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August 28, 2002

VIA FEDERAL EXPRESS

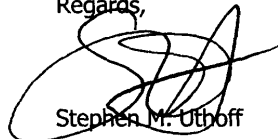
Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *North San Diego County Transit Development Board*
Finance Docket No. 34111
Our File No. 2612

Dear Secretary Williams:

Enclosed please find an original and ten copies of the **PETITION BY THE CITY OF ENCINITAS FOR STAY PENDING REQUEST FOR JUDICIAL REVIEW** in the above-referenced proceeding. An additional copy is enclosed to conform which can be returned to us in the enclosed self-addressed, stamped envelope. Three diskettes are also enclosed for your convenience.

Regards,


Stephen M. Uthoff

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Office of Proceedings
AUG 30 2002
Part of
Public Record

SMU:
Enclosures
cc: Client
All Parties on Certificate of Service



**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 34111

**NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD
- PETITION FOR DECLARATORY ORDER -**

**PETITION OF THE CITY OF ENCINITAS FOR STAY PENDING REQUEST
FOR JUDICIAL REVIEW**

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document should be addressed to:

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Counsel for CITY OF ENCINITAS

DATED: August 28, 2002

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COMES NOW Respondent City of Encinitas ("City") and submits its Petition to Stay the Board's Order granting the North San Diego County Transit Development Board's ("NCTD") Petition for Declaratory Order served on August 21, 2002.

I. BACKGROUND

The Petition filed on behalf of the NCTD requested the Service Transportation Board ("Board") to declare that the Interstate Commerce Commission Termination Act ("ICCTA") at 49 U.S.C. §10501(b)(2) and 49 U.S.C. §10901, preempts otherwise applicable state and local laws, and that neither the State of California nor any agency or political subdivision thereof can require compliance with any state or local regulation which would affect the construction of a passing track in Encinitas.

The City is a municipal corporation incorporated in 1986 and is located in San Diego County, State of California. Its city offices are located at 505 South Vulcan Ave, Encinitas, California 92024.

The NCTD is a transit district created by pursuant to California Public Utilities Code §125000 *et seq.* It is located at 810 Mission Avenue, Oceanside, California 92054. NCTD is "local government authority" providing "mass transportation" as identified in 49 U.S.C. § 10501(c)(1)(A) & (B). In 1992 it acquired an existing right of way in San Diego County from the Atchison, Topeka and Santa Fe Railway.¹ See generally, *Orange County Transportation Authority, etc., et al.*; Finance Docket No 32173, (service date April 7 1994), 10 I.C.C. 2d 78 (1994).

The NCTD currently owns and operates approximately 6.1 miles of single-track railroad line and associated railroad right of way within the City. This action concerns the proposed construction and operation of a 40 m.p.h., 1.7 mile long passing track in the City between E Street and Chesterfield Drive (the "Passing Track").

¹ In 1996 the Atchison, Topeka and Santa Fe Railway Co. merged with and into Burlington Northern Railroad Company. The name of the surviving corporation of the merger is the Burlington Northern and Santa Fe Railway Company which shall hereinafter be referred to as "BNSF".

The current line and the Passing Track are located in close proximity to residential and commercial development, and an elementary school. The Passing Track is also located within the Coastal Zone and is subject to the California Coastal Act and the Coastal Zone Management Act.

The Passing Track shall also be placed over established informal pedestrian trails through the NCTD's right of way which are used by pedestrians to cross the tracks from east to west to access the beach and surrounding coastal area. These informal trails are essential because of the lack of adequate ingress and egress to the beach area through formal crossings. In the past the City has experienced one of the highest rates of fatalities to pedestrians and vehicle drivers of any municipality transversed by the NCTD's rail line (16 fatalities from 1992 through 1999).

The dispute concerning the Passing Track dates back to at least 1996. On or about June 26, 1996 the NCTD filed an application with the City for approval of a Coastal Development Permit ("CDP"), as required by the California Coastal Act, to allow the construction of a passing track substantially similar to the current proposed Passing Track. The NCTD was and is required to obtain approval of a CDP from the City pursuant to California Public Resources Code §§30600(a) and (d).

After public hearings on the NCTD's then pending application, the City's Planning Commission ultimately determined, *inter alia*, that preparation of an environmental report would be required prior to construction. The NCTD appealed the Planning Commission's decision to the full City Council of Encinitas. However, before the appeal was heard, on February 20, 1998 the NCTD notified the City that it was abandoning its appeal and withdrew its application for a CDP. Because the NCTD abandoned its appeal, the decision of the City is now final and binding on the parties. At that point the project was essentially put on hold by the NCTD.

On July 19, 2001, NCTD staff presented the NCTD Board with a recommendation that future action on the Passing Track be postponed until completion of a Programmatic Environmental Impact Report which would comprehensively address the impact of double

tracking all segments of the NCTD rail line. Notwithstanding the staff's recommendation, the NCTD Board voted to proceed with the Passing Track on an expedited basis.

On August 16, 2001, after a request to further review the decision, the NCTD Board voted to not to reconsider its decision concerning the Passing Track and further approved the expenditure of funds to revise and complete the plans and specifications for construction of the Passing Track.

The City contended that its rights were not preempted by the ICCTA in the first instance, that the NCTD's actions were *ultra vires* since they constituted violations of its legislative charter, Public Utilities Code §125260 and the applicable Regional Transportation Plan, and were subject to review pursuant to the California Coastal Act and the Coastal Zone Management Act. Moreover, the NCTD in any event had agreed to voluntarily comply with state environmental laws.

On October 11, 2001 the NCTD filed a Petition for Declaratory Order. On December 6, 2001 the Board issued its order instituting the requested declaratory order proceedings. The Board further ordered that all briefing be completed by January 4, 2002.

Notwithstanding their imposition of an expedited briefing schedule, the Board did not rule on this matter until August 21, 2002 whereupon, notwithstanding the City's evidence and arguments, the Board ruled in favor of the NCTD².

II. ARGUMENT

A. THERE ARE SUFFICIENT GROUNDS FOR GRANTING THE CITY'S PETITION FOR STAY.

There are four basic criteria that the Board must consider in determining to grant a stay. Those four criteria are:

- (1) that there is a strong likelihood the movant will prevail on the merits;
- (2) that the movant will suffer irreparable harm in the absence of a stay;
- (3) that other interested parties will not be substantially harmed; and

² The Board's decision will take effect on September 20, 2002.

(4) that the public interest supports the granting of the stay.

Norfolk Southern Railway Company, STB Finance Docket No. 34209, 34225, 2002 STB Lexis 442, July 25, 2002 citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) [other citations omitted].

1. The City Will Prevail on the Merits of this Case.

The City respectfully contends that the Board has erred on several counts in its decision granting the NCTD's position. First, while the Board states in footnote 12 that it is not ruling on any state law issue, its decision is an unconstitutional infringement on the sovereignty of the State of California to control its own political subdivisions. By allowing the NCTD to go forward notwithstanding its legislative charter, the Board has essentially allowed a state agency to "run amuck" without the potential for any state oversight. The unconstitutionality of this decision is without question and as such, the City contends that the Board will be overruled.

Second, the NCTD and the Board have failed to acknowledge any evidence which shows an unreasonable burden on interstate commerce to support its decision. The "evidence" submitted by the NCTD by way of declaration from BNSF personnel is completely hypothetical. The BNSF representative did not provide any evidence on how the proposed Passing Track will actually impact interstate freight rail operations. Contrary to this, the City provided evidence to show that the BNSF does not intend to increase its capacity, the frequency of its trains, or in fact, benefit from this Passing Track in any way. Because there has been no actual showing of any impact on interstate commerce, how then can the prevention of this Passing Track unreasonably burden interstate commerce? Instead, by its decision the Board has lowered the bar such that to the extent there is any hypothetical impact on interstate freight operations, any state or local regulation of a carrier would be prohibited. This clearly goes outside the scope of the ICCTA.

Third, since the City did not have an opportunity to conduct discovery, its due process rights were affected. The City requested an opportunity to conduct discovery. The Board did not address the City's request for an opportunity to conduct discovery until it issued its ruling in this case. The Board ruled that the City had an opportunity to conduct discovery since it was not prevented from doing so. However, due to the expedited briefing schedule ordered by the Board (based upon the NCTD's illusory need for a prompt decision) the City was precluded from conducting any meaningful discovery before its brief was due. The Board issued its order instituting the declaratory order proceeding on December 6, 2001. Pursuant to the Board's briefing schedule the NCTD had until December 17, 2001 to file its opening brief and thereafter the City's response was due on January 4, 2002. Thus, at best, the City had less than thirty days to conduct discovery. Furthermore, this time was further shortened because the Board's order was served by mail on the City (which takes days for transmittal from Washington, D.C. to Long Beach, California), and there would have been obvious difficulties in scheduling depositions, etc. over the Christmas and New Year's holidays. Also, in order for the discovery to be meaningful it would have had to be completed in time to be incorporated into any brief filed by the City. Thus, the Board's expedited briefing schedule (which the City argued was not warranted), effectively prevented the City from conducting any discovery. Given the Board's complete reliance upon a single declaration presented by a BNSF employee for its evidentiary basis in deciding this matter, the City's inability to conduct discovery obviously impacted the decision in this case.³

Thus, the City believes it will prevail on its appeal.

2. The Movant will Suffer Irreparable Harm in the Absence of a Stay.

Because there has been a lack of any environmental analysis or compliance with the environmental review process the building of the Passing Track will cause irreparable

³ Indeed, the City's arguments that there was no need for an expedited briefing schedule were validated when the NCTD admitted in a newspaper interview that they were never in danger of losing the funding for the Passing Track. See Exhibit "A."

harm to the City. To deny a stay only to have an appellate court overturn the Board's decision and during that process having the Passing Track built would be tantamount to the closing the proverbial barn door after the horse has gone. The proposed Passing Track is located in close proximity to residential developments, an elementary school and is within the Coastal Zone. NCTD also intends to build the Passing Track over established informal pedestrian trails which access the beach and surrounding coastal area. Once the track is built, the damage will have already been done.

3. The Other Interested Parties Will Not be Substantially Harmed.

The stay of this action pending the court of appeals' hearing will not substantially harm the NCTD. The plans for the Passing Track date back to 1996. The project was put on hold by the NCTD from 1998-2001. Only when there was some unsubstantiated risk of losing state funds did the NCTD become concerned with this project. In reality the NCTD was never in jeopardy of losing its funding for this project. Ellen Roundtree, manager of grants and legislative affairs for the NCTD admitted in an interview with a local newspaper that the NCTD was never in jeopardy of losing its funding. See Exhibit "A." Also, it is unclear if the NCTD currently has funding to complete this project. While it did have some funding available to it from the state agency, the total anticipated costs of this rail project now exceeds \$6,000,000.00 resulting in a \$3,288,000.00 shortfall in funding (see Exhibit "I" to City's Brief filed on January 4, 2002). Thus, in reality the NCTD is not prepared to go forward with the construction of this project in any event.

4. The Public Interest Supports the Granting of the Stay.

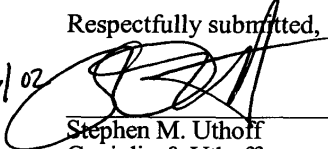
Given the far-reaching Constitutional impact of this Board's decision in addition to the tangible impact on the citizens of the City of Encinitas and the California Coast Zone, the public's interest would be best supported by granting the stay pending judicial review of this action.

III. CONCLUSION

The City has demonstrated that there is sufficient basis for granting the stay of the Board's order pending appellate review, and requests that the stay be granted.

Respectfully submitted,

8/28/02

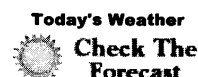


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CITY OF ENCINITAS

EXHIBIT A



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Panel gives NCTD extension on passing-track money

JANET LAVELLE
Staff Writer

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ENCINITAS ---- A state transportation board agreed Wednesday to grant an extension for construction funds to build a passing track through Encinitas, but said it wants regular updates on the legal battle over the rail project.

The nine-member California Transportation Commission, which distributes state funds for transportation projects, gave North County Transit District a 19-month extension to use a \$2.95 million grant to build a 1.7-mile passing track through downtown Encinitas and Cardiff. The grant was due to expire Feb. 28.

The project became entangled in controversy and legal wranglings after the city of Encinitas filed a lawsuit in August to prevent construction. The City Council decided Tuesday to appeal a ruling issued last week by a U.S. District Court judge that the case should be decided by the federal Surface Transportation Board. A decision by the federal board, which regulates interstate commerce, is pending.



BILL WECHTER / Staff
Photographer

After Encinitas Mayor Christy Guerin described the legal and political turmoil surrounding the project to the state Transportation Commission in Sacramento on Wednesday, the panel granted the funding extension but ordered the transit district and city officials to return to Sacramento every three months to give an update on the situation.

A northbound Coaster train travels through Cardiff on Wednesday afternoon. A state board agreed to grant an extension for construction funds to build a passing track in the area, but wants updates on the battle over the project.

Guerin and Ellen Roundtree, manager of grants and legislative affairs for the transit district, both said in phone interviews from Sacramento on Wednesday that they left the meeting feeling that they had gotten at least some of what they had requested.

Roundtree said the transit district got its extension.

"They want a status report every quarter, and that's fine. We would have done that anyway,"

she said.

Roundtree added that Guerin "was very eloquent" in persuading the commission that community opposition to the second track warranted their attention.

Guerin said that, although the commission rejected her request not to give the transit district an extension on the funding, the trip was a success.

"I'm extremely pleased we came up here to talk in front of the commission," she said. "We made a request that, if they decided to grant the extension, that they watch this really closely. We asked them to review it every six months, and they actually made it a three-month review."

Even before the meeting Wednesday, the legal battle cost the transit district a setback.

Transit district staff members discovered last fall that a new cost estimate for the passing track put the price tag at \$6.2 million ---- or \$3.3 million more than the district had for the project. The district staff applied to the California Transportation Commission for a \$3.3 million grant, and the request would have been heard at Wednesday's commission meeting. Roundtree said she withdrew the request in December, however, after state transportation officials said the unresolved lawsuit would likely sink chances of getting the money.

"We reserve the right to reapply," Roundtree said.

Guerin also accused the transit district staff of misleading the public and the transit district board of directors for many months about the Feb. 28 deadline to use the \$2.95 million grant. Guerin, who represents Encinitas on the transit district board, said the deadline had always been characterized as a "use it or lose it" situation.

Guerin said she recently discovered that the \$2.95 million in construction money came from funds raised by the 1990 Clean Air and Transportation Act, or Proposition 116.

"It's not a use it or lose funding," she said. "It's there until 2010. I was pretty angry when I found that out because I think some (transit district) board members voted for the passing track because they thought the money would be lost otherwise."

While the project has been on the transit district's to-do list for years, the district's board of directors approved construction of the second track with a 6-3 vote in July and reaffirmed its intention with a 5-4 vote in August.

Roundtree said projects using Prop. 116 must periodically renew their applications for the funding and that was the purpose of the Feb. 28 deadline. The district was never in jeopardy of losing the money, she said.

"It really stays (as funding to be used) in the rail corridor for NCTD," she said. "It would have to take a legislative act to change that. But what they could have done was taken the funds away temporarily" until the district submitted a new request.

"I think there was a lot of confusion over that," Roundtree said. "But it was not intentional."

Contact staff writer Janet Lavelle at (760) 943-2314 or jlavelle@nctimes.com.

1/24/02

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CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing **PETITION OF THE CITY OF ENCINITAS FOR STAY PENDING REQUEST FOR JUDICIAL REVIEW** on the persons listed below by Federal Express, prepaid and properly addressed.

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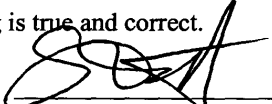
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I declare under penalty of perjury under the laws of the State of California and the
United States of America that the foregoing is true and correct.

DATED: August 28, 2002


STEPHEN M. UTHOFF