

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

306341

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**BAYLANDS DEVELOPMENT, INC.
PETITION FOR DECLARATORY ORDER**

REPLY TO PETITION FOR DECLARATORY ORDER

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I. INTRODUCTION

Petitioner Baylands Development, Inc. (“**Petitioner**”), a real estate developer who does not own the subject property or appear to have standing, seeks the Surface Transportation Board’s (**Board**) declaration that 424 Jessie Historic Properties, LLC (“**JHP**”) has abandoned a 2,000 foot long by 30 foot wide “spur” track on property Petitioner seeks to develop. Petitioner’s obvious attempt to forum shop and collaterally attack a California State Court judgment quieting JHP’s title against Visitacion Investment, LLC (“**Visitacion**”), the owner of the subject property, should be denied for at least three reasons. **First**, there is no controversy or uncertainty necessitating the Board’s intervention. As Petitioner admits, the California State Court has already determined that JHP and its predecessors have not abandoned the express deeded easements over the subject property, including its rights over the “spur” for roadway access, existing and future railroad related uses, and existing and future communication lines and facilities. Accordingly, the Petition is moot and Petitioner’s improper attempt to circumvent the California State Court’s judgment and manufacture a controversy over the use and abandonment of the “spur” within the Easements for the Board’s determination should be rejected. **Second**, under Petitioner’s theory that the spur has been removed and JHP has not exhibited a continuing intent to provide common carrier service using the spur, the spur is an excepted track and the determination of whether it was abandoned is not within the Board’s authority under 49 U.S.C. section 10906. **Third**, even if the Board deviated from its long-settled precedent to refrain from ruling on state property law issues, it should not grant the requested relief because, as the California State Court found, JHP and its predecessors did not abandon their easements over the subject property, including their rights to use the spur track for railroad related uses. Petitioner’s desire to commandeer JHP’s known express easement rights in order to profit \$10,000,000 from a mixed use residential and commercial development on the subject property has already been

rejected by the California State Court, is unauthorized by law, and should not be sanctioned by the Board.

II. STATEMENT OF FACTS

On August 10, 1990, Southern Pacific Transportation Company (“**Southern Pacific**”) sold certain of its real property commonly known as 222 Tunnel Avenue, San Francisco (“**Visitacion Property**”) to Visitacion’s affiliate and predecessor in title, Tuntex (USA), Inc. by Grant Deed (“1990 Deed”). [5 JA 1400-1401, 1465-1470; 6 JA 1483, 1485-1489, 1498-1514.]¹ In the 1990 Deed, Southern Pacific expressly reserved the following three easements (“**Easements**”):

A perpetual, exclusive easement in, on, under, over and through the locations described in Schedule 1 (***Railroad Main Line Easement***), Schedule 2 (***Drill & Spur Track Easement***), and Schedule 3 (***Access Roadway Easement***) attached hereto, in which areas Grantor (and its lessees, sublessees, licensees, successors or assigns) shall have the ***right to own, operate, maintain, repair, lease, license, and/or remove existing and/or future railroad, rail and railroad related equipment and facilities and communications lines and facilities of every kind and nature including but not limited to all existing facilities, telephone, telegraph, television and fiber optic lines and related equipment.*** All improvements presently existing on or hereafter constructed on the easement area, if owned by Grantor, shall remain the personal property of the Grantor and its successors and assigns. Upon abandonment or termination of the easement, or any portion thereof, Grantor shall be obligated to execute and deliver to Grantee or its successors and assigns an instrument in form and substance satisfactory to Grantee, or its successors and assigns, relinquishing the easement described in this paragraph. Grantor shall defend, indemnify and hold Grantee, its successors and assignees, harmless from and against any

¹ Citations to “JA” herein are to the volumes and page numbers of the Joint Appendix setting forth the record on Visitacion’s appeal of the California State Court judgment, for which Petitioner gratuitously attached only Visitacion’s Opening Brief. A full copy of the record can be downloaded at the following link: <https://steyerlaw.sharefile.com/d-s87d7bdd78669425aa91697a3e48f4712>

liability, damage, cost or expense arising from or in connection with Grantor's use of the property covered by the easement reserved herein.

[6 JA 1483-1484, 1489-1490, 1498-1514.] The metes and bounds of the legal description of the Easements were later corrected by a Deed Correcting Description of Rail Easement recorded on August 22, 1991. [6 JA 1483-1484, 1490, 1515-1532.] The Easements reserved to Southern Pacific and its lessees, sublessees, successors, and assigns, include distinct easements for the Main Line for railroad purposes, drill and spur tracks, an access roadway, and the right to remove existing railroad tracks and install communication lines and facilities of every kind and nature, benefiting certain portions of adjoining properties located at 2201 Bayshore Boulevard and 220 Tunnel Avenue, San Francisco (collectively, the “**JHP Property**”) retained by Southern Pacific. [5 JA 1400, 1465-1470; 6 JA 1483, 1488, 1498-1502, 1723-1732, 1753-1755, 1764-1765, 1785-1791.] The Visitacion Property includes the servient estate that is burdened by the Easements. [5 JA 1400, 1465-1468; 6 JA 1483, 1488-1490.] The eastern boundary of the JHP Property was and is adjacent to Caltrain passenger rail lines and freight train rail lines [5 JA 1400-1401, 1404-1418; 6 JA 1715-1716.]

In 1996, Southern Pacific merged with Union Pacific Railroad Company (“Union Pacific”). [6 JA 1483, 1488, 1708-1709.] In 2010, Union Pacific proposed to sell the JHP Property, including the Easements, to Visitacion, noting that at least a portion of the Easements were needed by the Peninsula Corridor Joint Powers Board, the owner of the Main Line, to access an existing signal cabinet. [6 JA 1483-1484, 1712-1714, 1718-1720, 1785-1787, 1792-1797.] Despite Visitacion’s (and now Petitioners’) spurious claim that they need to extinguish the Easements to develop the Visitacion Property, Visitacion did not purchase the JHP Property in 2010. [6 JA 1483-1484, 1792-1797.]

In 2014, Union Pacific re-engaged with Visitacion with respect to the sale of the JHP Property and the Easements. [6 JA 1483-1484, 1702-1710, 1774-1778, 1792-1797.] Recognizing the existence and necessity of the Easements, Visitacion offered to exchange alternative access to the JHP Property for Union Pacific's relinquishment of the Easements. [6 JA 1483-1484, 1792-1797.] Union Pacific did not agree to Visitacion's proposal, noting that it had not abandoned the Easements and had no intention to relinquish the Easements, which had to be retained for access to the JHP Property, which would otherwise be landlocked. [6 JA 1483-1484, 1718-1744, 1792-1812.]

Union Pacific marketed the JHP Property and the Easements for sale to the public, and ultimately sold the JHP Property together with the Easements to JHP's principal Patrick McNerney, who later conveyed the JHP Property and the Easements to JHP. [5 JA 1400-1401, 1404-1427, 1469-1470; 6 JA 1483-1484, 1491, 1533-1554, 1666-1687, 1723-1731, 1785-1792.]

III. THE CALIFORNIA STATE COURT ACTION

On October 1, 2019, Visitacion consented to the jurisdiction of the California State Court over the Easements by filing a Complaint in the Superior Court of California, County of San Francisco, against JHP and all others who claimed an interest in the Visitacion Property and the Easements, asserting causes of action for Quiet Title, Declaratory Relief, and a Preliminary and Permanent Injunction, alleging that JHP "relinquished any and all property rights in the Easements and that the Easements have been abandoned and/or terminated." [1 JA 10-134.] JHP answered Visitacion's Complaint [1 JA 154-166] and filed a Cross-complaint against Visitacion asserting causes of action for Quiet Title and Declaratory Relief, to confirm that the Easements have not been abandoned. [1 JA 167-241.]

On July 15, 2021, the California State Court issued an order granting JHP's motion for summary judgment on Visitacion's Complaint and on JHP's Cross-complaint, finding that the

Easements reserved by Southern Pacific are broad and encompass rights for communications lines and facilities of every kind and nature and for access, in addition to railroad related uses, and finding that the Easements were not abandoned. [9 JA 2328-2333.]

In accordance with its findings on summary judgment, on August 23, 2021, the California State Court entered judgment in favor of JHP and against Visitacion, quieting JHP's title to the Easements ("**Judgment**"). [9 JA 2343-2356.] The Judgment was recorded on August 26, 2021, in the Official Records of the San Francisco Assessor-Recorder as Document No. 2021136756. On August 31, 2021, Visitacion appealed the Judgment in California First District Court of Appeal, Division Two, Case No. A163550, which appeal is fully briefed and pending decision. [9 JA 2374-2375.]

IV. ARGUMENT

Petitioner seeks a declaratory order that JHP and its predecessors abandoned all of their rights to the "spur" granted by the Easements over the Visitacion Property. However, declaratory order proceedings are only authorized when the order would terminate a controversy or remove uncertainty. See 5 U.S.C. § 554(e); 49 U.S.C. § 1321. Here, the Board must deny the Petition because there is no controversy or uncertainty for the Board to decide. The California State Court has already determined that the Easements, including JHP's right to use the spur track, were not abandoned. As the Board has repeatedly held, it should not intervene to usurp the California State Court's Judgment governing Visitacion's and JHP's property rights under state law. See, e.g., Holland Park Owner, LLC - Pet. for Declaratory Order, FD 36308, slip op. at 3 (STB served Jan. 6, 2020) ("The determination of the scope of the easement and whether the easement still exists would involve questions of state property law and is the type of issue best left to the courts."); Ohio River Partners, LLC – Acquis. & Operation Exemption – Hannibal Dev., LLC, FD 35984, slip op. at 3 (STB served Apr. 1, 2016) (stating that a state court rather than the Board

should resolve a dispute regarding the exclusivity of an easement); Allegheny Valley R.R. – Pet. for Declaratory Order – Fiore, FD 35388, slip op. at 3 (STB served Apr. 25, 2011) (“[T]he size and extent of a railroad easement is a matter of state property law and best addressed by state courts.”). Accordingly, the Petition is moot and must be denied.

In addition, Petitioner’s attempt to manufacture a controversy by construing the Easements as limited to the “right to own operate, maintain, repair, lease, license, and/or remove existing and/or future railroad, rail and railroad related equipment and facilities” ignores the express language of the Easements that permits JHP’s use for roadway access, and for existing and future communication lines and facilities, and contradicts the California State Court’s findings and the Judgment. But even if JHP’s use of the “spur” is limited as Petitioner claims, the Board has no authority over the spur as excepted track under 49 U.S.C. section 10906. See, e.g., United Transportation Union-Illinois Legislative Board v. Surface Transportation Board (1999) 183 F.3d 606, 612-14 (affirming the Board’s classification of sidetrack to be constructed by noncarrier shipper as “spur” and thus exempted from the Board’s authority under § 10906); Holland Park Owner, LLC - Pet. for Declaratory Order, FD 36308, slip op. at 4 (STB served Jan. 6, 2020) (where user “has not exhibited a continuing intent to provide common carrier service using the track at issue, [] the track would therefore no longer be subject to Board jurisdiction if it were § 10906 excepted track”); cf. JGB Prop., LLC – Pet. for Declaratory Order, FD 35817 (STB served May 22, 2015) (Board maintained jurisdiction over excepted track despite its removal where carrier and shipper interested in restoring common carrier service).

Lastly, even if the California State Court’s Judgment that the Easements were not abandoned was not controlling, and even if the Board had authority to determine whether the Easements were abandoned, Petitioner has failed to meet its burden of proof that the Easements

were abandoned. Petitioner's evidence is limited to its claim that JHP has not shown an intent to use the spur for common carrier rail service, ignoring that the Easements are indisputably broad and permit use for access, for existing and future railroad related purposes, and for existing and future communications lines and facilities of every kind and nature. Petitioner does not, and cannot, proffer any evidence that such uses of the Easements were abandoned. In any event, the overwhelming evidence establishes that the Easements were never abandoned for railroad or other uses: Southern Pacific expressly reserved the Easements in its sale to Visitacion's predecessor in the 1990 Deed [6 JA 1483-1484, 1489-1490, 1498-1532]; the Easements permit both *existing* and *future* uses related to railroad and communications lines for any purpose whatsoever, including for Southern Pacific's subsidiary's fiber optic business that was operating at the time the Easements were reserved in the 1990 Deed [6 JA 1483-1484, 1498-1514, 1728-1729, 1753-1755, 1780-1781, 1785-1787]; Union Pacific's representatives in 2010 and again in 2014 expressed that the Easements had to be retained and may be needed in connection with the adjacent Main Line [6 JA 1483-1484, 1795-1797]; Southern Pacific and Union Pacific did not abandon or relinquish the Easements [5 JA 1400-1403, 1460-1464; 6 JA 1483-1484, 1489-1490, 1498-1514]; Robert Krantz, Union Pacific's corporate designee who was employed for more than 25 years with Southern Pacific and, later, as Union Pacific's Director of Real Estate, testified concerning Southern Pacific's and Union Pacific's books and records, the reservation of the Easements, Southern Pacific's and Union Pacific's businesses and operations at the JHP Property, Southern Pacific's and Union Pacific's policies with respect to abandoning and relinquishing easements, and the condition and configuration of the JHP Property and the necessity of the Easements, and confirmed that Southern Pacific and Union Pacific never intended to abandon and never abandoned the Easements [5 JA 1400-1401; 6 JA 1483-1484,

1702-1710, 1735-1738, 1743-1745, 1767-1769, 1774-1778]; Union Pacific's abandonment policy required its affirmative determination in its sole and absolute discretion to terminate the Easements conditioned upon satisfactory alternative access and monetary consideration, which Mr. Krantz confirmed never occurred [6 JA 1483-1484, 1735-1738, 1742-1744, 1767-1769]; the Easements were used by Union Pacific in 2014 and are critical for access as the JHP Property would otherwise be effectively landlocked due to a large grade separation along the northern boundary, railroad tracks along the eastern boundary, and Visitacion's proposed retaining wall to the west [5 JA 1400-1418, 1460-1464; 6 JA 1483-1484, 1692-1694, 1711-1717, 1721-1732, 1735, 1737, 1742-1747, 1777-1778, 1785-1816]; Union Pacific treated the Easements as assets and actively marketed the Easements for sale [6 JA 1713-1714, 1721-1722, 1725, 1736-1737, 1743-1748, 1767-1769, 1771, 1778, 1780, 1793-1797]; Union Pacific expressly deeded the Easements in its sale of the JHP Property [5 JA 1400-1418, 1460-1464; 6 JA 1483-1484, 1719, 1721-1724, 1726-1731, 1745-1746, 1750-1752, 1788-1797, 1801-1816]; JHP and its principal Mr. McNerney had no intent to abandon the Easements [5 JA 1400-1427; 6 JA 1483-1492, 1547-1554]; the JHP Property is undeveloped, and no determination has been made as to its development for commercial, residential, or other uses [5 JA 1400-1403, 1692-1694]; the JHP Property is zoned M-1, which allows for redevelopment for commercial use, residential use, heavy manufacturing, storage yards, truck terminals, internet exchange (*e.g.*, a data center), wireless telecommunication facilities, among other uses, all of which may require use of the Easements [5 JA 1400-1403, 1472; 6 JA 1483, 1690, 1693-1700]; the JHP Property has been and can be used as an adjunct to the adjacent Caltrain passenger rail lines and freight train rail lines, including for drill and spur tracks, railroad electrification, shipping and receiving, loading and unloading of rail cars, and access, requiring the use of the Easements including the spur track [5

JA 1400-1418, 1428-1435, 1465-1473; 6 JA 1483, 1690, 1692-1694, 1697-1700, 1714-1716, 1727-1728, 1735-1738, 1778-1783, 1788-1812]; in 2016, Visitacion confirmed the existence of the Easements in a license agreement for its use of a portion of the JHP Property [5 JA 1400-1402, 1429-1435]; and in 2019, JHP licensed the JHP Property to a railroad maintenance and construction contractor to support its work on the Peninsula Corridor Electrification Project for Caltrain [5 JA 1400-1403, 1428-1435]. Because the Easements plainly have not been abandoned, the Board should deny the Petition.

V. CONCLUSION

For the foregoing reasons, the Board should deny Baylands Development, Inc.'s Petition for Declaratory Order.

Respectfully submitted,

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Dated: March 16, 2023

CERTIFICATE OF SERVICE

I, Fred M. Terry, certify that on March 16, 2023, I served a true and correct copy of 424 Jessie Historic Properties, LLC's Reply to Petition for Declaratory Order via electronic mail upon all parties in this proceeding as follows:

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