

**ATTACHMENT A**

**MUTUAL RELEASE AND SETTLEMENT AGREEMENT  
AND MEMORANDUM OF UNDERSTANDING**

THIS MUTUAL RELEASE AND SETTLEMENT AGREEMENT AND MEMORANDUM OF SETTLEMENT ("AGREEMENT") IS ENTERED INTO THIS 16<sup>th</sup> DAY OF NOVEMBER 2023, BETWEEN **THE CITY OF LONGMONT, COLORADO** ("CITY") AND **BNSF RAILWAY COMPANY**. ("BNSF"), HEREAFTER COLLECTIVELY REFERRED TO AS THE "PARTIES."

**RECITALS**

**WHEREAS**, On June 27, 2023, the City filed an application to install an at-grade crossing of the BNSF railway rail grade crossing at the extension of Boston Avenue within the City (“the Application”) with the Colorado Public Utilities Commission (“PUC”).

**WHEREAS**, BNSF filed an intervention in opposition to the City’s Application (“the Intervention”).

**WHEREAS**, on October 17, 2023, the Parties filed their Second Joint Motion Requesting Continuance of the October 18, 2023, Evidentiary Hearing, or in the Alternative, A Request for a Status Conference (“the Joint Motion”) indicating the Parties had reached a settlement in principle on the Application and Intervention (collectively “the Dispute”) and avoid a hearing before the PUC.

**WHEREAS**, the Joint Motion stated that the Parties had agreed to a settlement in principle, and would be formalized in a “a memorandum of understanding filed with the Commission as an attachment to a notice of settlement to be filed with the Commission prior to November 17, 2023.”

**WHEREAS**, on October 18, 2023, the PUC approved the Joint Motion in Decision No. 23A-0353R, with the modification that “[a]ny notice of settlement to be filed in this Proceeding, if any, including any attachments thereto, shall be filed by November 16, 2023.”

**WHEREAS**, the Parties desire to settle and compromise the disputes between them contained in the Application and Intervention and any other factually or legally related claims (collectively referred to hereinafter as the “Settled Claims”) to avoid the costs, burdens, and risks of further administrative proceedings and potential litigation.

**WHEREAS**, the Parties now wish to memorialize in writing a full and binding settlement and to release all Parties from any and all liability and claims existing or that may exist between them as of the date of this Agreement relating to the Settled Claims.

**IN CONSIDERATION** of the understandings expressed in the foregoing Recitals and the terms and arrangements expressed within this Agreement below, and other good and valuable consideration as set forth herein, the Parties mutually covenant and agree as follows:

**ATTACHMENT A****OBLIGATIONS, PROMISES, AND COVENANTS****I. MUTUAL RELEASE.**

Each of the Parties, by and on behalf of itself, as well as all of its successors, administrators, servants, agents, attorneys, insurers, heirs and assigns, hereby mutually releases, acquits and forever discharges the other Party, and all former and current officers, directors, shareholders, managers, members, employees, agents, divisions, insurers, contractors and attorneys, from any and all claims, causes of action, allegations, liabilities, injuries, harms, expenses, costs and damages of any kind or nature that any Party did or may have asserted against any such entities or persons as a result of the matters alleged in the Dispute, including, without limiting the generality of the foregoing, any act or omission by the City, BNSF, and all of their former and current officers, directors, shareholders, managers, members, employees, servants, agents, divisions, insurers, contractors and attorneys, arising out of, or relating to any aspect of the Dispute. Specifically, but not by way of limitation, this Release includes all claims under:

Any federal or state statute, regulation, or constitutional provision.

- Any local ordinance or regulation.
- Any claim in tort, contract, warranty, or for violation of a covenant of good faith and fair dealing.
- Any claim of discriminatory or retaliatory treatment.
- Any other claims of any type arising out of federal common law, or the common law of any state.
- Any claim seeking declaratory, injunctive, or equitable relief.

Without limiting the generality of any aspect of the foregoing, this Agreement applies to any and all matters that the City or BNSF has asserted, or could have asserted, in the Dispute.

The mutual release in this Agreement, to the broadest extent possible, includes claims for attorneys' fees, costs, disbursements, fees, interest, or other payments; and all other common law, legal, equitable or statutory claims (whether based on a contract, tort, or other theory) that the Parties now have, ever had, or may hereafter have, against the other Party, or any and all former and current officers, directors, shareholders, managers, members, employees, servants, agents, divisions, insurers, contractors and attorneys of any Party, occurring in the Dispute at any time up to and including the date of this Agreement, except for claims arising out of BNSF's or the City's failure to perform under Paragraphs 2 or 7 below, or for otherwise enforcing this Agreement.

The Parties mutually agree that all claims are released whether known or unknown, suspected or unsuspected, claimed, contingent or non-contingent, whether concealed or hidden, presently possessed or possessed in the future, and whether liability be direct or indirect, liquidated or unliquidated, foreseen or unforeseen, whether those claims could be brought directly by a Party on its or his own behalf or by any other person, entity, agency, or organization or his, her, their, or its behalf, by reason of any fact, matter, event, act, omission, transaction, cause or thing whatsoever occurring in the Dispute at any time up to and including the date of this Agreement, except for claims arising out of BNSF's or the City's failure to perform under Paragraphs 2 and 7 below, or for otherwise enforcing this Agreement, without regard to the subsequent discovery or existence of such different or additional facts. Each of the Parties hereby expressly waives and relinquishes, to the

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fullest extent permitted by law, the provisions, rights, and benefits of any statute, regulation, or principle of contract or common law which might otherwise render a general release unenforceable with respect to any of the above-mentioned Settled Claims.

Except as otherwise set forth herein (and specifically including BNSF's withdrawal of its Intervention and objection), the Parties, by executing this mutual release, do not waive any of their rights to continue participating in the PUC proceeding concerning the Application, and the Parties mutually agree to cooperate as directed by the PUC and otherwise in bringing the Application proceeding and the City's project contemplated in the Application to a conclusion.

**2. DISMISSAL OF CLAIMS, OBLIGATIONS, AND COVENANT NOT TO SUE.**

Following execution of this Agreement by both of the Parties and filing with the PUC with a "Notice of Settlement," legal counsel for BNSF shall file with the PUC within fifteen (15) days a motion to withdraw its Intervention, noting that BNSF no longer opposes the City's Application, and the City shall make any filings with the PUC the City deems necessary to move or cause the PUC to approve the City's Application including the filing of an updated sketch plan and cost estimate for the Application, with each Party to bear its own respective attorneys' fees and litigation costs.

Each of the Parties further agrees and covenants that it has not commenced any other civil action against the other Party, or any of the former and current officers, directors, shareholders, managers, members, employees, servants, agents, divisions, insurers, contractors and attorneys of the other Party, and that, in the future, it will not sue, or assert any federal, state or administrative cause of action of any type or kind, at law or in equity, whether before a court of law or an administrative agency, against the other Party, or any of its officers, directors, divisions, insurers, or against any current and former employee, servant, agent or attorney of any such entity respecting any purported claim, cause of action, liability, expense or damage arising from, related to, concerned with, or involving any acts by any of them that occurred prior to the effective date of this Agreement, or pertaining to any purported omission by any such entity or person to perform acts that purportedly were to be performed prior to the effective date of this Agreement, regarding any act or omission arising out of, or related to, or associated with, the Dispute. The Parties further mutually and expressly waive and agree that each has not and will not sue or otherwise assert any claim it ever possessed under any state or federal law with regard to any allegation of any kind that arose prior to the effective date of this Agreement regarding any act or omission arising out of, or related to, or associated with, the Dispute.

**3. FURTHER INTENT AND UNDERSTANDING.**

The Parties mutually understand and acknowledge that no promise or inducement was offered by the other Party except as expressly set forth herein; that this Agreement is executed without any reliance on any statement or representation by any person or Party released or its representatives, attorneys, insurers or anyone else concerning the nature or extent of any injury or damage, or legal liability for any such matter, or for any tax implications or respecting any other fact or matter; that the representatives of each Party is of lawful age and legally competent to execute this Agreement, and to accept full responsibility for the consequences of such action. Each of the Parties assumes all risk of any mistake of fact, whether any such fact or facts is past, presently existing, or arises in the future, as to the extent of any injuries, disabilities, damages, loss of income, loss of earning potential,

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expenses or damages the undersigned incurred or which may be incurred as a result of any physical, emotional or psychological injury or harm allegedly sustained by any person or entity whose interests are represented by either Party, even if such injuries, losses or damages were not earlier known, disclosed to or discovered prior to the execution of this Agreement. Each of the Parties also acknowledges that a portion of the consideration received by it as recited herein is consideration for its voluntary and knowing assumption of the risk of all unknown or undiscovered injuries, damages and losses in terms of future complications, further physical, psychological and emotional pain, discomfort and distress, future damages and losses, and that it shall, under no circumstances, seek to reopen and present further claims against any person or entity released under the provisions of this Agreement.

**4. NO ADMISSION OF LIABILITY.**

Each of the Parties acknowledges and understands that the consideration described herein is not to be construed in any way as any admission of liability on the part of the other Party or any other released entity or person, but on the contrary, it is understood that all released entities and persons specifically deny any liability on account of any matter alleged or that could have been alleged in the Dispute, any other claim in question, or otherwise.

**5. COSTS AND ATTORNEYS ' FEES.**

Each Party agrees that it shall bear all of its own costs and attorneys' fees associated with the Dispute and with negotiating this Agreement and for all representation in the events that preceded this Agreement, if any.

**6. SOLE OWNERS OF CLAIMS.**

Each of the Parties hereby represents that it is the sole owner of all claims released and purported to be released hereby, and that it made no assignment or transfer of any claim released herein to any third party. Each of the Parties hereby represents that it has conducted a diligent investigation to uncover any other persons or entities that could have asserted any claims released by this Agreement, and that each Party has no knowledge or awareness of any other person or entity that could have asserted any claims released by the Agreement. Each Party further represents and warrants that no third party is subrogated to the interest in claims released in this Agreement, including but not limited to insurers, parent companies or subsidiaries subrogated by reason of payment of costs or expenses, or, if any third party was by some means subrogated to its interest, that the interest of any subrogee was settled, compromised and extinguished by each Party as a specific and direct term and condition of this Agreement.

**7. SETTLEMENT CONSIDERATION – MEMORANDUM OF UNDERSTANDING.**

As consideration for this Agreement, the Parties Agree to the following terms as a binding "Memorandum of Understanding" between the Parties

- 1) Pursuant to C.R.S. § 40-6-109.5(3), the City of Longmont waives its statutory right to a decision in 120 days after the Application was deemed complete.

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- 2) BNSF will withdraw further opposition to the Application by filing a Notice of Withdrawal of their intervention within fifteen (15) days of the filing of this Agreement with the PUC.
- 3) BNSF will provide an updated sketch plan (front sheet) and cost estimate for the Application. Any final Commission decision approving the Application shall be conditioned on an updated sketch plan and cost estimates being provided and filed by BNSF. It is a material condition of this Agreement that the final design as approved by the Commission be based on BNSF's sketch and cost estimate and not on any non-BNSF documents previously submitted by the City to the Commission.
- 4) The City will agree to support and cooperate in BNSF efforts to obtain grants (from any available source — federal or state) to 1) as an initial step, studying the feasibility of grade separation of existing at-grade crossings between BNSF Railway crossings on Colorado State Highway 119 and Colorado State Highway 66 within the City of Longmont; and 2) if feasibility is confirmed, the City will agree to support and cooperate in efforts to obtain grants for construction of grade separations of the Colorado State Highway 119 and Colorado State Highway 66 crossings. The Parties agree that grade separation of these crossings is for the benefit of the traveling public. While the Parties understand and agree that the effort to obtain the grants will be a joint effort between the City and BNSF, the City will ultimately be the applicant for any grants, and the City agrees to make all reasonable efforts in supporting and obtaining the grants for the grade separation of these crossings. Any matching funds required for the grants will be evenly split between the City and BNSF, subject to prior appropriation by the City and internal approval of the funding match by BNSF. Grade separation of these crossings pursuant to this Agreement is contingent upon the City obtaining grants and nothing in this Agreement shall be construed to require grade separation of these crossings absent obtaining federal or state grants.

**GENERAL PROVISIONS**

8. **INTEGRATION.** The Parties understand, acknowledge and agree that this Agreement constitutes the entire agreement of the Parties regarding the subject matter and transactions referred to herein. The Parties understand, acknowledge and agree that the terms of this Agreement are contractual in nature and not mere recitals. As such, the Parties understand, acknowledge and agree that this Agreement is fully integrated and supersedes all previous oral or written agreements of the Parties.
9. **BINDING EFFECT.** This Agreement shall inure to the benefit of, and be binding upon, the successors, and assigns of each of the Parties.
10. **GOVERNING LAW.** The Parties have entered into this Agreement in Colorado, and agree to be governed by the laws of the State of Colorado.
11. **ARTICLE X, SECTION 20/TABOR.** The Parties understand and acknowledge that the City is subject to Article X, § 20 of the Colorado Constitution (“TABOR”). The Parties do

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not intend to violate the terms and requirements of TABOR by the execution of this Agreement. It is understood and agreed that this Agreement does not create a multi-fiscal year direct or indirect debt or obligation within the meaning of TABOR and, therefore, notwithstanding anything in this Agreement to the contrary, all payment obligations of the City are expressly dependent and conditioned upon the continuing availability of funds beyond the term of the City's current fiscal period ending upon the next succeeding December 31. Financial obligations of the City payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available in accordance with the rules, regulations, and resolutions of the City, and other applicable law.

12. **HEADINGS.** The headings used in this Agreement are for the convenience of the Parties only. As such, these headings shall not have any legal effect whatsoever or, in any other way alter or modify the meaning or interpretation of this Agreement.
13. **ADDITIONAL ASSURANCES.** This Agreement is intended to be self-executing. Notwithstanding the foregoing, all Parties agree that, at the reasonable request of another Party, each Party shall execute any further documents or instruments reasonably necessary to effectuate the transactions contemplated by this Agreement.
13. **SEVERABILITY.** If any provision of this Agreement should be declared to be unenforceable, with the exception of each Party's release of any and all claims as identified above in this Agreement, then the remainder of this Agreement shall continue to be binding upon each of the Parties.
14. **EXECUTION IN COUNTERPARTS.** This Agreement may be executed in counterparts, each of which shall have full force and effect upon execution by all Parties to this Agreement.
15. **WARRANTIES.** Each of the Parties expressly warrants that it has carefully and completely read the terms of this Agreement. Each of the Parties expressly warrants that it has had the opportunity to consult with counsel prior to executing this Agreement, that it fully understand the terms of this Agreement, and that it enters into this Agreement knowingly and voluntarily, and without coercion, duress or undue influence. Each of the Parties expressly acknowledges that it believes the terms of this Agreement are appropriate to reach a full and final release of the Settled Claims. Each of the Parties expressly understands and agrees that the signing of this Agreement shall be forever binding, and no rescission, modification or release of the Parties from the terms of this Agreement will be made for mistake or any other reasons. Each of the Parties represents that it is legally competent to execute this Agreement. Each of the Parties further warrants and acknowledges that no promise or inducement has been offered except as set forth herein and that this Agreement was executed by it without reliance upon any statement or representation by the persons or Parties released or its representatives concerning the nature or extent of any damages or any legal liability therefore.
16. **AMENDMENT.** This Agreement may not be amended except in a writing setting forth such amendment and executed by both Parties.

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17. **ENFORCEABILITY**. Each of the Parties expressly acknowledges that this Agreement shall be governed by the laws of the State of Colorado and shall be enforceable in accordance with its terms under Colorado law. Any disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, interpretation, performance or termination, shall be brought in a Colorado District Court of competent jurisdiction.

**WHEREFORE**, each of the Parties agrees to and accepts the terms of this Release and Settlement Agreement on the date reflected next to it or his signature.

[The remainder of this page is left blank intentionally]

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CAUTION: THIS IS A RELEASE. READ BEFORE SIGNING.

EACH OF THE UNDERSIGNED HAS EACH READ THE FOREGOING RELEASE AND SETTLEMENT AGREEMENT AND MEMORANDUM OF UNDERSTANDING. EACH OF THE UNDERSIGNED ASSERTS ITS FULL UNDERSTANDING THAT THIS AGREEMENT HAS IMPORTANT LEGAL CONSEQUENCES. EACH OF THE UNDERSIGNED REALIZES THAT IT IS RELEASING ANY AND ALL CLAIMS THAT EACH MAY HAVE AGAINST THE OTHER PARTY AND OTHER RELEASEES AS SET FORTH ABOVE. EACH PARTY ALSO REPRESENTS AND ASSERTS THAT IT IS CAPABLE OF EVALUATING THIS MATTER AND DECIDING HOW TO PROCEED. EACH OF THE UNDERSIGNED REPRESENTS AND ASSERTS THAT IT WAS AFFORDED THE OPPORTUNITY TO OBTAIN A LAWYER'S ADVICE AND IN FACT RECEIVED SUCH ADVICE RESPECTING THE MEANING, INTENT, SCOPE AND PURPOSE OF THIS AGREEMENT BEFORE IT SIGNED THE AGREEMENT.

CITY OF LONGMONT, COLORADO

Jim Angstadt  
Director of Public Works & Engineering

SIGNATURE: *Jim Angstadt*

DATE: 11/17/2023

APPROVED AS TO FORM:

Tim Hole  
Assistant City Attorney

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

BNSF RAILWAY COMPANY

NAME: Cheryl Townlian  
Assistant Director of Public Projects  
DATE: 1/5/2024

SIGNATURE: \_\_\_\_\_

DocuSigned by:  
*Cheryl Townlian*  
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CITY OF LONGMONT, COLORADO

Jim Angstadt  
Director of Public Works & Engineering

SIGNATURE: 

DATE: 11/17/2023

APPROVED AS TO FORM:

Tim Hole  
Assistant City Attorney

SIGNATURE: 

DATE: \_\_\_\_\_

BNSF RAILWAY COMPANY

NAME: \_\_\_\_\_ SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_