

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH COUNTY TRANSIT DISTRICT –)	
PETITION FOR DECLARATORY ORDER)	
)	Docket No. FD 36433

**REPLY TO SUPPLEMENTAL STATUS UPDATE
OF THE CITY OF DEL MAR**

Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: March 11, 2022

Attorneys for City of Del Mar

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH COUNTY TRANSIT DISTRICT –)	
PETITION FOR DECLARATORY ORDER)	Docket No. FD 36433
)	

**REPLY TO SUPPLEMENTAL STATUS UPDATE
OF THE CITY OF DEL MAR**

Pursuant to 49 C.F.R. § 1104.13, the City of Del Mar (“Del Mar”) hereby replies to the Supplemental Status Update that North County Transit District (“NCTD”) filed with the Surface Transportation Board (“Board” or “STB”) on March 4, 2022 (“NCTD Supplement” or “Supp.”).

NCTD now claims that “recent events” pertaining to matters associated with its August 28, 2020 Petition for Declaratory Order (“Petition”) require a Board decision to be issued “as soon as possible” on the preemption issues it has raised. However, nothing in its Supplement warrants the issuance of a Declaratory Order at this time, nor has NCTD established a basis for any finding of preemption.

If anything, the new issues raised by NCTD provide additional support for ordering Board-sponsored mediation, under the Board’s rules at 49 C.F.R. § 1109, as Del Mar and the California Coastal Commission (“Coastal Commission”) have requested. With the assistance and involvement of Board staff knowledgeable of railroad preemption, the parties, along with the San Diego Association of Governments (“SANDAG”), which is responsible for construction and stabilization initiatives along the

coastal bluffs area in Del Mar (“Bluffs”), will be in the best position to fairly and mutually resolve the issues that are the subject of the Petition, just as they have cooperatively addressed and resolved railroad safety and stabilization projects on the Del Mar Bluffs for over 20 years.

At a minimum, if the Board believes that a Declaratory Order proceeding is necessary, Del Mar agrees with the California Coastal Commission that as a matter of due process, further briefing and possible limited discovery is required to address the new issues raised in NCTD’s Supplement, including on issues of self-governance, prior to any final determination being made.

A. Del Mar Has Cooperated and Not Interfered with Bluff Stabilization

NCTD asserts that “a[s] it relates to the stabilization of the bluffs, significant safety risks have been created and are ongoing due to the actions of the Commission in collaboration with the City.” NCTD Supp. at 7. Specifically, NCTD complains that the Commission has been “actively delaying” Federal Consistency Review and the has been unfairly seeking to “extract” from NCTD expensive project design changes on which NCTD does not agree. *Id.* at 8-9. NCTD’s continuing complaints about the Federal Consistency Review process are completely manufactured and unwarranted.

The NCTD right of way abuts City property on both the east and west side as well as State property to the west, including the Torrey Pines State Beach. As Del Mar

explained in its October 20, 2022 Reply, the actual facts show that Del Mar and the Commission have actively worked in good faith in cooperation toward Bluff stabilization, the Commission has allowed emergency stabilization work *prior* to Federal Consistency Review, and there has been **no** instances in the parties' decades long history where Del Mar, or the Commission, has sought to interfere with that work, much of which has occurred on Del Mar's and the State's property. Del Mar Reply at 15-16. NCTD's Supplement provides nothing new to refute those facts.

As addressed in Del Mar's Reply, Bluff stabilization project review is made pursuant to federal law under the Coastal Zone Management Act ("CZMA"), and NCTD has not demonstrated that the CZMA and ICCTA cannot be harmonized. Congress did not intend that the Board's authority over common carriers under ICCTA, such as NCTD, would supersede the National Oceanic and Atmospheric Administration's authority and obligations to manage natural resources in coastal zones for the nation. See, e.g., *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001) ("[Federal] agencies' complementary exercise of their statutory authority accurately reflects Congress's intent for the [statutes] to be construed *in pari materia*.").

NCTD's effort to use the auspices of the Board to initiate a proceeding and grant relief that would impinge upon concurrent federal law must be rejected. As Del Mar further explained in its October 5, 2020 Reply, SANDAG, not NCTD, has jurisdiction over Bluff stabilization, and as discussed above, SANDAG as project sponsor is continuing to work in cooperation with the Coastal Commission on project review, as

evidenced in the correspondence included in Exhibit E and Exhibit F of NCTD's Supplement. While it appears that NCTD ultimately may be most frustrated with SANDAG's longstanding cooperative approach and engagement in Federal Consistency Review of Bluff stabilization projects, that frustration does not warrant a declaratory order from the Board that might greatly impede and hinder SANDAG and the Coastal Commission's orderly project planning and review process.

NCTD's continuing assertions of Del Mar or the Coastal Commission's unreasonable interference with SANDAG's Bluff stabilization program are untrue and contrived.

B. The Coastal Commission's and Del Mar's Review of Fencing is Not Preempted

NCTD asserts that Del Mar is "[i]nviting residents and visitors to illegally trespass on NCTD railroad right-of-way property," because Del Mar has not agreed with NCTD's fencing plans on or around its property. Nothing could be further from the truth. Del Mar has consistently been supportive of safety on the Bluffs, and it in no way invites or encourages trespassing. Del Mar also remains supportive of enhanced right-of-way security, including through **targeted fencing at the track level**, focused in areas where the data and hazardous incident analysis reflects that fencing will achieve its intended purpose of enhanced public safety, and minimizing impacts to adjoining public and private property, public resources, viewpoints, and overlooks along the natural, scenic, and sensitive Del Mar Bluffs. Del Mar's City Statement on NCTD's proposed rail

fencing is included as **Attachment A**. Del Mar's letter to the NCTD Board regarding NCTD's proposed fencing is included in **Attachment B**.

Contrary to NCTD's assertions, neither Del Mar nor the Coastal Commission has unreasonably interfered with the proposed fencing in violation of 49 U.S.C. 10501(b) as NCTD now claims.

First, the actual facts show that NCTD developed and designed a fencing project on or around its right-of-way without consultation with Del Mar or the Coastal Commission, in a manner that may actually place public safety in jeopardy, create further geologic stability hazards and damage, and endanger and damage natural resources within the coastal zone. Also, Del Mar repeatedly asked NCTD for project design and engineering plans; construction drawings; surveys, maps, and legal descriptions related to the location of the proposed fencing; and geotechnical, drainage, or hydrological studies or reports related to the proposed fencing. Yet NCTD only belatedly provided limited project information, and not enough to ensure that its proposed project is safe, does not adversely impact the fragile Del Mar Bluffs, NCTD's own operations, or those of other railroads that use the line. In fact, NCTD appears to have abdicated its responsibilities when it reallocated \$200,000 in grant funds for project environmental review to project construction, thereby deliberately and purposely avoiding critically needed review that it promised would be undertaken in its grant application. *See Attachment B*, at pg. 3.

In the end, NCTD rushed through its proposed "safety" fencing plan on Del Mar's eroding bluffs without adequate review or public input. Unfortunately, that

unvetted and hurried plan appears to increase catastrophic risk to the public, train passengers, railway workers, beachgoers, and the entire LOSSAN rail corridor.

Second, as NCTD acknowledges, the Del Mar City Council considered, but ultimately rejected a license agreement between NCTD and the City addressing public use of the NCTD right-of-way and fencing. The primary unresolved issues between the parties concern: (1) NCTD's conceptual fencing locations, materials, and dimensions; (2) the apparent lack of professional architectural and engineering design and drawings; (3) lack of sufficient geotechnical analysis; (4) lack of local location-based hazardous analysis; and (5) overarching liability and maintenance responsibilities. Del Mar believes that the two sides remain very close to reaching an agreement, and should be able to get there with the assistance of STB-sponsored mediation including all responsible governmental stakeholders. However, despite its continuing concerns, Del Mar has done nothing to date to interfere with or prevent NCTD with moving forward with the project. Del Mar has in no way interfered, let alone unreasonably interfered, with NCTD railroad operations in violation of ICCTA as NCTD claims.

Third, NCTD alleges that Del Mar's efforts to cooperate and coordinate on best practices with security fencing somehow interferes with its ability to fully implement federally mandated safety programs and plans. It does not. To the contrary, the Federal Railroad Administration ("FRA") has recognized that when it comes to fencing, that best practices include community involvement. The FRA's report on *High-Security Fencing for Rail Right-of-way Applications: Current Use and Best Practices*, DOT/FRA/ORD-

15/38 (Oct. 2015), states that “[c]ooperating with local communities seems natural to building a robust fencing program, high-security or otherwise.” *Id.* at 15, https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/15476/High%20Security%20Fencing_final.pdf (emphasis added) (“FRA Report”). The FRA Report specifically recommends as one of four fundamental “best practices” that “[p]ositive community engagement can be extremely beneficial to a fencing program and a successful localized trespass-prevention program in general.” *Id.* at 21. The FRA Report also highlights that “[s]everal railroad agencies . . . [are] willing[] to work with local property owners, abutters, and officials to install fencing that is both aesthetic and acceptable to the community.” *Id.* at 17.

Additionally, the FRA Report recommends as a best practice that fencing “should be strategically located, ideally using a robust hazard analysis that includes all relevant sources of trespassing information.” *Id.* at 21. FRA states that such pre-project, location-based hazard analysis is “essential,” and is regularly followed by larger transit agencies including the Long Island Railroad and New Jersey Transit. *Id.* at 12-13.

Unfortunately, the “fence it all” plan NCTD proposes, including large-scale fencing of the entire eastern upper Bluff in Del Mar appears closer to a spite fence. It will not address legitimate safety concerns as there is no track level access at a vast majority of these locations, and the fencing location and design has been mostly independent of any community involvement, or any robust location-based hazard analysis. Unfortunately, instead of taking such FRA-recommended best-practices, NCTD

has elected to disregard the basic fact, “reiterated several times over by safety professionals [] that you can’t fence the entire ROW!” *Id.* at 12.

Fourth, NCTD cryptically asserts that “[b]ecause there is no federal action related to” its fencing project, no Federal Consistency Review is needed under the CZMA, and “the Commission is asserting that NCTD must obtain a state permit.” NCTD Supp. At 4. However, it is entirely unclear the actual source of the funding, which is undocumented.¹ Also, in its Petition, NCTD acknowledged that even if the project is funded under state funding, the project “may later include federal dollars” (NCTD Pet. at 13), and if includes federal dollars, then Federal Consistency Review is required and there can be no preemption.

Fifth, as correctly noted in the Coastal Commission’s March 8, 2022 Status Update and Opposition (“Opposition”), even if it the Board were to determine that a portion of the Bluff stabilization or fencing projects involved state rather than federal funding, that does not change the fact that NCTD must participate in a Consistency Review under the Coastal Act’s permitting regime. Del Mar agrees with the Coastal Commission that this review is necessary to ensure that the project “complies with state law, including protecting the scenic and visual qualities of the coastal bluffs, minimizing

¹ If the Board initiates a Declaratory Order proceeding, adequate time for discovery on the issue of funding and other issues on the safety and impacts of NCTD’s plans, including geological, public resource, biological, and habitat impacts will be required for an adequate record to be developed.

impacts to public access, and insuring the stability and structural safety of the bluffs. (Cal. Public Resources Code, §§ 30210-30214, 30251-30253).” Coastal Commission Opposition at 3.

Del Mar addressed at length in its October 20, 2022 Reply why California’s Coastal Management Program is not preempted under ICCTA. Del Mar Reply at 18-29. While NCTD’s Petition focused primarily on Federal Consistency Review, Del Mar preliminarily addressed why even state law issues, including state property law and trespass, and Coastal Act Consistency Review, are not preempted under ICCTA. *Id.* at 24-29. While Del Mar will not repeat these arguments here, even NCTD acknowledges that it is a state government entity authorized to operate public transit in North San Diego County. As an entity of the State, receiving state funding, NCTD’s adherence to state environmental laws and the California’s Coastal Management Program is not regulation by the state but a form of self-governance by the owner. *Friends of the Eel River v. N. Coast R.R. Auth.*, 399 P.3d 37 (Cal. 2017) (“*Friends of the Eel River*”).

In *Friends of the Eel River*, the California Supreme Court found that a state agency does not engage in “regulation” within the meaning of the ICCTA when applied to state law governing the state’s “own” rail project subject to certain state guidelines. *Id.* at 65. How the state itself and the state’s own subsidiaries must abide by their own legal responsibilities is not a matter of regulation subject to the ICCTA, but a matter of self-governance. *Id.*

Thus, the Court in *Friends of the Eel River* held that California’s sovereign decision-making with respect to a publicly-funded repair project by a state-created public railroad did not constitute preempted “regulation of rail transportation” under 49 U.S.C. § 10501(b). Rather, the application of the State’s core environmental review statute to the project was an “expression of state governmental decisions about the disposition of state authority and resources,” entirely within the State’s core sovereign function of self-governance. *Friends of the Eel River* at 70. The very same rationale and finding equally applies here, should it be determined that a portion of NCTD’s proposed fencing project actually involves state funding, and that the proposed project is actually entirely within NCTD’s right-of-way.²

Finally, in its Opposition, the Coastal Commission notes that, because the issue of state funding, and the application of principals of self-governance and *Friends of*

² NCTD contends that *North San Diego Cnty. Transp. Dev. Bd. – Petition for Declaratory Order*, FD No. 34111 (STB served Aug. 21, 2002) controls. That case is inapposite. In that case, the STB asserted jurisdiction over the new “passing” track, not fencing on or around the right-of-way unrelated to operations. Also, the case involved a regulatory permit requirement by a city, not a state entity involved in self-governance, through state imposed pre-decisional process to be completed by a state subsidiary railroad. The same is the case with respect to *City of Encinitas v. North San Diego County Transit Development Board, et al.*, 2002 WL 34681621 (S.D. Ca. 2002). Neither case involved or discussed principals of self-governance as addressed and resolved in *Friends of the Eel River*. While NCTD clearly does not like the result of *Friends of the Eel River*, the law is settled, and Board should decline to allow it “another bite of the apple” through further review, especially where the United States Supreme Court has denied NCTD’s Petition for a writ of certiorari. *North Coast R.R. Auth. v. Friends of the Eel River, cert. denied*, 138 S. Ct. 1696 (2018).

the Eel River have not been fully addressed by the parties to date, although the argument was expressly not waived, it has asked for an opportunity to fully brief the question of self-governance prior to final action on NCTD's Petition. Coastal Commission Opposition at 4. Del Mar agrees that, should the STB decide that this issue is necessary to address and resolve prior to taking final action on the Petition, the Board should provide all parties with a further opportunity to address the issue of self-governance. However, prior to authorizing further briefing, Del Mar respectfully reiterates that each of the governmental entities with a stake in bluff stabilization and safety should be given an opportunity to confer and resolve their differences through Board-sponsored mediation.

C. Board-Sponsored Mediation is Needed to Help Resolve Remaining Differences Amongst the Governmental Stakeholders

NCTD's Supplement continues to ignore the fact that, in order to best protect public safety and resources, ultimately, all government entities with a stake in bluff stabilization and safety need to continue their decades long cooperative approach, including the Coastal Commission, SANDAG, the City of Del Mar, **and** NCTD. The parties have engaged in productive discussions to resolve issues raised in NCTD's Petition, including on public safety; preservation of scenic viewpoints and coastal access; safe railroad operations; targeted fencing; and reduced liability for all public entities. Successful mediation can help bring about a cooperative approach to Bluff project review and resolution, as the parties have done for decades – including on matters that go well beyond NCTD's rail operations within its right-of-way.

Del Mar continues to believe that, if the parties collectively act in good faith, and with the assistance of the Board staff, they are in the best position to come to a mutually agreeable resolution that furthers the public interest. Accordingly, prior to taking any formal action on NCTD's Petition, the Board should first grant Del Mar and the Coastal Commission's Motions for Mediation and commence mediation between NCTD, the Coastal Commission, SANDAG, and Del Mar to assist them in mutually resolving their disputes.

Respectfully submitted,

CITY OF DEL MAR



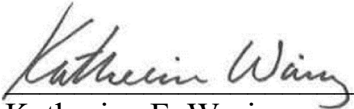
Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: March 11, 2022

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this 11th day of March, 2022, I caused a copy of the foregoing document to be served by U.S. First Class Mail or by more expeditious means on all parties of record.


Katherine F. Waring
An Attorney for City of Del Mar

ATTACHMENT A

City of Del Mar Statement regarding North County Transit District's Proposed Rail Fencing Project in Del Mar

January 11, 2022

Background

The rail line through Del Mar traverses the Del Mar bluffs from Seagrove Park to the City boundary with San Diego to the south. The rail line has been in its current location since 1909. For decades, pedestrians have crossed the tracks to access the beach. Scenic trails and overlooks along the tracks are also used for jogging and other recreational activities. The North County Transit District (NCTD) considers this trespassing. The City continues to cooperate with NCTD on effective safety measures.

About 60 trains per day pass through Del Mar. That number is planned to double by 2030. NCTD reports that train strikes and near misses remain a safety problem.

In August 2020, NCTD filed a Petition with the Federal Surface Transportation Board (STB) against the California Coastal Commission and the City of Del Mar. The Petition seeks to preclude Del Mar and the Coastal Commission from having any say over NCTD rail projects on the Bluffs (such as bluff stabilization and fencing). Del Mar and the Coastal Commission contested the Petition. Other interested parties also filed briefs with the STB. The full rundown of filings can be found here: <https://prod.stb.gov/proceedings-actions/filings/>. The Petition was stayed to allow the parties to attempt to negotiate a compromise and resolution. The stay expired on December 31, 2021.

The City of Del Mar's Position

The attached statement was issued by the Del Mar City Council in November 2020. This remains Del Mar's official, steadfast position. Del Mar's November 2020 policy position statement provided the lens through which the City has approached the collaborative process with NCTD and the Coastal Commission over the course of the past 16 months.

Outcome

The City endeavored to work collaboratively with NCTD. This included, frequent and regular meetings at the staff level, site walks by City Councilmembers and staff, a view shed analysis, a modified fence design proposal, and extensive work on a draft license agreement between the City and NCTD for continued pedestrian use of an area known as the "upper bluff" recreational trail. Throughout the process, City staff updated the City Council who, in turn, provided feedback and direction to guide staff-level discussions. Unfortunately, the parties were unable to reach agreement. The primary unresolved issues concern: (1) NCTD's conceptual fencing locations, materials, and dimensions; (2) the apparent lack of professional architectural and engineering design and drawings; (3) lack of sufficient geotechnical analysis; and (4) overarching liability and maintenance responsibilities.

The attached letter from the City of Del Mar to the NCTD Board (dated January 11, 2022) further elaborates the City's concerns with NCTD's "best and final" fencing proposal and license agreement terms and conditions.

In the letter to NCTD, endorsed by the full Del Mar City Council, Mayor Dwight Worden states, “The Del Mar bluffs are one of the last remaining native coastal bluffs in San Diego. The bluffs are sensitive and must be preserved. The City of Del Mar, through the California Coastal Commission, wants to protect the bluffs as a valuable natural resource to the public. Del Mar also recognizes the need for safety measures along the rail line that traverses the Del Mar bluffs. Fencing in some areas may improve safety. Legal crossings coupled with other safety measures, such as signage and advanced warning systems, could greatly enhance public safety and are viable options instead of installing fences in areas where it is already difficult, if not impossible, to access the railroad tracks. Del Mar fails to understand why NCTD's current position is such a harsh ‘take it or leave it’ posture after all the progress we have made so far.”

Next Steps

On December 30, 2021, NCTD filed a status update with the STB as required. NCTD requested STB to place the Petition in active status because negotiations were not successful. NCTD plans to bring a “fencing project” for Board consideration on January 20, 2022.

Del Mar, through the City Attorney’s office, has retained special counsel in Washington, DC, who specialize in defending public entities before the Surface Transportation Board.

Del Mar and the California Coastal Commission continues to advocate that NCTD must uphold its legal responsibilities, both in terms of regulatory requirements and self-governance as a public agency. This includes consistency review through the Coastal Commission to preserve public access, protect the sensitive coastal bluffs, and minimize adverse impacts. Fencing must be limited, properly designed, constructed and located where it will serve as a targeted, effective measure that directly addresses legitimate safety concerns.

With the Caltrans grant-funded Coastal Connections Study underway through summer 2022, in partnership with NCTD and SANDAG, and the design phase in progress by SANDAG for the Bluff Stabilization 5 project, there is tremendous synergy for designing and constructing these improvements holistically for the stability of the bluffs, preserving coastal access, and enhancing public safety.

ATTACHMENT B



CITY OF DEL MAR™

January 11, 2022

Chair Kranz and Board of Directors
North County Transit District
810 Mission Avenue
Oceanside, CA 92054
mtucker@nctd.org

SENT VIA EMAIL

Re: North County Transit District (NCTD) Board Item Regarding Del Mar Fencing

Dear Chair Kranz and Members of the Board of Directors:

This letter is sent on behalf of the City of Del Mar, with the endorsement of the full City Council, in response to your recent letter dated January 4, 2022, and in anticipation of the upcoming NCTD Board item on January 20, 2022, regarding Del Mar fencing. We appreciate the opportunity to provide some insight on this matter from the City's perspective and to confirm the City's position with regard to the installation of fencing along the railroad right-of-way in Del Mar.

As you noted in your letter, staff from the City of Del Mar (City), California Coastal Commission (CCC), and NCTD (collectively "Parties") spent the entirety of a year engaging in good faith discussions working toward mutual agreement with regard to a proper process for review of NCTD projects, including fencing, and to develop a modified fence and enhanced safety proposal that would achieve the mutual goals and priorities of the Parties.

The attached document titled, "*City of Del Mar Priorities for Addressing the Rail Right-of-Way Through the Del Mar Bluffs*" was adopted by the City Council at a public meeting on November 23, 2020, and details the City's priorities including public safety and access; reducing liability for all public entities; environmental review and compliance; avoiding or minimizing impacts to neighbors; preserving trails and viewpoints; and ensuring cooperation among government entities and opportunity for public input.

In keeping with the identified City priorities, the City consistently requested the following throughout the collaborative discussion process among the Parties and asks for NCTD Board consideration of the same:

- 1. Enhanced Safety Through Targeted Fencing at Track Level.** The City proposes that NCTD limit the installation of fencing to the area from Coast Boulevard to 13th Street, or potentially as far as 11th Street, with increased safety signage. This

would enhance public safety and avoid impacts to adjoining public and private property, viewpoints, and overlooks along the natural, scenic, and sensitive Del Mar Bluff.

This proposal is supported by NCTD's data, which identifies the number of fatal and non-fatal incidents per mile that occurred from Oceanside to San Diego during 2010 to 2020, with milepost and date. NCTD's data shows the number of fatal and non-fatal incidents that occurred between Coast Boulevard and 13th Street in Del Mar was higher in comparison to the number and frequency of incidents that occurred in other stretches of coaster track within North County. This data also indicates a comparatively very low incident rate for the stretch of track between 13th Street and the City's southern border. These statistics support concentrating fencing and other increased public safety measures specifically in the area from Coast Boulevard to 13th Street, or as far as 11th Street, at track level.

Another particular concern remains NCTD's proposed fencing of the entire eastern upper bluff in Del Mar. This is unnecessary because the vast majority of the upper bluff does not allow for track level access. Fencing the upper bluff will not address legitimate safety concerns or reduce liability exposure for on-track incidents. Demarcation fencing and safety signage could be installed rather than the proposed 4-foot post and cable fencing. Demarcation fencing and safety signage would still achieve the goal of enhancing safety and decreasing liability while avoiding impacts to existing drainage systems, and adjoining public and private property, preserve viewpoints and overlooks, and mitigate unnecessary environmental and geotechnical impacts to the fragile and sensitive upper bluff.

- 2. Completion of Coastal Connections Study.** The City continues to request that the need for additional fencing beyond the area between Coast Boulevard and up to 13th or 11th Street be deferred for consideration until the San Diego Association of Governments (SANDAG) Coastal Connections Conceptual Planning Study has been completed. Legal crossings and access improvements would allow for safe public access across the tracks and to the beach, which is a critical consideration when planning for fencing along the rail right-of-way.

The Coastal Connections Study is currently underway and expected to be complete in summer 2022. Among other things, study outcomes will provide 4-6 potential pedestrian access improvements including conceptual design, implementation plans, and potential funding sources. This information will be presented to the City Council, and SANDAG and NCTD Boards at the completion of the study.

- 3. License Agreement.** The City cannot agree to consider accepting maintenance and liability for the fencing improvements within the License Area as required by NCTD, or fully evaluate the impacts to the City in doing so, without more substantive information. To better understand and evaluate the proposed fencing,

and terms of the related NCTD License Agreement, the City has repeatedly asked, and reiterates its request for the following:

- Construction drawings related to proposed fencing along the Del Mar Bluffs;
- Material and manufacturer specifications related to the proposed fencing;
- Licensed professional civil or structural engineered designs or plans related to the proposed fencing;
- Licensed professional geotechnical, drainage, or hydrological studies or reports related to the proposed fencing; and
- Licensed professional surveys, maps, or legal descriptions related to the proposed fencing.

4. Environmental Review and Compliance. The City has consistently requested additional environmental review and geotechnical analysis of the potential impacts the fencing project would have on the fragile Del Mar bluffs.

The approved 2018 Caltrans grant funding application submitted by LOSSAN, NCTD, and SANDAG, included \$200,000 for environmental review related to the fencing project; however, it appears that the grant was subsequently amended in September 2020 to reallocate those funds to project construction, and the comprehensive and critically needed environment review for this project was never completed.

It should also be noted that although NCTD has consistently indicated that SANDAG is not a party to the fencing project, we disagree. SANDAG was a co-applicant with NCTD for the Caltrans funding that was approved for the fencing project, and there is a strong nexus between the SANDAG Del Mar Bluffs 5 project and NCTD's fencing project.

The City asks that NCTD work with SANDAG to complete the environmental review for the fencing in conjunction with the Del Mar Bluffs 5 project to ensure that any environmental impacts resulting from the fencing are identified and properly mitigated prior to finalizing the fence design and installation.

5. Collaboration. All government entities with a stake in these issues should continue to cooperatively participate in their resolution, including NCTD, CCC, SANDAG, and the City of Del Mar. The City and Coastal Commission have consistently requested that SANDAG be included in the discussions related to the fencing project as their input and coordination between the Del Mar Bluffs 5, Coastal Connections Study, and fencing project is essential.

In closing, The Del Mar bluffs are one of the last remaining native coastal bluffs in San Diego. The bluffs are sensitive and must be preserved. The City of Del Mar, through the California Coastal Commission, wants to protect the bluffs as a valuable natural resource to the public. Del Mar also recognizes the need for safety measures along the rail line that traverses the Del Mar bluffs. Fencing in some areas may improve safety. Legal

NCTD Board Item - Del Mar Fencing
January 11, 2022

crossings coupled with other safety measures, such as signage and advanced warning systems, could greatly enhance public safety and are viable options instead of installing fences in areas where it is already difficult, if not impossible, to access the railroad tracks. Del Mar fails to understand why NCTD's current position is such a harsh "take it or leave it" posture after all the progress we have made so far.

Sincerely,

A handwritten signature in black ink that reads "D. Dwight Worden". The signature is written in a cursive, flowing style.

Dwight Worden
Mayor

Enclosures: City of Del Mar Priorities in Addressing Rail ROW in Del Mar 11-23-20

cc: Del Mar City Council
Ashley Jones, City Manager
Leslie Devaney, City Attorney
Bill Pate, Assistant City Attorney
Jack Ainsworth, CCC Executive Director
Matt Tucker, NCTD Executive Director

City of Del Mar Priorities in Addressing the Rail Right-of Way Through the Del Mar Bluffs

Adopted November 23, 2020 by the Del Mar City Council

The City of Del Mar seeks cooperative resolution of rail safety and access issues on the Del Mar Bluffs in conformance with the following City priorities:

1. **SAFETY.** Public safety is the number one criterion.
2. **PUBLIC ACCESS.** The ability of the public to safely access the coast, including Del Mar's bluff-top trails, is a priority.
3. **LIABILITY.** Reducing the liability exposure of all agencies and entities involved in rail operations on the Del Mar bluffs is a priority.
4. **ENVIRONMENTAL.** All rail related activities on the Del Mar bluffs should be done in conformance with applicable environmental standards, including the California Environmental Quality Act (CEQA), National Environmental Policy Act (NEPA), the California Coastal Act, and Del Mar's certified Local Coastal Program (LCP), and should include appropriate mitigation.
5. **IMPACTS TO NEIGHBORS.** Avoiding or mitigating impacts to adjoining public and private property is a priority as to noise, vibration, view impacts, and privacy.
6. **TRAILS AND VIEWPOINTS.** Viewpoints, overlooks, and access trails to and along the railroad right-of-way should be preserved, augmented, or replaced where feasible.
7. **COOPERATION.** All government entities with a stake in these issues should participate in their resolution, including participating in discussion of funding options and constraints. Agencies involved should include: the North County Transit District (NCTD), the California Coastal Commission (CCC), SANDAG, AMTRAK, BNSF, the California Transportation Commission (CTC), and the City of Del Mar.
8. **PUBLIC INPUT.** Input from the public, including from organizations and individuals, should be welcomed and considered in the decision-making process.