

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

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STB Docket No. AB-55 (Sub-No. 794X)

CSX TRANSPORTATION INC.— ABANDONMENT EXEMPTION
IN PINELLAS COUNTY, FL

RESPONSE OF CITY OF ST. PETERSBURG TO DECISION, DATED JANUARY 27, 2023,
AND REPLY TO RESPONSE OF CSX TRANSPORTATION AND GEORGETOWN AND
HIGHLINE RAILWAY COMPANY LLC REGARDING SAME.

The City of St. Petersburg, FL (“City”), by and through the undersigned counsel, responds to the Decision of the Surface Transportation Board (“STB” or “Board”), dated January 27, 2023 (“2023 Decision”) and the Response of CSX Transportation and Georgetown and Highline Railway Company LLC (“2023 Response”) to the 2023 Decision. In response to the 2023 Decision and 2023 Response, the City states as follows:

I. SUMMARY

The City stands by all its prior filings and remains ready and willing to pursue its previously dismissed claim for adverse abandonment, to negotiate in good faith with CSX Transportation (“CSXT”) to serve as a trail sponsor pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (“Trails Act”), or to pursue rulemaking appropriate to resolve the concerns presented here (and to prevent their future recurrence). The City still believes that the actions of CSXT and Georgetown and Highline Railway Company LLC (“GHL”) are contrary to the intent of the Trails Act and the public policy that it is intended to promote. Time and additional evidence demonstrate

that contradiction and vindicate the Board's concerns over CSXT and GHL's relationship, as set forth in the appeal opinion dated June 19, 2020 ("Appeal Decision")

II. BACKGROUND

The City previously argued that CSXT's invocation of the Trails Act was merely to allow it time to seek greater compensation for its interest, at the expense of a legitimate public interest. More specifically, the City opined CSXT's predecessor in interest obtained only an easement interest in the subject property. Accordingly, in the event of abandonment, CSXT would, by operation of law, be divested of *all* rights to the property without compensation. This is also detailed in the federal litigation stemming from the abandonment, *Collective Edge, LLC v. United States*, No. 20-34 (Fed. Cl.), DJ# 90-1-23-15950 (the "Takings Case"). The City believes that, when faced with the prospect of losing the subject line, CSXT opted to have a NITU granted to its wholly owned, limited liability subsidiary, GHL, solely to obtain additional time to find a buyer willing to pay more than the City might offer in NITU negotiations. On that basis, the City sought to overcome the STB's rebuttable presumption of fitness of a trail sponsor by arguing that GHL itself had no intention of fulfilling the duties of a trail sponsor, and that GHL's statement that it was "ready, willing, and able" to negotiate trail use was pretext, at best. Over the City's objections, the STB Director ruled that GHL was qualified as a trail sponsor and granted the NITU to GHL.

In the City's appeal, dated February 3, 2020, the City sought to have that decision overturned. Although the Board denied the City's appeal and stated that the City had failed to rebut the presumption, the Board also acknowledged the unique circumstances presented and implicitly recognized the fundamental considerations raised by the City and other parties regarding the relationship between CSXT and GHL.

The Takings Case proceeded, defended by the United States Department of Justice (“DOJ”). Approximately two years later, DOJ sent a letter to the Board for the stated purpose of providing the Board with more relevant information (“DOJ Letter”), which the City believes to be related to the arguments it previously raised in its appeal.

The City continues to respect the prior decisions in this matter from the STB and does not intend to attempt to relitigate same. The City also has no desire to interfere in or delay the ongoing Takings Case (which the City is not a party to). That being said, the City desires to support the STB by providing additional information that may warrant action by STB to ensure that in the future the Trails Act is being used in accordance with applicable law.

III. ARGUMENT

A. New evidence demonstrates that the conveyance from CSXT to GHL is inconsistent with the purpose of the Trails Act.

“Congress’ stated purposes in enacting the Trails Act were twofold: to preserve rail corridors for future railroad use and to permit public recreational use of trails.” *Citizens Against Rails-To-Trails v. Surface Transp. Bd.*, 347 U.S. App. D.C. 382, 267 (2001). *Citizens* relied on *Preseault v. ICC*, 494 U.S. 1 (1990)—a case vital to Trails Act validation and interpretation—in which the Supreme Court noted that the Trails Act served a valid public purpose for those reasons. *Id.* at 17. In other words, both the text of the Trails Act itself and the case law interpreting the Trails Act leave no doubt that that the policy goal of the Trails Act is the creation of trails for the benefit of the public.

Evidence obtained by DOJ in the related Takings Case made clear that CSXT is not using the Trails Act not for its intended purpose. By their own admission, the agreement between CSXT and GHL is not an agreement to create a trail. As set forth in the DOJ Letter and 2023 Response, there are no actual negotiations between CSXT and GHL to create a trail. Nor is GHL a placeholder

for any entity that is likely to create a trail—it is nothing more than a placeholder for a purely speculative third party. The most definitive commitment that CSXT could make as to the creation of a trail was that “CSXT and GHL have received interest from other parties and hope to replace GHL with another trail user.”

If there was no trail sponsor available for the applicable rail line, the arrangement between CSXT and GHL could be seen to further the goals of the Trails Act by preventing full abandonment of that line. But as described in Part I, above, the City continues to offer to either serve as a trail sponsor under the Trails Act or to proceed with adverse abandonment for the purpose of creating a trail under state law. Regardless of the original intent, it is increasingly looking like CSXT’s securing a NITU for a wholly owned limited liability subsidiary now involves no intention of actually making a trail. The new evidence now shows CSXT has prevented the creation of a trail for its own financial benefit. To support this course of action, CSXT relies on a theory that the *hypothetical* future creation of a trail is equivalent to the *actual* intent to create one. This cannot be a proper interpretation of the Trails Act and demonstrates CSXT is not operating “diligently and in good faith” to work toward trail creation, as instructed by the Board in its Appeal Decision.

B. Because CSTX has used the Trails Act for a private purpose, the NITU may be subject to attack as an unconstitutional taking.

Under prior standards, CSXT could have negotiated longer prior to finalizing the abandonment details. See *Limiting Extensions of Trail Use Negotiating Periods*, EP 749 (Sub-No. 1). Now, CSXT looks to other STB precedent, including *Ga. Great S.*, 6 S.T.B., arguing in the 2023 Response that, once a “trail agreement” is reached by the railroad and a third party, the STB no longer has a say—i.e., that a trail never actually has to be created and that the STB cannot intervene on that basis. This is illustrated in this case as CSXT/GHL informed the STB that an “agreement was reached,” but CSXT now represents to the Board that neither it nor GHL ever

intended to create a trail. *See* 2023 Response. This interpretation of the Trails Act runs afoul of the Takings Clause of the U.S. Constitution.

Under *Preseault* and its progeny, the conversion of a railroad easement to a trail is a taking when it defeats an interest that would otherwise cause the subject property to revert from railroad ownership. *See Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). The new evidence presented in the DOJ Letter illustrates why this situation validates the Supreme Court’s decision and logic. As set forth in the DOJ Letter, underlying property owner Ferg’s Bar and Grill (“Ferg’s”) continues to pay rent to CSXT. If not for the NITU granted to GHL, the subject property would have reverted to Ferg’s ownership immediately upon abandonment more than two years ago, and Ferg’s would not be paying rent at a rapidly increasing rate. The taking is self-evident.

But under the Fifth Amendment of the U.S. Constitution, a taking can be justified only when there is a *public purpose*. USCS Const. Amend. 5 (providing “...nor shall private property be taken for public use, without just compensation”). In the seminal case of *Kelo v. City of New London*, 545 U.S. 469 (2005), the Supreme Court considered the constitution’s public use requirement. “[T]he City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. ... Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.” *Id.* at 477-78. The Court in *Kelo* ultimately held that the taking at issue satisfied the public purpose requirement because it was done under a specific plan determined specifically to be in the interest of the public. *Id.* at 478. But the Court also held that a taking may be challenged if the purpose is solely to provide a private benefit. *Id.*

The NITU obtained by CSXT and GHL prevents the City from constructing a trail on the affected parcel and ensures that CSXT continues to receive rent payments from the owner of

underlying land. Meanwhile, CSXT and GHIL acknowledge that they have no plans to build a trail—only an agreement *contemplating* that that a trail may be created by a speculative third party at an unforeseeable future time. This pretextual use of the Trails Act results in a situation that benefits only CSXT—not the public. As such, it is starting to resemble precisely the sort of purely private benefit that is prohibited under the rationale articulated in *Kelo*.

The private benefit to CSXT is the speculative sales price compared to what the City has previously offered. But the true cost of this arrangement is not only much greater than any value to CSXT, it is potentially grossly disproportionate to any hypothetical benefit that might be realized. In the Takings Case and based on the City’s own appraisals, taxpayers will likely be on the hook for tens of millions of dollars in damages for the *very real* taking that has already resulted from the CSXT–GHIL arrangement, while there is no plan—or even intent—to build an actual trail. Meanwhile, the abutting landowners are left with escalating costs and lingering uncertainty.

C. The Board has the authority and duty to resolve this issue concerning the proper application of the Trails Act.

The City acknowledges that the STB has “little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use.” *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990). But the STB is also mandated to “impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with [the Trails Act], and *shall not permit abandonment or discontinuance inconsistent or disruptive of such use.*” 16 U.S.C. § 1247(d) (*emphasis added*).

As it may sometimes take years to resolve the financial and logistical details necessary to convert a railroad easement to trail use, the City acknowledges that delay *alone* is insufficient to give rise to a claim that the Trails Act has been used to effectuate an unconstitutional taking. But mounting evidence demonstrates that CSTX and GHIL have misused the Trails Act to achieve a

purely private purpose and that the NITU issued to GHL is being used to effectuate that purely private purpose. While the City understands that the Takings Case and the issue of an inverse condemnation and relief under the Tucker Act are beyond the reach and authority of the STB (and once again emphasizes the City's desire to avoid any delay in resolving the Takings Case), the STB *does* have the authority and duty to determine what happens to the subject line—which is an issue that is inextricably linked to the Takings Case and the pretext used by CSXT and GHL to use the Trails Act to prevent the construction of a trail.

Understanding the STB's role under the Trails Act is limited, determining whether the Act was properly invoked is clearly within that role. *See Goos*, 911 F.2d at 1295. Although STB cannot force CSXT to negotiate with the City, *see Rail Abans.—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 598 (1986), STB may still take a variety of actions that would help resolve the situation, including denial or revocation of a NITU, denial or revocation of authority to abandon a line, or termination of trail use, *see generally* 49 CFR Part 1152.29. Furthermore, responsive action by the STB can also be accomplished under a variety of postures.

Although the City's primary goal is to see a trail constructed on the applicable property, the City also supports the policy goal of the Trails Act to maintain the continuity of rail property for future reactivation when possible. Accordingly, the City believes that the public interest is best served by leaving the NITU in place for the time being, to allow additional information to be obtained for the purpose of allowing the STB and other involved parties to make an informed decision.

The City also acknowledges that, while the STB has authority to take many different actions to resolve the instant matter, rulemaking may be the most desirable vehicle for the Board to resolve these foundational issues now—and in the future. Input from third parties could help

guide the Board in its approach that would potentially have precedential impact for many interested parties. That being said, much of the information that would be useful to the Board would likely be under the exclusive control of CSXT and not accessible to the public. Accordingly, the City respectfully requests that STB grant the City and other interested parties eight months to conduct discovery from CSXT and GHL regarding the subject line and other lines owned by GHL in similar circumstances to support future action by the STB. At the end of that period, the City and other interested parties may file an appropriate petition for rulemaking or one or more motions in the Instant Matter, if appropriate.

That eight-month period would also offer CSXT and GHL an opportunity to effectuate the purpose of the Trails Act in a constitutional manner by committing to the creation of a trail of an agreed upon nature in a reasonable amount of time (or identify a third party who will do so) or by transferring the property to the City or another third party that is willing to do so.

Respectfully submitted this 8th day of March, 2023.

OFFICE OF THE CITY ATTORNEY
FOR THE CITY OF ST. PETERSBURG

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail service or U.S. Postal Service, first class, to all parties in the instant action.