

Decision No. R04-0220

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-154R

IN THE MATTER OF THE APPLICATION OF THE CITY OF LOVELAND, COLORADO
FOR THE AUTHORITY TO ESTABLISH A NEW AT-GRADE CROSSING AT THE
PROPOSED GREAT WESTERN RAILROAD COMPANY'S CROSSING ON SCULPTOR
DRIVE IN THE CITY OF LOVELAND, LARIMER COUNTY, COLORADO.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
WILLIAM J. FRITZEL
DENYING APPLICATION AND DISMISSING CASE**

Mailed Date: March 3, 2004

Appearances:

Clinton P. Swift, Esq., Denver, Colorado, for the City of Loveland;

Jennifer L. Warnken, Esq., and Daniel K. Calisher, Esq., Denver,
Colorado, for OmniTRAX, Inc., and Great Western Railway of
Colorado, LLC; and

John J. Roberts, Assistant Attorney General for the Staff of the
Colorado Public Utilities Commission.

I. STATEMENT OF THE CASE

1. On April 10, 2003, the City of Loveland, Colorado (Loveland) filed an application for authority to establish a new at-grade crossing of the Great Western Railroad Company's (Great Western) crossing at the proposed extension of Sculptor Drive in Loveland.

2. On April 23, 2003, the Commission issued notice of the application.

3. On May 28, 2003, an Entry of Appearance and Notice of Intervention was filed by OmniTRAX, Inc., and Great Western.

4. On June 4, 2003, Staff of the Colorado Public Utilities Commission (Staff) filed an Entry of Appearance and Notice of Intervention.

5. The matter was heard on October 29, 2003 in Loveland. Testimony was received from witnesses and Exhibits I through IV were marked for identification and admitted into evidence. At the conclusion of the case, the matter was taken under advisement.

6. Statements of Position were filed by the parties on January 30, 2004.

7. Pursuant to § 40-6-109, C.R.S., the record and exhibits of the proceeding together with a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

8. Loveland is a municipal corporation organized pursuant to the laws of the State of Colorado.

9. Great Western is a railroad, that owns tracks and runs trains at the location of the proposed Sculptor Drive at-grade crossing in eastern Loveland.

10. The Commission has jurisdiction over this matter.

11. On April 10, 2003, Loveland filed an application for authority to establish a new at-grade crossing at the intersection of Great Western's railroad tracks and the proposed extension of Sculptor Drive. (See exhibit II.)

12. Loveland proposes to construct a new at-grade crossing equipped with warning devices consisting of flashing lights, gates, bells, and constant warning track circuits using Performance Motion Devices III equipment. Loveland also proposes to construct a raised center median on Sculptor Drive at the proposed crossing.

13. Sculptor Drive is a two-lane street south of the Great Western tracks. It currently exists from State Highway 402 north to a point approximately 200 feet to the south of the Great Western tracks. The street currently is located in a rural area of Loveland. However, new residential developments exist in the area, and new developments are planned in the area of the proposed new crossing. (See Exhibit III 1 through 6). Loveland plans to extend Sculptor Drive across the tracks north to U.S. Highway 34.

14. Great Western's railroad tracks run in an east/west direction. There are four daily train movements, two in each direction. These movements occur five days a week with the possibility of some trains being run on the weekend. The railroad timetable speed at the location of the proposed Sculptor crossing is 20 miles an hour.

15. Sculptor Drive as extended across the tracks would cross the tracks at a 90-degree angle. The terrain at the location of the proposed new crossing is generally flat. There is good sight distance from all quadrants.

16. Sculptor Drive as extended will be considered a minor arterial by Loveland. It will have a posted speed limit of 35 miles an hour in the vicinity of the proposed new crossing. The street would have the capacity to accommodate approximately 12,000 vehicles a day. The average daily traffic (ADT) on the existing Sculptor Drive is 3,000 vehicles per day. Loveland anticipates that by 2020, the ADT on Sculptor Drive will be 8,500. (Application, paragraph 9, Exhibit ID)

17. There currently exist three railroad crossings in the near vicinity of the proposed Sculptor Drive crossing. County Road 9 (CR9) or Boyd Lake Road is located approximately 2,819 feet to the east of, and parallel to Sculptor Drive. Denver Avenue, is located

approximately 5,052 feet to the west and parallel to Sculptor Drive. Located to the west and parallel to Denver Avenue, Boise Avenue crosses the Great Western tracks. (See Exhibit IA, 3, page 31 and Exhibit II.)

18. CR9 is currently classified as a minor arterial, however, Loveland's 2020 Transportation Plan (Exhibit IA, 3) shows CR9 as a four-lane major arterial, projected to be completed within four years. The railroad crossing at CR9 will soon be equipped with flashing lights, motion detection, gates, and bells. The Commission granted Loveland's application to install the protection devices in Decision No. C04-0062 in Docket No. 03A-091R, January 16, 2004.

19. The existing crossing at Denver Avenue is protected with traffic signals. Denver Avenue is currently classified as a minor arterial road.

20. Loveland believes that there is a need to establish a new railroad crossing at Sculptor Drive. New residential developments currently exist near the vicinity of the crossing, and it is projected that due to Loveland's population growth, that there will be many more residences and some commercial built in the vicinity of the crossing by 2020. Loveland believes that the proposed crossing is necessary to accommodate the growing number of people that need to travel from their homes to places of employment, shopping, and other destinations. Mr. David Klockeman, Loveland Public Works Engineering Manager testified that 45 percent of the population of Loveland leave the city every day for employment to adjacent cities including Fort Collins, Greeley, Longmont, Boulder, and Denver.

21. Loveland's 2020 transportation plan (I,A,3) grades each arterial street and assigns a level of service (LOS). The LOS measures travel time and delay on a street. The arterials are ranked A through F.

22. The Loveland 2020 transportation plan predicts the LOS in the year 2020 on Denver, Boise, and CR9 would decrease if the proposed Sculptor Drive crossing is not approved. The 2020 transportation plan projects that CR9 would have a LOS of C. Denver Avenue for segments of the street in the vicinity, and north of the proposed crossing, is projected be at Level F. Boise Avenue, north of the railroad tracks would be also at Level F. Mr. William C. Fox, who testified on behalf of Loveland calculated the LOS projected to 2020 for CR9, Denver Avenue, and Boise. Mr. Fox, stated that if the Sculptor Drive Crossing is approved, Denver Avenue from the railroad track north to Highway 34 would improve somewhat, however, the LOS would still be Grade F. The same is true of Boise Avenue north of the Great Western tracks to US Highway 34. Although the LOS would improve somewhat, it still would be rated Grade F. Loveland witnesses Klockeman and Fox testified that the deterioration of the level of service leads to increased congestion and increases in accidents.

23. The Loveland witnesses testified that there is a need for the proposed Sculptor Drive crossing in order to lessen anticipated congestion at the Denver, Boise, and CR9 crossings, and to reduce the number of accidents at the existing crossings.

24. Great Western and Staff oppose the proposed Sculptor Drive crossing. The witnesses for Great Western and Staff believe that the proposed crossing is unnecessary and contrary to the policy of the United States Department of Transportation Federal Railroad

Administration (FRA). Great Western and Staff recommend against the approval of the proposed crossing.

25. Witness Steven Fender of the FRA testified that the FRA has a policy of discouraging new at-grade crossings. The FRA has a policy goal to reduce the number of existing at-grade crossings by 25 percent throughout the United States. (*See* Exhibit I, B, 3.)

26. Staff agrees with the policy of the FRA regarding at-grade crossings. Staff witness Jack Baier testified that Staff has a longstanding policy of recommending that no new at-grade crossings be approved. Staff believes that the number of existing at-grade crossings should be reduced wherever possible, by consolidation or elimination.

27. Mr. Baier presented a hazard analysis of the proposed crossing. The hazard rating is developed from a model that considers the number of trains per day, the daily traffic volume, and the type of warning devices. This information is used to predict the number of train/vehicle accidents for a five-year period.

28. Mr. Baier performed a hazard rating of the existing crossing at CR9 alone and a combined hazard rating of the proposed crossing and the CR9 crossing. The results of the analysis shows that if the proposed Sculptor Drive crossing is not approved, the hazard rating for CR9 crossing alone is 0.78 or 0.78 accidents during a five-year period. The combined hazard rating for the proposed crossing at Sculptor Drive (assuming that the proposed crossing is approved) and CR9 is 1.37 or a predicted 1.37 accident rate per five-year period.

29. Great Western and Staff also point out that the justification of necessity for the new crossing advocated by Loveland only focuses on the long-term need for the new crossing.

They assert that Loveland has not established a current need for the crossing or a need in the short-term future.

30. Great Western and Staff are concerned that if a new crossing were approved by the Commission, there would be an increased exposure to train-vehicle accidents. The intervenors are concerned that the Loveland 2020 transportation plan and the analysis of Loveland's witnesses evaluate only potential accidents between vehicles and ignore train/vehicle accidents.

III. DISCUSSION

31. Under the provisions of § 40-4-106(2)(a), C.R.S., the Commission is granted the authority to approve new railroad crossings in the State of Colorado. In order to obtain approval for a crossing, an applicant must establish that a new crossing is necessary to prevent accidents and that the safety of the public will be promoted. The statute states:

The Commission has the power to determine, order, and prescribe, in accordance with the plans and specifications to be approved by it, the just and reasonable manner including the particular point of crossing at which the tracks or other facilities of any public utility may be constructed across the tracks or other facilities of any other public utility at grade, or above or below grade, or at the same or different levels, or at which the tracks or other facilities of any railroad corporation may be constructed across the tracks or other facilities of any other railroad corporation or across any public highway at grade, or above or below grade, or at which any public highway may be constructed across the tracks or other facilities of any railroad corporation at grade, or above or below grade and to determine, order, and prescribe the terms and conditions of installation and operation, maintenance, and protection of all such crossings which may be constructed including the watchman thereat or the installation and regulation of lights, block, interlocking, or other system of signaling, safety appliance devices, or such other means or instrumentalities as may to the Commission appear reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted.

32. The evidence of record establishes and it is found, that Loveland, who has the burden of proof in this case, has failed to establish that the crossing is necessary and that the safety of the public will be promoted. The evidence shows that there does not exist a current or short-term future need for the proposed at-grade crossing. There currently exist two crossings that are located near the proposed Sculptor Drive crossing site. These crossings, Denver Avenue and CR9 are protected with appropriate safety devices. CR9, located approximately one half mile to the east of the proposed crossing, will soon have state-of-the-art, at-grade crossing protection devices.

33. The evidence produced at the hearing by Loveland in regard to need is unconvincing. The adjacent crossings of CR9, Denver, and Boise Avenues are currently, and in the near term future, adequate to safely accommodate vehicular traffic crossing the Great Western tracks. The levels of service on Boise Avenue, Denver Avenue, and CR9 would not show much of an improvement if the proposed crossing was approved.

34. The safety of the general public at a railroad crossing is the paramount consideration regarding whether a new crossing should be approved by the Commission. The evidence provided by Staff on the issue of safety is persuasive. Staff witness Baier's hazard index shows a potential increase for accidents if the new crossing was approved.

35. The FRA policy of eliminating existing at-grade crossings and discouraging the opening of new ones is a sound policy that recognizes that each new at-grade crossing increases the risk of serious train-vehicle accidents.

36. It is found that the construction of a new at-grade crossing at Sculptor Drive is not reasonable and necessary to prevent accidents, and the safety of the public would not be promoted. The application should be denied.

37. Pursuant to § 40-6-109(2), C.R.S., it is recommended that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. The application of the City of Loveland, Docket No. 03A-154R is denied.
2. Docket No. 03A-154R is dismissed.
3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.
4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.
 - a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.
 - b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the

administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge