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24 September 2014  
By Express Delivery

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W., Room 1034  
Washington, D.C. 20423-0001

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ENTERED  
Office of Proceedings  
September 25, 2014  
Part of  
Public Record

Re: AB 167 (Sub-no. 1189X): Conrail - Aban.  
Exemption - In Hudson County,  
and related proceedings  
AB 55 (Sub-no. 686X): CSX- Disc. Exemption,  
AB 290 (Sub-no. 306X): NS Rwy - Disc. Exemption

Dear Ms. Brown:

Enclosed please find for filing the original (unbound) and ten copies of Additional Supplemental Comments on behalf of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") on the Environmental Assessment served 3/23/2009, especially concerning the violation of NHPA section 110(k), the evasion of federal abandonment licensing requirements, and the various unlawful actions by and agreements between Consolidated Rail Corporation ("Conrail") and a developer d/b/a 212 Marin Boulevard LLC, et al. that have occurred.

Thank you for your assistance in this matter.

Very truly,  
  
Charles H. Montange  
for City et al

Encls. (orig and ten)  
cc. Service list (w/encl.)

Before the Surface Transportation Board

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

Additional Supplemental Comments  
on behalf of City of Jersey City,  
Rails to Trails Conservancy  
and Pennsylvania Railroad Harsimus Stem  
Embankment Preservation Coalition  
on Environmental Assessment served 3/23/2009

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Before the Surface Transportation Board

Consolidated Rail Corporation -       )  
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INTRODUCTION

The Surface Transportation Board in its decision in this proceeding served August 11, 2014, indicated an intent to issue a revised and updated environmental assessment (EA), to which end it requested Consolidated Rail Corporation ("Conrail") to submit a supplemental environmental and historic report. Conrail filed a de minimis supplement which basically argued there was nothing to supplement. City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") replied to Conrail's filing on September 3, 2014, noting serious deficiencies in the March 23, 2009 EA, particularly in respect to the analysis of Conrail's anticipatory demolition of the Harsimus Branch.

This Board has noted that "[i]n some cases, railroads have taken actions affecting rail property without first seeking abandonment authority" and has stated that such actions, even if they occur "on inactive lines, nonetheless "are unlawful."<sup>1</sup> Conrail and its chosen developer have engaged in exactly such unlawful actions in connection with the Harsimus Branch. Those actions amount to an effort to evade this Board's jurisdiction over transfers of rail lines, as well as any of the environmental, historic resource or public interest remedies administered by this Board.

City et al also remains concerned that the Board lacks resources and procedures to address an evasion of this magnitude, and so blatant a violation of section 110(k) of the National Historic Preservation Act, 16 U.S.C. 470h-2(k). City et al accordingly is making this submission of supplemental information bearing on the admission by Conrail's chosen developer (212 Marin Boulevard, LLC, et al, referred to herein as "the LLCs") that Conrail made fraudulent misrepresentations to the LLCs, the Board, City, and the Courts to the effect that the Harsimus Branch was not subject to STB abandonment jurisdiction.

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<sup>1</sup> Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, Ex Parte no. 678, served April 23, 2008, at p. 4.

## ADDITIONAL SUPPLEMENTAL COMMENTS

First, City et al attach copies of relevant pages of the New Jersey Title Practice Handbook for the periods in question. At all times, title professionals involved in real estate transactions involving Conrail property were required to obtain either proof of abandonment, or proof that none was required. If STB abandonment approval is required, then the Practice Manual called for further proof of compliance with N.J.S.A. 48:12-125.1. Appendix 1, Handbook (2000 ed.) p. 98-4. See also 3d Ed., revised Sept. 2005 (similar requirements) at p. 98-3 (also in Appendix 1).

N.J.S.A. 48:12-125.1 is annexed as Attachment I. It requires notice to local governments, and provides that deeds issued without compliance are void. N.J.S.A. 48:12-125.1(e). In this regard, the New Jersey statute is similar to Section 18 of the New York Transportation Law. CSX, a railroad involved in a discontinuance proceeding coincident with Conrail's abandonment proceeding here, has admitted elsewhere that if such a statute "applied to the property proposed to be conveyed ..., without a ... waiver [of the statute], conveyance of such property could not be insured by a title insurance company, and if it was made, with or without title insurance, the conveyance would be void or voidable." CSX Motion for Leave to Reply, Reply and Motion for Procedural Schedule, p.6 in CSX Transportation - Pet.

for Declaratory Order, F.D. 33888(Sub-no. 101), dated Dec. 11, 2007 (excerpts included in App. 1).

The City did not receive any notice from Conrail pursuant to NJSA 48:12-125.1 at any relevant time. When the City did receive a notice dated Feb. 7, 2008, that Conrail intended to institute an abandonment proceeding before this agency, City responded by letter dated March 4, 2008 (also included in Appendix 1), that pursuant to section 125.1 City intended to acquire the property, would seek relief at STB (including deed invalidation as well), and opposed use of notice of exemption procedures. The City has followed that course to date.

Second, we attach a Certification (Appendix 2) by John J. Curley (City's outside eminent domain counsel) dated Nov. 3, 2005, in one of the many suits filed by the LLCs against the City and others (including one of its in-house attorneys). The Certification presents correspondence between Mr. Curley's office and Conrail in which Mr. Curley on behalf of the City advised Conrail that City sought to acquire the relevant portion of the Branch (App. 2, Ex A, Feb. 18, 2005 letter). The correspondence reiterates that position again in the face of confusion professed by Conrail (App. 2, Ex B), and sought entry to do an appraisal as required under state law (App. 2, Ex C, April 4, 2005 letter). Rather than allow entry, Conrail continued to profess confusion (App. 2, Ex D). Mr. Curley

reiterated, yet another time, that the City wanted all the property, and requested proof of abandonment (per the Handbook, App. 1) as well as copies of contracts affecting Conrail's ownership, and other information such as title insurance commitments (App. 2, Ex E, June 7, 2005 letter). In response (App. 2, Ex F, June 17, 2005), Conrail declined to allow inspection because, Conrail said, it was moving local offices. Conrail asserted that the property was a portion of the Conrail Harsimus Branch abandoned in April 1994 "pursuant to federal law which does not require formal ICC (now Surface Transportation Board) approval." Conrail claimed it had no title insurance commitments. On June 28, 2005 (App. 2, Ex G), Mr. Curley's office asked again for copies of contracts with SLH Holding Corporation (predecessor to the LLCs), title insurance commitments, and again per the Handbook (App. 1), "[p]roof" that STB "approval is not required for the sale of the property."

Although Conrail's office move was supposedly too burdensome to allow Conrail to cooperate in an inspection of the property, it was not so burdensome as to prevent Conrail from selling the property to the LLCs. In response to the June 28, 2005 letter from Mr. Curley's office, Conrail on July 18, 2005, stated that it had sold the property on July 13, 2005, to the LLCs (App. 2, Ex H, letter dated July 18, 2005). In short, Conrail delayed cooperation with the City in the provision of

information in order to present the City with a fait accompli (an illegal sale to the LLCs). As Mr. Curley states in the Certification, neither the LLCs nor Conrail have supplied any of the documents requested "in this long correspondence."

Although Conrail did not specify to Mr. Curley in its correspondence what federal law allowed it to avoid an abandonment authorization for a line, City subsequently learned via discovery in F.D. 34818 that Conrail took the position with the LLCs that the line was a "spur." In particular, Mr. Fiorilla (for Conrail) informed Mr. Alampi (for LLCs) on October 4, 2005 (several months after the sale to the LLCs) that the line "was property abandoned under the governing criteria for Spur Lines under the applicable federal statute..." Fiorilla to Alampi, Letter dated Oct. 4, 2005 (Exhibit K to "Summary Statement" filed Jan. 21, 2009 in AB 167-1189X). The reference to spur indicates reliance on the spur track exemption from abandonment pre-authorization currently codified at 49 U.S.C. 10906. City et al have thus construed Conrail to maintain that the spur exception applied to the Harsimus Branch. But the Harsimus Branch was originally a mainline for freight. The LLCs now admit there is no "good faith" argument that the Harsimus Branch was anything other than a line. E.g., Horgan Declaration, Appendix 4, para 22. It has long been the law that railroads may not avoid federal abandonment approvals by unilaterally

designating lines as spurs. Conrail was at all times represented by experienced legal counsel who knew or should have known the law prior to unlawfully selling railroad property to the LLCs without first obtaining abandonment authorization. This was especially the case since the City raised the issue with the railroad prior to the unlawful 2005 sale to the LLCs.

The LLCs upon acquisition promptly sought demolition permits for the Embankment. Further negotiations failed. City et al filed a Petition for a declaration that the property was a line of railroad. City of Jersey City, et al -- Petition for a Declaratory Order, F.D. 34818, filed January 12, 2006. The LLCs sought more time to respond to the petition, and began to demolish railroad stanchions. On January 23, 2006, City et al opposed the extension unless a stay were entered to prevent destruction of remaining rail structures, supported by a Verified Statement of Mr. Curley (included in the opposition) recounting the LLCs' apparent race to present STB and City et al with another fait accompli (demolition of stanchions).<sup>2</sup> STB warned Conrail and the LLCs that they assumed the risk of premature salvage of the line,<sup>3</sup> and subsequently noted that the LLCs (referred to as SLH) had agreed to halt further demolition

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<sup>2</sup> A copy of the opposition and request for a stay, and Mr. Curley's Verified Statement, is contained in Appendix 2.

<sup>3</sup> City of Jersey City et al - Pet. Dec. Order, F.D. 34818, Dec. p. 2 n.2, served Jan. 24, 2006.

during the course of the proceeding.<sup>4</sup> The LLCs, however, continued to pursue state and local permits for demolition. These efforts are now largely stayed pending an outcome of STB proceedings, although the LLCs bring repeated "OPRA" (state law open records) lawsuits against City (and sometimes the Embankment Coalition) seeking documents the LLCs claim are germane to their stayed litigation, and also seeking attorneys' fees.

Conrail continues to refuse to disclose the relevant documents long ago sought by the City. Because this proceeding was in abeyance until August 11, 2014, City et al have had no opportunity to seek the relevant documents. On August 11, 2014, City et al served discovery requests in this proceeding against Conrail seeking the relevant documents. Conrail has responded only with objections. City took two actions in response. City filed a motion with STB to compel Conrail to supply some of these documents to City pursuant to this Board's discovery rules. (This motion is currently pending.) City also served a set of document requests upon the LLCs. The date for the LLCs' response has not yet expired. City et al expect the documents, if ever produced, to corroborate and to extend the evidentiary

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<sup>4</sup> City of Jersey City et al - Pet. Dec. Order, F.D. 34818, Dec. p.2, served Feb. 8, 2006.

showing that Conrail and the LLCs engaged in an unlawful anticipatory demolition of the Harsimus Branch.

At no point in this entire process was any portion of the Harsimus Branch ever offered to the City (or anyone else) in a lawful fashion. At no point did Conrail obtain an abandonment authorization, and at no point did Conrail provide proof that none was required. No party, let alone the City, could lawfully acquire the property without an abandonment authorization, nor could any party, let alone the City, acquire the property in a fashion that complied with the title standards in the applicable standards for real estate transactions involving Conrail property in New Jersey.

Third, the LLCs and Conrail from time to time have argued that the City declined opportunities to buy the Harsimus Branch properties.<sup>5</sup> As already noted, Conrail never offered the property to the City in a lawful fashion, nor did Conrail ever

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<sup>5</sup> For example, in 212 Marin Boulevard, LLC et al. v. City of Jersey City, Joanne Monahan, et al., NJ Superior Court, Hudson County, HUD-L-4908-05, First Amended Complaint (Dec. 30, 2009), complains that the City "had several chances to purchase the property" under state law, but failed to do so, and otherwise should have purchased the property without any STB authorization. See id. para 2. According to the LLCs, pursuit of STB remedies and state remedies triggered by STB proceedings (N.J.S.A. 48:12-125.1) by the City and others (Complaint paras 61-68) deprived the LLCs of federal constitutional rights causing the LLCs to be entitled to damages under 42 USC 1983 (Complaint, fourth cause of action) and allegedly because seeking compliance with federal law is now a tort (fifth and sixth causes). The Complaint seeks to prohibit the City from

offer the property to the City in a fashion that the City could obtain good title pursuant to applicable title standards. The

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consideration of "railroad abandonment" issues and further seeks damages and attorneys' fees. This is another SLAPP-type suit in that the LLCs sued not only the City but also Joanne Monahan, a member of the City's Law Department, to silence and to burden her personally.

The basic legal theory of Conrail's chosen developer (the LLCs) and, at least until the ruling of the D.C. Circuit in City of Jersey City v. Conrail, supra, 668 F.3d 741, Conrail as well, is that the City should have joined Conrail and the LLCs in evading federal jurisdiction over abandonment of rail lines. Their view was that the City should ignore STB and simply use state law eminent domain to buy the line. That was a central point of their SLAPP suit against City et al's undersigned counsel in 212 Marin Boulevard, et al v. Montange, HUD-L-2196-11. As indicated, the LLCs are still asserting that view in state court, and are suing City and threatening "others" (the suit lists a host of John Doe defendants) with liability for damages until and unless they also join the LLCs and Conrail in evading federal remedies. The LLCs manager, referencing the LLCs' suit against the City for violating 42 USC 1983 and tort law for asserting this agency's jurisdiction, publicly indicates that he implements his threats to punish his adversaries. Transcript of Zoning Board of Adjustment Proceeding, supra, March 30, 2011 at 134. The developer acknowledges that he has threatened to bankrupt personally the leadership of the Embankment Preservation Coalition "when this is all over." Transcript, supra, April 5, 2011, at p. 146. He also said he would "devastate" the City. Id. at 140.

The LLCs now admit that the Harsimus Branch was transferred to Conrail as a line of railroad subject to STB jurisdiction. The courts have so determined in a final judgment. The LLCs nonetheless continue to pursue claims against the City and its legal counsel, and continue to threaten litigation against "others" (like the leadership of the Coalition) on the theory that City and "others" infringe on the LLCs' "civil rights" and commit torts by seeking lawful remedies at the STB and by refusing to evade this Board's jurisdiction. This is a further confirmation of, and demonstration of the LLCs' unremitting commitment to, the original and on-going scheme of Conrail and the LLCs to engage in an anticipatory demolition of the Harsimus Branch and to evade this Board's jurisdiction. It is also a cynical abuse of national and state legal proceedings.

City is not required to act unlawfully, or to acquire bad title simply to convenience Conrail in evading STB regulation and historic preservation laws. Accusing the City of failure to take advantage of an unlawful opportunity is like accusing one spouse of failing to beat his spouse. The answer is that spouse beating is unlawful and indeed immoral. As the D.C. Circuit clearly held, the City is within its rights to "refus[e] to invade federal jurisdiction and to engage in unlawful self-help." City of Jersey City v. Conrail, 668 F.3d 741, 746 (D.C. Cir. 2012).

In the 1990's, the Jersey City Redevelopment Agency (JCRA) worked with Conrail on various redevelopment plans for the Harsimus Branch properties, which plans apparently envisioned conversion of the Branch into residential housing. But in 1999, the relevant portion of the Harsimus Branch (namely, the Embankment) was determined eligible for the State and National Registers of Historic Places. Conrail was well aware of that determination. Conrail's president sent a sworn letter, dated June 4, 1999, to Administrator Guzzo of the New Jersey Department of Environmental Protection (DEP) objecting to the listing of the Harsimus Embankment parcels because that would preclude JCRA from altering the site without approval from the DEP. Conrail was concerned that historic regulation attendant to such a designation would be detrimental to Conrail's profits

from disposing of the line. Conrail's sworn letter dated June 4, 1999, is contained in Appendix 3.

By letter dated January 25, 2000, DEP specifically advised Conrail that the property was listed on the State Register on December 29, 1999. DEP confirmed that the listing prevents any state or local agency from undertaking a project encroaching on listed property without DEP approval. This letter (previously filed) is supplied again in Appendix 3. As a result, JCRA - whose interest in the line was limited to uses that would encroach on the property -- no longer had an acquisition interest, and so advised Conrail. However, JCRA's inability to proceed with an acquisition plan due to the 1999 historic designation of the Embankment because JCRA envisioned an inappropriate development of historic property did not mean that the City had somehow waived its right to object to the destruction of the Embankment by others, nor did it mean that the City had waived any rights lawfully to acquire the property for uses consistent and compatible with its historic character. To claim that the City's rights were somehow waived would amount to claiming that a determination that a property is eligible for state and federal historic protection disables state and local governments from protecting it. That would be absurd. As the D.C. Circuit instead held, "the fact that the City could have purchased the property in no way absolves Conrail of its legal

duty - which, again, we must assume for purposes of standing - to seek STB authority to abandon the Harsimus Branch before selling it to the LLCs." City of Jersey City v. Conrail, supra, 668 F.3d at 746.<sup>6</sup>

Indeed, with the election of Mayor Cunningham in July 2001, the City actively began pursuing adaptive re-use of the property for purposes consistent with historic preservation. See Jersey City Planning Director Robert Cotter declaration, para 10, dated May 7, 2006, filed in F.D. 34818, and filed in AB 167-1189X with City et al's "Summary Statement" on Jan. 21, 2009. Among other things, on March 13, 2003, the Embankment Coalition submitted to Conrail a package of support letters expressing the willingness of the City to acquire the property, including a letter signed by all nine City Council members. Id para 11. City adopted an ordinance conferring historic landmark status on the property. City held meetings with Conrail. Id. paras 12-13. Conrail, evidently upset with the historic regulation, asserted it was selling the property to a private developer, and at the same time took the position that City's condemnation authority was pre-empted. Id. para 13. A consultant (Andrew Strauss)

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<sup>6</sup> Since the United States District Court subsequently held that the Harsimus Branch was conveyed to Conrail as a line of railroad subject to STB abandonment jurisdiction, the assumption for purposes of standing is now a legally established requirement.

undertook to determine if Conrail had obtained abandonment authority. Id. He found none. Id. Accord, Verified Statement of Andrew Strauss (also filed in AB 167-1189X with "Summary Statement" on Jan. 21, 2009).

Mr. Strauss, the aforementioned consultant, in his Verified Statement and annexed report, already on file, recounts extensive contacts with STB and State officials, none of whom found any record of abandonment. Indeed, Mr. Strauss in his Nov. 17, 2004, report at p. 5 annexed to his Verified Statement indicates he contacted Mr. Daniel Horgan (LLCs' counsel herein) to review his files for any evidence of STB abandonment authority. Mr. Horgan indicated he would review his files.

According to a subsequent Declaration of Mr. Horgan filed in U.S.D.C. 09-1900 (discussed infra and presented in Appendix 4), Mr. Horgan did not become an attorney for the LLCs until 2008, and he indicates he did not review his files until after the LLCs and Conrail lost their claim that City et al lacked standing to assert their federal STB remedies in City of Jersey City v. Conrail, 668 F.3d 741 in early February, 2012. Horgan para 14, in Appendix 4. Ultimately, when he finally did review his files, Mr. Horgan conceded that there was no good faith basis to maintain that the Harsimus Branch at issue here was conveyed to Conrail as anything other than a line of railroad subject to STB abandonment jurisdiction. He therefore concludes

on behalf of the LLCs that Conrail made fraudulent misrepresentations when Conrail claimed that no abandonment authority was necessary for the Harsimus Branch.<sup>7</sup> In short, the

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<sup>7</sup>An his declaration included in Appendix 4, Mr. Horgan states that he has concluded that no one in good faith could assert that the Harsimus Branch was something other than a line of railroad subject to STB abandonment jurisdiction based on information in existence prior to 2005 and that he was not retained by the LLCs until 2008. However, since 2008, Mr. Horgan has participated in litigation for the LLCs claiming that STB abandonment jurisdiction must be ignored by City et al. Indeed, he has participated in multiple suits against City, or City, RTC, Embankment Coalition and their attorneys. Compare HUD-L-4908-05 (Complaint alleging that, inter alia, pursuit of remedies at STB violates civil rights of LLCs and is a tort) with 212 Marin Boulevard ret al v. Montange, et al, HUD-L-2196-11, the LLCs' SLAPP suit alleging inter alia some sort of malpractice if an attorney assists City of Jersey City in seeking compliance with federal abandonment law rather than in acting illegally under state law and facilitating evasions of federal rail abandonment law.

On 22 November 2013, City et al formally requested this Board to lift the abeyance order in AB 167-1189X in light of the judicial determination of this Board's jurisdiction over the Harsimus Branch. The LLCs and Conrail resisted this due to the LLCs' appeal of the summary judgment that the Harsimus Branch was a line. (The appeal was unsuccessful.) Nonetheless, on June 26, 2014, the LLCs per Mr. Horgan filed a letter in the LLCs' civil rights suit in state court (HUD-L- 4908-05) contending the City was delaying AB 167-1189X (which was still under an abeyance order dating from 2010). On May 8, 2014, the LLCs per Mr. Horgan filed a petition (F.D. 35825) seeking an exempt abandonment, and -- along with Conrail -- on that basis sought further delay in re-starting AB 167-1189X. In short, Conrail's chosen developer (the LLCs) continues to maintain in state court that (a) the City's refusal to cooperate with the LLCs and Conrail in evading STB jurisdiction is a federal civil rights violation and a tort, and, (b) incredibly, that the City is somehow responsible for delays in this proceeding when the proceedings (i) were delayed for six years due to arguments of the LLCs and Conrail which the LLCs now denounce as fraudulent, and (ii) were further delayed (over City et al's objection) at

LLCs have supplied a legal opinion that in 2004 and 2005, that a party on reasonable inquiry would have concluded that the Harsimus Branch was a line of railroad subject to STB abandonment jurisdiction. This is an admission that a party would have to be willfully ignorant (blind) to assert the contrary on the issue.

Although City secured grants (see Cotter Declaration) for acquisition of the Harsimus Branch in 2004 and in 2005, Conrail remained unresponsive. Ultimately the City retained eminent domain counsel (Mr. Curley). Conrail, as already indicated, still remained uncooperative. While holding off Mr. Curley with professed confusion and failures to provide information in a timely fashion throughout 2005, Conrail issued deeds to the LLCs for the property. The deeds on their face declared the property to be part of a line of railroad. The LLCs accepted those deeds, without proof of abandonment or that no abandonment authorization was required. This fait accompli was not only a knowing or willfully blind evasion of this Board's jurisdiction, but also it was a violation of New Jersey title standards as set forth in the Handbook, Appendix 1 which required proof of either STB abandonment authority or that none was required. To

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the request of the LLCs and Conrail in order to accommodate the LLCs' filing of additional legal proceedings.

reiterate, the 2005 sale can only be viewed as an intentional evasion of STB jurisdiction, including NHPA section 106, in that Conrail (and for that matter the LLCs) knew, or were willfully blind, to the fact that the property was part of a line of railroad under STB abandonment jurisdiction.

Indeed, since the Harsimus Branch was a line of railroad, and remains so until there is an effective abandonment, it is illegal for the City to acquire it by eminent domain. This Board must first authorize abandonment. By similar token, the LLCs' acquisition in 2005 was illegal. Conrail's illegal sale of the line to the developer in 2005 in the face of inquiries from City's eminent domain counsel was a clear anticipatory demolition.

Fourth, in U.S.D.C. 09-1900, the LLCs supplied a declaration by their attorney Daniel Horgan (set forth in Appendix 4) which does two things germane here. The initial point with which Mr. Horgan deals is the fact that he was put on notice in 2004 by a consultant retained by the Coalition that there was no evidence that the Harsimus Branch was lawfully abandoned. He has a difficult time reconciling this with his representation of the LLCs, commencing he says in 2008, because in (a) state court lawsuits, including a SLAPP suit against the City, Coalition, RTC and their attorneys, and (b) proceedings before this agency, including F.D. 35825, he forcefully argued

the opposite. This straddle is particularly painful since the LLCs have now stipulated that the Harsimus Branch was conveyed to Conrail as a line subject to STB abandonment jurisdiction, and indeed have admitted in United States District Court that Conrail fraudulently misrepresented the contrary to them, the City, the courts and this agency. Thus, the LLCs seem still to be maintaining positions in various tribunals that the LLCs elsewhere have stipulated to be false, and have accused Conrail of fraudulent misrepresentation for so stating. It is a difficult reconciliation, and nothing herein should be read to suggest that City et al believe, aver, or admit that Mr. Horgan is successful in his effort in this portion of the LLCs' filing.

The second and more interesting part of the Horgan declaration for the LLCs sets forth the results of what their attorney states was his independent investigation into the regulatory status of the Branch.<sup>8</sup> Based on the evidence the LLCs' attorney marshalled, he concludes that there was "no longer a good faith basis" to claim that the Harsimus Branch

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<sup>8</sup> The Horgan declaration indicates that the he did not get around to examining whether Conrail had lawfully abandoned the line until after the D.C. Circuit determined that City et al had standing to pursue their STB remedies in City of Jersey City v. Conrail, 668 F.3d 741 (2012). The LLCs and Conrail had been disputing the standing of City et al on their prior theory that the Harsimus Branch was not a line, and that STB jurisdiction, which the LLCs had been disputing based on their prior theory that the Harsimus Branch was not a line.

properties were a "spur" nor that they were conveyed as something other than "as a line of railroad in 1976." App. 4, p.8, para 22.

But the question was never in doubt. Conrail's only rationale at the relevant time (2005) for the proposition that the Harsimus Branch was not a line was that it was an unregulated "spur." Everything else presented by Conrail or the LLCs since that time has been post hoc rationalization and, as the LLCs now argue, fraudulent. However, the Harsimus Branch was never a spur as that term is used for jurisdictional purposes. The portion of the Branch at issue was former freight mainline - the stem by which the yards on the Hudson River were reached. The mainline served many shippers, and connected to other rail lines, at both ends. It was electrified. It was documented in the nomination papers for the State and National Registers. The law has always been clear that Conrail cannot evade STB abandonment jurisdiction by labeling a line as a "spur," or purporting to abandon it by non-use. As to notice, Conrail's own deeds to the LLCs stated the property was part of a line of railroad.

In any event, Mr. Horgan attests that the documents he reviewed (all pre-dating 2005) "provided evidence that Conrail's representations to the LLCs in 2005 that the Embankment was merely a spur, [sic] it either knew these statements were false

or was negligent in its representations to the LLCs.” Id. In other words, in the professional opinion of the LLCs’ attorney, at the time of the sale to the LLCs in 2005, Conrail knew or should have known the Branch was not a spur but instead was conveyed to Conrail as a line subject to STB abandonment jurisdiction. But if Conrail knew or should have known, so should any purchaser. This is reaffirmed by the New Jersey title practice handbook, which places a duty of inquiry on purchasers to obtain proof of abandonment authority or that none was required. All of this corroborates that Conrail engaged in an intentional (or an equivalent willfully blind) evasion of STB abandonment jurisdiction in 2005. It follows that Conrail engaged in an anticipatory demolition in violation of NHPA section 110(k).

Fifth, the LLCs seek complete destruction of the Harsimus Embankment despite its protection under NHPA section 106 and in the face of their plainly illegal acquisition. The manager of the LLCs (Mr. Hyman) recently offered to donate the Embankment (stones and fill) to Hoboken for hurricane flood control. See Declaration of Stephen Marks, June 14, 2014 in Appendix 5. The LLCs stated the LLCs have “55,000 CU of big stones and 155,500 of fill that needs to be removed expeditiously in an orderly and safe manner” for use by Hoboken for flood control. Jan. 19, 2014 comment from Steven Hyman in [www.rebuild](http://www.rebuild)

bydesign.org/project/comprehensive-strategy/ (download excerpts attached in App. 5). Conrail is the LLCs' stalwart wingman in Embankment destruction. City et al filed in this docket on or about April 25, 2008, Conrail's joinder - signed by Mr. Broder as Conrail's V.P. and General Counsel - in the LLCs' demolition requests concerning the Embankment.

Equally bad for Conrail's legal position, Conrail has stated that if the deeds to the LLCs are voided due to the unlawful abandonment, it will simply re-issue them. See Conrail Comments in this docket filed Jan. 6, 2009, at p. 18 n. 14. We now know something we did not know then: Conrail entered into a contract with the LLCs in 2007 (annexed as part of Appendix 4) requiring Conrail to secure the property to the LLCs in the event this Board voided the deeds. This contract was entered after this Board determined that the Harsimus Branch was a line of railroad subject to this agency's abandonment jurisdiction, and before any abandonment proceeding was filed. A contract to destroy historic property before a proceeding is filed, much less concluded, constitutes an intent to demolish in willful evasion of NHPA section 106. City et al did not learn of the 2007 contract until the LLCs made it available in legal proceedings in 2012. A copy is enclosed in Appendix 4. That contract is the apparent reason Conrail on January 6, 2009, indicated that voiding the deeds would be ineffective because

the railroad would re-deed the property to the LLCs. However, the ready answer to this kind of anticipatory demolition and evasion of STB remedies is to condition any abandonment not simply on voiding the deeds, but in addition on a requirement that Conrail convey the property to the City on the same terms as offered to the LLCs.

The LLCs stated in U.S.D.C. 09-1900 that there were other similar agreements to the 2007 agreement. A motion to compel Conrail to produce documents germane to any such agreements is pending, and City et al have also sought same from the LLCs. In the event that Conrail and the LLCs respond to the discovery requests, additional relevant information may surface.

By entry into the 2007 contract in Appendix 4, the LLCs and Conrail affirmed their intent to evade not only this Board's jurisdiction, but any meaningful compliance with section 106 of the National Historic Preservation Act. There can be no meaningful discussion of preservation alternatives when the railroad alienated the property to a developer seeking its destruction, joined in requests for destruction, and then entered into a contract pledging to assist in destruction before any proceeding was filed at STB in the event, in some subsequent proceeding, the agency sought to provide meaningful relief. The 2005 sale was an anticipatory demolition; the 2007 contract reiterates that intent to evade the law, and amounts itself not

just to a confirmation of an anticipatory demolition, but another action in furtherance of anticipatory demolition.

#### CONCLUSION

Conrail's sale of the Harsimus Branch to the LLCs in 2005 was a fait accompli in evasion of STB jurisdiction and for the purpose of rendering STB-administered remedies, including section 106, meaningless. NHPA section 110(k) applies. The Conrail/LLCs' 2007 agreement to secure the property to the LLCs even if the deeds are voided re-affirms the intent to evade and to engage in an anticipatory demolition. The Board has said that it "will take whatever steps [are] necessary to enforce compliance with [its obligations under NEPA and NHPA]."<sup>9</sup> Given what the evasion and anticipatory demolition activities of Conrail and the LLCs not only in 2005 but also before and after that date, the "steps necessary" for meaningful NHPA compliance are clear: No abandonment may be granted unless the deeds are voided and Conrail is ordered to transfer the property to the City on terms equivalent to those of Conrail's sale of the property to the LLCs. Moreover, this relief is compatible with N.J.S.A. 48:12-125.1.

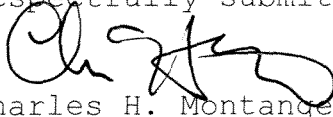
The sooner this relief is afforded, the more merciful for the public, due to the threats and burdens emanating from the

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<sup>9</sup> Consummation of Rail Line Abandonments, *supra*, at p. 4.

LLCs and their myriad of lawsuits and conflicting claims and charges against City et al and "others" not yet named.

Respectfully submitted,



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426 NW 162d St.  
Seattle, WA 98177  
(206) 546-1936  
Fax: -3739  
Counsel for City of Jersey City,  
Rails to Trails Conservancy,  
and Pennsylvania Railroad Harsimus  
Stem Embankment Preservation Coalition

Of counsel: Andrea Ferster  
General Counsel  
Rails to Trails Conservancy  
The Duke Ellington Building  
2121 Ward Court, NW  
5th Floor  
Washington, D.C. 20037

#### APPENDICES

##### Appendix 1

- a) L. Fineberg, Handbook of New Jersey Title Practice p. 98-4 to 5 (Second Ed. 2000)
- b) L. Fineberg, id., pp. 98-1 to 6 (3d ed. revised 2005)
- c) CSX, Motion for Leave (excerpts) dated Dec. 11, 2007, in F.D. 33888 (Sub-no. 101), at p. 6 (discussing NY Transp. Law section 18 voiding deeds in violation of preferential purchase right)
- d) Letter, Jersey City Mayor to Conrail Associate General Counsel dated March 4, 2008, notifying of concerns about AB 167-1189X and intent to invoke NJSA 48:12-125.1

##### Appendix 2

- a) J. Curley Declaration dated Nov. 3, 2005 (collects correspondence with Conrail in which City seeks information and access concerning Harsimus Branch prior to sale to LLCs) in 212

Marin Boulevard LLC et al v. City of Jersey City, HUD-L-4908-05, dated Nov. 3, 2005 (civil rights and tort claims against City and others for assertion of STB jurisdiction over Harsimus Branch abandonment)

b) Opposition to LLCs' Extension of Time (due to destruction of stanchions by LLCs), including Jan. 21, 2006 John Curley Declaration) in City of Jersey City, et al - Pet. Dec. Order, F.D. 34818, Jan. 23, 2006

#### Appendix 3

a) Conrail President's letter of June 4, 1999, objecting to State and National listing of Harsimus Branch

b) NJ DEP letter of Jan. 25, 2000, advising Conrail of listing

#### Appendix 4

a) Declaration of Daniel Horgan in City of Jersey City v. Conrail, USDC for DC No. 09-1900, filed 11/08/2012, ECF #94-1 (Exhibits other than Ex 2 available on USDC DC website)

b) Exhibit 2 to Horgan Dec: copy of the "Memorandum of Understanding between Conrail and the LLCs dated October 12, 2007"

#### Appendix 5

a) Declaration of Stephen Marks in AB 167-1189X, executed June 10, 2014

b) Steven Hyman comments on Rebuild by Design (Hoboken flood control proposal) dated 1/19/2014, as downloaded 2/23/2014

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Attachment I

New Jersey Statutes Annotated

**48:12-125.1. Railroad rights of way; acquisition; abandonment; sale, conveyance.**

1. a. In order to permit the State and its political subdivisions to receive notice of, and be afforded an opportunity to acquire, by purchase or condemnation, railroad rights of way proposed to be abandoned, any railroad company which makes application to the Surface Transportation Board for authority to abandon any part of its right of way on which passenger or freight services are operated, or to abandon, sell, or lease any of its right of way over which services have previously been authorized for abandonment and title to such right of way currently remains with the railroad shall, within 10 days of making such application, serve notice thereof upon the State and upon each county and municipality in which any part of the right of way proposed for abandonment is located.

b. No sale or conveyance of any part of such right of way shall thereafter be made to any entity other than the State, or a county or municipality, for a period of 90 days from the date of approval by the Surface Transportation Board of the application for abandonment or from the date of service of the notice required by subsection a. of this section, whichever occurs later, unless prior thereto each governmental entity entitled to such notice shall have filed with the railroad company a written disclaimer of interest in acquiring all or any part of said right of way during the time period in which a railroad company is restricted from selling or conveying any part of a right of way pursuant to this subsection.

c. During the period of 90 days in which a railroad company is prohibited from selling or conveying any part of a right of way pursuant to subsection b. of this section, such railroad company shall negotiate in good faith for the sale or conveyance of the right of way with the State, or with any municipality or county in which the right of way proposed for abandonment is located and which expresses written interest in acquiring such right of way.

d. Any sale or conveyance of a right of way made after the expiration of

the foregoing 90-day period to any entity, other than the State or a county or municipality in which any part of the right of way proposed for abandonment is located, shall be subject to the right of first refusal by any of the foregoing governmental entities, provided that the governmental entity has made an offer to purchase such right of way during the 90-day period and which offer was refused by the railroad company. The governmental entity shall have no less than 90 days from either the date of receipt from the railroad company of an offer to purchase the right of way by an entity, other than one of the foregoing governmental entities, or any other contract setting forth the terms and conditions governing the sale to which this right of first refusal is applicable or the effective date of abandonment as authorized by the Surface Transportation Board, including the expiration of any stays, whichever occurs later, to exercise this right of first refusal. Upon exercising this right of first refusal, the governmental entity shall purchase the right of way for the same amount agreed upon between the railroad company and the person to whom the company attempted to sell or convey such right of way pursuant to this subsection.

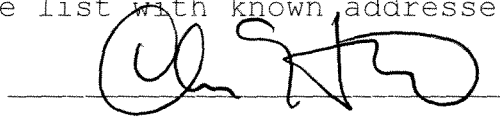
e. Any sale or conveyance made in violation of P.L.1967, c.282 (C.48:12-125.1 et seq.) shall be void.

As used in this act "right of way" means the roadbed of a line of railroad, not exceeding 100 feet in width, as measured horizontally at the elevation of the base of the rail, including the full embankment or excavated area, with slopes, slope ditches, retaining walls, or foundations necessary to provide a width not to exceed 100 feet at the base of the rail, but not including tracks, appurtenances, ballast nor any structures or buildings erected thereon.

L.1967, c.282, s.1; amended 2009, c.323.

# Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, this 2<sup>nd</sup> day of September 2014 addressed to Daniel Horgan, counsel for the LLCs, Waters, McPherson, McNeill, P.C., 300 Lighting Way, P.O. Box 1560, Secaucus, NJ 07096; and Robert M. Jenkins III, counsel for Conrail, Mayer Brown LLP, 1999 K Street, N.W., Washington, D.C. 20006-1101 and other parties on the attached service list with known addresses.



## Service List

[AB 167 (Sub-no. 1189X)]

- with address corrections as of August 2014 -

Robert Jenkins III, Esq.  
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For Conrail

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Waters, McPherson, McNeill PC  
300 Lighting Way  
Secaucus, NJ 07096  
For 212 Marin et al

And the following self-represented individuals or entities:

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NJ Dept. Environmental Protection  
P.O. Box 420  
Trenton, NJ 08625-0420

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Hudson County Division of Planning  
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Meadowview Complex  
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Secaucus, NJ 07094

Joseph A. Simonetta, CAE,  
Executive Director  
Preservation New Jersey  
414 River View Plaza  
Trenton, NJ 08611

Justin Frohwith, President  
Jersey City Landmarks Conservancy  
54 Duncan Avenue  
Jersey City, NJ 07303

Eric Fleming, President  
Harsimus Cove Association  
344 Grove Street  
P.O. Box 101  
Jersey City, NJ 07302

President  
Hamilton Park Neighborhood Association  
PMB 166  
344 Grove Street  
Jersey City, NJ 07302

Jill Edelman, President  
Powerhouse Arts District Nbd Ass'n  
140 Bay Street, Unit 6J  
Jersey City, NJ 07302

President  
The Village Nbd Ass'n  
365 Second Street  
Jersey City, NJ 07302

President  
Van Vorst Park Association  
91 Bright Street  
Jersey City, NJ 07302

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CNJ Rail Corporation  
81 Century Lane  
Watchung, NJ 07069

## Appendix 1

- a) L. Fineberg, Handbook of New Jersey Title Practice p. 98-4 to 5 (Second Ed. 2000)
- b) L. Fineberg, id., pp. 98-1 to 6 (3d ed. revised 2005)
- c) CSX, Motion for Leave (excerpts) dated Dec. 11, 2007, in F.D. 33888 (Sub-no. 101), at p. 6 (discussing NY Transp. Law section 18 voiding deeds in violation of preferential purchase right)
- d) Letter, Jersey City Mayor to Conrail Associate General Counsel dated March 4, 2008, notifying of concerns about AB 167-1189X and intent to invoke NJSA 48:12-125.1

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2000**

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by

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

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**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.<sup>1</sup> The case did *not* discuss whether ConRail is exempt from railroad *franchise* taxes and imposed pursuant to different sections of the statute.<sup>2</sup> Accordingly, ConRail is *exempt* from railroad taxes imposed *subsequent* to 1981, but not prior thereto.<sup>3</sup> 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.*<sup>4</sup>, 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.<sup>5</sup>
- 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

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<sup>10</sup>(...continued)  
R.R.R.A. 1988).

<sup>1</sup>N.J.S.A. 54:29A-7.

<sup>2</sup>N.J.S.A. 54:29A-13 & -14.

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

<sup>4</sup>See N.J.S.A. 48:3-7; 48:12-23.1.

<sup>5</sup>With 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.<sup>1</sup>

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:

---

<sup>1</sup>Note 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.<sup>1</sup>

**§9808. Conveyances from the State.** As noted previously, the State of New Jersey has acquired much land formerly owned by ConRail.<sup>2</sup> A statute<sup>3</sup> 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 statute<sup>4</sup>, or other applicable law. In addition, proof of compliance with the items previously set forth,<sup>5</sup> should generally be requested (with the exception of item no. 3).<sup>6</sup>

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

---

<sup>1</sup>See Chapter 45.

<sup>2</sup>See §9803, *supra*.

<sup>3</sup>N.J.S.A. 27:25-1 *et seq.*

<sup>4</sup>*Id.*

<sup>5</sup>See §9806, *supra*.

<sup>6</sup>N.J.S.A. 27:25-8.

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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.<sup>1</sup> 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.<sup>2</sup>

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 1973**<sup>3</sup>, 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.<sup>4</sup>

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.<sup>5</sup>

**§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

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

<sup>2</sup>*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).

<sup>3</sup>45 U.S.C. §§701 *et seq.*

<sup>4</sup>45 U.S.C. §§711 *et seq.* The USRA has ceased to exist as an entity.

<sup>5</sup>See 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.<sup>1</sup>

**§9804. Government Regulation.** Railroads are regulated by the Surface Transportation Board ["STB"] (which is part of the United States Department of Transportation)<sup>2</sup> and by the New Jersey Board of Public Utilities and the New Jersey Department of Transportation.<sup>3</sup> 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.<sup>4</sup>

**§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.<sup>5</sup> Class I Railroad property (the main stem) is tax exempt.<sup>6</sup> Class II Railroad property (other real estate used for railroad purposes) is taxable, but the tax is paid directly to the State.<sup>5</sup> Thus, Class II property is exempt from local assessment and taxation.<sup>7</sup> Class III Railroad property (passenger facilities) is treated like Class I property.<sup>8</sup> Railroads also pay a franchise tax pursuant to statute.<sup>9</sup> Other railroad-owned lands which are not used for railroad purposes are subject to local property taxation by municipalities.<sup>10</sup>

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

<sup>2</sup>The 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).

<sup>3</sup>See §§ 9812 and 9808, *infra* (respectively).

<sup>4</sup>N.J.S.A. 48:12-125.1 *et seq.*

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

<sup>6</sup>N.J.S.A. 54:29A-17.

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

<sup>8</sup>N.J.S.A. 54:29A-7 & -17.

<sup>9</sup>N.J.S.A. 54:29A-13 & -14.

<sup>10</sup>N.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.<sup>1</sup> 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.<sup>2</sup> The case did *not* discuss whether ConRail is exempt from railroad *franchise* taxes and imposed pursuant to different sections of the statute.<sup>3</sup> Accordingly, ConRail is *exempt* from railroad taxes imposed *subsequent* to 1981, but not prior thereto.<sup>4</sup> New Jersey Transit, as a government agency, is tax exempt.

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- 3) Approval by the Department of Transportation or the Board of Public Utilities pursuant to N.J.S.A. 48:2-1 *et seq.*<sup>5</sup>, 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.<sup>6</sup>
- 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.

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<sup>1</sup>45 U.S.C. §581(c)(5).

<sup>2</sup>N.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).

<sup>3</sup>N.J.S.A. 54:29A-13 & -14.

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

<sup>5</sup>See N.J.S.A. 48:3-7; 48:12-23.1.

<sup>6</sup>With 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.<sup>1</sup>

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.<sup>2</sup>

**§9808. Conveyances from the State.** As noted previously, the State of New Jersey has acquired much land formerly owned by ConRail.<sup>3</sup> A statute created the **New Jersey Transit Corporation**, which is given the power to operate railroads.<sup>4</sup> 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.*<sup>5</sup> In

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

<sup>2</sup>See Chapter 45.

<sup>3</sup>See §9803, *supra*.

<sup>4</sup>N.J.S.A. 27:25-1 *et seq.*

<sup>5</sup>See preceding Note.

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

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.<sup>2</sup> 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.<sup>3</sup> With respect to mortgages, the conveyances made pursuant to the Consummation Orders were (supposedly) free and clear of liens.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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

<sup>2</sup>See §9806, *supra*.

<sup>3</sup>See Chapter 70.

<sup>4</sup>See §9803, *supra*.

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

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

<sup>7</sup>See §804, *supra*.

**§9812. Conveyances by Other Public Utilities.** The Board of Public Utilities, discussed above, does not merely regulate the activities of railroads.<sup>1</sup> Rather, it exercises jurisdiction over other **public utilities**, such as “bus operation, ... pipeline, gas, electric, light, heat, power, water, ...” etc.<sup>2</sup> 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.

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<sup>1</sup>See §9804, *supra*. See also §4514, *supra*.

<sup>2</sup>N.J.S.A. 48:2-13.

LAW OFFICES OF  
**LOUIS E. GITOMER**

LOUIS E. GITOMER  
LOU\_GITOMER@VERIZON.NET

December 11, 2007

THE ADAMS BUILDING, SUITE 301  
600 BALTIMORE AVENUE  
TOWSON, MARYLAND 21204-4022  
(202) 466-6532  
FAX (410) 332-0885

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

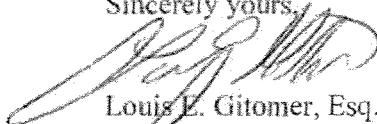
**Re: Finance Docket No. 33888 (Sub-No. 101), CSX Transportation, Inc.—  
*Petition for Declaratory Order***

Dear Secretary Williams:

Enclosed for e-filing is the Motion for Leave to Reply, Reply, and Motion for  
Procedural Schedule of CSX Transportation, Inc.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer, Esq.  
Attorney for CSX Transportation, Inc.

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388 (Sub-No. 101)

---

CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER

---

MOTION FOR LEAVE TO REPLY, REPLY, AND MOTION FOR PROCEDURAL  
SCHEDULE

---

Kim Bongiovanni, Esq.  
CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202  
(904) 359-1233

Louis E. Gitomer, Esq.  
Law Offices of Louis E. Gitomer  
600 Baltimore Avenue, Suite 301  
Towson, MD 21204  
(202) 466-6532

Attorneys for: CSX TRANSPORTATION, INC.

Dated: December 11, 2007

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388 (Sub-No. 101)

---

CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER

---

MOTION FOR LEAVE TO REPLY, REPLY, AND MOTION FOR PROCEDURAL  
SCHEDULE

---

CSX Transportation, Inc. (“CSXT”) respectfully requests the Surface Transportation Board (the “Board”) to permit CSXT to reply to the Reply of Frank Vitale and Francis Vitale (the “Vitale Reply”) and to establish a procedural schedule. There are four sections to this pleading: (1) a brief background; (2) justification for the Board accepting this reply to the Vitale reply; (3) a brief reply to the Vitale Reply; and (4) a request for the Board to establish a procedural schedule for the handling of this declaratory order proceeding.

**BACKGROUND**

By an Agreement dated February 20, 1986 (the “Agreement”)<sup>1</sup> Consolidated Rail Corporation (“Conrail”) contracted to sell to Frank Vitale and Francis Vitale (collectively, the “Vitalles”) “all of its right, title and interest in and the premises described in the Schedule attached hereto and enumerated as ‘Schedule A’, comprising approximately seven (7) acres, more or less, subject to a final survey.” Conrail reserved “a seventy-five (75) foot wide easement identified on the attached plans, which easement shall extend upward only to a

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<sup>1</sup> The Agreement is attached as Exhibit 1 to the Petition for Declaratory Order filed on October 4, 2007 by CSXT (the “Petition”).

decision at this time. Therefore, CSXT contends that the Board will benefit from having a more complete record as to the facts of this situation. The Board has accepted similar replies,<sup>6</sup> and CSXT respectfully requests the Board to accept the limited reply below.

#### REPLY OF CSXT

CSXT will generally use the headings in Section 2 of the Vitales Reply as the basis for this reply, for the items to which CSXT is replying.

**First.** The Vitales contend that CSXT has certified to the New York State Department of Transportation ("NYSDOT") that the Agreement will not interfere with railroad operations.

Section 18 of the Transportation Law of the State of New York requires that, prior to the disposition of any property which has been abandoned for rail transportation purposes, no railroad property owner shall dispose of such property without having first obtained notification from the Commissioner of the NYSDOT either that the preferential right of acquisition granted to the State under Section 18 does not apply to the property in question, or that a release of such preferential right has been granted. Section 18(1) continues: "Conveyances of property in violation of this section shall be null and void." In other words, if Section 18 applied to the property proposed to be conveyed under the Agreement, without a Section 18 waiver, conveyance of such property could not be insured by a title insurance company, and if it was made, with or without title insurance, the conveyance would be void or voidable.

CSXT certified to NYSDOT that the retention of the Railroad Easement under the Agreement ensured that the property submitted for Section 18 review was not "abandoned" for

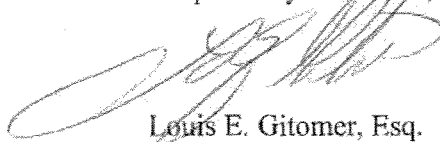
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<sup>6</sup> *Keokuk Junction Railway Company d/b/a Peoria and Western Railway—Lease and Operation Exemption—BNSF Railway Company*, STB Finance Docket No. 34974; *Keokuk Junction Railway Company d/b/a Peoria & Western Railway—Lease and Operation Exemption—BNSF Railway Company between Vermont and Farmington, IL*, STB Finance Docket No. 34918 (STB served December 6, 2007) at 4.

## CONCLUSION

CSXT respectfully requests the Board to accept the reply filed herein and establish the procedural schedule requested in order to determine that the termination of the Agreement by CSXT is in accord with the preemption provisions of 49 U.S.C. §11321.

Respectfully submitted,



Kim Bongiovanni, Esq.  
CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202  
(904) 359-1233

Louis E. Gitomer, Esq.  
Law Offices of Louis E. Gitomer  
600 Baltimore Avenue, Suite 301  
Towson, MD 21204  
(202) 466-6532

Attorneys for: CSX TRANSPORTATION, INC.

Dated: December 11, 2007

# 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 irretrievably 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.

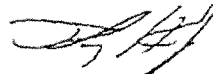
The preservation of history and access is embodied in the segment of the Harsimus Branch west of Marin Boulevard. The six Embankment blocks provide rock solid evidence of the might of the Pennsylvania Railroad. The Embankment is a lesson to be learned about Jersey City's role as the railhead of our nation. 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

## Appendix 2

a) J. Curley Declaration dated Nov. 3, 2005 (collects correspondence with Conrail in which City seeks information and access concerning Harsimus Branch prior to sale to LLCs) in 212 Marin Boulevard LLC et al v. City of Jersey City, HUD-L-4908-05, dated Nov. 3, 2005 (civil rights and tort claims against City and others for assertion of STB jurisdiction over Harsimus Branch abandonment)

b) Opposition to LLCs's Extension of Time (due to destruction of stanchions by LLCs), including Jan. 21, 2006 John Curley Declaration) in City of Jersey City, et al - Pet. Dec. Order, F.D. 34818, Jan. 23, 2006

**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.

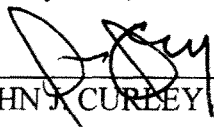
9. Attached as Exhibit H is letter from John K. Fiorilla, Esq. of Capehart Scatchard to John J. Curley, Esq. dated July 18, 2005.

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 – 16<sup>th</sup> Floor  
Philadelphia, PA 19103  
Attn: Director-Real Estate

Re: 6<sup>th</sup> 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

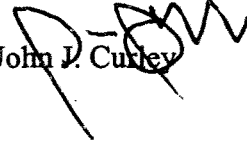
Page 2

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  
6<sup>th</sup> 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 6<sup>th</sup> Street Embankment properties in Jersey City.

We note from your letter of February 18<sup>th</sup> 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

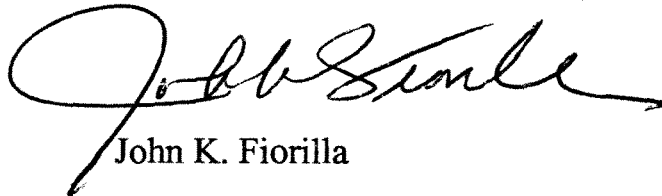
John J. Curley, Esq.  
Our File No. 0476.50485  
March 1, 2005  
Page 2

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](mailto: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: 6<sup>th</sup> 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.

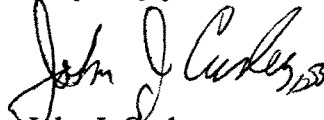
Please advise as to when it would be convenient for the appraisal inspection to take place.

**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



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*)

AJD498369

**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: 6<sup>th</sup> 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 6<sup>th</sup> 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

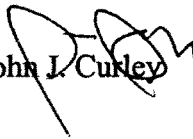
Page 2

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,

JJC:DB

  
John J. Curley

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

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.

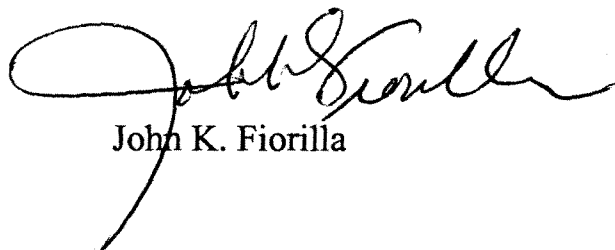
John J. Curley, Esq.  
Our File No. 0476.50485  
June 17, 2005  
Page 2

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", written over a horizontal line.

John K. Fiorilla

JKF/ajd

cc: Edward D. McKirdy, Esq.  
Carmin 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:

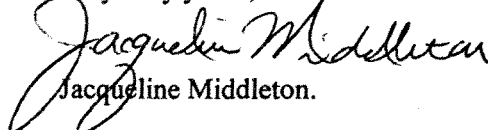
I represent the City of Jersey City in the acquisition of property commonly referred to as the Sixth Street Embankment. Thank you for your letter dated June 17, 2005. I will contact you regarding appraisal inspections which we can schedule after July 15, 2005 pursuant to your request.

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 (6<sup>th</sup> 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

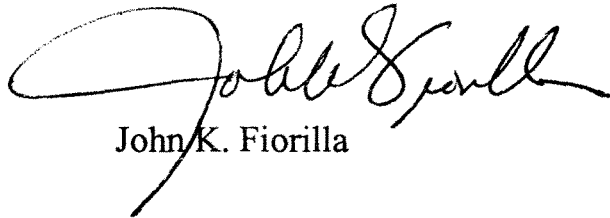
Page 2

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

AJD\503766

**JOHN J. CURLEY LLC**  
**Attorneys at Law**

**Jacqueline Middleton**

Harborside Financial Center  
1202 Plaza Ten  
Jersey City, NJ 07311

**JMiddleton@curlaw.com**

Tel: (201) 217-0700  
Fax: (201) 217-9765

November 2, 2005

**CERTIFIED AND REGULAR MAIL**

Edward D. McKirdy, Esq.  
136 South Street  
PO Box 2379  
Morristown, NJ 07962

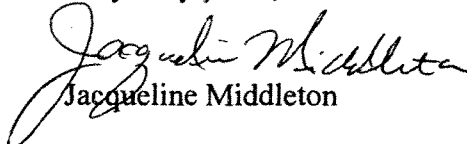
Re: Sixth Street Embankment Project  
Block 212, Lot M  
Block 247, Lot 50.A  
Block 280, Lot 50.A  
Block 317.5, Lot 50.A  
Block 354.1, Lot 50.A  
Block 389.1, Lot 50  
Block 415, Lots 50, 50.PL  
Block 446, Lot 18.A

Dear Mr. McKirdy:

I represent the City of Jersey City. Notice is hereby given by Jersey City of the exercise of its right to enter upon the above referenced property in order to conduct an appraisal inspection under the statutory authority granted to it by the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq., and specifically, N.J.S.A. 20:3-16.

Please be advised that representatives from Value Research Group, LLC and McGuire Associates will be entering the property to perform an appraisal inspection on Friday, November 18, 2005 at 10:00 am. Please encourage your client to exercise his right to accompany the appraiser during the inspection.

Very truly yours,

  
Jacqueline Middleton

JM/krh

Cc: Joanne Monahan, Asst. Corporation Counsel  
Gregory Corrado, Asst. Business Administrator  
Mr. Ben Delisle  
Mr. Hugh McGuire  
Mr. Paul Biesser

**COPY FILED**

**JOHN J. CURLEY LLC**  
Harborside Financial Center  
1202 Plaza Ten  
Jersey City, NJ 07311  
Telephone: (201) 217-0700  
Attorneys for Plaintiff

OCT 21 2005

MAURICE J. GALLIOLI, A.J.S.C.

CITY OF JERSEY CITY, a Municipal  
Corporation of the State of New Jersey,

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: HUDSON COUNTY

Docket No. HUD-L-5037-05

Plaintiff,

vs.

CIVIL ACTION

446 NEWARK AVENUE, L.L.C., a Limited  
Liability Company of the State of New Jersey;  
415 BRUNSWICK STREET, L.L.C., a Limited  
Liability Company of the State of New Jersey;  
389 MONMOUTH STREET, L.L.C., a Limited  
Liability Company of the State of New Jersey;  
354 COLE STREET, L.L.C., a Limited  
Liability Company of the State of New Jersey;  
317 JERSEY AVENUE, L.L.C., a Limited  
Liability Company of the State of New Jersey;  
280 ERIE STREET, L.L.C., a Limited Liability  
Company of the State of New Jersey; 247  
MANILA AVENUE, L.L.C., a Limited  
Liability Company of the State of New Jersey;  
212 MARIN BOULEVARD, L.L.C., a Limited  
Liability Company of the State of New Jersey;

ORDER FOR PRELIMINARY ENTRY

PURSUANT TO N.J.S.A. 20:3-16

Defendants.

This matter having been brought before the Court on the return date of an Order to Show Cause for an Order permitting the Plaintiff City of Jersey City to enter upon the real property of the Defendants 446 Newark Avenue, L.L.C., 415 Brunswick Street, L.L.C., 389 Monmouth Street, L.L.C., 354 Cole Street, L.L.C., 317 Jersey Avenue, L.L.C., 280 Erie Street, L.L.C., 247 Manila Avenue, L.L.C., and 212 Marin Boulevard, L.L.C., for the purpose of conducting

preliminary studies pursuant to N.J.S.A. 20:3-16 prior to commencing condemnation proceedings, and John J. Curley LLC, having appeared for the Plaintiff and McKirdy & Riskin, PA, having appeared for the Defendants, and the Court having reviewed the petition, certifications and briefs submitted by the parties, and for good cause shown,

It is on this 21<sup>st</sup> day of October, 2005

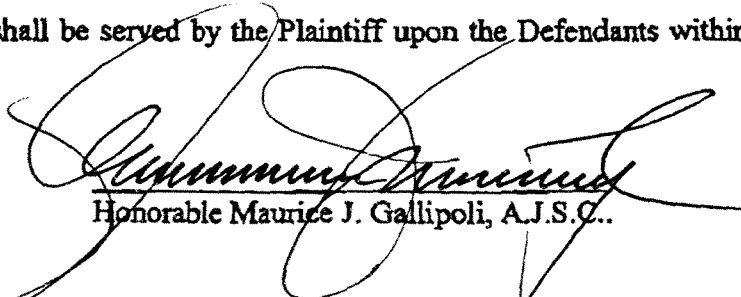
ORDERED:

1. Plaintiff is entitled to entry upon Defendants' property to conduct preliminary studies and make studies, surveys, tests, soundings, borings and appraisals pursuant to the Eminent Domain Act of 1971, N.J.S.A. 20:3-16.

2. Defendants shall permit the City of Jersey City, its agents and consultants, to enter upon their real property as designated on the Tax Map of the City of Jersey City as Block 212, Lot M, Block 247, Lot 50.A, Block 280, Lot 50.A, Block 317.5, Lot 50A, Block 354.1, Lot 50.A, Block 389.1, Lot 50, and Block 415, Lots 50 and 50.Pl and Block 446, Lot 18.A.

3. The City of Jersey City shall schedule all dates of entry and notify Defendants ten (10) days prior to the scheduled date of entry. A preliminary entry may be scheduled in less than the required ten (10) day notification period if the Defendants agree to an alternative date. If the time or date scheduled by the City of Jersey City is inconvenient to the Defendants, the City shall in good faith work with the Defendants to schedule a convenient time providing there is no time delay in rescheduling the entry.

4. Copies of this Order shall be served by the Plaintiff upon the Defendants within 7 days from the date hereof.

  
Honorable Maurice J. Gallipoli, A.J.S.C..

Fax Cover Page

To: Secretary, STB and Office of Proceeding

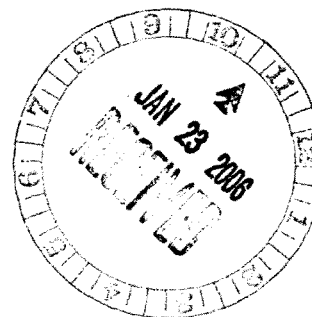
From: Charles H. Montange  
426 NW 162 St.  
Seattle, WA 98177

(206) 546-1936  
fax: 546-3739

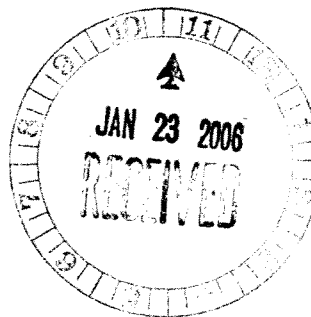
Date: 23 Jan 06

Message: For Filing.

Attached page(s): 14



CHARLES H. MONTANGE  
ATTORNEY AT LAW  
426 NW 162ND STREET  
SEATTLE, WASHINGTON 98177  
(206) 546-1936  
FAX: (206) 546-3739



23 January 2006  
BY FAX

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: City of Jersey City, et al. --  
Petition for a Declaratory Order,  
F.D. 34818

fax filing

Please distribute immediately

Dear Mr. Williams:

At some point on Friday, January 20, intervenors 211 Marin et al. (hereinafter "the developer") filed a petition seeking 20 additional days to reply to City of Jersey City's Petition for a Declaratory Order. This fax is to advise that City of Jersey City opposes the developer's proposed extension, because the developer is demolishing the very railroad structures that this proceeding is about, which is obviously not the sort of conduct in which a party seeking more time should be engaging. I enclose a copy (12 pages) of our Opposition by fax.

I am attempting to have eleven copies of this filing assembled in Washington, D.C. and hand-delivered for filing today (January 23).

Please advise the Office of Proceedings that we are tendering an opposition to the extension request. City of Jersey City urges that any extension be conditioned upon the entry of a housekeeping stay barring developer from further destruction of the premises pending the outcome of this proceeding.

Thank you for your assistance in this filing.

Very truly,



Charles H. Montange  
for petitioners

City of Jersey City,  
Rails to Trails Conservancy,  
Embankment Preservation Coalition,  
and NJ State Assemblyman Louis P.  
Manzo

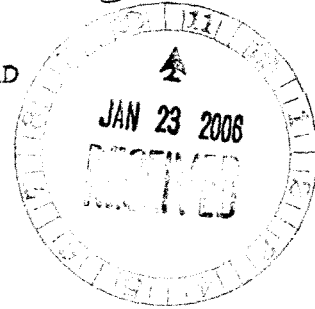
Encl.

cc. Counsel, per certificate of service  
(w/encl.)

## BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

Rails to Trails Conservancy,  
Jersey City, and  
Pennsylvania Railroad Harsimus Stem  
Embankment Coalition --  
Petition for a Declaratory Order



ENTERED  
Office of Proceedings

PETITIONERS CITY OF JERSEY CITY, ET AL'S  
OPPOSITION TO  
INTERVENOR 212 MARIN BOULEVARD, ET AL'S  
"PETITION FOR EXTENSION OF TIME"

JAN 23 2006

Part of  
Public Record

While petitioners City of Jersey City, et al. (hereinafter "Jersey City") do not oppose intervention in this proceeding by 212 Marin Boulevard, et al (intervenors are hereinafter referred to as "SLH Properties" or "the developer"),<sup>1</sup> Jersey City underscores its opposition and objection to any extension of time for the developer (or anyone else) to file a reply.

As made clear below, at the same time the developer's attorneys were drafting their request for an extension, the developer was initiating demolition of structures relating to the Harsimus Embankment. No party should expect to get an extension when they at the same time are so blatantly using any

<sup>1</sup> On January 20, 2006, 212 Marin Boulevard, LLC; 247 Manila Boulevard, 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 (which state that they refer to themselves collectively as "SLH Properties") filed a petition to intervene. All the SLH Properties have common ownership (namely, developer Steven Hyman).

time made available to them for the purpose of actively destroying the very assets that are the point of the proceeding in which they seek the extension.

No extension of any sort should be allowed unless this Board issues an order preserving the status quo, or conditions the extension upon such an order.

#### INTRODUCTION

Background. This proceeding raises the question whether Consolidated Railroad Corporation (Conrail) illegally abandoned the Harsimus Branch railroad line between MP 1.3 (near Luis Munoz Marin Blvd., formerly Henderson Street) and MP 2.54 (near Waldo Avenue) in the City of Jersey City, in violation of 49 U.S.C. § 10903. The portion of railroad line at issue contains the Harsimus Embankment (also known as the Sixth Street Embankment). The Embankment is a structure which not only is listed on the New Jersey Register of Historic Places<sup>2</sup> but also has been determined eligible for listing on the National Register of Historic Places.<sup>3</sup>

Conrail never sought abandonment authority from this Board prior to selling the segment of line containing the Embankment to the developer, who seeks to tear it down and subdivide it for

---

<sup>2</sup> See Letter, D. Guzzo to Conrail, Jan. 25, 2000 (Embankment "was entered onto the New Jersey Register of Historic Places on December 29, 1999"), second document in Appendix I to Jersey City's Petition for a Declaratory Order.

<sup>3</sup> The only reason it was not listed on the National Register is that the then-owner (Conrail) objected. See Verified Statement of Richard James, ¶2 (attached as Exhibit E to Jersey City's Petition for a Declaratory Order).

houses. Had Conrail sought abandonment approval, it would have had to comply with section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, before exercising any authority to abandon the line. Certainly there could have been no demolition prior to compliance with section 106.

STB's e-library records Jersey City's petition as filed on January 13, 2006. At the very same time the developer's attorneys were preparing their motion for an extension of time (which they filed on Friday, January 19), the developer's construction personnel began removing old stone piers and stanchions from the property. This action must be viewed in the context of the developer's standard no-hold's-barred practice of denying any City request for additional time in state court litigation, while pushing forward on the ground "in the hope he can just outrun any opposition"<sup>4</sup> in respect to leveling the Harsimus Embankment and breaking up this railroad line into little housing developments. Further factual detail is set forth in the Verified Statement of John J. Curley, set forth in full below and incorporated herein as Jersey City's statement of facts.

---

<sup>4</sup> Verified Statement of John J. Curley, *infra*, ¶8, penultimate line.

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

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

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

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,

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

ARGUMENT

No extension of time should be granted absent a stay maintaining the status quo. In cases involving disputes over the need for authority or for a particular kind of authority from this Board, this Board frequently grants, at the behest of an interested party, a "housekeeping" stay to maintain the status quo pending further consideration,<sup>1</sup> without the need to make the traditional showings under Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977) ("WMATA") and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Those showings bear on (i) probability of success on the merits, (ii) irreparable injury to the moving party absent a stay, (iii) lack of commensurate harm to the other side, and (iv) public interest in favor of a stay.

As a matter of course, this Board should enter a housekeeping stay prohibiting further demolition and thus preserving the status quo here. In any event, Jersey City has more than met the requirements for a stay under WMATA.<sup>2</sup>

1. Probability of success on the merits. Jersey City has demonstrated probability of success on the merits. Conrail is

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<sup>1</sup> For example, in this Board's recent decision in City of Alameda -- Acquisition Exemption -- Alameda Belt Line, FD 34798, served Dec. 15, 2005, the Board issued a housekeeping stay to maintain the status quo pending further efforts by the parties to set forth their positions.

<sup>2</sup> The developer has submitted to the jurisdiction of this Board by intervening. See also 49 U.S.C. § 721(b)(4).

obligated to obtain abandonment authority for railroad lines pursuant to 49 U.S.C. § 10903; Conrail cannot unilaterally reclassify railroad lines as spurs on the basis of more recent non-use. Jersey City's Petition establishes that the Harsimus Branch was unequivocally a railroad line (it was the main line of freight into the Pennsylvania Railroad's Jersey City freight transshipment terminal) and that it continued in rail use under Conrail, gradually diminishing until the early 1990's.

As indicated in Jersey City's Petition at more length, under applicable precedent (e.g., Chelsea Property Owners-- Abandonment -- Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in NY, NY, 8 ICC2d 773, AB 167 (Sub-no. 1094), served Sept. 16, 1992, aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994)), the Harsimus Branch is accordingly a railroad line.

Although Conrail must obtain abandonment authority for the Branch, Conrail did not. See Strauss Verified Statement, Exhibit D to Jersey City's Petition. Moreover, Conrail's General Counsel conceded that Conrail did not obtain abandonment authority in a telephone conversation with counsel for Jersey City the day before Jersey City tendered its Petition to STB for filing. Jersey City is likely to prevail on the merits.

2. Irreparable injury to Jersey City and the public. While the destruction of an ordinary structure might be remediable by the payment of damages, the demolition of historic structures is not. Destruction of an historic structure

constitutes an irrevocable commitment (in the form of elimination) of a resource. "The act of demolition is irrevocable. Consideration of alternative plans ... is permanently foreclosed once the structures have been razed." Boston Waterfront Residents Association v. Romney, 343 F.Supp. 89, 91 (D. Mass. 1972). As the Second Circuit noted in affirming the grant of an injunction against the demolition of an historic structure, "the district judge was surely correct in finding irreparable injury; demolition is generally irreparable." WATCH v. Harris, 603 F.2d 310, 312 n.2 (2d Cir. 1979). See also Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 282 (3d Cir. 1983) (upholding injunction against demolition pending compliance with section 106). The developer threatens destruction of not only the historic Harsimus Embankment but also the ancillary old stone stanchions. He has demonstrably started his engines in that regard, taking out an old stone stanchion or pier even as his attorneys crafted their motion for an extension of time last week. See V.S. of John J. Curley, supra, part of our statement of facts. As Mr. Curley makes clear, further destruction of the old stone stanchions is expected. Moreover, as Jersey City explained in its Petition, the developer in state court is seeking to compel the local Planning Board to issue required permits without regard to this Board's jurisdiction. Petition at 27. Once those permits are issued, the developer will presumably launch his bulldozers on the Embankment itself. In

the circumstances, the delay sought by the developer here is merely cover for the infliction of irreparable injury on Jersey City and the public.

3. Lack of commensurate harm to others. Conrail and the railroad industry in general will sustain no harm from a stay. Conrail has no financial interest left in the Embankment, having already deeded it to (and having already been paid by) the developer.<sup>3</sup> The developer will sustain no legally cognizable harm, for there has been no compliance with section 106 with respect to any part of the old Embankment, including the old stone stanchions now being assaulted. In any event, any harm to the developer will be limited to a brief delay while this Board considers the issues, and the length of that delay is at least partly in control of the developer, who, ironically, is the very party that has requested slower procedures of the Board.<sup>4</sup>

4. Public interest. Congress has declared the public interest here: that is compliance with section 106 of the NHPA. In any event, Jersey City wishes to acquire the property at issue for rail (light rail) and open space purposes. See Curley V.S., supra, at ¶ 6; see also Exhibit C to Petition (Curley V.S.) ¶ 6. The City's ordinances declare the public interest

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<sup>3</sup> Moreover, the City is prepared to pay Conrail the amount Conrail was paid by the developer should Conrail obtain requisite abandonment authority so the property may lawfully be sold.

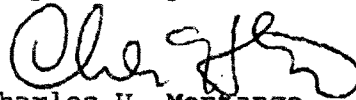
<sup>4</sup> It is certainly relevant to note that Jersey City asked for expeditious treatment (both in its cover letter to the filing and in its Petition at pp. 26-27).

in favor of preservation of the very structures under assault by the developer. See Exhibit G to Jersey City's Petition.

Conclusion

No extension of time should be granted the developer (or any other party) for filing a reply unless a housekeeping stay is entered barring further destruction of the property, at least until this Board issues a final decision in this proceeding.

Respectfully submitted,



Charles H. Montange  
Attorney for petitioners  
City of Jersey City,  
Rails to Trails Conservancy,  
PRR Harsimus Stem Embankment  
Preservation Coalition,  
and Assemblyman Louis M. Manzo

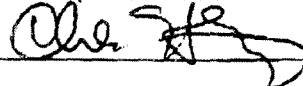
426 NW 162d St.  
Seattle, WA 98177  
(206) 546-1936  
fax: -3739

Of counsel for  
Rails to Trails Conservancy

Andrea Ferster  
Rails to Trails Conservancy  
1100--17th St., N.W., Tenth Fl.  
Washington, D.C. 20036

Certificate of Service

I hereby certify service on January 23, 2006, by placing copies of the foregoing petition with an express service, next business day delivery, addressed to Jonathan Broder, VP/General Counsel; David C. Ziccardi, Associate General Counsel, Consolidated Rail Corp., 2001 Market St., 8th Fl., Philadelphia, PA 19103, and to Carmine R. Alampi, Alampi & Demarrais, One University Plaza, Suite 404, Hackensack, NJ 07601.



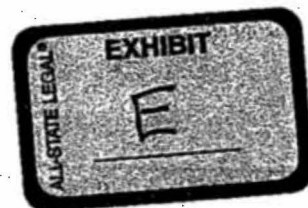
### Appendix 3

- a) Conrail President's letter of June 4, 1999, objecting to State and National listing of Harsimus Branch
- b) NJ DEP letter of Jan. 25, 2000, advising Conrail of listing

CONRAIL

WILLIAM E. O'TOOLE  
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 08602-0404

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

Dear Administrator Guzzo:

Conrail, the owner of the Pennsylvania Railroad Harsimus 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 247, Lot 50A; Block 280, Lot 50A; Block 317.5; Block 345.1, and Block 389.1.

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 or rail and ancillary structures and equipment.

Conrail ceased freight operations along the Embankment years ago. In or about 1996, Conrail removed the steel bridges, tracks and ancillary 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.

Administrator Dorothy P. Gurzo

June 4, 1999

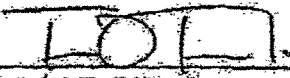
Page 2

Because these properties no longer have a railroad purpose, Conrail wishes to realize their real estate value. The Company also wishes to be relieved 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).

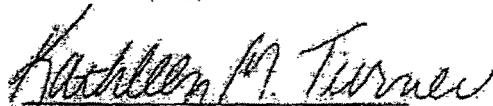
It is our understanding that if a government agency owns a site that has been listed on the New Jersey Register of Historic Places, that agency cannot alter the site without approval from the New Jersey Commissioner of Environmental Protection. Imposition of such a condition on the embankment properties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

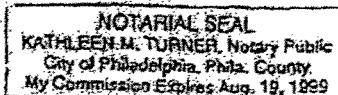
For all these reasons, Conrail, as owner of the Embankment, objects to its listing on the New Jersey and National Registers of Historic Places. Please be advised that CSX Corporation and Norfolk Southern Corporation, the joint owners of Conrail, are in agreement with and support this statement of objections.

Sincerely,

  
Timothy T. O'Toole

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

  
Kathleen M. Turner  
Notary Public





State of New Jersey

Christine Todd Whitman  
Governor

Department of Environmental Protection  
Division of Parks & Forestry  
Historic Preservation Office  
PO Box 404  
Trenton, NJ 08625-0404  
TEL: (609)292-2023  
FAX: (609)984-0578

Robert C. Shinn, Jr.  
Commissioner

January 25, 2000

Consolidated Rail Corporation  
2001 Market Street  
P.O. Box 41419  
Philadelphia, PA 19101-1419

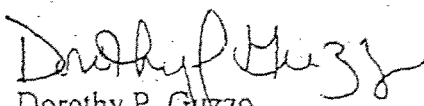
Dear Property Owner:

I am pleased to inform you that the Pennsylvania Railroad Harsimus Branch Embankment, 163-351 Sixth Street, Jersey City, Hudson County was entered onto the New Jersey Register of Historic Places on December 29, 1999. In accordance with N.J.S.A. 13:1B-15.131, listing of an area, site, structure or object on the New Jersey Register of Historic Places prevents the State, a county, municipality or any of their agencies or instrumentalities from undertaking any project that will encroach upon, damage or destroy the property listed without approval from the Commissioner of the Department of Environmental Protection.

The application for the Pennsylvania Railroad Harsimus Branch Embankment was favorably received by the State Review Board for Historic Sites and was subsequently signed onto the New Jersey Register by the State Historic Preservation Officer. It will now be sent to the National Park Service, U.S. Department of the Interior, Washington, D.C. to be considered for inclusion in the National Register of Historic Places. The Historic Preservation Office will inform you when we receive notification from the National Register Office that the Pennsylvania Railroad Harsimus Branch Embankment has been entered onto the National Register.

Congratulations.

Sincerely,

  
Dorothy P. Guzzo  
Administrator

#### Appendix 4

a) Declaration of Daniel Horgan in City of Jersey City v. Conrail, USDC for DC No. 09-1900, filed 11/08/2012, ECF #94-1 (Exhibits other than Ex 2 available on USDC DC website)

b) Mr. Horgan's Exhibit 2 is a copy of the "Memorandum of Understanding between Conrail and the LLCs dated October 12, 2007"

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

because the parties await an outcome from the federal actions (first the STB proceeding, and now this case). On July 27, 2012, the trial court entered a protective order requiring the City to institute a litigation hold for records over the City's strenuous objections. (Exhibit 8). A second protective order has been submitted to the Court.

28. As evidenced by this disclosure, the LLCs have been forced to bring actions to vindicate their rights, and are not using litigation to harass the Plaintiffs.

I am aware of the provisions of Title 28 of the United States Code, Section 1746, and I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 8, 2012

/s/ Daniel E. Horgan  
Daniel E. Horgan, Esq.  
Bar No. 239772

720902.2

**Exhibit # 2**

Exhibit to Declaration of Daniel E. Horgan submitted with reply to Defendants-Intervenors' Motion for Leave to File Amended Pleading

**Nature of Exhibit: Memorandum of Understanding dated October 12, 2007 between Consolidated Rail Corporation and SLH Holding Co., LLC and the Defendants-Intervenors LLCs**

In the matter:

City of Jersey City et al. v. Consolidated Rail Corporation, et al.

C.A. No. 09-cv-1900 (CKK)

Daniel E. Horgan, Esq.  
Bar No. 239772

Eric D. McCullough, Esq.  
Admitted Pro Hac Vice

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Counsel for Intervenor-Defendants - 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

Dated: November 8, 2012

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made this 12<sup>th</sup> 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 12<sup>th</sup> 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. Boord

Title: VP - General Counsel

Date: Oct. 12, 2007

**SLH HOLDING CO., LLC**

By: A. Hym

Title: member

Date: Oct. 12 2007

## Appendix 5

- a) Declaration of Stephen Marks in AB 167-1189X, executed June 10, 2014
- b) Steven Hyman comments on Rebuild by Design (Hoboken flood control proposal) dated 1/19/2014, as downloaded 2/23/2014

BEFORE THE SURFACE TRANSPORTATION BOARD

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

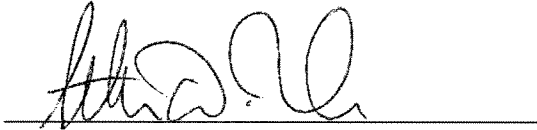
DECLARATION OF STEPHEN MARKS

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 63<sup>rd</sup> Street, Apt. 35E, New York, NY 10065.
6. The email was entitled “6<sup>th</sup> 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: \_\_\_\_\_

A handwritten signature in black ink, appearing to be "A. W. U.", written over a horizontal line.

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

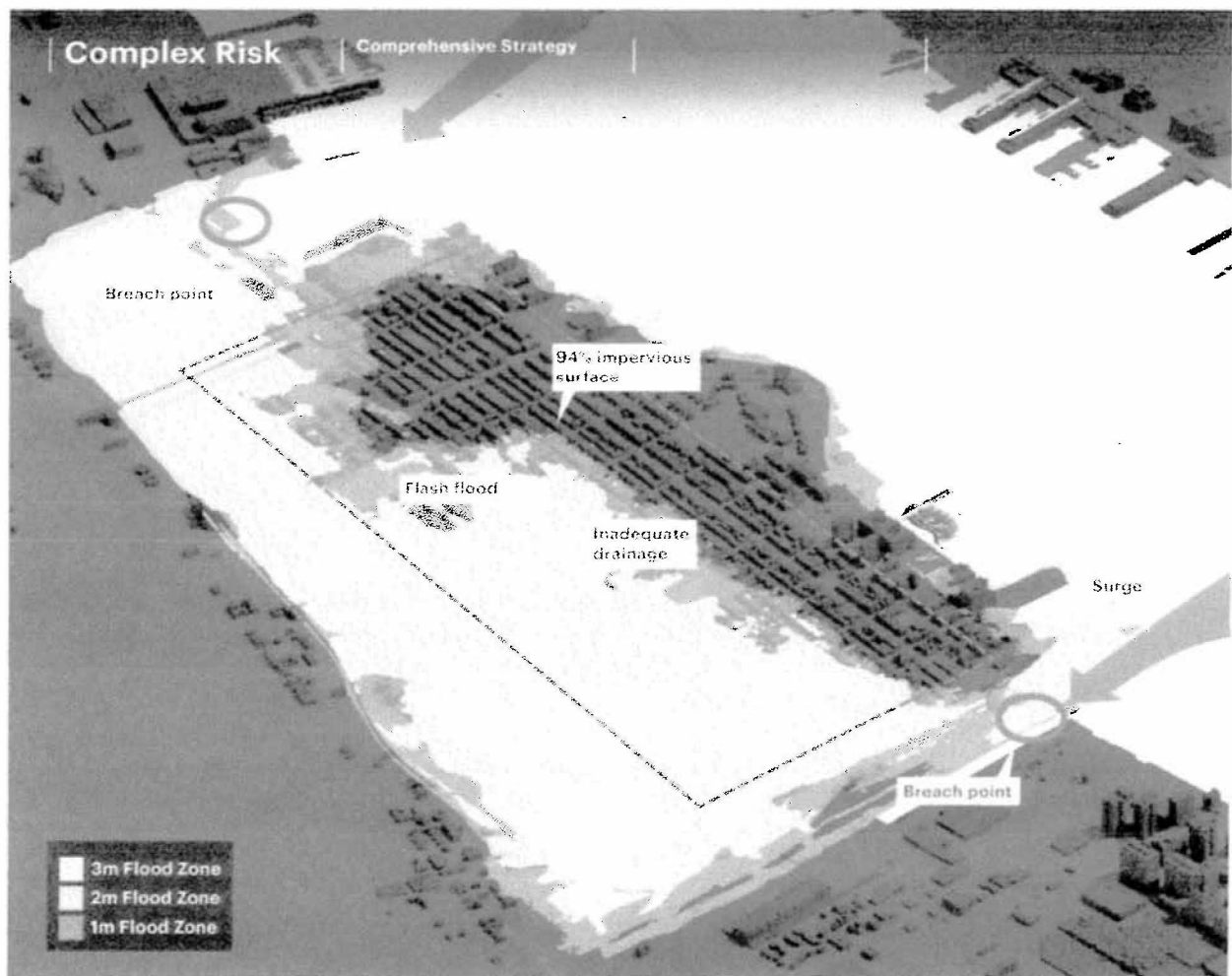
Menu

# 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



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 ↓