

Decision No. R99-1398

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 97A-084R

---

IN THE MATTER OF THE APPLICATION OF THE BOARD OF THE TOWN OF  
EAGLE, STATE OF COLORADO, FOR AUTHORITY TO CONSTRUCT A  
PEDESTRIAN AND BICYCLE CROSSING UNDER THE UNION PACIFIC RAILROAD  
STRUCTURE LOCATED IN THE TOWN OF EAGLE, STATE OF COLORADO.

---

**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
ARTHUR G. STALIWE**

---

---

Mailed Date: December 30, 1999

Appearances:

Heather Hocker, Esq., Denver, Colorado, on  
behalf of the Town of Eagle;

Gregory Sopkin, Assistant Attorney General,  
on behalf of the staff of the Commission;  
and

Susan Grabler, Denver, Colorado, for the  
Union Pacific Railroad.

**I. STATEMENT OF THE CASE**

A. By application filed February 19, 1997, the Town of Eagle requests permission from this Commission to construct a pedestrian and bicycle crossing underneath an existing railroad overpass structure in the Town of Eagle. On February 25, 1997, the Commission gave notice of the application to all who might desire to protest, object, or intervene.

B. On February 25, 1997, the staff of the Commission entered its appearance, followed on February 28, 1997 by the Colorado Department of Transportation. Also on February 28, 1997, the Denver and Rio Grande Western Railroad Company, predecessor to the Union Pacific Railroad, entered its appearance.

C. After consultation with the parties, the hearing in this matter was ultimately scheduled for December 9, 1999, with the parties listed above appearing.

D. Pursuant to the provisions of § 40-6-109, C.R.S., Administrative Law Judge Staliwe now transmits to the Commission the record and exhibits of said hearing, together with a written recommended decision containing findings of fact, conclusions, and order.

## **II. FINDINGS OF FACT**

A. Based upon all the evidence of record, the following is found as fact:

1. None of the parties who appeared at hearing had any factual dispute with the application as filed by the Town of Eagle. Pertinently, the proposed recreational trail is described by the Town of Eagle as follows:

The project consists of the construction of a portion of a recreational trail that will extend along U.S. Highway 6 and the Eagle River. In order to connect this trail to portions of the trail north of

the railroad the trail will cross the 100 foot railroad right-of-way beneath an existing railroad overpass structure, the center of which is at approximate milepost No. 327.93. The original purpose of the overpass was to cross a drainage valley which flows from the north side of the railroad to the south side of the railroad. The path to be constructed, across the railroad right-of-way, will have an eight-foot wide concrete pavement surface with two-foot gravel shoulders, all on a gravel base course. The sub-grade will essentially follow the existing ground line.

2. As indicated by counsel for the Town of Eagle, the proposed pedestrian and bicycle recreational trail is going to be an eight feet wide, six-inch thick ribbon of concrete sitting on a gravel bed. As illustrated by Exhibit B to the application, at the point of crossing the proposed trail will sit 15 feet below the surrounding tableland and 12 feet beneath the bottom of the railroad bridge, approximately a foot or two above the bottom of the drainage valley. As indicated by Exhibit D to the application, the point of crossing lies northeast of the built up area of the Town of Eagle, between the Eagle River on the south and Interstate Highway 70 to the north, in the flood plain of the Eagle River.

3. The Town of Eagle, through its counsel, was adamant that this recreational trail is not a part of the town's street or highway system. The Town of Eagle has not legally declared this path be a public highway pursuant to applicable statutory or ordinance provisions. Indeed, the Town of Eagle

expresses no opinion on the legal status of this recreational path (other than it is not a public highway), simply desiring an order from this agency approving the trail even though it is not a public highway.

4. The Union Pacific Railroad expresses no objection to the recreational bicycle trail, since it does not cross the right-of-way of the railroad at grade, instead funneling pedestrians and bicyclists some 15 feet below the railroad's tracks. Similarly, the staff of the Commission has no objection to the construction of the bicycle path beneath the railroad's tracks for the same reason expressed by the railroad: the path will separate trains and people by 15 vertical feet. However, staff does take the position that the recreational bicycle and pedestrian path constitutes a public highway within the ambit of § 40-6-106(2)(a), C.R.S.

### **III. DISCUSSION**

A. Pursuant to § 40-6-106(2)(a), C.R.S., this agency's jurisdiction is limited to railroad crossings involving public highways:

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 any public highway may be constructed across the tracks or other facilities of any railroad corporation at grade, or above or below grade...

The term "public highway" is not defined anywhere in Title 40, of the public utilities law.

B. In part, staff relies on § 43-2-201(1)(b), C.R.S., which provides:

(1) The following are declared to be public highways:

\*\*\*

(b) All roads over private or other lands dedicated to public uses by due process of law...

In turn, § 43-1-202, C.R.S., defines public highways as, "all roads and highways which are, on May 4, 1921, by law open to public traffic..."

C. However, in this case the Town of Eagle has expressly stated that this pedestrian and bicycle path is **not** a public highway, and it is the Town of Eagle who will own and construct the path under the railroad's bridge. There is no, "...dedicated to public uses by due process of law..." as a public highway in this case.

D. Staff also relies in part on the Colorado Supreme Court's ruling in *Simon v. Pettit*, Colo., 687 P.2d 1299 (1984), wherein the court held that two footpaths that were 18 inches wide were not public highways. Since this path will be eight feet wide and concrete paved it must be a public highway, staff

argues. However, the Supreme Court predicated its ruling on several grounds:

Second, there is no evidence that the city...has...in any way accepted them as public streets.

687 P.2d at 1303. Going on, the court noted:

Third, footpaths in an urban setting, serving primarily as a shortcut to the other side of the block, surrounded on all sides \*1304 by alternative routes along established streets and sidewalks, simply do not provide a sufficiently compelling reason to rigidly interpret the public highways statute. See *Lofland v. Truitt*, 260 A.2d 909 (Del. Ch. 1969) (use of woods road was mostly as a shortcut or for a pleasure drive); *Felici v. Pennsylvania--Reading Seashore Lines*, 83 N.J.Super. 373, 200 A.2d 126 (1964) (footpath used as shortcut for the sake of convenience was not a public highway); *Burrell v. Kirkland*, 242 S.C. 201, 130 S.E.2d 470 (1963) (shortcut across private properties should not be adjudicated on piecemeal basis). For the above reasons, the two footpaths should be excluded from the definition of "road" in section 43-2-201(1)(c).

687 P.2d at 1303, 1304. In this case the bike path is described as being for recreational purposes, and is not a substitute for nearby U.S. Highway 6 or Interstate 70. Staff's reliance on *Simon v. Pettit*, *supra*, does not appear to be well placed. Similarly, reliance on the Kansas case of *Kratina v. Board of Commissioners*, 219 Kan. 499, 548 P.2d 1232 (1976) is equally curious given the Kansas court's ruling:

...

In Kansas as elsewhere a public roadway may be established in three different ways: by purchase or condemnation, by prescription, or by dedication. Dedication may be either statutory, as by the filing

of a plat, or common law. In this case there were no official proceedings to open the road and no claim of dedication, so we are concerned only with prescription.

548 P.2d at 1235. Prescription is not an issue here, since the bike path has not been built.

E. Again, given the express statement by the Town of Eagle that this bike path is not a public highway, not a part of its street system, etc., it is not within this agency's power to overrule the town and somehow declare the path dedicated to public use as a highway, and thus subject to our oversight as it slips under a railroad bridge.

F. However, assuming *arguendo* that this bike path is somehow found to be a public highway under a common law theory, etc., should this agency approve the point of crossing? The answer must be no.

G. While it is generally a good thing to separate trains from other traffic by grade separations, in this case the pedestrians and bicyclists are placed at the bottom of what the town itself calls a drainage valley. In the event of a severe thunderstorm and resulting flashflood, anyone taking shelter under the bridge will find themselves caught between a swollen Eagle River to the south and a torrent of water pouring down the drainage valley from the north. While bicyclists may be strong enough to scramble up the sodden dirt embankments of the

drainage valley, can the same be said for small children, the elderly, the infirm, or wheelchair bound pedestrians out for a stroll on the concrete?

H. In a similar situation involving the Regional Transportation District ("RTD") in Docket No. 97A-340R, staff desired that there be a grade separation for pedestrians either over or under the tracks of the Burlington Northern Railroad. RTD's engineers vigorously objected, in the case of a subterranean crossing noting that the area in question is a designated floodplain, subject to periodic flooding from both unseasonable rises in adjacent waterways (the Platte River), as well as unexpected cloud burst activity. Accordingly, RTD asserted, any subterranean grade separation was dangerous to those caught below grade during rising water.

I. This office agreed by Decision No. R98-116, and an at-grade crossing was approved. While this bike path is not subterranean (there is open sky above the path), it is true that this bike path lies some 15 feet below surrounding tableland at the point it crosses under the bridge, and only a foot or two above the bottom of a drainage valley. At the point where it crosses under the railroad bridge the path poses virtually the same hazard to pedestrians that the underground crossing in 97A-340R posed. Accordingly, the same result must obtain here.



#### IV. ORDER

##### A. The Commission Orders That:

1. The Town of Eagle's recreational bike path is not a public highway within the ambit of § 40-6-106(2)(a), C.R.S. Accordingly, this agency lacks jurisdiction over the subject matter, and the application is dismissed as unnecessarily filed.

2. Alternatively, if the bike path in question is a public highway and this agency has jurisdiction, then the application must be denied as unsafe. The proposed route of the concrete path is near the bottom of what the Town of Eagle itself describes as a drainage valley, with high ground to the north and the Eagle River to the south.

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

