

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 12A-1216R

IN THE MATTER OF THE APPLICATION FOR THE MODIFICATION OF AN EXISTING AT-GRADE CROSSING - KING’S ROAD CROSSING IN THE TOWN OF WINTER PARK, COLORADO.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING APPLICATION**

Mailed Date: July 11, 2014

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 A. The Commission Orders That:14

I. STATEMENT

1. On November 20, 2012, the Town of Winter Park (Town or Applicant) filed an Application in which the Town seeks authority to modify the existing at-grade crossing located at King’s Crossing Road in the Town. That filing commenced this proceeding.

2. On December 3, 2012, the Public Utilities Commission (Commission or PUC) gave notice of the Application; and established an intervention period until January 2, 2013.

3. By Decision No. C13-0057-1, issued January 11, 2013, the Commission deemed the Application complete within the meaning of § 40-6-109.5, C.R.S., and referred this matter to an Administrative Law Judge (ALJ).

4. On December 19, 2012, Union Pacific Railroad Company (UPRR) intervened of right in this proceeding. The crossing at issue crosses UPRR's track. UPRR neither opposed nor contested the Application but stated that it would participate in any hearing. UPRR is represented by legal counsel in this matter.

5. On January 3, 2013, one day after the intervention period ended, Cornerstone Winter Park Holdings, LLC and Grand Park Development, LLC (collectively, Cornerstone), filed their Joint Motion to Intervene. In that filing, Cornerstone asserted that they own property adjacent to the crossing at issue in this proceeding. They also asserted that grade separation is contractually required at the crossing and an engineering firm has been contracted to complete the design with approval expected in 2013. Further, Cornerstone contended that information contained within the Town's Application is incorrect in light of the future Cornerstone development in the area of the subject crossing and an Annexation Agreement and the First Amendment to the Annexation Agreement between Cornerstone and the Town.

6. On January 11, 2013, the Town filed their objection to Cornerstone's Motion to Intervene. As grounds the Town argued that the intervention was late and good cause had not been shown to allow the late intervention.

7. Also on January 11, 2013, Cornerstone filed their Revised Motion to Intervene. In this motion, Cornerstone claimed that the late filing of the intervention was due to their receipt of the Notice on December 4, 2012, therefore they believed that the intervention period ended on January 3, 2013. In the alternative, Cornerstone argued that since the intervention was only one

day late there was no prejudice to the Application or any party and failure to allow the intervention would prejudice Cornerstone's interest as well as the public's interest.

8. On January 18, 2013, Applicant filed their Objection to Revised Motion to Intervene. Applicant argued that the intervention should be denied due to a lack of good cause to allow the intervention, and in addition, Cornerstone did not meet the requirements of an intervenor by right.

9. By Interim Decision No. R13-0133-I, issued January 30, 2013, the interventions of UPRR and Cornerstone were granted and a prehearing conference was scheduled for February 7, 2013.

10. At the scheduled prehearing conference all parties were represented. Applicant moved to stay the proceeding in order to pursue a settlement with the Intervenors and also to seek a judicial determination as to whether the Annexation Agreement between Cornerstone and the Town is valid. Applicant agreed to waive the requirement that a Commission Decision be issued within 210 days and to provide a status report every 90 days.

11. By Interim Decision No. R13-0187-I, issued on February 7, 2013, the proceeding was stayed and Applicant's waiver of the requirement that a Commission Decision issue within 210 days was acknowledged.

12. On January 29, 2014, Applicant filed its Motion to Lift Stay and Set for Prehearing Conference.

13. On February 12, 2014, Intervenor Cornerstone filed its Response to the Motion. Cornerstone stated it did not object to the relief requested but still intended to contest the Application.

14. By Interim Decision No. R13-0171-I, issued on February 13, 2014, the Motion to Lift Stay and Set for Prehearing Conference was granted and a prehearing conference was scheduled for March 13, 2014.

15. Pursuant to Interim Decision No. R14-0469-I issued May 5, 2014, a prehearing conference was held on May 15, 2014. At the prehearing conference the ALJ *sua sponte* continued the scheduled evidentiary hearing until June 18, 2014 to allow additional time for the parties to file exhibits.

16. On May 19, 2014, the Town filed a Motion *In Limine* Regarding the Testimony of Sue Grabler.

17. By Interim Decision No. R14-0611-I, issued on June 5, 2014, the Motion *In Limine* Regarding the Testimony of Sue Grabler was denied.

18. On June 6, 2014, Cornerstone filed its Motion to Consolidate Proceedings, Vacate Hearing, and for Accelerated Response (Motion). In its Motion, Cornerstone states that on June 5, 2014, the West Mountain Metropolitan District and the Town of Fraser collectively applied to the PUC for authority to construct a new highway-rail grade separation and abolish the at-grade railroad crossing at King's Crossing Road. Cornerstone requests that the above captioned proceeding be consolidated with this new application pursuant to Rule 1402 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR), 723-1.

19. On June 11, 2014, the Town filed its Response to Motion to Consolidate Proceedings, Vacate Hearing, and for Accelerated Response (Response). In its Response the Town argued that the request to consolidate is "premature" and that the Town has not been served with the "Underpass Application".

20. By Interim Decision No. R14-0658-I, issued on June 16, 2014, the Motion to Consolidate Proceedings, Vacate Hearing, and for Accelerated Response was denied.

21. On June 18, 2014, the evidentiary hearing was held in Winter Park, Colorado. The ALJ heard testimony of Town's witnesses Drew Nelson,¹ and Kevin Vecchiarelli;² and intervenors Cornerstone witnesses Jeff Durbin,³ Janice Christopher,⁴ Jack Bestall,⁵ Clark Lipscomb,⁶ and Sue Grabler.⁷ The video deposition of Ms. Kari McDowell Schroeder⁸ was provided and reviewed by the ALJ prior to the hearing due to uncertainty of Ms. McDowell Schroeder's availability for the hearing. Hearing Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 26, F, and S were offered and admitted into evidence. At the conclusion of the hearing the matter was taken under advisement by the undersigned ALJ.

22. On June 27, 2014, the parties each filed their Post Hearing Statement of Position and the Town filed Exhibit 26.

23. In reaching this Recommended Decision the ALJ has considered all arguments presented by the parties, including those arguments not specifically addressed in this Decision. Likewise, the ALJ has considered all evidence presented at the hearing, even if the evidence is not specifically addressed in this Decision.

¹ Mr. Nelson is the Town Manager for the Town of Winter Park.

² Mr. Vecchiarelli works for JVA, Inc. and works as a consultant to the Town of Winter Park.

³ Mr. Durbin is the Town Manager for the Town of Fraiser.

⁴ Ms. Christopher is a registered professional engineer with Felsburg Holt & Ullevig and works as a consultant to Cornerstone.

⁵ Mr. Bestall works for Bestall Collaborative Limited and is a consultant to Cornerstone.

⁶ Mr. Lipscomb works for Cornerstone.

⁷ Ms. Grabler works for Railroad Coordination, LLC and is a consultant to Cornerstone.

⁸ Ms. McDowell Schroeder is a registered professional engineer with McDowell Engineering and works as a consultant to the Town of Winter Park.

24. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the hearing and a written recommended decision in this matter.

II. FINDINGS OF FACT

25. King's Crossing Road is a two-lane collector roadway with a design speed of 25 miles per hour (MPH) located in Winter Park, Colorado. The roadway includes one 12-foot-wide vehicle travel lane in each direction and shoulders.

26. The west side of the crossing has a 10 percent vertical grade going uphill to the southwest and downhill to the northeast.

27. The application is for an improvement to the existing crossing. The improvements would create a quiet zone to comply with Federal Railroad Administration's (FRA) requirements.

28. Traffic counts in July of 2013 showed that 1,300 vehicles use the crossing per day and 16 to 18 trains cross Kings Crossing Road per day. *Exhibit 4, p. 2.*

29. There have been no train/vehicle accidents at the crossing in the last five years. *Exhibit 4, p. 17.*

30. There had been a 100 foot median on the west side of the railroad crossing from 2005 until 2007. The median was removed after it was determined to be a hazard. Vehicles had hit the nose of the median after starting a slide on icy conditions at the top of the 10 percent grade.

31. The proposed median is 175 feet in length.

32. The national significant risk threshold index number for a quiet zone, according to the FRA, is 14,347.

33. On the north side of the railroad crossing is dirt/gravel road. The road has a gate with a chain and a lock attached. The lock and chain do not secure the gate to a nearby post.

III. DISCUSSION AND CONCLUSIONS

34. Pursuant to § 40-4-106(1), C.R.S., the Commission is empowered to require public utilities to maintain and operate their facilities in such a manner as to promote and safeguard the health and safety of their employees, passengers, customers, and the public. More specifically, the Commission is charged with determining, ordering, and prescribing the just and reasonable manner in which the tracks or other facilities or any railway corporation may be constructed across any public highway. § 40-4-106(2)(a), C.R.S. Such determination includes consideration of the particular point of crossing, the terms and conditions of installation and construction of the crossing, as well as the warning, signaling, or other safety appliances to be required in order to prevent accidents. *Id.*

35. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order." § 24-4-105(7), C.R.S. As provided in Commission Rule 4 CCR 723-1-1500, "[t]he proponent of the order is that party commencing a proceeding."

36. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App. 1985). While the quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula, a party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

37. As the proponent of a Commission order approving the Project, the Town has the burden of establishing that the configuration and the improvements the subject crossing will, indeed, promote and safeguard public safety. Rules of Practice and Procedure, 4 CCR 723-1-1500.

38. The Town seeks to make changes and safety upgrades at the at-grade crossing of Kings Crossing Road with the tracks of the UPRR. The Town proposes these changes as part of the process to create a quiet zone at the subject crossing with the proposed safety changes helping to safeguard both the Town and UPRR by providing a safer crossing. The proposed crossing upgrades are necessary to comply with the FRA's requirements for quiet zone implementation.

39. The proposed crossing changes include replacement of the existing at-grade active warning equipment to include new flashing lights with automatic gates and bells located at the two entrance quadrants of the crossing, constant warning time detection circuitry, power out indicator on the signal bungalow, the addition of an 8' asphalt truck apron on the south side of the roadway, the addition of curb and gutter with 8' concrete walks, and the addition of raised medians of approximately 175' in length west from the crossing and approximately 102' in length east from the crossing.

40. At issue in this matter is the median proposed to be constructed on the west side of the subject crossing. No party raised an issue with the proposed median on the east side of the subject crossing. Three fundamental questions need to be determined regarding this median. First, will construction of a median make the subject crossing safer? Second, if construction of a median will make the crossing safer, which of the lengths proposed in this matter is the safer length of median to construct? Third, is the Cornerstone access a public roadway or a private driveway for purposes of applying the FRA quiet zone requirements?

A. Safety of the Median

41. The first question to answer is if installation of a median will make the subject crossing safer. Information contained within Hearing Exhibit 4 and the testimony of Cornerstone witness Ms. Grabler provide the answer to this question.

42. Hearing Exhibit 4 contains a number of pages that show the risk index calculations for three scenarios of 10,000 vehicle future traffic volumes; one calculation with the existing conditions at the subject crossing, one calculation with four-quadrant gates and no medians, and one with four-quadrant gates with medians. The quiet zone risk index for the existing conditions at the crossing is 34,850.12. The quiet zone risk index for four-quadrant gates and no medians is 6,273.02. The quiet zone risk index for four-quadrant gates with medians is 2,788.01.

43. It is in the best interest of the Town and the general public to create a quiet zone that is as safe as possible. While the addition of medians may enhance safety, the degree to which safety is enhanced is also important to note.

44. It is important to note that the national significant risk threshold index number, which determines if a crossing qualifies for a quiet zone, is a changing number.⁹ What may qualify for a quiet zone one year may not the next

45. While the Town failed to present a national significant risk threshold index number for two-quadrant gates with medians and two-quadrant gates without medians, the numbers with four-quadrant gates are instructive. The addition of a median with four-quadrant gates drops the index number by 3485.01 points or 56 percent.

⁹ The index was created in 2006 and has dropped 4000 to 5000 points since its inception. *Hearing Transcript p 253-254.*

46. When questioned by the ALJ, Cornerstone witness Ms. Grabler stated that a drop from 6,273.02. index points to 2,788.01 index points is a significant drop. *Hearing Transcript p. 256, l. 1-9.*

47. Based on a comparison of the quiet zone risk indices for the scenarios of a crossing without medians and with medians and confirmation from Cornerstone witness Ms. Grabler, the installation of medians will make the subject crossing significantly safer.

48. The Town has met its burden by a preponderance of the evidence to show that the addition of a median to the subject crossing shall promote and safeguard public safety.

B. Length of Median

49. A median, as requested by the Applicant, has been shown to significantly improve the safety at the subject crossing. The parties have proposed different lengths for the median. The Town proposes a 175' median while Cornerstone proposes a 60' median.

50. Both the Town and Cornerstone have employed different sight calculations to support their respective arguments.

51. Hearing Exhibit 22 contains photos showing four different signs distance scenario calculations prepared by Town witness Ms. McDowell Schroeder. Scenario 3 shows a visual representation of Ms. McDowell Schroeder's sight distance calculations for a 60' median and Scenario 4 shows a visual representation of Ms. McDowell Schroeder's sight distance calculations for a 175' median. Based on Ms. McDowell Schroeder's calculations, the exhibit includes information that the American Association of State Highway Transportation Officials (AASHTO) sight distance recommendations for a 25 MPH roadway is 155' for a flat roadway and 180' for a roadway with a 10 percent downgrade.

52. Scenario 3 on Hearing Exhibit 22 indicates that if a 60' median was constructed west of the crossing, the first distance at which a driver would be able to see the nose of the median would be a line of sight of 130'. Ms. McDowell Schroeder states on page 57 of Hearing Exhibit 26 that the 130' line of sight is less than Ms. McDowell Schroeder's calculated 180' minimum requirement for a 25 MPH road with a down grade of 10 percent.

53. Scenario 4 on Hearing Exhibit 33 indicates that if a 175' median was constructed west of the crossing, the first distance at which a driver would be able to see the nose of the median would a line of sight of 295'. Ms. McDowell Schroeder states on page 59 of Hearing Exhibit 26 that the 295' line of sight exceeds her calculated 180' sight distance requirements.

54. Cornerstone witness Ms. Christopher disagrees with the method used by Town witness Ms. McDowell Schroeder to calculate the required stopping sight distance at the crossing. Ms. Christopher discussed in her testimony that Ms. McDowell Schroeder made errors in her calculation by basing her calculations on the centerline of the roadway versus the centerline of the traveled roadway, and that a 20 MPH design speed should have been used as opposed to the posted 25 MPH speed limit.

55. Ms. Christopher based her stopping sight distance calculations using an average 7 percent down grade and a 20 MPH design speed. Ms. Christopher notes that the grades of the roadway were not included on the Town's Application exhibits, and that she calculated grades from the exhibit from between 5 percent to 10 percent and used an average down grade of 7 percent. Ms. Christopher bases her use of a 20 MPH design speed as opposed to the 25 MPH posted speed limit on the radius of the curve in the roadway on Kings Crossing Road leading to the highway-rail crossing. Ms. Christopher measured the radius of curvature from the Town exhibits and found the average radius to be 100'. Based on the AASHTO guidelines for curve

design, she calculated a design speed for the curve of 20 MPH. Using a 7 percent down grade and a design speed of 20 MPH, Ms. Christopher calculated that a 122' stopping sight distance was all that was necessary if a 60' median was installed at the crossing. Ms. Christopher based her calculations on information provided to her by Cornerstone's consultant Bestall Collaborative Limited, but did not perform her own sight visit. It is Ms. Christopher's opinion that a 60' median at the crossing is safe and that other proposed safety measures would allow the traffic to slow down prior to reaching the median.

56. Neither of the engineering witnesses provided a copy of the AASHTO guidelines upon which they each based their assumptions and calculations.

57. In reviewing Ms. Christopher's recommended 60' median and stopping sight distance calculation of 122' and looking at that distance on Exhibit C1.0 to the application, drivers would be located on a segment of the roadway that is at a 10 percent downgrade at 122' from the nose of a 60' median. However, because Ms. Christopher's calculations were based on a 7 percent downgrade and comparing Ms. Christopher's calculations to Ms. McDowell Schroeder's calculations, it would appear that the use of a 7 percent grade by Ms. Christopher underestimates the necessary stopping sight distance to the nose of a 60' median.

58. The 175' median proposed by the Town will provide drivers with 295' of stopping sight distance based on the 10 percent grade shown on Exhibit C1.0 to the Application, which is well above the 180' calculated by Ms. McDowell Schroeder for the speed limit posted for the roadway and the 10 percent downgrade. The majority of the 180' minimum calculated distance appears to be located along roadway with a 10 percent down grade.

59. Based on the information provided in this proceeding, it is the opinion of the ALJ that the 175' median length proposed by the Town is the safer median to construct than the

60' median proposed by Cornerstone considering the downgrade shown on Exhibit C1.0 to the Application and the posted speed limit of 25 MPH in the area. The calculations discussed to provide support that the 60' median condition is safe appear to be underestimated given the terrain in the area shown in photos and on the roadway profile on Exhibit C1.0 to the Application. The proposed lighted Chevron Alignment signs (W1- 8R), "Keep Right" sign (R4-7), and Horizontal Alignment sign (W1-1a) and flashing warning sign will enhance the safe stopping sight distance at the subject crossing.

60. In addition, testimony was presented that the 100' median in existence at the crossing from 2005 to 2007 resulted in accidents from vehicles sliding into the nose of the median. The instillation of a 60' median would likely result in a similar amount of vehicle accidents.

61. The addition of a median that is 175' in length addresses the problem that arose with the 100' median, and improves overall safety.

62. The Town has met its burden to show that a 175' median better promotes and safeguards public safety than a 60' median.

63. With the finding that 175' median is the safer median length for the subject crossing; the construction of the median will necessarily block the ability of vehicles to make left-turns into and out of the Cornerstone access.

64. The overriding concern of the Commission is the safety of the public. Therefore it is not necessary for the purposes of this proceeding to determine if the Cornerstone access is a public access or a private access. The safety at the crossing must take priority over access issues near the crossing.

65. The building of the median will limit the options for Cornerstone's construction traffic. While not desired by Winter Park, the addition of the 175' median may result in Cornerstone construction traffic being forced to travel through the Town.

66. The Town will be required to inform the Commission in writing that the approved changes to the crossing are complete and operational within ten days after completion. The Commission will expect this letter by October 31, 2015. However, the Commission understands this letter may be provided earlier or later than this date depending on changes or delays to the construction schedule.

67. UPRR will be required to file a copy of the updated inventory form for this crossing in this proceeding by the end of construction on October 31, 2015.

IV. ORDER

A. The Commission Orders That:

1. The Application filed by the Town of Winter Park on November 20, 2012 is granted.

2. The Town of Winter Park is authorized and ordered to proceed with proposed crossing changes at the highway-rail crossing of Kings Crossing Road with the Union Pacific Railroad Company tracks including new flashing lights with automatic gates and bells located at the two entrance quadrants of the crossing, constant warning time detection circuitry, power out indicator on the signal bungalow, the addition of an 8' asphalt truck apron on the south side of the roadway, the addition of curb and gutter with 8' concrete walks, and the addition of raised medians of approximately 175' in length west from the crossing and approximately 102' in length east from the crossing.

3. The Town of Winter Park is required to inform the Commission in writing that the crossing changes are complete and operational within ten days after completion. The Commission will expect this letter by October 31, 2015. However, the Commission understands this letter may be provided earlier or later than this date depending on changes or delays to the construction schedule.

4. The Union Pacific Railroad Company shall be required to file a copy of the updated inventory form for this crossing in this proceeding by the end of construction on October 31, 2015.

5. The Commission retains jurisdiction to enter further decisions as necessary.

6. 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.

7. 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.

8. 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.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director