:29A-7 *et seq.* and Franchise Taxes pursuant to N.J.S.A. 54:29A-13 & -14.

Comments regarding above requirements:

No. (1): Self-explanatory.

No. (2): Since the Deeds do not have metes and bounds descriptions, the railroad's property maps may have to be consulted. Be wary of the *exceptions and reservations* contained in those deeds.¹

Nos.(3)&(4): If approvals are not required, a letter or affidavit from the railroad is normally sufficient. Otherwise, one may contact:
Donna Troiano, P.E.,
Chief, Bureau of Utilities
N.J. D.O.T.
1035 Parkway Avenue
Trenton, NJ 08625
609-530-2524.

No. (5): Self-explanatory.

No. (6) Information may be obtained by contacting:

New Jersey Department of the Treasury
Division of Taxation
Local Property & Public Utility Branch
50 Barrack Street, CN-269
Trenton, NJ 08624
Phone: (609) 292-6400

ConRail is located at the following address:

¹Note that a statute purports to exempt railroads from subdivision requirements. N.J.S.A. 48:12-23.1. See §11603, *infra*.

Consolidated Rail Corporation
Real Estate Department
510 Thornall Street, Suite 390
Edison, New Jersey 08837
Phone: (732) 906-3000

§9807. Conveyances from the "New Corporations". Conveyances from the new corporations (such as Erie-Lackawanna, Inc.) created by the Consummation Orders should not involve railroad property *per se*, and thus can be treated like any other conveyance by a corporation.¹

§9808. Conveyances from the State. As noted previously, the State of New Jersey has acquired much land formerly owned by ConRail.² A statute³ created the *New Jersey Transit Corporation*, which is given the power to operate railroads. Therefore, in connection with a proposed conveyance by the State, the New Jersey Department of Transportation, or the New Jersey Transit Corporation, proof should be required that the conveyance is made in accordance with the statute⁴, or other applicable law. In addition, proof of compliance with the items previously set forth,⁵ should generally be requested (with the exception of item no. 3).⁶

More information may be obtained by contacting:

New Jersey Transit
One Penn Plaza East
Newark, New Jersey 07105
Phone: (973) 491-7000
Attention: Real Estate Department

§9809. Conveyances from Other Entities. Conveyances from still-existing bankrupt railroads or other railroad entities (which are not part of the

¹See Chapter 45.

²See §9803, *supra*.

³N.J.S.A. 27:25-1 *et seq.*

⁴*Id.*

⁵See §9806, *supra*.

⁶N.J.S.A. 27:25-8.

HANDBOOK OF NEW JERSEY TITLE PRACTICE

**Third Edition
(Revised September 2005)**

A Treatise Concerning the Examination and Insurance
of Real Estate Titles in the State of New Jersey

by

LAWRENCE JOEL FINEBERG, A.B., J.D., CTP
of the New Jersey and New York Bars

with the assistance of the Editorial Board of the
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Volume II

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Third Edition published in 2003 and revised in 2005

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CHAPTER 98

RAILROADS & PUBLIC UTILITIES

§9801. Overview. New Jersey is - or was - criss-crossed by dozens of railroads. There were the major roads, such as the Pennsylvania, the Central of New Jersey, the Delaware, Lackawanna and Western (later the Erie-Lackawanna), etc.; and there were the minor roads, such as the Philadelphia, Marlton & Medford. The golden age of railroads is over; left behind in its wake is a great deal of confusion and uncertainty from the title examiner's perspective.

§9802. Background. Most railroads in New Jersey date back to the mid-Nineteenth Century, when they were chartered by special acts of the State Legislature, which usually granted them the power to condemn lands.¹ In 1872, three major transportation companies (the Delaware and Raritan Canal Company, the Camden & Amboy Railroad & Transportation Company, and the New Jersey Railroad & Transportation Company), consolidated to form the United New Jersey Railroad & Canal Company, commonly known as the United Companies. Much of its land was then leased to the Pennsylvania Railroad Company for 999 years.²

In the 1960's, the Pennsylvania consolidated with the New York Central to form the Penn Central Transportation Company. By the 1970s it was bankrupt, along with a score of other northeastern railroads, including the Erie Lackawanna and the Jersey Central. Congress reacted by enacting the Regional Rail Reorganization Act of 1973³, which created the Consolidated Rail Corporation ["ConRail"], to operate the freight lines which could be salvaged. The major railroad lines comprising ConRail were: Penn Central Transportation Company; Central Railroad Company of New Jersey; The Reading Company; Lehigh & Hudson River Railroad Co.; Lehigh Valley Railroad; and Erie Lackawanna Railway. The Act also created the United States Railway Association ["USRA"], which was charged with creating and implementing a "final system plan" for the railroads.⁴

Railroad properties were conveyed by the bankruptcy trustees of various railroads to ConRail. These are broad conveyance deeds, filed in the Secretary of State's Office in Trenton. Note the lack of a metes and bounds (or any other readily identifiable form of) description. Equally troubling are the exception and reservation clauses.⁵

§9803. Recent Developments. As the individual railroads emerged from bankruptcy, new corporations were created to hold the remainder of the railroads' property that had not been transferred to ConRail. This was effectuated by the recording of a broad conveyance deed and **Consummation Order** (of the Bankruptcy Court) in each county where the railroad still retained property. These conveyances are (more-or-less) free and clear of all liens and encumbrances. Note that the Erie Lackawanna conveyed to

¹*Lehigh Valley R.R. Co. v. Chapman*, 35 N.J. 177 (1961).

²*River Dev. Corp. v. Liberty Corp.*, 45 N.J. Super. 445 (Ch. Div. 1957), *aff'd* 51 N.J. Super. 447 (App. Div. 1958), *aff'd* 29 N.J. 239 (1959).

³45 U.S.C. §§701 *et seq.*

⁴45 U.S.C. §§711 *et seq.* The USRA has ceased to exist as an entity.

⁵See Chapter 55 generally. Note that certified copies of railroad reorganization documents are recordable with the County Clerk or Register, pursuant to N.J.S.A. 46:16-4.2.

Erie Lackawanna Inc. (a Delaware corporation). The Jersey Central conveyed to **Central Jersey Industries, Inc.**

The break-up of ConRail occurred in 1999. All of ConRail's stock has been purchased by **Norfolk Southern Corporation** and **CSX Transportation Company**. As a result of this transaction, it is anticipated that deeds will be recorded from ConRail to new entities known as **New York Central, LLC** and **Pennsylvania RR, LLC**.

Thus, title to railroad property may be vested in ConRail; in one of the newly-created entities discussed above; or in some other entity, such as the State of New Jersey (or New Jersey Transit), which acquired title to much of the land conveyed to ConRail, pursuant to the **Public Transportation Act of 1979**.¹

§9804. Government Regulation. Railroads are regulated by the **Surface Transportation Board** ["STB"] (which is part of the United States Department of Transportation)² and by the **New Jersey Board of Public Utilities** and the **New Jersey Department of Transportation**.³ In addition, where STB approval is required for a transaction, a ninety (90) day right of first refusal exists in favor of the State of New Jersey, and the County and municipalities in which the land is located.⁴

§9805. Railroad Taxes. Railroads do not pay real estate taxes in the same fashion as other entities. They are taxed under the authority of the **Railroad Tax Law of 1948**, which imposes both property and franchise taxes.⁵ **Class I** Railroad property (the main stem) is tax exempt.⁶ **Class II** Railroad property (other real estate used for railroad purposes) is taxable, but the tax is paid directly to the State.⁵ Thus, **Class II** property is exempt from local assessment and taxation.⁷ **Class III** Railroad property (passenger facilities) is treated like **Class I** property.⁸ Railroads also pay a franchise tax pursuant to statute.⁹ Other railroad-owned lands which are not used for railroad purposes are subject to local property taxation by municipalities.¹⁰

¹N.J.S.A. 27:25-1 *et seq.*; see 27:25-2, which appears to vest title in New Jersey Transit.

²The STB replaced the Interstate Commerce Commission ["ICC"] by virtue of the ICC Termination Act of 1995, P.L. 104-88; 49 U.S.C. §10501. See *Ridgefield Park v. N.Y., S. & W. Ry. Corp.*, 318 N.J. Super. 385 (App. Div. 1999).

³See §§ 9812 and 9808, *infra* (respectively).

⁴N.J.S.A. 48:12-125.1 *et seq.*

⁵N.J.S.A. 54:29A-1 *et seq.* Administrative regulations are found in N.J.A.C. 18:23-1.1 *et seq.*

⁶N.J.S.A. 54:29A-17.

⁷N.J.S.A. 54:29A-7. See *Consol. Rail Corp. v. Dir., Div. of Tax.*, 19 N.J. Tax 378 (App. Div. 2001)

⁸N.J.S.A. 54:29A-7 & -17.

⁹N.J.S.A. 54:29A-13 & -14.

¹⁰N.J.S.A. 54:29A-4. See *Consol. Rail Corp. v. Dir., Div. of Tax.*, *supra*.

ConRail claims an exemption from Class II taxes and railroad franchise taxes based upon a provision of the Federal law which created it.¹ In a reported decision, the Court held that the Federal exemption statute did *not* apply to New Jersey Class II railroad taxes assessed *before* the effective date of the exemption statute (August 13, 1981) and imposed pursuant to statute.² The case did *not* discuss whether ConRail is exempt from railroad *franchise* taxes and imposed pursuant to different sections of the statute.³ Accordingly, ConRail is *exempt* from railroad taxes imposed *subsequent* to 1981, but not prior thereto.⁴ New Jersey Transit, as a government agency, is tax exempt.

§9806. Conveyances from ConRail; etc. In order to insure a conveyance from a railroad, one should require:

- 1) Recording of a certified copy of the deed (originally filed in the Secretary of State's Office) pursuant to N.J.S.A. 46:16-4.3, with the County Clerk or Register, pursuant to N.J.S.A. 46:16-4.2.
- 2) Proof that said deed includes the subject premises.
- 3) Approval by the Department of Transportation or the Board of Public Utilities pursuant to N.J.S.A. 48:2-1 *et seq.*⁵, or, in the alternative, proof that such approval is not required.
- 4) Approval by the STB pursuant to 49 U.S.C. §§1 *et seq.*, or, in the alternative, proof that such approval is not required.⁶
- 5) If STB approval is required, proof of compliance with the ninety (90) day notice provisions of N.J.S.A. 48:12-125.1 *et seq.* with respect to the State of New Jersey, the County of _____, and the [municipality] of _____.
- 6) Proof of payment of Railroad Property Taxes pursuant to N.J.S.A. 54:29A-7 *et seq.* and Franchise Taxes pursuant to N.J.S.A. 54:29A-13 & -14.

Comments regarding above requirements:

No. (1): Self-explanatory.

¹45 U.S.C. §581(c)(5).

²N.J.S.A. 54:29A-7. *State of N.J. v. Consolidated Rail Corp.*, 690 F. Supp. 1061 (Sp. Ct. R.R.R.A. 1988).

³N.J.S.A. 54:29A-13 & -14.

⁴See *N.J. Transit Corp. v. Somerville*, 273 N.J. Super. 171 (App. Div. 1994).

⁵See N.J.S.A. 48:3-7; 48:12-23.1.

⁶With respect to abandonments, see 49 U.S.C. §10903.

No. (2): Since the Deeds do not have metes and bounds descriptions, the railroad's property maps may have to be consulted. Be wary of the *exceptions and reservations* contained in those deeds.¹

Nos.(3)&(4): If approvals are not required, a letter or affidavit from the railroad is normally sufficient. Otherwise, one may contact:

Chief, Bureau of Utilities, N.J. D.O.T.
1035 Parkway Avenue, P. O. Box 600
Trenton, NJ 08625
609-530-2000

No. (5): Self-explanatory.

No. (6) Information may be obtained by contacting:

New Jersey Department of the Treasury
Division of Taxation
Local Property & Public Utility Branch
50 Barrack Street, P.O. Box 269
Trenton, NJ 08695
Phone: (609) 292-6400

ConRail is located at the following address:

Consolidated Rail Corporation
Real Estate Department
510 Thornall Street, Suite 390
Edison, New Jersey 08837
Phone: (732) 906-3000

§9807. Conveyances from the "New Corporations". Conveyances from the new corporations (such as Erie-Lackawanna, Inc.) created by the Consummation Orders should not involve railroad property *per se*, and thus can be treated like any other conveyance by a corporation.²

§9808. Conveyances from the State. As noted previously, the State of New Jersey has acquired much land formerly owned by ConRail.³ A statute created the **New Jersey Transit Corporation**, which is given the power to operate railroads.⁴ Therefore, in connection with a proposed conveyance by the **State of New Jersey**, the **New Jersey Department of Transportation**, or the **New Jersey Transit Corporation**, *proof should be required that the conveyance is made in accordance with the statute or other applicable law.*⁵ In

¹Note that a statute purports to exempt railroads from subdivision requirements. N.J.S.A. 48:12-23.1. See §11603, *infra*.

²See Chapter 45.

³See §9803, *supra*.

⁴N.J.S.A. 27:25-1 *et seq.*

⁵See preceding Note.

addition, proof of compliance with the items previously set forth should generally be requested (with the exception of item no. 3).¹

More information may be obtained by contacting:

New Jersey Transit
One Penn Plaza East
Newark, New Jersey 07105
Phone: (973) 491-7000
Attention: Real Estate Department

§9809. Conveyances from Other Entities. Conveyances from still-existing bankrupt railroads or other railroad entities (which are not part of the ConRail system or which were formerly part of the ConRail system) must be handled on a case-by-case basis. Presumably most or all of the requirements set forth above will be applicable.² A partial list of railroads currently operating outside the ConRail system includes: N.Y., Susquehanna & Western; Rahway Valley; Staten Island R.R.; N. J. Transit; N.J.D.O.T.; AMTRAK; Black River & Western; N.Y. & Greenwood Lake; Morristown & Erie; etc.

§9810. Judgments and Mortgages. Judgments against the railroads are usually disposed of by indemnity agreement.³ With respect to mortgages, the conveyances made pursuant to the Consummation Orders were (supposedly) free and clear of liens.⁴ In addition, most title companies have generally waived pre-bankruptcy mortgages on properties conveyed to ConRail. Doubtful cases should be referred to the appropriate underwriting authorities.

§9811. Quality of Title. As suggested previously, title to lands acquired by railroads was not always a fee simple absolute. Sometimes the railroad obtained a 99 (or 999) year lease, or an easement. In other cases, the railroad acquired a fee simple determinable or fee simple conditional, for so long as (or on condition that) the land was used for railroad purposes.⁵

It may be necessary to address these issues though appropriate exceptions to title. Note that a bankruptcy court reorganization proceeding does not have the power to convert a base fee magically into a fee simple absolute or a leasehold into a fee simple estate.⁶ In any event, it is important to locate and examine carefully the deed by which the railroad (or its predecessor) originally acquired title, in order to determine the nature of the estate thereby acquired. This may involve going beyond the customary search period.⁷

¹See §9806, *supra*. See also N.J.S.A. 27:25-8.

²See §9806, *supra*.

³See Chapter 70.

⁴See §9803, *supra*.

⁵*Lehigh Valley Railroad v. Chapman*, 35 N.J. 177 (1961); see also §§209 *et seq.*, *supra*.

⁶Aaron, *Bankruptcy Law Fundamentals*, §6.01[1] (1991). See Chapter 29.

⁷See §804, *supra*.

§9812. Conveyances by Other Public Utilities. The Board of Public Utilities, discussed above, does not merely regulate the activities of railroads.¹ Rather, it exercises jurisdiction over other public utilities, such as "bus operation, ... pipeline, gas, electric, light, heat, power, water, ..." etc.² Thus, when one is asked to insure a conveyance, lease or mortgage by an entity which is regulated by the Board of Public Utilities, the following requirement should be set up in the commitment:

Proof is required that the approval of the Board of Public Utilities has been obtained, under N.J.S.A. 48:3-7 or other applicable statute, for the [conveyance] to be insured, or, in the alternative, proof that such approval is not required.

¹See §9804, *supra*. See also §4514, *supra*.

²N.J.S.A. 48:2-13.

**Appendix VI -- Attorney Horgan's statement concerning his discovery of
information indicating Conrail committed fraudulent misrepresentations**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITY OF JERSEY CITY, *et al.*)
)
 Plaintiffs)
)
 v.)
)
 CONSOLIDATED RAIL CORPORATION,)
)
 Defendant, and)
)
 212 MARIN BOULEVARD, LLC, *et al.*,)
)
 Defendant-Intervenors.)
)

C.A. No. 09-cv-01900-CKK

DECLARATION OF DANIEL E. HORGAN

1. I am an attorney-at-law admitted to practice before the United States District Court for the District of Columbia and lead counsel for the eight Limited Liability Company defendants-intervenors (the “LLCs”) in the above-captioned matter. I make this Declaration in support of the LLCs’ motion for leave to file an amended answer pursuant to Rule 15 of the Federal Rules of Civil Procedure, and to respond to certain factual allegations raised by the Plaintiffs and by Conrail in their respective oppositions to the LLCs’ motion. I make this Declaration based on my personal knowledge and as the attorney of record for the LLCs.

A. Plaintiffs’ Allegations Concerning Knowledge of this Firm of Facts Pertaining to the Harsimus Branch

2. On page 6 of the Plaintiffs’ memorandum, ECF # 90, they allege that my firm and I have been on notice since 2004 that “... no one could find any abandonment authority for the Harsimus Branch” and the implication that in 2004 I represented the LLC’s.

3. The LLCs did not even exist in 2004 and were formed sometime in 2005. My representation of the LLCs began in October 2008. Prior to that time neither I nor my firm had

represented the owners of either the LLCs or any predecessor entity to them, including SLH Holdings, which had secured the option to purchase the Embankment from Conrail sometime in 2003.

4. Plaintiffs rely upon a Declaration by Andrew Strauss from 2006 (ECF #90-2), which does not speak to any discussion with me but only provides a copy of the report Mr. Strauss provided to Maureen Crowley of the Embankment Coalition on or about November 17, 2004. A courtesy copy of that memorandum report also appears to have been sent to Steve Gucciardo. Both Ms. Crowley and Mr. Gucciardo are members of the Plaintiff, Embankment Coalition.

5. That November 2004 attached report, at page 5, (ECF#90-2, page 10 of 12) relates that Mr. Strauss had contacted me because I had represented the Harborside development project. In 2004, I agreed to review "archived files" because the representation of Harborside was no longer active and the transactions that Mr. Strauss was generally asking about focused upon real estate documents from past transactions and the approvals, if any, that Conrail may have secured for those transactions. I was not able to locate any such documents and have no recollection of any further discussion with Mr. Strauss on the subject at that time.

6. In July 2004, some five months before Mr. Strauss's inquiry, I had been engaged by a client in serious conflict with the City of Jersey City, its officials, and others, including Steve Gucciardo, concerning my client's property and development rights. In July 2005, when the LLCs purchased the Embankment from Conrail, I was fully engaged in that unrelated, non-railroad dispute, which resulted in the filing of a Complaint in the United States District Court for the District of New Jersey under the caption New Gold Equities Corp. v. City Of Jersey City et al., D.N.J. 2:05-cv-03561-DRD-SDW, ECF Docket #1 (the "New Gold Matter"). The City and

Mr. Gucciardo were defendants in that action. While that matter was active, I declined to become involved in several matters involving complex property disputes with the City which involved historic preservation, development rights, and related issues out of concern for a potential for conflicts with the New Gold Matter on issues involved in litigating it. In fact, in late 2006 I was approached by the representatives of the LLCs and declined to represent them even though the New Gold Matter had been formally settled. (See, 2:05-cv-03561-DRD-SDW, ECF Docket #23, filed August 21, 2006). During this entire period, and prior to becoming involved with the representation of the LLCs, in October 2008 when the matter was before the D.C. Circuit Court of Appeals (for the first time) my role at the time was focused exclusively upon seeking settlement with the City, not in litigating any of the matters, although my role later expanded significantly.

7. My understanding of the efforts of Mr. Strauss' to research whether Conrail had ever formally sought to abandonment rail lines in Jersey City, on the waterfront, and including the Harsimus Branch, arise exclusively from his engagement by the LLCs, which is described in the November 2004 report. (ECF #90-2). That specific engagement arose because, as he said in his November 17, 2004 memorandum filed by Plaintiffs, his efforts to use Internet searches and other inquiries to the STB were inconclusive, at best. "Initial Docket searches revealed the same information as did later searches; nothing but dead ends." (Strauss Declaration, ECF #90-2, page 8 of 12, filed October 22, 2012). Mr. Strauss's efforts on behalf of Plaintiffs were inconclusive as to whether Conrail had filed any abandonment on the Jersey City waterfront and did not address the location of any of the rail lines in question. By contrast, his commission from the LLCs was to begin with the prior, inconclusive research through in person visits to the National Archives in Maryland and STB archives in Washington, D.C. Those visits confirmed the absence of prior

abandonment applications by Conrail, but for the first time addressed the locations of the various rail lines which Conrail had not abandoned. See, Strauss Declaration, ECF#81-33 at page 4 of 11, filed September 6, 2012. In addition, the first conclusive admission by Conrail that it had not abandoned any of these lines came in its March 6, 2008 pre-filing notice with the STB while the D.C. Circuit Court of Appeals was reviewing Judge Urbina's dismissal of the case for lack of standing. See, ECF #81-11, filed September 6, 2012.

8. The conclusion of Plaintiffs' counsel that "certainly by the time the Plaintiffs originally moved for summary judgment three years ago all the evidence was of record, in most cases several times over" is not accurate. Everything relied upon by the LLCs, both in opposition to Plaintiffs' renewed motion for summary judgment and in their proposed amended pleadings, existed in some form somewhere, but certainly not in any discovery in this case because none has commenced even as of today. The information supporting the allegations in the amended pleadings has been carefully assembled from many sources, corroborated, and put forth in good faith as the basis for legitimate factual claims and disputes.

B Renewed Investigation by LLCs into History of Harsimus Branch and Conrail Abandonments

9. Conrail has also made the fact-based argument in its opposition that the LLCs had all the information necessary to reach the conclusion in 2006 that the Embankment and the Harsimus Branch were, in fact, Line Code 1420 as described in the Final System Plan. Conrail relies heavily on the fact that from 2006 through the early part of 2012, the LLCs were represented in the STB proceeding and later this action by experienced railroad attorneys. See, ECF #89, filed October 22, 2012.

10. The LLCs' position in the STB petition filed by the Plaintiffs in 2006 was that the Embankment was a spur of Line Code 1420, and that the Embankment was treated by Conrail as

an extension of the Harsimus Cove Yard on the Jersey City waterfront. A review of the LLCs' position to the STB as submitted to this Court by Conrail shows that the LLCs relied heavily on historical records of Conrail and its predecessors that the LLCs' counsel obtained from several sources, including Conrail and the LLCs' former counsel's review of valuation maps at the National Archives. The LLCs also submitted certifications from individuals with knowledge of Conrail's activities and the decision-making process of the United States Railway Association ("USRA"), which was formed by Congress in 1973 to review the status and operational needs of the railroad industry. ECF #89-1 to -19.

11. The LLCs had arrived at the conclusion that the Harsimus Branch and the Embankment formed a spur of Line Code 1420, as opposed to actually being Line Code 1420 as described in the USRA Final System Plan. Conrail presented in substance the same conclusion in Plaintiffs' STB petition for a determination of whether the Embankment was a regulated line.

12. The STB ultimately rejected the LLCs' and Conrail's argument, and concluded the Harsimus Branch was Line Code 1420, and that the subject line began at the Hudson River waterfront. See, ECF #81-3, filed September 6, 2012. The STB dismissed the position of the parties that the Harsimus Branch was a spur of the so-called Pennsylvania Railroad main line, which the STB reported had been abandoned and subsequently dismantled in 1964—twelve years before Conrail took title to railroad assets. Id. at 9-10 of 12.

13. As recounted above, the LLCs initially retained me in October 2008 to represent them in negotiations with the other parties. My role expanded to include appearing as counsel of record in certain lawsuits that had been filed, or were filed by my office, in the Superior Court of New Jersey. Subsequently, on May 17, 2012, I entered a notice of appearance in this action as counsel of record, and prior counsel formally withdrew. See, ECF ## 66-69.

14. With my involvement in the case, and facing the prospect of a remand from the D.C. Circuit Court on the issue of standing, the LLCs authorized a renewed investigation into the Embankment and the Harsimus Branch in early 2012. The LLCs retained Mr. Strauss, who had previously done Internet-based research on behalf of the Plaintiffs, to perform additional investigation at the national Archives and to review the records of the STB and its predecessor agency, the Interstate Commerce Commission.

15. As recounted in Mr. Strauss' declaration previously filed by the LLCs with this Court (ECF #81-33, filed September 6, 2012), he was unable to locate any records indicating an abandonment of the Harsimus Branch by Conrail. However, he did locate an application for abandonment of another track in Jersey City called the Lafayette Industrial Track. A Conrail-prepared map filed with that petition showed the Lafayette track and the Embankment and Hudson Street Industrial Track. *Id.* at 8 of 11.

16. As explained above, in the 1980's I represented clients in connection with the Harborside development in downtown Jersey City. The map Mr. Strauss retrieved, previously produced at ECF #8 of 11, peaked my curiosity because the Harsimus Branch-Hudson Street Industrial Track was located very close to the Harborside development. I had recalled property boundary disputes with Conrail and private developers, which was the subject of much negotiation among Conrail, the developers, and the Jersey City Redevelopment Agency.

17. I was able to locate in my files two maps that shed light on the location of the rail lines. The first was a riparian survey dated 1985, which has been produced as ECF #81-17, filed September 6, 2012. The riparian survey shows a segment of Conrail-owned track that the LLCs contend is a segment of the Hudson Street Industrial Track.

18. The second map is a major subdivision survey from 1988, previously submitted as ECF #81-16, filed September 6, 2012. That map memorializes the agreement between Conrail, the private developers, and the Jersey City Redevelopment Agency concerning lot boundaries. The same segment of track from the 1985 survey appears on the 1988 subdivision map.

19. Next, the LLCs ordered historic aerial photographs of downtown Jersey City circa 1976 and 1978, around the time Conrail took title to railroad assets. See, ECF #82, filed September 6, 2012. The aerial photographs, when reviewed in conjunction with the 1985 riparian survey and 1988 subdivision map, led me to conclude that as of 1976, Conrail was actively running freight trains to downtown Jersey City to service industrial customers, including, most prominently, the Colgate-Palmolive factory. Further, the Embankment carried the only tracks that connected the Hudson Street Industrial Track with the nationwide rail network.

20. I compared my findings with the position of Conrail (and the LLCs) presented in STB filings and submissions by Conrail to this Court, that the old Pennsylvania Railroad main line was Line Code 1420, and the Harsimus Branch was merely a spur of the main line. Among authority cited by Conrail was a book by Kenneth French entitled Railroads of Hoboken and Jersey City (Arcadia Publishing 2002), which is a book of historic photographs of railroads in Jersey City. One page included two photographs (previously produced at ECF #87-22) of the main line being demolished in 1964. That is consistent with the STB's finding in 2007 that the main line had been abandoned in 1961. ECF #81-3 at 9-10 of 12.

21. Finally, through an open public records request filed with the City in an unrelated matter, I obtained a copy of an Agreement dated January 14, 1983 between Conrail and a private developer for a downtown project. The Agreement provided for sale of Conrail assets, and

created a purchase option for an additional parcel that corresponds to the track shown on the 1985 riparian survey and 1988 subdivision map. (Exhibit 1: Agreement, dated January 14, 1983). A specific provision concerning the purchase option for the segment of track appears in the Agreement: "Conrail hereby grants and conveys to Purchaser an Option to purchase the area designated on the plan attached hereto as Parcel 2 Option Area, containing 26,040 square feet more or less, upon abandonment by Conrail (in accordance with law) of the rail right-of-way within said Option area at the fair market value thereof." The LLCs' research has concluded Conrail never obtained abandonment authorization to sell this segment.

22. The 1985 riparian survey, the 1988 subdivision map, the 1976 and 1978 aerial photographs, and the 1983 Agreement are all materials not previously relied upon by any party in this long-standing dispute. After reviewing those materials, I concluded that there was no longer a good faith basis to (1) argue the Embankment was a spur (a position the LLCs have not, in fact, ever taken in this pending District Court matter, ECF #26), or (2) withhold the LLCs' stipulation of the fact the Embankment was conveyed as a line of rail in 1976 (ECF #78). Further, these documents provided evidence that Conrail's representations to the LLCs in 2005 that the Embankment was merely a spur, it either knew those statements were false or was negligent in its representations to the LLCs. Accordingly, when this Court instructed the parties to stipulate as to all undisputed facts, the LLCs consented to the finding the Embankment was conveyed as a line in 1976 because there was no longer a good faith basis for the LLCs to say otherwise, and my duty of candor to the Court demanded the LLCs' agreement to the stipulation. ECF #78.

C. The LLCs' Memorandum of Understanding with Conrail

23. Attached hereto as Exhibit 2 is a true and accurate copy of a Memorandum of Understanding between Conrail and the LLCs, dated October 12, 2007.

24. The docket number referred to in Paragraph 6 of that agreement refers to a case pending in the Superior Court of New Jersey, Law Division, Hudson County captioned 212 Marin Boulevard, LLC et al. v. City of Jersey City et al. The LLCs have filed a civil rights lawsuit against the City and several of its agents as a result of the civil rights defendants' interference with the LLCs' land use applications for development of the Embankment. The City has filed a third-party action against Conrail.

25. The Memorandum of Understanding states it is contingent upon approval by the Board of Directors. Attached hereto as Exhibit 3 is a true and accurate copy of an e-mail sent by Jonathan Broder, Secretary and General Counsel for Conrail, to the principal agent for the LLCs Steven Hyman, on November 7, 2007. That e-mail confirms the Conrail Board adopted the Memorandum of Understanding.

D. Plaintiffs' Assertions Concerning the LLCs' Bad Faith Motivation

26. Plaintiffs have alleged in their opposition brief that the LLCs have filed their motion to amend their answer for improper purpose, and level the allegation that the LLCs are vexatious litigants that have filed improper lawsuits (so-called Strategic Lawsuits Against Public participation, or SLAPP) against the Plaintiffs and their attorneys. Plaintiffs have not disclosed that although they have accused the LLCs of filing lawsuits in bad faith, their arguments have been rejected by the Judges who have heard those applications.

27. Plaintiffs and the LLCs are in fact involved in several lawsuits in New Jersey. Given Plaintiffs' characterizations of the LLCs' motives, attached hereto are true and accurate copies of recent decisions rendered in the state court proceedings:

- a. 212 Marin Boulevard, LLC et al. v. Charles Montange et al., docket number HUD-L-2196-11 – This lawsuit alleges Plaintiffs' counsel has a conflict of interest

because the interests of the three Plaintiffs are dissimilar. The LLCs' complaint was dismissed; the Judge noted, however, that "Should the Defendants' goals or means of achieving those goals eventually diverge, Montange's joint representation could potentially become problematic. However, that scenario remains hypothetical." (Exhibit 4). That decision is on appeal.

b. In the same action, the Plaintiffs here filed a motion for frivolous litigation, including that the conflicts lawsuit was a SLAPP suit. The trial Judge in New Jersey rejected that argument and denied Plaintiffs' demand for attorneys' fees. (Exhibit 5). Plaintiffs have cross-appealed that issue.

c. Hyman v. City of Jersey City et al., docket number A-789-10T4 – The LLCs' managing agent obtained a decision from the New Jersey Appellate Division that the City wrongfully withheld documents from him under an open public records request. (Exhibit 6). In addition to ordering turn-over of records, the Court remanded the matter on August 27, 2012 for a hearing on whether select documents were privileged. This appellate court also found that plaintiff was entitled to his attorney fees in the matter.

d. 212 Marin Boulevard, LLC v. City of Jersey City et al., docket number HUD-L-4908-11 – This is another open public records act case the LLCs were forced to bring against the City. The State Court found the City wrongfully withheld documents, and ordered turn-over and additional actions to secure public records to produce to the LLCs. The court awarded the LLCs' attorneys' fees. (Exhibit 7).

e. 212 Marin Boulevard, LLC et al. v. City of Jersey City, docket number HUD-L-4908-05 – This is the civil rights lawsuit. That case has been stayed since 2005

**Appendix VII – Developer’s pleading arguing that Conrail engaged in
fraudulent misrepresentations to the developer, STB, City and courts**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITY OF JERSEY CITY,
RAILS TO TRAILS CONSERVANCY, and
PENNSYLVANIA RAILROAD HARSIMUS STEM
EMBANKMENT PRESERVATION COALITION,

Plaintiffs,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant,

and

212 MARIN BOULEVARD, LLC;
247 MANILA AVENUE, LLC;
280 ERIE STREET, LLC;
317 JERSEY AVENUE, LLC;
354 COLES STREET, LLC;
389 MONMOUTH STREET, LLC;
415 BRUNSWICK STREET, LLC; and
446 NEWARK AVENUE, LLC,

PAULA T. DOW, ATTORNEY GENERAL, STATE
OF NEW JERSEY

Intervenor-Defendants.

Civil Action No.
09-cv-1900 (CKK)

**AMENDED ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS, CROSS-
CLAIMS, AND JURY DEMAND**

212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Coles Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC (collectively, the “LLCs”), by and through their undersigned counsel, hereby make this Amended Answer to the Complaint for Declaratory and Injunctive Relief (the “Complaint”) of Plaintiffs City of Jersey City (the “City”), Rails to Trails

COUNT III
PREEMPTION

112. The LLCs repeat the allegations contained in Paragraphs 1 through 111 as if set forth at length herein.

113. The Plaintiffs have alleged they are entitled to invoke the remedies available under N.J. Stat. 48:12-125.1, which provides that a railroad must first offer former regulated railroad assets for sale to New Jersey state governmental bodies, including the State, its agencies, counties, and municipalities, such as the City.

114. N.J. Stat. 48:12-125.1 violates the exclusive jurisdiction of the STB to set conditions on abandonment and post-abandonment conditions, and is preempted by federal law and this Court's original and exclusive jurisdiction to interpret, alter, amend, or modify the FSP.

WHEREFORE, the LLCs demand judgment as follows:

- A. Declaratory judgment of this Court that N.J. Stat. 48:12-125.1 is preempted by federal law; and
- B. Such other relief as the Court deems equitable and just.

CROSS-CLAIMS AGAINST CONRAIL

COUNT IV
FRAUD

115. The LLCs repeat the allegations contained in Paragraphs 1 through 114 as if set forth at length herein.

116. Conrail was created by Congress pursuant to the 3-R Act in 1973 to take ownership of railroad assets of eight bankrupt railroad companies and to operate rail service along those assets.

117. The USRA was created to determine which assets of the bankrupt railroads should be transferred to Conrail. In 1975, USRA released the FSP, which identified which assets should be transferred to Conrail. The FSP listed lines of rail that were to be transferred to Conrail which lines of rail included additional properties ancillary to those lines, such as spurs, yards, and side tracks, but not specifically identified.

118. The Special Court approved the FSP on April 1, 1976, and the trustee in the bankruptcy matter transferred the assets to Conrail by deeds.

119. Among the many assets transferred to Conrail were two lines that were identified as Line Code 1420 (Harsimus Branch) and Line Code 1440 (Hudson Street Branch). Both Line Code 1420 and Line Code 1440 were transferred as lines of rail, subject to STB (then, the ICC) jurisdiction.

120. Conrail operated these lines of rail for many years subsequent to 1976 until its remaining customers left and the nature of the area changed such that rail freight service was no longer required, feasible or foreseeable.

121. Conrail is required to operate consistent with federal law, including STB regulations.

122. In the 1980's and 1990's, Conrail, in cooperation with the City's redevelopment plans, sold portions of Line Code 1420 east of Marin Boulevard, and either sold, or relinquished to the City and NJ Transit for use of light rail, the entire 1.3 mile length of Line Code 1440.

123. Conrail did not seek STB abandonment authority prior to selling or abandoning those assets.

124. Conrail also ended rail service in downtown Jersey City, in part due to requests from the City, and demolished cross-bridges connecting the segments of the Embankment and tore up tracks and ties. Conrail allowed the City to demolish the bridge connecting the Embankment at Marin Boulevard. Conrail did not seek or obtain STB abandonment authority before ending rail service and removing the railroad improvements.

125. After the installation of the Marion Junction in 1994, Conrail did not use the Harsimus Branch for any purpose. Upon information and belief, Conrail did not (and could not due to the absence of tracks, bridges, trestles, and signals) operate trains along the Harsimus Branch or the old Pennsylvania Railroad main line east of Marion Junction after 1994 (the old Pennsylvania Railroad main line having been demolished and removed from Railroad Avenue in approximately 1964).

126. In 2003, when Conrail entered into a contract of sale with the LLCs, there were no properties still owned by Conrail east of the Embankment in downtown Jersey City that had formed part of Line Codes 1420 and 1440.

127. Conrail internally reclassified the Harsimus Branch as a spur in 1994 without approval by the STB.

128. Conrail, with fraudulent intent and at numerous times, misrepresented to the LLCs that the Embankment was a spur or other, non-regulated railroad improvement, which could be freely conveyed by Conrail without first obtaining abandonment authority from the STB. It also made similar representations to the City to further its sale of properties to the LLCs without the necessity of seeking STB abandonment authority.

129. Conrail made those misrepresentations, through its attorneys, and otherwise with the intent that the LLCs would rely on those statements. The LLCs did rely upon those statements to their detriment, incurring enormous costs, delays and loss of opportunities, as well as being subjected to the wrongful actions of the Plaintiffs.

130. Conrail was aware at the time it sold the Embankment to the LLCs that it had not sought abandonment authority for the Harsimus Branch and that if the Embankment was in fact a line, it would have placed the LLCs into ownership of a line of rail, thereby subjecting their properties to the regulatory jurisdiction of the STB.

131. Conrail knew the Embankment was in fact a segment of Line Code 1420. Conrail fraudulently misrepresented the status of the Embankment to the LLCs to induce them to purchase the Embankment. The LLCs did in fact rely upon the statements and actions of Conrail.

132. Conrail purported to transfer all its "right, title, and interest" in the Embankment lots to the LLCs in July 2005. Conrail could not convey its interest as a common carrier to the LLCs, but no notice of that was given to the LLCs as Conrail did not reserve any residual rights by way of easement to resume rail operations along the Embankment.

133. With an intent to defraud the LLCs in the sale of the properties, but while avoiding the City and Coalition's objections that its properties were still federally regulated, Conrail represented to the City that the properties had been legally abandoned. Among other fraudulent and misleading statements made at the behest of Conrail, one of its attorneys responded to specific City and Coalition inquiries that: "You should be aware that the Jersey City Embankment, which is a portion of the Conrail Harsimus Branch was abandoned in April 1994 without application to the Interstate Commerce Commission pursuant to federal law which does not require formal ICC now Surface Transportation Board approval." Upon information

and belief, this statement, among others, led the City into a course of litigation on the line of rail issue and challenging the LLCs title and ownership interests. By so doing, a regulatory cloud has been placed on the LLCs' title and has forced them to suffer damages, including, but not limited to the cost of litigating these matters and lost business opportunities.

134. The LLCs reasonably relied on statements by Conrail, believing that Conrail was correctly describing the status of the Embankment. They were not aware of the true nature and history of Conrail's actions with respect to its former properties, and during the preceeding twenty-nine years, to the LLCs' knowledge and belief, no property owner in the waterfront area of Jersey City had ever been subjected to any sort of claim arising from Conrail's lack of regulatory compliance. The LLCs also received title insurance binders, and title insurance policies at closing that gave no indication of Conrail's lack of regulatory compliance. Information concerning the status of the Embankment and Conrail's regulatory compliance is to a large degree contained within Conrail's own files, or maintained by the National Archives, and not readily ascertainable to the LLCs prior to the closing.

135. After the purchase, Conrail continued to tell the LLCs, as well as the STB and this Court, the Harsimus Branch was a spur, not that it had been legally abandoned in 1994 without formal ICC action.

136. The LLCs learned the Harsimus Branch was in fact a line years after the sale, and only after reviewing Conrail's filings with the STB and this Court, and in preparation for the potential remand of the case from the Circuit Court of Appeals which did, in fact, reverse the prior dismissal of Plaintiffs' case for lack of standing. Prior to that time, Conrail had further induced the LLCs into a false sense of comfort in its false and misleading statements by an agreement executed between the LLCs and Conrail in which Conrail promised the LLCs that it

would take all necessary steps to protect their interests in their titles to the properties. The LLCs reasonably relied upon Conrail's positions taken before the STB, this court, and in its written and verbal promises of solidarity with the LLCs.

137. In addition to fraudulently misrepresenting the actual status of the Embankment to induce the LLCs to purchase the Embankment, Conrail acted in order to avoid scrutiny of its own illegal, de facto abandonments of lines of rail in Jersey City east of Marin Boulevard, and the de facto abandonment of rail service across the Embankment, accomplished through demolition of the cross-bridges and removal of track.

138. Conrail first misrepresented to the STB, and later to this Court, the Embankment is a spur or side track or yard track of the Harsimus Cove Yard, which was transferred to Conrail as ancillary track, and that the Embankment was not Line Code 1420 when in fact it was Conrail that decided on its own that the Harsimus Branch was a spur in the 1990's, and not USRA in the 1970's. Conrail has identified the Pennsylvania Railroad main line from CP Waldo to Exchange Place along Railroad Avenue as Line Code 1420, notwithstanding the fact that in 1961 passenger service along Railroad Avenue was abandoned, and in 1964 the above-grade, elevated steel trestles were removed from Railroad Avenue. Conrail has thus argued Line Code 1420, as described in the 1976 FSP, was an abandoned former line, despite the fact that it was never conveyed to Conrail and had all the tracks removed twelve years before the formation of Conrail.

139. Conrail has also avoided discussion of Line Code 1440 to avoid disclosure and scrutiny of Conrail's complete de facto abandonment of that line without STB authorization. After initially intending to include Line Code 1440 in the STB abandonment petition, Conrail's actual application, filed in January 2009, does not include Line Code 1440.

140. Conrail has misrepresented the Embankment's actual status to the LLCs, the STB, and this Court for its own pecuniary gain and to avoid examination of its own wrongful conduct beginning in the 1980's. When the City objected in 2008 to the inclusion of the Hudson Street Industrial Track in the proposed Conrail STB filing by an letter from Assemblyman Smith, but later relied upon the traffic from that line which connected to the Harsimus Branch at Marin Boulevard at Mile Post 1.30 to support its initial summary judgment motion before the court in the present matter, neither Conrail nor the City brought the inconvenient fact of the unabandoned Hudson Street Industrial Track to the attention of the court or the LLCs. The City remained silent so that its own complicity in Conrail's history of past regulatory violations (lack of abandonment applications) would not come to the attention of the court or the LLCs.

141. Conrail fraudulently misrepresented its status, resulting in damages to the LLCs, including, but not limited to, cost of acquiring the Embankment, loss of value of the Embankment if it is federally regulated and subjected to restrictions of other federal remedies such as Plaintiffs now seek, loss of opportunity to develop the Embankment, and costs associated with litigating the status of the Embankment before the STB, the Circuit Court, and this Court, including attorneys' fees.

WHEREFORE, the LLCs demand judgment against Conrail as follows:

- A. Damages for the fraudulent misrepresentation of the status of the Embankment, including actual damages, and punitive damages;
- B. Attorneys' fees and cost of suit; and
- C. Such other relief as the Court considers equitable and just.

COUNT V

NEGIGENT MISREPRESENTATION

142. The LLCs repeat the allegations contained in Paragraphs 1 through 141 as if set forth at length herein.

143. In its negotiations with the LLCs, Conrail failed to perform customary diligence necessary and expected of a regulated railroad to assess the true and correct status of assets the railroad intends to sell to third parties. It also failed to properly inform and/or supervise its agents and attorneys with respect to communications with the LLCs and with the City and others in respect to the true status of the properties sold to the LLCs.

144. Conrail negligently maintained its internal records so as to allow the Embankment lots to be reclassified as spur tracks, when in fact the Embankment was part of a line subject to STB abandonment jurisdiction.

145. Conrail negligently failed to pursue STB abandonment prior to selling the Embankment to the LLCs.

146. A reasonable business enterprise, engaged in the business of railroad ownership and operation should have been aware that the Embankment would be considered subject to federal regulations and STB abandonment authority.

147. As a result of Conrail's negligence, the LLCs have received title to property with a cloud on title arising from the regulatory scheme.

148. The LLCs have suffered damages, including lost opportunities and costs of defending title, as a result of Conrail's negligence.

WHEREFORE, the LLCs demand judgment as follows:

- A. Damages for the negligent misrepresentation of the status of the Embankment;
- B. Attorneys' fees and cost of suit; and

C. Such other relief as the Court considers equitable and just.

DEMAND FOR JURY TRIAL

The LLCs hereby demand a jury trial on all issues so triable

Dated: October 4, 2012

Respectfully submitted,

/s/ Daniel E. Horgan

Daniel E. Horgan

Bar No. 239772

Waters, McPherson, McNeill, P.C.

300 Lighting Way

P.O. Box 1560

Secaucus, New Jersey 07096

Tel: (201) 863-4400

Attorneys for 212 Marin Boulevard, LLC, 247

Manila Avenue, LLC, 280 Erie street, LLC, 317

Jersey Avenue, LLC, 354 Coles Street, LLC, 389

Monmouth Street, LLC, 415 Brunswick Street, LLC

and 446 Newark Avenue, LLC

LIST OF EXHIBITS

Exhibit 1: July 26, 1975 United States Railway Association Final System Plan (excerpted)

Exhibit 2: March 31, 1976 Deed from Fairfax Leary, Trustee, to Consolidated Rail Corporation

Exhibit 3: Deeds (eight total) from Consolidated Rail Corporation, to LLCs, dated July 12, 2005

Exhibit 4: Pennsylvania Railroad Track Charts

Exhibit 5: Pictures of P.R.R. Harsimus looking west to receiving yard - main stem (embankment) from the book Jersey City's Hudson River Waterfront, Book One: The Pennsylvania Railroad 1941-1964 by Charles Caldes, Journal Square Publishing 2009

Exhibit 6: Declaration of David B. Dixon of September 6, 2012, with attachments

Exhibit 7: 1985 survey entitled "Map of the Property of Waterfront Associates" showing, in part riparian boundaries

Exhibit 8: 1988 Major Subdivision/Boundary survey by Lange & Surveying and Mapping

Exhibit 9: Conrail's Notices of Exemption Docket No. AB 167 Sub No. 1189X dated January 6, 2009

Appendix VIII – STB Power To Void Deeds

Additional Considerations Germane to Voiding
Conrail Deeds to the Developer

This agency has repeatedly warned parties that it is a misuse of its processes for railroads to transfer rail lines for non-rail purposes (i.e., abandonment) unless the railroad first obtains an abandonment authorization. E.g., City of Temple, Tex. – Acquisition and Operation Exemption – Georgetown Railroad Company, F.D. 35369, served April 23, 2010, slip op. p. 1 (“acquiring a line of railroad for the purpose of abandoning rather than operating over it constitutes a misuse of [this Board’s] procedures”). This agency has voided deeds, or required reconveyance, in such situations. E.g., The Land Conservancy of Seattle & King County – Acquisition & Operation Exemption -- BNSF, F.D. 33389, served Sept. 26, 1997, slip op. at 3 (STB voids a sale from BNSF to a land trust on the ground that it was for a trail conversion which needed an abandonment authorization).

In the case of the Harsimus Branch, Conrail transferred eight blocks of the Harsimus Branch to a developer for non-rail use (in this case, destruction of an historic asset to make way for residential and commercial uses). There is no basis to treat a developer more favorably than a land trust.

Moreover, Conrail did not just fail to seek abandonment authorization. It and the developer fraudulently or recklessly claimed the line was a “spur” and, motivated by a desire to maximize real estate profits by evading historic

designations, failed to seek any authorization whatsoever by arbitrarily claiming the Harsimus Branch was a “spur.” This was a knowing abuse of STB abandonment jurisdiction. It is, moreover, a clear threat to the integrity of the agency’s processes. As this Board has said, “persons who engage in such abuses [should not] be allowed to profit from them.” SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Railway between La Harpe and Peoria, F.D. 33995, served Oct. 17, 2002, slip at 19 (orders reconveyance of 71.5-mile line). The Board reiterated that it was ordering reconveyance even if other remedies were available: “We understand that our decision to revoke the exemptions could be viewed as producing unnecessary turmoil, given that a party wishing to acquire the Line for continued rail service could do so under the OFA procedures if an abandonment proposal were pursued. But there is no assurance that an OFA would go through. Moreover, as we have stated, no party to the sale should be allowed to profit from the tactics that were employed in this case.” Slip at 19 n. 35.

ICC explained in Oregon Short Line R.Co. Abandonment, 267 ICC 633, 635 (1947) that a railroad cannot avoid abandonment approval requirements by classifying a former branch line as an unregulated “spur”: “[o]nce having assumed common carrier obligations subject to the jurisdiction of the [ICC] with respect to a particular line of railroad, that obligation remains until appropriate authority for

abandonment is obtained.” This has been the consistent position of ICC and STB throughout the period. See The Atchison, Topeka and Santa Fe Railway Company – Abandonment Exemption – in Lyon County, KS, AB 52 (Sub-no. 71X), slip op. at 5 (ICC, served June 17, 1991) (“Because this track was clearly part of a rail line at one time, we find that it cannot be converted into an exempt spur ... solely through the railroad’s unilateral decision to change its use of the track segment over time”); Allegheny Valley R. Co -- Pet. Dec. Order, F.D. 35239, served June 15, 2010, slip op. at 9 (Conrail line could not be unilaterally converted into exempt spur). See also Nicholson v. ICC, 711 F.2d 364, 368 & n. 12 (D.C.Cir. 1983) (arbitrary name or class given by a railroad to a line is not controlling whether the property is a line for regulatory purposes).

The abuse of STB jurisdiction is particularly aggravated here. Both Conrail and the developer [Steven Hyman d/b/a 212 Marin Blvd. LLC., et al. (“LLCs”)] were counseled by attorneys. Both knew or should have known that the Harsimus Branch was a line requiring abandonment approval. Nonetheless they drove forward without any abandonment authorization. The developer’s strategy, as the LLCs’ then-manager Mr. Hyman stated on the record, has been to use legal proceedings for the improper motive of bankrupting the LLCs’ opponents:

-- "I'm going to sue anybody in Jersey City that says the word 'embankment' because my rights and my wife's rights have been abused."¹

-- "Where I am right now is that we're going to devastate the City unless you back off and the City agrees to let it happen." See App. 7, transcript p. 140, April 5, 2011.

-- "What I said to [Stephen Gucciardo, Maureen Crowley and Jenny Meyer, three members of the Coalition's board of directors] is when this is over, I'm going to bankrupt you all personally. And then I turned to the [attorney for the Coalition, Janine Bauer] and I said, 'you, too.'" Id.146.

The developer followed up his threat with lawsuits against the City, RTC, the Coalition, and their attorneys. The strategy was not to address the merits or to mitigate the unlawful conduct, but instead to litigate the public until it gave up.

Additionally, this case meets all the elements of a civil conspiracy justifying deed voidance; the ordinary elements include (1) an agreement between two or more parties (here Conrail and the LLCs in 2005 and 2007) (2) to participate in an unlawful act (here, illegal de facto abandonment), or a lawful act in an unlawful way (here, property sale without STB prior authorization followed by a cover up), (3) an overt act pursuant to/in furtherance of the conspiracy (here, purported sale, followed by litigation and threats of continued litigation to bankrupt opponents),

¹ Transcript at p. 134, March 30, 2011, In the Matter of Case Z09-010; "A" Appeal 212 Marin Boulevard, LLC, et al, Zoning Board of Adjustment, City of Jersey City, County of Hudson.

(4) injury (disabling City from lawful acquisition, risk to the Embankment, cost of litigation incurred by City et al.).

Appendix IX—Coalition consultant's statement concerning efforts to ascertain
regulatory status of Harsimus Branch

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

Rails to Trails Conservancy,
Jersey City, and
Pennsylvania Railroad Harsimus Stem
Embankment Coalition, petitioners --
Petition for a Declaratory Order

VERIFIED STATEMENT OF
ANDREW STRAUSS

I, Andrew Strauss, make this Verified Statement in support of the Petition for a Declaratory Order filed by petitioners Jersey City, et al. in the above-captioned proceeding.

1. I am a principal of Strauss and Associates, a firm specializing in land use planning and acquisition of land for beneficial public use. My resume is attached. I was retained to assist the Embankment Coalition, one of the petitioners in the above-captioned proceeding, in its efforts to acquire, preserve and develop the portion of the Harsimus Branch containing the so-called Sixth Street Embankment for park, open space, trail and other compatible purposes.

2. In the course of my efforts, I attended a meeting on March 16, 2004 in the office of the late Jersey City Mayor Cunningham. Mayor Cunningham, other City officers and employees, representatives of Conrail, and representatives of the Embankment Coalition were present. My contemporaneous notes, although brief, indicate principal attendees. They are attached hereto.

3. At the March 16 meeting, Conrail took the position that the Embankment was "railroad property and therefore immune from condemnation." Insofar as I am aware, Conrail's position that federal jurisdiction preempted Jersey City from using state law eminent domain power was accepted by Jersey City. Although I am not an attorney, I do know as a licensed professional planner in New Jersey that the only basis for a freight railroad line being immune from condemnation is when it falls under federal freight railroad regulatory jurisdiction. This puzzled me, for Conrail's proposed sale of the property to a developer suggested that the property was not under federal jurisdiction, because such a sale would be illegal unless Conrail first obtained abandonment authority. It therefore appeared to me that perhaps Conrail had obtained abandonment authority.

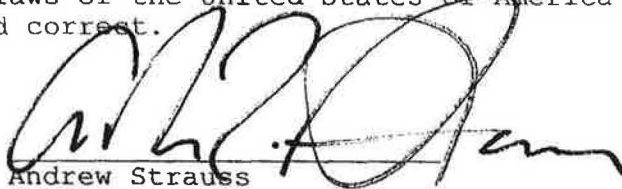
4. In light of this confusing situation, I undertook, at the request of the Embankment Coalition, a research project and technical review to determine whether Conrail had obtained an abandonment authorization covering the portion of the Harsimus Branch containing the Embankment. I prepared a memorandum, dated November 17, 2004 (attached hereto), to Maureen Crowley, president of the Embankment Coalition, which summarized my research. As detailed in the Memorandum, I diligently inquired of the Surface Transportation Board for records of any abandonment. STB staff could locate no records, nor could I find any records by other

means.

5. Based on my discussions with STB staff, I understand that STB lacks jurisdiction over "spurs." In that event, STB would not require STB abandonment authority, although, at the same time, Conrail's claim that the property was immune from condemnation may not be correct. While I am not an attorney, I would find it very unlikely that the Harsimus Branch was a mere spur. The Harsimus Branch contained multiple lines of track and was the Pennsylvania Railroad's main line into an important harbor facility.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 1.6.06.


Andrew Strauss

200 WEST STATE STREET
TRENTON NJ 08608
PHONE: 609/695-2777
FAX: 609/695-1222

ANDREW L. STRAUSS, AICP / PP

Strauss and Associates / Planners

Selected Curriculum Vitae

December 2005

Planning Practice

I have been engaged professionally in complex planning and land use matters since 1986. Subjects I have managed include: zoning code, master plans, redevelopment and waterfront plans, low- and moderate-income housing, development fee programs, demographics, real estate analysis, expert testimony and acquisition of land for public recreational purposes. I am principal of the firm, Strauss and Associates / Planners.

Education

M.C.P., University of Pennsylvania, Philadelphia, Pennsylvania (1986)
Departmental Fellow, University of Pennsylvania (1984-1986)
B.A., Grinnell College, Grinnell, Iowa (1982)

Experience

Principal, Strauss and Associates / Planners, Trenton, New Jersey, 1995 to present.
Lecturer, Waterfront Planning and Zoning, New York University, Wagner School of Planning and Public Policy, 1995 to 1998
Project Manager, Trust for Public Land, New Jersey Field Office, Morristown, NJ, 1990-1995.
Policy Advisor, Governor Thomas H. Kean, Office of Policy and Planning, Trenton, NJ, 1986-90.

Affiliations

Member, American Institute of Certified Planners (AICP)
Licensed Professional Planner (NJ License No. 4850)
Member, American Planning Assn.; Land Use Law Div.; Planning and Environment Div.
Member, Governor's Dredged Materials Management Team*
Board Member / Vice President, Jewish Community Center of the Delaware Valley
Vice Chair, Lower Makefield Township Planning Commission (PA)
Member, Dodge Foundation / OSI / New Jersey Grant Advisory Board
Executive Committee, Sierra Club, New Jersey Chapter*
Trustee, Barnegat Bay Environmental Grant Fund*

Articles / Publications

Expecting the Unexpected on Perth Amboy's Central Waterfront, Planners' Journal, American Planning Association, New Jersey Chapter, Summer, 1997
The Century Plan, Editor. P. Blanchard, author, The Trust for Public Land, New York, 1995.
Jarner Award, Best Environmental Plan, Am. Planning Assn., New Jersey Chapter,
The Hudson River Waterfront Walkway in Jersey City: Quiet Revolution or Noisy Evolution?
Planners' Journal, American Planning Association, New Jersey Chapter, Winter 1995.
New Jersey's Gold Coast: Revisiting Public Access and the Hudson River Waterfront Walkway,
G. Wang, co-author, Carolina Planning, Univ. of North Carolina / Chapel Hill, 1992.

* Term / commitment completed.

Research Directions

Over the last two months Strauss and Associates has conducted an extensive research effort to determine the official abandonment status of the Harsimus Branch Embankment. After searching various websites and speaking to numerous state and federal railroad officials, we have come to the conclusion that the Harsimus Branch Embankment has not been abandoned through any recorded or adequately documented legal means. Likewise there is no record of any official discontinuance of rail service on the subject property. However, because of the absence of a recorded abandonment order and removal of the tracks and cross-bridges, Conrail retains the right (or could be required) to commence legal abandonment. If so, Conrail will most certainly claim what is known as the class exemption for out-of-service lines, which speeds up the usual abandonment process considerably.

No assumptions should be made however. Because in general railroads are not permitted to remove trackage unless they have abandoned the railroad line, there are two additional possibilities to consider: First, that perhaps Conrail did procedurally abandon the Harsimus Embankment back in the early 1990s and we just cannot find any record of it; or Second, that Conrail will maintain that the Harsimus Branch Embankment is a spur or a sidetrack, in which case a realty transaction would be exempt from regulation by the Surface Transportation Board (STB). Under the second scenario, the Embankment would not need to be abandoned under the auspices of the STB, but still leaves open the question of reversionary rights of original property owners if (portions of) the property was not owned in-fee by the railroad.

In order to clear up the confusion over the status of the Embankment, it is recommended that the City file a petition for a declaratory order with the STB and ask the Board to declare whether or not the line was abandoned and no longer subject to STB oversight, and if it was abandoned, whether or not it still remains part of protected rail operations. The standard \$1,400 fee for filing this petition may be waived given the public interest purpose of the application.

Findings

Strauss and Associates concludes that there has been no legal procedural abandonment of the Harsimus Branch Embankment. As noted, because there has been no train traffic on the Harsimus Branch in over ten years (well beyond the two-year threshold), Conrail retains the right to invoke the class exemption for out-of-service lines and avoid normal regulatory scrutiny of rail line abandonment by the STB in the instance that is required to file an abandonment (See, Appendix B - STB's Spur and Industrial Side-track Exemption Policy, which includes a discussion of 'spur use' criteria and federal case law). Under the ICC Termination Act, 49 U.S.C. 10502, a railroad company can abandon an out-of-service line simply by filing an exemption notice with the STB certifying that no traffic has moved on the line for two years. Unlike the usual application process for railroad line abandonment, no Notice of Intent to Abandon or System Diagram Map or Narrative Notice is required. However, ten days before filing the exemption notice with the STB, Conrail would have to notify the New Jersey Board of Public Utilities or equivalent agency of its intention to do so. Conrail would also have to send an advance environmental notice to the State of New Jersey, including the New Jersey State Historic Preservation Office in accordance with the STB regulation 49 CFR 1105.11. A complete list of required State of New Jersey contacts has been furnished to Strauss and Associates by STB legal staff, and is included at Appendix C.

With respect to exemption procedure, the STB will publish an exemption notice in the Federal Register within 20 days after it is filed. Thirty days after the Federal Register notice, the railroad may abandon the line, unless the Board stays the exemption. Requests to stay the abandonment process may be made based on environmental or historic preservation concerns. A stay request may be filed at any time but must allow the STB sufficient time to consider and act on the petition before the abandonment becomes effective. Given the Embankment's listing on the New Jersey State Historic Register and its eligibility for the National Register of Historic Resources, the STB would have to consider the historic preservation

ramifications of abandonment and conduct a Section 106 Review (examining impacts and alternatives, as stipulated by the National Historic Preservation Act), effectively extending the abandonment process and possibly resulting in temporary, or less likely, permanent conditions applied to the abandonment. The New Jersey Historic Preservation Office would be consulted as part of the Section 106 Review. Once an STB decision is made, offers to subsidize or purchase the line must be filed within 30 days after the Federal Register publication.

Through the course of its research, Strauss and Associates searched the STB website (www.stb.dot.gov) and the National Register (www.gpoaccess.gov/fr/) website for any reference to mention of the Harsimus Line. In addition, and on behalf of Strauss and Associates, various STB staff searched these same websites in addition to the Board's microfiche and index card files. No relevant references to the Harsimus Line were found.

In furtherance of this memo Strauss and Associates spent many hours talking to STB officials and web-based abandonment docket searches. The STB recently revamped its website, making it user- and search-friendly, but still failing to yield information in the matter of the Harsimus Branch or the Sixth Street Embankment. Initial docket searches revealed the same information as did later searches; nothing but dead ends. Searches were made of rail recordings, rail abandonments, STB and ICC decisions and other filings involving the key words, "Harsimus," "Pennsylvania Railroad," "Conrail / Hudson County," "Conrail / Jersey City," etc. The only relevant reference that came up in our STB website docket search related to the abandonment of the Weehawken Branch / River Line. The Waldo Street intersection with the Passaic and Harismus (sic) Line was referred to as a starting point. However, the subject Weehawken Branch / River Line runs north-south from a railroad reference point at Waldo St., just west of the Harsimus Branch / Embankment property.

Again, and on behalf of Strauss and Associates, Mr. Rudy Saint-Louis, STB Staff Attorney (202.565.1590) searched STB's case management system for all Conrail abandonments in Jersey City and/or Hudson County. The Database came up with 16 documents, most of which could be dismissed directly. The list of abandonments is attached at Appendix D. Interestingly, there was one document, Case No. 1158_X (Item No. 14 within Appendix. D), a 1996 abandonment exemption covering a section of track just under one mile in length that appeared promising. Mr. Saint-Louis searched the microfilm for this case and found that it referred to the Meadows II Industrial Track. Working with and through Mr. Saint-Louis, Strauss and Associates we could find no reference to Harsimus or Harismus other than in regard to the Weehawken Branch / River Line abandonment.

STB Librarian Kelley Weber (202.565.1668) researched the old index card file of finance documents going back to 1887 but could find no reference to Harsimus or relevant Jersey City cases, including but not limited to pre-Conrail abandonments. The index card file she searched predates the establishment of the STB - which replaced the Interstate Commerce Commission (ICC) in 1995 - and includes the pre-computer era at STB as well. Abandonments were recorded as regular finance documents until the early 1970s when they were broken out and separately recorded.

All railroad abandonments are published in the Federal Register. A search of the Federal Register's website (www.gpoaccess.gov/fr/) using the keywords "Harsimus," "Harismus," "New Jersey," "Hudson County" and "Jersey City" resulted in the same reference to the Passaic and Harsimus Line (spelled "Harismus") in the abandonment documents regarding the Weehawken Branch / River Line. At our request a follow-up search was initiated by Paul Markoff of the STB's Environmental Analysis Section (202.565.1625), which also resulted in the same (negative) findings.

At the state level, Strauss and Associates initiated its research with a call to Sam DiDonato at the New Jersey Department of Treasury, Division of Taxation, Property Administration (609.984.1636), in order to ascertain the tax status of the Embankment. Mr. DiDonato reported that much of the land beneath the Embankment is legally Class I (non-railroad use) property, transferred from exempt property taxation

status by the State of New Jersey to local (municipal) taxation as of 1998. A set of State property taxation maps were delivered by Mr. DiDonato to Strauss and Associates, copies of which were in-turn delivered to the Embankment Coalition. As delineated on the maps, the following parcels were transferred (NOTE: each parcel was later given a block number by the Jersey City Tax Assessor):

<u>Item</u>	<u>Location</u>	<u>Area</u>	<u>Transfer Date</u>
1.	From a point west of Waldo Ave. to Newark Ave.	0.709 ac.	1998
2.	Between Newark and Brunswick Sts.	0.319 ac.	1998
3.	Between Brunswick and Monmouth Sts.	0.882 ac.	1998
4.	Between Monmouth and Coles Sts.	0.881 ac.	1998
5.	Between Coles and Jersey Sts.	0.884 ac.	1998
6.	Between Jersey and Erie Sts.	0.882 ac., est.	1998
7.	Between Erie and Grove Sts.	0.882 ac., est.	1998
8.	Between Grove and Henderson Sts.	1.4 ac., est.	1998

At the New Jersey Department of Transportation (NJDOT), we spoke to a number of officials regarding the status of the Harsimus Line. We discussed the embankment with Paul Snyder, Director, Office of Railroad Engineering and Safety, NJDOT (609.530.5681). The Office of Railroad Engineering and Safety's records, which include old Public Utility Commission files from the early 1970s, showed that last inspection of the rail bridges was in 1990. The 1990 inspection sheet cited routine repairs that needed to be made, but there was no reported urgency. In September 1994 the rails were removed and, in 1996 the bridges were demolished. That is the sum total of information on the Harsimus Branch, as furnished by the DOT's Office of Railroad Engineering and Safety.

We also contacted Jim Badgley, Director, Office of Freight Services, NJDOT (609.530.8026), who noted that many railroad lines in NJ are out-of-service but not officially abandoned. Mr. Badgley said it is likely that there were safety issues regarding the bridges. He explained that the NJDOT retains no regulatory power over railroads, therefore, no permits would have been issued by NJDOT for removal of the tracks and/or connecting bridge structures.

Mr. Snyder at the NJDOT's Office of Railroad Engineering and Safety did refer Strauss and Associates to the Federal Railroad Administration's (FRA) website which is maintained by their Office of Safety Analysis. The FRA's website (www.fra.dot.gov/OfficeofSafety/) includes an inventory of all railroad grade crossings throughout the country. GIS maps show the subject Harsimus line (although the line is not labeled) and the crossings contain ID numbers, but offer no additional information regarding Harsimus Branch, its abandonment or related matters.

Strauss and Associates spoke to several officials at NJ Transit, an agency within NJDOT. Although NJT staff were keenly interested in discussing the matter, no one was able to provide any useful information to us. Those contacted at NJT include: Rich Wizneschi, Planning (973.491.7808); Bernadette Gill, Director, Office of Real Estate (973.491.7167); David Dieck, Rail Contracts (973.491.7920); and Jack Brendlen, New Light Rail Construction Unit (973.491.8234).

Strauss and Associates contacted Charles Scott at the New Jersey Historic Preservation Office (609.633.2396). As the Hudson County field officer, Mr. Scott was very familiar with the Embankment and the relevant abandonment issues related to its future. Mr. Scott reiterated that listings on the State and National Registers of Historic Resources does not restrict private use of private property unless there are government funds involved or government oversight required, such as STB review of abandonment. Local historic listing of the Embankment in Jersey City has more significance, since the zoning ordinance has the Municipal Land Use Law backing it.

Memo to M. Crowley, et. al.
November 17, 2004
Page Five

Strauss and Associates contacted Mr. Daniel Horgan, Esq. at Waters, McPherson McNeil in Secaucus (201.863.4400). Mr. Horgan serves as counsel to the Harborside Center in Jersey City, a one-time "break bulk" cargo and warehouse facility formerly served by at-grade railroad lines that connected directly to the Embankment. Mr. Horgan has agreed to review archived files to determine whether the Harsimus Branch may have been included (by reference) in the abandonments filed by Conrail to facilitate acquisition and development of Harborside, Colgate, NJT's light rail project and/or road widenings along Henderson-Marin Boulevard. The results this search will be forthcoming and will likely take weeks or months and may still be inclusive (thus, we thought it best not to delay further the delivery of this memo).

Strauss and Associates also searched the Jersey Journal and Star Ledger newspapers. The only relevant reference in the Star Ledger was dated 6/11/1991, titled, "NJ Transit Reaches Deal to Buy Waterfront Rail Line." The quote is, "(A)t present some Conrail freight trains operating between the Northern Branch and the railroad's terminal in Kearny must back onto the Harismus Cove."

At the New Jersey State Library and Archives, Strauss and Associates located two atlases that confirmed the historic nomenclature Harsimus Branch and Harsimus Docks. These historic Jersey City Atlases were dated 1887 and 1908.

* * *

3/16 - Mayor Lunningham
Bob Laffer, JC
Bob Ryan, CR
John Fiorello, Esq.

Maureen, Steve
Rick
Steve Hyman
(NA)

Larry Bembry, JC
Paul Macke, JC
Anthony Cruz, JC
Russ Maffei, JC
Stan Easton, JC
Joanne Monahan, JC
Esq.

/ John Flynn, letter of 3/11 75/25 grant/loan - to
Urban Aid cap (?)

/ Mayor on-bd. for ED

/ ED for public use

/ Steering Comm re acq & reuse

/ Council - Hyman (K) = legally binding, grt. extension

/ Approval cash (LA) is available

/ Bob Ryan, Council
John Fiorello, Esq. ↑

732.906.3015

732.545.3814

3-16-04

Embankment OpenSpace meeting

Attendees

1. Larry Bemby - Grants Office - 201-547-5754
2. Paul W. Mackey - Law Dept. - 201-547-5178
3. John K. Fiorella - WFLUP ATTY FOR COUNCIL 732-545-2250
4. Robert L. Ryan - Council 732-906-3015
5. Richard Jann - PPL 201-298-7157
6. Andy Strauss - Strauss Assoc. 609-699-2777
7. Bob Cotten - City Planning 201-547-5050
8. Russ Maffei - Grants office 201-547-5758
9. Anthony Cruz - Mayor's office 5575
10. STEPHEN GUCCIANDO EMBANKMENT PRES. COUNCIL 201-522-9209
11. Maureen Crowley " " 201-963-0232

Appendix X – Certification of John J. Curley in 212 Marin v. City of Jersey City, HUD-L-4908, dated Nov. 3, 2005, setting forth Conrail evasion of City informational requests, including especially

Letter, Curley to Fiorilla, June 7, 2005, asking for “proof of abandonment of the rail use through Surface Transportation Board or other similar administrative procedures”;

Letter, Fiorilla to Curley, June 17, 2005, stating that “the Conrail Harsimus Branch ... was abandoned in April 1994 without application to the Interstate Commerce Commission pursuant to federal law that does not require formal ICC (now Surface Transportation Board) approval”;

Letter, Middleton (Curley’s Office) to Fiorilla, June 28, 2005, asking for “proof that Surface Transportation Board approval is not required”;

Letter, Fiorilla to Curley, July 18, 2005 responding to Middleton letter by stating that Conrail had sold the property to the developer on July 13, 2005

JOHN J. CURLEY LLC
Harborside Financial Center
1202 Plaza Ten
Jersey City, NJ 07311
Telephone: (201) 217-0700
Attorneys for Plaintiff

212 MARIN BOULEVARD, LLC;
247 MANILA AVENUE, LLC;
280 ERIE STREET, LLC;
317 JERSEY AVENUE, LLC;
354 COLE STREET, LLC;
389 MONMOUTH STREET, LLC;
415 BRUNSWICK STREET, LLC;
446 NEWARK AVENUE, LLC; and
CLAUDIA JASTRZEBSKI,

Plaintiff,

vs.

CITY OF JERSEY CITY; JOANNE
MONAHAN, Assistant Corporation Counsel;
and THE PLANNING BOARD OF THE CITY
OF JERSEY CITY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. HUD-L-4908-05

CIVIL ACTION
CERTIFICATION OF
JOHN J. CURLEY

John J. Curley certifies as follows:

1. I am a member of the law firm of John J. Curley LLC, attorneys for the defendants City of Jersey City and Joanne Monahan. I am fully familiar with this matter. This certification is in support of the City's opposition to the plaintiff's request for preliminary injunctive relief.
2. Attached as Exhibit A is letter from John J. Curley, Esq. to Consolidated Rail Corporation dated February 18, 2005.
3. Attached as Exhibit B is letter from John K. Fiorilla, Esq. of Capehart Scatchard to John J. Curley, Esq. dated March 1, 2005.

4. Attached as Exhibit C is letter from John J. Curley, Esq. to John K. Fiorilla, Esq. of Capehart Scatchard dated April 4, 2005.

5. Attached as Exhibit D is letter from John K. Fiorilla, Esq. of Capehart Scatchard to John J. Curley, Esq. dated April 26, 2005.

6. Attached as Exhibit E is letter from John J. Curley, Esq. to John K. Fiorilla, Esq. of Capehart Scatchard dated June 7, 2005.

7. Attached as Exhibit F is letter from John K. Fiorilla, Esq. of Capehart Scatchard to John J. Curley, Esq. dated June 17, 2005.

8. Attached as Exhibit G is letter from Jacqueline Middleton, Esq. to John K. Fiorilla, Esq. of Capehart Scatchard dated June 28, 2005.

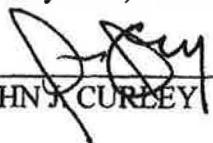
9. Attached as Exhibit H is letter from John K. Fiorilla, Esq. of Capehart Scatchard to John J. Curley, Esq. dated July 18, 2005.

10. Attached as Exhibit I is letter from Jacqueline Middleton, Esq. to Edward D. McKirdy, Esq. dated November 2, 2005.

11. Other than polite responses, neither Conrail nor the plaintiffs have supplied any of the documents requested in this long course of correspondence. The Court entered a broad preliminary entry order on October 21, 2005 directing the plaintiffs to allow appraisal inspection and other pre-taking entries as permitted by N.J.S.A. 20:3-16. A copy of the order is attached as Exhibit J.

12. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: Nov. 3, 2005


JOHN J. CURLEY

JOHN J. CURLEY LLC

Attorneys at Law

John J. Curley

5 Marine View Plaza, Suite 320
Hoboken, New Jersey 07030
Tel: (201) 217-0700 Fax: (201) 217-9765

JCurley@curlaw.com

Jersey City Office
660 Newark Avenue
Jersey City, New Jersey 07306

February 18, 2005

Consolidated Rail Corporation
Two Commerce Square
2001 Market Street – 16th Floor
Philadelphia, PA 19103
Attn: Director-Real Estate

Re: 6th Street Embankment Project
Jersey City, NJ
Our File No. 319.9405

Dear Sirs:

I have been retained by the City of Jersey City in connection with its acquisition of the above property.

I am enclosing for your reference a copy of the description of the property prepared by Conrail consisting of a narrative description and an attached map.

I am also enclosing a copy of Ordinance 04-096 of the City of Jersey City adopted by the Municipal Council at its meeting on September 8, 2004, authorizing the acquisition of this property by purchase or condemnation.

I would appreciate your contacting me to arrange for an appraisal inspection of the property. Under the New Jersey Eminent Domain Act, the property owner is entitled to accompany the City's appraiser during his inspection of the property.

Although I am aware that the property has been offered for sale and that Conrail may have entered into an option or sale agreement with a prospective buyer, the enclosed Ordinance represents a determination by the City of Jersey City that the property is needed for a public purpose. In view of this fact, I look forward to the opportunity to meet with you and to discuss the voluntary sale of the property so that formal condemnation proceedings can be avoided.

JOHN J. CURLEY LLC

Consolidated Rail Corporation

February 18, 2005

Page 2

Thank you for your anticipated cooperation.

Very truly yours,

JJC:DB

Enc.

John J. Curley



**cc: Consolidated Rail Corporation
510 Thornall street – Suite 390
Edison, NJ 08837
Attn: Director-Real Estate
w/e**

**cc: Joanne Monahan, Asst. Corporation Counsel
Maureen Crowley, Project Coordinator**

March 1, 2005

Via Fax and Regular Mail

John J. Curley, Esq.
John J. Curley L.L.C.
Suite 320
5 Marine View Plaza
Hoboken, NJ 07030

Re: Consolidated Rail Corporation - Jersey City Railroad Embankment
6th Street Embankment Project – Jersey City
Our File No. 0476.50485

Dear Mr. Curley:

Our firm represents Consolidated Rail Corporation in the State of New Jersey and specifically represents Conrail regarding the so called 6th Street Embankment properties in Jersey City.

We note from your letter of February 18th and from our file that it appears that the description of the properties which the City is interested in purchasing includes some eight parcels of land, while the Ordinance you enclose involves only seven parcels. In addition, we find that the Historical Preservation Ordinance previously passed by the City involved only six of these parcels. Obviously the City needs to be clear and specific as to what it wants or needs in regards to the embankment properties and it would appear that this must be cleared up so that any negotiations between the owner of property (or its agent) and the City can proceed and so that the City's appraisal can be properly commissioned.

This having been said, we would appreciate your providing any and all further correspondence and notices regarding this matter to be sent to both me, at the address on this letter, and to Conrail's Director of Real Estate, Robert W. Ryan, whose address is

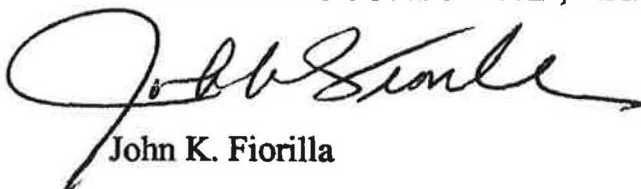
John J. Curley, Esq.
Our File No. 0476.50485
March 1, 2005
Page 2

510 Thornall Street, Suite 390, Edison, New Jersey, 08837. My email address appears on this letter, Mr. Ryan's email address is Bob.Ryan@Conrail.com.

Your attention to this matter is kindly appreciated.

Sincerely,

CAPEHART & SCATCHARD, P.A.



John K. Fiorilla

JKF/ajd

cc: Mr. Robert W. Ryan *(via fax and regular mail)*
Jonathan M. Broder, Esq. *(via fax and regular mail)* (w/copy of 02/18/05 letter of Curley)
Carmine A. Alampi, Esq. *(via fax and regular mail)* (w/copy of 2/18/05 letter of Curley)

AJD\494471

JOHN J. CURLEY LLC

Attorneys at Law

John J. Curley

5 Marine View Plaza, Suite 320
Hoboken, New Jersey 07030
Tel: (201) 217-0700 Fax: (201) 217-9765

JCurley@curlaw.com

Jersey City Office
660 Newark Avenue
Jersey City, New Jersey 07306

April 4, 2005

John K. Fiorilla, Esq.
Capehart Scatchard, P.A.
Laurel Corporate Center
8000 Midlantic Drive – Suite 300
Mount Laurel, NJ 08054

Re: 6th Street Embankment Project
Jersey City, New Jersey
Our File No. 319.9405
Your File No. 0476.50485

Dear Mr. Fiorilla:

I represent the City of Jersey City in connection with its acquisition of the above property.

I wish to acknowledge your letter dated March 1, 2005. In that letter, you questioned whether the City is interested in purchasing all eight parcels of land offered for sale by Conrail in its bid offering, or just seven parcels as set forth in Ordinance 04-096 adopted on September 8, 2004.

The City is interested in purchasing all eight parcels and is in the process of adopting an amendatory ordinance to authorize this action.

The authority of the City to acquire by voluntary acquisition or condemnation is independent from any ordinances pertaining to historic preservation.

I am contacting you to arrange an appraisal inspection by the City's appraisers in accordance with N.J.S.A. 20:3-6.

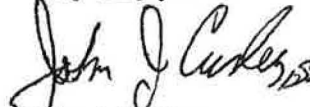
Please advise as to when it would be convenient for the appraisal inspection to take place.

JOHN J. CURLEY LLC

John K. Fiorilla, Esq.
Capehart Scatchard, P.A.
April 4, 2005

Thank you for your anticipated cooperation.

Very truly yours,


John J. Curley

JJC:DB

cc: Joanne Monahan, Asst. Corporation Counsel
Maureen Crowley, Project Coordinator
Hugh A. McGuire, Jr.
Paul T. Beisser, III

cc: Mr. Robert W. Ryan
Director of Real Estate
Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837



319.9405

John K. Fiorilla
856.914.2054
jfiorilla@capehart.com

April 26, 2005

Via Email, Fax, and United Parcel Service, Next Day Air

John J. Curley, Esq.
John J. Curley, L.L.C.
Suite 320
5 Marine View Plaza
Hoboken, NJ 07030

Re: Consolidated Rail Corporation – Jersey City Railroad Embankment
Your File No. 319.9405
Our File No. 0476.50485
6th Street Embankment Project

Dear Mr. Curley:

Thank you for your letter of April 4, 2005, responding to mine of March 1, 2005. Upon review, I am still confused relating to the intent of Jersey City with respect to its proposed acquisitions.

I have compared your letter with City Ordinance No. 05048 and I note a discrepancy between the two documents: Your letter indicates that Jersey City is interested "in purchasing all eight parcels," but the Ordinance goes beyond the eight Conrail parcels and also refers to Block 446, Lot 18B, which is not in Conrail ownership.

Please advise as soon as possible what the City's actual intent is. Please also advise whether Jersey City intends to adopt the amendatory ordinance, despite the discrepancy indicated above.

Thank you for your anticipated prompt response.

Sincerely,
CAPEHART & SCATCHARD, P.A.

/s/ John K. Fiorilla

John K. Fiorilla

JKF/WBH/ajd

cc: Robert Byrne, Clerk (*via fax and regular mail*)
Joanne Monahan, Esq. (*via fax and regular mail*)

AJDW98369

JOHN J. CURLEY LLC

Attorneys at Law

John J. Curley

5 Marine View Plaza, Suite 320
Hoboken, New Jersey 07030
Tel: (201) 217-0700 Fax: (201) 217-9765

JCurley@curlaw.com

Jersey City Office
660 Newark Avenue
Jersey City, New Jersey 07306

June 7, 2005

John K. Fiorilla, Esq.
Capehart Scatchard, P.A.
Laurel Corporate Center
8000 Midlantic Drive – Suite 300
Mount Laurel, NJ 08054

Re: 6th Street Embankment Project
Jersey City, New Jersey
Our File No. 319.9405
Your File No. 0476.50485

Dear Mr. Fiorilla:

I represent the City of Jersey City in connection with its acquisition of the above property.

An amendatory ordinance authorizing the condemnation of an omitted Conrail parcel was passed by the City Council at its meeting last night. A copy of that ordinance will be supplied to you upon receipt.

It is the City's intent to inquire all of the property owned by Conrail forming a part of the 6th Street Rail Embankment. The City may or may not acquire other property in addition to the Conrail parcels.

I would appreciate your advising as to when it would be convenient to schedule an appraisal inspection of all of the Conrail parcels included in the ordinances adopted by the City of Jersey City.

If you are unable to supply me with a date that is convenient for an appraisal inspection, I will proceed in accordance with N.J.S.A. 20:3-16.

I would also appreciate your providing me with the following information which would be helpful towards accomplishing this acquisition through a voluntary sale:

JOHN J. CURLEY LLC

John K. Fiorilla, Esq.

June 7, 2005

Page 2

1. Proof of the abandonment of the rail use of the property through Surface Transportation Board or other similar federal administrative procedures.
2. Copies of any contracts, option agreements, leases or other agreements which may affect Conrail's ownership of the property.
3. Copies of any railroad valuation maps or surveys which depict the property.
4. Any title insurance policies or title insurance commitments obtained by Conrail or others purporting to disclose the condition of title to the properties.

Your cooperation in this regard would be greatly appreciated.

Very truly yours,


John J. Curley

JJC:DB

cc: Joanne Monahan, Asst. Corporation Counsel
Ms. Maureen Crowley
Mr. Hugh A. McGuire, Jr.
Mr. Paul T. Beisser, III

cc: Mr. Robert W. Ryan
Director of Real Estate
Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837



John K. Fiorilla
856.914.2054
jfiorilla@capehart.com

June 17, 2005

Via Fax and Regular Mail

John J. Curley, Esq.
John J. Curley, L.L.C.
Suite 320
5 Marine View Plaza
Hoboken, NJ 07030

Re: Consolidated Rail Corporation – Jersey City Railroad Embankment
Your File No. 319.9405
Our File No. 0476.50485
6th Street Embankment Project

Dear Mr. Curley:

This letter is in response to yours of June 7, 2005 regarding the Jersey City Railroad Embankment which is owned by my client, Consolidated Rail Corporation.

Please note that, although my client is still the fee owner of this property, SLH Holding Corporation has an option to purchase the property and that option includes enhanced authority regarding condemnation, zoning, and development approval. SLH Holding Corporation is represented by Edward D. McKirdy, Esq. of Morristown, New Jersey and Carmine Alampi, Esq. of Hackensack, New Jersey.

Regarding a convenient date for appraisal inspections, Conrail's real estate offices are currently being moved from Edison, New Jersey to Elizabeth, New Jersey and the boxing and moving of records, including the valuation maps you requested, is currently underway. Our client would like to set up a convenient date for the appraisal inspections after July 15, 2005 when the moving and adjustments involved in the move (and vacations of some of the involved employees) will be concluded. Please call me about this.

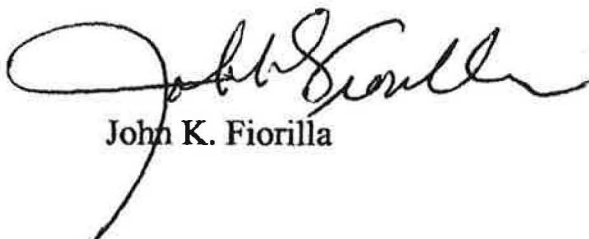
John J. Curley, Esq.
Our File No. 0476.50485
June 17, 2005
Page 2

You should also be aware that the Jersey City Embankment, which is a portion of the Conrail Harsimus Branch, was abandoned in April, 1994 without application to the Interstate Commerce Commission pursuant to federal law which does not require formal ICC (now Surface Transportation Board) approval. Please also note that Conrail has no title insurance commitments regarding the property which it obtained from the Trustees of the Penn Central Transportation Company at Conrail's creation in April, 1976 pursuant to the Regional Rail Reorganization Act and the orders of the Special Court of Rail Reorganization.

I look forward to hearing from you regarding the appraisal inspection date so that we may set mutually convenient times.

Sincerely,

CAPEHART & SCATCHARD, P.A.

A handwritten signature in black ink, appearing to read "John K. Fiorilla", with a large, stylized loop at the beginning and a long, sweeping underline.

John K. Fiorilla

JKF/ajd

cc: Edward D. McKirdy, Esq.
Carmine Alampi, Esq.
Mr. Robert W. Ryan

AJD/502009

JOHN J. CURLEY LLC
Attorneys at Law

Jacqueline Middleton

5 Marine View Plaza, Suite 320
Hoboken, New Jersey 07030
Tel: (201) 217-0700 Fax: (201) 217-9765

JMiddleton@curlaw.com

Jersey City Office
660 Newark Avenue
Jersey City, New Jersey 07306

June 28, 2005

John K. Fiorilla, Esq.
Capehart Scatchard, P.A.
Laurel Corporate Center
8000 Midlantic Drive – Suite 300
Mount Laurel, New Jersey 08054

Re: Sixth Street Embankment Project
Jersey City, New Jersey
Our File No. 319.9405
Your File No. 0476.50485

Dear Mr. Fiorilla:

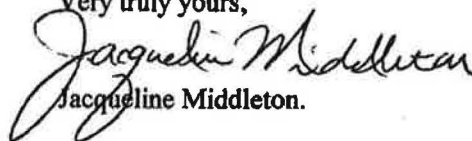
I represent the City of Jersey City in the acquisition of property commonly referred to as the Sixth Street Embankment. Thank you for your letter dated June 17, 2005. I will contact you regarding appraisal inspections which we can schedule after July 15, 2005 pursuant to your request.

I would appreciate you forwarding me the following documents:

- Copies of any contracts, option agreements, leases or other agreements with SLH Holding Corporation.
- Any title insurance policies or title insurance commitments in Conrail's possession obtained by a third party.
- Approval of sale of property by the Department of Transportation or the Board of Regulatory Commissioners pursuant to N.J.S.A. 48:2-1 et seq., or in the alternative, proof that such approval is not required.
- Proof that Surface Transportation Board approval is not required for the sale of the property.

Your cooperation in this regard would be greatly appreciated.

Very truly yours,


Jacqueline Middleton.

Cc Joanne Monahan, Asst. Corporation Counsel
Ms. Maureen Crowley

July 18, 2005

Via Fax and Regular Mail

John J. Curley, Esq.
John J. Curley, L.L.C.
Suite 320
5 Marine View Plaza
Hoboken, NJ 07030

Re: Consolidated Rail Corporation - Jersey City Railroad Embankment (6th Street)
Our File No. 0476.50485

Dear Mr. Curley:

In response to the letter of June 28, 2005 sent by Jacqueline Middleton of your office, please be advised that, on July 13, 2005, Consolidated Rail Corporation sold its entire interest in all of the so called embankment properties in Jersey City and no longer has any interest actual or equitable in those properties.

Conrail sold the properties to the following corporations, all of whom were given deeds, which we are told have been or shortly will be filed with the Hudson County Register of Deeds.

1. 212 Marin Boulevard, L.L.C. Block 212 Lot 50A (LotM)
2. 247 Manila Avenue, L.L.C. Block 247 Lot 50A
3. 280 Erie Street, L.L.C. Block 280 Lots B1 and 50A
4. 317 Jersey Avenue, L.L.C. Block 317.5 Lot 50A
5. 354 Cole Street, L.L.C. Block 354.1 Lot 50A
6. 389 Monmouth Street, L.L.C. Block 389.1 Lot 50 & 51
7. 415 Brunswick Street, L.L.C. Block 415 Lot 50
8. 446 Newark Avenue, L.L.C. Block 446 Lot 18A

July 18, 2005

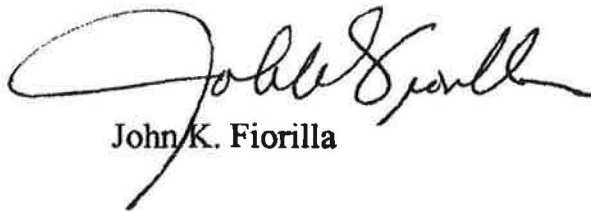
Page 2

Please note that these corporations are represented by Edward McKirdy of the firm of McKirdy & Riskin, P.A. in Morristown. Mr. McKirdy can be reached at 973-539-8900. His office address is P.O. Box 2379, Morristown, New Jersey, 07962.

If you have any questions, please do not hesitate to call.

Sincerely,

CAPEHART & SCATCHARD, P.A.

A handwritten signature in black ink, appearing to read "John K. Fiorilla". The signature is fluid and cursive, with a large initial "J" and "F".

John K. Fiorilla

JKF/ajd

cc: Jonathan M. Broder, Esq.
Edward D. McKirdy, Esq.
Carmine A. Alampi, Esq.
Mr. Robert W. Ryan

AJD503766

Appendix XI – Kaese et al V.S. (expert opinion on various adverse impacts),
as set forth in Environmental Comments filed April 25, 2019,
in this proceeding

BEFORE THE SURFACE TRANSPORTATION BOARD

**Consolidated Rail Corporation –)
Abandonment Exemption –) AB 167 (Sub-no 1189X)
in Hudson County, NJ)**

JOINT VERIFIED STATEMENT OF DIANE KAESE,

ULANA ZAKALAK, AND ALLEN KRATZ

(Independent Historic Preservation Consultants)

**I, Diane Kaese, state that I am owner of Kaese Architecture PLLC
(architecture and preservation in Greater New York City area), that I hold a Master
of Science degree from Columbia University in Historic Preservation, that I have
expertise in historic preservation, including assessment of adverse effects on
section 106 assets, and that my resume is attached.**

**I, Ulana Zakalak, state that I am the owner of Zakalak Associates (historic
preservation consulting in the Greater New York City area) and Zakalak
Restoration Arts (historic preservation-related construction), that I hold a Master of
Science degree from Columbia University in Historic Preservation, that I have
expertise in historic preservation, including assessment of adverse effects on
section 106 assets, and that my resume is attached.**

I, Allen Kratz, state that I am an independent consultant and principal of Allen W. Kratz Historic Preservation Consulting, LLC. I have two decades of experience in economic development, property management, project management, and historic preservation, including work for the Real Estate and Economic Development Division of NJ Transit. I was a gubernatorial appointee to the New Jersey Historic Trust, am a mayoral appointee to the Hoboken Historic Preservation Commission, and have experience in the drafting of historic preservation ordinances and a National Register nomination. My resume is attached.

We make this verified statement at the request of Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition as part of its response, along with Rails-to-Trails Conservancy and City of Jersey City, to the Cultural Resources Effects Assessment Report (CREAR) issued in the above captioned proceeding on or about March 29, 2019. As a result of our training and experience, we have expertise in the application of the criteria for determining adverse effects on properties eligible for the protections of section 106 of the National Historic Preservation Act and comparable state and city statutes and ordinances. The Surface Transportation Board Office of Environmental Analysis has provided only a 30-day comment period on the CREAR and we understand has informed counsel for the Coalition that extensions of time are unlikely. Our

evaluation is therefore constrained by what we are able to provide within the time period the agency is affording.

Introduction

1. The Cultural Resources Effects Assessment Report (CREAR) that the Surface Transportation Board (STB) issued in March 2019 concludes that Conrail's proposed actions in the above-referenced matter would result in adverse effects to historic properties listed in or eligible for listing in the National Register. We concur. Adverse effects are virtually assured for this property once this agency removes federal jurisdiction from the rail corridor by granting an unconditioned abandonment license to Conrail, for this will permit developers to acquire and/or to develop the property for non-rail uses, a process that has unfortunately already commenced owing to Conrail's sale of key portions of the property to a developer before complying with section 106 of the National Historic Preservation Act. "The transfer, lease, or sale of property out of Federal ... control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance" is an adverse effect. 36 C.F.R. 800.5(a)(2)(vii). We also concur in the CREAR conclusion that redevelopment of the Branch, or a settlement involving partial redevelopment of the Branch, will have adverse impacts, and that preservation will not have adverse impacts.

2. While the agency is not yet considering mitigation measures, it is clear that a key part of any mitigation strategy associated with loss of Federal control (that is, Surface Transportation Board (STB) granting an abandonment license to Conrail) is the imposition of "adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance." STB appears to contend that the prior sale by Conrail to a developer of the six-block-long Embankment and an additional two blocks of the historic Harsimus Branch somehow limit the agency's options for meaningful mitigation. We are informed that the agency has the power to condition or to deny abandonments in the public interest, both under its organic statute (49 U.S.C. 10903) and under section 110(k) of the National Historic Preservation Act, 49 U.S.C. 306113 (remedies against "anticipatory demolition," as occurred here). Simple denial of the abandonment license (the no-action alternative that the agency states that New Jersey SHPO requested the agency to analyze) would eliminate loss of Federal control and preserve all the historic assets. Alternatively, the agency could deny abandonment and simply authorize discontinuance, thus relieving Conrail of common carrier obligations but at the same time maintaining Federal control sufficient to prevent destruction of the historic assets. Should the agency authorize abandonment, then the agency should insist on levels of protection from Conrail and its chosen

developers for the property comparable to those that would have been achieved had the agency denied Conrail's abandonment request. We do NOT concur with the CREAM conclusion that "no action" (denial of the rail abandonment license) will have adverse impacts, including "demolition by neglect."

Analysis

3. We now address six questions that arise in regard to the CREAM:
 - A. If the Board were to authorize abandonment, what adverse effects would ensue from each of these three potential scenarios: (1) the complete preservation of the rail right-of-way and the Embankment (Scenario 1, page 1-10); (2) demolition and redevelopment of the Embankment (Scenario 2, page 1-10), and (3) an "agreement" among "owners of the Harsimus Branch right-of-way and [City of] Jersey City... that involves partial preservation and partial redevelopment of the Embankment and the Harsimus Branch right-of-way" (Scenario 3, page 1-11)?

Stated another way: The OEA finds adverse impacts in Scenario 2 and Scenario 3 on six of the properties in the Area of Potential Effect listed at pages 1-11 and 1-12. Using the Section 800.5(a)(2) criteria for adverse impact, do we concur?

- B. In our expert opinion, should the list of adversely affected properties within the APR include additional properties from the list at 1-7 to 1-10, given the criteria for adverse impacts?

- C. As to Scenario 2 (demolition and redevelopment of the Embankment), to what extent, and at what pace, would the “market” likely develop the Embankment and remaining right of way and create additional effects within the adjacent historic neighborhoods and their National Register and National Register-eligible resources?
- D. Is the STB OEA correct in characterizing “no action” (denial of an abandonment license) as having the adverse impact of “demolition by neglect?”
- E. What mitigation is recommended if, under Section 110(k) of the National Historic Preservation Act, the right of way is transferred back to Conrail for conservation?
- F. Has Conrail’s *de facto* abandonment of the Harsimus Branch, by removing many rail-related materials from the branch, and selling the eight blocks of real estate prior to the start of the Section 106 process, foreclosed reasonable opportunity for comment?

Discussion of Questions A-F

Question A. *If the Board were to authorize abandonment, what adverse effects would ensue from each of these three potential scenarios: (1) the complete preservation of the rail right-of-way and the Embankment (page 1-10), (2) demolition and redevelopment of the Embankment” (page 1-10). and (3) an “agreement” among “owners of the Harsimus Branch right-of-way and [City of]*

Jersey City... that involves partial preservation and partial redevelopment of the Embankment and the Harsimus Branch right-of-way" (page 1-11)?

Stated another way: The OEA finds adverse impacts in (1) and (2) on six of the properties in the Area of Potential Effect listed at pages 1-11 and 1-12.¹ Using the Section 800.5(a)(2) criteria for adverse impact, do we concur?

We offer our expert opinion regarding "Question A" as follows, noting, as time constraints allow, the specific historic, architectural, and cultural significance of each of the listed resources:

1. Pennsylvania Railroad Harsimus Branch Embankment.

Demolition of the massive stone structure would be the severest of adverse effects on the historic structure itself – eradication. Demolition and redevelopment would have cascading adverse effects, including removal of the easternmost part of the extant Pennsylvania Railroad Harsimus Branch Right of Way Historic District, closest to the Hudson River and the Port of New York and New Jersey that the Harsimus Branch played an important role in building. Similarly, the Pennsylvania Railroad (New York to Philadelphia) Historic District would lose an important contributing element.

¹ (1) Pennsylvania Railroad Harsimus Branch Embankment, (2) Pennsylvania Railroad Harsimus Branch Right-of-Way Historic District, (3) Pennsylvania Railroad (New York to Philadelphia) Historic District, (4) New Jersey Railroad Bergen Cut Historic District, (5) Hamilton Park Historic District and Extension 1-12, and (6) Harsimus Cove Historic District

Demolition and redevelopment of the Embankment would also have a severe negative effect on the abutting historic districts of Hamilton Park and Harsimus Cove. Richard James, who wrote the *Nomination* of the Embankment to the State and National Registers of Historic Places, notes elsewhere that "The adjacent neighborhoods of Hamilton Park and Harsimus Cove developed with and were structured by the rail infrastructure. This is their real history. In the Hamilton Park nomination (Sheehan, 1977), the embankment is described as both the southern "edge" and "boundary" of the district. In the Harsimus nomination (Sullebarger, 1987) it is described as the northern "boundary."

Boundaries and edges are not voids. Often, they help define districts. If so, to obliterate an edge is to degrade the integrity of the district."²

Furthermore, demolition and redevelopment of the Embankment will have a profound adverse effect on the Immigrant Roman Catholic Church Historic District and its constituent churches of St. Anthony of Padua and Holy Rosary, as well as on other buildings listed in their own right on the State and National Registers. See items below.

2. Pennsylvania Railroad Harsimus Branch Right of Way (Milepost 0.00 near CP Waldo to Milepost 0.86 Newark Luis Munoz Marin Boulevard).

² Richard James, "Consultative Comment on AB-167_1189X, NHPA Section 1-6 Review," 7/6/2017.

The intact remains of the Harsimus Branch Right-of-Way, from CP Waldo to Marin Boulevard, convey the historic impact of transportation, industry, and trade in Jersey City. Without this Branch, the Pennsylvania would have been severely restricted from getting its goods into New York. As the local example of the engine of industry that created the port of New York and New Jersey as well as Jersey City, the extant Harsimus Branch makes manifest national transportation history and its local impact. The Harsimus Branch possesses all seven aspects of integrity as described by the National Register of Historic Places. The entire extant rail line, has been determined eligible for the National Register. The adverse effects of disassembly, demolition, and redevelopment would transform a wider historic landscape that includes listed or eligible properties as well as resources that might, with further consideration, be determined eligible.

3. Pennsylvania Railroad (New York to Philadelphia) Historic District.

The Pennsylvania Railroad (New York to Philadelphia) Historic District contains the most important rail line in the history of train transportation in the United States. Before bridges or tunnels were built to access the New York City market, passengers and cargo to the City were carried to Jersey City via multiple rail lines that terminated at the

Hudson River waterfront. There both passengers and cargo continued to New York on boats. The Pennsylvania Railroad's Harsimus Branch was one of the most important rail branches, diverging from the PRR passenger line near Waldo and carrying as many as seven tracks to the Harsimus Cove rail yards, where the cargo would be offloaded into warehouses or onto car floats. The loss of this Branch as a contributor would adversely affect the greater Historic District.

4. New Jersey Railroad Bergen Cut Historic District.

Time constraints made it impossible for us to consider adverse effects on this District in detail. It appears, however, to be adversely affected by any disassembly of the Harsimus Branch Right-of-Way Historic District.

5. Hamilton Park Historic District and Extension.

The disassembly of the Harsimus Branch Right-of-Way Historic District and the demolition and future redevelopment of the Embankment would have significant negative impacts on the Hamilton Park Historic District. Loss of the Embankment, which has been determined a contributor to the Historic District, would not only diminish the identity of the District but the adverse physical effects of removal of the massive stone structures—the resultant noise, dirt, release of contaminants, and shaking of historic buildings from heavy truck traffic and construction—

would also be extremely detrimental to the buildings within the District. In addition, Hamilton Park is centered on its public square, an oasis of green from which proposed towers, a jarring element in the historic landscape, would be visible. (See also item 6 below).

6. Harsimus Cove Historic District.

(See also Item 5 above.) The Embankment is a boundary of the Harsimus Cove Historic District, and its loss would damage the integrity of the District. The Embankment has also been determined to be a contributing element to both the Hamilton Park Historic District and Harsimus Cove Historic District. Both of these historic districts embracing the Embankment are low in scale and density, consisting primarily of two- or three-story-plus-basement Victorian-era brick and brownstone rowhouses. The area encompassed by the two historic districts predates the construction of the Embankment; dwellings similar to those extant in both districts were demolished to accommodate the construction of the Embankment. Both of these historic districts are known for the intact continuity of their historic row houses, dating from before the Civil War to the late nineteenth century. The demolition of the Embankment would result in construction-period vibrations to the buildings in both neighborhoods, at the risk of inadvertent environmental

contamination and the permanent loss of integrity to the historic fabric of both neighborhoods.

7. St. Anthony of Padua Roman Catholic Church.

The demolition of the Embankment would negatively affect St. Anthony's Polish Roman Catholic Church. St. Anthony's is on the National Register of Historic Places. Built in 1892, St. Anthony of Padua has survived remarkably intact for 126 years, its brownstone façade in close proximity to the great brownstone Embankment. The church is architecturally significant as a unique religious edifice in Jersey City. It is a colorful mixture of western and eastern design influences, with a Victorian Gothic exterior, a Byzantine-influenced interior, and a mix of ethnic art and symbolism. In both design and workmanship. St. Anthony of Padua Church is indicative of the high quality of late-nineteenth-century architecture in Jersey City. Most prominent are the church's significant examples of windows, as well as exquisite mosaics. Although unsigned, the windows are believed to the work of Franz Mayer or Francis Zettler, two masters of the Munich School of stained glass. The windows alone would cost several million dollars to reproduce if they were damaged.

An engineering report commissioned by the parish of St. Anthony of Padua Roman Catholic Church describes how vibrations from demolition of the Embankment and subsequent new construction on the cleared site would likely adversely affect the church, and in particular, its exterior envelope and stained-glass windows. From an engineering point of view, the Church's fragile brownstone envelope might not be able to withstand the vibrations from the demolition of the Embankment structures.

Vibrations can cause significant damage to buildings, especially ones that are old and already have underlying problems such as brownstone exfoliation. The steeple of the church might also not be able to withstand vibrations from demolition, pile driving, and trucks navigating around the neighborhood to transport tons of debris.

8. St. Anthony of Padua Roman Catholic Church and School Complex.

Any adverse effects on St. Anthony's Church would adversely affect the integrity of the Church and School Complex.

9. Immigrant Roman Catholic Church (St. Anthony's/Holy Rosary)

Historic District.

St. Anthony's Roman Catholic Church is the mother church of all Polish parishes in New Jersey. Holy Rosary is the first Italian parish in New Jersey; the current church cornerstone was laid in 1903,

contemporaneously with the construction of the stone Embankment across the street (1901-05). Located next to each other along Sixth Street, St. Anthony's and Holy Rosary together make up a historic district that strikingly conveys the history of the Catholic Church's accommodation of waves of immigrants into Jersey City and the nation.

Both St. Anthony of Padua and Holy Rosary use, and have used for decades, the Harsimus Branch Embankment as the backdrop for their summer festivals. Sixth Street is closed for the festivals, and the Embankment wall makes a handsome setting for musical bands, concession stands, religious processions, and the festivals in general. Because St. Anthony has no open space of any kind, the area in front of the Embankment serves as its yard for activities and the annual festivals. The festivals draw thousands of Jersey City residents and folks from surrounding areas and are the major fundraisers for both parishes. Without the Embankment, the parishes would not have a location to hold La Fiesta Italiana or other cultural and religious outdoor events for the benefit of the community.

10. Jersey City and Harsimus Cemetery Historic District.

If the Embankment were to be demolished and redevelopment allowed to proceed, redevelopment would predictably move in a westerly direction

until it bordered the historic cemetery. Chartered in 1829, the Jersey City and Harsimus Cemetery is a “garden cemetery,” one of the first landscaped, rural cemeteries in New Jersey. It was designed to appear rural and rustic, separate from urban cemeteries dominated by nearby commercial or residential buildings. Redevelopment would predictably detract from this historic aesthetic. The Jersey City and Harsimus Cemetery Historic District is eligible for listing in the National Register of Historic Places.

In sum, applying the Section 800.5(a)(2) criteria for adverse impact, our expert opinion aligns with that of the OEA in finding adverse impacts in Scenario 2 and Scenario 3 on the six properties in the Area of Potential Effect listed at pages 1-11 and 1-12.³ In our expert opinion, there would also be adverse effects under those scenarios on the additional specific properties that we have described above. Time constraints did not allow us to consider adverse effects on other properties in the APE.

³ (1) Pennsylvania Railroad Harsimus Branch Embankment, (2) Pennsylvania Railroad Harsimus Branch Right-of-Way Historic District, (3) Pennsylvania Railroad (New York to Philadelphia) Historic District, (4) New Jersey Railroad Bergen Cut Historic District, (5) Hamilton Park Historic District and Extension, and (6) Harsimus Cove Historic District.

Question B. *In our expert opinions, should the list of adversely impacted properties within the APE include additional properties from the list at 1-7 to 1-10, given the criteria for adverse impact?*

The short timeframe for comment does not enable us to offer a detailed expert opinion on this question. Nonetheless, in our expert opinion, we reasonably believe that loss of Federal jurisdiction and destruction of the Embankment would change the historic context of the properties in the Area of Potential Effect. Moreover, we reviewed the comments of the City et al. and concur in all conclusions expressed therein relating to adverse impact and related issues that would impair the integrity of the historic properties in the Area of Potential Effect.

Question C. *As to Scenario 2 (demolition and redevelopment of the Embankment), to what extent, and at what pace, would the “market” likely develop the Embankment and remaining right of way and create additional effects in the adjacent neighborhoods and their National Register and National Register-eligible resources?*

In our expert opinion, the Harsimus Branch is, and increasingly will become, the object of intense developer interest because it is a scarce resource in Downtown Jersey City: an underutilized transportation corridor and undeveloped open space. In the event of loss of Federal control by authorizing abandonment, the Harsimus

Branch would be destroyed by development. Three factors very likely would attract developer interest in developing the Harsimus Branch:

(a) proximity to Jersey City's "Gold Coast."

The eastern end of the Harsimus Branch is contiguous to the high-density, high-rise, high-market-value commercial and residential properties along the Hudson River, a waterfront area colloquially known in development circles as the "Gold Coast." We further understand that at one point the Hyman limited liability corporations (developer to whom Conrail sold eight blocks of the Branch in 2005) proposed to Jersey City's governing body, the City Council, that the Hyman interests construct high-rise buildings along the entire embankment structure within the Harsimus Branch. In addition, we note that Conrail proposed constructing 10,000 residential units on property that it owns adjacent to the western portion of the Harsimus Branch, near the "Palisades" portion of the Harsimus Branch.

(b) adjacency to low-rise, architecturally appealing, well-maintained historic neighborhoods.

The above-grade portion of the Harsimus Branch is contiguous to and, according to a SHPO Opinion, a contributing element to two historic neighborhoods – Hamilton Park and Harsimus Cove, both of which are

historic districts designated by Jersey City and listed on the New Jersey Register of Historic Places and the National Register of Historic Places. In both neighborhoods, the multiple blocks of largely intact 19th-century single-family residences have historic architectural charm that has created cohesive neighborhoods with high market appeal, owner investment, and ever-increasing property values. Typically preserved at the historic, low-rise height, the single-family residences offer a further bonus to prospective developers: new, higher buildings will have unobstructed views above the second and third stories. In short, in our expert opinion, well-preserved historic residential neighborhoods invite real-estate interests to invest nearby in hopes of capturing the value of the existing neighborhood's economic stability

(c) development plan approvals for the easternmost block of the Embankment.

The City of Jersey City in 2015 approved its latest update of the City's Luis Munoz Marin Boulevard Redevelopment Plan, which includes the easternmost portion of the Harsimus Branch (the block from Luis Munoz Marin Boulevard west to Manila Avenue). Contingent upon settlement of the legal dispute between the City, Embankment Preservation Coalition, and Rails-to-Trails Conservancy on one side and

Conrail and LLCs on the other, and contingent upon other terms and conditions, the redevelopment plan permits as of right on the Block One portion of the Harsimus Branch, providing for, in relevant part: two residential high-rise towers containing a maximum of 400 dwelling units and 200 hotel rooms, the west tower being no higher than 35 stories and the east tower being no higher than 45 stories, both constructed on a parking base that must include at least one restaurant or café that is open to the public and that is directly accessible from a public walkway that spans the length of the block. The walkway is at least 30 feet wide, accessible by a “grand stairway” from Luis Marin Boulevard and extends west across Manila Avenue by means of a bridge to be constructed as part of the development.⁴

In addition, we understand that the Hyman limited liability corporations (parties to litigation related to the above-referenced STB proceeding) proposed high-rise redevelopment for the entire embankment structure.

⁴ See Division of Planning, City of Jersey City, New Jersey, Marin Boulevard (Henderson Street) Redevelopment Plan, Amended May 13, 2015, pages 6-7. Among the other conditions: Seven segments of the Historic Pennsylvania Railroad Harsimus Branch Embankment must be transferred in fee simple ownership to the City of Jersey City for use as a public park and trail/light rail corridor and site plan approval by the City’s Planning Board is required for implementation of any improvements on the land. See Jersey City, City Ordinance 120047 “Ordinance of the Municipal Council of the City of Jersey City Adopting Amendments to the Luis Munoz Marin Boulevard Redevelopment Plan,” adopted by City Council April 11, 2012.

Furthermore, we understand that Conrail (a party to this STB proceeding) proposed constructing 10,000 residential units on its portion of the Harsimus Branch.

In summary, in our expert opinion, development pressures will lead to demolition and redevelopment of the Branch. This in turn will create adverse effects upon neighboring properties (a) by causing “physical destruction of or damage to all or part of the property’ within the Area of Potential Effect (Section 800.5(a)(2)(i)), (b) by resulting in “changes [to] the character of the ...physical features with the property’s setting that contribute to its historic significance” (Section 800.5()(2)(iv)); and by the “introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features. (Section 800.5(a)(2)(v).

Question D. *Is the Board correct in characterizing “no action” as “demolition by neglect?”*

OEA states in conclusory fashion (that is, without analysis) that rail-related material and structures within the rail right-of-way, including the Embankment, “would continue to deteriorate over time due to vegetation growth and natural weathering.” (page 3-7). We note the OEA’s additional belief that “physical

deterioration of rail-related materials, sites and structures within the rail right of way would eventually create maintenance or public safety concerns that would necessitate the property owners to remove them” or public-agency removal. (page 3-8). The loss of those materials over time, the OEA concludes, “would constitute demolition by neglect.” (page 3-8)

We disagree. In our expert opinion, the Embankment—constructed with a live-load capacity for locomotives and fully-loaded freight rail cars to operate in simultaneous motion over its seven active Class I railroad tracks—is well positioned to withstand the relatively passive effects of nature and of volunteer vegetation that the owner can control with routine maintenance. It is unlikely that the Embankment will deteriorate to the point of its masonry collapsing or its structural components falling onto adjacent properties. The Embankment is not prone to be demolished by neglect and, therefore, in our expert opinion, “no action” would not result in “physical destruction of or damage to all or part of the property,” an adverse effect under Section 800.5(a)(2)(i).

We find support for our expert opinion from the OEA itself elsewhere in the report: “OEA determined that “the complete preservation of the Harsimus Branch by Jersey City (Scenario 1) would not result in any adverse effects to historic properties listed or eligible for listing in the National Register....This scenario would avoid adverse effects to National Register-listed and National Register-

eligible historic properties with the APE....” (page 1-11). It is our expert opinion that preservation of the Branch, which can be accomplished here by taking “no action” on Conrail’s abandonment request, will, as STB OEA suggests, have no adverse impact on section 106 properties.

Moreover, in our expert opinion, continued STB jurisdiction will inhibit further removal of rail-related structures and appurtenances and further dismemberment of the corridor, by Conrail, its successors and assigns. In addition, continued STB jurisdiction could create conditions for reassembling land interests encompassed by the corridor.

Question E. *What mitigation is recommended if, under Sec. 110(k) of the National Historic Preservation Act, the right of way is transferred back to Conrail for conservation?*

If STB implements “no action” or actually enforces Section 110(k), or otherwise seeks to mitigate the de facto abandonment by Conrail, we recommend the following mitigation to preserve the Harsimus Branch and the Embankment:

1. Conrail shall prepare—for prior written approval by the City of Jersey City (City) and the New Jersey State Historic Preservation Office—a plan for maintaining the Harsimus Branch, including the Embankment, in a state of good repair.

2. The approved maintenance plan shall include vegetation control at grade and, on the Embankment, prevention of damage that would be caused by uncontrolled volunteer trees, vines, and other vegetation.
3. The maintenance plan for the Embankment structure shall adhere to the Secretary of the Interior's *Standards for the Treatment of Historic Properties*.
4. Conrail shall implement the plan, or cause its assignee to implement the plan.
5. The City shall enforce the plan with fines and penalties appropriate to any deviation from the plan.
6. Conrail shall place in escrow, or by means of a letter of credit drawn to the favor of Jersey City, a sum of funds sufficient for the City to use, solely upon its demand, and with no intervention by Conrail, to remediate any maintenance or repair that Conrail declines to perform.
7. Any cost incurred by the City of Jersey City or other party to enforce the terms of the maintenance plan, including the cost of engineering analysis, legal representation, and court costs, shall be borne by Conrail.

8. To the extent that Conrail contracts maintenance activities to another party, Conrail shall name the City of Jersey City as the secondary obligee.
9. To the extent that Conrail obtains property and casualty insurance coverage and liability coverage for the property, it shall name the City of Jersey City and the New Jersey State Historic Preservation Office as "Additional Insureds."
10. The maintenance plan shall be binding upon Conrail, its successors and assigns.
11. A complete copy of the maintenance plan shall be filed with the Recorder of Deeds of Hudson County.
12. A copy of the maintenance plan shall be provided to the Surface Transportation Board and the New Jersey Historic Preservation Offices for inclusion in their files related to the above-referenced proceeding.

In our expert opinion, if the right of way were to be returned to Conrail for conservation, the creation, adoption, implementation, and enforcement of a maintenance plan that includes all of the terms and conditions summarized above will completely and at minimal expense prevent any possible adverse effects described in Section 800.5, namely, "physical destruction of...part of the property"

(Section 800.5(a)(2)(i); “alteration of [the] property...that is not consistent with the Secretary’s standards for the treatment of historic properties and applicable guidelines” (Section 800.5(a)(2)(ii), and a “change of the...physical features within the property’s setting that contribute to its historic significance” (Section 800.5(a)(2)(iv).

Question F. *Has Conrail’s de facto abandonment of the Harsimus Branch, by removing many rail-related materials from the branch, and selling the eight blocks of real estate prior to the start of the Section 106 process, foreclosed reasonable opportunity for comment?*

We note the OEA’s description of Conrail’s “removal for transportation and public safety purposes prior to the start of the Board’s abandonment proceeding,...the entire superstructure of the viaduct that once conveyed the elevated rail line to the west of the Embankment; the bridges connecting the Embankment segments; all but one of the catenary poles that once supported the electrical lines powering the electrified rail line; and all rail and railroad ties.”
(page 4-70; emphasis added)

Assuming, solely for the sake of argument, that Conrail had valid “transportation and public safety” reasons for removing the listed items above, in our expert opinion, Conrail’s actions nonetheless constitute adverse effects in that

these represented “physical destruction of...part of the property” (Section 800.5(a)(2)(i); “alteration of [the] property...that is not consistent with the Secretary’s standards for the treatment of historic properties and applicable guidelines” (Section 800.5(a)(2)(ii), and a “change of the...physical features within the property’s setting that contribute to its historic significance” (Section 800.5(a)(2)(iv).

In our expert opinion, the adverse effects listed above have foreclosed a reasonable opportunity to offer expert advice on how to prevent those adverse effects. In addition, since the Harsimus Branch was an integral part of the former mainline of the Pennsylvania Railroad for freight, and publicly available records showed no indication that the line had ever been abandoned, these removals and sale of the corridor without first seeking ICC or STB abandonment authorization manifest a knowing evasion of section 106 processes. In our opinion, STB, ACHP, and NJ SHPO should determine corrective action and penalties on Conrail and not seek to assist Conrail in obtaining an abandonment authorization that amounts to loss of Federal control over the important section 106 assets remaining in the corridor.

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Diane Kaese

Dated:

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Ulana Zakalak

Dated:

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.


Allen Kratz

Dated:



Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Diane Kaese

Dated: 4.24.2019

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Ulana Zakalak

Dated:

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Allen Kratz

Dated:

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Diane Kaese

Dated: 4/22/19

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.


Ulana Zakalak

Dated:

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Allen Kratz

Dated:

Diane S. Kaese, R.A., AIA

(917) 414-8097 (c)

dskaeese@kaesearch.com

Experience

Kaese Architecture PLLC, 2017 to present
Kaese & Lynch Architecture and Engineering LLP, 2009 to 2017
Diane S. Kaese, R.A., Sole Proprietor, 2008 to 2009
Senior Project Manager, Simpson Gumpertz & Heger Inc., 2004 to 2008
Senior Architect, WJE Engineers and Architects P.C., 1988 to 2004
Project Manager, Tishman Construction Corporation, 1985 to 1988
Staff Architect, The Ehrenkrantz Group, 1983 to 1985
Draftsperson, Meadows/Woll Architects, 1981 to 1983
Building Inspector, City of Lincoln, Nebraska, 1978 to 1980

Investigations

- Hutchinson Elementary School, Pelham, NY (circa 1912/1924, facade conditions assessment and report)
- Old Child's Restaurant/Ford Amphitheater, Coney Island, NY (landmarked terra cotta and masonry structure)
- Bleeker Street Subway Station, New York, NY (IRT 1904 historic finishes consulting-terra cotta, mosaics, glass tile; determine scope of work for MTA contract documents)
- 11 E 44th Street, New York, NY (circa 1928 office/retail building, storefront investigation and Local Law 11 inspection)
- 807 Park Avenue, New York, NY (LL11 inspection and report for 11-story tall building)
- West End Collegiate Church, New York, NY (water leak investigation and rebuilding dormers and gables at circa 1890s Dutch Revival church)
- Pennsylvania Museum, Harrisburg, PA (circa 1968 conditions survey and recommendations for repair for the marble clad concrete structure)
- Music Box Theater, New York, NY (conditions survey and recommendations for repair)
- One Morton Square, New York, NY (conditions survey of roof, facades and interior building systems including firestopping)
- The Pavilion at Philip Johnson Estate, New Canaan, CT (evaluation and design for temporary stabilization of a deteriorated decorative precast concrete structure)
- 983 Park Avenue, New York, NY (evaluated existing penthouse wall and roof systems, provided recommendations for removal and repair)
- Montauk Lighthouse, Montauk, NY (circa 1790, investigation to determine causes of peeling paint and vertical cracking)
- Pennsylvania Archives Building, Harrisburg, PA (circa 1968 conditions survey and recommendations for repair for the marble clad steel structure)
- Buckley School, New York, NY (conditions surveys and local Law 11 filings for 5 connected brick structures of various ages and construction types)
- Jefferson Park Boys Club, New York, NY (conditions survey of the circa 1927 brick, terra cotta and cast stone community facility)
- 7 West 29th Street, New York, NY (conditions survey for 1880's brick and limestone commercial structure)
- Kings County Hospital, Brooklyn, NY (conditions survey and Local Law 11 filing of 7 brick and limestone buildings with decorative lead panels circa 1926-1944)
- 284 West 11th Street, New York, NY (water leak investigation and reconstruction of a brick addition to a historic structure to address long-term water leaks)

324 Pearl Street, Suite 1F, New York, New York 10038 T 212.608.0629 F 212.608.0628 www.kaeselynch.com

ARCHITECTURE | PRESERVATION | ENGINEERING

- Board of Education Storage Facility, Long Island City, NY (concrete testing and development of repairs for Works Progress Administration historic poured-in-place concrete structure)
- Crescent Avenue Church, North Plainfield, NJ (investigation of brownstone and cast stone failures, design of stabilization and temporary protection)
- Guardian Life Insurance Company of America, 7 Hanover, New York, NY (due-diligence survey and repair details for the brick curtain wall corporate headquarters)
- Cadman Towers, New York, NY (concrete testing and peer review for repairs for the poured-in-place concrete residential structures, circa 1973)
- Royster Building, Norfolk, VA (conditions survey and repair recommendations for the severely deteriorated brick and terra cotta facade)
- Marble Collegiate Church, New York, NY (conditions survey and cleaning tests for the landmarked Tuckahoe marble structure)
- 345 Adams Street, Brooklyn, NY (investigate the deteriorated terra cotta, brick and stucco facades of the mixed-use city-owned building)
- Guardian Life Insurance Company of America (Annex), Union Square, New York, NY (investigate the curtain wall and the failure of a large sheet of glass in the 1961 Skidmore, Owings & Merrill annex)
- Guardian Life Insurance Company of America, Union Square, New York, NY (Local Law 11 survey for the 1910 granite and brick company headquarters)
- Custom House, New York, NY (investigated plaster deterioration to determine the need for replacement at the long abandoned circa 1899 Cass Gilbert structure, tested paint strippers for use on the plaster and addressed plaster concerns during construction; cleaning tests products for interior stone; sounded the interior marble installations after several panel failures)
- Sun Oil Company, Philadelphia, PA (investigation of severely deteriorated brick office structures)
- Cornell Club, New York, NY (tests in preparation for the cleaning of the stained limestone facade)
- Bronx Museum of the Arts, Bronx, NY (investigation of granite facade tile installation failures)
- Pan Am Building (now the Met Life Building), New York, NY (soiling evaluation and cleaning tests in preparation for the cleaning of the 58-story precast concrete commercial structure designed by Emery Roth & Sons with the assistance of Walter Gropius and Pietro Belluschi)
- District Building, Washington, DC (assessment of the marble facade condition and recommendations for cleaning)
- Juilliard School, New York State Theater, Metropolitan Opera at Lincoln Center, New York, NY (circa 1968, condition survey of the travertine facade, design repairs)
- Fred F. French Building, New York, NY (conditions survey of the 1927 terra cotta and brick facade, Local Law 11 inspection)
- 120 Broadway, New York, NY (investigated and documented conditions of the circa 1912 brick and terra cotta facades; designed repairs; detailed the first major use of fiberglass as a replacement for terra cotta cornices, National Register Landmark)
- National Arts Club, New York, NY (conducted a window condition survey of the 1870's Calvert Vaux designed structure)
- Sailors Snug Harbor, Staten Island, NY (documentation of all 1830's brick structures on the campus)

Roofing/Waterproofing

- Clare Rose Inc., Brookhaven, NY (peer review of masonry waterproofing details for new warehouse)
- Unitarian Universalist Congregation at Shelter Rock, Manhasset, NY (phased slate roof replacement, misc. waterproofing)
- Buckley School, New York, NY (water leakage investigations and repairs for courtyard/plaza)
- Private Residence, Fisher's Island, NY (Slate repairs associated with replacement of copper roofing and flashing)
- Lyceum Theater, New York, NY (replacement of the historic slate mansard roof, copper dormers, and ornamental metalwork)
- Temple Emanu-El, New York, NY (consulting for slate roof fall protection system and snow guard system)
- Jefferson Park Boys Club, New York, NY (replaced the copper mansard roof, dormers and the supporting steel structure)
- Buckley School, New York, NY (roof replacement program for 12 different roofs using various roof systems)
- Third Church of Christ, New York, NY (replacement of flashing and gutters at the slate roof)
- Vassar Library, Poughkeepsie, NY (investigation and recommendations to address leaks in new slate roof installation)

- Eldridge Street Synagogue, New York, NY (installation of a new slate roof)
- Guardian Life Insurance Company of America New York, NY (Carlyle roof patching and repair program to extend life of roof)

Construction Documents

- Various schools, Pelham Free School District, Pelham, NY (documents for masonry repairs)
- 158 Franklin Street, New York, NY (documents for masonry restoration and vault reconstruction)
- American Academy of Dramatic Arts, New York, NY (circa 1908, documents for masonry repairs, cast iron cornice repair)
- Fort Washington Collegiate Church, New York, NY (documents for removal of cast stone, masonry repairs)
- 269 Bowery, New York, NY (documents for two-story vault repairs and additional plumbing stack)
- Trinity Lutheran Church, New York, NY (documents for fall protection, steeple removal and remediation of unsafe masonry)
- 92 Warren Street, New York, NY (brick vault repair and waterproofing)
- One South Broad Street, Philadelphia, PA (circa 1929 granite facade, repair and restoration drawings)
- West End Collegiate Church, New York, NY (brick dormer and gable rebuilding, new flashing)
- 11 East 44th Street, New York, NY (storefront demolition and rebuilding, facade repairs to bulkhead, masonry repairs)
- One Morton Square, New York, NY (repair documents to address water leaks, missing firestopping and flashing)
- Lyceum Theater, New York, NY (circa 1905, prepared construction documents for the restoration of the terra cotta facade, the slate mansard roof, the decorative metalwork and dormers)
- Whitehall Apartments, Bronx, NY (design documents for new brick cladding of one-story school and garage structure)
- Jefferson Park Boys Club, New York, NY (documents for the masonry and roofing repairs to the 1927 community facility)
- Buckley School, New York, NY (documents for roof replacements, sidewalk replacement, facade repairs, facade and parapet rebuilding, Local Law 11 repairs)
- Fred F. French Building, New York, NY (documents for facade restoration including terra cotta and masonry)
- Little Red Lighthouse, New York, NY (prepared repair documents for the stabilization and "warehousing" of the abandoned cast iron lighthouse)

Construction Administration

- American Academy of Dramatic Arts, New York, NY (masonry repairs, cast iron cornice repair, make-safe repairs to facade elements)
- Old Child's Restaurant/Ford Amphitheater, Coney Island, NY (restoration and/or replacement of masonry and polychrome terra cotta)
- Ghostbuster Fire Station – Ladder Company No.8, New York, NY (facade restoration of brick and limestone firehouse)
- West End Collegiate Church, New York, NY (brick dormer rebuilding, new flashing details, gable rebuilding)
- Clare Rose Inc., Brookhaven, NY (periodic review of masonry and waterproofing installations at new warehouse)
- Bleeker Street Subway Station, New York, NY (administer historic portion of 1904 IRT station restoration)
- 59th Street Columbus Circle Subway Station, New York, NY (administer historic portions of the IRT 1904 station-historic terra cotta, mosaics, brick and marble cleaning and rebuilding)
- 11 East 44th Street, New York, NY (administered bulkhead facade repairs, storefront demolition and rebuilding)
- Whitehall Apartments, Bronx, NY (administered the recladding of the one-story school/garage structure)
- Lyceum Theater, New York, NY (administered the restoration of the terra cotta facade, the slate mansard roof, the decorative metalwork and dormers)
- Buckley School, New York, NY (administered construction of roof replacements, facade repairs, courtyard/plaza rebuilding, facade and parapet rebuilding, and Local Law 11 repairs)
- Whitney Museum of American Art, New York, NY (administered the removal, cleaning, and replacement of the stone facade of the museum, miscellaneous projects to attach artwork to restored facade)
- Marble Collegiate Church, New York, NY (administered the restoration of the facade including repointing, cleaning, rebuilding of the finials, and the installation of dutchmen)

- Juilliard School, New York State Theater, Metropolitan Opera at Lincoln Center, New York, NY (administer repairs to the travertine facade)
- Bronx Museum of the Arts, Bronx, NY (administered the recladding and reroofing of the museum)
- Fred F. French Building, New York, NY (administered the replacement of over 3200 pieces of polychrome terra cotta, replacement of sills, brick corners, and the complete rebuilding of the fire escape in the occupied landmarked structure)
- Carnegie Hall, New York, NY (project manager for the rehabilitation of the main hall, stage, and patron facilities area of the landmarked structure)
- National Arts Club, New York, NY (administered the rehabilitation of the windows and the polychromatic brownstone and granite facades of this NYC and National Register landmark structure)
- Prospect Park Boathouse, Brooklyn, NY (administered the rehabilitation of the abandoned landmarked 1905 terra cotta boathouse to a visitor's center and park rangers police station; the project included new terra cotta, new terrace roofing, a complete interior fit out, and a new clay tile roof)
- Helen Hayes Theater, New York, NY (documented and catalogued the removal of designated artifacts from the theater for storage at the NYC Landmarks artifact warehouse)

Consulting/Reports

- Hutchinson Elementary School, Pelham, NY (conditions assessment)
- Old Child's Restaurant/Ford Amphitheater, Coney Island, NY (conditions assessment, materials consulting for project architect)
- Trinity Lutheran Church, New York, NY (conditions assessment, space planning for accessibility)
- One South Broad Street, Philadelphia, PA (conditions assessment)
- Unitarian Universalist Congregation at Shelter Rock, Manhasset, NY (conditions assessment)
- 59th Street Columbus Circle Subway Station, New York, NY (historic consultant for general contractor)
- Bleeker Street Subway Station, New York, NY (historic consultant for project architect)
- Free Synagogue of Flushing, Flushing, NY (conditions assessment of Former Mann residence and Synagogue)
- Roebling Gatehouse, Roebling, NJ (Historic Structures Report)

Owners Representative

- Stephen Wise Free Synagogue, New York, NY (2010)
- Eldridge Street Synagogue, New York, NY (1988 to 2008)
- 309 West 104th Street, New York, NY (1996 to present)

Registration

Registered Architect: New York (Lic. No. 019042)
Registered Architect: New Jersey (Lic. No. 21AIO1788400)
Registered Architect: Pennsylvania (Lic No. RA406829)

Education

University of Nebraska, Lincoln, Nebraska
B.S. in Architecture, 1979
Columbia University, New York, NY
M.S. in Preservation, 1983
RESTORE Certificate, New York, NY, 1985

Professional Activities

Association for Preservation Technology – Member
Sealant Waterproofing and Restoration Institute – Member, Board Member 2018 - 2019
American Institute of Architects - Member
National Trust for Historic Preservation – Member
New York City Department of Buildings Construction Requirements and Materials Committee (Code Revisions) – 2014-2015, 2017 - present

Historic Paulus Hook Association
President, 1999 – 2003, 2014 – 2017, 2018
Chair, Construction Committee 1999 - present
Municipal Arts Society
Preservation Committee 1989 – present
Preservation New Jersey, 2000 – 2009
Board Member
Education Committee, chair
Member Jersey City Historic Preservation Commission, 1986 - 1993
Co-Author Jersey City Historic Preservation Ordinance, 1986
Lecturer at numerous conferences on various topics associated with preservation, construction management, professional projects, and roles and responsibilities of parties involved in construction

Honors and Awards

Old Child's Restaurant/Ford Amphitheater
New York Landmarks Conservancy Lucy Moses Award, 2018
Palladio Award – Adaptive Reuse/Sympathetic Addition, 2018 - Traditional Building Magazine
Trinity Award – SWR Institute, 2017
AIA New York State 2018 Excelsior Award of Merit, Historic Preservation
Gold Reconstruction Award 2017, Building Design and Construction
Engineering News Record – 2017 Best Landscape/Urban Development
Greater New York Construction User Council - 2017 Outstanding Cultural Project
Building Brooklyn Awards, 2017 - Destination Arts Award, Brooklyn Chamber of Commerce
MTA Bleeker Street Subway Station
New York Landmarks Conservancy Lucy Moses Award, 2013
Eldridge Street Synagogue
National Trust for Historic Preservation, 2008
AIA New York-Merit Award for Historic Preservation, 2008
New York State Preservation League, 2008
Lucy Moses Award, 2008
The Victorian Society of America, 2008
Municipal Arts Society MASTERwork Award, 2008
Whitney Museum of Art
Friends of the Upper East Side Certificate of Merit, 1999
Fred F. French Building
New York City Landmark Preservation Commission Award, 1993

Teaching Experience

Pratt Institute, New York City, 2004 to 2013, 2017 and 2018: Taught classes in architectural history, New York City history, and preservation theory and practice

Columbia University, New York City, 2004 to 2014: Taught classes in preservation technology

Drew University, Madison NJ, 2006, 2008, 2010, 2013: Presented Seminars on Historic Plaster and Mortar

Eldridge Street Project/Museum at Eldridge Street, 2000 to 2008: Developed and conducted walking tours and lectures related to the building and surrounding neighborhood

Career Day, Parent Participant (Architect) -- York Preparatory School, MAT (PS 136), PS 11

Developed curriculum for fifth graders with Eldridge Street Project staff and New York City teachers to explore basic concepts of the built environment. Taught segment of the curriculum for ten years.

Mentor in Engineering, 1987 – 1991

(4/19)



Professional Qualifications

ZAKALAK ASSOCIATES: COMPANY RESUME

Zakalak Associates is a cultural resource management firm founded in 1986 by Ulana Zakalak, the principal. The firm provides a full range of the highest quality architectural and planning services, such as Tax Act certification applications, historic preservation planning and design, resource documentation and evaluation, review and compliance. National Register nominations, HABS/HAER recordings, and owner representation are also available.

Zakalak Associates has established a solid base of experience with municipalities, historic preservation commissions, non-profit groups, developers, churches and private clients. Since starting her consulting practice over thirty years ago, Ms. Zakalak has gained a reputation for her documentation and preservation of urban sites, in particular the built environments of Jersey City and the City of Newark. Current projects include the preparation of Tax Credit applications for multiple commercial buildings in downtown Newark, including the Hahne and Company building, the New Jersey Bell Telephone Company Headquarters, the St. Francis Hotel and St. Michael's Hospital. Zakalak Associates has also consulted on the new Prudential office towers in the Military Park Commons Historic District, and the creation of Teachers Village in the Four Corners Historic District, both in Newark. Zakalak Associates authored the Historic Preservation Element of the 2012 Newark Master Plan and was co-author of the Neighborhoods Element. Zakalak Associates was also successful in qualifying the former Jersey City Medical Center, now known as the Beacon, as the largest tax credit project in the country.

A leading practitioner in New Jersey's preservation community, Zakalak Associates has completed cultural resource surveys of the City of Paterson, the Town of West New York, and fifteen Essex County municipalities. The firm has also been successful in qualifying prominent historic sites for acceptance to the New Jersey State and National Register of Historic Places, including the Forest Hill Historic District in Newark, one of the largest historic districts in New Jersey listing over 1,200 properties. Zakalak Associates was also responsible for the Weequahic Park, Military Park Commons, Four Corners and North Broad Street Historic Districts in Newark.

In 1991, Ms. Zakalak was honored with a Certificate of Appreciation from the Newark Preservation and Landmarks Committee for her "Outstanding Contribution to the Preservation of Newark's Past." In 2005, Zakalak Associates was presented with the New Jersey Historic Preservation Award for Historic Rehabilitation and Adaptive Reuse for the Union Building on Clinton Street in Newark. The project also won an Award of Merit from New York Construction Best of 2004 Awards. Ms. Zakalak won the 2009 New Jersey Historic Preservation Award for the Restoration of the Rialto and Capitol Buildings at the Beacon; in 2010, the New Jersey Historic Preservation Award for the Restoration of the John F. Peto House and Studio in Island Heights, NJ; and in 2014, for the G. G. Green Opera House adaptive reuse in Woodbury, NJ. In 2015, Ms. Zakalak won the New Jersey Historic Preservation Award for the restoration of the Wright-Clark house at 527 Mt. Prospect Avenue in Newark as well as for the Hotel Indigo. Most recently, Zakalak won awards for the restoration of the Criterion and Hague Buildings at the Beacon in Jersey City. Ms. Zakalak is a trustee of the Jersey City Landmarks Conservancy and a consultant to the Newark Preservation and Landmarks Committee.

**4 BEACON WAY #302, JERSEY CITY, NJ 07304
(732) 804-7332 ulana@zakalakrestoration.com**



Ulana D. Zakalak

E d u c a t i o n

Columbia University, Graduate School of Architecture, Planning and Preservation 1982
New York, New York
Master of Science in Historic Preservation.

Rutgers College, Rutgers University 1979
New Brunswick, New Jersey
Bachelor of Arts, Archaeology and American History.

P r o f e s s i o n a l e x p e r i e n c e

Zakalak Associates LLC 1986-present
Jersey City, New Jersey
Principal of a cultural resource management firm specializing in historic preservation planning, surveys, documentation, review and compliance, and owner representation.

Zakalak Restoration Arts LLC
Jersey City, New Jersey **2007-present**
Founder and principal of a historic restoration contracting firm.

Robert E. Meadows, P.C. Architect 1981-1985
New York, New York
Associate-in-Charge of Cultural Resource Management, Project Director:

- Historic Structure Report: Allaire Village, Farmingdale, NJ
- Cultural Resources Survey, Downtown Newark, City of Newark, NJ
- Cultural Resources Survey, City of Passaic
- Thematic Nomination of NJ Post Offices Built Between 1900-1941
- Documentation of the Ford Assembly Plant, Edgewater, NJ
- Archaeologist for the renovation of Gracie Mansion, New York, NY

Astoria Development Project 1980
New York, NY
Historic Preservation Consultant

Rutgers Archaeological Survey Office 1979
New Brunswick, NJ
Archaeologist

P r o f e s s i o n a l M e m b e r s h i p s

*SBA Emerging Leaders Initiative; Preservation Alumni, Columbia University;
Society for Industrial Archaeology (Roebling Chapter); National Trust for Historic Preservation*



ZAKALAK ASSOCIATES: SELECTED PROJECT EXPERIENCE

National Register of Historic Places Nominations:

Military Park Commons Historic District, Newark
Newark Public Schools Multiple Property Documentation Application, Newark
St. Stanislaus Bishop and Martyr RC Church, Newark
Temple B'Nai Abraham (Deliverance Temple), Newark
Bay Head Historic District, Bay Head, New Jersey
Probasco-Dittmar House, Colts Neck, New Jersey
St. Anthony of Padua Roman Catholic Church, Jersey City
Weequahic Park Historic District, Newark
Robbins-Messler House, Asbury Park
Grover House, Lincroft, Monmouth County
Ahavas Sholom, last remaining synagogue in Newark
Four Corners Historic District, Newark
Riverbank Park, Newark
Montrose Park Historic District, South Orange
South Orange Fire Station, South Orange
St. Casimir's Polish Roman Catholic Church, Newark
St. Lucy's Church, Newark
North Broad Street Historic District, Newark
Kenney (Community) Memorial Hospital, Newark - first NJ African-American hospital
Hahne and Company Department Store, Newark
Thematic Nomination of the Outdoor Sculpture of Gutzon Borglum, Newark
Robert Treat Hotel, Park Place, Newark
Old School Baptist Church and Cemetery, Main Street, South River, Middlesex Cty.
Glencoe (Coe Mansion), Martin Luther King Boulevard, Newark
Schooley's Mountain Historic District, Washington Township, Morris County
Essex Club, Park Place, Newark
Essex County Jail, Newark (designed by John Haviland, 1828)
George Wurts House, Asbury Park, Monmouth County
State Street School, Newark
Oheb Shalom, (Metropolitan Baptist Church), Newark
Walker-Combs-Hartshorne Farmstead, Freehold, Monmouth County
Forest Hill Historic District, Newark
Fairmount Baptist Church (Old Bethany), Newark
Protestant Foster Home, Broadway, Newark
Belleville Avenue Cong. Church (Clinton AME Zion), Newark
Casa Italiana, the former Stanley Theater, South Orange Avenue, Newark
Watts, Campbell Company, machine shop, McCarter Highway, Newark
Tiffany and Company Factory, silversmiths and stationers, Newark

ZAKALAK ASSOCIATES: SELECTED PROJECT EXPERIENCE

Preservation Planning and Design Assistance:

City of Newark Master Plan
Symphony Hall Renovation, Newark
Military Park Renovation, Newark
Pierre Apartments, Camden
North Star Academy Charter School, Newark (Uncommon Schools)
Team Academy, Newark (Kipp Schools)
40 Rector Street, (Science High School) Newark, NJ (Boraie Development)
2 Center Street, Newark, NJ (Dranoff Properties)
Borden Farm Products Pasteurization and Distribution Plant, Newark
Teachers Village, Four Corners Historic District, Newark (RBH Group)
Jersey City Medical Center, now "The Beacon" (Metrovest Equities, Building Land and Technology)
Halsey Street Streetscape Rehabilitation, Newark (Brick City Development Corp.)

Cultural resources (historic sites) surveys:

Reconnaissance and Intensive Level Surveys of the City of Paterson
Reconnaissance Level Survey of 15 Essex County municipalities, e.g.: Belleville, Caldwell, Essex Fells, Maplewood, Nutley, Roseland, South Orange, West Caldwell and West Orange
Reconnaissance and Intensive Level Surveys of the Town of West New York
Various Newark neighborhoods for the Housing Authority of the City of Newark

HABS/HAER Recordings:

Colgate-Palmolive plant, oldest soap manufacturing plant in the US, Jersey City, NJ
Central Railroad of New Jersey Newark Station, Broad Street, Newark.
Blocks 51 and 52 in Newark for the new Prudential towers, Newark, NJ.

Tax Act Certifications:

Jersey City Medical Center (10 high-rise buildings converted to market-rate housing)
Hahne's Department Store, Newark, NJ
St. Michael's Hospital, Newark, NJ
National State Bank Building, 810 Broad Street, Newark, NJ (conversion of bank to Hotel Indigo)
Columbian Steam Laundry, 127 Halsey Street, Newark, NJ
240 Martin Luther King Boulevard, Newark, NJ
James Wright Clark House, Mt. Prospect Avenue, Newark, NJ
Crescent Gardens, Camden (18 buildings)
G.G.Green's Block, Woodbury
Carlton Hotel (Hotel St. Francis) Newark
Bloomfield South Junior High School, Bloomfield (loft-style residential conversion)
Barr's Block, Bridgeport, CT (market-rate residential conversion)
North Broad Street Historic District, Newark, for the St. James Development Corporation (8 buildings)
Union Building, 11-15 Clinton Street, Newark (12-story office building to loft conversion)
Colleoni Apartments, Newark (market-rate apartment conversion)
Columbian Block, 224-226 Market Street, Newark, NJ (loft-style residential conversion)

ZAKALAK ASSOCIATES: SELECTED PROJECT EXPERIENCE

Tax Act Certifications (continued):

216, 218, 222 Market Street, Newark, NJ (Rock Plaza Lofts: residential and commercial conversion)
Bowers Building, 189-191 Market Street, Newark, NJ (loft-style residential conversion)
John Frederick Peto House and Studio, Island Heights, NJ
Fort Monmouth Historic District, Non-Commissioned Officers Housing
Whitlock Cordage Buildings, Jersey City, NJ

Television Documentaries:

A Walk through Newark (PBS – Channel 13)
Our Vanishing Past (New Jersey Network Public Television)

Historical/Architectural Documentations and Assessments:

Borough of Tinton Falls, design guidelines and consultant to Preservation Commission
Llewellyn Park Gate House, West Orange, Local Register Designation Application
St. Cloud Presbyterian Church, West Orange, Local Register Designation Application
Crawford House Historic Preservation Plan, Tinton Falls
Closter Victorians Local Historic District (Durie/Knickerbocker Avenue)
Pierson's Mill, Maplewood Township, Essex County
Montrose Park Historic District, Village of South Orange, Essex County
Magnolia Avenue Local Historic District, Tenafly
Summit Avenue Historic District, Hackensack, Bergen County
University Heights Science Park, Newark
NJ DOT Bridge Replacement Study: various locations
Atlantic City Inlet/Gardiner's Basin Area, Atlantic City, Atlantic County
New Jersey Performing Arts Center site, Newark
Liberty State Park, Jersey City, design guidelines for the North Terminal walkway and bulkhead
Historic Structure Report on Maybury Hill, Princeton Township, Mercer County
Old Stone House, South Orange, Essex County
First Baptist Church, Paterson
65 Central Avenue, Newark Museum, Newark
NJ Transit Light Rail Line, Newark
Conover-Crime House, Colts Neck, Monmouth County
Fort Monmouth Historic District, North and South Posts, Oceanport, NJ

Selected List of Clients:

Berger Hotels Group, Newark
Biederman Redevelopment Ventures Corp.
Building Land and Technology, Stamford, CT
Boraie Development, New Brunswick
Borough of Bay Head
Borough of Closter
Borough of Tenafly
Borough of Tinton Falls, Historic Preservation Commission and Planning Board

ZAKALAK ASSOCIATES: SELECTED PROJECT EXPERIENCE

Selected List of Clients (continued)

City of East Orange
City of Newark
City of Newark Landmarks and Historic Preservation Commission
City of Paterson
City University of New York, New York
Civic Builders, New York
Colgate-Palmolive Company, New York
County of Essex
CTS Architects, Chatham, NJ
Dranoff Properties, Philadelphia
Dubrow Management Corporation, Newark
Durand Hedden House and Garden Museum, Maplewood
Elizabethtown Water Company
Episcopal Development Corporation, Newark
Fidelco, Millburn and Newark
Hanini Construction, Newark
Housing Authority of the City of Newark
Kajima International, Fort Lee
Kipp Schools, Newark
Langan Engineering, Elmwood Park
L & M Development, Larchmont, NY
M & M Development, Newark, NJ
Metrovest Equities, NYC
Middletown Township Historic Preservation Commission
Montrose Park Historic District Assn., South Orange
National Park Service, Department of the Interior
New Jersey Transit
Newark Museum
Newark Preservation and Landmarks Committee
Prudential Insurance Company of America
Public Storage Inc., Pasadena, California
RBH Group, New York
Regan Development, Ardsley, New York
RPM Development, Montclair and Camden, NJ
Smithsonian Institution
South Orange Historical and Preservation Society, South Orange
South River Historical and Preservation Society, South River
Uncommon Schools, New York
St. Anthony of Padua Church, Jersey City
St. Casimir's Church, Newark
St. James Community Development Corporation, Newark
St. Lucy's Church, Newark
Town of Clinton
Town of West New York
Township of Washington, Morris County
Township of West Orange Historical Preservation Commission
University Heights Science Park, Inc., Newark

ALLEN W. KRATZ, M.L.S., J.D.

PRINCIPAL, ALLEN W. KRATZ HISTORIC
PRESERVATION CONSULTING, LLC

1245 Bloomfield Street
Hoboken, NJ 07030

201-214-7476 allenwkratz@gmail.com

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|----------------------------------|--|
| COMMUNITY ORGANIZING | <ul style="list-style-type: none">• Led a grassroots effort that defeated variances for an overbuild and partial demolition of the landmark Church of the Holy Innocents in Hoboken, 2007.• Helped Jersey City's Embankment Preservation Coalition defeat zoning variances to demolish historic former railroad right of way, 2010-2011. |
| LEGAL EXPERTISE | <ul style="list-style-type: none">• Redrafted Hoboken's preservation ordinance; adopted 2012.• Cross-examined developer's planner and preservationist to defeat demolition of Hoboken's historic Neumann Leathers factory (work space for artists, small entrepreneurs) for residential condo development, 2008.• Represented NJ Transit before N.J. Historic Sites Council, 2009, 2011. |
| MANAGEMENT | <ul style="list-style-type: none">• President of Hoboken Public Library's trustees, 2013-2017, oversaw \$3.2M historic preservation and flood-resilience project; secured \$2M federal, state, county and municipal funding; obtained Hoboken's first waivers under New Jersey's rehab subcode for historic structures as part of project. |
| NATIONAL REGISTER LISTING | <ul style="list-style-type: none">• Documented history of two properties for listing on National and New Jersey Registers of Historic Places: 1891 First Baptist Church, Hoboken 2005; 1897 Hoboken Free Public Library & Manual Training School, 2013. |
| HERITAGE TOURISM | <ul style="list-style-type: none">• Scripted and led four unique walking tours for Hoboken Historical Museum to all 17 National Register sites in Hoboken, 2005-06.• Produced a "then and now" tour of Hoboken Terminal for national conference of transportation professionals comparing form and function issues faced by Lackawanna Railroad in 1907 and NJ Transit in 2007. |
| TEACHING | <ul style="list-style-type: none">• Led sessions on historic preservation laws for N.J. Institute for Legal Education, 2010, 2011. |
| CONSENSUS BUILDING | <ul style="list-style-type: none">• Worked with NJ Transit, its advertising contractor and N.J. Historic Sites Council to add advertising in the main waiting room of 1935 Newark Penn Station while respecting character-defining Art Deco architecture, 2009. |
| PROBLEM SOLVING | <ul style="list-style-type: none">• Arranged nearby property owner to provide sabbath parking for parishioners of historic church, inducing congregation to use its church instead of decamping to suburbs and selling building to developer, 2005. |
| CIVIL SERVICE | <ul style="list-style-type: none">• Gubernatorial appointee, New Jersey Historic Trust, 2004-2009.• Mayoral appointee, Hoboken Historic Preservation Commission, 2018- .• Mayoral appointee, advisory group for flood-resilience project, 2018- .• Board of Selectmen appointee, Brooksville (Maine) Comprehensive Plan Committee and Ordinance Committee, 2017 -. |
| EDUCATION | <ul style="list-style-type: none">• B.A., Earlham College; M.L.S., Drexel University; J.D., American University; historic preservation certificate, Drew University. |
| CLIENTS | <ul style="list-style-type: none">• Rebuild by Design, a Rockefeller Foundation initiative to maximize citizen engagement in design of seven HUD-funded post-Sandy resilience projects. |

**Appendix XII—Verified Statement of John J. Curley, Jan. 21, 2006
in STB F.D. 34818 (developer destruction of historic assets)**

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

Rails to Trails Conservancy,
Jersey City, and
Pennsylvania Railroad Harsimus Stem
Embankment Coalition, petitioners --
Petition for a Declaratory Order

VERIFIED STATEMENT OF
JOHN J. CURLEY

I, John J. Curley, make this Verified Statement in opposition to the developer's request for a 20 day extension to respond to the Petition for a Declaratory Order filed by petitioners the City of Jersey City, et al. in the above-captioned proceeding.

1. I am special counsel for the City of Jersey City, Jersey City Historic Preservation Commission and Joanne Monahan (Assistant City Counsel) in litigation brought by eight limited liability companies controlled by developer Steven Hyman (the "Developer") who claims to hold property interests acquired by from Conrail to the portion of the Harsimus Branch containing the Sixth Street Embankment.

2. A Petition has been filed with the Surface Transportation Board for a declaratory judgment that the Surface Transportation Board has jurisdiction over the railroad property at issue in this proceeding.

3. The Developer is seeking a 20 day extension of time in

(0037, 0009, 00005706, DOC)

which to respond to the Petition.

4. The Developer proposes to develop the Embankment property for residential purposes through the construction of one and two family homes, which is in accordance with the zoning of the area. The construction of the residential units necessitates the demolition of the remaining railroad structures and the embankment as the homes are to be constructed at grade.

5. The Developer has filed several site plan and subdivision applications with the Planning Board of the City of Jersey City for the residential development. The applications before the Planning Board have been prosecuted with the threat of an automatic approval in the event of delay of decision beyond the statutory time period for planning board action. Moreover, a court order prevented the Planning Board from denying the application as to the property located on Monmouth Street between Fifth and Sixth Streets on the basis of possible Federal jurisdiction. This parcel is designated as Block 415, Lot 50 on the Jersey City tax assessment map. Record title to the parcel is held by 415 Brunswick Street, L.L.C. by a quitclaim deed from Conrail made without a termination of Surface Transportation Board jurisdiction. Within the last five days, and after service of the Petition for Declaratory Relief upon the developer, the developer has demolished and removed a stone pier railroad structure from this parcel.

6. The old stone railroad pier or stanchion was demolished

(0116.0106.00061706.DOC)

as part of site preparation on the parcel for a change to non-rail use. This pier or stanchion would probably have been reused if a light rail system were to be built on the right of way as contemplated by the City of Jersey City.

7. If the Developer is granted the requested extension, these construction activities will likely continue. One additional stone pier is on the parcel in question. Furthermore, there are approximately seven more piers or stanchions which formerly supported rail tracks on the adjacent parcel on Newark Avenue (Block 446, Lot 18A) that Conrail conveyed by quitclaim deed to the same developer under the name of 446 Newark Avenue, L.L.C. These pier structures are not protected by historic landmark designation, but are clearly structural components of the elevated rail system leading to the embankment running along Sixth Street and were in use until at least 1992. Unless restrained, the developer would be able to demolish and remove these rail structures before submitting an answer to the pending Petition.

8. The Developer has refused to grant the City of Jersey City any extensions of time to reply to summary judgment motions filed in pending state court actions. The purpose of these motions has been to obtain approvals for subdivision and demolition activities in order to establish non-rail use of the land purchased from Conrail without termination of the Surface Transportation Board's jurisdiction. It is my belief that the developer and

(0019.0000.00000000.DOC)

Conrail intentionally delayed the City of Jersey City's appraisal inspections to slow down the City's acquisition process. For example, a letter from Conrail's attorney on June 17, 2005 promised access for appraisal inspections after July 15, 2005 stating that Conrail was in the process of moving its offices in New Jersey and needed time. However, Conrail delivered the quitclaim deeds to the developer on July 12, 2005 without notifying the City that it was about to complete a sale of the properties. It was only in reply to a follow up appraisal inspection request that Conrail's attorney wrote on July 18, 2005 that the property had been sold. The developer then refused the City access to conduct its appraisal inspection. The City of Jersey City was forced to apply to the court for an order against the developer for access. The land use approval litigation in the state court was then commenced by the developer. The entire strategy being pursued by the developer is based upon speed in the hope that he can just outrun any opposition.

9. Since its acquisition of the properties, the developer has never provided any proof to the City that the property has undergone abandonment proceedings before the Surface Transportation Board or is exempt from this requirement, and thereby settle the jurisdictional questions surrounding this dispute.

10. As set forth in greater detail in my Verified Statement accompanying the Petition to the Surface Transportation Board,

(01210,0405,00003705.DOC)

immediate action by the Surface Transportation Board is required to protect its jurisdiction over the embankment and to prevent the destruction of a State and local historic landmark that is eligible for listing on the National Register of Historic Places. The developer's request for an extension of time to respond is yet another tactic being used against the City of Jersey City in order for the developer to carry out his plan to devote the land to non-rail use. Once accomplished, demolition of the rail piers cannot be undone, thereby rendering the City of Jersey City and the Surface Transportation Board in effect powerless.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 21, 2006.


John J. Curley

Appendix XIII – Stephen Marks V.S. executed June 10, 2014
and Rebuild by Design download of 2/23/2014
(developer offers to donate the Embankment walls and fill for storm fill)

BEFORE THE SURFACE TRANSPORTATION BOARD

Consolidated Rail Corporation –)
Abandonment Exemption –) AB 167 (Sub-no. 1189X)
In Hudson County, NJ)

DECLARATION OF STEPHEN MARKS

I, Stephen Marks, declare and testify, pursuant to 28 U.S.C. 1746, as follows:

1. I am the Municipal Manager of the City of Hoboken, New Jersey, which is a neighboring municipality immediately adjacent to Downtown Jersey City.
2. I make this Declaration on the basis of my personal knowledge at the request of counsel for City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition for use in the above-captioned proceeding.
3. The City of Hoboken sustained serious flood damage as a result of Hurricane Sandy.
4. On November 18, 2013 I received an email from Joanne Buonarota, Secretary to Hoboken Mayor Dawn Zimmer.
5. Ms. Buonrata forwarded an email to me which she had received from SHYMAN@SHYMAN.NET purporting to be Steven Hyman and having a mailing address of 245 East 63rd Street, Apt. 35E, New York, NY 10065.
6. The email was entitled “6th Street Embankment” and stated: *“Thanks for passing this info along. If you want any more details please contact me. I thing (sic) that there could be 60,000 lineal feet of huge stones that could be used to protect the water front.”*
7. Attached to the email was a 36 page document entitled “Free Stones and Fill.PDF” with background information on the Harsimus Stem Embankment.
8. On or about January 23, 2014, Mr. Steven Hyman, whom I understand to be the manager of 212 Marin Boulevard LLC and other LLCs which claim ownership of the Harsimus or Sixth Street Embankment in Jersey City, attended a public meeting in Hoboken’s “Multi-Service Center (Community Center) related to the U.S. Department of Housing and Urban Development’s “Rebuild By Design” competition introduced himself to me.
9. I had met Mr. Hyman many years ago and easily recognized him.

10. At the community meeting, Mr. Hyman offered to donate to City of Hoboken the rock walls and fill comprising the Harsimus Embankment for use as fill and for flood protection.
11. I informed Mr. Hyman that the City of Hoboken was not interested in use of the Harsimus Embankment for that purpose.
12. I declare under penalty of perjury and in accordance with 28 U.S.C. 1746 that the foregoing is true and correct.

Signature: _____

Executed on: June 10, 2014.

≡ Menu

REBUILD BY DESIGN

An Initiative of the President's
Hurricane Sandy Rebuilding
Task Force

In Collaboration With
NYU's Institute for Public
Knowledge
Municipal Art Society
Regional Plan Association
Van Alen Institute

Lead Supporter
The Rockefeller Foundation

With Support From
Deutsche Bank Americas
Foundation
Hearst Foundation
Surdna Foundation
The JPB Foundation
The New Jersey Recovery
Fund

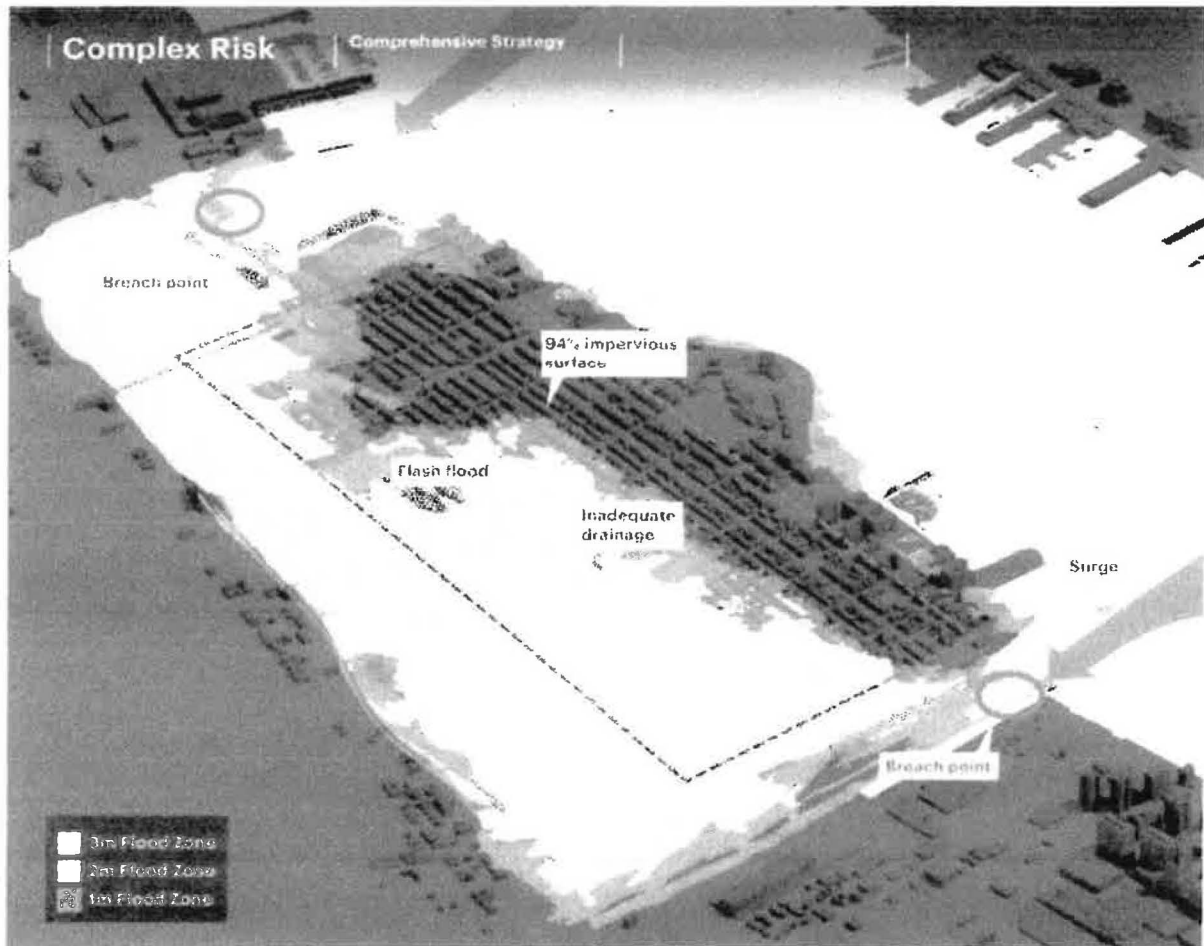
Menu

Resist, Delay, Store, Discharge: a comprehensive strategy for Hoboken

OMA

New Jersey

↓ Updates



Menu

October 29, 2013 9:09 am

from Mark

This plan is excellent! The north Hoboken park is a great idea

Reply ↓

October 29, 2013 8:19 pm

from Justin

I don't think making the Hudson Bergen Light Rail tracks into a park is going to alleviate flooding.

Reply ↓

October 30, 2013 8:22 am

from Dawn Zimmer

I support this thoughtful approach to address Hoboken's historic flooding problems due to storms overwhelming the combined sewer system at high tide and the increasing threats from coastal flooding due to rising seas and stronger storms.

Reply ↓

January 19, 2014 2:19 pm

from Steven Hyman

Post a comment

Your email address will not be published.
Required fields are marked *

Your name: *

Your email: *

Please type the letters/numbers above.

Post Comment

Menu

You have possibly been let down by the Government for political reasons. You can not fix the past but you can master the future. My wife Vickie Hyman owns the 6th Street Embankment in Jersey City. If the Government is willing to help you, Vickie will assist.

Vickie will donate six acres of walls and fill to Hoboken and/or Jersey City or any other municipalities that Vickie Hyman selects. All the stones and fill that encumbers the Embankment properties are to be used for reclamation efforts to defend the water front.

There are 55,000 CU of big stones and 155,000 of fill that needs to be removed expeditiously in an orderly and safe manner.

All the insurance will be purchased from a AAA credible insurance company but not Chicago Title. A cash bond of \$5M per block will be administered by the Hudson County Superior Judge Barry Sarkisian or Retired Judge Arthur D'Italia.

Mayor Healy, City Councilman Fulop and others passed an ordinance that is self explanatory and enclosed. L. Harvey Smith and others passed an ordinance in the NJ

Menu Legislature that is illegal and it must be voided. The zoning should change for the Embankment properties should Vickie get the stones and fill removed by Hoboken. Lastly, Vickie should be recognized as the rightful owner of the 6th Street Embankment that has been litigated for almost 10 years.

Steve

October 30, 2013 8:58 am
from Garden Street resident

as the illustration shows, given that the surge came in via a small number of points, it seems like this plan brings huge potential to reduce the flooding risk. Please help us move this forward!

Reply ↓

Appendix XIV -- Letter, then-Mayor Healy to Conrail Associate G.C. Enright,
March 4, 2008

CITY OF JERSEY CITY

0-37
7-13-11

JERRAMIAH T. HEALY
MAYOR



CITY HALL
JERSEY CITY, NJ 07302
TEL: (201) 547-5200
FAX: (201) 547-4288

March 4, 2008

John K. Enright
Associate General Counsel
Consolidated Rail Corporation
1000 Howard Boulevard
Mt. Laurel, NJ 08054

Re: Abandonment Proposal - Jersey City, NJ
Harsimus Branch - Mile Post 0.0 to 1.36
Hudson Street Industrial Track - Mile Post 0.0 to 0.72

Dear Mr. Enright:

We are in receipt of your letter dated February 7, 2008, informing the City of Jersey City that Conrail is proposing to abandon the above referenced railroad properties pursuant to a proceeding before the Surface Transportation Board (STB) and seeking the City's comments on environmental issues and compatibility with City plans. Your letter indicates that this matter will be docketed as STB No. AB 167 (Sub-No. 1189X).

With regard to the Hudson Industrial Track, we will show that it is already in use for alternative transportation means.

With regard to the Harsimus Branch, we will show that it is completely undeveloped and provides an obvious future transportation corridor; that it can be used for alternative transportation and recreation uses; that it provides an invaluable lesson about our city's industrial past and role in building our nation's wealth; and that there are serious process concerns, such as 106 review, that are seemingly being ignored by Conrail.

Please be advised that, pursuant to NJSA 48:125.1., the City of Jersey City intends to acquire this property by purchase or condemnation. (A copy of that Ordinance is attached.)

Hudson Street Industrial Track

All of the former railroad right-of-way which you reference as Hudson Street Industrial Track is now used for city streets (Columbus Drive, Hudson Street, Essex Street, Washington Street). In addition, a significant portion of the Hudson Street Industrial Track right-of-way is now used for the Hudson-Bergen Light Rail system.

The light rail, which started carrying passengers in April 2000, has been a vital component of our transportation system. Light rail (and the PATH subway) has allowed Jersey City to develop over 15 million square feet of office space and over 15,000 apartments in the two square miles of our Downtown Financial District without adding a single lane of highway. It is unthinkable to imagine this scale of development without the light rail system. Because the Hudson Street Industrial Track right of way is no longer needed to serve industry, and because it is needed for light rail and other transportation purposes, and indeed has been acquired by public authorities for such purposes and already is in public use, the City of course supports abandonment of Conrail's freight rail obligations in connection with the Hudson Street Industrial Track.

Harsimus Branch

The Harsimus Branch as described in your letter must be analyzed in two parts: one portion consists of right of way which had been at least partly developed for non-rail uses, and another portion which remains intact. In particular, the eastern end of the Harsimus Branch (east of Marin Boulevard) has been largely redeveloped into office, retail and residential uses. This redevelopment is part of general renewal of the City's waterfront, and has been transpiring for the past two decades. The Hudson Bergen Light Rail System in fact serves and fosters that redevelopment and intersects the Harsimus Branch. Indeed, sufficient space exists to connect the Harsimus Branch to the Light Rail System in downtown Jersey City.

To this end, we note that the Harsimus Branch right-of-way west of Marin Boulevard is completely undeveloped. It consists of six blocks of raised granite and brownstone trestle (referred to as "the Embankment") while the remainder is at grade right-of-way, portions of which contain concrete and stone stanchions, which once supported elevated railroad trestles. Although track, ties, and bridges have been removed, these could be restored for a grade-separated light rail system (also fully compatible with freight rail use) that could be extended through the Bergen Arches as an exceptionally desirable additional rail line serving the public.

The City expressed interest in acquisition of the Embankment, but was concerned that it could not use eminent domain procedures because the property remained a "line of railroad" regulated by a federal agency, the Surface Transportation Board (STB). Railroads may not abandon or sell lines of railroad without prior approval of the STB. Moreover, state and local governments may not employ their eminent domain remedies until STB has authorized abandonment. Notwithstanding City's interest, Conrail in 2006, without any abandonment authority from STB, purported to sell the Embankment and portions of the at grade right-of-way to a land developer for demolition and redevelopment as townhouses. This constituted an illegal abandonment and amounted among other things to a plan of anticipatory demolition in the event

someone was to force the railroad to seek the requisite authority. When negotiations between the developer and Conrail stalled, and the developer commenced demolition of stanchions, the City and others brought a declaratory proceeding at the Surface Transportation Board for a determination that the Embankment was part of a line of railroad for which the prior authorization of the Board was required for any abandonment or sale of the property. Conrail and the developer agreed to halt further demolition during the pendency of the proceeding.

Jersey City is deeply invested in our effort to preserve, protect and re-use the right-of-way provided by the Harsimus Branch. Its value as a transportation corridor cannot be underestimated. As explained in the paragraphs above regarding the Hudson Industrial Track right-of-way, the re-use of former rail lines for modern mass transit systems and city streets enables us to grow our city's economy, making New Jersey and the New York Metropolitan area richer and stronger. As I have noted, the current development of downtown Jersey City could not have been maintained without the Light Rail System which occupies portions of the old Hudson Street Industrial Track. If further development is to continue, additional transportation facilities must be added. Ironically, the plans presented to the City so far by Conrail's developer for the property not only would remove a transportation facility that can serve the downtown, but also add to traffic congestion in our already overtaxed streets. This generally would pose serious adverse environmental and traffic consequences over alternatives involving preservation of the rail corridor, intact.

We firmly believe that the re-use of the Harsimus Branch right-of-way as mass transit right-of-way is inextricably related to our city's ability to grow and prosper into the coming decades, and the public need for preserving the property for that purpose is so great that all parties and instrumentalities of government should regard it as inevitable.

We also believe that the re-use of the Harsimus Branch as a component of the East Coast Greenway bicycle-way is a highly desirable and feasible project of national proportions. Re-use of rail rights-of-way for bicycle trails is very common for abandoned rail lines in the suburbs, but city residents ride bikes, too. We have recently established bike lanes throughout Jersey City in an effort to make this form of transportation safer and more convenient. A grade separated bikeway on the Embankment is entirely possible, and even more so if there is a mass transit component as well.

We also envision the "Embankment" section of the Harsimus Branch as a pedestrian walkway. This is totally compatible with transit use. In fact, the two are mutually beneficial, as they make each other safer and more accessible. This is a reality in some of the world's great cities. The idea was born in Paris with Promenade Plantee established on an abandoned, elevated rail line. Its success has inspired New York City's High Line, the Bloomingdale Trail in Chicago, and the Reading Viaduct in Philadelphia. The economic growth along these routes is legendary. We seek similar returns for Jersey City.

The Harsimus Branch Embankment has been declared a Municipal Landmark by the Mayor and Council of Jersey City, and is so listed in the Jersey City Land Development Ordinance. Accordingly, any abandonment for development that required its removal would be inconsistent with existing land use plans.

The Harsimus Branch Embankment is on the New Jersey Register of Historic Sites and Places. As such, any abandonment will require their review and comment, as we expect Governor Corzine will inform you when his office responds to your correspondence.

The Embankment has also been determined eligible for listing on the National Register of Historic Places. It is bounded on the north and south by two National Historic Districts. Since spokesmen for Conrail have advised the City that Conrail is cooperating with the developer's plans either to demolish the Embankment for townhouses or to convert the Embankment into a parking garage with high rise residential towers on top, we are concerned that any abandonment by Conrail as matters stand will have serious and irremediably adverse consequences not just to the City's interests in preserving the property for vital transportation (consistent with its historical uses), but also to the adjoining National Historic Districts, and quite possibly to individual structures within them.

The preservation of history and access is embodied in the segment of the Harsimus Branch west of Marin Boulevard. The six Embankment blocks provide rock solid evidence of the might of the Pennsylvania Railroad. The Embankment is a lesson to be learned about Jersey City's role as the railhead of our nation. The fact that the Hudson River waterfront was virtually 100 percent given over to rail yards for more than 100 years is lost to today's children, unless there is a visible remnant of its scale. Like the paleontologist's projections of the size of the beast from the scale of its femur, teachers can draw the same lesson from the Embankment. The fact that we can adaptively use this railroad right-of-way for essential transit and desirable recreational purposes makes this history lesson all the more reasonable and feasible.

These comments are only a sketch of our serious environmental, historic, land use and process concerns with Conrail's actions and inactions, and projected approach to STB, to date. We reserve the right to comment further at an appropriate time.

Since Conrail has indicated that it intends its abandonment effort to somehow validate its purported transfer of the Harsimus Branch to a developer, the City of Jersey City must and will request the Surface Transportation Board to deny such abandonment until and unless that transfer is invalidated, the railroad complies in a meaningful fashion with the requirements of section 106 of the National Historic Preservation Act and other applicable provisions of that statute, and the serious and adverse environmental consequences of the railroad's actions and inactions thoroughly analyzed, and other appropriate relief is awarded to the City. Given the serious adverse consequences flowing from Conrail's actions to date, and given the public controversy and unanswered questions, we also do not feel that this is an appropriate instance for the railroad to employ "notice of exemption" procedures as portended by STB docket number (I am told the "x" in that docket means Conrail intends to use exemption procedures).

Please be further advised that the City requests to be served promptly with all papers filed by the railroad with STB.

Sincerely,



JERRAMIAH T. HEALY
MAYOR

Enclosure