

ENTERED
Office of Proceedings

JAN 24 2003

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB 167 (Sub-No. 1094)A



CHELSEA PROPERTY OWNERS -- ABANDONMENT -- PORTION OF THE
CONSOLIDATED RAIL CORPORATION'S WEST 30TH STREET SECONDARY TRACK IN
NEW YORK, NEW YORK

REPLY OF THE CITY OF NEW YORK TO CHELSEA PROPERTY OWNERS REPLY TO
THE PETITION OF THE CITY OF NEW YORK TO LATE FILE A REQUEST FOR
ISSUANCE OF A CERTIFICATE OF INTERIM TRAIL USE

The City of New York (the "City") hereby submits its reply to the Chelsea Property Owners' ("CPO") Reply to the Petition of The City of New York to Late File a Request for Issuance of a Certificate of Interim Trail Use.¹ CPO has raised issues of law not previously raised and makes certain misstatements of fact to which the City has sought leave to respond in order to ensure that this Board makes its decisions in this proceeding based on a complete and accurate record.

CPO's argument suffers from three fatal flaws:

- (1) CPO has shown no prejudice from granting the City the right to negotiate an interim trail use agreement with the railroads.

¹ The City is today filing a Motion for Leave to File a Reply to a Reply and tenders this Reply in anticipation of a favorable ruling on that Motion.

- (2) CPO both misapprehends and misstates the reach of the City's Uniform Land Use Review Procedure.
- (3) CPO has created out of whole cloth a limitation on the applicability of the interim trail use procedure, a limitation that finds no basis in the statute or this Board's regulations.

In this Reply, the City will address only the second and third of those flaws because they present entirely new legal arguments that the City did not address in its initial pleadings.

A. A Certificate of Interim Trail Use and Trail Use Agreement is not an Interest in Real Property that is Subject to the City's Uniform Land Use Review Procedure.

CPO is incorrect when it asserts that the City's entering into a trail use agreement pursuant to 16 U.S.C. Sec. 1247(d) ("Rails to Trails Law"), is subject to Section 197-c(a)(11) of the New York City Charter's Uniform Land Use Review Procedure ("ULURP") as an acquisition of an interest in land. Section 197-c(a)(11) requires, in relevant part, compliance with ULURP when the City acquires real property. If the City is successful in entering into a trail use agreement with the railroads, it will not be acquiring an interest in real property for the purposes of ULURP.

CPO simply restates a portion of the introductory sentence to the ULURP statute (which, taken as a fragment, is misleading, as discussed below), and then, based upon a general definition of what constitutes real property under a different statute, concludes that a trail use agreement is an acquisition of an interest in real property covered by ULURP Sec. 197-c(a)(11). CPO makes a creative but ultimately erroneous leap from one statute to the other.

The essence of a CITU is that it is *interim*, that is, the CITU and the trail use agreement which it authorizes constitutes a revocable license to use and manage railroad property for trail use purposes. This license is subject to surrender by the City to the railroads (subject to terms

and conditions upon which the City and the railroads may agree as approved by the Board) and to revocation by the Board for restoration of rail service upon petition by any person with standing to seek it. ULURP does not extend to revocable licenses entered into by the City because they are not considered interests in real property. This is longstanding City practice that has been confirmed by New York State's highest court. *In matter of Gerges, et al. v Koch*, 62 NY2d 84 at 92; 464 NE2d 441, 476 NYS2d 73 (1984)(license from the federal government for a prison barge is not an acquisition of real property subject to ULURP Sec. 197-c(a)(11)). CPO creates the illusion that the City's practice and the ruling in *Gerges* contradict the plain language of the City Charter by quoting fragments of City Charter provisions and omitting key text. By citing a fragment of the ULURP statute, CPO confuses real property acquisitions that are subject to ULURP Sec. 197-c(a)(11) with revocable licenses that are not. A portion of the introductory passage to Sec. 197-c,² as quoted by CPO, states that "applications for changes, approvals, contracts, consents, permits . . . respecting the use, development or improvement of real property subject to City regulation shall be reviewed pursuant to a uniform review procedure." The sentence in the City Charter does not end there, however. Rather, it continues: "*in the following categories*:" (emphasis added). Only the twelve categories of actions that follow, which are more limited than would be encompassed within the broadest possible reading of the portion of the introductory phrase quoted by CPO, are subject to ULURP review.³ For example, the word

² For the Board's ready reference, a copy of Section 197-c is attached to this Reply as Exhibit 1.

³ CPO does not allege that a CITU or a trail use agreement would be covered by any ULURP category other than 197-c(a)(11), which relates to acquisitions of real property, and none of the other 11 categories apply. Categories 1 and 2 pertain to mapping actions, that is, changes to the map of the City of New York. Categories 3 and 4 pertain to zoning changes. Category 5 pertains to capital projects (see fn. 4 *infra*). Category 6 deals with franchises, concessions and revocable consents, all of which are creations of the City Charter granting certain rights to use Continued...

"consent" in the introductory phrase refers to "revocable consents" in Sec. 197-c(a)(6)(being the right to *construct and use* for *private* use pipes, conduits and tunnels under, and railroad tracks upon, and connecting bridges over inalienable property, and other like private uses ; see New York City Charter Sec. 362(d)). The word "permits" in the introductory phrase refers to "special permits within the jurisdiction of the city planning commission under the zoning resolution" (Sec. 197-c(a)(4)). The word "contracts" refers to contracts for projects that are funded with capital budget monies, and are covered in the "site selection" provisions of ULURP Sec. 197-c(a)(5), or are encompassed by one of the other categories.

CPO then cites a definition from a different statute, that is, City Charter Section 210(8), which is part of a chapter that governs capital projects and the City budget, in an attempt to define what constitutes "real property" for purposes of ULURP. *CPO Reply* at 7-8. CPO cites a decision from the State civil court of first impression, of which CPO is seeking reversal. Putting aside the question whether the case cited by CPO is good law, a question to which the parties await an answer pending the outcome of the City's and CPO's appeal of that decision, the definition cited by CPO does not change the fact that entering into an interim trail use agreement is a revocable license. Revocable licenses are not acquisitions of real property subject to the

City property (*see* City Charter Sec. 362, attached hereto as Exhibit 2). Category 7 pertains to City Council approval of the expenditure of private funds for public improvements. Category 8 pertains to housing and urban renewal plans (which are authorized and governed by state law), category 9 pertains to land fills, category 10 pertains to City dispositions of property, and category 12 pertains to initiatives of the City Planning Commission for use or development of real property which are enacted by the City Council pursuant to local law. It is possible, as indicated in the example set forth in footnote 4 *infra*, that in the course of undertaking the design and renovation of the Highline for public trail use one or more of the above categories will be implicated in the future. However, such future actions will be determined in the course of planning for Highline trail use conversion and are not implicated by the mere issuance of a CITU or execution and delivery of a trail use agreement.

provisions of Sec. 197-c(a)(11) nor do they present an action that triggers any of the other 11 categories under ULURP. The City Council, the body of City government in which land use review approval (under ULURP and other City Charter provisions) ultimately rests, supports the Mayor's position that ULURP does not apply to a trail use agreement.⁴ See Exhibit 3.

Furthermore, for a variety of different reasons, the City may elect to create a special purpose entity to enter into a trail use agreement with the railroads and other parties.⁵ The City is not committed to this arrangement—this is an evolving matter that the City will conclude after discussion and agreement with the railroads⁶. The point is that at this juncture it has not been determined whether or not it is the City or a special purpose entity that will enter into a trail use agreement with the railroads. If it is the latter, then even if a trail use agreement did fall within

⁴ If the City were to seek to spend capital budget monies to improve the Highline for trail use, the City would be required to undertake ULURP as a capital project under Section 197-c(a)(5)(see *Gerges* at 92). It has not been determined at this time whether capital budget monies will be used to improve the Highline. The Friends of the High Line, Inc. ("FOHL") has promised the City that it will procure State, federal and private monies for Highline trail use conversion, and the City intends to hold FOHL to that promise. However, if ultimately capital budget monies are appropriated for Highline improvements, ULURP may be undertaken for that purpose at a later date, with no impact on the timing of the City's entering into a trail use agreement with the railroads.

⁵ For example, persons or entities with which the City seeks cooperation for Highline trail use may obtain representation on the governing board of such an entity. Further, procurement of services for construction and maintenance would be easier with a special purpose entity than if the City were to procure such services.

⁶ The City understands that the railroad parties and the Board will require the City to ultimately protect the railroads from liability arising in connection with Highline trail use (barring insurance arrangements and other protections satisfactory to the railroads and the Board), and the City is willing to comply with that requirement. The use of a special purpose entity, if any, will be structured in a way (e.g., through a City indemnity) to ensure compliance with this baseline requirement.

the 12 actions listed in ULURP (which it does not), there would be no City acquisition of such property, and ULURP would not apply.

Because of the possibility that CPO might choose to litigate the question of the applicability of ULURP (*see CPO Reply* at 8, fn. 6), it is important that this Board understand the timing and processes that CPO could be triggering by its actions.⁷ ULURP is generally a routine process used for a large number of City-land use related actions. From the inception of preparing an application, ULURP review generally takes approximately 8 months to a year to complete. In some cases, the process can take longer. For example, where a street demapping action is concerned, time will be required to consult with and address the concerns of all City agencies and public utilities which may be affected by the demapping, by virtue of having to relocate or reserve easements for sanitary sewers, storm sewers, electrical and telephone lines and gas conduit, and to address parking, traffic and private property access issues.

This 8-12 month time frame begins with the start of work necessary to prepare an application; in this case, essentially, the environmental review work. CPO's suggestion to the contrary notwithstanding, this work has begun. City staff have been working since mid-December 2002 on compliance with the City Environmental Quality Review Act ("CEQR") in connection with a trail use agreement.

⁷ CPO's posture here is not entirely different than that of the proverbial individual who murders his parents and then throws himself on the mercy of the court because he is an orphan. CPO's litigious posturing may lead ultimately to the commencement of the ULURP process, a process in which the City does not believe it must engage at this time. CPO asserts that the ULURP review will cause further delays to the decision about what to do with the Highline. If ULURP review is in fact undertaken it will be because of the actions of CPO, which will have no one to look to but itself for having caused that delay.

ULURP prescribes a series of steps and time periods during which community boards and governmental bodies have an opportunity to consider and vote upon (whether in an advisory capacity, as with a community board or Borough President, or in an approving capacity, as with the City Planning Commission) the proposed action. The time frames are finite, and not all possible reviews apply in every case. In cases of important time-sensitive public matters, each stage of review can be completed faster than maximum allowed by the City Charter. This is particularly true for applications that enjoy broad public support, as the Highline trail use conversion does. For example, if the City were to subject the trail use agreement to ULURP as an acquisition, City Charter Section 197-d would allow *up to* 50 days, after the City Planning Commission's filing of the application with the City Council, for the City Council to call up the ULURP application for a vote. It is extremely unlikely that the City Council would let this matter wait the maximum time allowed. The Mayor's office is in regular coordination with City Council members and their staff on the Highline trail use matter, and is confident that City Council would attend promptly to any ULURP application for trail use. As a further example, CPO refers to a 5 day period in which the Mayor may review the application after approval by the City Council, after which the application is subject to another 10 day City Council review. The Mayor can approve the application the day it is filed with his office -- he need not wait for 5 days to expire. The second City Council review only applies if the Mayor vetoes the City Council's ULURP approval. Given that the CITU application is an initiative of the Mayor, there will be no veto on the matter. Thus, there will be no second City Council review. Finally, inasmuch as the Highline trail use conversion enjoys broad public support (including the affected Manhattan community board and the Manhattan Borough President, see Exhibit 4), it is likely

that expeditious approval of all stages of ULURP would be forthcoming, should ULURP review of the trail use agreement occur.

B. CPO Offers No Coherent Argument as to Why a CITU Should Not Be Available in an Adverse Abandonment Proceeding.

Citing no provisions of the applicable statute or regulations, because it cannot, CPO advances the proposition that a CITU is not available in an adverse abandonment proceeding. Neither the statute nor the regulations make any such distinction between adverse or other abandonments.

In an adverse abandonment proceeding, this Board's decisions confirm that the statutory standard and regulations governing abandonments apply. *E.g. Salt Lake City Corp. – Adverse Abandonment – In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183), *slip op.*, 2002 WL 368014 (I.C.C.) Service Date March 8, 2002, at 4 (“*Salt Lake City Corp.*”); *CSX Corp., et al. – Adverse Abandonment Application – Canadian National Ry. Co. et al.*, STB Docket No. AB-31 (Sub-No. 38), *slip op.* 2002 WL 127074 (I.C.C.), Service Date Feb. 1, 2002 (“*CSX Corp.*”); *City of Rochelle, IL – Adverse Discontinuance Rochelle Railroad Company*, STB Docket AB-549, *slip op.*, 1999 WL 376054 (I.C.C.), Service Date May 27, 1999. In these cases, a party other than the railroad whose right to operate in interstate commerce is at issue brings the application and bears the burden of proving that the public convenience and necessity no longer justifies that continued operation. *Salt Lake City Corp.* at *4. Where an applicant seeks waiver of some or all of the regulations that govern abandonments, the Board will entertain those requests on a case by case basis. For example, in *CSX Corp.*, the Board granted an exemption from 49 U.S.C. §10905, and as a result stated that public use and trail use were not considerations in that proceeding and that it would also not entertain any potential offers of financial assistance. Until those regulations are waived like any of the other regulations and

standards that govern the abandonment process, they continue to apply to any adverse abandonment proceeding.

The Board, it is true, has ruled that trail use/rail banking and public use requests are not appropriate in adverse discontinuance proceedings. *See City of Rochelle, Illinois* at *2. The reasoning there is that until the owner of the track seeks to fully abandon the obligation to provide freight service, there is no basis to assume that trail use can safely occur. However, this is an abandonment not a discontinuance case and the full measure of the Board's regulations apply.

CPO is correct that the Board's cases make clear that one of the primary uses of the adverse abandonment process is to remove from the railroad the shield of the Board's plenary jurisdiction to permit parties to exercise their rights under state law. *Salt Lake City Corp* at *4. If this Board is provided with evidence that demonstrates that the railroad in an adverse abandonment proceeding is using some aspect of the Board's process to evade otherwise applicable state processes then the Board should, either on its own motion or on motion of a party, waive the requirements of 49 C.F.R. §1152.29 so that the railroad can not continue that conduct.

Here, however, the City and FOHL are the proponents of the CITU. The railroad is at best a willing but hesitant participant in the process - - it can not be described as purposefully or in any way deceptively attempting to use the CITU process as a way of shielding itself from the operation of state law and preserving its rights to operate on this rail corridor. Not only is there no evidence that the railroads are abusing the Board's process, the evidence before the Board demonstrates that the City's trail use request is entirely consistent with the applicable statute. 49 U.S.C. §1247(d) was enacted to "encourage State and local agencies and private interests to

establish appropriate trails". That is precisely what the City is seeking to do here. The City, not the railroad, is the moving party and is attempting to meet the needs of its residents through preservation of a preexisting corridor for recreational use. No City or State processes are being evaded here.

CPO began this proceeding many years ago and had the ability then, just as it does now, to seek waiver of any of the applicable regulations. Absent a showing that the railroad is abusing this Board's process by agreeing to participate in the negotiation of an interim trail use agreement there is no basis for this Board to conclude that Section 1152.29 of the abandonment regulations does not or should not apply.

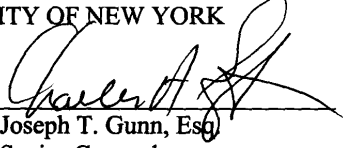
C. Conclusion

The City continues to assert, as it did in its Reply filed on December 17, 2002, that the Settlement Agreement is not sufficiently final to permit the Board to reach a conclusion as to whether it satisfies the surety condition imposed in 1992. If, however, the Board concludes that it does, the City maintains its request that the Board withhold the issuance of a final order of abandonment pending completion of negotiation of an interim trail use agreement. Nothing about the applicable statutes or the Board's regulations preclude the use of this mechanism in this proceeding. CPO's request for a lead paint stabilization program and for other relief related to the preservation of the Highline, presented without evidentiary support and almost as a throwaway request in its pleading in an attempt to further obstruct the orderly completion of this Board's processes, can be and should be addressed as part of any environmental or other conditions attendant upon the transformation of the rail right-of-way into a trail.

WHEREFORE, and in view of all of the foregoing, the City hereby requests that the Board withhold issuance of an abandonment decision in this proceeding and permit the City and the railroads to enter into negotiation of an agreement for interim trail use.

Respectfully submitted,

THE CITY OF NEW YORK

By: 

Joseph T. Gunn, Esq.
Senior Counsel
New York City Law Department
100 Church Street
New York, New York 10007
Tel. (212) 788-1169
Fax. (212) 227-5648
Email. JGunn@law.nyc.gov

Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
Tel. (202) 842-2345
Fax. (202) 408-7763
Email. cspitulnik@mwmlaw.com

Dated: January 24, 2003

Certificate of Service

I, Joseph Gunn, certify that on the 24th day of January, 2003, I caused a copy of the foregoing REPLY OF THE CITY OF NEW YORK TO CHELSEA PROPERTY OWNERS' REPLY TO THE PETITION OF THE CITY OF NEW YORK TO LATE FILE A REQUEST FOR ISSUANCE OF A CERTIFICATE OF INTERIM TRAIL USE to be served by first class mail on the parties listed below.

Counsel

Represents

Elizabeth Bradford
655 West 34th Street
New York, New York 10001-1188

(NYCCDC)

John F. Guinan
New York Department of Transportation
Albany, New York 12232

(NYDOT)

Robert M. Jenkins
Mayer Brown Rowe & Maw
1909 K Street, NW
Washington, D.C. 20006-1101

(Conrail)
(by hand delivery)

Dennis G. Lyons
Arnold & Porter
555 Twelfth Street, NW, Suite 940
Washington, DC 20004-1206

(CSX and CSXT)
(by hand delivery)

Anthony P. Semancik
347 Madison Avenue
New York, New York 10017-3706

(MTA)

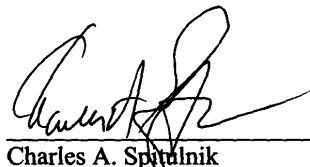
Carolyn F. Corwin
Kimberly K. Egan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

(Friends of the
High Line)
(by hand delivery)

John Broadley, Esq.
Chelsea Property Owners
1054 31st Street, N.W. - Suite 200
Washington, D.C. 20007

(CPO)
(by hand delivery)

Dated: January 24, 2003


Charles A. Spitalnik

subdivisions c and d of this section.

c. All plans proposed pursuant to this section shall be referred to the department of city planning for circulation by the department to all affected community boards, all affected borough boards and all affected borough presidents for review and written recommendation, except that any such plan need not be circulated to the agency or official that proposed such plan. All affected community boards and borough boards to which such a plan is referred shall hold a public hearing on any such plan, except that in the case of a plan that includes an entire borough or land in more than one borough, only one public hearing need be held in each affected borough. The city planning commission shall establish by rule the procedures and schedule for review of such plans, consistent with the provisions of this section. A community board or borough board may review a plan which does not involve land so located as to require its review if in its judgment the plan significantly affects the welfare of the district or borough served by such board. In such a case, the plan and any written recommendations relative thereto shall be made available to such board on request. Such board may hold its own public hearing on such plan if it desires and may submit its own written recommendations in regard thereto to the city planning commission.

d. Within a reasonable time period following review and recommendation of a plan pursuant to subdivision c of this section, the city planning commission shall (1) review such plan, (2) hold a public hearing on such plan, and (3) by resolution approve, approve with modifications or disapprove such plan. If the commission has approved a plan or approved a plan with modifications, such plan shall be subject to review and action by the council pursuant to section one hundred ninety-seven-d. The council may by a two-thirds vote approve a plan which the city planning commission disapproved or on which the commission has failed to act if the mayor so requests. Upon the filing by the mayor of such a request with the commission and the council, the commission shall within five days file with the council a copy of its decision together with a copy of the plan. Copies of approved plans shall be filed with the city clerk, the department of city planning, the affected borough presidents, the affected borough boards and the affected community boards.

§ 197-b. Notification of plans and proposals. a. Advance notice of all preliminary and final plans of public agencies and public benefit corporations or of private agencies, entities or developers filed with the city that relate to the use, development or improvement of land subject to city regulation shall be given to the affected community board or boards and the office of the affected borough president, provided that exceptions may be made in matters of no appreciable public concern by agency rule.

b. Copies of (1) all requests for proposals and other solicitations of proposals issued by or on behalf of the city, whether or not issued by an agency, a local development corporation or other entity, and (2) all letters of intent executed by or on behalf of the city, whether or not executed by an agency, a local development corporation or other entity, that relate to the private use or the disposition of city-owned land, shall be conveyed to the community boards where such land is located and the office of the borough president where such land is located promptly after issuance or execution.

§ 197-c. Uniform land use review procedure. a. Except as otherwise provided in this charter, applications by any person or agency for changes, approvals, contracts, consents, permits or authorization there-

of, respecting the use, development or improvement of real property subject to city regulation shall be reviewed pursuant to a uniform review procedure in the following categories:

- (1) Changes in the city map pursuant to section one hundred ninety-eight and section one hundred ninety-nine;
- (2) Maps of subdivisions or platings of land into streets, avenues or public places pursuant to section two hundred two;
- (3) Designations of zoning districts under the zoning resolution, including conversion from one land use to another land use, pursuant to sections two hundred and two hundred one;
- (4) Special permits within the jurisdiction of the city planning commission under the zoning resolution, pursuant to sections two hundred and two hundred one;
- (5) Site selection for capital projects pursuant to section two hundred eighteen;
- (6) Revocable consents pursuant to section three hundred sixty-four, requests for proposals and other solicitations for franchises pursuant to section three hundred sixty-three, and major concessions as defined pursuant to section three hundred seventy-four;
- (7) Improvements in real property the costs of which are payable other than by the city pursuant to section two hundred twenty;
- (8) Housing and urban renewal plans and projects pursuant to city, state and federal housing laws;
- (9) Sanitary or waterfront land-fills pursuant to applicable charter provisions or other provisions of law;
- (10) Sale, lease (other than the lease of office space), exchange, or other disposition of the real property of the city, including the sale or lease of land under water pursuant to section sixteen hundred two, chapter fifteen, and other applicable provisions of law;
- (11) Acquisition by the city of real property (other than the acquisition of office space for office use or a building for office use), including acquisition by purchase, condemnation, exchange or lease and including the acquisition of land under water pursuant to section sixteen hundred two, chapter fifteen, and other applicable provisions of law; and
- (12) Such other matters involving the use, development or improvement of property as are proposed by the city planning commission and enacted by the council pursuant to local law.

b. The following documents shall be filed with the department of city planning: (1) applications under this section, (2) any amendments thereto that are made prior to approval of such applications pursuant to this chapter, (3) any written information submitted by an applicant for purposes of determining whether an environmental impact statement will be required by law, and (4) documents or records intended to define or substantially redefine the overall scope of issues to be addressed in any draft environmental impact statement required by law. The department of city planning shall forward a copy of any materials it receives pursuant to this subdivision (whether or not such materials have been certified as complete) within five days to each affected borough president, community board or borough board.

c. The department of city planning shall be responsible for certifying that applications pursuant to subdivision a of this section are complete and ready to proceed through the uniform land use review procedure provided for in this section. Upon certification of an application, the department shall give notice of such certification to the council. If an application under this section has not been certified within six months after filing, both the applicant and, if the land use proposed in

not to exceed thirty days from the date of the original request.

c. Centralized contract and contractor information. The mayor shall ensure that copies of city contracts and other standard information regarding city contracts and contractors are reasonably available for public inspection in accordance with provisions of section one thousand sixty-four of this charter.

§ 335. Suspension and debarment. a. No person or firm shall be suspended or debarred from contracting with the city or any agency of the city except in accordance with the provisions of this section.

b. Authority to suspend or debar from bidding on or receiving city contracts.

1. Upon the petition of the head of an agency, after reasonable notice and reasonable opportunity for the person or firm to respond at a hearing to be held on a record, the office of administrative trials and hearings shall determine whether a person or firm should be debarred for cause from consideration for award of any city contract for a period not to exceed five years.

2. The agency petitioning for the debarment of a person or firm shall have the authority to suspend a person or a firm for a period not to exceed three months from consideration for award of a contract if there is probable cause for debarment such determination may be appealed to the agency head for final action.

3. The causes for debarment or suspension shall be defined by the procurement policy board and shall include but not be limited to the following matters, as may be interpreted by rule of the procurement policy board:

a. indictment or conviction for an offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a city contractor;

b. violation of contract provisions, as set forth below:

(i) failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract;

(ii) a record of unsatisfactory performance in accordance with the terms of one or more contracts;

c. arrears on any debt or contract with the city or any agency of the city, default as surety or otherwise upon any obligation to the city or any agency or arrears for taxes;

d. an agency determination of non-responsibility made pursuant to subdivision a of section three hundred thirteen, where the determination involves questions of the contractor's qualifications to perform on any city contract, or

e. violation of the provisions of sections thirteen hundred four or thirteen hundred five of this charter, or any rule or standard promulgated pursuant thereto.

CHAPTER 14

FRANCHISES, REVOCABLE CONSENTS AND CONCESSIONS

§ 362. Definitions. For the purposes of this charter:

a. "Concession" shall mean a grant made by an agency for the private use of city-owned property for which the city receives compensation other than in the form of a fee to cover administrative costs, except that concessions shall not include franchises, revocable consents and leases.

b. "Franchise" shall mean a grant by an agency of a right to occupy or use the inalienable property of the city to provide a public service.

c. "Responsible Agency" shall mean (1) with respect to a franchise, the agency designated by the mayor pursuant to section three hundred sixty-three or three hundred seventy-eight as the agency having primary expertise and responsibility for the type of franchise involved, (2) with respect to a revocable consent, the agency authorized to grant a revocable consent of the type involved pursuant to section three hundred sixty-four, or (3) with respect to a concession, the agency granting a concession.

d. "Revocable Consent" shall mean a grant by the city of a right, revocable at will, (1) to any person to construct and use for private use pipes, conduits and tunnels under, railroad tracks upon, and connecting bridges over inalienable property, (2) to an owner of real property or, with the consent of the owner, to a tenant of real property to use adjacent inalienable property for such purposes as may be permitted by rules of the department of transportation or the department of information technology and telecommunications or (3) to a public service corporation for facilities ancillary to, but not within, a franchise granted prior to the effective date of this section.

§ 363. Franchises. a. Franchises shall be awarded only in accordance with the provisions of an authorizing resolution adopted by the council pursuant to the provisions of this section.

b. An initial determination of the need for franchises of a particular type shall be made by the head of the agency designated by the mayor as having the primary expertise and responsibility in the policy area covered by that type of franchise. Upon making such a determination, such agency, with the advice of the corporation counsel and such other agencies as the mayor shall determine, shall prepare a proposed authorizing resolution for that type of franchise and shall submit such proposed authorizing resolution to the mayor. Such a proposed authorizing resolution shall set forth the nature of the franchise or franchises to be granted, the public service to be provided, the terms and conditions of the franchise or franchises, including any subsidies that will be given to a franchisee, the method by which proposals will be solicited for the franchise or franchises and the criteria to be used in evaluating the proposals submitted in response to such a solicitation.

c. The mayor may submit such a proposed authorizing resolution to the council. Promptly upon submission to the council, the text of any such authorizing resolution shall be published in the City Record. Within ninety days of receiving such a proposed resolution, the council or a committee of the council shall hold a public hearing on such resolution. The council may approve, approve with modifications or disapprove such resolution by majority vote. Any action of the council approving a modification to a proposed authorizing resolution or disapproving a proposed authorizing resolution shall be subject to the disapproval of the mayor in the same manner as a local law which is passed by the council, and any such disapproval shall be subject to reconsideration, repassing and adoption, notwithstanding the objections of the mayor, in the same manner as a local law which is disapproved by the mayor. The council may on its own initiative amend an authorizing resolution. The procedure for council review and approval of such a proposed amendment shall be the same as for an authorizing resolution.

d. No authorizing resolution or other action of the council may provide for any involvement by the council or any member of the council in the selection of a franchisee pursuant to such resolution.

e. Pursuant to an authorizing resolution adopted by the council, the responsible agency may issue one or more requests for proposals or other



CHRISTOPHER COLLINS
COUNSEL/DEPUTY DIRECTOR

THE COUNCIL
THE CITY OF NEW YORK
LAND USE DIVISION
250 BROADWAY ROOM 1602
NEW YORK, N.Y. 10007

212-788-7302

January 23, 2003

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

Dear Mr. Williams:

I write to clarify the position of the New York City Council (the "Council") regarding the applicability of the Uniform Land Use Review Procedure ("ULURP") as set forth in the New York City Charter. In late 2001, the City Council commenced an action in state court in New York County (*New York City Council et al. v. City of New York et al.*, Sup. Ct. of State of New York, New York County, Index No. 122270/01, 2002) alleging that the consummation of a certain Settlement Agreement between and among the City of New York, other governmental agencies, CSX Corporation and other railroad entities and the owners of real property beneath the Highline would trigger ULURP for several reasons. The Council prevailed at the trial court and the matter is now on appeal before the Appellate Division, 1st Department.

The Council has argued, and the trial court agreed, that effectuation of the Settlement Agreement would result in a change to the City Map and in the acquisition of real property by the City. Both results render ULURP applicable. Our City Map argument is predicated on the fact that the Highline appears on the City Map, was placed there by an act of the New York State legislature and that demolition of the structure would require its removal from the City Map. As to the acquisition of real property, it is the Council's position that the Settlement Agreement calls for the transfer of both the easements over city streets and the physical structure to the City.

The City Council supports the Petition of the City of New York to Late File a Request for Issuance of a Certificate of Interim Trail Use ("CITU") and disagrees with the position regarding ULURP taken by Chelsea Property Owners ("CPO").

The Council believes that if a CITU is issued by the STB and, subsequently, CSX and the City or a City-created entity executes a trail use agreement, ULURP would not be triggered. The Council believes that this position is supported by law and is not inconsistent with any position taken by it in the state court litigation referenced above.

Honorable V. A. Williams
January 23, 2003
Page 2

First of all, if a trail use agreement is successfully concluded, the Highline structure will remain in place and no change to the City Map will be needed. Secondly, a trail use agreement does not involve the acquisition of an interest in real property by the City; rather, the City or a City-created entity would assume management responsibilities and liability. It is important to keep in mind that what the City seeks is a Certificate of *Interim* Trail Use. Such a use under federal law will bring with it the continued plenary jurisdiction of the STB who may require the surrender of the CITU in the event of the restoration of rail use.

The City Council also recognizes that certain actions taken by the City of New York in the future would trigger ULURP. For example, if the City were to expend capital budget dollars on the Highline structure, a "site selection" ULURP would be required. However, a possible future action by a municipal government should not serve as a bar to the STB granting a CITU or to the negotiation and execution of a trail use agreement.

In conclusion, the City Council believes that as long as STB jurisdiction and the possibility of a reversion to rail use continue to exist, the City of New York will not receive an interest in real property that would be subject to ULURP.

Sincerely,

Christopher Collins, Esq.

Christopher Collins, Esq.

CC:cc

BOARD OF EDUCATION OF THE CITY OF NEW YORK
COMMUNITY SCHOOL BOARD DISTRICT 2
333 SEVENTH AVENUE, 7TH FLOOR
NEW YORK, NEW YORK 10001
(212) 330-9494 FAX (212) 330-9499

Karen F. Feuer, President
Douglas H. Robinson, 1st Vice President
Danny Yip, 2nd Vice President
Winnie Li, Secretary

Brian V. Ellner, Member
Mae Gamble, Member
Gloria Martinez, Member
Mary Somoza, Member

High Line Resolution

WHEREAS, in the 1930s the City of New York, the State of New York, and the New York Central Railroad agreed to move dangerous railroad activity from street level to elevated structures along 10th Avenue in Manhattan as part of the West Side Improvement Project; and

WHEREAS, this 1.45 mile-long elevated structure, known as the "High Line," was paid for in part with public funds and operated as a commercial freight railroad until 1980; and

WHEREAS, the High Line is located entirely within the boundaries of Community School District 2 in Manhattan; and

WHEREAS, the High Line is principally located in Manhattan Community District 4, which encompasses the neighborhoods of Chelsea and Clinton; and

WHEREAS, according to 1999 statistics, only 2% of the land in District 4 is devoted to open space or outdoor recreation; and

WHEREAS, there are only four parks in Chelsea to serve the outdoor needs of Chelsea's youth; and

WHEREAS, there are six Community School District 2 public schools located in Chelsea and Clinton: PS 11; the Clinton School for Writers and Artists; PS 33; MS 33 (the Chelsea Middle School); the Upper Lab School; and the New York City Museum School; and

WHEREAS, there is insufficient open public space for recreational use for the students in our schools and in schools throughout the City; and

WHEREAS, the Friends of the High Line ("FHL"), a 501(c)(3) not-for-profit organization, which has extensive public support and the support of numerous elected officials at all levels of government, has done extensive preliminary work to create a "Rails-To-Trails" program for the High Line; and

WHEREAS, the creation of an open public space and park on the High Line will help alleviate the lack of open space for the children in our district; and

WHEREAS, the preservation of the High Line will play a valuable teaching and historic role for children in our public schools; and

WHEREAS, the preservation of the High Line and its eventual transformation to an open public space will afford countless opportunities for public school involvement;

NOW, THEREFORE, BE IT RESOLVED, that Community School District 2 in Manhattan hereby calls upon Governor George Pataki, Mayor Rudolph Giuliani and Speaker Peter Vallone to support the resolution of New York City Council Members Miller and Quinn to preserve the High Line and urge those elected officials to take all necessary steps to obtain a Certificate of Interim Trail Use from the United States Surface Transportation Board to preserve the High Line for use as an open public space for our City's youth.



THE CITY OF NEW YORK
OFFICE OF THE PRESIDENT
BOROUGH OF MANHATTAN

C. VIRGINIA FIELDS
BOROUGH PRESIDENT

TESTIMONY OF MANHATTAN BOROUGH PRESIDENT
C. VIRGINIA FIELDS

before

The Committee on Federal and State Legislation
The Council of the City of New York
on

Resolution Number 1747 calling on the Governor, the Mayor and the Metropolitan
Transportation Authority to take all necessary steps to railbank the High Line

April 18, 2001

A crumbling steel dinosaur? No. The High Line is a unique piece of New York City and its history. That is why I am here to voice support for the resolution introduced by Councilmembers Miller and Quinn and other councilmembers from all the boroughs calling upon the Mayor, the Governor and the MTA to do all they can to help get the High Line railbanked under the federal rails-to-trails program.

This railbanking action is important because it would preserve both the structure and the railroad easement that comes with it and allow interim use as public open space – a commodity that is sorely needed in this borough. And preservation of the High Line – at the very least on an interim basis – will allow a logical planning sequence to ensue. We do not want to repeat the mistakes of earlier times when such treasures as the original Penn Station were torn down. If the railroad is demolished, it will never be rebuilt. And along with this, easements that would permit possible future re-use as a transportation facility will be lost forever. This may compromise future transit options on the far west side, which will be important as the area develops further. We don't want to repeat the story of the east side's loss of elevated trains and the long battle to build a Second Avenue Subway – a battle I am proud to say I have spearheaded and we are winning.

MUNICIPAL BUILDING • 1 CENTRE STREET • NEW YORK, NY 10007
PHONE (212) 669-8300 FAX (212) 669-4305
www.cvirginiafields.com

As you know, I have commissioned a study to look at potential uses for the area of the West Side Rail Yards that should be completed within the next several months. I am truly concerned and interested in ensuring that this 'final frontier' in the middle of Manhattan benefits from adequate planning, including all necessary community involvement. Part of this planning should include the future of the High Line and I have had my consultant team meet with the Friends of the High Line to ensure as much input as possible.

The purpose of planning is to lay out future uses and to ensure that they are consistent with the overall plans for the area. We may look to such cities as Pittsburgh -- home of the only urban rail-trail in this country and one which is purely recreational. Or we may look to another similar project in Paris that is not only recreational, but has spurred economic development as well.

In Paris, the Promenade Plantée was an abandoned elevated railroad that is now a 3 mile long public park and walkway. Beneath the viaduct, housed in the arches, are a series of commercial spaces that are devoted to arts, crafts and similar industries -- picture in your mind's eye the retail and restaurant space under the Fifty Ninth Street Bridge here in Manhattan. The Paris project also brought with it the development of much needed office and commercial space, over 1000 new housing units . . . and economic revitalization to the area.

I believe that these two projects are just two interesting examples of what can be done, depending on the needs of the community and we certainly owe it to ourselves to ensure that the broadest set of options is considered.

While it is probably still too early to lay out specific uses for the High Line, I remain dedicated to the creation of open space and parkland and the preservation of the Borough's unique architectural artifacts and history.

I am also aware that skeptics may have a number of "what ifs." But, that is precisely what the planning process is all about. It is during this time that coordination with other on-going projects, financing plans, specific uses and similar concerns are discussed and worked out.

The bottom line is that this first step of interim railtrail designation is essential for the process to proceed. Once the threat of demolition has been removed, we can all work together to ensure that a plan acceptable to all is achieved.

Therefore, I reiterate my support for this resolution and I urge the Committee to act favorably on it.

Thank you.