

TR-101899

Department of Public Works  
PO Box 1995  
Vancouver, WA 98668-1995



Phone (360) 487-7130  
Fax (360) 487-7139  
[www.cityofvancouver.us](http://www.cityofvancouver.us)

November 10, 2010

Docket Clerk  
Office of Chief Council  
Federal Railroad Administration  
1200 New Jersey Ave. SE, MS - 25  
Washington, DC 20590

2010 NOV 17 AM 8:09  
RECEIVED  
FEDERAL RAILROAD ADMINISTRATION  
WASHINGTON, DC

**Subject:** A Petition for Waiver of Compliance to Federal Railroad Administration (FRA) regulations at DOT 090091D (SE 144<sup>th</sup> Avenue) in the City of Vancouver, Washington

This letter and attachments are for a petition for a waiver of compliance to certain sections under Title 49 CFR 211. In a letter dated October 8, 2009 to FRA's Region 8 Grade Crossing Manager, Chris Adams and in a subsequent letter dated March 11, 2010 to FRA's Staff Director Highway-Rail Grade Crossing and Trespasser Division, Ron Ries, the City of Vancouver informed the FRA of our position that this was a long standing private crossing and should not be subject to the requirements listed in CFR 222.25(b)(1). FRA staff has taken the position that the crossing is private but allows access to the public. Accordingly the crossing is required to be evaluated by a diagnostic team. FRA has taken this position in a January 8, 2010 correspondence from Ron Ries in which it is stated "that business visitors drawn from the general public frequent the property at 14237 Evergreen Highway, it would appear (*emphasis added*) that this private highway-rail grade crossing allows access to the public."

We believe that the FRA did not have complete and accurate information regarding the nature and use of this private crossing and therefore was not able to evaluate all pertinent factors and information when this determination was made. We also believe that if the FRA were to reevaluate their initial determination based on all the information and factors they now possess, that they would come to the conclusion that this crossing is solely a private crossing without public access. In the event FRA chooses not to reevaluate their initial determination, we are hereby respectfully submitting this petition for waiver of compliance to Title 49, CFR 222.25(b)(1). In seeking this waiver, the City is reaffirming our position that the crossing is private and not open to general public access.

The following information is provided by the City of Vancouver, as required by the Federal Railroad Administration.

The City of Vancouver proposes a train horn quiet zone that includes the following crossings:

<u>Crossing ID</u>	<u>Street Name</u>
DOT 090090W	SE 139 <sup>th</sup> Ave
DOT 090091D	Private crossing (Referred to as SE 144 <sup>th</sup> Ave due to the close proximity to this public road.)
DOT 090092K	SE 147 <sup>th</sup> Ave (sometimes also referred to as SE 148 <sup>th</sup> Ave0
DOT 090094Y	SE 164 <sup>th</sup> Ave

The proposed quiet zone provides noise relief for residents while **significantly** improving safety by upgrading existing crossings with four quadrant gate systems from the existing two quadrant gate systems at the existing three public crossings within the proposed quiet zone. The attached plan shows details on the proposed quiet zone.

WAIVER OF COMPLIANCE:

The City of Vancouver seeks a waiver of compliance for the following private rail grade crossing east of the Vancouver Station in the BNSF's Northwest Division, Fallbridge Subdivision:

DOT 090091D                      SE 144<sup>th</sup> Ave private crossing with public access

The City of Vancouver seeks a waiver of FRA's determination that the private crossing at SE 144<sup>th</sup> Ave allows access to the public due to a resident's possession of a Home Occupation Permit under Vancouver Municipal Code Chapter 20.860. FRA's determination that this permit makes the crossing open to public access under Title 49 CFR 222.25(b)(1) consequently results in a required diagnostic team evaluation of this crossing and that the crossing then be equipped or treated in accordance with the recommendations of the diagnostic team.

The City of Vancouver has consistently contended that crossing DOT 090091D does not meet the intent of 49 CFR Part 222.25(b)(1) and should be treated as a private crossing without public access because of the following:

- The crossing does not allow access to the general public. The crossing is signed "PRIVATE RR CROSSING. NO TRESPASSING. RIGHT TO PASS BY PERMISSION SUBJECT TO CONTROL OF OWNER THE BNSF RWY CO." See photographs 1 through 3. Only homeowners or invitees of the homeowners on the other side of the crossing are given permission to cross. Those are either invited guests or invited counseling patients. It is not open to the general public. Access allowed under the Home Occupation Permit is solely for the provision of professional counseling services by appointment at the invitation of the home owner providing those services at their residence. In addition that permit limits the maximum number of vehicle trips (customer, employee and delivery vehicles) to an aggregate total of not more than 6 per day. (See attached Notice of Compliance with the Home Occupation Requirements, Permit Number HOC 2004-00188).
- This business invitee is done by appointment with no random arrival. Members of the general public without an invitation and without an appointment are not allowed. The counseling patient is passing with the expressed permission of the owner. They are not uninvited random members of the public. From a safety standpoint, there is no material difference between clients invited to the counselor's residence and social guests invited to any residence. Accordingly it does not allow access to the public, otherwise any residence that invites anyone to their residence for any reason would have to be treated the same. In fact they are not under the regulation. We believe that the FRA did not make their initial determination with the pertinent facts of this specific situation in hand. Rather we believe their evaluation was based on erroneous information that uninvited members of the general public could use this crossing. The use of this private crossing is minimal and highly restrictive. It is completely different than having a park on the other side of the crossing, a beach open to the general public or a bait shop or similar open commercial establishment where uninvited members of the general public would have a reason to visit and

traverse the crossing. We believe these are examples of the types of situations that were intended to be covered under Part 222.25(b)(1) not the situation that exists at crossing DOT 090091D.

- The volume of traffic on this private crossing is not significant by FRA highway-grade crossing standards. The volume of traffic has been measured on the private roadway and is less than the number of trips normally expected to be generated by the three homes that it services. It was measured at 20 vehicles per day and the Institute for Transportation Engineers Trip Generation Handbook estimates three homes should produce 30 vehicle trips per day. The number of invited counseling patients and related traffic is also limited under the home occupation permit referenced above to no more than 6 trips per day total.

At Ron Ries' direction in a letter dated January 8, 2010, the City convened a diagnostic team meeting on January 25, 2010 to evaluate the private crossing assumed to have public access. Attempts were made to identify and evaluate a low cost Alternative Safety Measure (ASM). If in a quiet zone, BNSF only supports a full Supplemental Safety Measure consisting of a four-quadrant gate improvement. This would require widening of the private road approaching the crossing and re-grading to improve sight distance which would likely result in significant civil improvements and associated costs (estimated to be more than \$500,000) and environmental impacts. The private roadway crosses a wetland close to the tracks. A full four-gate crossing is physically questionable with the layout of this crossing as well as unreasonable and impractical for a private crossing that serves only three residences and a few business invitees.

At a second diagnostic team meeting held on August 19, 2010, input from additional parties was sought out and included Washington State Department of Transportation Rail Office, AMTRAK, and the Washington Utility and Transportation Commission. Residents interested in the quiet zone and the owner of the residence with the home occupation permit were also allowed to observe the diagnostic team meeting. The diagnostic team again was not able to reach consensus so a SSM of 4-quadrant gate system was recommended by BNSF as the default Supplemental Safety Measure. Of the three public crossings located within the proposed quiet zone, only the SE 147<sup>th</sup> Ave. crossing is within ¼ mile of the private crossing at SE 144<sup>th</sup> Ave. Interestingly enough, it was discussed that if a wayside horn was installed at SE 147<sup>th</sup> and 4-quadrant gate SSM's were installed at SE 139<sup>th</sup> and SE 164<sup>th</sup> this area could enjoy quiet zones at SE 139<sup>th</sup> and SE 164<sup>th</sup> with the private crossing at SE 144<sup>th</sup> not even having to be considered for any upgrades or modifications. While BNSF was supportive of this option, it should be noted that the residents in the vicinity of SE 147<sup>th</sup> are not supportive of a wayside horn substitute at this location and instead continue to support a full-fledged quiet zone initiative.

By granting this waiver request you will enable the City of Vancouver to once again proceed with the establishment of the long awaited train horn quiet zone in the east Vancouver rail corridor. Citizens in this area have overwhelmingly indicated their interest to fund, through a local improvement district, the supplemental safety improvements at the three public crossings that will permit routine train horn noise to end, vastly improving their quality of life, and resulting in a much reduced train crossing risk index, the exact goals of the train horn noise rule established by the FRA.

SUPPLEMENTAL INFORMATION:

There are over 40 freight and passenger train movements per day over these tracks. Amtrak operates passenger trains over this section of track. This track is part of the Strategic Rail Corridor Network.

STEPS TAKEN REGARDING JOINT PETITIONER APPLICATION:

The City of Vancouver works closely with BNSF Railroad on a variety of projects. We believe we have a good working relationship and contacted them immediately regarding the proposed waiver. At FRA's

direction, the City convened two diagnostic team meetings to address Supplemental Safety Measures as well as explore lower cost Alternative Safety Measures.

The City of Vancouver has requested BNSF input on this waiver. BNSF has indicated in a letter dated October 29, 2010 that they will not support the City's petition. Also attached is a response letter by the City dated November 10, 2010 to BNSF's October 29, 2010 letter.

Accordingly, per 49 CFR Part 222.15(b), the City of Vancouver requests that you or the Associate Administrator waive the requirement for a joint petition and accept Vancouver's petition for consideration. We do not believe a joint petition in this particular case significantly contributes to public safety. The facts of this case show that the volume of traffic on this private crossing is extremely low. The crossing does not allow access to the general public, only homeowners or invitees of the homeowners are given permission to cross. Also if the quiet zone is approved, the three public crossings will be upgraded to 4-quadrant gate SSM's significantly improving safety and resulting in a much reduced train crossing risk index.

Name and title of person who will act as point of contact during the quiet zone development process:

Matt Ransom  
Long Range Planning Manager  
City of Vancouver  
PO Box 1995  
Vancouver, WA 98668-1995  
Phone: (360) 487-7707  
Email: [matt.ransom@cityofvancouver.us](mailto:matt.ransom@cityofvancouver.us)

See the attached list of each party receiving this notification.

Respectfully submitted,



Brian K. Carlson, P.E.  
Director of Public Works  
City of Vancouver

Attachments:

Notification list

Photographs 1 through 3 of SE 144<sup>th</sup> Ave private crossing (DOT 090091D)

Aerial plan view of Proposed Quiet Zone

October 8, 2009 letter from Brent Boger to Chris Adams

January 8, 2010 correspondence from Ron Ries to Brent Boger

March 11, 2010 letter from Brent Boger to Ron Ries

Home Occupation Permit No. HOC2004-00188 to Kathy Marshack 14237 SE Evergreen Hwy

October 29, 2010 letter from Richard Wagner to Brian Carlson

November 10, 2010 letter from Brian Carlson to Richard Wagner

## Recipients

### 1. Railroads operating over the grade crossings:

Richard Wagner  
Manager of Public Projects WA  
BNSF Railway  
2454 Occidental Ave South, Suite 2D  
Seattle, WA 98134-1451

Kurt Laird  
General Superintendent  
187 South Holgate St  
Seattle, WA 98134

### 2. State agency responsible for highway and road safety, and State agency responsible for grade crossing safety:

Ahmer Nizam  
Railroad Specialist  
Washington DOT  
PO Box 47407  
Olympia, WA 98504-7329

Katherine Hunter  
Transportation Compliance Manager  
Washington Utilities and Transportation Commission  
1300 S. Evergreen Park Dr. SW  
PO Box 47250  
Olympia, WA 98504-7250

### 3. Federal Railroad Administration

Associate Administrator for Safety  
Federal Railroad Administration  
1200 New Jersey Ave. SE, MS - 25  
Washington, DC 20590

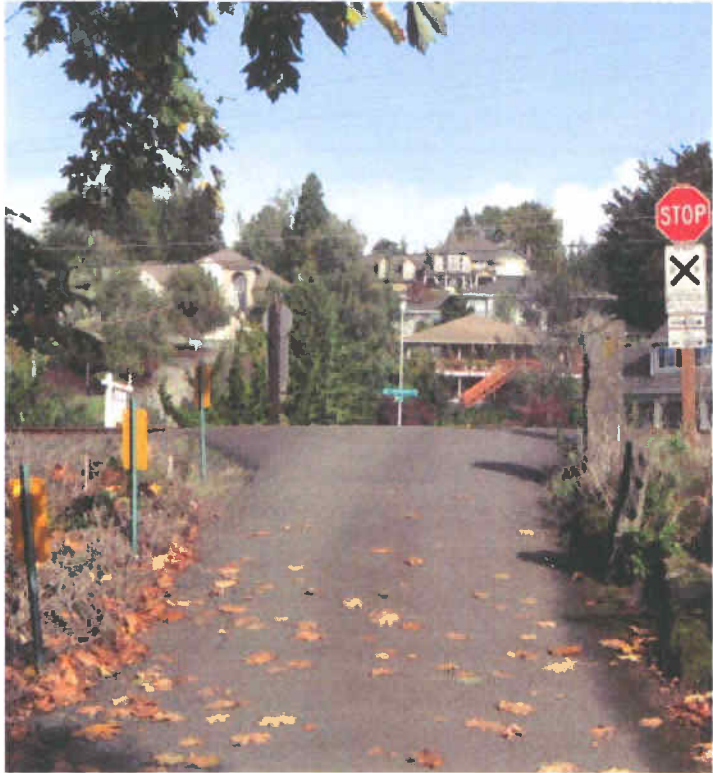
Christine Adams  
Regional Manager for Grade Crossing Safety  
Federal Railroad Administration  
PO Box 2744  
Vancouver, WA 98668



**PHOTO PAGE: Views of crossings**



**PHOTO 1: Private crossing (north side)**



**PHOTO 2: Private crossing (south side)**



PHOTO 3: Private crossing, NO TRESPASSING sign





SE 139TH AVE.  
DOT #090090W

SE 148TH AVE.  
DOT #090092K

PRIVATE CROSSING  
NEAR SE 144TH CT.  
DOT #090091D

SE 164TH AVE.  
DOT #090094Y

WAIVER OF COMPLIANCE  
EAST VANCOUVER  
TRAIN HORN QUIET ZONE  
BNSF CORRIDOR  
FALLBRIDGE SUBDIVISION



COPY



P.O. Box 1995 · Vancouver, WA 98668-1995  
[www.ci.vancouver.wa.us](http://www.ci.vancouver.wa.us)

October 8, 2009

Chris Adams  
Region 8 Grade Crossing Manager  
Federal Railroad Administration  
P.O. Box 2744  
Vancouver, WA 98668

Re: 14237 Evergreen Highway

Dear Ms. Adams:

I have reviewed the situation with respect to the use of the residential property at 14237 SE Evergreen Highway and the quiet zone requirements for the nearby private crossing. After reviewing the quiet zone rules and regulations, it is my opinion that the private crossing does not require a diagnostic review.

When we met on September 3, 2009, I was shown a provision of Appendix "C" to Part 222, "Guide to Establishing Quiet Zones". That provision (found under Section II in the Federal Register at Vol. 71 page 47654) states: "Private crossings with public access, industrial or commercial use must have a diagnostic team review and be treated according to the team's recommendations."

The activity at 14237 Evergreen that was argued to be a "commercial use" is that of a counselor who sees fewer than five patients per day at her private residence. FRA appears to suggest that the Quiet Zone Regulations consider her dwelling a commercial use because of the City-permitted home occupation activity.

That is a stretch. But in looking at the different phrasing in the actual regulation instead of the guidelines, it is more than a stretch to apply the diagnostic test requirement to that crossing. The actual regulation is codified at 222.25 (b)(1). It provides that the diagnostic test requirement only applies where there is access to an "active commercial site" through a private crossing. That conveys somewhat of a different meaning than when access is to a "commercial use" through a private crossing.

Thus when looking at the actual regulation, the contention that a diagnostic test is required rests on the notion that five counseling patient visitors per day to an active private residence site changes the character of that site, for purposes of establishing a

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Office of City Attorney

Telephone: 360-487-8500 • Facsimile: 360-487-8501 •

quiet zone, to an "active commercial site." While I agree that providing a service and being paid for it is commercial, it is evident that treating this crossing with only incidental commercial crossings differently from a crossing that has no incidental crossings is not the intent of the regulations establishing quiet zones.

No other conclusion is reasonable especially when looking at the City's zoning code. The City issued a home occupation permit under Chapter 20.860 of the Vancouver Municipal Code (VMC). Subsection 20.860(B)(7) states in part that "such [commercial] activity shall be secondary to the use of the dwelling for living purposes." (Chapter 20.860 is included with this letter). Throughout the Chapter, the VMC makes clear that home occupations are not to change the character of the property from residential to commercial.

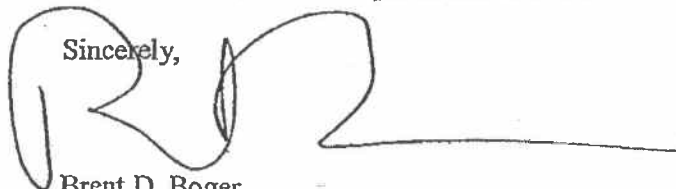
It is also clear that the purpose of the private crossing provisions under Part 222 is that they are generally not to be treated as public crossings unless they are the functional equivalent of public crossings. For example, if there was access to a restaurant or industrial park across a private crossing a diagnostic test could be required. Seeing five patients per day does not present the same safety concerns as frequent crossings to an industrial park or restaurant. Moreover, five crossings are not outside of the number normally expected to be seen at a residence without a home occupation.

As you know, City of Vancouver staff has been working with the residents of the area for several years to deal with train horn noise. City staff has proceeded on the belief that the quiet zone could be established through the installation of four-gate crossings at 139<sup>th</sup>, 147<sup>th</sup> and 164<sup>th</sup> Avenues. Until now, we were not aware of the need to improve private crossings beyond that required under 222.25(c)(1) (stop sign, crossbar and warning sign).

Finally, I would like to point out that because the crossing near 14237 SE Evergreen is private, that the City has absolutely no control over it. BNSF has permitted the crossing and entered into a crossing agreement with knowledge of the home occupation on the other side. Because the crossing is private, the City has no power to order safety improvements. This is not to say, of course, that FRA is in anyway prevented from doing a diagnostic review. But under the quiet zone regulations currently established, the LID cannot be required to pay for such diagnostic or for the improvements as a condition to establishing the quiet zone.

If you have any questions, please feel free to contact me.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to be "Brent D. Boger". The signature is written over the word "Sincerely," and extends across the width of the page.

Brent D. Boger  
Assistant City Attorney

## CHAPTER 20.860 VMC

### Section 20.860.010 Purpose.

- A. Support small-scale businesses. Provide residents with an opportunity to use their homes to engage in small-scale business activities.
- B. Reduce traffic congestion. By providing opportunities for residents to work in their homes, reduce home-to-work and work-to-home trips that add to the congestion on the City's streets during the morning and evening peak periods.
- C. Protect neighborhood character. Establish approval criteria and standards to ensure that home occupations are conducted as lawful uses that are subordinate to the residential use of the property and are conducted in a manner that is not detrimental or disruptive in terms of appearance or operation to neighboring properties.

### Section 20.860.020 Development Requirements.

- A. Applicability. Home occupations shall be a limited use in all zoning districts within legally established residential homes. Such uses shall be subject to a Type I review, pursuant to Section 20.210.040 VMC, subject to the development standards in subsection B below.
- B. Development requirements. Failure to comply with any or all of the following development standards will result in revocation of the home occupation permit.
  1. Employees. One non-resident employee is permitted for home occupation activities located in all zoning districts. The person or persons providing the business or service must reside within the dwelling on the premises.
  2. Incidental Sales. The sale of consumer goods shall be prohibited except when the product to be sold is clearly incidental and secondary to the services authorized by such home occupation.
  3. Off-site impacts. No home occupation shall generate measurable levels at the property line of noise, dust, smoke, odor or glare as defined in VMC 20.935 Off-Site Impacts. The home occupation activity shall not generate solid waste in volume or type which is not normally associated with residential use unless specifically permitted.
  4. Disturbing Influences. The home occupation use shall not create electronic interference, including but not limited to; interference with radio, satellite reception, telephone or television reception.



5. Exterior modification. To preserve the residential appearance of the structure, there shall be no evidence of the home occupation from the exterior of the structure, except door nameplate signage not to exceed 2 square feet for home occupation in non-residential zones is permitted.
6. Limitations on customers and visitors. The combined total number of customers, employees, visitors and delivery vehicles associated with the home occupation shall be limited to no more than six per day.
7. Location of use. All uses or activities associated with home occupation s shall be wholly carried on within a dwelling or accessory structure by a member or members of a family except as allowed in 20.860.020(B)(1). Such activity shall be secondary to the use of the dwelling for living purposes. Not more than 25% of the combined floor space of such dwelling and accessory structure or 800 square feet, whichever is less may be used for the home occupation.
8. Outdoor storage. No outdoor storage associated with home occupation shall be permitted.
9. Vehicles. Vehicles related to the home occupation shall be restricted to standard non-commercial cars, trucks, and vans.
10. Exemptions. The following uses are exempt from obtaining a home occupation permit:
  - a. Garage Sales as per 20.885.020(E).
  - b. Special Use Standards for Family Child Day Care Homes and Child Care Centers. Child Care Homes licensed by the state for the care of 12 or fewer children. No signs allowed.
  - c. Adult Care Homes licensed by the state for the care of 6 or fewer persons. No signs allowed.
11. Examples of permitted uses include but are not limited to the following:
  - a. Artists, illustrators, writers, photographers (no photo processing), editors, drafters, publishers;
  - b. Professional office for consultants and other similar activities;
  - c. Bookkeeping, law office, and architect;
  - d. Distribution of products assembled at home for off-premise sales (such as garden produce or crafts);

- c. Janitorial services (office);
- f. Mail order business or sales representative; *any other*
- g. Interior decorator;
- h. Manufacturer's representative. *any other*
- 12. Examples of prohibited uses include, but are not limited to, the following:
  - a. Auto repair;
  - b. Welding shops;
  - c. Large appliance/electronics or equipment repair or service;
  - d. Truck hauling and/or tow storage yard;
  - e. Vehicle sales;
  - f. Cabinet making;
  - g. Manufacturing and/or related storage;
  - h. Kennel or stable;
  - i. Wholesale or retail sales;
  - j. Restaurants/drinking establishments;
  - k. Metal plating;
  - l. Any use generating, storing or utilizing hazardous waste.

(M-3643, Added, 01/26/2004)

JAN - 8 2010

Mr. Brent D. Boger  
Assistant City Attorney  
City of Vancouver  
P.O. Box 1995  
Vancouver, WA 98668

Dear Mr. Boger:

Thank you for your October 8, 2009, letter to the Federal Railroad Administration (FRA) in which you asserted that the requirements contained in Title 49 Code of Federal Regulations (CFR) 222.25(b)(1) for private highway-rail grade crossings should not apply to the private highway-rail grade crossing located at 14237 Evergreen Highway.

Section 222.25(b)(1) of Title 49 Code of Federal Regulations reads as follows:

Private highway-rail grade crossings that are located in New Quiet Zones or New Partial Quiet Zones and allow access to the public, or which provide access to active industrial or commercial sites, must be evaluated by a diagnostic team and equipped or treated in accordance with the recommendations of such diagnostic team.

It is my understanding that you believe that the requirements contained in 49 CFR 222.25(b)(1) should not apply to the private highway-rail grade crossing located at 14237 Evergreen Highway because this private crossing does not provide access to an active industrial or commercial site. In support of your position, you have noted that the dwelling located at 14237 Evergreen Highway is occupied by a counselor who provides counseling services to fewer than five patients per day at that location—a number of visitors that you assert could normally be expected at a residence without home occupation activity. In addition, you have noted that the City of Vancouver issued a home occupation permit for the dwelling located at 14237 Evergreen Highway, which requires occupants to abide by the requirements and restrictions set forth in Section 20.860.020 of the Vancouver Municipal Code, such as the requirement that all activities associated with home occupations shall be secondary to the use of the dwelling for living purposes. In your letter, you assert that these



requirements and restrictions are intended to prevent conversion of the character of the property from residential to commercial.

It should, however, be noted that the requirements of 49 CFR 222.25(b)(1) are not limited simply to private highway-rail grade crossings that are located in New Quiet Zones or New Partial Quiet Zones and that provide access to active industrial or commercial sites. The requirements of 49 CFR 222.25(b)(1) also apply to private highway-rail grade crossings that are located in New Quiet Zones or New Partial Quiet Zones and that allow access to the public. As you have indicated that business visitors drawn from the general public frequent the property at 14237 Evergreen Highway, it would appear that this private highway-rail grade crossing allows access to the public. Thus, the requirements of 49 CFR 222.25(b)(1) would apply to the private highway-rail grade crossing at 14237 Evergreen Highway, if this private highway-rail grade crossing is included in a New Quiet Zone or New Partial Quiet Zone, in the absence of an FRA-approved waiver of these requirements.

Please note, however, that even if the City will be required to conduct a diagnostic review of the private highway-rail grade crossing at 14237 Evergreen Highway, and treat the crossing in accordance with the recommendations of the diagnostic team, it may not become necessary to expend substantial sums of money to implement necessary crossing improvements. Automatic warning devices may not be deemed necessary by the diagnostic team, especially if there are good sight lines and low highway traffic levels at the crossing.

Thank you for your interest in this matter. Please feel free to contact me at (202) 493-6285, or Ms. Kathy Shelton, Staff Attorney in FRA's Office of Chief Counsel, at (202) 493-6063, if you have any additional questions or concerns.

Sincerely,



Ronald Ries  
Staff Director  
Highway-Rail Grade Crossing and Trespasser Division



P.O. Box 1995 · Vancouver, WA 98668-1995  
www.ci.vancouver.wa.us

March 11, 2010

Mr. Ronald Reis  
Federal Railroad Administration  
1200 New Jersey Avenue NW  
Washington, DC 20590

Re: Private crossing at 14237 Evergreen Highway

Dear Mr. Reis:

I am in receipt of your letter responding to my letter of October 8, 2009.

According to your letter, the basis for requiring the diagnostic review is because 49 CFR 222.25(b)(1) applies to a crossing that allows access to the public.

The crossing does not allow access to the public. Enclosed please find a photograph of a sign at the crossing which says that the crossing is a private rail road crossing. It also says: "NO TRESSPASSING - RIGHT TO PASS BY PERMISSION SUBJECT TO CONTROL OF OWNER" A counseling patient of the home occupation in question uses the crossing not as a member of the public but as an invitee of the person possessing the house with the home occupation. The counseling patient is passing with the permission of the owner.

The home occupation permit concerns only compliance with the Vancouver Zoning Code and does nothing to change the legal status of the street from private to open to the public. Since the street and crossing are private, the street could be gated if the property owners agreed to do that among themselves.

We stand by our earlier correspondence that the crossing is private and is not subject to diagnostic review under Federal Railroad Administration regulations.

As you probably know, FRA's determination seriously jeopardizes a project the City has been working on for several years with residents of the area to establish a local improvement district to upgrade three crossings for a quiet zone. FRA has been consulted on this procedure for much of the time. We are considering elevating this

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Office of City Attorney

Telephone: 360-487-8500 • Facsimile: 360-487-8501 • e-mail: [brent.boger@ci.vancouver.wa.us](mailto:brent.boger@ci.vancouver.wa.us)

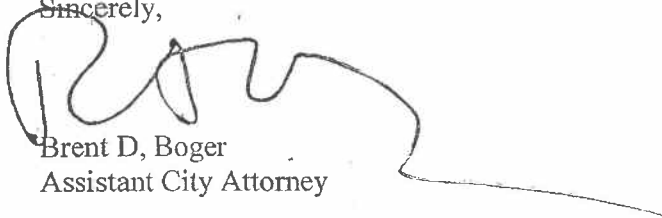
Letter to Ronald Reis  
March 11, 2010  
Page 2

matter, including the possibility of bringing a declaratory relief action, to establish that FRA's application of its regulations to this crossing is erroneous. We would do that reluctantly but might be forced to if the only two choices are legal proceedings or abandonment of the quiet zone.

We request through the Freedom of Information Act (FOIA) any and all correspondence you have received with respect to the subject crossing located at 14237 Evergreen Highway, Vancouver, Washington. Please advise of any copying costs required to obtain this information.

Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Bogert", with a long horizontal flourish extending to the right.

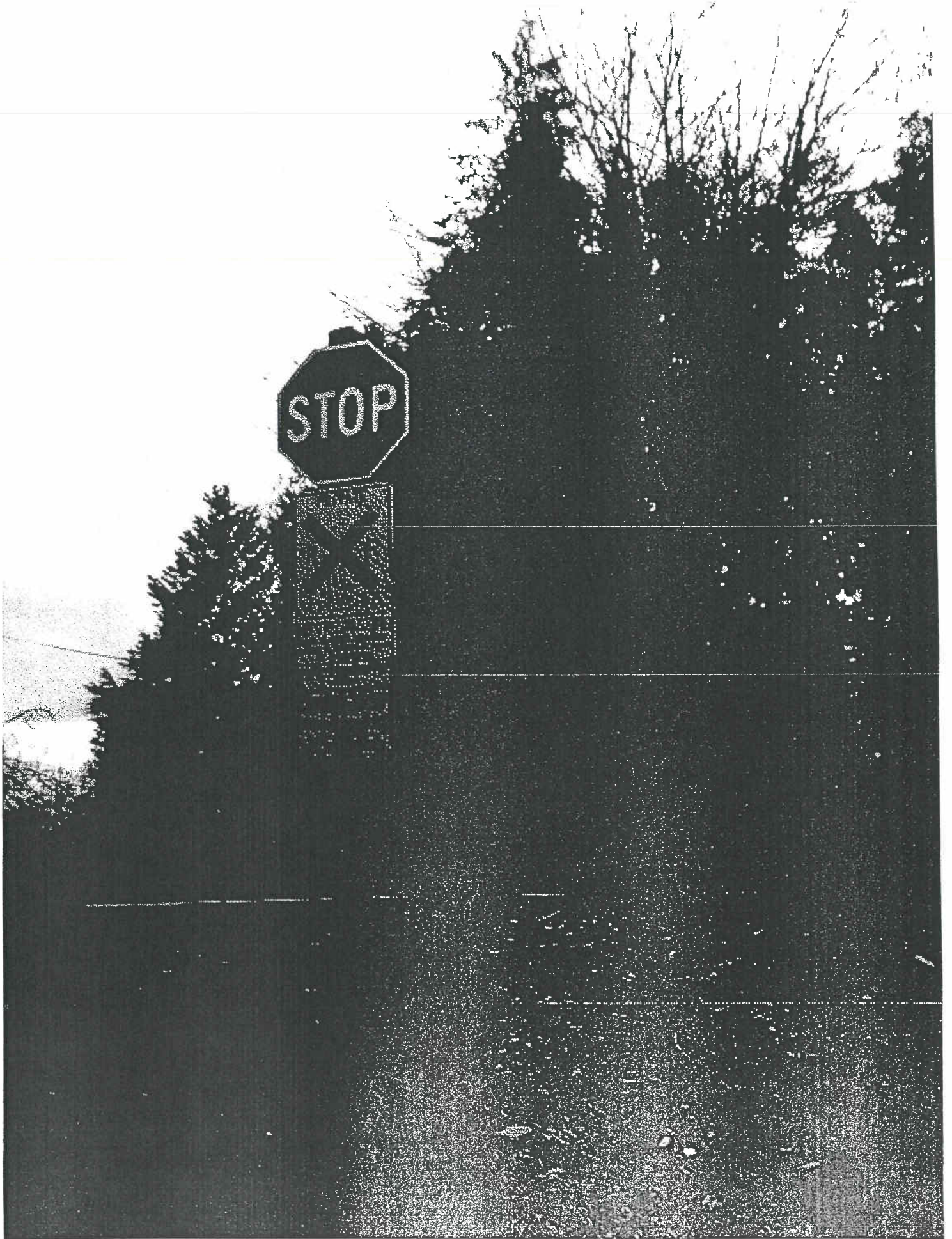
Brent D. Boger  
Assistant City Attorney

Enclosure











**CITY OF VANCOUVER CERTIFICATE OF APPROVAL**  
**NOTICE OF COMPLIANCE WITH HOME OCCUPATION REQUIREMENTS**

**NAME:** Kathy Marshack  
**Address:** 14237 SE Evergreen Hwy  
**Home Occupation Description:** Psychotherapy/Psychology Home Office.  
**Permit Number:** HOC2004-00188.  
**Date Issued:** March 16, 2005

This notice and certificate is issued as evidence that on March 10, 2005, Kathy Marshack owner and applicant of home occupation #HOC2004-00188, psychotherapy/psychology home office, has agreed to conform to the requirements for home occupations as outlined in Vancouver Municipal Code (VMC) 20.860. Kathy Marshack also agrees to comply with all other applicable codes and standards adopted by VMC and the applicable building codes. Use and occupancy of the home office is hereby authorized and approved as follows:

1. Home occupation is subject to all criteria set forth in VMC 20.860.
2. Approval subject to floor plan submitted by applicant indicating area used for home business does not exceed 800 square feet or 25% of residence floor area.
3. To preserve the residential appearance of the structure, signs are prohibited.
4. This home occupation is strictly limited to one non-resident employee.
5. Combined total of customer, employee and delivery vehicles is limited to a maximum of six (6) per day.
6. All employee, client and/or delivery vehicle parking and maneuvering must be located wholly within Marshack property on an accepted improved surface and may not extend into or obstruct any portion of the common access road.
7. The home occupation must be conducted in a manner that is not detrimental or disruptive in terms of appearance or operation to neighboring properties.

It is the City's position that the railroad crossing and road that provides access to the Marshack home are private. Therefore, the City of Vancouver assumes no liability for crossing and road maintenance or for any damage to persons or property that may result from their use. It is the responsibility of Ms. Marshack to obtain and maintain required permits from Burlington Northern Santa Fe Corp (BNSF), to allow the use of BNSF's crossing for her home business. The City's issuance of a home occupation permit does not give permission or license to violate any contract, agreement, term or condition between Ms. Marshack and BNSF. Furthermore, issuance of a home occupation permit does not give Ms. Marshack permission or license to violate any BNSF's property rights.

This permit supersedes Home Occupation Permit #V97HO065 and its conditions. Permit #V97HO065 is hereby revoked and replaced with HOC2004-00188. Failure to comply with VMC20.860 and the above conditions will result in revocation of HOC2004-00188.

Approved By City Staff: \_\_\_\_\_

*godie Sharp, Planner*





Richard W Wagner  
Manager Public  
Projects

BNSF Railway Company  
2454 Occidental Ave S  
Suite 2D  
Seattle, WA 98134

206-625-6152  
206-625-6115 (fax)  
Richard.Wagner@bnsf.com

October 29, 2010

Brian Carlson PE  
Director of Public Works  
City of Vancouver  
PO Box 1995  
Vancouver, WA 98668 - 1995

**Re: East Vancouver Quiet Zone Waiver of Compliance for DOT 090091D**

Mr Carlson –

At a meeting on October 20<sup>th</sup>, 2010 the City of Vancouver presented me with a draft Petition for Waiver of Compliance to FRA regulations through 49 USC 20101(c) at DOT 090091D located within Vancouver, Washington. The petition is a joint application that would require BNSF Railway's approval or concurrence, which I explained would not be forthcoming. This letter is to confirm that BNSF does not support the City's Petition.

Regarding the draft document, I did offer edits relating to the crossing diagnostic that was conducted on August 18<sup>th</sup>, 2010. Those suggested revisions were provided solely to correct the content of the document as it relates to the diagnostic meeting and should not be construed in any manner as supportive of the Petition. It is important to note that none of the diagnostic team members recommended that nothing should be done at this crossing as far as upgrading the safety measures or the civil aspects of the crossing in the event it is converted to a quiet zone. Instead, it would be accurate to say that there was no consensus on the specific measures to take.

The draft Petition for Waiver of Compliance represents the position that safety at this crossing will "not significantly impact public safety" despite the proposed waiver of compliance to the FRA regulations. However, those were not the findings or recommendations of the diagnostic team members.

BNSF also objects to the City's classification of the crossing as SE 144<sup>th</sup> (DOT 090091D) as wholly private, rather than a private crossing with public access. BNSF, the Federal Railroad Administration, and the Washington Utilities and Transportation Commission all agree that the crossing is private with public access. The City of Vancouver granted one of the private crossing's homeowners a license to operate a business out of her home – thereby converting the use of the crossing to include public access.

BNSF Railway will continue to recognize the importance of the safety of the public, our employees, and operations at RR grade crossings. The private crossing at SE 144<sup>th</sup> (DOT 090091D) is no different in that regard and safety continues to be the foremost policy we pursue in all diagnostic assessments.

Respectfully,

Richard W Wagner  
Manager Public Projects



Department of Public Works  
PO Box 1995  
Vancouver, WA 98668-1995



Phone (360) 487-7130  
Fax (360) 487-7139  
[www.cityofvancouver.us](http://www.cityofvancouver.us)

November 10, 2010

Richard Wagner  
Manager Public Projects  
BNSF railway Company  
2454 Occidental Ave S  
Suite 2D  
Seattle, WA 98134

**Subject:** A Petition for Waiver of Compliance to Federal Railroad Administration (FRA) regulations at DOT 090091D (SE 144<sup>th</sup> Avenue) in the City of Vancouver, Washington

Dear Rick

Thank you for your letter of October 29, 2010 in which you indicate that BNSF will not support the City's petition and accordingly a joint petition request will not be forthcoming pursuant to Title 49 Part 222.15(a). While we are disappointed in BNSF's stance, we understand some of the reasons for your position.

As we have discussed, the City is seeking a waiver of FRA's initial determination that the private crossing at SE 144<sup>th</sup> Ave allows access to the public due to a resident's possession of a Home Occupation Permit under Vancouver Municipal Code Chapter 20.860. FRA's determination that this permit makes the crossing open to public access under Title 49 CFR 222.25(b)(1) consequently resulted in a required diagnostic team evaluation of this crossing and that the crossing then be equipped or treated in accordance with the recommendations of the diagnostic team.

The City believes that the FRA did not have complete and accurate information regarding the nature and use of this private crossing and therefore was not able to evaluate all pertinent factors and information when this initial determination was made. We also believe that if the FRA were to reevaluate their initial determination based on all the information and factors they now possess, that they would come to the conclusion that this crossing is solely a private crossing without public access.

The City of Vancouver has consistently contended and continues to maintain that crossing at SE 144<sup>th</sup> Avenue does not meet the intent of 49 CFR Part 222.25(b)(1) and should be treated as a private crossing without public access because of the following:

- The crossing does not allow access to the general public. The crossing is signed "PRIVATE RR CROSSING. NO TRESPASSING. RIGHT TO PASS BY PERMISSION SUBJECT TO CONTROL OF OWNER THE BNSF RWY CO." Only homeowners or invitees of the homeowners on the other side of the crossing are given permission to cross. Those are either

invited guests or invited counseling patients. It is not open to the general public. Access allowed under the Home Occupation Permit is solely for the provision of professional counseling services by appointment at the invitation of the home owner providing those services at their residence. In addition that permit limits the maximum number of vehicle trips (customer, employee and delivery vehicles) to an aggregate total of not more than 6 per day.

- This business invitee is done by appointment with no random arrival. Members of the general public without an invitation and without an appointment are not allowed. The counseling patient is passing with the expressed permission of the owner. They are not uninvited random members of the public. From a safety standpoint, there is no material difference between clients invited to the counselor's residence and social guests invited to any residence. Accordingly it does not allow access to the public, otherwise any residence that invites anyone to their residence for any reason would have to be treated the same. In fact they are not under the regulation. We believe that the FRA did not make their initial determination with the pertinent facts of this specific situation in hand. Rather we believe their evaluation was based on erroneous information that uninvited members of the general public could use this crossing. The use of this private crossing is minimal and highly restrictive. It is completely different than having a park on the other side of the crossing, a beach open to the general public or a bait shop or similar open commercial establishment where uninvited members of the general public would have a reason to visit and traverse the crossing. We believe these are examples of the types of situations that were intended to be covered under Part 222.25(b)(1) not the situation that exists at crossing DOT 090091D.

In addition it should be noted that the volume of traffic on this private crossing is not significant by FRA highway-grade crossing standards. The volume of traffic has been measured on the private roadway and is less than the number of trips normally expected to be generated by the three homes that it services. It was measured at 20 vehicles per day and the Institute for Transportation Engineers Trip Generation Handbook estimates three homes should produce 30 vehicle trips per day. The number of invited counseling patients and related traffic is also limited under the home occupation permit referenced above to no more than 6 trips per day total.

At Ron Ries' direction in a letter dated January 8, 2010, the City convened a diagnostic team meeting on January 25, 2010 to evaluate the private crossing assumed to have public access. Attempts were made to identify and evaluate a low cost Alternative Safety Measure (ASM). If in a quiet zone, BNSF only supported a full Supplemental Safety Measure consisting of a four-quadrant gate improvement. This would require widening of the private road approaching the crossing and re-grading to improve sight distance which would likely result in significant civil improvements and associated costs (estimated to be more than \$500,000) and environmental impacts. The private roadway crosses a wetland close to the tracks. A full four-gate crossing is physically questionable with the layout of this crossing as well as unreasonable and impractical for a private crossing that serves only three residences and a few business invitees.

At a second diagnostic team meeting held on August 19, 2010, input from additional parties was sought out and included Washington State Department of Transportation Rail Office, AMTRAK, and the Washington Utility and Transportation Commission. Residents interested in the quiet zone and the owner of the residence with the home occupation permit were also allowed to observe the diagnostic team meeting. The diagnostic team again was not able to reach consensus so a SSM of 4-quadrant gate system was recommended by BNSF as the default Supplemental Safety Measure. Of the three public crossings located within the proposed quiet zone, only the SE 147<sup>th</sup> Ave. crossing is within ¼ mile of the private crossing at SE 144<sup>th</sup> Ave. Interestingly enough, it was discussed that if a wayside horn was installed at SE

147<sup>th</sup> and 4-quadrant gate SSM's were installed at SE 139<sup>th</sup> and SE 164<sup>th</sup> this area could enjoy quiet zones at SE 139<sup>th</sup> and SE 164<sup>th</sup> with the private crossing at SE 144<sup>th</sup> not even having to be considered for any upgrades or modifications. While BNSF appeared to be supportive of this option, it should be noted that the residents in the vicinity of SE 147<sup>th</sup> are not supportive of a wayside horn substitute at this location and instead continue to support a full-fledged quiet zone initiative.

It also important to note that throughout all discussions to date, all parties have agreed that if there was no home occupation permit at this residence, the crossing would not require diagnostic team evaluation and no upgrades or modifications would be required as a result of the quiet zone initiative.

There are two paragraphs in your October 29, 2010 letter that the City also wants to comment on.

They are:

“The draft Petition for Waiver of Compliance represents the position that safety at this crossing will “not significantly impact public safety” despite the proposed waiver of compliance to the FRA regulations. However, those were not the findings or recommendations of the diagnostic team members.

BNSF also objects to the City's classification of the crossing at SE 144<sup>th</sup> (DOT 090091D) as wholly private, rather than a private crossing with public access. BNSF, the Federal Railroad Administration, and the Washington Utilities and Transportation Commission all agree that the crossing is private with public access. The City of Vancouver granted one of the private crossing's homeowners a license to operate a business out of her home – thereby converting the use of the crossing to include public access.”

The final petition has been reworded to clarify the statement concerning public safety that you commented on above. The draft petition was stating this in regard to the City asking FRA to waive the requirement for a joint submission of a petition because the City does not believe that a joint petition in this particular case significantly contributes to public safety. The facts of this case show that the volume of traffic on this private crossing is extremely low. The crossing does not allow access to the general public, only homeowners or invitees of the homeowners are given permission to cross. Also if the quiet zone is approved, the three public crossings will be upgraded to 4-quadrant gate SSM's significantly improving safety and resulting in a much reduced train crossing risk index.

It also needs to be noted that the City's proposed waiver petition was not discussed with the other diagnostic team members. Accordingly they had no findings or recommendations with respect to the City's Petition for Waiver of Compliance.

The initial determination that the crossing at SE 144<sup>th</sup> Avenue is private with public access is solely FRA's. BNSF may agree with FRA's determination but to our knowledge WUTC has not weighed in with their opinion.

It is true that the City granted one of the homeowners a home occupation permit. But it should be noted that this was not a new activity occurring at this household, in fact the activity existed before the City annexed this area into the City in 1997. The City's issuance of the home occupation permit essentially recognized a pre-existing activity. It should be noted that the City-issued home occupation permit contains several conditions including a limit on the amount of trips to no more than six vehicle trips per day (customer, employee and delivery vehicles) in aggregate. In addition the City required the

homeowner to obtain and maintain required permits from BNSF to allow the use of this crossing for their home business. If BNSF had concerns regarding activity at this crossing as a result of the home occupation permit, this would have been a prime opportunity for BNSF and the homeowner to resolve any safety concerns with the existing private crossing. If BNSF did not believe the home occupation permit required an upgrade to the crossing, then we believe BNSF should not be opposed to the waiver request.

While the proposed quiet zone provides noise relief for residents it would also significantly improve safety by upgrading the three existing public crossings with four quadrant gate systems from the existing two quadrant gate systems within the proposed quiet zone. The City believes our petition for waiver of compliance should be granted. By granting the waiver request, FRA will enable the City to once again proceed with the establishment of the long awaited train horn quiet zone in the east Vancouver rail corridor. Citizens in this area have overwhelmingly indicated their interest to fund, through a local improvement district, the supplemental safety improvements at the three public crossings that will permit routine train horn noise to end, vastly improving their quality of life, and resulting in a much reduced train crossing risk index, the exact goals of the train horn noise rule established by the FRA.

Sincerely,



Brian K. Carlson, P.E.  
Director of Public Works  
City of Vancouver