

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

308800

ENTERED
Office of Proceedings
October 10, 2024
Part of
Public Record

DECISION ID NO.: 52362
DECIDED DATE: 11/5/2024
SERVED DATE: 11/5/2024
APPROVED:  Acting Director



GRANTED
Office of
Proceedings



Finance Docket No. 36433

NORTH COUNTY TRANSIT DISTRICT -
PETITION FOR DECLARATORY ORDER

AMENDED MOTION FOR VOLUNTARY DISMISSAL

COMES NOW Petitioner North County Transit District ("NCTD"), and files this Amended Motion for Voluntary Dismissal of the instant proceeding, without prejudice. This amended motion is identical to the motion for voluntary dismissal filed by NCTD on October 7, 2024, except, with respect to footnote 1, to clarify that NCTD shall NOT file a new STB petition for declaratory order related to the now-abandoned fencing project approved on January 20, 2022. In support of this amended motion, NCTD shows as follows:

1. On August 28, 2020, NCTD, a California state agency responsible for providing public transit in north San Diego County and a common carrier subject to the Surface Transportation Board's ("Board") jurisdiction, filed a petition for declaratory order at the Board concerning proposed bluff stabilization projects and a separate proposed fencing project. The petition asked the Board to find that (1) the preemption provision of the ICC Termination Act of 1995 ("ICCTA") — 49 U.S.C. § 10501(b) — preempts any attempt by a state or local entity to regulate NCTD's rail line maintenance or upgrading activities in its rail right-of-way pursuant to the state coastal permitting regime under the California Coastal Act, Cal. Pub. Res. Code § 30000 *et seq.* ("Coastal Act"), and (2) any consistency review under the federal Coastal Zone Management

Act, 16 U.S.C. § 1451 *et seq.*, cannot be harmonized with § 10501(b), because state and local regulation of NCTD's rail maintenance and upgrading projects would directly interfere with or prevent rail operations,

2. On May 22, 2023, the Board issued a decision in this proceeding declining to issue a declaratory order regarding the applicability of certain laws and regulations related to a proposed bluff stabilization project and held this proceeding in abeyance with respect to the applicability of certain laws and regulations related to NCTD's proposed fencing project.

3. With regard to the abeyance holding, the California Coastal Commission ("Coastal Commission") had ordered NCTD to obtain a Coastal Development Permit ("CDP") pursuant to the Coastal Act before going forward with a fencing project along the coast. (Comm'n Status Update Ex. A, Mar. 8, 2022.) NCTD argued that the requirement to obtain a CDP is preempted by 49 U.S.C. § 10501(b). (NCTD Pet. 29, 33.) However, the Board explained that the resolution of certain claims pending in a state court case, *California Coastal Commission v. North County Transit District*, Superior Court of California, County of San Diego, Central Division, Case No. 37-2022-00014504, regarding the fencing project could inform, if not dictate, the outcome of any Coastal Act preemption analysis. Specifically, the question whether NCTD voluntarily agreed to comply with California environmental law, including the Coastal Act, as a condition of receiving a state grant for the fencing project, could resolve the fencing project preemption question. (NCTD Status Update Att. at 14-15, Apr. 13, 2022.) The Board noted that it has held that ICCTA preemption generally does not apply to a voluntary agreement. *See e.g., Twp. of Woodbridge, N.J. v. Consol. Rail Corp.*, NOR 42053, slip op. at 5 (STB served Dec. 1, 2000). Accordingly, the Board held this proceeding in abeyance pending resolution of the state court proceedings

regarding the voluntary agreement issue and directed the parties to submit any relevant court decision to the Board within five days of its issuance.

4. On September 19, 2024, NCTD and the Coastal Commission entered into a settlement agreement to settle the state law case. NCTD agreed in Section 2.3 thereof to dismiss the petition for a declaratory order pending before the Board in this proceeding as a condition of this settlement. (Settlement Agreement attached hereto as Exhibit A). Once this Board proceeding has been dismissed, the Coastal Commission has agreed to file its dismissal of this state case with prejudice. Consequently, as a result of this pending dismissal, the Board's abeyance question regarding the voluntary agreement will not be resolved in the state court case.

Therefore, NCTD moves the Board for an Order dismissing its Petition for Declaratory Order, without prejudice, and discontinuing the instant proceeding.¹ The Coastal Commission supports this motion.

Respectfully submitted,

/s/ Daniel R. Elliott

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Dated: October 10, 2024

¹ NCTD notes that there is a related state court case that was brought by a non-party to the present STB action (Friends of the Del Mar Bluffs; San Diego County Superior Court Case No. 37-2022-00011260-CU-TT-CTL) that seeks, among other remedies, what appears to be an exclusive easement over a portion of NCTD's rail line and facilities in Del Mar that was not the subject of this action. As a matter of clarification to the original motion for voluntary dismissal, NCTD will not file a new STB petition for declaratory order related to the now-abandoned fencing project approved on January 20, 2022.

Certificate of Service

I certify that I have, on this 10th day of October 2024, served by email copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott

Daniel R. Elliott

Attorney for North County Transit District

SETTLEMENT AGREEMENT

CALIFORNIA COASTAL COMMISSION v. NORTH COUNTY TRANSIT DISTRICT **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO** **CENTRAL DIVISION, CASE NO. 37-2022-00014504**

This Settlement Agreement (hereinafter, “Agreement”) is entered into and effective the last date signed below, by and between the Petitioner/Plaintiff CALIFORNIA COASTAL COMMISSION, an agency of the State of California (the “Coastal Commission”), on the one hand, and the Respondent/Defendant NORTH COUNTY TRANSIT DISTRICT, a California public entity (“NCTD”) and Real Party in Interest/Defendant EXBON DEVELOPMENT, INC. (“Exbon”) as Real Party in Interest (collectively the “Respondents”), on the other hand. The Coastal Commission and Respondents shall sometimes hereinafter be referred to individually as “Party” and/or collectively as the “Parties.”

This Agreement is intended by the Parties hereto to fully, finally, completely, and unconditionally compromise, resolve and settle the lawsuit identified as *California Coastal Commission v. North County Transit District*, Superior Court of California, County of San Diego, Central Division, Case No. 37-2022-00014504 (the “Litigation”) as between the Parties, subject to the terms and conditions set forth below.

RECITALS

i. WHEREAS, the Coastal Commission is a state agency created pursuant to Public Resources Code section 30300, *et seq.* The Coastal Commission has the authority and responsibility to implement and enforce the provisions of the Coastal Act of 1976 (the “Coastal Act”), Pub. Res. Code §§ 30000 *et seq.* by, among other things, the filing of lawsuits.

ii. WHEREAS, NCTD is a public agency existing under the laws of the State of California, pursuant to California Public Utilities Code sections 125000, *et seq.*, and is responsible for providing commuter rail passenger trips, primarily in North San Diego County, and its services include the BREEZE bus, SPRINTER hybrid rail, COASTER commuter rail, FLEX demand response service, and LIFT ADA paratransit service. NCTD is also obligated to maintain the rail line from the Orange County line through San Diego County to Santa Fe Depot (“Line”), and to fulfill its obligations to other common carrier railroad entities (e.g., Amtrak and BNSF Railway).

iii. WHEREAS, NCTD elected to move forward with certain maintenance and safety projects within its right-of-way, including construction of safety fencing along the Line in the City of Del Mar.

iv. WHEREAS, on or about January 20, 2022, the majority of the NCTD Board of Directors (the “NCTD Board”) voted to approve and authorize the NCTD Executive Director to execute a contract with Real Party Exbon, Inc. for construction of safety fencing through the City of Del Mar (the “Project”).

v. WHEREAS, in approving the Project, the NCTD Board conditioned the grant of authority upon the potential acceptance of a license agreement by the City of Del Mar to provide

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for a modified Project, including a lower height for safety fencing, to meet the objections of the City of Del Mar to the proposed Project, on or before February 28, 2022.

vi. WHEREAS, at a special meeting held on February 28, 2022, the City of Del Mar's City Council voted against entering into the proposed license agreement with NCTD.

vii. WHEREAS, the Coastal Commission and its executive director determined that the NCTD Board's January 20, 2022 Project approval and the City of Del Mar's rejection of the licensing agreement meant that NCTD planned to proceed with its original fencing plan without first obtaining a coastal development permit.

viii. WHEREAS, on March 3, 2022, the Coastal Commission's executive director issued oral notice, followed by written confirmation, to NCTD that he planned to issue a cease and desist order as authorized under Public Resources Code section 30809.

ix. WHEREAS, because NCTD failed to respond to the oral notice and written confirmation to the Coastal Commission's executive director's satisfaction, on March 7, 2022, the Coastal Commission's executive director issued a cease and desist order to NCTD pursuant to the Coastal Act. (Pub. Resources Code, § 30809.) The order directed NCTD to cease development until it had obtained Coastal Act authorization or confirmation from the Coastal Commission that the development is exempt ("Cease and Desist Order").

x. WHEREAS, on April 19, 2022, the Coastal Commission filed the Litigation against NCTD asserting three causes of action under California state law: (1) Violation of CEQA ("CEQA"), Pub. Res. Code §§ 21000 et seq.; (2) Violation of the Coastal Act and (3) Violation of the Coastal Commission's Executive Director Cease and Desist Order.

xi. WHEREAS, on June 8, 2022, in regard to a project to stabilize the coastal bluffs in the City of Del Mar, the Coastal Commission conditionally concurred with the San Diego Association of Government's ("SANDAG") Consistency Certification CC-0005-21, finding the Del Mar Bluffs stabilization Project 5 ("Project 5") was consistent with the California Coastal Management Program, provided the conditions are satisfied.

xii. WHEREAS, the Coastal Commission's conditional concurrence with the Consistency Certification CC-0005-21 includes findings by the Coastal Commission that Project 5, as conditioned, would be consistent with the California Coastal Management Program, authorizes the "enhancement of the north-south trail system east of the rail track on the top of the bluff between Seagrove Park and 4th Street," and acknowledges that SANDAG's proposal for such development of a blufftop trail includes "fencing consisting of three-foot-tall wooden pylons and steel cabling, or another similarly low-profile design. The use of wooden pylons and low-profile designs would ensure that the fencing would not adversely impact visual resources."

xiii. WHEREAS, NCTD denies the allegations of Coastal Commission stated herein and in the Litigation and that any violation of the law has occurred.

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xiv. WHEREAS, it is the desire of the Parties to resolve and settle their disputes and claims arising out of or relating to the Litigation.

xv. WHEREAS, the NCTD Board has authorized counsel for NCTD to negotiate regarding resolution of the Litigation and has authorized its Executive Director to enter into this Agreement.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING, THE MUTUAL PROMISES CONTAINED HEREIN, AND FOR OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED, WITHOUT ANY ADMISSION OR CONCESSION ON THE PART OF THE PARTIES, IT IS HEREBY AGREED, BY AND AMONG THE PARTIES AS FOLLOWS:

AGREEMENT

1. Recitals Incorporated. The recitals set forth above are incorporated herein by reference and are explicitly made a part of this Agreement.

2. Settlement Terms. NCTD and the Coastal Commission agree to do the following:

2.1 Pursuant to the settlement authority granted by the NCTD Board to the NCTD Executive Director and General Counsel, the Project approved by the NCTD Board on January 20, 2022, is hereby abandoned, and shall not be further pursued by NCTD.

2.2 In settlement of these claims and in lieu of the Project approved by the NCTD Board on January 20, 2022, which has now been abandoned, NCTD shall only pursue fencing of its Line in the City of Del Mar pursuant to the provisions of the Coastal Commission's conditional concurrence with Consistency Certification CC-0005-21, including the above-identified specifications, to be implemented by SANDAG as a part of the overall project that was the subject of Consistency Certification CC-0005-21.

2.3 NCTD shall dismiss its petition currently pending before the Surface Transportation Board (Docket No. FD 36433). NCTD shall not file any new petition with the STB based on the Project approved by the NCTD Board on January 20, 2022.

2.4 Once Surface Transportation Board Docket No. 36433 has been dismissed, the Coastal Commission shall file its dismissal of the Litigation with prejudice. Notwithstanding the dismissal being with prejudice, if NCTD violates any term listed above, and the Coastal Commission responds by filing a new action for violation of the Coastal Act, NCTD shall not use the fact that the dismissal of the Litigation was with prejudice as a defense against that new action. Likewise, the settlement of this Litigation, and dismissal of the Surface Transportation Board action (Docket No. FD36433), are without any admission of liability by NCTD and shall not be used by the Coastal Commission to estop or bar, or assert jurisdiction over, any future project by NCTD not involving the fencing approved by the NCTD Board on January 20, 2022.

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3. Release and Waiver of Fees and Costs. The Coastal Commission agrees that this Agreement settles all of the Commission's claims for relief from NCTD and Exbon, their officers, directors, agents and employees for the violations of the Coastal Act alleged in the Litigation and occurring prior to the Effective Date of this Agreement, including claims for civil penalties, fines, or damages under the Coastal Act, including under Public Resources Code Sections 30805, 30820, 30821, and 30822.

4. Each Party shall bear its own legal fees, costs, and expenses of any nature whatsoever incurred to date that arise out of or relate to the above-captioned litigation and the subject matter of this Agreement.

5. This release shall not operate to release any claims the Parties may later have for the enforcement of the obligations created by this Agreement or the enforcement of the Coastal Act and/or other laws in connection with any future actions.

6. No Admission of Liability. The Parties agree that this Agreement, and the performance of the acts required by it, does not constitute an admission of liability or wrongdoing on the part of anyone and will not be used for any purpose as an admission of liability or wrongdoing by any Party.

7. Verbal Representations. This Agreement contains the complete expression of the whole agreement between the Parties hereto, and there are no promises, representations, agreements, warranties, or inducements, either expressed verbally or implied, except as are fully set forth herein. This Agreement cannot be enlarged, modified, or changed in any respect except by written agreement between the Parties.

8. Severability of Provisions. Each provision of this Agreement, whether or not contained in separate paragraphs, shall be considered severable. If for any reason any such provisions or parts of such provisions thereof are determined to be invalid, unenforceable, or contrary to any existing or future applicable law or judicial ruling, such invalidity shall not impair the operation of or affect those portions of this Agreement that are valid, but in such event, this Agreement shall be construed and enforced in all respects as if such invalid or unenforceable provision or part of such provisions has been omitted.

9. Binding Effect. Each and all of the covenants, conditions, and restrictions in this Agreement shall inure to the benefit of and shall be binding upon the Parties, their successors-in-interest, agents, representatives, assignees, transferees, or any party claiming by derivative right an interest in the claims released herein.

10. Representation of Comprehension. In entering into this Agreement, the Parties represent that they have relied upon, or have had the opportunity to rely upon the legal advice of their attorneys, who are the attorneys of their own choice, and that these terms are fully undertaken and voluntarily accepted by them. All Parties further represent that they have no question with regard to the legal import of any term, word, phrase, or portion of this Agreement, or the Agreement in its entirety, and accept the terms of this Agreement as written.

11. Headings and Draftsmanship. The headings employed to identify the provisions contained herein are solely for the convenience of the Parties to this Agreement. If any ambiguity

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appears in either the headings or the provisions attendant thereto, such ambiguity shall not be construed against any Party to this Agreement on the grounds that such Party drafted this Agreement.

12. Further Assurances. All Parties agree to cooperate fully and execute any and all supplementary documents and take all additional actions that may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

13. Choice of Law and Venue. The Parties agree that this Agreement shall be governed by and interpreted according to the laws of the State of California, without regard to principles of conflicts of law thereof. Any dispute, controversy, or claim arising out of or relating to this Agreement, including the validity, invalidity, breach, or termination thereof, shall be resolved by litigation in San Diego County, California.

14. Representation by Counsel. All Parties acknowledge and agree that they were, or had, the opportunity to be represented by their independent counsel with respect to the Project and this Agreement, understand the terms of this Agreement, agree to be bound thereby and have the authority to bind those individuals and entities which it purports to represent to this Agreement. The terms of this Agreement shall not be construed as having been drafted by one Party as opposed to the other, and the Parties further represent that they have not relied on any representations of the other in entering into this Agreement other than what is stated herein.

15. Counterparts. This Agreement may be signed in counterparts, which when read together shall constitute the entire Agreement of the Parties hereto.

16. Facsimile/Electronic Signatures. Facsimiles and electronically scanned copies of signatures shall be acceptable and treated as an original.

IT IS SO STIPULATED.

Dated: September 19, 2024

CALIFORNIA COASTAL COMMISSION

DocuSigned by:



By: Kate Huckelbridge

Title: Executive Director, California Coastal Commission

Counsel for CALIFORNIA COASTAL COMMISSION

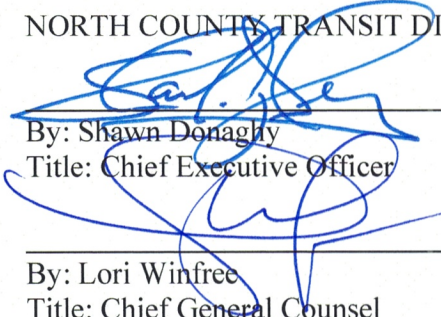


Roxanne Carter, Deputy Attorney General
ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA

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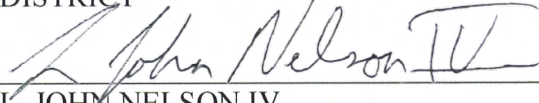
Dated: September 19, 2024

NORTH COUNTY TRANSIT DISTRICT


By: Shawn Donaghy
Title: Chief Executive Officer

By: Lori Winfree
Title: Chief General Counsel

Counsel for NORTH COUNTY TRANSIT
DISTRICT

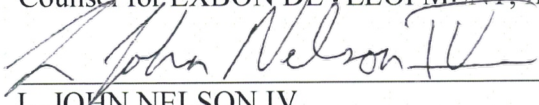

L. JOHN NELSON IV
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Dated: September 19, 2024

EXBON DEVELOPMENT, INC.


By: He Bum Yang
Title: Project Manager

Counsel for EXBON DEVELOPMENT, INC.


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