

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF TRANSPORTATION**

In the Matter of the Petition of
the City of Burnsville for
the Establishment of a New Roadway Grade Crossing
on 143rd Street between
Judicial Road and CSAH 5 in Burnsville, MN
Pursuant to Minn. Stat. § 219.072 (2002)

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

The Minnesota Department of Transportation (the Department or MnDOT) initiated this proceeding by issuing a Notice of and Order for Hearing on March 11, 2004. The notice scheduled a hearing in this matter beginning at 9:30 a.m. on Tuesday, April 20, 2004, at the Office of Administrative Hearings, Suite 1700, 100 Washington Avenue South, Minneapolis, Minnesota. The Administrative Law Judge subsequently scheduled the hearing to begin at 10:15 a.m. on the same date and at the same place.

Thomas M. Scott, Attorney at Law, Suite 317, Eagandale Office Center, 1380 Corporate Center Curve, Eagan, Minnesota 55121, represented the City of Burnsville (sometimes "the City") in this proceeding. No other parties sought leave to intervene in the proceeding. The record closed on May 3, 2002, when the City's post-hearing submission was received.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Transportation (the Commissioner) will make the final decision after reviewing the hearing record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions and Recommendations. Under Minnesota Law¹¹, the Commissioner must not make her final decision until after the parties have had access to this Report for at least ten days. During that time, the Commissioner must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument to her. Parties should contact the office of Carol Molnau, Commissioner, Minnesota Department of Transportation, 4th Floor Transportation, 395 John Ireland Boulevard, St. Paul, Minnesota 55155-1899, to find out how to file objections or present argument.

The record of this contested case proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.^[2]

STATEMENT OF THE ISSUE

Whether or not the Commissioner should grant the City's petition to establish a new at-grade crossing of the Canadian Pacific Railway's tracks on 143rd Street in the City of Burnsville.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The County Highway 42 Corridor

1. The Petitioner, the City of Burnsville (the City), is a Minnesota municipal corporation and a political subdivision of the State of Minnesota. The City owns and maintains a system of streets and roadways within its limits, including 143rd Street. County Highway 42 (CH 42) transects the City from east to west.

2. The principal function of CH 42 is to serve as non-freeway principal arterial roadway.^[3] In that capacity, it serves as the only continuous east-west roadway serving central Dakota and Scott Counties and provides direct connections to all of the major north-south freeways in the area.^[4] The roadway's function and traffic volume are such that it was classified as part of the National Highway System in 1994.^[5]

3. In addition to the roadway's principal arterial function, expanding commercial and retail development along the CH 42 right-of-way has created a secondary function—that is, a means of access for local traffic to adjacent businesses.^[6]

4. The City of Burnsville represents the fourth largest center of retail commerce in the state, and most of the City's retail commerce and municipal government functions are clustered along the CH 42 corridor. CH 42 also represents the primary corridor of access for any future commercial and industrial development within the City.^[7]

5. Over time, CH 42's dual functions as a principal arterial roadway and as a point of access to commercial establishments have come into increasing conflict. Because of conflicting traffic patterns, the more useful CH 42 has become in providing

access to commercial businesses the less useful and safe it has become as a multi-lane urban arterial highway.^[8]

6. As a consequence, in June 1997 Dakota and Scott Counties, in collaboration with affected municipalities and public bodies, established advisory and technical committees to conduct a County Highway 42 Corridor Study. The purpose of the study was to provide a blueprint to guide planning for future roadway improvements in the CH 42 Corridor. The study involved both input from the public and series of technical analyses on topics essential for planning future roadway improvements.^[9]

7. The final report of the CH 42 Corridor Study, as issued on February 18, 1999, contained eleven general recommendations and parameters for future roadway improvements to make the highway safer and more useful.^[10]

- (a) Provide additional turning lanes;
- (b) Implement turn restrictions and median modifications;
- (c) Identify more compatible land use patterns;
- (d) Develop model land use and zoning regulations;
- (e) Extend existing roadways that are parallel to CH 42 in order to provide new connections among neighborhoods, commercial areas, and communities;
- (f) Identify a search area for a new east-west principal arterial roadway south of CH 42;
- (g) Provide new connections and directional signage in order to divert through and local traffic to available alternative routes;
- (h) Develop land use-based guidelines that include a hierarch of access—that is, private driveways connect to local streets and collectors, collectors connect to minor arterials, minor arterials connect to principal arterials;
- (i) Develop a formal access variance process consistent in both Dakota and Scott Counties;
- (j) Increase capacity by providing additional auxiliary turning lanes and/or through lanes; and
- (k) Increase capacity by improving the efficiency of the existing roadway through access modification/limitations and improved signal coordination.

8. Among other things, the CH 42 Corridor Study's final report recommended that cities and counties "should adopt a policy requiring that all railroad crossings be grade separated."^[11] The CH 42 Corridor Study final report divided the corridor into

sixteen identifiable segments for implementation purposes.^[12] Segment 8 includes a 1.3-mile section of CH 42 extending from Joppa Avenue/CH 31 (Glendale Road) in the City of Savage east to CH 5 in the City of Burnsville.^[13]

Segment 8 Implementation Plan

9. Of the sixteen segments of the CH 42 corridor, only Segment 8 failed to gain public support for the mitigation measures that the 1999 report proposed in order to address traffic operations and safety deficiencies.^[14] Consequently, Dakota County and the City sought additional public input and technical studies in order to develop an alternative, specific implementation plan for Segment 8. The County and City completed that process and issued a Segment 8 Implementation Plan in July 2002.^[15]

10. The broad goals of the Segment 8 Implementation Plan coincide with those in the CH 42 Corridor Study's final report, namely: (1) to improve CH 42's capacity to function as a principal arterial roadway by increasing its capacity and improving traffic flow; (2) to place greater emphasis on that principal function by creating alternative routes for short trips and other means of access for members of the public who patronize adjacent businesses; and (3) to improve safety by reducing the number of, and danger posed by, conflict points that have been created over time because of CH 42's dual functions.^[16]

11. Initial planning for Segment 8 presented eleven alternatives, along with a twelfth "no-build" alternative.^[17] The Segment 8 Implementation Plan narrowed the alternatives to four. The preferred alternative is Alternative #9, which is designed to accomplish the CH 43 Corridor Study's goals by:^[18]

- (a) Improving through traffic flow by reducing the number of intersections with traffic signals within the segment from five to four;
- (b) Reducing the danger of conflict posed by five other existing intersections by reducing access at four intersections to three-quarter access and by restricting another to right in/right out access;^[19]
- (c) Increasing the capacity of CH 42 in Segment 8 from four lanes to six lanes from its intersection with CH 5 to the Savage city limits, with a proposal to increase the capacity of the entire segment to six lanes in the future;
- (d) Creating frontage road systems for local traffic both north and south of CH 42 by connecting and extending the local street systems;
- (e) Reducing the number of conflict points by closing four private access points along CH 42;

12. In 1990 the population of Dakota County was about 275,000. By 2000, the population had increased to about 355,000, and comparable rates of increase are projected for the future.^[20]

13. In 1986, the Average Daily Traffic (ADT) count along Segment 8 of CH 42 was approximately 18,000 average daily trips. By 2003, the ADT had increased to about 38,700 average daily trips.^[21] Without the planned improvements, the forecast volume for 2020 will be an ADT in excess of 60,000 average daily trips.^[22]

14. The proposed southern frontage road system will improve traffic safety in two ways. First, existence of a frontage system will reduce the number of accidents on CH42 because there will be a reduction of traffic volume on that roadway, and there is a proportional relationship between traffic volume and crashes. Second, it will facilitate restriction of access points along the CH 42 corridor and thereby eliminate points of conflict or mitigate their potential danger.

The Rail Line

15. The Canadian Pacific Railway Limited (the Railroad) is a Canadian corporation that operates a transcontinental railway system in Canada and the United States. The Canadian Pacific's corporate offices are located in Calgary, Alberta, and it is authorized by the Surface Transportation Board (SRB) of the U. S. Department of Transportation to provide rail service as a common carrier in the City.

16. The Railroad currently owns a track that was originally constructed by the Minnesota, Northfield & Southern Railroad and was formerly operated by that railroad as a mainline track between Minneapolis and Northfield (hereinafter "the Northfield Track").^[23]

17. One segment of the Northfield Track is commonly called the Savage Spur. It begins at a Union Pacific Railroad mainline track that intersects the Northfield Track in the City of Savage, and it ends at a Union Pacific spur track in the City of Northfield.^[24] The Savage Spur is currently classified as a Class 1 track on which train speeds are limited to 10 miles per hour or less.^[25]

18. The Railroad currently leases the northern and southern segments of the Savage Spur to Progressive Rail, which operates them as branch lines to provide rail transportation services to businesses located from outside the Burnsville city limits north to the City of Bloomington ("the Northern Spur Segment") and to businesses located from the City of Lakeville's industrial park south to the City of Northfield ("the Southern Spur Segment").^[26] The middle segment of the Savage Spur—that is, the portion of the track located within the Burnsville city limits ("the Burnsville Spur Segment")^[27] is currently not being leased to Progressive Rail and has not been actively used as either a through line or a spur since at least 1997. Neither the Railroad nor its lessee currently has any active customers along the Burnsville Spur Segment. But the Railroad has not abandoned Burnsville Spur Segment, nor has it placed that segment out of service.^[28]

19. Since Progressive Rail began leasing the Southern Spur Segment from the Railroad in 1996 and began operating it as a branch line, traffic on that segment has increased from 600 cars per day to 6,000 cars per day.^[29] The Railroad foresees that within five years Progressive Rail will be leasing the Railroad's entire Savage Spur and

will be operating trains on the Burnsville Spur Segment as part of the Progressive Rail branch line. It is also possible that Progressive Rail may begin operating through traffic along the entire Savage Spur at the current Class 1 track speed of 10 miles per hour or less, and that in the future Progressive Rail may request the Department to upgrade the track class to enable it to operate through traffic at speeds up to 25 miles per hour.^[30]

20. In planning for the more distant future, the Railroad considers the entire Northfield Track to have some potential as a commuter rail passenger service corridor, but no planning for that has occurred.^[31]

21. There are currently six roadway crossings within the Burnsville Spur Segment. There is an at-grade separated crossing where the track intersects with CSAH 42, and at-grade crossings where the track intersects with Burnsville Parkway, Southcross Drive, 150th Street, 152nd Street, and 155th Street.^[32] The crossing controls for the at-grade crossings located at Southcross Drive and 150th Street consist of flashing lights and gates,^[33] and the crossing controls for the at-grade crossings located at Burnsville Parkway and 155th Street consist of signal light systems.^[34] The crossing control at 152nd Street consists of a simple cross-buck warning sign; but 152nd Street is not a through street and is currently the only access to some homes to the west of the track.^[35] The Railroad considers that to be a private crossing.^[36]

The Proposed At-Grade Crossing

22. There was once an at-grade crossing of the Burnsville Spur Segment track at 143rd Street, but by agreement between the City and the Railroad's predecessor,^[37] that at-grade crossing was removed in 1986.^[38] At the time the City agreed to eliminate that at-grade crossing, there was little commercial or residential development in the area, and the land surrounding the at-grade crossing was largely vacant farmland.^[39] During the last eighteen years, a significant amount of development has occurred, and there are now an additional forty to fifty industrial and commercial businesses in the vicinity. There has also been significantly more residential development to the south of those industrial and commercial concerns.^[40]

23. The City is now proposing to reconstruct the earlier at-grade crossing of the Railroad's Burnsville Spur Segment at 143rd Street. That crossing would be 1,437 feet south of the grade separated crossing of CH 42 over that spur and 1,408 feet north of the at-grade crossing of the spur by Southcross Drive.^[41] Southcross Drive is a four-lane minor arterial roadway. It represents a segment of the City's ring route of roadways, which provides a bypass of the City's congested retail areas and the access ramps of I-35W and I-35E.^[42]

24. A rail crossing at 143rd Street is an essential link in the southern frontage road system proposed in the Segment 8 Implementation Plan. It will permit cross traffic to and from the commercial and industrial area south of CH 42 and west of CH 5 and the commercial area south of CH 42 and east of CH 5 and thereby divert local traffic from both arterials.^[43]

25. The traffic volume of the southern frontage road system at the proposed 143rd Street at-grade crossing is projected to be 3,000 average daily trips. Included in those trips is projected noontime traffic traveling to the Burnsville Center complex that will be diverted off CH 42.^[44] It is projected that seven percent (7%) of average daily trips will be made by commercial vehicles. The roadway speed limit of the reconnected 143rd Street will be 30 miles per hour.^[45]

26. The crossing will intersect the railroad track at right angles, and the alignment of the roadway with the track, the sight distances, and other design features will conform to the AASHTO design manual.^[46]

27. For crossing safety devices, the City is proposing to install railroad signals with gates but not until the railroad or its lessee actually begin to resume service on the Burnsville Spur Segment.^[47]

28. Only very limited pedestrian traffic across the proposed at-grade crossing is expected, and a sidewalk will be constructed on the north side of the improved 143rd Street to accommodate that traffic.^[48]

Public Safety Considerations

29. With an at-grade crossing at 143rd Street, there will be a continuous southern frontage road system from Joppa Avenue in the City of Savage through Segment 8 to the Burnsville Center complex.

30. There is a greater potential for accidents whenever local traffic enters a non-freeway principal arterial roadway. That accident potential results from different traffic streams attempting to merge with one another at divergent rates of speed. Frontage roads are constructed to reduce that problem. Without the 143rd Street at-grade crossing, the proposed eastbound southern frontage road system for CH 42 will be interrupted at Judicial Road and the westbound at Newton Avenue South, so diversions of traffic back onto CH 42 and onto CH 5 would be likely. Such diversions would result in greater potential for accidents and would reduce the traffic safety benefits that would otherwise be created by the planned improvements to Segment 8 of CH 42.^[49]

31. The hospital, police, and fire services in the City of Burnsville are all located to the north and east of the intersection of CH 42 and CH 5.^[50] Construction of the proposed at-grade crossing will not significantly affect regional response routes for emergency vehicles proceeding to of the City located to the south and west of the intersection of CH 42 and CH 5. There would an improvement of access of emergency vehicles to some businesses located near a through 143rd Street.

32. The area that would surround the proposed at-grade crossing on 143rd Street is primarily commercial and light industrial, and there are no elementary or secondary schools located in the vicinity of the proposed at-grade crossing. So, the proposed crossing does not lie across any likely school bus routes.^[51]

33. There are softball and soccer fields between the Railroad's track and 143rd Street along its northwestern approach to the proposed at-grade crossing. Those recreational facilities are located several hundred feet from the proposed at-grade crossing and are separated from it by some vacant land and a farm field.^[52]

34. Although no through traffic of vehicles carrying hazardous materials is expected, some vehicles carrying such materials will probably use the crossing to services businesses in the vicinity of the crossing.^[53]

Analysis of Alternatives

35. The City evaluated three alternatives in addition to the proposed at-grade crossing of the Railroad's Burnsville Spur Segment at 143rd Street.^[54]

36. For each alternative, the City's analysis considered, among other things, feasibility of construction, construction costs, right-of-way impacts and related costs, safety issues, conformance with existing design standards, and overall effectiveness of accomplishing the goals identified in the CH 42 Corridor Study and the Segment 8 Implementation Plan.^[55]

37. What the City identified as Alternative A was the "no-build" alternative. The disadvantages of Alternative A are that it would limit the efficacy of the proposed southern frontage road system, which would be interrupted for eastbound traffic at Judicial Road and for westbound traffic at Newton Avenue South. A no-build alternative would therefore limit diversion of local traffic from CH 42 and would impair that roadway's function as a non-freeway principal arterial roadway.^[56]

38. What the City identified as Alternative B was to construct a frontage road system about half a mile south of CH 42 along Southcross Drive. The main disadvantage of Alternative B is that it would significantly increase the travel times for local traffic coming to or going from commercial businesses along the CH 42 Corridor. Those increases in travel times would likely discourage most local traffic from using Southcross Drive and defeat the purpose of using that route as a frontage system. Alternative B would therefore result in little or no diversion of local traffic from CH 42 and would impair that roadway's function as a non-freeway principal arterial roadway even more than Alternative A.^[57]

39. Alternative C would involve constructing a grade separation and overpass of the Burnsville Spur Segment track where it intersects 143rd Street.^[58] Although a grade separated crossing was proposed in the Segment 8 Implementation Plan, the City ultimately rejected Alternative C for several reasons:

a. The cost of constructing a grade separated crossing would be significantly higher than constructing an at-grade crossing—an estimate of \$3 million to \$4 million higher. Since an at-grade crossing previously existed at the same location, the existing roadway bed and grade closely match the elevation of

the tracks. A grade separated crossing would need significant grade modifications to meet railroad bridge clearance requirements.^[59]

b. A grade separated crossing would result in adverse environmental impacts because the embankment footprint of such a crossing would require filling 0.61 acre of an adjacent pond, as well as adjacent wetland areas.

c. The embankment footprint of a grade separated crossing would severely impact and likely require relocations of some businesses located approximately 100 feet east and north and a residence located approximately 500 feet east and south of the proposed crossing.^[60]

d. Constructing a grade separated crossing would require the relocation of both public and private sewer and water lines that could remain intact if an at-grade crossing were constructed.

40. The fourth alternative (Alternative D) was the at-grade crossing that the City has proposed in its petition.^[61] After evaluating the other alternatives, the City concluded that Alternative D was the easiest to construct, involved lower construction costs, and had the fewest right-of-way impacts and related costs. The City also concluded that Alternative D was the best alternative from a traffic safety standpoint and was the most effective in accomplishing the goals identified in the CH42 Corridor Study and the Segment 8 Implementation Plan.^[62]

Other Considerations

41. While there was significant public comment and participation associated with the development of the Segment 8 Implementation Plan, there is no evidence of public comment directed specifically at the proposal to construct an at-grade crossing of the Railroad's Burnsville Spur Segment at 143rd Street.

42. Newton Avenue South intersects at right angles with the north side of 143rd Street approximately 200 feet east of the proposed at-grade crossing, and Judicial Road intersects at right angles with the south side of 143rd Street approximately 200 feet west of the proposed at-grade crossing.^[63] There will also be some private drives in the immediate vicinity of the proposed at-grade crossing.^[64] The City agrees to place appropriate signage at those intersections.^[65]

43. The City will assume responsibility for the cost of constructing the proposed at-grade crossing.

44. It is the policy of the U. S. Department of Transportation to reduce the number of at-grade crossings of railroad tracks by roadways throughout the United States.^[66]

Procedural Matters

45. The City and the Railroad were not able to agree about the need, location, or type of warning devices required for the City's proposed at-grade crossing of the Railroad's Burnsville Spur Segment track at 143rd Street in Burnsville.

46. On February 23, 2004, the City filed a petition with the Department for approval of a new at-grade crossing at on 143rd Street at its intersection with the Burnsville Spur Segment.^[67]

47. On March 11, 2004, the Department issued a Notice and Order for Hearing in this matter, and this contested case proceeding ensued.

48. On March 12, 2004, the Department's Office of Freight and Commercial Vehicle Operations published a Notice of this contested case proceeding in the Transportation Regulation Proceedings Notice and Hearing Bulletin. That notice and the earlier Notice of Hearing required petitions to intervene in this proceeding to be filed at least ten (10) days prior to the date set for the hearing, or on or before April 12, 2004. No petitions to intervene were received.

49. On March 30, 2004, the Railroad filed a Notice of Intention to Appear at the hearing in order to introduce evidence at the hearing as an interested party.^[68]

Other Findings

50. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

51. The Memorandum that follows explains the reasons for these Findings, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Findings.

52. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge authority to conduct this proceeding and to make recommendations to the Commissioner of the Minnesota Department of Transportation. The law also gives the Commissioner authority to make findings, conclusions, and a final order in this proceeding.^[69]

2. The Department gave proper and timely notice of the hearing in this proceeding, and it has also fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.

3. The City is a road authority within the meaning of Minn. R. pt. 8830.2700, subp. 4, and its officials are public officials within the meaning of Minn. Stat. § 219.072.

4. Minn. Stat. § 219.072 provides:

The establishment of all new grade crossings must be approved by the commissioner. When establishment of a new grade crossing is desired, either by the public officials having the necessary authority or by the railroad company, and the public officials and the railroad company cannot agree as to need, location, or type of warning devices required, either party may file a petition with the commissioner setting forth the facts and submitting the matter for determination. The commissioner, after notice as the commissioner deems reasonable, shall conduct a hearing and issue an order determining the matters submitted. If the commissioner approves the establishment of a new grade crossing, the commissioner may in the same order direct that the costs, including the costs of the type of warning devices required, be divided between the railroad company and the public authority involved as the parties may agree, or, if they fail to agree, then as determined by the commissioner on the basis of benefit to the users of each. However, the commissioner may defer determination of the division of costs to a subsequent order to be made on the basis of evidence previously taken.

5. The City and the Railroad cannot agree about the need, location, or type of warning devices required for the City's proposed at-grade crossing of the Railroad's Burnsville Spur Segment track at 143rd Street in Burnsville, and the City therefore has authority to file a petition with the Commissioner seeking establishment of a new grade crossing.

6. By adopting Minn. R. pts. 8830.2700 and 8830.2710, the Department satisfied the legislature's directive in Minn. Stat. § 219.073 to "consider that the number of grade crossings in this state should be reduced and that public safety will be enhanced by reducing the number of grade crossings."

7. Minn. R. pt. 8830.2710, subp. 1, provides that:

A proposed new grade crossing or proposed relocation of an existing grade crossing *must meet at least one of the criteria* in items A to E to be considered for establishment or relocation.

A. It will provide access to two or more private properties or to public lands, that have no alternate access route.

B. It will provide access where an alternate grade crossing or grade separation is not available within one-quarter mile (0.4 kilometer) in an urban area or one mile (1.6 kilometers) in a rural area and will have an ADT of:

(1) 750 vehicles or more, if located in an urban area; or

(2) 150 vehicles or more, in a rural area.

- C. It will consolidate two or more existing grade crossings.
- D. It is required by the construction of a new rail line.
- E. It will increase public safety by eliminating another safety problem area such as an accident-prone roadway intersection.

8. The City has established by a preponderance of the evidence that the proposed at-grade crossing will provide access where an alternate grade crossing or grade separation is not available within one-quarter mile in an urban area and will have an ADT of 750 vehicles or more in an urban area.

9. The City has also established by a preponderance of the evidence that the proposed at-grade crossing “will increase public safety by eliminating another safety problem area such as an accident-prone roadway intersection.”^[70]

10. In view of Conclusions 8 and 9, above, the City has therefore satisfied the requirements of Minn. R. pt. 8830.2710, subp. 1.

11. Minn. R. pt. 8830.2710, subp. 2, provides that “[a] road authority or rail carrier that proposes a new grade crossing or the relocation of an existing grade crossing must perform an analysis of alternatives to the proposed new or relocated grade crossing.” The City has performed an analysis of alternatives to the proposed at-grade crossing and has therefore satisfied the requirements of that rule.

12. The City’s application for establishment of the proposed at-grade crossing is complete in all respects.

13. The City has the burden of proving by a preponderance of the evidence all facts that may be necessary for favorable consideration of its petition to establish the proposed at-grade crossing.

14. The City has established that need, based on the public interest, exists for the proposed at-grade crossing.

15. The Memorandum that follows explains the reasons for these Conclusions, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Conclusions.

16. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner enter an order GRANTING the City's Petition for establishment of a new roadway at-grade crossing over the Canadian Pacific Railway railroad tracks at the intersection of those tracks with 143rd Street in the City of Burnsville with any conditions that may appear reasonable and necessary.

Dated this 12th day of May 2004.

S/ Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Taped, 2 tapes
No transcript prepared

NOTICE

Under Minnesota law,^[71] the Commissioner must serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

Applicable Law

The Commissioner's decision in this matter is governed by the provisions of Minn. Stat. § 291.072 and by Minn. R. pts. 8830.2700 and 8830.2710. Prior to 1980, the legislature appears not to have addressed the problem of constructing a new grade crossing over a public thoroughfare where officials responsible for the thoroughfare and the railroad could not agree on the need or location of the grade crossing.^[72] Some common law remedies may have been available to the parties, but the availability of any such remedies became immaterial in 1980 when the legislature enacted Minn. Stat. § 219.072, which necessarily superseded any existing law on the subject. That statute now provides, among other things, that:

[w]hen establishment of a new grade crossing is desired, either by the public officials having the necessary authority or by the railroad company, and the public officials and the railroad company cannot agree as to need, location, or type of warning devices required, either party may file a petition with the commissioner setting forth the facts and submitting the matter for determination

On its face, the statute contains no explicit standards to govern the Commissioner's substantive decision. It merely directs the Commissioner to "issue an order determining the matters submitted." However, as the court of appeals indicated in *Matter of Resolution of the City of Austin*,^[73] there is an implicit statutory directive that the Commissioner must base the decision on a finding of "need." In examining the statutory scheme, the court of appeals further noted that "[s]ection 219.072 does not define "need" for the purpose of approving a new grade crossing."^[74] But the court of appeals only addressed the definition of "need" to the extent of rejecting a claim that "need means 'essential.'"^[75] It declined to fashion its own definition. So in the end, the court of appeals decided the issue of need in the *City of Austin* on the facts, holding only that the particular grade crossing at issue there was "necessary to improve emergency vehicle access, pedestrian safety, traffic flow, and development."^[76] There is nothing in the court of appeal's opinion that suggests that those four factors exhaust all of the possibilities of what might constitute "need."

In *City of Austin*, both the ALJ and the Commissioner considered potential disruption of railroad's rail operations in what appears to have been a balancing approach to determining need. But in that particular case, both considered that factor unimportant and found that disruption to rail operations was "speculative." In holding that the Commissioner's finding of speculative disruption to rail operations was supported by substantial evidence, the court of appeals implicitly approved the practice of incorporating disruption to the railroad as part of a balancing approach to determining need.^[77] In other words, potential disruption to rail operations is a legitimate factor to consider in the balance in deciding the issue of need.

Although the Railroad sought, and was granted, leave to present evidence at the hearing in this matter, it did not seek leave to intervene as a party with status to challenge the City's application. The Railroad's evidence addressed two issues. First, the Railroad established there is a national public policy to reduce the number of at-grade rail crossings. The Railroad suggested that the City's proposal conflicted with that public policy.^[78] Second, although the section of track at issue here is currently not being used either as a spur line or part of a branch or through line, there is a reasonable probability that the lessee that operates branch lines on the two adjoining spur segments (the Northern and Southern Spur Segments) will be leasing the segment at issue here (the Burnsville Spur Segment) as part of its branch line within the next five years.^[79] But the Railroad's witnesses stopped short of testifying that constructing the proposed at-grade crossing would hinder the Burnsville Spur Segment's future development and use as part of a branch line.^[80] In short, even if the Railroad were a party to this proceeding and seeking more actively to prevent the construction of this at-grade crossing, a challenge based on potential disruption to future rail operations would be as "speculative" as the Court of Appeals found that challenge to be in the *City of Austin* case.

Like the federal government, the Minnesota legislature has expressed a public policy that discourages at-grade crossings. Enacted by the legislature in 1990,^[81] Minn. Stat. § 219.073 provides that:

In accordance with chapter 14, the commissioner of transportation shall adopt rules by December 1, 1991, that contain standards governing the establishment, vacation, relocation, consolidation, and separation of grades at public grade crossings. *In adopting standards, the commissioner shall consider that the number of grade crossings in this state should be reduced and that public safety will be enhanced by reducing the number of grade crossings.* [Emphasis supplied.]

The ALJ concludes that the statute expresses a legislative policy to reduce the number of at-grade crossing but also concludes that the legislature intended that public policy to be carried out by the Commissioner through rulemaking.

Minn. Stat. § 219.073 speaks to the court of appeals' observation in *City of Austin* that Minn. Stat. § 219.072 lacks any standards for the Commissioner's determinations of need. The legislature directed the Commissioner to fill that void by rulemaking. By including the phrase "[I]n adopting standards," the legislature intended that the Department's *rules* be framed in a way that reduced the number of at-grade crossings. The legislature did not necessarily intend that there be a presumption against granting each of the individual petitions filed pursuant to those rules.

The current rules on establishing new grade crossings^[82] indicate that the Department clearly understood what the legislature's intent was. Minn. R. pt. 8830.2700 speaks primarily to the *process* of submitting petitions to the Commissioner to establish new grade crossings when the parties cannot agree. Subpart 5 of the rule primarily specifies what materials must, at a minimum, accompany the petition, but it

also touches on substantive standards by indicating that those materials should “demonstrate the need for the grade crossing, how safety concerns are addressed, and how the grade crossing affects the public interest.”^[83] That provision is consistent with the relatively broad view of factors bearing on need that the court of appeals expressed in *City of Austin, supra*.

The second rule that the Department has adopted pertaining to establishment of new grade crossings is Minn. R. pt. 8830.2710. In subpart 1 of that rule, the Commissioner specifically addressed the legislature’s intent that the rules incorporate a means of reducing the number of at-grade crossings. It provides that:

Subpart 1. **Candidate for establishment or relocation.** A proposed new grade crossing or proposed relocation of an existing grade crossing *must meet at least one of the criteria* in items A to E to be considered for establishment or relocation.

In other words, before the Commissioner will even consider the merits of a new at-grade crossing proposal and weigh the various factors that might bear on need, the petitioner must first make a *prima facie* showing that the at-grade crossing proposal meets one of five narrowly defined criteria. Proposals that fail to meet that threshold test are automatically excluded from any consideration or weighing of need. Framing the rule in these terms automatically limits the number of at-grade crossing proposals that are even eligible for favorable consideration. This threshold test applies equally to situations where the road authority and railroad agree on need.^[84] In short, a threshold test of general application is the means that the Department chose for implementing *within the context of the rule* the legislature’s desire to reduce the number of at-grade crossings.

The City Has Met the Legal Threshold Requirements

Here, the City has established that its petition meets the threshold test in Minn. R. pt. 8830.2710, subpart 1, in two respects: (1) it meets the criterion for establish at grade crossings in urban areas;^[85] and (2) the proposed at-grade crossing “will increase the public safety by eliminating another safety problem areas such as an accident-prone roadway intersection.”^[86] Minn. R. pt. 8830.2710, subp. 2, establishes one other gate keeping criterion for all petitions—namely, that “[a] road authority or rail carrier that proposes a new grade crossing or the relocation of an existing grade crossing must perform an analysis of alternatives to the proposed new or relocated grade crossing.” There is no suggestion in this rule provision that at this stage the analysis of alternatives must meet some particular standards of scope, depth, or quality. It simply has to be in the materials submitted along with the petition, to later be weighed in the balance of need for whatever it may be worth. The City’s petition also met that requirement.

Minn. R. pt. 8830.2700, subp. 5, itemizes several materials and items of information that must accompany the application and that are likely to shed light on “the need for the grade crossing, how safety concerns are addressed, and how the grade crossing affects the public interest.” The City’s petition contained all of the required

information and the evidence that the City presented at the hearing supplement that required information. The petition is therefore complete, and that the Commissioner may therefore proceed to consider its merits.

Analysis of Relevant Factors

Once a petitioner is able to cross the threshold and obtain consideration of a petition to establish a new at-grade crossing, Minn. R. pt. 8830.2710, subp. 3, goes on to list fourteen factors that the Commissioner must consider in determining the merits of the proposal:

Subp. 3. **Considerations.** The commissioner shall consider the following factors in determining whether a grade crossing may be established or relocated:

- A. use of the grade crossing by emergency vehicles;
- B. use of the grade crossing by vehicles carrying hazardous materials, vehicles carrying passengers for hire, and school buses;
- C. conformity of sight distances with the AASHTO design manual;
- D. alignments of the roadway and the railroad track, and the angle of intersection of those alignments;
- E. profile of the intersection of the roadway and the railroad track, and of the approaches to the intersection;
- F. distance and travel time to an alternate crossing;
- G. distance from the grade crossing to adjacent intersections or driveways;
- H. volume of vehicular traffic and operating speed;
- I. volume of train traffic and operating speed;
- J. use of the grade crossing by pedestrians, bicyclists, and recreational users;
- K. type of warning devices proposed;
- L. other factors that might adversely affect the safety of roadway users, pedestrians, bicyclists, and recreational users;
- M. costs and benefits of constructing the grade crossing, and the cost participation that would be required of each of the parties involved, as well as the availability of funds; and

N. public opinion regarding establishment or relocation of the grade crossing.

Although each of those fourteen factors is relevant to a determination of whether to grant a petition, they are not only things that the Commissioner may consider in determining whether there is a need for the at-grade crossing.^[87] For example, the list does not contain any reference to more general considerations of the public interest. Here, the evidence established that the proposed at-grade crossing is an integral element in a plan to create a frontage road system immediately south of CH 42. It also established that by drawing local traffic off of CH 42, that frontage road system will make CH 42 a safer roadway for its primary use as a non-freeway principal arterial roadway. The ALJ also concludes that the increase in highway safety outweighs the relatively small incremental increased risk the proposed at-grade crossing might pose to vehicles traveling across the at-grade crossing.

But the evidence presented by the Railroad does raise an issue related to the City's petition. The City is proposing not to install signal and gate warning devices until after the Railroad or its lessee actually begins operating trains along the Burnsville Spur Segment and using that track as spur to serve industrial or commercial customers. It is unclear from the City's petition what would actually trigger the its obligation to install flashing light signals and gates—an actual resumption of rail traffic or some notice by the Railroad that it intended to resume operating trains on that track segment in some designated date.

The City represented in its application that that spur segment is currently not in service. On the other hand, the Railroad presented evidence that although not currently carrying any rail traffic, that segment has not been placed out of service and is still available for use as Class 1 track. So if there were commercial need, there would be nothing to prevent the Railroad or its lessee from operating trains on that track in the immediate future. Clearly, actual resumption of train service on the track before gates and warning lights are installed would create an increased and unnecessary risk to the 3,000 vehicles per day that would be using the new at-grade crossing. On the other hand, requiring the Railroad to give notice and then wait until the City installed gates and warning lights creates a *de facto* restriction on the Railroad's ability to use track that is legally unrestricted. The Commissioner may therefore wish to consider approving the City's petition on condition that it install appropriate gates and warning lights during initial construction.^[88]

Conclusion

The ALJ concludes that the City has established a need for the proposed at-grade crossing that is based on the public interest in improving traffic safety. The ALJ further concludes that the City's petition meets all requirements of statute and rule and, therefore, recommends that the Commissioner grant the petition with any conditions that may appear reasonable and necessary to preserve the Railroad's legitimate commercial interests.

B.H.J.

^[1] Minn. Stat. § 14.61 (2000). (Unless otherwise specified, all references to Minnesota Statutes are to the 2000 edition.)

^[2] See Minn. Stat. § 14.62, subd. 2a.

^[3] Testimony of Kristine Elwood; Exhibit 6.

^[4] Exhibit 6.

^[5] Testimony of Kristine Elwood.

^[6] Testimony of Craig Eberling; Exhibit 6.

^[7] Testimony of Craig Eberling.

^[8] Exhibit 6; testimony of Kristine Elwood.

^[9] Exhibit 6.

^[10] *Id.* at pp. 1-6 and 1-7.

^[11] Exhibit 6 at p. 1-15.

^[12] Exhibit 6.

^[13] Exhibits 4, 7, and 11.

^[14] Exhibit 7.

^[15] *Id.*

^[16] Testimony of Kristine Elwood; Exhibits 4, 7, and 11.

^[17] Exhibit 7.

^[18] *Id.*

^[19] Converting intersections into three-quarter access and right in/right out access improves safety at conflict points by preventing cross traffic from making left turns and from crossing the roadway, which are among the most dangerous vehicle movements. (Testimony of Mitchell Rasmussen)

^[20] Testimony of Kristine Elwood.

^[21] *Id.*

^[22] Exhibit 11 at p. 3-9; testimony of Kristine Elwood.

^[23] Testimony of Edward Dalby.

^[24] See Exhibits 5 and 8; testimony of James Krieger.

^[25] Testimony of James Krieger.

^[26] Testimony of Edward Dalby

^[27] Circled in red on Exhibit 8.

^[28] Testimony of James Krieger

^[29] Testimony of Edward Dalby.

^[30] *Id.*

^[31] *Id.*

^[32] Testimony of Thomas Sohrweide. See Exhibit 5.

^[33] Testimony of Mitchell Rasmussen, Thomas Sohrweide, and Edward Dalby.

^[34] Testimony of Mitchell Rasmussen Edward Dalby.

^[35] Testimony of Mitchell Rasmussen and Thomas Sohrweide.

- [36] Testimony of Edward Dalby.
- [37] The Soo Line Railroad.
- [38] Testimony of Craig Ebeling and James Krieger.
- [39] Testimony of Craig Ebeling; see Exhibit 10.
- [40] *Id.*
- [41] Testimony of Mitchell Rasmussen.
- [42] *Id.*
- [43] Testimony of Craig Ebeling and Thomas Sohrweide; see Exhibit 4.
- [44] Testimony of Thomas Sohrweide.
- [45] Exhibit 1.
- [46] Exhibit 1.; testimony of Thomas Sohrweide.
- [47] The record fails to disclose what crossing safety devices, if any, the City is proposing to install before the Railroad or its lessee actually resume service on that segment.
- [48] Testimony of Thomas Sohrweide.
- [49] Exhibit 1; testimony of Mitchell Rasmussen and Thomas Sohrweide.
- [50] Testimony of Mitchell Rasmussen; Exhibit 5.
- [51] Testimony of Mitchell Rasmussen.
- [52] Exhibit 2; testimony of Edward Dalby.
- [53] *Id.*
- [54] See Exhibit 1.
- [55] Exhibit 1.
- [56] *Id.*; Exhibit 4.
- [57] Exhibits 1 and 5.
- [58] *Id.* (route depicted in blue on p. 8 of Exhibit 15).
- [59] Exhibit 1.
- [60] Exhibits 1 and 2.
- [61] Exhibit 1.
- [62] *Id.*; testimony of Mitchell Rasmussen.
- [63] Exhibits 1 and 4.
- [64] *Id.*
- [65] Testimony of Thomas Sohrweide.
- [66] Exhibit A.
- [67] Exhibit 1.
- [68] Minn. R. pt. 1400.7150, subp. 1, permits nonparties to offer evidence at a contested case hearing with approval of the presiding judge.
- [69] See Minn. Stat. §§ 14.50 and 144A.135, as well as § 219.072.
- [70] Minn. R. pt. 8830.2710, subp. 1E.
- [71] Minn. Stat. § 14.62, subd. 1.
- [72] See *generally* Minn. Stat. Ch. 219 (1978).
- [73] 567 N.W.2d 529, 532-33 (Minn.App. 1997).
- [74] *Id.*
- [75] *Id.*
- [76] *Id.*
- [77] 567 N.W.2d at 533.
- [78] Testimony of James Krieger; Exhibit A.

[79] Testimony of Edward Dalby.

[80] The record establishes that there are already five at-grade crossings that intersect the Burnsville Spur Segment. And one—the crossing at 152nd Street—is protected only by cross-buck warning signs. That crossing would appear to be a greater impediment to future development of the rail line in question than the proposed at-grade crossing.

[81] Laws 1990, c. 468, §4.

[82] Adopted August 31, 1998. See 23 S.R. 524.

[83] Minn. R. pt. 8830.2700, subp. 5.

[84] Minn. R. pt. 8830.2710, subp. 3.

[85] Minn. R. pt. 8830.2710, subpart 1B.

[86] Minn. R. pt. 8830.2710, subpart 1E.

[87] When the court of appeals decided *City of Austin*, Minn. R. pt. 8830.2710, subp. 3, had been proposed but not yet adopted. In its decision, the court of appeals specifically noted that the Commissioner's decision was consistent with the proposed rules, at least in some respects. But the court did not specifically address the question of whether the listing of factors in Minn. R. pt. 8830.2710, subp. 3, was an exclusive listing. 567 N.W.2d at 532-33.

[88] The evidence in the record did not reveal the reason why the City and the Railroad were unable to reach agreement on the proposed at-grade crossing. If the reason was disagreement over installation of warning devices at the crossing and in view of the findings and conclusions in this report, the City and the Railroad may still wish to pursue a negotiated solution. In that event, the parties and the Department may wish to seek an extension from the Chief Administrative Law Judge of the 90-day deadline set forth in Minn. Stat. § 14.62, subd. 2a.