

SERVICE DATE – SEPTEMBER 18, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36660

BAYLANDS DEVELOPMENT, INC.—PETITION FOR DECLARATORY ORDER

Decided: September 18, 2023

On February 24, 2023, Baylands Development, Inc. (Baylands), a noncarrier, filed a petition for declaratory order requesting that the Board determine that a railroad spur (the Spur) is abandoned and no longer needed as part of the interstate rail network. The Spur, consisting of a 30-foot wide, approximately 2,000-foot long, railroad right-of-way, is located partially in the City and County of San Francisco, Cal., and partially in the City of Brisbane, San Mateo County, Cal. (Pet. 1-2.) According to Baylands, there is a pending state court action involving the interpretation and enforceability of an easement, owned by 424 Jessie Historic Properties, LLC (JHP),¹ that is on a portion of the Spur. (Pet. 10-11.) As discussed below, this matter will be held in abeyance pending resolution of the related state court action.

BACKGROUND

According to Baylands, the Spur was once owned by the Southern Pacific Railroad (SP) and part of SP's Bayshore Yard. The Spur connects to the Peninsula Corridor (formerly known as SP's Bayshore Cutoff) that runs north-south between San Francisco and San Jose, Cal., at Bayshore Station near the San Francisco/San Mateo County border.² (Pet. 2.) Baylands states that SP decided to close its Bayshore Yard in 1979 with the yard's facilities, track, and infrastructure being dismantled over the next several years. (*Id.* at 3.) Thereafter, in 1989 and 1990, SP sold the Bayshore Yard site to the predecessors in interest of the property's current

¹ JHP is a California limited liability company that specializes in residential and commercial redevelopment. (Pet. 8.)

² Baylands states that the Peninsula Corridor is owned by the Peninsula Corridor Joint Powers Board, which acquired the right-of-way from SP and operates non-jurisdictional passenger commuter rail service over the corridor. (Pet. 3); see also Peninsula Corridor Joint Powers Bd.—Acquis. Exemption—S. Pac. Transp. Co., FD 31980 (ICC served Jan. 17, 1992). The Union Pacific Railroad Company (UP), successor to SP, is authorized to operate common carrier freight service over the Peninsula Corridor. (Pet. 4); see also S. Pac. Transp. Co.—Trackage Rights Exemption—Peninsula Corridor Joint Powers Bd., FD 31983 (ICC served Jan. 17, 1992).

owners, Visitacion Investment, LLC (Visitacion), and Sunquest Properties, Inc. (Sunquest).³ (*Id.* at 4.) Visitacion owns the portion of the Bayshore Yard site situated in the City and County of San Francisco, as well as an adjacent property, also in the City and County of San Francisco. (*Id.*) Sunquest owns the portion of the Bayshore Yard site situated in San Mateo County. (*Id.*) The Spur traverses over portions of both the Visitacion property and the Sunquest property. (*Id.*)

Baylands states that, at the time of the Bayshore Yard's conveyance in 1989 and 1990, SP reserved for itself certain easements in the Spur. (Pet. 6.) For the segment of the Spur located on what is now Visitacion's property—the northern segment that connects to the Peninsula Corridor—SP reserved (1) an easement entitled the “Drill & Spur Track Easement” (the Visitacion Track Easement) and (2) an easement for an adjacent vehicular access road, entitled “Access Roadway Easement” (the Road Easement). (*Id.* at 7.) For the portion of the Spur located on what is now Sunquest's property—the southern segment—Baylands asserts that SP reserved a “Drill and Spur Track Easement” and a “Drill Track Connection Easement” (together, the Sunquest Track Easement).⁴ (*Id.*) The asserted easement on the southern segment connects to the interstate rail network at the Peninsula Corridor through the asserted easement on the northern segment.

In 2015, UP (SP's successor in interest) sold to Patrick McNerney—who in turn conveyed to noncarrier JHP⁵—the fee interest in two small adjoining parcels adjacent to Visitacion's property (collectively, the JHP Property),⁶ as well as the Visitacion Track Easement and the adjacent Road Easement.⁷ (Pet. 7-8.) UP, however, retained its interest in the Sunquest Track Easement. (*Id.* at 8.) Baylands states that Mr. McNerney has submitted an application with the local municipality seeking to redevelop the JHP Property as high density residential

³ Visitacion and Sunquest have retained Baylands for coordination of non-rail redevelopment of the Bayshore Yard. (Pet. 4-5.) More specifically, Baylands states that Visitacion and Sunquest intend to redevelop their respective properties, in a fully coordinated manner, for commercial and residential purposes and have received community input and approval from applicable municipalities. (*Id.* at 4-6.) Baylands also asserts that neither rail service nor access to freight rail is contemplated in the development plans. (*Id.* at 6.)

⁴ The Sunquest Track Easement begins at the San Francisco/San Mateo County line and terminates on Sunquest's property at the border of Bayshore Boulevard, where a grade crossing was formerly located. (Pet. 7; *see also id.*, Ex. A.)

⁵ According to Baylands, Mr. McNerney is the registered agent and principal of JHP. (Pet. 8.)

⁶ Baylands states that the JHP Property abuts the Peninsula Corridor and the northern and eastern borders of Visitacion's property. (Pet. 7-8.) According to Baylands, the JHP Property physically connects with the Access Road but not the Spur. (*Id.* at 8.) Thus, Baylands argues that neither the Spur nor the Visitacion Track Easement could be used to serve the JHP Property. (*Id.*)

⁷ The Road Easement provides vehicular access over the Visitacion property only, between the JHP Property and the public road network via Sunnydale Avenue. (Pet., Ex. A Attachment A-1, V.S. Howard Pearce ¶ 7.)

housing, despite Visitacion and Baylands’ redevelopment plans that called for the JHP Property to be used as public open space. (Pet. 9; see id., Ex. E, V.S. Greg Vilkin ¶ 21.) According to Baylands, when it attempted to resolve this matter with JHP, JHP exhibited an intent to leverage its interests in the Visitacion Track Easement and Road Easement to extract concessions for its own development proposal on the JHP Property. (Id. at 10; see also id., Ex. E, V.S. Greg Vilkin ¶ 22.)

In 2019, Visitacion initiated a quiet title action in San Francisco County Superior Court (Superior Court) seeking a determination that the Visitacion Track Easement and Road Easement had been abandoned under state law. (Id. at 10; see also id., Ex. E, V.S. Greg Vilkin ¶ 23.) The Superior Court, however, denied Visitacion’s quiet title action and determined that the easements had not been abandoned under state law based upon JHP’s ability and interest in using the easements for communication lines and facilities and for vehicular access purposes. (Id. at 11); see also Visitacion Inv., LLC v. 424 Jessie Historic Props., LLC, No. CGC-19-579667, at 2-4 (S.F. Cnty. Super. Ct. July 15, 2021). On June 30, 2023, Baylands notified the Board that the California First District Court of Appeal issued a decision in Visitacion Investment, LLC v. 424 Jessie Historic Properties, LLC, A163550, (Cal. Ct. App. June 27, 2023), reversing the lower court’s order granting summary judgment in favor of JHP and remanding the matter to trial court. (Baylands Letter 1, June 30, 2023.)

In its petition for declaratory order, Baylands argues that JHP’s position in state court—that JHP’s easements have not been abandoned—raises the question of whether a common carrier obligation remains on the Spur. (Pet. 1-2, 11.) Baylands states that the possibility of a retained common carrier obligation could impede Baylands’ development of the Visitacion and Sunquest properties. Baylands asserts that, if the Spur is still under the Board’s jurisdiction, it would need to adjust plans to accommodate the possible resumption of rail service over the Spur (which could be done without the Board’s approval under 49 U.S.C. § 10906), including by reducing the number of residential housing units by 100. (Id. at 6.) Thus, Baylands argues that, absent a determination that the Board no longer has jurisdiction over the Spur, it cannot proceed with municipally approved plans for the Bayshore Yard site. (Id. at 20.) Moreover, Baylands acknowledges that if the Board maintains jurisdiction over the Spur, the application of city zoning and planning regulations, environmental laws, and condemnation laws may be federally preempted. (Id. at 20-21.)

On March 16, 2023, JHP filed a reply in opposition to Baylands’ petition asserting, among other things, that the Board “should not intervene to usurp the California State Court’s Judgment governing Visitacion’s and JHP’s property rights under state law.” (Reply 6.) JHP also argues that it is not within the Board’s “authority” to determine whether the Spur has been abandoned because the Spur is excepted track under 49 U.S.C. § 10906.⁸ (Id. at 7.) Finally, JHP

⁸ Contrary to JHP’s assertion that the Board lacks authority to determine whether the Spur has been abandoned because the Spur is excepted track under 49 U.S.C. § 10906, Board precedent makes clear that excepted track is within the Board’s jurisdiction under 49 U.S.C. § 10501(b). In certain cases, the Board has provided declaratory relief to determine whether excepted track remains under Board jurisdiction in adversarial situations. See New York City

contends that the evidence presented in state court indicates that neither JHP nor its predecessors in interest have abandoned the easements for any purpose, including for use as a spur track. (Id. at 7-10.) On April 5, 2023, Baylands filed a reply (and motion for leave to file a reply), responding to the JHP reply.⁹

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). For the reasons explained below, this matter will be held in abeyance pending resolution of the ongoing quiet title action between Visitacion and JHP (Visitacion Inv., LLC v. 424 Jessie Historic Props., LLC, No. CGC-19-579667 (S.F. Cnty. Super. Ct.)).

Abeyance is appropriate where it would promote efficiency and not be fundamentally unfair to any party. E.g., N. Am. Freight Car Ass’n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3 (STB served Mar. 31, 2017). Here, abeyance would promote efficiency. The California First District Court of Appeal focuses on UP’s railroad-related activities over, and possible abandonment of, the relevant railroad easements before selling any property or easements to JHP. Visitacion Investment, LLC v. 424 Jessie Historic Properties, LLC, A163550, 14-20 (Cal. Ct. App. June 27, 2023). Evidence of UP’s activities will be critical to confirming whether the Spur is excepted track (as suggested by Baylands) and whether it has been abandoned for STB purposes. See, e.g., NewVista Prop. Holdings, LLC—Pet. for Declaratory Ord., FD 36040, slip op. at 2-4 (STB served Mar. 17, 2017) (discussing factors considered by the Board in determining abandonment). For example, if the court finds that the easements do not continue in effect, the information and evidence pertaining to such a determination would provide context for important issues, such as whether UP exhibited a “fixed and continuing intent” to use the Spur. See generally Pinelawn Cemetery—Pet. for Declaratory Ord., FD 35468, slip op. at 10-11 (STB served Apr. 21, 2015). Conversely, if the court finds that the Visitacion Track Easement and adjacent Road Easement continue in effect, the need for a declaratory order from the Board would possibly be obviated because, even if the Board determined that its jurisdiction over the Spur had been removed, JHP would still be allowed to use the Visitacion Track and Road Easements under state law. Accord Great Walton R.R.—Pet. for Declaratory Ord., AB 1242 (Sub-No. 1), slip op. at 11-12 (STB served June 9, 2020), corrected (STB served June 23, 2020) (holding docket in abeyance pending resolution of state property law issues that could impact the need to determine whether excepted track remains part of the interstate rail system).

Econ. Dev. Corp. ex rel. City of New York—Pet. for Declaratory Ord., FD 36467, slip op. at 5-6 (STB served June 11, 2021); NewVista Prop. Holdings, LLC—Pet. for Declaratory Ord., FD 36040, slip op. at 2-4 (STB served Mar. 17, 2017); Pinelawn Cemetery—Pet. for Declaratory Ord., FD 35468, slip op. at 10-11, 11 n.31 (STB served Apr. 21, 2015).

⁹ While the Board’s regulations do not permit “replies to replies,” 49 C.F.R. § 1104.13(c), in the interest of a more complete record, the Board will accept this filing into the record. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

Abeyance would not be fundamentally unfair to any party. Here, the completion of the state court action may allow for a more expeditious resolution of issues at the Board, if such action is ultimately necessary. Accordingly, this matter will be held in abeyance pending resolution of the state court action. To ensure that the Board remains informed regarding the progress of the state court action, the parties will be directed to submit any decision by the court regarding the merits of any of the claims in the case (or any other decision relevant to this matter) within 15 days of its issuance.

For the reasons stated above, this matter will be held in abeyance.

It is ordered:

1. Bayland's sur-reply to JHP's reply is accepted into the record.
2. The matter is held in abeyance pending further Board order.
3. The parties are directed to submit any merits decision, any other relevant decision by the state court, and any other agreement or similar document resolving the quiet title action within 15 days of its issuance.
4. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.