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August 29, 2007

HAND DELIVERY
~~FEDEX~~

Hon Vernon A Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Dear Secretary Williams

Enclosed for filing in STB Finance Docket No 34818, *City of Jersey City et al – Petition for Declaratory Order* are the original and eleven copies of Petition for Reconsideration of Intervenors, 212 Marin Boulevard, LLC et al

A check for $200 00 payable to the Surface Transportation Board in payment of the filing fee is enclosed Kindly return a copy of this letter and the Petition marked "FILED" to this office in the envelope provided

Service upon the Petitioners and Respondents was effective by fax and by overnighting two copies of the Petition to their respective counsel

If you have any questions concerning the foregoing or if I otherwise can be of assistance, please let me know

Very truly yours,

McKIRDY & RISKIN, PA

L JEFFREY LEWIS

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AUG 2 2007

LJL/sbh
enclosures
c c Charles H Montange, Esq
c c Robert M Jenkins, III, Esq

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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D C.

STB Finance Docket No. 34818

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION,
AND NEW JERSEY STATE ASSEMBLYMAN LOUIS M. MANZO -
PETITION FOR DECLARATORY ORDER

PETITION FOR RECONSIDERATION
OF
212 MARIN BOULEVARD L.L.C., 247 MANILA AVENUE L.L C.
280 ERIE STREET L.L.C., 317 JERSEY AVENUE L.L.C ,
354 COLES STREET L L.C., 389 MONMOUTH STREET L.L C ,
415 BRUNSWICK STREET L.L.C AND 446 NEWARK AVENUE L L.C.

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SURFACE TRANSPORTATION BOARD

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SURFACE TRANSPORTATION BOARD

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Due and dated· August 29, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No 34818

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
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Intervenors 212 Marin Boulevard L.L C , 247 Manila Avenue L.L.C., 280 Erie Street L.L.C., 317 Jersey Avenue L.L.C., 354 Coles Street L.L.C., 389 Monmouth Street L..L.C., 415 Brunswick Street L.L.C. and 446 Newark Avenue L L.C. (hereinafter collectively referred to as "Intervenors"), pursuant to 49 C.F.R. 1115.3(a), hereby petition the Board for reconsideration of its August 8, 2007 decision (the "August 8 Decision") in the above-captioned matter.

The August 8 Decision concluded that certain properties referred to in the written decision as the "Embankment" were "transferred to Conrail as a line of railroad under Line Code

1420." Decision at 6. As set forth below, the August 8 Decision involves material error and should be reversed.

1. The Board Improperly Relied on Materials Outside the Record and on Incompetent Evidence: The August 8 Decision introduces numerous factual references from prior proceedings of the Interstate Commerce Commission without providing a true copy of the relevant portions of the record, as required by 49 C.F.R. 1114 5, and without limiting its use to corroboration of matters otherwise established by the record, as required by 49 C.F.R. 1114.6. Further, the August 8 Decision relies upon information the Board or its staff found on internet sites that were not cited by any party, are obviously unsworn hearsay statements, and whose reliability has not been demonstrated. *See* Decision at n.11 and n.17. Significant portions of the Board's reasoning and its decision are based upon factual information unknown to the parties. Finally, the Board relies upon statements made in testimonial submissions that are plainly not based upon personal knowledge, but are based upon the summary or interpretation of other publications that would not themselves be evidential. *See* Decision at n.3 (Verified Statement of Richard James and Historic Preservation Materials).

2. The August 8 Decision Fails to Reconcile Material Facts: The August 8 Decision purports to find that the Embankment was transferred to Conrail in the Final System Plan

("FSP") as a line of railroad. Its conclusion is inadequately explained and inconsistent with the record

(a) Where is FSP Line Code 1420 MP 1.0 to 7.0? The August 8 Decision fails to answer the preliminary question - where exactly is Line Code 1420 located? The "Harsimus Branch" identified as FSP Line Code 1420 clearly is not the same as the UNJRR's historic Harsimus Branch. Valuation Maps V101 / ST-1 and ST-2 show the historic "Harsimus Branch" as starting at Waldo Avenue (Station 0+00) and continuing eastward to the Hudson River (Station 78+03). When these chaining station locations are converted to miles, the mile markers for Waldo Avenue and the Hudson River are MP 0.0 and MP 1.47 respectively (feet indicated by the chaining station divided by 5,280 feet per mile).[1] It should be noted that the maps explicitly show the "I.C.C. Chaining" Stations and show that the branch ends at the Hudson River near transfer bridges 3 and 4.

The August 8 Decision accepts without analysis the assertion that the "Embankment" begins at MP 1.3. There is nothing in the record to suggest this conclusion. If the valuation maps are used and MP 1.0 is located at the Hudson River (Decision at 6), then the easternmost Embankment property is located at MP 1.59 (Station 78+03 minus Station 46+62 /

[1] The conversion technique from feet to miles demonstrated above is used on the valuation maps themselves *See* Intervenors' Reply Brief at 15 n 11 & Ex. L.

5,280) or MP 0.88 (Station 46+62 / 5,280) if measured from Waldo Avenue. The track maps cited by the Board consistently refer to the Embankment properties with mileposts that are less than 1.0 even though every other milepost reference is between 1.0 and 7.0. This strongly demonstrates that the Embankment is not located between MP 1.0 and MP 7.0.

Assuming *arguendo* that the Embankment property starts at MP 1.3, where is the segment from MP 1.0 to MP 1.3? The FSP Line Code 1420 runs from MP 1.0 to 7.0 and not MP 1.3 to MP 7.0. There is no record of an abandonment proceeding. Yet the area located to the east of the Embankment is fully developed with commercial buildings, with no hint of a railroad having been there, as part of the City of Jersey City's Harsimus Cove South Redevelopment. *See* Intervenors' Reply Brief Ex. Q. For convenience, an aerial photograph of the area is attached to this Petition as page A-1. The location designated by the Board for the Embankment is arbitrary and without support in the record.

The problems are equally great if one looks westward -- if the Embankment property starts at MP 1.3, then why is Waldo Avenue described as MP 2.54? The distance from the eastern end of the Embankment to Waldo Avenue is only 0.88 miles, as calculated in the previous analysis. Yet the difference in milepost designations suggests that it should be 1.24 miles.

Every distance measured on the valuation maps for these properties is precise. Overlooking the inconsistency between the milepost markers referenced by Petitioner City of Jersey City, et al., involves a material error.

(b) The Board Overlooked the Abandonment of the Conterminous River Line: The Embankment properties were rendered inaccessible by the abandonment of the River Line, approved by decision of the Board in STB Docket No. AB-167 (Sub No. 1067-N), Conrail Abandonment of the River Line in Hudson County, served January 17, 2002. The Sixth Street Embankment joined the River Line east of Waldo, with the effect that the Embankment properties were cut off from any continuous line of railroad.

3. Jersey City's Position is Inconsistent with its Active Redevelopment of the Harsimus Cove Area and the Board Should Have Declined to Declare the Embankment an Active Line of Railroad: Jersey City should be estopped from arguing that the Embankment properties are located on an active line of railroad because it has taken inconsistent positions in the past.

Jersey City does not deny that it has championed redevelopment of the Harsimus Cove area without seeking to abandon any portion of what it now claims is FSP Line Code 1420 As previously noted, the area is completely developed with commercial buildings. See Page A-1 attached (aerial photograph

of the Harsimus Cove area). If it is part of a line of railroad, then several residential and commercial properties have already been built upon that line of railroad pursuant to Jersey City's redevelopment authority.

Jersey City failed to give notice to any of the owners of the affected properties even though the Board's ruling will have the same affect on the entire line of railroad designated as FSP Line Code 1420. These include G&S Investors JC Ltd., the owner of the Block 15 Lots 22 and 23 - properties improved with a ShopRite supermarket and a Bed Bath and Beyond store, respectively. If FSP Line Code 1420 follows the Sixth Street Embankment through to the Hudson River, as the Board states in its decision and as Jersey City's argument necessarily implies, then depending on its exact location, Line Code 1420 could affect other significant residential and commercial properties as well: (1) Avalon Cove apartments (Block 15 Lot 19 X); (2) the forty-story Marbella apartment tower (Block 15 Lot 28 X); (3) the Doubletree hotel (Block 15 Lot 26 X), and (4) Harborside Financial Center, Plaza Ten office building (Block 15 Lot 18 X). The possible inclusion of the Harborside Financial Center is ironic because the office of one of Jersey City's attorney, John Curley, Esq., is in that building.

Jersey City sought to redevelop the Sixth Street Embankment properties. *See* Intervenors' Reply Brief Ex. R. It was only

after Intervenors purchased the Embankment properties - following a bidding procedure in which Jersey City chose not to participate - that Jersey City brought this action to have the Embankment declared a line of railroad. Jersey City has invoked its eminent domain powers to gain access to the Embankment properties and then claimed it cannot condemn the properties because they are part of a line of railroad. It has used its land use authority to enact an ordinance to impede Intervenors development by requiring proof of railroad abandonment when no such requirement has been imposed on any other landowner - the New Jersey courts struck down the ordinance as improper

Jersey City has misused its own powers solely to impede Intervenors and to interfere with Intervenors' use of the Embankment property. In this action, Jersey City seeks to use the Board's authority for this same illegitimate purpose. The Board should not allow itself to become part of this effort.

4. No Legitimate Purpose is Served by Determining the Embankment is Part of a Line of Railroad: The Board should abstain from declaring a property to be part of a line of railroad where the declaration is uncertain and serves no railroad purpose.

Assuming for this argument that the Embankment is part of a line of railroad, the exercise of jurisdiction serves no

legitimate railroad purpose but only becomes part of Jersey City's litigation tactics. Consider the following facts:

- Neither Jersey City, Conrail nor Intervenors believed that the Embankment was part of a line of railroad until Jersey City adopted its current position in order to oppose Intervenors' use of the property;
- Through its redevelopment of the Harsimus Cove area (which would be a continuation of the line of railroad passing through the Embankment), Jersey City has eliminated any potential railroad customers and has permitted the erection of a large retail store at the eastern end of the Embankment. (See attached pages A-1 and A-2). Indeed, if any rail service established over the Embankment would have to pass through the Bed Bath & Beyond store located across Marin Blvd ;
- As shown on the attached pages A-2 through A-5, the properties on either side of the Embankment are almost entirely residential, together with a few small retail properties, a church and a ball field. The Embankment is inaccessible to adjacent properties due to the height of the retaining walls;

- There are no tracks or bridges to connect the separate Embankment parcels. Jersey City insisted they be removed;
- Conrail has already obtained Board approval to abandon a segment of the River Line - which included a segment that connected the Embankment to the original UNJRR main line.

The Embankment is series of unconnected City blocks surrounded by residential properties that is bounded on the west by the abandoned River Line and on the east by a Bed Bath & Beyond retail store. It is inaccessible without a ladder due to the height of the retaining walls. If the Embankment ever was part of a line of railroad, no legitimate purpose is served by declaring it so at this time.

5. The Board Lacks Jurisdiction to Determine What Properties Were Conveyed to Conrail by Line Code 1420:

Jurisdiction to interpret the orders of the Special Court, Regional Rail Reorganization Act conveying the properties of the bankrupt railroads to Conrail was vested exclusively in the Special Court. 45 U.S.C. 719(e)(2). Although the Special Court was abolished in 1996, its jurisdiction to decide actions pursuant to 45 U.S.C. 719(e)(2) was transferred to the United States District Court for the District of Columbia by Section

605 of the Federal Courts Improvement Act, P.L. 104-317, 110 Stat. 3858. 49 U.S.C. 719(b)(2).

WHEREFORE, Intervenors 212 Marin Boulevard L.L.C., 247 Manila Avenue L.L.C., 280 Erie Street L.L.C., 317 Jersey Avenue L.L.C., 354 Coles Street L.L.C., 389 Monmouth Street L.L.C., 415 Brunswick Street L.L.C. and 446 Newark Avenue L.L.C., ask that the Board to reconsider and reverse its Decision dated August 8, 2007 for the reasons stated in the above arguments.

Respectfully submitted,
212 MARIN BOULEVARD L.L.C., et al.

By their attorneys,

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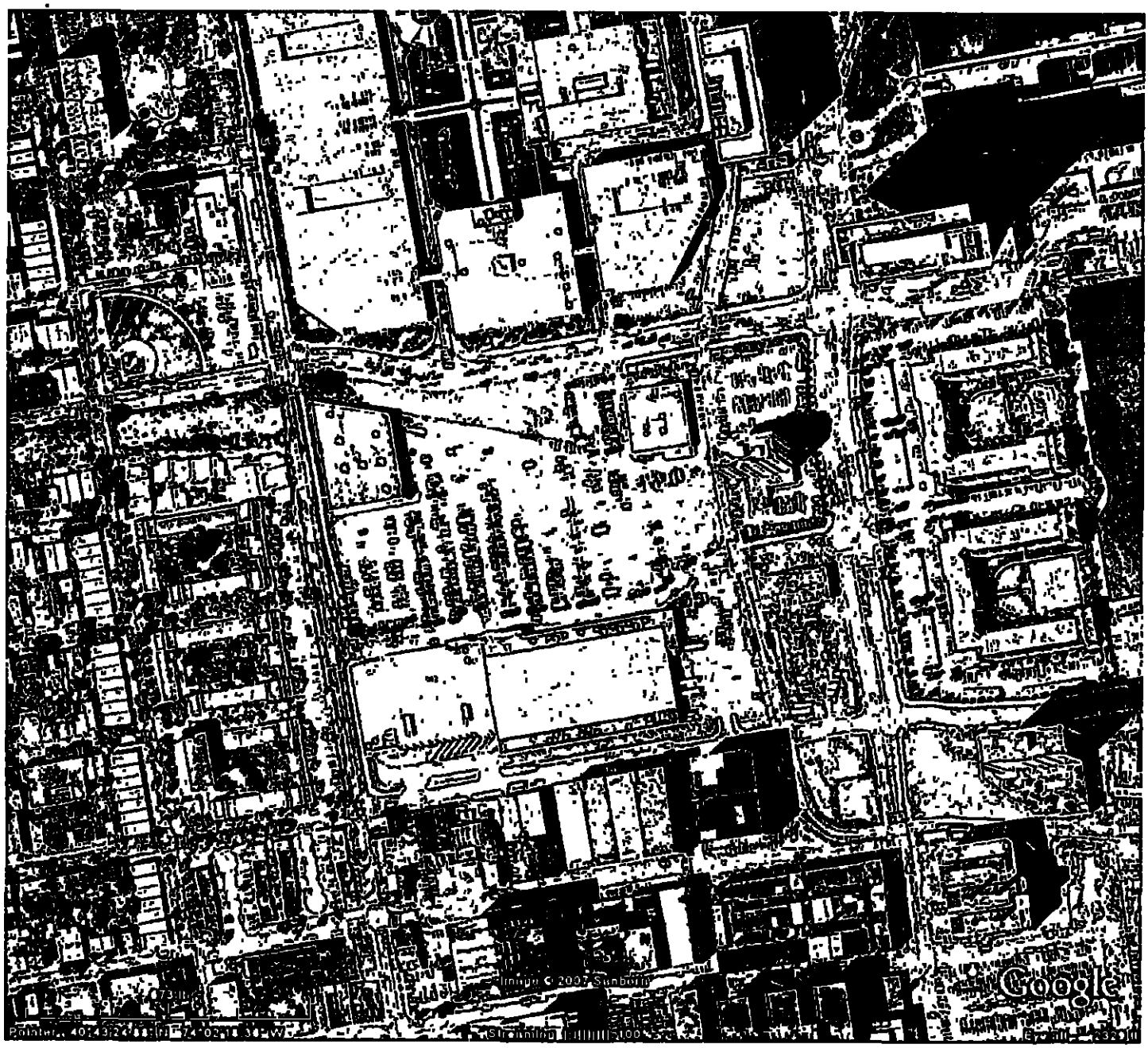
Due and dated: August 29, 2007



Aerial photograph showing eastern end of Embankment and Harsimus Cove area

Aerial photograph showing eastern end of Embankment (parcel between Manilla Ave. and Marin Blvd.) and Bed Bath & Beyond retail store

Aerial photograph showing portion of Embankment (parcels between Jersey Ave. and Manilla Ave.)

Aerial photograph showing portion of Embankment (parcels between Monmouth St. and Jersey Ave.)

Aerial photograph showing portion of Embankment (parcels between Newark Ave. and Monmouth St.)

CERTIFICATE OF SERVICE

I certify that I this day served the foregoing Petition for Reconsideration upon the City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition and New Jersey State Assemlyman Louis M. Manzo, and upon the Consolidated Rail Corporation, by faxing and sending by overnight courier copies thereof to their respective counsel, Charles H. Montange, Esq., and Robert M. Jenkins, III, Esq.

Dated this 29th day of August 2007.

L. JEFFREY LEWIS