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June 22, 1999

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Mike Rowswell
Utilities and Transportation Commission
1300 E. Evergreen Park Drive S.W.
Post Office Box 47250
Olympia, Washington 98504-7250

Re: WUTC PROPOSED RULEMAKING
TR - 981102

Dear Mr. Rowswell:

Per the Commission staff request, I am enclosing the memorandum we filed in a private crossing case in Cowlitz County. I also asked my partners for any research they had on the relationship between WUTC action on crossings and local community development plans. The agreement is that the community development plans are certainly something to be considered, but that they do not prevent WUTC action.

I hope this information is of some help. I'm sorry that we did not have anything more definitive. If you have any questions, please feel free to call.

Very truly Yours,

Kroschel Gibson Kinerk Reeve, LLP


David M. Reeve

/dr
encl.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR COWLITZ COUNTY

EAGLE RIDGE DEVELOPMENT, INC.,)
a Washington Corporation,)
)
Plaintiff,)
vs.)
)
BURLINGTON NORTHERN)
RAILROAD,)
)
Defendant.)

No. 98-2-00635-9

DEFENDANTS BN'S MEMORANDUM
TO DISMISS CLAIM FOR
INJUNCTIVE RELIEF

INTRODUCTION

Defendant Burlington Northern and Santa Fe Railway Company, formerly Burlington Northern Railroad Company files this memorandum in opposition to plaintiff Eagle Ridge Development, Inc.'s request for a temporary restraining order and further requests injunctive relief from the Court enjoining plaintiff from further use of said crossing until safety issues are adequately addressed and until plaintiff obtains approval from the appropriate state agency to use this grade crossing for public use.

STATEMENT OF FACTS

Burlington Northern's double mainline tracks which serve as the railroads main link for interstate commerce through the northwest, run north and south, intersecting plaintiff's residential development at milepost 90.2.¹ These tracks provide interstate traffic for Union Pacific and Burlington Northern railroads, as well as passenger trains from

¹ See, Affidavit of Dan L. Snapp, appended hereto as Exhibit A

1 Amtrak.¹ Approximately 40 trains travel over these tracks daily in both directions, at all
2 hours.¹ The authorized speed limit over these tracks for passenger trains is 70 mph and
3 for freight trains is 50 m.p.h.¹ In addition, there is a limited sight distance for train crews
4 approaching milepost 90.2 crossing northbound due to the curvature of the track and
5 presence of trees.² On April 28, 1998, at approximately 1:00 p.m., there was a "near
6 miss" incident over the milepost 90.2 crossing involving an Amtrak train and a flatbed
7 pickup.² The Amtrak train had to employ an emergency brake application to avoid
8 impacting the truck on the crossing.²

9
10 Following that incident, Burlington Northern sought permission to selectively cut
11 some alder trees on its right-of-way affecting the northbound sight distance. The Bureau
12 of Fish and Wildlife denied that request, due to the potential adverse effect on water
13 temperatures at a nearby Coho salmon spawning area.² The limited sight distance and
14 accompanying safety concerns at milepost 90.2 crossing remain.

15
16 Following the April 28, 1998 "near miss" incident, Burlington Northern's safety
17 concerns at this crossing were further intensified when reports of doublewide mobile
18 homes being moved over the crossing were made.² Burlington Northern officials checked
19 the status of permitting over the crossing and confirmed that neither plaintiff nor any other
20 private landowners had obtained any agreement or permission from the railroad to use
21 the crossing.

22
23 Given the very real and significant safety concerns, coupled with the lack of
24 permission, Burlington Northern had no recourse but to barricade the crossing. The
25 railroad was later informed that an adult man with reported health problems was already
26

27 ² See, Affidavit of Dan Mesford, appended hereto as Exhibit B

1 residing in the plaintiff's development so the barricades were removed and a simple,
2 cable gate with a lock was installed. The railroad provided the man and the local Castle
3 Rock Fire Department with keys to the gate.²
4

5 It appears plaintiff Eagle Ridge purchased over 100 acres at the eastside of
6 milepost 90.2 in 1991 and subsequently developed them into 22 separate residential
7 lots.³ In addition, Eagle Ridge has installed a gravel road on the eastside of the crossing
8 (on the railroad's right-of-way, without permission) up to the crossing. Multiple family
9 residents are being built on the lots with accompanying traffic over the crossing by
10 builders and contractors.² None of those individuals or company's have obtained
11 permission from the railroad to use the crossing.
12

13 Plaintiff Eagle Ridge has undertaken to convert a "farm crossing" into a public
14 crossing without obtaining the necessary input from the respective road authority and
15 railroad, as well as the requisite approval of the Washington Utilities and Transportation
16 Commission ("WUTC") in direct contravention to state statutes and regulations.
17 Historically, when the nature and character of a private crossing has been changed as
18 dramatically as it has in this case, the landowners have enlisted the sponsorship of the
19 respective county to obtain the appropriate design specifications for a public crossing
20 from the railroad and undertaken the regulatory hearings and approval from the WUTC
21 before opening it for public use.³
22

23 Plaintiff Eagle Ridge has neither addressed the safety issues involved in use of
24 this grade crossing for public access to a residential development, nor obtained the
25 approval from the appropriate state agencies required by state law. More troubling is that
26

27 ³ See, Exhibit A to Plaintiff's Motion and Affidavit for Order to Show Cause.

1 Plaintiff appears not to care. At page six of its motion it argues that if there are safety
2 issues created by their acts its not their problem and access should be unfettered.
3
4 Defendant respectfully submits that this is not a reasonable approach and that the motion
5 for TRO should be denied.

6 **STATEMENT OF AUTHORITIES**

7 **A. PLAINTIFF'S RESERVATION OF EASEMENT DOES NOT ALLOW FOR**
8 **INGRESS AND EGRESS OF GUESTS AND INVITEES OF A RESIDENTIAL**
9 **DEVELOPMENT.**

10 By deed dated June 26th 1871,⁴ the predecessor to Plaintiff granted a railroad
11 right of way to the Northern Pacific Railroad Company, a predecessor in interest to
12 defendant the Burlington Northern and Santa Fe Railway Company ("Railroad"). That
13 deed provided in part:

14 Said party of the first part reserves the privilege of erecting out
15 buildings within one hundred feet of the center of said Rail Road.
16 And to cultivate and use all lands not used in constructing and
17 keeping in repair said road. The said party of the second part does
agree to make all necessary crossings for the use of said
premises.

18 The deed conveyed a fee title to the Railroad. It reserved an easement for use by the
19 grantor. See generally Scott v. Wallitner, 49 Wn. 2d 161, 299 P.2d 204 (1956); Queen
20 City Savings and Loan Assoc. v. Mecham, 14 Wn. App 470, 543 P.2d 355 (1975).

21 The property retained by the grantor became the dominant estate. The property
22 granted to the Railroad became the servient estate.

23
24 The Plaintiff now seeks to impose upon the railroad a use far in excess and
25 different in character from that granted by the above deed over 100 years ago. The
26

27 ⁴ See, Exhibit 4, appended to BNSF's Memorandum

1 general rules for construction of an easement are set forth in Washington Real
2 Property Deskbook as follows:

3
4 The rules of construction are applied to determine the intent of the
5 parties in setting up an express easement. York v. Cooper, 60 Wn
6 2d 283, 373 P.2d 493 (1962). See Powell & Pohan, Powell on
7 Real Property ¶ 415 (1984) for an expanded discussion of rules of
8 construction. If the easement grant or reservation is specific in its
9 terms, the language is decisive of the extent of the easements.
10 Decker v. State, 188 Wash. 222, 62 P.2d 35 (1936). If the
11 easement is ambiguous or even silent on some points, the rules of
12 construction call for **examination of the situation of the property,
13 the parties and the surrounding circumstances.** City of Seattle
14 v. Nazareus, 60 Wn.2d 657, 374 P.2d 1014 (1962). **In most
15 cases, if the easement grant is in general terms, the easement
16 owner will be limited to use which is “reasonable” and which
17 is least burdensome to the servient estate.** Moe. Cagle, 62
18 Wn.2d 935, 385 P.2d 56 (1963).

19 Washington Real Property Deskbook, The Washington State Bar Association (2d ed.
20 1986) at p15-18 (emphasis added)(hereafter “Deskbook”).

21 In the present case the unambiguous language of the deed demonstrates that
22 the use of the easement to service a subdivision was not contemplated. The
23 paragraph in which the reservation of the easement is found mentions the construction
24 of “out buildings” and “cultivat[ion]” of the land. It is clear that the intent was to
25 maintain the integrity of the farm that was in existence at the time of the grant. It was
26 not contemplated, nor is it reasonable to read the deed as granting an easement to
27 service a residential subdivision.

28 It was only recently that the land was subdivided and attempts were made to
expand the use of the easement. The fact that it has not been used in this manner in
the past is evidence that such a use was never intended. Hanson v. Lee, 3 Wn. App.
461, 476 P.2d 550 (1970), Rhoades v. Barnes. 54 Wash. 145. 102 P. 884 (1909). As

1 noted above, the easement should be limited to the use which is least burdensome to
2 the servient estate. Deskbook, supra. The clear interpretation of the deed and
3 surrounding circumstances warrant finding that the easement granted in 1871 did not
4 include the use contemplated by the Plaintiff.
5

6 **B. PLAINTIFF'S READING OF THE DEED AS PROVIDING FOR A**
7 **PUBLIC GRADE CROSSING IS WITHOUT FACTUAL SUPPORT**
8 **AND AGAINST PUBLIC POLICY.**

9 In addition to the above, it should be noted that the use contemplated by the
10 Plaintiff is as a public crossing. A grade crossing is defined by statute as follows:

11 The term "grade-crossing " when used in this chapter, means any
12 point or place where a railroad crosses a highway or a highway
13 crosses a railroad or one railroad crosses another at a common
14 grade.

15 R.C.W. § 81.53.010. This section goes on to define Highway as follows:

16 The term "highway," when used in this chapter, includes all state
17 and county roads, streets, alleys, avenues, boulevards, parkways
18 and other public places actually open and in use, or to be opened
19 and used, for travel by the public.

20 Id. The grade crossing in issue in this case is a highway within the meaning of this
21 section. It is no longer used by a single individual for accessing his fields. The
22 crossing is now open for use by over twenty residences. The Cowlitz County PUD
23 has a crossing for utility lines to service this development. Its employees will use the
24 crossing for installing, maintaining and servicing its customers. The local fire
25 department and emergency response personnel have requested access across this
26 road. As noted by Plaintiff, they have contracted with companies to deliver
27 manufactured homes. Motion and Affidavit at p. 3. It was clearly contemplated that
28 this crossing be used as a public crossing.

1 The Revised Code of Washington requires approval of public grade crossing by
2 the Washington Utilities and transportation Commission (WUTC). That section states
3 that railroads “shall in no instance cross any railroad or highway at grade without
4 authority first being obtained from the commission to do so.” R.C.W. § 81.53.020.
5
6 Conversions such as this have occurred in the past. They are normally handled by the
7 developer seeking WUTC approval based on a county petition. This is accomplished
8 by the county filing “a written petition with the commission, setting forth the reasons
9 why the crossing cannot be made either above or below grade.” R.C.W. § 81.53.030.
10 The statutory scheme provides for public hearings regarding the establishment of a
11 grade crossing and includes modifications of the crossing required for public safety.
12 R.C.W. § 81.53.030, 060, 070. At public hearings the WUTC is also responsible for
13 ensuring compliance with other statewide policies and safety statutes. See, e.g.
14 R.C.W. § 48.11.020 (SEPA).

15
16 The Plaintiff should not be allowed to use the grade crossing involved without
17 complying with the statutory scheme in place for the safety of the public. Use as a
18 public crossing is disfavored by the law. In State v. Walla Walla Co., 5 Wn.2d 95, 104
19 P.2d 764 (1940) the court noted as follows:
20

21 It needs no argument to demonstrate that the crossing of a railroad
22 by a highway at grade is dangerous and generally undesirable. **The**
23 **policy of the law is against the allowance of such crossings.**

24 Id. at 104. The expansion of the easement to create a public without WUTC authority
25 or hearing on required safety precautions at the crossing should not be sanctioned by
26 this court.
27

1 C. A RESTRAINING ORDER SHOULD NOT BE GRANTED
2 BECAUSE PLAINTIFF CANNOT ESTABLISH THAT THERE HAS
3 BEEN AN INVASION OF A CLEAR LEGAL RIGHT, THAT THERE
4 IS NO ADEQUATE REMEDY AT LAW AND THAT THE PUBLIC
5 INTEREST HAS BEEN ADEQUATELY ADDRESSED.

6 In Butler v. Craft Engineering Construction, 67 Wn. App. 684, 843 P.2d 1071

7 (1992) the court held:

8 Our Supreme Court has established three requirements for the
9 granting of injunctive relief. One who seeks an injunction must
10 show

11 (1) that he has a clear legal or equitable right, (2) that he
12 has a well-grounded fear of immediate invasion of that
13 right, and (3) that the acts complained of are either
14 resulting in or will result in actual and substantial injury to
15 him.

16 Tyler Pipe Indus. Inc. v. Department of Rev. 96 Wn.2d 785, 792,
17 638 P.2d 1213 (1982) . . . In addition, equitable factors are to be
18 considered before a decision is made. since injunctions are
19 addressed to the equitable powers of the court, the listed criteria
20 “must be examined in light of equity including balancing the relative
21 interests of the parties **and, if appropriate, the interests of the**
22 **public.”** Tyler Pipe, 96 Wn.2d at 792.

23 Butler v. Craft Eng Constructor Co. 67 Wn. App. 684, 843 P.2d 1071 (1992). “Neither
24 a temporary restraining order nor a preliminary injunction is proper in a doubtful case.”

25 Fisher v. Parkview Properties, 71 Wn. App. 468, 859 P.2d 77 (1993).

26 Limiting of the access to the development is not something that was lightly done
27 by the Railroad. Defendant certainly has the legal right to avoid a burden on the
28 servant estate greater that that originally contemplated. Green v. Lupo, 32 Wn. App.
318, 647 P.2d 51 (1982), Rupert v. Gunter, 31 Wn. App. 27, 640 P.2d 36 (1982).
Defendant was informed that no one was in residence on the far side of its tracks.
When it was informed that someone did reside on the far side of its tracks it created a
gate for that limited access.² At the request of the local aid and fire personnel, a gate

1 key was made available to them.² Defendant has also informed the Plaintiff of the
2 proper steps to be taken to convert this crossing to a public crossing.

3
4 It appears, however, that the Plaintiff has not come to the court with clean
5 hands. The Defendant has no record of being contacted by the Plaintiff when this
6 increase in use was contemplated.³ It also appears that neither the W.U.T.C. nor the
7 County was contacted about creation of a public crossing. The crossing created is
8 potentially life threatening because of the site distances and increase in traffic. The
9 Plaintiff has apparently not undertaken any study or research on how to protect those
10 to whom it has sold property. Rather, it was satisfied once it obtained insurable title.
11 The increase in the use requested by the Plaintiff should not be allowed until the court
12 is satisfied that the issues of public safety have been adequately addressed.

14 CONCLUSION

15 The Plaintiff seeks for its own financial gain to increase the burden on a
16 reserved easment by converting it from a farm crossing to a public crossing servicing a
17 residential development. This is an increase in use that is not supported by the
18 relevant deed. The conversion of this grade crossing from a private to a public
19 crossing without WUTC authority makes the intended use illegal. By use of an illegal
20 grade crossing the Plaintiff seeks to avoid the statutory scheme in place for public
21 safety. Consequently, the Plaintiff cannot meet his burden for issuance of a TRO and
22 his motion should be denied.

24 Respectfully submitted this ____ day of May, 1998.

26 Kroschel Gibson Kinerk Reeve, LLP

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Daniel L. Kinerk, WSBA #13537
David M. Reeve, WSB #13374
Of Attorneys for Defendant
The Burlington Northern and Santa Fe
Railway Company ("BNSF")

DEFENDANT BNSF'S MEMORANDUM
TO DISMISS CLAIM FOR INJUNCTIVE RELIEF - 10

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