

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0624R

IN THE MATTER OF THE APPLICATION OF THE WEST MOUNTAIN METROPOLITAN DISTRICT AND THE TOWN OF FRASER FOR AUTHORITY TO CONSTRUCT A NEW HIGHWAY-RAIL GRADE SEPARATION AT THE PROPOSED CROSSING OF GRAND PARK DRIVE AND THE UNION PACIFIC RAILROAD COMPANY TRACKS IN FRASER, COLORADO AND ABOLISH THE AT-GRADE RAILROAD CROSSING AT KINGS CROSSING ROAD (DOT NO. 254-214U) IN WINTER PARK, COLORADO.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
REQUIRING CORNERSTONE WINTER PARK LLC
AND GRAND PARK DEVELOPMENT LLC
TO SHOW CAUSE WHY THEIR MOTION
TO INTERVENE SHOULD NOT BE DENIED**

Mailed Date: September 5, 2014

I. STATEMENT, FINDINGS, AND CONCLUSION

1. Only those portions of the procedural history necessary to understand this Decision are included.
2. On June 5, 2014, the West Mountain Metropolitan District (the District) and the Town of Fraser filed the above-captioned Application.
3. On June 20, 2014, the Commission gave public notice of the Application.
4. On July 11, 2014, Union Pacific Railroad Company filed an “Entry of Appearance and Notice of Intervention,” which it amended by a filing made on July 14, 2014.
5. On July 15, 2014, the Town of Winter Park filed a “Motion to Intervene.”
6. On July 17, 2014, Cornerstone Winter Park Holdings, LLC (Cornerstone) and Grand Park Development LLC (Grand Park) filed a “Motion to Intervene.”

7. On August 20, 2014, the Administrative Law Judge (ALJ) assigned to this proceeding scheduled the matter for a prehearing conference to take place on September 2, 2014. Decision No. R14-1014-I.

8. At the date, time and location designated, September 2, 2014, the ALJ convened the prehearing conference. Except for Cornerstone and Grand Park, all parties appeared. During the prehearing conference, the parties agreed to, and the ALJ approved a procedural schedule and hearing date. *See* Decision No. R14-1066-I issued September 2, 2014.

9. Mr. Jack Bestall, a non-attorney, appeared at the prehearing conference and indicated that he is with Cornerstone and Grand Park. However, no filings made by Cornerstone and Grand Park identify Mr. Bestall as its representative or contact person (or as affiliated with them in any way). Attorney Mikeala Rivera is the only person who has been identified as a representative for Cornerstone and Grand Park. *See* Cornerstone and Grand Park's Motion to Intervene. And, Mr. Bestall is listed as a representative for one of the Applicants (the District), in its Application. Thus, the ALJ does not deem Mr. Bestall's appearance at the prehearing conference as being on behalf of Cornerstone and Grand Park.¹

10. The Decision scheduling the prehearing conference was properly served on Cornerstone and Grand Park on August 20, 2014 through the Commission's e-filing system.² *See* Certificate of Service for Decision No. R14-1014-I.

¹ The ALJ notes that, based on his interactions with counsel for the District, it appeared that Mr. Bestall was present at the prehearing conference for the District.

² Attorney Mikeala Rivera is registered in the Commission's e-filing system to receive all notices to Cornerstone and Grand Park; she is registered as the administrator for Cornerstone and Grand Park's e-filing accounts. The certificate of service for Decision No. R14-1014-I shows that Cornerstone and Grand Park were properly served with that Decision through the Commission's e-filing system. However, due to the format of the E-filing system, the certificate does not indicate the specific email addresses where the Decision was served. An additional certificate of service was filed on September 4, 2014 clarifying that Decision No. R14-1014-I was served on Ms. Rivera through the Commission's e-filing system on August 20, 2014. This certificate merely creates a more complete record of where the Decision was sent, and does not modify the original certificate of service.

11. The Decision scheduling the prehearing conference states, “[f]or purposes of this Decision only, the ALJ is treating all entities who have filed interventions as parties.” Decision No. R14-1014-I, at ¶ 9. And, all parties were ordered to appear at the prehearing conference. *Id.*, at ¶ 12. Thus, the Decision made it clear that Cornerstone and Grand Park must appear at the prehearing conference.

12. In addition, Decision No. R14-1014-I also warns the parties that failure to appear at the prehearing conference may result in a decision dismissing the Application or denying an intervener the right to participate in this proceeding. *Id.*, at ¶ 13.

13. Cornerstone and Grand Park’s failure to appear at the prehearing conference, despite having proper notice, is a blatant violation of Decision No. R14-1014-I. Cornerstone and Grand Park have not shown good cause for their failure to appear.

14. Cornerstone and Grand Park’s failure to appear prevented the ALJ from addressing their Motion to Intervene. In considering whether to grant Cornerstone and Grand Park’s Motion to Intervene, the Commission asked the ALJ to consider the fact that Clark Lipscomb is a member of the District’s Board of Directors (and filed an affidavit with the Application), and is also listed as a contact person for Cornerstone and Grand Park in the Application. Decision No. C14-0966-I issued August 11, 2014. Cornerstone and Grand Park were put on notice that this issue would be addressed at the prehearing conference. Decision No. R14-1014-I. Because Mr. Lipscomb is listed by the Applicants, not by Cornerstone and Grand Park, it is unclear whether Mr. Lipscomb is a designated representative for Cornerstone and Grand Park. As Cornerstone and Grand Park failed to appear at the prehearing conference, it was unable to provide clarification as to Mr. Lipscomb’s role in this proceeding on their behalf (if any).

15. First and foremost, Cornerstone and Grand Park's failure to appear is deemed a waiver of any objection to the hearing date and procedural schedule established in their absence.

16. More importantly, Cornerstone and Grand Park's failure to appear is a failure to prosecute its Motion to Intervene. *See Rathbun v. Sparks*, 425 P.2d 296, 298-99 (1967). The ALJ would be within her authority to deny Cornerstone and Grand Park's Motion to Intervene on these grounds.

17. Nonetheless, the ALJ will allow Cornerstone and Grand Park an opportunity to show cause why its Motion to Intervene should not be denied for its failure to appear at the prehearing conference. Cornerstone and Grand Park will also be required to provide information as to Mr. Clark Lipscomb's role in this proceeding on their behalf.

18. If Cornerstone and Grand Park do not make a show cause filing as required by this Decision, their Motion to Intervene will be denied.

II. ORDER

A. It Is Ordered That:

1. Cornerstone Winter Park Holdings, LLC (Cornerstone) and Grand Park Development LLC (Grand Park) must make a filing, on or by 5:00 p.m. on September 12, 2014, which shows cause why their Motion to Intervene should not be denied for their failure to appear at the properly noticed prehearing conference held on September 2, 2014. The filing shall also include information explaining Mr. Clark Lipscomb's role in this proceeding on behalf of Cornerstone and Grand Park.

2. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director