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October 18, 2017

Victoria Rutson
Director, Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. AB 167 (1189X) and associated
dockets

Dear Ms. Rutson:

On behalf of Consolidated Rail Corporation ("Conrail"), this responds to the submission that City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al.") filed on October 6, 2017, in response to Conrail's letter dated September 8, 2017.

Conrail's letter attached a decision issued on August 31, 2017 by the Superior Court of New Jersey, which addressed claims against Conrail brought by Chicago Title Insurance Company ("Chicago Title"), the title insurer for the Harsimus Embankment properties at issue in AB 167 (1189X) and associated dockets. As City et al. have argued to the STB for close to a decade in connection with the environmental and historic preservation proceedings in AB 167 (1189X), Chicago Title argued to the Court that Conrail fraudulently or negligently misrepresented the jurisdictional status of the Embankments when it sold them to the LLCs. Following a two-day trial in which the Court heard live witnesses, considered the documentary evidence, and received legal briefing from both sides, the Court concluded that Conrail's statements were not even negligent, much less fraudulent. In a 24-page decision, the Court found "no credible proof" that Conrail or its witnesses (Messrs. Ryan and Fiorilla, who testified at trial and were Conrail's representatives in the sale) knew or should have known that the Embankments were part of a jurisdictional rail line. Slip op. at 17-18, 19.

Faced with this thorough and conclusive demonstration that all of City et al.'s protestations about Conrail's allegedly intentionally fraudulent sale of the Embankments were wrong—and that the Board's conclusion in its March 2009 Environmental Assessment (slip op. at 14, served March 23, 2009) that there is no evidence of "any intent on Conrail's part to harm historic sites or structures" was right—City et al. in their October 6 letter attack the Court's decision the same way they have persistently attacked the Board's decision. City et al. claim that Conrail and its representatives must have "knowingly and intentionally breached the law," because they must have known that the Embankments were part of a jurisdictional rail line. Oct. 6 Letter at 4. But that *ipse dixit* ignores that the Court, after considering both the documentary

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evidence and the credibility of live testimony of witnesses in a two-day trial, found exactly the opposite. However fervently City et al. believe that Conrail simply *had* to know that the Embankments were part of a jurisdictional rail line, the Court found that Conrail neither purposely nor negligently misrepresented Conrail's contrary belief. As Conrail has repeatedly had to point out in these proceedings in response to City et al.'s arguments, mere disagreement with a legal position is not evidence of fraud. *See, e.g.,* Reply of Consolidated Rail Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company to "Motion on Behalf of City of Jersey City et al to Compel Consolidated Rail Corporation et al to Respond to Discovery (Document) Requests," AB 167 (Sub-No. 1189X), at 5 (Oct. 7, 2014) ("Oct. 7, 2014 Reply"); *see also id.* at 6.

It does no good for City et al. to attach to their letter the verified statement of another lawyer, Thomas McFarland, parroting the same legal arguments that City et al. have been making for years about why the Embankments were transferred to Conrail as a line of railroad. Conrail could easily repeat yet again, as it has several times in this proceeding, why it believes the City et al.'s legal arguments were and are wrong.¹ The point here is that a highly motivated plaintiff presenting both documentary evidence and the testimony of live witnesses, and making every legal and factual argument it could muster, failed to convince the Court that Conrail's position was "anything other than a reasoned and informed opinion as to the belief that the parcel was a spur track." Slip op. at 21.² Thus, much as City et al. may desire to continue to beat a dead horse, their position has been judicially rejected.

Finally, Conrail must respond to the suggestion in City et al.'s October 6 letter that there was something nefarious about Conrail's opposition in 1999 (years before the sale to the LLCs) to the designation of the Embankments as eligible for listing on the State and National Registers. Oct. 6 Letter at 6. Not only Conrail but *the City of Jersey City itself* in 1999 opposed such a designation. (See the attached letter from Schundler to Hall dated July 7, 1999.) It is the height

¹ *See, e.g.,* Letter to V. Rutson from R. Jenkins, AB 167 (Sub-No. 1189X), at 2-5 (June 29, 2017); Reply of Consolidated Rail Corporation to "Additional Supplemental Comments" of Jersey City, et al., AB 167 (Sub-No. 1189X), at 1-8 (Oct. 15, 2014); Oct. 7, 2014 Reply at 2-15; Reply of Consolidated Rail Corporation to Motion for a Scheduling Order, AB 167 (Sub-No. 1189X), at 2-4 (July 3, 2014); Comments of Consolidated Rail Corporation on Environmental Assessment, AB 167 (Sub-No. 1189X), at 18-22 (May 7, 2009); Reply to City Parties' "Restatement of Previously Requested Relief and Reservation of Rights," AB 167 (Sub-No. 1189X), at 4-11 (Mar. 18, 2009); Comments of Consolidated Rail Corporation on Issues Raised in Pre-Filing Correspondence, AB 167 (Sub-No. 1189X), at 10-12, 13-18 (Jan. 6, 2009).

² While, for purposes of this abandonment proceeding, Conrail has chosen not to contest that the Harsimus Branch was transferred to Conrail as a line of railroad, Conrail has never stipulated or otherwise agreed that the Harsimus Branch was in fact transferred to Conrail as anything other than a nonjurisdictional spur.

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of hypocrisy for City et al. to claim that Conrail was acting in bad faith when Conrail took the same position the City itself took about whether the Embankments should be listed.

Sincerely yours,



Robert M. Jenkins III

Enclosure

cc: Consulting and Interested Parties
Charles H. Montange
Eric Strohmeyer

ATTACHMENT

LETTER FROM MAYOR BRET SCHUNDLER TO JAMES HALL

JULY 7, 1999

CITY OF
JERSEY CITY

BRET SCHUNDLER
MAYOR



CITY HALL
JERSEY CITY, NJ 07302
(201) 547-5200

July 7, 1999

James Hall
Department of Environmental Protection
State of New Jersey
Assistant Commissioner for Natural and Historic Resources
P.O. Box 402
Trenton, New Jersey 08625

Re: State Review Board Hearing on the Sixth Street Embankment

Dear Mr. Hall:

Please accept this letter as a formal objection by the City of Jersey City to the nomination of the Sixth Street Embankment to the State Historic Register by the State Review Hearing Board on June 9, 1999. It is my understanding that the Board's jurisdiction is limited to determine historic eligibility of a site, yet during the hearing there was no specific discussion of eligibility criteria, nor was there any discussion of the presentation of the City's consultant, Dr. Michael Alterman of Louis Berger Associates, as to the lack of historic significance of this site.

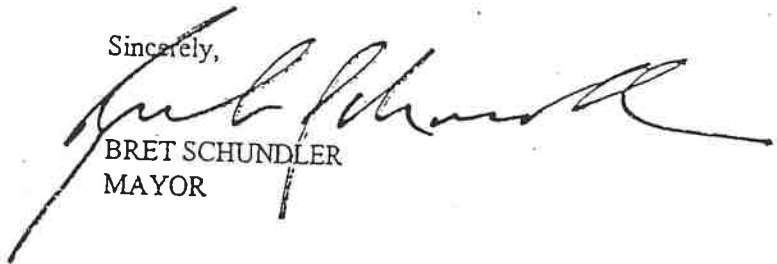
Dr. Alterman's extremely detailed presentation specifically addressed the issue of historic significance of this site. We fail to understand why the Board seemed to completely disregard the merits of the points he raised. In fact, according to my staff, there was no discussion at all relative to Dr. Alterman's presentation on behalf of the City. The attached summary represents the City's specific concerns as to what occurred at the hearing.

As you know, Jersey City celebrates its rich history and has worked hard to preserve significant structures which represent our history, including: the Apple Tree House, P.S. #2, and the Loews Theater. However, we respectfully disagree with the Board's opinion regarding the eligibility of this site. At a minimum, the Board should have considered alternatives to wholesale preservation of the embankment, including: partial preservation of the structure, or the creation of a historic park, as suggested by Jersey City. The fact that Board members were impressed with the preservation sentiment expressed by a select group of residents is irrelevant as to whether the embankment is legally "eligible" to be placed on the Historic Register.

James Hall
Page 2
July 7, 1999

After reviewing these facts, I am confident you will agree that the Sixth Street Embankment should not be placed on the State and National Historic Registers due to its ineligibility under the National Register Criteria for Evaluation. Thank you for your consideration of this request. If you would like to discuss this matter in further detail or visit the site, please contact me at (201) 547-5500.

Sincerely,

A handwritten signature in black ink, appearing to read "Bret Schundler", written over the printed name and title.

BRET SCHUNDLER
MAYOR

BS:TG:jmt
Enclosure
cc: Dorothy Guzzo

OBJECTIONS

1. Pursuant to the Public Comment Guidelines, Dr. Michael Alterman, the City's consultant, gave a photographic slide presentation and expert testimony regarding facts that were not included in the nomination application. Dr. Alterman explained to the Board how the Embankment no longer serves its function to support a freight line; tracks and connecting bridges have been removed and the Harsimus Cove freight yards have been replaced by the flourishing Newport development. He stressed the fact that over the past thirty years, the Embankment has suffered from lack of maintenance and intrusive vegetation. He showed photographic slides of some portions of the remaining Embankment that are severely deteriorated and which show evidence of vandalism on the stonework and trespassing on the top of the Embankment. Photographic slides of other railroad embankments within Jersey City and surrounding communities demonstrated the Sixth Street Embankment's lack of distinction as an architectural feature. Despite this expert testimony and photographic slide presentation, the State Review Board did not ask any questions of Dr. Alterman or discuss his presentation, as they had stated that they would do prior to the Hearing.
2. The nomination application indicated that the Embankment forms a connection between two historic districts, Harsimus Cove and Hamilton Park. Yet historically this is incorrect. Rather than forming a link with either the Harsimus Cove or Hamilton Park Historic Districts, the Embankment was built with total disregard for the surrounding residential neighborhoods, its purpose being to transport freight as efficiently as possible through this area to the waterfront yards. Construction of the Harsimus Branch freight line and the Embankment specifically created a barrier, rather than a link, between the historic residential neighborhoods.
3. Prior to the commencement of the Hearing, the staff of the State Review Board distributed Public Comment Guidelines to everyone who attended the Hearing. Pursuant to Paragraph Two of the Guidelines, public comment must only address issues within the Board's jurisdiction in evaluating nominations. Subjects which the Board may not consider in its evaluation are economic issues or any other issue that does not directly address the National Register Criteria for Evaluation. Despite this language, the State Review Board allowed members of the Embankment Preservation Coalition to discuss economic issues and other issues which did not address the Criteria for Evaluation. For example, a member of the Coalition tainted the hearing by inaccurately stating that the study by Louis Berger & Associates, Inc. dealt solely with redevelopment of the Embankment.
4. In their report, Louis Berger & Associates, Inc. included a conclusions and recommendations section that deals with the project area on a block-by-block basis. Based upon an evaluation of an array of historic resource, architectural and aesthetic, engineering, environmental, socioeconomic, and development economic factors, this section concludes on a block-by-block basis what should be the major goals and preferred design choices for any redevelopment activity. For example, Block 212, which runs from Luis Munoz Marin Boulevard to Manila Avenue, contains the smallest and most seriously deteriorated section of the six-block embankment. It was determined that reconstruction of the embankment on this block was neither feasible nor prudent from many perspectives, including historic preservation. Photographic slides of the severe deterioration of this block were shown to the Board. Despite this block-by-block analysis of the Embankment and the photographic slides of the deterioration of this portion of the Embankment, there was no discussion among members of the Board regarding possible boundaries of the Embankment for placement on the State and National Historic Registers.
5. The City of Jersey City requested that Louis Berger & Associates, Inc. examine the feasibility of

development for the six-block area. A copy of their report was forwarded to Mr. Terry Karschner of the New Jersey Historic Preservation Office on May 25, 1999. The study evaluated various development alternatives and included recommendations regarding embankment preservation, stabilization and interpretation, and design options that were sensitive to the Embankment and to the adjacent residential areas that included the Hamilton Park and Harsimus Cove Historic Districts. For example, a park concept for Block 280, which runs from Erie Street to Jersey Avenue, was recommended. The park design preserves most of the historic railroad embankment walls, deconstructing it from the interior to create terraced spaces with differentiated functions. This park concept is an essential community-building asset and a unique way of preserving the embankment stones and commemorating the engineering achievement, former rail use, and history of Jersey City's industrial age.

6. The Deputy Attorney General (DAG) at the Hearing was Valerie Gray. She serves as the DAG for both the Historic Preservation Office (HPO) and for the State Review Board. We were informed by Sue Pringle of the HPO that Valerie Gray does not serve as a member of the Board, but is present at such meetings in purely an advisory capacity. At the Hearing, the DAG commented that she lived near the Embankment in her youth and made several improper comments to the Board regarding her opinion that the Embankment was a great structure and worthy of preservation
7. The National Register of Historic Places Registration Form was principally prepared by Richard A. James, who resides at 226 Fifth Street, Jersey City, New Jersey, which borders the embankment. He prepared the Form with the assistance of Bob Craig, a Historic Preservation Specialist with the New Jersey Historic Preservation Office (HPO). Mr. Charles Scott, a Principal Historic Preservation Specialist from the HPO, made the presentation before the State Review Board. A possible explanation as to why he made the presentation, rather than Mr. James, could be that a conflict of interest exists because Mr. James owns a residence within two hundred feet of the Embankment.