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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH COUNTY TRANSIT DISTRICT –)
VERIFIED PETITION FOR DECLARATORY)
ORDER)

Docket No. FD 36433

**REPLY TO STATUS UPDATE
OF THE CITY OF DEL MAR**

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Dated January 14, 2022

Attorneys for City of Del Mar

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The City of Del Mar (“Del Mar”) hereby replies to the Status Update that North County Transit District (“NCTD”) filed with the Surface Transportation Board (“Board” or “STB”) on December 30, 2021 (“Status Update”).

In decisions served on November 30, 2020 and April 7, 2021, the Board has granted several unopposed motions by NCTD to hold in abeyance agency consideration of NCTD’s Petition for Declaratory Order (“Petition”), based on NCTD’s statement of its “constructive discussions” with the California Coastal Commission (“Coastal Commission”) and Del Mar to resolve the matters at issue, and because “[t]he Board favors the private resolution of disputes whenever possible.” In its Status Update, NCTD states that, despite “constructive discussions” with Del Mar and the Coastal Commission, and “[d]espite significant efforts by NCTD to address the parties’ concerns, negotiations have not been successful. As a result, NCTD sees no choice but to proceed with this matter in an expedited manner to resolve the disputes at issue.” Del Mar replies to NCTD’s Status Report as follows.

First, Del Mar agrees with NCTD that the parties have engaged in productive discussions to resolve issues raised in NCTD's Petition. NCTD's Petition implicates a broad range of significant activities and projects affecting the last remaining natural coastal bluffs area in San Diego's North County in Del Mar ("Bluffs" or "Del Mar Bluffs") with winding trails, vistas, and wildlife habitats that go well beyond railroad operations being conducted within NCTD's right-of-way. Del Mar has cooperatively discussed with NCTD over the last year the City's strong interests in (i) public safety, (ii) preservation of scenic viewpoints and coastal access; (iii) ensuring safe railroad operations; (iv) reduced liability for all public entities; (v) ensuring that railroad projects (much of which involve federal and state funding) having the potential to result in significant impacts to the environment and to coastal access and recreation be consistent with applicable laws; and (vi) ensuring that all government stakeholders, including NCTD, the Coastal Commission, and the San Diego Association of Governments ("SANDAG"), who pursuant to state law, is in charge of planning, development, funding, and construction of the NCTD right-of-way and related projects, should continue to cooperatively participate in project review and resolution, as they have for decades.

Second, while Del Mar agrees with NCTD that the parties' discussions have not fully resolved all issues raised in NCTD's Petition, Del Mar strongly disagrees that the discussions to date have concluded. Without divulging any privileged settlement discussions, Del Mar states that those discussions have been productive and are not at a final impasse. In fact, since NCTD filed its status report, the parties have exchanged

proposals pertaining to matters that are the subject of NCTD's Petition. Also, on January 5, 2022 the Coastal Commission sent to SANDAG a letter pertaining to ongoing cooperative efforts to review and resolve SANDAG's most recent application involving Del Mar Bluffs stabilization, and project fencing. A copy of the Coastal Commission's January 5, 2022 letter is appended hereto as **Attachment A**.

Third, NCTD's Status Update insists that expedited consideration of its Petition is needed because (i) "the Phase 5 stabilization project located on the Del Mar Bluffs is in final design with an anticipated contract award in 2022," and (ii) "NCTD staff was instructed by the Board of Directors to bring a fencing project to the January 2022 Board meeting for consideration of approval." However, neither of these provide a legitimate basis for Board expedition, let alone the issuance of the Declaratory Order NCTD seeks.

As explained above and in Del Mar's October 5, 2020 Reply, **SANDAG**, not NCTD, is the duly authorized entity engaged in the Bluff stabilization project, and **SANDAG** has directed and funded, with the assistance of local, state, and federal funding, all of the Bluff stabilization projects since 2003, much of which has occurred on Del Mar's and the State's property. Yet SANDAG has not joined NCTD's petition, and has not claimed that any past or ongoing federal or state law consistency review in which it has been or is engaged has interfered with railroad operations. Instead, as the Coastal Commission's January 5, 2022 letter confirms, SANDAG and the Coastal Commission are once again working cooperatively on Phase 5 of the Bluffs stabilization project. The

parties' long history and continuing, cooperative discussions on the Bluffs stabilization project demonstrate that there is no unreasonable interference, and no present controversy requiring Board resolution, let alone a need for expedited resolution. NCTD's Petition unnecessarily seeks to interfere with that cooperative review, and unsettle orderly consideration and resolution by the relevant stakeholders.

As for the referenced proposed fencing project, while fencing has been a central point of discussion amongst the parties, as noted, those discussions have not yet concluded. In fact, Del Mar was surprised and confused by NCTD's sudden announcement in its Status Update that its staff will "bring a fencing project" to NCTD's Board of Directors meeting for approval, scheduled for next week, especially since the parties are still in ongoing discussions about the matter and critical information on the project remains outstanding.

Del Mar has no idea exactly what "project" will be brought to NCTD's Board for consideration. To better understand and evaluate the proposed fencing, Del Mar has repeatedly asked NCTD for project design and engineering plans; construction drawings; surveys, maps, and legal descriptions related to the location of the proposed fencing; and geotechnical, drainage, and hydrological studies and reports related to the proposed fencing. While these are reasonable requests for project information, NCTD has still yet to complete these items, or at least has failed to provide this information to Del Mar or the Coastal Commission to date. These are the basic pre-approval elements NCTD or SANDAG needs to have completed in order to ensure that the fencing is

properly situated on NCTD's own property; is safe; and does not adversely impact the fragile Del Mar Bluffs, NCTD's own operations, or those of other railroads that use the line. Such plans and studies are also seemingly necessary for securing construction bids and ultimate project approval.

Respectfully, it is impossible for Del Mar or the Coastal Commission to have unreasonably interfered with a project that they have not even seen, let alone sought to prevent, and the request for basic project planning information does not constitute unreasonable interference with railroad operations. Nevertheless, regardless of what specific project may be brought, neither Del Mar, the Coastal Commission, nor any other party to Del Mar's knowledge has sought to interfere with the NCTD Board's consideration of that project, nor can it, although Del Mar questions the authority of NCTD to consider and approve any such project that is properly under the control of SANDAG, and in any event, would still require appropriate consistency review.

* * *

While NCTD does not satisfy the indispensable threshold requirement of demonstrating the existence of a real, live, concrete controversy, or even if there were a controversy, that Del Mar or the Coastal Commission's involvement in project review unreasonably interferes with railroad operations warranting the issuance of a Board declaratory order, Del Mar still believes that the Board has a role to play in resolving the parties' disagreements. NCTD states in its Status Update that it "sees no choice but to proceed" with Board consideration of its Petition, which it says is necessary "to ensure

the parties understand their obligations under the applicable laws.” However, even if the parties were at an impasse in their discussions, which Del Mar does not believe that they are, there is a much better way to resolve any remaining differences.

Specifically, Del Mar believes that the ordering of Board-sponsored mediation, under 49 C.F.R. § 1109, would be the best way to help resolve the issues that are the subject of NCTD’s petition at this time. Again, Del Mar believes that the private settlement discussions over the last year between NCTD, the Coastal Commission, and Del Mar, have been productive, and still have the potential to bear constructive results and ultimate resolution. In seeking to obtain fair and final resolution, both Parties would benefit by having the involvement of Board staff knowledgeable of railroad preemption.

Del Mar believes that, if the parties collectively act in good faith, and with the assistance of the Board staff, they are in the best position to come to a mutually agreeable resolution that furthers the public interest. “The Board favors the resolution of disputes through alternative dispute resolution in lieu of formal Board proceedings whenever possible. 49 C.F.R. § 1109.1.” *R.J. Corman R.R. Property, LLC – Abandonment Exemption – in Scott, Campbell, and Anderson Counties, Tenn.*, AB 1296X (STB served Dec. 1, 2020) (ordering mediation even over the objections of one party). Accordingly, concurrently with this reply, and pursuant to 49 C.F.R. § 1109.2, Del Mar is filing a Motion for Board-Sponsored Mediation.

Del Mar appreciates the Board's consideration and assistance, and respectfully requests that it grant the Motion and commence mediation between NCTD, the Coastal Commission, SANDAG, and Del Mar to resolve their disputes.

Respectfully submitted,

CITY OF DEL MAR

A handwritten signature in black ink, appearing to read 'Peter A. Pfohl', is written over a faint, circular embossed seal of the City of Del Mar.

Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated January 14, 2022

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of January, 2022, I caused a copy of the foregoing document to be served by U.S. First Class Mail or by more expeditious means on all parties of record. Copies of this document are also being sent electronically to the individuals listed below:

John Kirk
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Katherine F. Waring
An Attorney for City of Del Mar

ATTACHMENT A

CALIFORNIA COASTAL COMMISSION

455 MARKET STREET, SUITE 300
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5202
FAX (415) 904-5400



January 5, 2022

Hasan Ikhata
Executive Director
San Diego Association of Governments
401 B Street, Suite 800
San Diego, CA 92101

Re: **Effects of Del Mar Bluffs Projects on Coastal Access and Recreation**

Dear Mr. Ikhata:

On August 12, 2021, California Coastal Commission (Commission) staff received documents and information from the San Diego Association of Governments (SANDAG) in support of Consistency Certification (CC) application no. CC-0005-21. This CC was submitted on behalf of SANDAG for the Del Mar Bluffs Stabilization 5 and 6 Project and also the follow-up authorization for the Del Mar Bluffs Emergency Repair Project at MP 245.2. The project consists of a continuation of the previous phases of bluff stabilization improvements and includes additional bluff stabilization measures, bluff toe protection measures, drainage improvements and access road improvements along a 1.6-mile section of the rail corridor. These improvements are intended to be the minimum necessary to preserve trackbed support and maintain the viability for passenger and freight rail operations until the tracks can be relocated off of the bluffs. In addition, Commission staff are aware of a proposal by North County Transit District (NCTD) to install security fencing along the length of the railroad right-of-way on the Del Mar bluffs, both landward and seaward of the railroad tracks, to limit access within the right-of-way due to safety concerns expressed by NCTD.

We appreciate the consideration and effort that SANDAG has put into refining the design of the proposed bluff stabilization improvements to minimize impacts to coastal resources; however, these stabilization and fencing projects collectively have the potential to result in significant adverse impacts to coastal access and recreation. The proposed stabilization measures would occupy a portion of the publicly available sandy beach that could otherwise be used for public recreation. They would also prevent the natural erosion processes that nourish beaches and impede the landward migration of the beach in response to sea level rise and coastal storms. They would interfere with public access to tidelands by impeding the ambulatory nature of the mean high tide line (the boundary between public and private lands). Lastly, the proposed improvements and/or fencing would significantly disrupt or eliminate pedestrian access on existing, informal access trails along the bluffs and down onto the beach that have been heavily used by the public for decades to traverse the blufftop, enjoy scenic coastal views and access the beach and ocean. Together, these projects could have very significant impacts to existing and

historic public coastal access and recreation.¹ This is especially concerning because, even under the accelerated timeline for relocating the tracks off of the bluffs by 2035, the soonest that the railroad improvements could be removed and the area returned to passive access and recreation would be upwards of fifteen years, and more likely closer to thirty years if the rail corridor is not relocated until 2050, which is a more realistic timeframe for relocation based on recent conversations with SANDAG.

For any project under the purview of the Commission, the standard of review is the Chapter Three Policies of the Coastal Act. Sections 30211 and 30221 require new development to not interfere with public access and recreation, while Section 30210 requires the provision of maximum public access. Other policies, including Sections 30212 and 30214, recognize the need to consider public safety, topography, site geography, natural resources, and private residences when providing public access. Taken together, these policies illustrate the need for comprehensive planning and a robust mitigation approach in order to address site-specific issues while also maintaining and enhancing public access and recreation.

Previous Commission approvals for work along the bluffs have identified these complex public access and recreation concerns in light of the need to protect the railroad. In its approval of the Del Mar Bluffs Stabilization 4 Project (CC-0004-18), the Commission found that public access planning and coordination with other agencies and the public to identify appropriate access improvements was the best way to provide maximum, long-term public access. SANDAG agreed with this approach and committed to organize and participate in the development of a plan for long-term public access improvements in Del Mar that would be submitted concurrently with the improvements considered in the Del Mar Bluffs Stabilization 6 Project. This plan, identified as Coastal Connections Conceptual Planning Study (Study), is currently underway but is not expected to be complete until the summer of 2022. Any funding necessary for the implementation of public access improvements identified by the Study would be determined at a later date.

As of the date of this letter, the Del Mar Bluffs Stabilization 5 and 6 project and the fencing project are progressing independently of one another and independent of the Study. Continuing to proceed in this manner is disjointed and inefficient. It will not result in maximum public access and could result in significant adverse impacts to coastal access and recreation that will last for decades. Additionally, it precludes the ability of SANDAG and Commission staff to consider and evaluate holistic solutions and mitigation approaches to these impacts. Please let me know if you concur that the stabilization and fencing proposals are integrated and should be considered together in order to analyze and mitigate for their cumulative, interrelated impacts. If so, I request that you help ensure that SANDAG and the Commission can review these proposals together. Your assistance in ensuring that our agencies can appropriately review these related projects is also crucial given that NCTD has requested expedited consideration of its petition to the Surface Transportation Board for an order that rail maintenance and upgrade activities are not subject to the Coastal Zone Management Act's federal consistency review and the Coastal Act's permitting requirements. We have worked successfully with SANDAG for many years to ensure

¹ The projects would also have impacts to other coastal resources, including visual and biological resources, although the focus of this letter is on access and recreation issues.

that important transportation projects can proceed in a manner that is consistent with the Coastal Act, and we request your assistance in helping ensure that this collaboration will continue.

Commission staff understand the significant engineering and regulatory requirements that the railroad must meet. This situation creates significant challenges, but it also presents significant opportunities for SANDAG and the Commission to work together to leverage available resources and momentum to create a synergistic and lasting system of access and recreation for the public. Thus, Commission staff encourage SANDAG to look for holistic opportunities to address the issues with the Del Mar Bluffs Stabilization 5 and 6 project, the fencing project, and public access and recreation. Commission staff also encourage SANDAG to incorporate the findings of the Study and also to incorporate input from other studies, agencies, and the public regarding public access and recreation. Finally, considering the magnitude of these efforts, Commission staff would like to offer its full assistance and resources to help develop a cohesive plan that maximizes public access and recreation, consistent with the Coastal Act.

We would like to sincerely thank SANDAG for its hard work and coordination on this and on past projects. We look forward to continued coordination and discussing the ways we can work together to improve public access and recreation in the area of the Del Mar Bluffs.

Sincerely,



John (Jack) Ainsworth,
Executive Director