

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36433

REPLY AND OPPOSITION BY CONCERNED DEL MAR RESIDENTS SHIRLI FABBRI
WEISS AND LAURA SCHAEFER TO NORTH COUNTY TRANSIT DISTRICT VERIFIED
PETITION FOR DECLARATORY ORDER

PREAMBLE

Shirli Fabbri Weiss and Laura Schaefer respectfully submit this Opposition to North County Transit District's Verified Petition for Declaratory Order pursuant to the Decision of the Surface Transportation Board ("STB") dated September 23, 2020 deciding that "...an extension is warranted to allow any interested person sufficient time to address the significant issues raised in the petition." Ms. Weiss and Ms. Schaefer each have standing as interested persons because they are residents of Respondent City of Del Mar, California ("City" or "Del Mar"), they are users of the railway that travels through North County San Diego and therefore constituents of the North County Transfer District ("NCTD"), and owners of residential property affected by construction on the bluffs overlooking the coast in Del Mar proposed by the NCTD's petition. Ms. Weiss and Ms. Schaefer are each attorneys who have practiced law over 40 years and 30 years respectively, but who are not acting in a representative capacity other than to represent themselves in submitting this brief. Ms. Weiss and Ms. Schaefer are two of the over 2,000 residents opposing certain actions proposed by the NCTD in its Petition.

INTRODUCTION

The NCTD Petition for an Order declaring that the ICCTA, 49 U.S.C. §10501, preempts any regulation by the California Coastal Commission and City of Del Mar of the undescribed or inadequately described current and future projects should be denied for the reasons shown in the Reply of the California Coastal Commission and City of Del Mar and shown in this submission, including the following reasons:

In its Petition, NCTD seeks an order that finds that the ICCTA broadly preempts all review or scrutiny by either the Coastal Commission or the City of Del Mar regarding NCTD's current projects and its unidentified future projects in a railroad right-of-way located in the City and which the NCTD alleges it acquired. It seeks to preclude any state or local regulation, now or in the future, of "NCTD's rail line maintenance and any other upgrading activities in its rail right-of-way pursuant to the state and local coastal permitting regime in California." The demand for

preemption is over-broad because the NCTD's current and future "projects – other than emergency repairs to the bluffs facing the coastline in the City are ill-defined or altogether undefined and the Petition should be denied outright on this basis.

The Petition also seeks a declaratory order from the STB allowing NCTD to erect a two mile fence on the Del Mar Bluffs to prevent rail accidents and suicides. There are many reasons to deny this request. First, the safety of people crossing the tracks should be analyzed under the Federal Railway Safety Act by a different agency, not the STB. Second, a fence to prevent movement of people across the tracks does not involve "rail transportation" as defined under the ICCTA and case law. Third, NCTD has not specified where the fence will be located; this is critical to the fact bound analysis required to determine preemption of state and local ordinances. Fourth, a fence, if placed on the upper bluff in Del Mar where there are no railroad tracks, will not affect rail safety. It will, however, have a devastating impact on the scenic views of our coastline, a beautiful and dramatic component of the City's aesthetic, properly regulated pursuant to the police powers of the City.

The railway trains run dangerously on an elevated and eroding bluff high above a public beach, as to which beach the railroad has no right-of-way. The problem of eroding bluffs has been known to NCTD since at least 1940, when a bluff collapse caused a train to plunge down the side of the bluff. With climate change and sea level rise, bluff erosion is accelerating at a much more rapid pace. The City and California Coastal Commission recognize the need for bluff stabilization, but NCTD is using the recent need to stabilize the bluffs as a way to muzzle state and city regulatory discussion regarding the inevitable need for track relocation.

The Petition was filed in violation of NCTD's regulations.

For these and other reasons, we respectfully request that NCTD's Petition be denied.

A. THE STB SHOULD DECLINE TO GRANT AN ORDER FINDING THAT THE ICCTA PREEMPTS ANY CALIFORNIA COASTAL COMMISSION OR CITY OF DEL MAR REGULATIONS REGARDING ANY OF THE NCTD'S UNSPECIFIED OR INADEQUATELY SPECIFIED CURRENT OR FUTURE PROPOSED "UPGRADING ACTIVITIES" IN NCTD'S RAIL RIGHT-OF-WAY.

The NCTD seeks an unprecedented, sweeping order that the ICCTA preempts the California Coastal Commission and the City of Del Mar's regulation of what it calls "numerous" future and current "projects" which are unspecified and which it vaguely characterizes as "other upgrading activities" or "major bluffs stabilization rail maintenance" projects that it intends to undertake in Del Mar in the near future.... NCTD declares that it needs this unprecedented order regarding "upcoming" and current projects now because it fears future challenge by the state and local authorities charged by law with regulating California and Del Mar's precious coastline. ("...NCTD seeks a declaratory order now because it has numerous crucial, upcoming rail maintenance and upgrading projects *that will be* challenged under the Coastal Act or local coastal laws by Del Mar or the Commission...."). (emphasis added). Other than emergency bluff stabilization, these projects are described in no detail whatsoever and are not shown to be of such

an emergency nature that the NCTD should be permitted to override California Coastal Commission and City regulation. As will be shown, specific details concerning NCTD's fencing project, for example, are needed to decide preemption issues. For example, City oversight and regulation of fencing on Del Mar's upper bluff area ("Upper Bluff") cannot be preempted because it would have little or nothing to do with the safety of the railway on the Del Mar lower bluff area ("Lower Bluff"), but it would dramatically affect residents' interests protected by Del Mar's police powers. Yet NCTD supplied no detail concerning the location on the bluffs of its fencing project. Having not adequately described these "projects," NCTD is not entitled to an order holding that Section 10501(b) preempts any regulation of them.

The analysis by the STB of federal preemption under 49 U.S.C. §10501(b) in *Bos. & Me.* 2001 Fed. Carr. Cas. (CCH) ¶ 38,352 (May 1, 2001), available at 2001 WL 458685 is instructive on the need for the party seeking preemption to supply the germane facts. In that ruling, the STB made clear that the application of preemption is fact bound. Prerequisites to deciding fact bound questions are that the railway projects for which preemption is sought and the statutes and regulations imposed on the specific railway action for which preemption is sought are described in detail. These prerequisites preclude sweeping pronouncements on undescribed or inadequately described future or current projects of the NCTD simply because, as it says, it fears opposition.

In *Boston & Maine*, 2001 WL 458685, the STB held that federal law preempted a certain specific noisome trade ordinance and certain specific Planning Board Conservation Commission's permit and pre-construction processes, but the STB found state and local regulation to be permissible "where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." In its order, the STB gave three guidelines for permissible state and local regulation:

1. Non-discriminatory enforcement of requirements such as building and electrical codes (other than pre-construction requirements) generally are not preempted.
2. A town may seek enforcement of voluntary agreements a railroad has entered into with a town.
3. Section 10501(b) should not be interpreted as intending to interfere with the role of state and local agencies in implementing federal environmental statutes.

All local regulation, in the STB's view, is subject to the same test: whether the statute or regulation is being applied to "unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce." As the STB found, this was a fact-bound question.

Because the NCTD has not, in its Petition, laid out the facts and details of its contemplated future projects and current projects, with the exception of emergency bluff stabilization, the STB should deny the broad preemption order requested and should avoid sweeping preemption pronouncements.

B. NCTD'S REQUEST FOR A DECLARATORY ORDER GRANTING PREEMPTION TO ERECT A FENCE WITHOUT REGULATION SHOULD BE DENIED

NCTD seeks a declaratory order to allow it to construct a two mile fence on an unspecified bluff area to reduce train fatalities. This request should be denied for several reasons. First, the safety of the rails should be analyzed under the Federal Railway Safety Act, not the ICCTA. Second, a fence to prevent movement of people across the tracks does not involve "rail transportation" under the ICCTA. Third, local regulation of fencing on the Upper Bluff in Del Mar does not unreasonably interfere with interstate commerce and does not promote rail safety, and fourth, the City's exercise of local police power over the Upper Bluff properly advances the aesthetic values of the City and is not preempted.

1. The Federal Statutory Scheme of the ICCTA and Federal Railway Safety Act Places Principal Federal Regulatory Authority for Rail Safety with the Federal Railroad Administration ("FRA"), Not the STB.

Assuming a fence is required for rail safety, the primary authority for rail safety rests with the Federal Railroad Administration (FRA) under the Federal Railroad Safety Act, not the STB.

In 1970, Congress enacted the Federal Railroad Safety Act (FRSA) to "promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C. 20101; *Island Park, LLC v. CSX Transp.*, 559 F.3d 96 (2d Cir. 2009) The FRSA "confers authority upon the Secretary of Transportation to 'prescribe regulations and issue orders for every area of railroad safety.'" 49 20103 (a); *Island Park*, 559 F.3d at p. 106. The FRSA has an "express pre-emption provision that contemplates continued state regulation of railroad safety." (*Island Park* at p. 107; See 49 U.S.C. 20106. "Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement" which the "ICCTA did not address." *Iowa, Chi. & R.R. Corp. v. Wash. County*, 384 F.3d 557, 561 (8th Cir. 2004). "Several circuits that have examined the interplay between ICCTA and FRSA have concluded that the federal statutory scheme places principal federal regulatory authority for rail safety with the Federal Railroad Administration ("FRA"), not the STB." *Id.*, citing *Boston & Me. Corp. v. Surface Transp. Bd.*, 361 U.S. App. D.C. 94, 364 F.3d 318, 321 (D.C. Cir. 2004); *Iowa, Chi. & E. R.R. Corp.*, 384 F.3d at 561; *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001). Thus, FRSA provides the appropriate basis for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law.

This issue implicates rail safety concerns such that the FRSA and not ICCTA is the principal governing statute in determining whether local and state authority is pre-empted. The analysis must start with the FRSA, and not the ICCTA and not in this forum.

2. Fencing to Prevent Trespassing Across the Tracks Does Not Implicate "Rail Transportation" as Defined by the ICCTA

ICCTA's jurisdictional provision contains an express pre-emption clause -- "the remedies provided under this part with respect to regulation of rail transportation are exclusive and

preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). Rail "transportation" is defined to include:

(A) "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property."

49 U.S.C. 10102(9)(A); *Island Park v. LLC v. CSX Transp.*, 559 F.3d 96 (2d Cir. 2009).

In *Island Park v. LLC v. CSX Transp.*, *supra*, 559 F.3d at p. 104, the court decided whether New York's attempt to close a railroad crossing was pre-empted by the ICCTA. The Court found it was not because the ICCTA's definition of "rail transportation" did not include the movement of people across the tracks. Of note here, the court in *Island Park* stated at page 104:

"If we adopted a definition of rail transportation for pre-emption purposes that includes the movement of people and property across railroad tracks, then any entity -- an automobile, bicycle or even a pedestrian passing over the crossing -- would arguably be beyond the reach of state regulatory authority. NYSDOT's order closing the rail crossing does not 'relate[] to' 'the movement of passengers or property . . . by rail.'" 49 U.S.C. § 10102(9)(A) ."

Here, the NCTD requests a declaratory order from the STB to allow it to erect fencing to prevent people from trespassing across the tracks and in the right-of-way. NCTD argues the erection of fencing is an activity that directly affects "rail transportation," and is beyond the reach of the state and local authorities to regulate. But as *Island Park* holds, the movement of people and property across the tracks is not "rail transportation" as defined under the ICCTA. Indeed, as the court observed, such a sweeping definition of "rail transportation" "might even call into question state public safety laws that prohibit trespassing on railroad property." *Id.* The erection of a fence on the bluffs does not implicate "rail transportation," is not preempted by the ICCTA and is subject to state and local regulation.

3. Local Regulation of Fencing on the Upper Del Mar Bluff Does Not Unreasonably Interfere with Interstate Commerce and Can and Should Be Harmonized with the NCTD'S Fencing Project.

The NCTD uses its discussion of the need for stabilization of the Bluffs to bootstrap its argument that it should be given sweeping authority to exclude Del Mar from regulation of fencing, and proclaims that it is impossible to harmonize the NCTD's (undescribed) fencing project with Del Mar's regulations. But the stabilization of the bluffs and fencing are very separate issues and there is no reason that any NCDT proposed fencing on the Upper Bluff cannot be harmonized with local laws, even permitting laws. The NCTD fails to describe the intended location of its fencing but location is crucial to the issue of preemption. There is a reason for this. The Del Mar Bluffs consists of an upper bluff ("Del Mar Upper Bluff" or "Upper Bluff") and a lower bluff ("Del Mar Lower Bluff" or "Lower Bluff"). The Upper Bluff, which is included to some extent

in the NCTD's right-of-way, runs along the top of the ocean bluff, perpendicular to the end of each of the streets in Del Mar.¹ Fencing on the Del Mar's Lower Bluff next to the railway presents completely different issues from those presented by fencing Del Mar's Upper Bluff.

The train tracks are located on the Lower Bluff. There are no tracks on the Upper Bluff, which are 30 to 60 feet or more above the Lower Bluffs in most areas. The train tracks are not visible from the street; one has to walk to the edge of the Upper Bluff to see the tracks. The Upper Bluff is too steep and high generally to make descent to the Lower Bluff possible. Below the Lower Bluff is the ocean.



Photo of Upper Bluff from Lower Bluff

Resident and other members of the public go to the end of the street to admire the sunset overlooking the Upper Bluff and there are view corridors of the ocean down each of the streets along this approximate two mile stretch of the Upper Bluff. City ordinances preclude residents from building in this corridor or blocking the corridor views. Tree ordinances prevent residents from planting trees to block these views.

¹ It is not clear where on the Upper Bluff the NCTD's right-of-way begins after each street dead ends; the Upper Bluff would have to be surveyed to make this determination. Notwithstanding this, NCTD has commenced removal of benches and all vegetation on the entire Upper Bluff. In addition, NCTD's right of way is subject to conditions permitting public access to the beach, which rights cannot be "preempted."



Street View in front of Upper Bluff area

First, as a threshold matter, NCTD's declaration that local law cannot be harmonized with a railway fencing project is not true. Recent history clearly demonstrates that the NCTD's desire for fencing can be harmonized with Del Mar's regulations protecting ocean views and safety. For example, the NCTD recently entered into an Agreement with the City of Encinitas and NCTD, which enabled the fence along the tracks in Encinitas -- 4' tall instead of 6', cable & post instead of an ugly "standard" chain-link fence. Attached as Exhibit A is a copy of the Memorandum of Understanding between the City of Encinitas and NCTD. This clearly shows that a City's police power interests in preserving aesthetics and views can be harmonized with the NCTD's desire for fencing along the tracks.

Second, NCTD fails to describe the location or other aspects of its fencing project. Thus, the Petition regarding fencing fails at the outset, because the NCTD has prevented a "fact-bound" analysis. *Boston & Maine*, 2001 WL 458685. NCTD states in its Petition only that intends to install a two mile fence in NCTD's right-of-way, but fails to state where in the right-of-way this fence will be place, its proposed height and the materials to be used. **The Petition's lack of detail concerning fencing location and materials to be used in fencing construction are very important to the question of whether the NCTD's undescribed fencing project should be given preemption over local laws regulating fencing and view obstruction**

Third, assuming the NCTD means to erect fencing in the Upper Bluff area, regulation of fencing on Del Mar's Upper Bluff would not interfere with railway operations and cannot be preempted under the ICCTA. Were it to be constructed in the Upper Bluff, fencing transparently would not be for the purpose of maintaining the railway or the safety of the railway, but rather for the sole purpose of preventing residents (whom the NCTD calls "trespassers") from walking the bluff. Though the NCTD may be annoyed by people walking the Upper Bluff, which has occurred for decades and presents no emergency, **there is no evidence that anyone has ever committed**

suicide by throwing himself from the Upper Bluff to the train tracks below, or fallen onto the train tracks from the Upper Bluffs. In other words, while fencing on the Lower Bluffs next to the railroad tracks may contribute to the safety of the tracks, (presumably governed by the FRSA), safety of the tracks is not controlled by fencing on the Upper Bluffs. Rather, fencing on the Upper Bluff would be a means for the NCTD to prevent Del Mar residents from walking on the Bluff. Setting aside the mean-spiritedness of any attempt by NCTD to fence the Upper Bluff and prevent scenic appreciation walking, especially in these pandemic times, there is no emergency and simply no reason that the NCTD should not be required to abide by Del Mar's regulations regarding fence construction along the Upper Bluff, which regulations are a legitimate exercise of its police powers not preempted by ICCTA.

4. The City May Validly Exercise Its Police Powers to Advance Aesthetic Values

The ICCTA permits states and cities "to exercise traditional police powers over the development of railroad property, to the extent the regulations protect health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion or subjective questions." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2015).

"It is well settled that the state may legitimately exercise its police powers to advance esthetic values." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, and United States Supreme Court cases cited therein. For example, in referring to the authority of state legislature to remove blighted housing, the high Court observed, such housing may be "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn." *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." (Citations omitted)." *Members of City Council*, at p. 805.

Here, NCTD asserts it must erect a fence to prevent train fatalities. NCTD has not stated where it plans to erect this fence. At a minimum, however, Del Mar has a right to exercise its police powers over the Upper Bluff in Del Mar to advance the aesthetic values of the community of Del Mar. The City's ordinances and interest in preserving view corridors for its residents and the general public is an appropriate exercise of its police powers that can be obeyed with reasonable certainty by NCTD, entail no extended delays by the City and are not subject to discretionary or subjective decision making. The City's Building Code, for example, is very clear about the protection of the City's view corridors.

Del Mar Municipal Code 23.51.010 states:

"Scenic views, whether of the Pacific Ocean, nearby lagoons, canyons, the community and its landscapes and urban forest character, or other scenic vistas, produce a variety of significant and tangible benefits for residents, property owners and visitors. Scenic views provide inspiring vistas, encourage distinct and creative architecture, and contribute to the economic value and comfortable enjoyment of real property within the City of Del Mar."

Design review ordinance 23.08.077 does not permit structures that “unreasonably blocks significant public coastal views” or “detracts from the natural beauty of the coastal area.” These city ordinances preclude building in view corridors or blocking views.

Residents live along the entire Upper Bluff, and their property values are tied to these ocean views. Many residents and visitors admire the sunset from the end of the street adjacent to the upper bluff. These views are jealously guarded by the City and its residents, and are a beautiful and unique component of the City’s aesthetic.

The City of Del Mar may exercise its police powers to advance aesthetic values. The City’s ordinances and interest in preserving these view corridors for its residents and the general public is an appropriate exercise of the City’s police power. The NCTD has not met its burden of establishing that a fence is required on the Upper bluff to operate the railroads efficiently and safely. The City’s ordinances, protecting its view corridors along the Upper bluff - far from the tracks on the Lower Bluff - have a remote or incidental effect on rail transportation, if any, and do not pose an unreasonable burden on interstate commerce.

C. THE NCTD SHOULD NOT BE PERMITTED TO USE BLUFF STABILIZATION AS A VEHICLE TO MUZZLE STATE AND CITY REGULATORY DISCUSSION CONCERNING TRACK RELOCATION.

In its arguments, the NCTD conflates emergency measures with non-emergency measures. For many years it has tackled bluff stabilization projects and for decades it has watched as accidents occurred on the Lower Bluff without initiating fencing in Del Mar or seeking a preemption order to blunt state and local regulation. Why the sudden urgency to silence all state and local regulation relative to Del Mar? The reason is that NCTD wishes to end discussion or regulation regarding the eventual moving of the train tracks from their current increasingly dangerous location on the Del Mar Bluffs.

The San Diego Main Line right of way runs north and south over a single track system along 1.7 miles of magnificent coastline in Del Mar. As shown on the photograph on p. 8 of the Petition and discussed above, the right of way comprises two levels of bluffs in Del Mar, which have been referred to in the petition as the Upper Bluff and Lower Bluffs. The track runs along the Lower Bluff and the Lower Bluff is elevated high above the beach where beachgoers walk in Del Mar. NCTD contends that the right-of-way encompassed the Upper Bluff and Lower Bluff. As shown on the Petition photograph p. 8, the train route on the Del Mar Bluff is particularly precarious because the Bluff is perched high above the beach and the train route has grown more precarious over the years. As the NCTD admits, as early as 1940, the bluff gave way and a traveling train actually fell onto the beach. Over the years, though it took a number of measures, the NCTD failed to adequately address the instability of the Bluffs, worsened by erosion and augmented by train vibration. In fact the current emergency nature of the Bluffs was caused or contributed to by the NCTD’s lack of adequate attention. This is not, we believe, out of lack of desire to address the problem, but rather, inability to adequately address the problem. The tracks are now shown to be, as a result of erosion and other environmental risks, in the wrong place at the wrong time. By attempting to mute local dialogue and regulation through preemption, the

NCTD is placing commercial interests above the safety of passengers, residents of Del Mar and beachgoers.

The NCTD declares that it”is extremely concerned that Del Mar and the Commission will interfere with [its] crucial, upcoming bluff stabilization rail projects under local, state or federal law....” and uses that rationale to urge the STB to give it sweeping authority to override and ignore state and local regulations on all non-emergency “projects” it has in mind. As citizens, we do not oppose emergency bluff stabilization measures which have become necessary as a result of NCTD’s inadequate maintenance of the track area over the years in the right-of-way. However, we oppose NCTD’s attempt to obtain a sweeping order finding that all environmental mitigation is preempted. Further, we oppose the NCTD’s attempts to muzzle agency or public discussion, regulation and demands that the tracks eventually be moved to a safe location.

First, for the reasons explained by the Coastal Commission, incorporated by reference, environmental mitigation is not preempted because it can be harmonized with the NCTD’s desired measures.

Second, the STB should not rule that the City (or Coastal Commission) can never by regulation require the NCTD to eventually move the tracks. That issue should not be ruled upon now on this record, as it would be premature for the NCTD to preclude state and local regulation on a fast developing and changing problem as to which NCTD’s objection is based mostly on lack of funding or threat to profitability. **The stark and inconvenient fact is that the tracks run dangerously on an elevated bluff high above a public beach, as to which beach the railroad has no right-of-way and cannot prevent foot traffic.** Environmental changes brought about by steady erosion, train vibration, the now-constant threat of wild fires in California including in Coastal communities,² the risk of earthquakes to which California is subject, and the known and unknown, steadily increase the risks of operating the railway on the bluff, and show that regulation should not be preempted or precluded, rather it should be encouraged. As was widely reported at the time, on New Year’s Eve 1940, following days of rain, a train traveling northbound plunged 65 feet down an embankment between 8th and 9th streets in Del Mar.

² The entire portion of the Malibu coast west, to the community of [Solromar](#) suffered damage from the 2018 Woolsey fire. The fire cost at least \$6 billion (2018 USD) in property damage. The Woolsey fire demonstrated that wildfires can proceed right to the coast.

1940s Train Wreck



*Train wreck. First three days January 1941.
Photo courtesy Larry Brooks, DMVA Historical Committee*

No matter how aggressively the Bluffs are stabilized, erosion continues and the NCTD cannot begin to guaranty against the risks of another train wreck presented by constant erosion, earthquake and wildfire to which the Bluffs are subject. It cannot escape the reality that one severe earthquake shake could plunge a train from the bluff to the beach in seconds. The STB should not issue any order that would have the effect of stifling or preempting Coastal Commission and City regulation and discussion of eventual transfer of the tracks to a safe location. The NCTD admits erosion of an average of 6 inches per year is a given, but erosion is episodic and unpredictable. The NCTD's brazen attempt to silence discussion and regulation related to re-location of the tracks turns a deaf ear and a blind eye to the safety of all.

D. THE PROCEDURE EMPLOYED BY THE NCTD IN FILING THE PETITION WAS ILLEGAL AND IRREGULAR AND THE STB SHOULD NOT AFFIRM THIS FLAWED PROCEDURE BY GRANTING THE RELIEF REQUESTED.

The NCTD violated its own procedure in approving and filing the Petition. The NCTD is a state agency funded by Californians. Instead of working with the California Coastal Commission, which is California's premier environmental state agency, and the City of Del Mar within whose

boundaries the Bluffs are located, NCTD seeks preemption of State and local regulations designed to protect the interests of people of California.

Pursuant to the California Public Utilities Act, Section 125102, cited in NCTD's Board Policy Number 4, "a majority of the Board members eligible to vote shall constitute a quorum and all official acts of the Board and shall require the affirmative vote of the majority of Board members eligible to vote." Clearly the filing of litigation seeking to override State, local and Federal statutes and regulations is an "official act" of the NCTD. However, there does not appear to exist, and the NCTD failed to provide upon request, any public record that the majority of members of the Board of the NCTD voted to approve the filing of the Petition. The verification appended to the Petition of executive director Mathew Tucker, attesting that he was "authorized" to file the Petition, is self-serving and insufficient here, where Tucker lacked authority to file the Petition without the affirmative vote of the majority of the NCTD Board and there is no evidence of such a vote.

In addition, it is now clear that the representative of the City of Del Mar and the City of Solana Beach, who sit on the Board, were neither informed of, nor included in any discussion regarding the proposed Petition. There is no record of a vote of the Board excluding Board member and City of Del Mar representative Terry Gaasterland from the discussion on a matter so crucial to that City and it was improper and illegal to do so. The residency of Board member in Del Mar does not meet the criteria of conflict of interest and no viable conflict appears to have been discussed. Excluding the Board member who is a member of Del Mar's City Council from discussion and vote on an official act is also an "official act" of the NCTD. No vote was taken to exclude Ms. Gaasterland on any grounds. Nor should the NCTD be allowed to ratify its violation of procedure after the fact, as that would make a mockery of its rules and add insult to injury.

Finally, the decision to file the Petition was made without any notice to the public, nor does the proposal appear on any NCTD agenda. Hence the Board member from Solana Beach, a city affected by the NCTD's plans to fence the railway up to Oceanside, was not informed of a secret discussion that took place in closed session on May 21, 2020, and the public was never informed of the dire proposed action against the interests of residents of Del Mar, and by extension, all of the Cities represented on NCTD, that the Petition represents.

As citizens of Del Mar, a City that NCTD is supposed to serve, we know we speak for numerous constituents of the NCTD in strongly objecting to the secret and illegitimate procedure followed by the NCTD, and the lack of public notice in the filing of the Petition. Emergency bluff

stabilization measures could surely have been taken without notice. But the filing of the much more sweeping Petition, done without a vote of the Board's majority, was illegal. The STB should not effectively affirm and support the illegal and irregular procedure deployed by the NCTD (or whomever drove the filing of the Petition), by issuing an Order granting any relief.

Respectfully Submitted,

_____/S/_____
Shirli Fabbri Weiss
shirli.weiss@dlapiper.com

October 5, 2020

_____/S/_____
Laura Schaefer
ls@boyce-schaefer

October 25, 2020

Recording Requested by
North County Transit District

When recorded, mail to:

North County Transit District
810 Mission Avenue
Oceanside, CA 92054
Attn: Real Estate Department

SPACE ABOVE FOR RECORDER'S USE

**MEMORANDUM OF UNDERSTANDING AND
LICENSE AGREEMENT**

THIS MEMORANDUM OF UNDERSTANDING AND LICENSE AGREEMENT ("Agreement" or "License") is made and entered into as of the effective date of May 1, 2020 ("Effective Date") by and between the North County Transit District, ("NCTD"), a public agency existing under the laws of the State of California, pursuant to California Public Utilities Code sections 125000, et seq. and the City of Encinitas, a California Municipal Corporation ("City" or "Licensee"), collectively referred to as the "Parties".

RECITALS

- A. NCTD has certain policies and regulations as well as obligations under state and federal law (collectively the "ROW Policies") governing the use of its Right-of-Way ("ROW").
- B. NCTD prohibits vehicular access, public parking and pedestrian access on its ROW (collectively "Trespassing").
- C. NCTD has significant costs related to enforcement of Trespassing and general maintenance of its ROW within the City due to trespassing of pedestrians and vehicles.
- D. The City of Encinitas is in need of public parking and various street improvements (collectively, "Improvements") along the Coast Highway corridor for general business, commercial, retail and other uses, as part of its North Coast Highway 101 Streetscape Project Phase I (the "Project").
- E. In exchange for the use of the ROW for the Improvements, City has agreed to maintain the licensed ROW area at its own costs and to assume all related liability for such use and maintenance (the "Mutual Benefit").
- F. Licensee has applied for the issuance of a License in accordance with the ROW Policies and NCTD has agreed to allow Licensee to use that portion of the ROW identified in Exhibit "A" ("License Area"), subject to the terms and conditions of this Agreement.
- G. Licensee agrees to be bound by the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained herein, the Parties agree as follows:

1. **License to Use.** In consideration of the covenants and conditions set forth in this Agreement, NCTD licenses to and permits Licensee use of the License Area as further defined in Exhibit "A" attached hereto and incorporated herein by reference for the sole purpose of the Project Improvements. NCTD and City agree to execute this Agreement prior to 100% design of the

proposed improvements (the "Revised Exhibit", consisting of Exhibit "B"). Acceptance of the Revised Exhibit shall be confirmed by the execution of the Acceptance of the Revised Exhibit Memorandum, attached as Exhibit "E", at which time the Revised Exhibit shall be attached hereto and incorporated by reference herein. The rights and obligations in this Agreement shall not be effective until such time as NCTD has accepted the Revised Exhibit, and the License Area will remain unimproved until the full 100% design of the Improvements is approved by NCTD and attached to this Agreement as Exhibit "B" as part of the Revised Exhibit.

The Parties agree and understand that the Project Improvements represent a temporary condition and are not the final and permanent improvements. Additionally, the Parties agree and understand that the Project Improvements may need to be modified, relocated or removed upon the commencement of the San Diego Association of Governments ("SANDAG") double tracking project within Encinitas ("Encinitas Double Track"). Upon funding and design of the Encinitas Double Track by SANDAG the parties will enter into a new agreement pursuant to the terms of Section 13 below.

2. **Authority Not Exclusive.** This License is non-exclusive. The Licensee shall respect the rights and property of NCTD and other authorized users of the ROW, easements, power poles, street light poles, vaults, and conduits. Except as otherwise required by applicable law, disputes between the Licensee and parties other than NCTD over the use, pursuant to this Agreement, of the easements, power poles, street light poles, vaults, conduits and other rights-of-way shall be submitted to NCTD for resolution.
3. **Relocation.** Licensee shall, at Licensee's sole expense and within a time period mutually agreeable to the Parties but at least one hundred and eighty (180) days after receiving written notice from NCTD, protect, temporarily relocate, or remove the Improvements if NCTD determines, in its sole and absolute discretion, that the Improvements are inconsistent or interfere with NCTD's current or planned use of the License Area or ROW. In consideration of NCTD's agreement to enter into this License, Licensee hereby waives any and all rights it may now have, or hereafter obtain, to any "relocation assistance benefits" pursuant to the Federal Uniform Relocation Assistance Act (42 U.S.C. § 4601 et seq.), the California Relocation Assistance law (Cal. Gov. Code § 7260 et seq.) or any other statute that replaces or provides rights similar to such statutes, if NCTD makes use of the ROW in such a way as to 'displace' Licensee from the License Area. Licensee shall in the future execute any further documentation of the release and waiver provided hereby as NCTD may reasonably require.
4. **Compensation/Mutual Benefit.** The Mutual Benefit received by the Parties is in lieu of any monetary compensation or "License Fee" for the use of the License Area. In order to provide a Mutual Benefit, NCTD will allow the use of the License Area in exchange for the maintenance and enforcement of the License Area at City's sole cost and a release of liability/hold harmless provision pursuant to Sections 7 and 10 of this Agreement. The Mutual Benefit as further described in Exhibit "D" and provided herein shall constitute a Reciprocal Benefit in accordance with NCTD Board Policy No. 11.

Nothing in this Section 4 shall affect the right of NCTD to require Licensee to relocate or remove the Improvements as set forth in Section 3 and Section 5.2.

5. **Limitations on Use.**

- 5.1 Licensee shall comply with all applicable terms, conditions and requirements of NCTD's policies regarding NCTD's ROW and all other NCTD ordinances, rules and regulations. Licensee shall comply with all applicable laws, rules and regulations of the Federal, State, County, local governments and all administrative agencies thereof which may have jurisdiction over Licensee's use of the License Area and the use, construction, and maintenance of the License Area and Improvements.

- 5.2 Consistent with Federal Transit Administration requirements, the Licensee's use of the License Area must not in any way interfere with NCTD's continuing control over the ROW or NCTD's expressed continued ability to carry out its functions. NCTD shall have the right to terminate this License at any time in order to maintain continuing control over the License Area or NCTD's expressed continued ability to carry out its functions.
- 5.3 Licensee shall not cause or permit any Hazardous Material to be used, stored, transported, generated, or disposed in or about the License Area by Licensee, Licensee's agents, employees, contractors, licensees, or invitees. "Hazardous Material" means any hazardous, toxic, or infectious substance, material, or waste which is or becomes regulated by any local governmental entity, the State of California, or the United States Government under any law, regulation or ordinance regulating or controlling any Hazardous Material (the "Hazardous Materials Laws"), including, without limitation, any material, or substance which is: (i) defined as a "hazardous waste," "extremely hazardous waste" or "restricted hazardous waste" under California Health and Safety Code §§ 25115, 25117 or 25122.7, or listed pursuant to California Health and Safety Code § 25140, (ii) defined as a "hazardous substance" under California Health and Safety Code § 25316, (iii) defined as a "hazardous material," "hazardous substance" or "hazardous waste" under California Health and Safety Code § 25501 (iv) defined as a "regulated medical waste" under 40 C.F.R. § 259.10(a) or § 259.30, (v) petroleum or petroleum product, (vi) asbestos, (vii) designated as a "hazardous substance" pursuant to § 311 of the Federal Water Pollution Control Act (33 U.S.C. § 1317), (viii) defined as a "hazardous waste" pursuant to § 1004 of the Federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. (42 U.S.C. § 6903), or (ix) defined as a "hazardous substance" pursuant to § 101 of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 et seq. (42 U.S.C. § 9601).
- 5.4 No use, construction, or maintenance by Licensee or on Licensee's behalf on the License Area will interfere with any railroad operations on the ROW.
- 5.5 Licensee shall not cross or permit the crossing over of the railroad tracks on the ROW except at public crossings approved by the California Public Utilities Commission.
- 5.6 Licensee shall not leave any personal property or equipment on the ROW unattended at any time without prior written permission from NCTD in its sole and absolute discretion. Any construction or maintenance activity shall require a Right of Entry Permit (see Sections 8 and 10).
- 5.7 Licensee shall not install or use any underground storage tanks in the License Area.
6. **Insurance.** Without limiting Licensee's indemnification obligations to NCTD under this License, Licensee shall provide and maintain during the term of this License, at Licensee's sole expense, insurance in the amounts and form specified in Exhibit "C", INSURANCE REQUIREMENTS.
7. **Indemnification.** Licensee agrees to protect, save, defend, and hold harmless NCTD and its Board of Directors ("Board") and each member of the Board, the National Railroad Passenger Corporation ("AMTRAK"), the Southern California Regional Rail Authority ("SCRRA" or "Metrolink"), and the Burlington Northern Santa Fe Railway Company ("BNSF") (collectively, the "Indemnified Parties"); and the Indemnified Parties' respective officers, agents, contractors and employees from any and all liability or claim of liability, loss or expense, including defense costs and legal fees and claims for damages of whatsoever character, nature and kind, whether directly or indirectly arising from or connected with an act or omission of Licensee, or any employee, agent, invitee (City invitee), or contractor of Licensee, or other person acting by or on behalf of Licensee on or about the License Area, including, but not limited to, liability, expense, and claims for bodily injury, death, personal injury, or property damage; provided, however, that; (1) nothing herein shall relieve any party indemnified hereunder from liability to the extent that such liability arises from such party's sole established negligence or willful misconduct for any and all Claims related to the design or

height of the fence improvements and/or trespassing on the ROW as a result of the design or height of the fence improvements; and (2) nothing herein shall relieve any Indemnified Parties from liability to the extent that such liability arises from such party's established negligence or willful misconduct for all other Claims.

Any design deviation of the Improvements other than the fence as identified herein from the Design Criteria Vol III LOSSAN Corridor in San Diego County or the LOSSAN Corridor-San Diego Subdivision Engineering Standard Drawings (ESD) shall require review and approval of NCTD in its sole and absolute discretion and shall require an amendment to this Section 7.

The requirements as to the types and limits of insurance coverage to be maintained by Licensee as required by Section 6, and any approval of such insurance by NCTD, are not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Licensee pursuant to this Agreement, including but not limited to the provisions concerning indemnification.

8. Construction.

- 8.1 Subject to NCTD's approval of the Improvements pursuant to Section 1, any work performed or caused to be performed by Licensee on the License Area shall be performed under an NCTD Right of Entry Permit ("ROE"); (a) at Licensee's sole cost and expense; (b) in accordance with any and all applicable laws, rules and regulations (including the NCTD's ordinances, rules and regulations) and (c) in a manner that is satisfactory to NCTD and that meets or exceeds the then-applicable standards of the industry for such work.
- 8.2 NCTD intends to install fencing along the ROW throughout the City in order to protect the ROW from trespassing. As part of the Project Improvements NCTD is agreeable to allowing an alternative fencing design subject to: (1) the insurance and indemnity provided by the City in Sections 6 and 7 above; and (2) the City agrees that the difference in the cost of the fence between NCTD's standard and City's requested alternative shall be at City's sole cost and expense (the "Fence Cost Delta"). City shall reimburse NCTD the Fence Cost Delta pursuant to Section 9 below. The timing of the fence installation shall be as soon as practicable as agreed between the parties with NCTD making the final determination. City's proposed alternative fence design shall be included in Exhibit "B".
- 8.3 Prior to the commencement of any work within the License Area, Licensee shall submit to NCTD for review and approval construction drawings, specifications, work plans and any other relevant information NCTD deems necessary, including but not limited to documents as required pursuant to Section 8, to enable NCTD to determine the scope and nature of the proposed work and the potential effect of such work on the ROW and train operations. NCTD may approve or disapprove any work or provision in such documents in NCTD's sole and absolute discretion, and NCTD may require such changes or impose such conditions as NCTD, in its sole and absolute discretion, deems necessary or appropriate in order to issue a ROE.
- 8.4 Licensee shall provide NCTD and all holders of underground utility facilities located within the License Area with at least seven (7) calendar days written notice prior to commencement of any work on the License Area. In the event of an emergency, Licensee shall notify NCTD personally or by telephone prior to commencing any work. Upon completion of any work, Licensee shall restore the License Area to its condition immediately preceding the commencement of the work.
- 8.5 Every individual who will be performing work in the License Area or ROW under this Agreement, before entering, shall first attend a class conducted by NCTD or NCTD's designee on Railroad Worker Protection Safety rules and regulations. Licensee shall pay all costs associated with such class.

- 8.6 The need for flag protection for Licensee's operations on or adjacent to the ROW shall be determined in the sole discretion of NCTD or NCTD's designee. In the event that NCTD or NCTD's designee determines that flag protection is necessary, Licensee shall not enter upon or use the License Area until flag protection has been provided. Licensee shall submit for flag protection services in accordance with NCTD policies and procedures. Licensee shall pay all costs of flag protection. NCTD or NCTD's designee shall use reasonable efforts to provide flag protection on the dates and times of Licensee's requested entries, provided that any work by NCTD, BNSF, or AMTRAK that requires flag protection shall take priority. NCTD shall not be liable for any costs, expenses, or claims if flag protection is not provided on Licensee's requested dates or times of entry.
- 8.7 Licensee shall, upon NCTD's request and at Licensee's expense, install barrier fencing, and/or landscaping to shield the railroad track area from public access and or the improvements thereon from public view. NCTD shall have the right to review and approve fencing and/or landscaping plans prior to installation.
- 8.8 NCTD's review and inspection of the construction drawings, specifications, work plans, and other construction documents, including but not limited to documents as required pursuant to Section 8.8, is for the purpose of examining the general arrangement, design, and details of the work for potential impact on the ROW, ROW safety, and railroad operations. NCTD and NCTD's employees, consultants, and agents assume no responsibility for and make no representations or warranties, express or implied, as to the design, condition, workmanship, or adequacy of the drawings, specifications, Permit Registration Documents (as defined below) or ESCP (as defined below), or Licensee's compliance with the same, construction documents, or work. No review, comments, requirements, or inspection shall relieve Licensee or Licensee's engineers, contractors, subcontractors, or consultants from the entire responsibility for the errors or omissions in the drawings, specifications, Permit Registration Documents (as defined below), ESCP (as defined below), or construction documents, or for the quality or adequacy of the work.
- 8.9 Storm Water Pollution Prevention: Compliance with Construction General Permit for the License:
- 8.9.1 If coverage under the Construction General Permit and/or NCTD MS4 Program requirements (as defined in this Section 8.8.1) pursuant to applicable NCTD, local, state, and federal ordinances, laws, rules and regulations is required, Licensee shall prepare, implement and monitor a Storm Water Pollution Prevention Plan ("SWPPP") that is consistent with the current NCTD SWPPP template and is in compliance with the current Construction General Permit for the purpose of preventing, among other things, the discharge of pollutants into receiving waters. This includes elimination of non-storm water pollution discharges such as improper dumping, spills or leakage from storage tanks or transfer areas. If coverage under the Construction General Permit is required, Licensee shall not perform or cause to be performed any construction or demolition activities on the License Area until Licensee obtains a Waste Dischargers Identification number, as that term is defined in the Construction General Permit. For purposes of this Section 8.8, "Construction General Permit" shall mean the State Water Resources Control Board ("SWRCB") National Pollutant Discharge Elimination System ("NPDES") General Permit for Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction and Land Disturbance Activities, as it may be amended or superseded, (currently Order No. 2012-0006-DWQ); and MS4 Program shall mean the RWQCB issued Phase II Small Municipal Separate Storm Sewer System ("MS4") Program (currently Order No. 2013-0001-DWQ) as it may be amended or superseded.
- 8.9.2 The Licensee shall prepare, implement and monitor an Erosion and Sediment Control Plan ("ESCP") consistent with the current NCTD ESCP template for the purpose of

preventing the discharge of pollutants into receiving waters for all construction or demolition activities performed or caused to be performed by Licensee on the License Area for activities not requiring coverage under the Construction General Permit, the industrial general permit or an individual National Pollutant Discharge Elimination System permit, including activities that result in a total land disturbance of less than one acre that are not part of a larger common plan of development or sale. This includes elimination of non-storm water pollution discharges such as improper dumping, spills or leakage from storage tanks or transfer areas.

8.9.3 Without limiting the provisions set forth in Sections 5.1, 8.1, 8.8.1 and 8.8.2, the Licensee shall comply with the NCTD Storm Water Management Program and all NCTD, local, state and federal ordinances, laws, rules and regulations governing storm water discharges, including but not limited to those associated with construction and demolition activities such as clearing, excavating, grading, demolition and other land disturbances.

8.9.4 The Licensee shall pay and be responsible for all fees, as applicable and as required by SWRCB, during the term of this Agreement.

8.9.5 The Licensee shall submit all SWRCB required documentation, as applicable and including but not limited to Permit Registration Documents, as that term is defined in the Construction General Permit, to the SWRCB through the SWRCB SMARTS online system and shall provide a copy of such documentation and proof of submittal to NCTD.

8.9.6 As required by Licensee's Phase II MS4 Permit (Order No. 2013-0001-DWQ) ("MS4 Permit"), NCTD may conduct periodic water sampling associated with any drainage facility installed by Licensee within the License Area. Licensee shall be required to reimburse NCTD for costs associated with collection, sampling and reporting. NCTD may require Licensee to perform corrective actions, at Licensee's sole cost and expense, in order to meet the requirements of the MS4 Permit.

9. **Reimbursement of NCTD.** Licensee shall reimburse NCTD, within sixty (60) days of invoice, for all cost and expense incurred by NCTD in connection with NCTD's review and processing of any work performed by or for Licensee on the License Area. These costs include, but are not limited to, NCTD staff time and consultant's fees for the expenses of reviewing construction documents, ESCPs, Permit Registration Documents, ROW support services, inspections, monitoring, security, the installation and removal of false work beneath tracks, equipment rentals, and restoration of the ROW to the same condition as when Licensee entered thereon. Costs of services provided by NCTD employees will be charged at the employees' fully burdened hourly rates (monthly salary and benefits). Services provided by NCTD consultants, equipment rentals, and other third-party costs will be charged at cost. Upon demand by NCTD, Licensee shall make any additional deposits that NCTD determines are necessary to reimburse NCTD for the costs and expenses incurred by NCTD. In the event that the costs and expenses incurred by NCTD exceed the amounts deposited, Licensee shall reimburse NCTD for all such costs and expenses within 30 days of invoice.

10. **Maintenance, Enforcement and Repair.** Licensee shall, at Licensee's sole expense, maintain the condition, and enforce the use of the Improvements and License Area in a condition satisfactory to NCTD and in accordance with all laws and ROW Policies. Licensee shall at all times maintain the License Area in accordance with the terms of this Agreement, as is its obligation under the agreed upon Mutual Benefit. At a minimum Licensee shall keep the Improvements and License Area in a clean and safe condition for its intended use and shall enforce any misuse within or Trespassing from the License Area. The broader scope of Licensee's maintenance enforcement obligations is provided in Exhibit "D" attached hereto and incorporated herein by reference. Failure to maintain the License Area pursuant to the minimum requirements in Exhibit "D" shall be a material breach of this Agreement which may result in termination pursuant to Section 12 below. Licensee shall be responsible for any citations issued by any agency having jurisdiction as a result

of Licensee's failure to comply with any applicable law, regulation, ordinance, rule, or order. Individual or "blanket" ROE's for specific maintenance work may be required in NCTD's sole and absolute discretion.

11. **Taxes.** Nothing contained in this Agreement shall be construed to exempt the Licensee from any tax levy or assessment which is or may be hereafter lawfully imposed. Notice is hereby given pursuant to Revenue and Tax Code Article 107.6 that this License may create a property interest subject to property taxation and may subject Licensee to the payment of property taxes levied on such interest.
12. **Default; Termination.** In the event that Licensee fails to perform any obligation under this Agreement, including maintaining the Mutual Benefit as provided herein, Licensee shall pay all costs and expenses incurred by NCTD in obtaining performance of such obligations, including costs of suit and reasonable attorney's fees. If Licensee uses the ROW for any purpose not expressly authorized by this Agreement or fails to act strictly in accordance with the terms and conditions of this Agreement, and if such default is not corrected within sixty (60) days' notice from NCTD to Licensee, NCTD may terminate this Agreement and prevent Licensee from using or remaining upon the ROW. If NCTD determines that any default by Licensee does or has the potential to cause a danger to the ROW or railroad operations, NCTD may immediately and without prior notice to Licensee terminate this Agreement and prevent Licensee from using or remaining upon the ROW, with or without process of law.

Either party may terminate this Agreement at any time and for any reason by giving written notice to the other Party of such termination, and specifying the effective date thereof at least one hundred eighty (180) days prior to the effective date.

Upon termination of this Agreement all Improvements shall be and remain a part of the License Area; or in the sole discretion of NCTD Licensee shall, at Licensee's sole expense, remove the Improvements and all other Licensee improvements in or upon the ROW and restore the ROW in a manner satisfactory to NCTD. Should Licensee fail or refuse to comply with the terms of this Section 12, NCTD may, at its option, perform such work, and Licensee shall reimburse NCTD for all costs and damages so incurred.

13. **Encinitas Double Track.** The Parties agree and understand that the Project Improvements provided herein are within the portion of the ROW which may be utilized by NCTD and SANDAG for the future Encinitas Double Track project. NCTD shall provide written notice to City at the time of Encinitas Double Track project design by SANDAG and/or funding of said project ("Double Track Notice"), the Parties shall work collaboratively to enter into a new agreement for the permanent streetscape improvements which shall be compatible with Encinitas Double Track as approved by NCTD in its sole and absolute discretion and confirmed consistent by SANDAG. If no agreement can be reached within one hundred eighty (180) days of Double Track Notice, NCTD may terminate this Agreement pursuant to the terms of Section 12. Any removal, relocation, or other costs including but not limited to engineering and design of any replacement/future streetscape improvements shall be at City's sole cost.
14. **Service of Notice.** Except as otherwise provided in this Agreement, any notice required or permitted to be given hereunder shall be in writing and may be given by personal delivery or by certified or registered mail, and shall be deemed sufficiently given if delivered or addressed to:

NCTD: North County Transit District
810 Mission Avenue
Oceanside, CA 92054
Attention: Real Estate Department

LICENSEE: City of Encinitas
550 South Vulcan Avenue
Encinitas, CA 92024
Attention: Development Services

Mailed notices shall be deemed given upon actual receipt at the address required, or forty-eight (48) hours following deposit in the mail, postage prepaid, whichever first occurs. Either party may by notice to the other specify a different address for notice purposes.

In the event the tracks become damaged, blocked or fouled in any way, Licensee shall immediately notify NCTD Rail Operations Center at (760) 435-7273.

14. **Vibration and Noise from Train Operation; Barricades.** Licensee recognizes and acknowledges that railroad tracks are located on or adjacent to the License Area and that the operation of trains over the tracks does and will produce vibrations which may affect the Improvements and Licensee's use of the License Area. With knowledge and understanding of these facts, Licensee, by execution of this Agreement, agrees that no legal action or complaint of any kind whatsoever shall be instituted against NCTD by Licensee or on Licensee's behalf as result of vibrations or as a result of the use of the railroad tracks in general.
15. **No Permanent Interest.** This Agreement does not convey any permanent interest in any real property, nor does it confer any right or obligation to any third party, including but not limited to, public access rights under any law, regulation or ordinance of any local, state or federal agency. Should any third party assert such a claim of right, title or interest, Licensee shall defend and indemnify NCTD pursuant to Section 7 of this Agreement. City expressly agrees and understands that any removal or relocation of any Improvements required under this Agreement, including but not limited to parking, shall be at City's sole expense, cost and risk.
16. **Laws and Venues.** This Agreement shall be interpreted in accordance with the laws of the State of California. If any action is brought to interpret or enforce any term of this Agreement, the action shall be brought in a State or Federal court situated in the County of San Diego, State of California.
17. **Acceptance of License Area.** Licensee accepts the License Area in its present physical "as-is" condition, and agrees to make no demands upon NCTD for any improvements or alterations. By signing this License, Licensee represents and warrants that Licensee has independently inspected the License Area and the area immediately surrounding and made all investigations, tests, and observations necessary to satisfy Licensee as to the condition of the License Area, zoning and land use laws, regulations, and ordinances affecting the License Area, and all of the conditions, restrictions, encumbrances, and other matters of record relating to the License Area. Licensee agrees that Licensee is relying solely on Licensee's independent inspection and that NCTD has made no warranty or representation with regard to the License Area. NCTD shall not be responsible for any latent defect or change in condition in the License Area and Licensee's obligations under this License shall not be diminished on account of any defect in the License Area, any change of condition, or any damages occurring on the License Area. In case of the eviction of Licensee by anyone owning or claiming title to or any interest in the License Area, NCTD shall not be liable to Licensee for any damage of any nature whatsoever or to refund any moneys paid hereunder. Licensee hereby releases NCTD from all future claims, actions, or demands that Licensee may have or may hereinafter have, known and unknown, in any way relating to the quality, fitness, or condition of the License Area, and Licensee specifically waives all rights under California Civil Code section 1542, which provides as follows:

"A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."

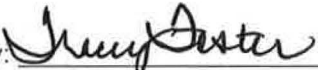
Initial: 

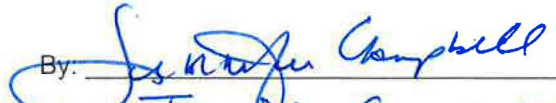
18. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Parties have signed below, effective as of the Effective Date, by their duly authorized representatives.

NCTD:
North County Transit District

LICENSEE:
City of Encinitas:

By: 
Name: Tracy Foster
Title: Chief Development Officer

By: 
Name: Jennifer Campbell
Title: Acting City Manager

Approved as to Form and Legality


Lori A. Winfree
General Counsel

Approved as to Form


Leslie E. Devaney
City Attorney

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF San Diego)

On May 22, 2020 before me, Brandi L. Lewis, a Notary Public in and for said State, personally appeared Jennifer Campbell, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.


Notary Public in and for said State

(SEAL)



A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)

COUNTY OF San Diego)

On June 8, 2020, before me, Suheil Rodriguez, a Notary Public in and for said State, personally appeared Tracey Lynn Foster, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



(SEAL)


Notary Public in and for said State

EXHIBIT A – LICENSE AREA
Based on 70% Plan Set



EXHIBIT A: ENCINITAS N COAST HIGHWAY 101 NCTD STREETSCAPE MEMORANDUM OF UNDERSTANDING EXHIBIT

EXHIBIT B – APPROVED IMPROVEMENTS

EXHIBIT C – INSURANCE REQUIREMENTS

Without limiting Licensee's indemnification of NCTD as provided herein, Licensee shall provide and maintain at its own expense during the term of this License the below listed and described policies of insurance covering its operations hereunder. Evidence of such insurance satisfactory to NCTD along with required endorsements will be delivered to NCTD concurrent with execution of this License. Such evidence shall include certificate of insurance (Accord Form 25-S or equivalent). All evidence of insurance shall be issued by a properly authorized officer, agent or qualified representative of the insurer and shall certify the names of the insured, any additional primary insureds, where appropriate, the type and amount of the insurance coverage, the location and operations to which the insurance applies and the expiration date.

1. **Commercial and General Liability:** Licensee shall provide and maintain the following commercial and general liability insurance:
 - A. Coverage for commercial general liability insurance shall be at least as broad as the Insurance Services Office Commercial General Liability (occurrence form CG 0001) coverage.
 - B. Licensee shall maintain limits of no less than two million dollars (\$2,000,000) per occurrence and four million dollars (\$4,000,000) aggregate limits for bodily injury, personal injury and property damage, including injury or damage. The general liability policies are to be endorsed to contain the following provisions:
 - a. NCTD, its Board of Directors, officers, employees, agents and volunteers are to be covered as additional insureds as respects liability arising out of the Right-of-Way licensed by Licensee. The coverage shall contain no special limitations on the scope of protection afforded to NCTD, its directors, officers, employees, agents and volunteers.
 - b. For any claims related to this License, Licensee's insurance shall be primary insurance as respects to NCTD, its Board of Directors, officers, employees, agents and volunteers. Any insurance, pooled coverage or self-insurance maintained by NCTD, its directors, officers, employees, agents and volunteers shall not be contributory.
 - c. Licensee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
 - d. The liability insurance shall indemnify the Licensee and its contractors against loss from liability imposed by law upon, or assumed under contract by the Licensee or its contractors for damages on account of such bodily injury (including death), property damage, personal injury and completed operations and products liability.
 - e. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to NCTD, its Board of Directors, officers, employees, contractors, agents or volunteers.
 - f. The insurance shall be provided on a policy form written by underwriters through an agency satisfactory to NCTD, which includes a cross-suit clause, and covers bodily injury and property damage liability, owned and non-owned vehicles and equipment, blanket contractual liability and completed operations liability.

2. Railroad Protective Liability:

- A. The Licensee shall obtain a railroad protective liability policy for work done within fifty (50) feet of railroad tracks. The standard limits shall be three million dollars (\$3,000,000) per occurrence limit and six million dollars (\$6,000,000) aggregate. NCTD reserves the right to increase these limits, depending on the scope of work related to the License.
- B. All work requiring railroad protective liability insurance shall name in the endorsement and schedules as additional insureds the following entities, including their directors, officers, agents and employees as their interests may appear:
 - a. North County Transit District (NCTD)
 - b. Burlington Northern Santa Fe Railway (BNSF)
 - c. National Railroad Passenger Corporation (AMTRAK)

3. **Automobile Liability:** Coverage for automobile liability insurance shall be at least as broad as Insurance Services Office Automobile Liability Coverage (Form CA 0001). Limits shall be not less than two million dollars (\$2,000,000) for bodily injury and property damage each accident limit from automobiles owned, leased, hired or borrowed by Licensee. The insurance shall indemnify against loss from liability imposed by law for damages on account of bodily injury, property damage, and personal injury. The automobile liability policy shall cover all owned, non-owned, leased and hired automobiles.

4. **Workers Compensation and Employer's Liability:** Licensee and its contractors and assigns shall cover or under the applicable statutory California State or Federal laws relating to workers' compensation insurance, all of their employees working on or about the Right-of-Way, and Licensee shall defend, protect and hold harmless NCTD, its Board of Directors, officers, employees, agents and volunteers from and against all claims, suits, and actions arising from any failure of the Licensee or any of Licensee's contractors or assigns to maintain such insurance.

- A. Licensee shall provide employer's liability insurance in the amount of one million (\$1,000,000) per occurrence for bodily injury and disease.
- B. Licensee shall provide NCTD with a certificate of Workers' Compensation and Employer's liability insurance coverage.
- C. Such insurance may include an insurer's waiver of subrogation in favor of NCTD and will be in a form and with insurance companies reasonably satisfactory to NCTD.

5. **OPTIONAL (As required by Risk Dept.) Property Insurance:** Licensee shall maintain property insurance covering the full replacement cost of Licensee's personal property, fixtures, equipment, and improvements against the hazards of fire, extended coverage/vandalism and malicious mischief, flood and other property-related losses. Deductible limits should be no more than five thousand dollars (\$5,000). However, NCTD reserves the right to modify deductible limits.

6. All policies required shall be issued by insurance companies who are rated not less than "A VII" by the latest A. M. Best Company Key Rating Guide, who are authorized to transact business in California.

7. NCTD makes no representation that the limits or forms of coverage of insurance specified in this section are adequate to cover Licensee's property or obligations under this License.

NCTD reserves the right to raise or lower limit requirements at the time of request, based upon the scope of work.

8. Prior to execution of this License, Licensee shall file with NCTD a certificate of insurance signed by the insurer's representative. Such evidence shall also include confirmation that coverage includes or has been modified to include required provisions as set forth herein. Licensee shall upon the reasonable demand of NCTD, deliver to NCTD such policy or policies of insurance. Each insurance policy required by this clause shall state or be endorsed to state that coverage shall not be amended or cancelled, except after thirty (30) days prior notice by U.S. mail has been given to NCTD.
9. If any insurance coverage is canceled or reduced, Licensee shall, within ten (10) days after receipt of written notice of such cancellation or reduction of coverage, file with NCTD a certificate showing that the required insurance has been reinstated or provided through another insurance company or companies, and said policy shall be submitted for approval as herein provided. At least fifteen (15) days prior to the expiration of any such policy, a certificate, showing that the insurance coverage has been renewed or extended, shall be filed with NCTD.
10. Every contractor or subcontractor of Licensee entering upon, using or performing any work upon the Right-of-Way by or on behalf of Licensee shall provide evidence of insurance required herein prior to entering upon the Right-of-Way.
11. NCTD reserves the right to increase the limits for the insurance required herein to amounts recommended by NCTD's insurance risk manager or insurance representative.
12. Notwithstanding any other provision of this License, Licensee may self-insure for any risk set forth in this section in the manner and to the extent that Licensee self-insures for similar risks with respect to its operations, equipment and property. The manner in which such self-insured is provided and the extent of such self-insurance shall be set forth in a letter of self-insurance, delivered to NCTD and signed by an authorized representative of Licensee, which fully describes the self-insurance program and how the program covers the risks set forth herein. Insurance provided by a joint powers authority or insurance pool shall be considered self-insurance for the purpose of this paragraph. If, at any time during the term of this License, Licensee elects not to self-insure, Licensee shall comply with all applicable provisions herein to the extent Licensee does not so self-insure. NCTD reserves the right to request Licensee financial statements for review prior to accepting self-insurance limits.

EXHIBIT D – MAINTENANCE AND MUTUAL BENEFIT OBLIGATIONS

The City of Encinitas shall maintain the improvements identified in Exhibit B, which may include monitoring and remediation of vegetation, fencing, erosion protection, trespass enforcement and replacement of worn or damaged improvements. Additional general maintenance obligations include activities such as trash removal, graffiti abatement, weed/vegetation/debris and dust control as well as maintenance of any drainage facilities or general run-on or other water intrusion.

Establishment of this MOU establishes a Mutual Benefit between NCTD and the City. The City's obligation to maintain and enforce the Licensed Area relieves NCTD of the significant costs related to enforcement of Trespassing and general maintenance described above and within the License Area. In exchange, the City obtains use of the License Area for the Improvements along the Coast Highway corridor for the allowable use(s).

EXHIBIT E – Acceptance of Revised Exhibit Memorandum

Acceptance of Revised Exhibit Memorandum

NCTD and City accept the Revised Exhibit, attached hereto and incorporated by reference.

North County Transit District

By: _____

Title: _____

Date: _____

City of Encinitas

By: _____

Title: _____

Date: _____

Proof of Service Financial Docket No. 36433

Parties of record:

I certify on October 5, 2020 all parties of record have been served via email in this matter.

CC:

Timothy J. Strafford
tstrafford@aar.org
Association of American Railroads

William C. Pate
wpate@dpmclaw.com
City of Del Mar

Louise Warren
Louise.Warren@coastal.ca.gov
California Coastal Commission

Daniel Elliott
danelliottiii@outlook.com
North County Transit District

Kristin Brinner
kristin@surfridersd.org
Surfrider Foundation, San Diego County

Signed:

_____/s/_____

Laura Schaefer