



February 5, 2009

Lisa A. Bartlett
Mayor

Steven H. Weinberg
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Lara Anderson

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Honorable Chair and Members of the Board
California Regional Rail Authority
700 South Flower Street, Suite 2600
Los Angeles, CA 90017-4101

Honorable Chair and Members of the Board
Orange County Transportation Authority
550 South Main Street
Orange, CA 92873-1584

Re: Agreements Related to Quiet Zones and Safety Enhancements between OCTA, SCRRA and City of Dana Point

Dear Board Members:

As you are no doubt aware, various cities in Orange County (including Dana Point) have been working with your respective Boards to create agreements related to quiet zones and related safety enhancements. On August 19, 2008, the City of Dana Point approved an agreement with OCTA (the "OCTA Cooperative Agreement") for this purpose.

The OCTA Cooperative Agreement was the subject of significant negotiation as it related to the indemnification provisions found in Article 8 of that Agreement. You will recall that many cities raised concerns relating to the indemnification language. Concerns also existed with respect to whether "insurance coverage" (or risk sharing pool coverage) would exist with respect to the obligations taken on by cities, and the availability of such coverage. Ultimately, we were pleased to arrive at mutually-acceptable indemnification language. The final language is typical of intergovernmental agency agreements wherein the respective parties take responsibility for their own acts and omissions and agree to indemnify each other for their respective acts and omissions. In essence, the indemnification language (attached hereto for your reference) provides that each party will be responsible to the other for its respective acts in the performance of the Agreement. The OCTA Cooperative Agreement goes on to provide that the City will defend and indemnify SCRRA for liabilities arising out of authority or jurisdiction delegated to the City related to the establishment of a quiet zone.

The indemnification language set forth in the OCTA Cooperative Agreement is also important in that the California Joint Powers Insurance Authority (CJPIA) (which is the City's risk sharing pool for "insurance" purposes) has opined that liabilities relating to the indemnification obligations would be covered by CJPIA's Memorandum of Coverage. This was particularly important since the CJPIA's Memorandum of Coverage contains an exclusion for "railroad operations." The CJPIA opined that since the City would not be involved in railroad operations pursuant to the authority or jurisdiction allocated to it pursuant to the OCTA Cooperative

Agreement, the exclusion language would not apply. Rather, coverage would exist pursuant to “contractual obligation” provisions set forth in the Memorandum of Coverage.

The OCTA Cooperative Agreement contemplates that prior to any construction of safety enhancements or quiet zone improvements, a construction and maintenance agreement (the "C&M Agreement") would be entered between the City and SCRRA (with OCTA's assistance). (See, Article 4, Section Q, which is attached for your reference.) At the time that the OCTA Cooperative Agreement was entered, the City assumed the C&M Agreement would be subordinate to, and at a minimum consistent with, the terms of the OCTA Cooperative Agreement. Unfortunately, when the C&M Agreement was ultimately provided to the City by SCRRA, the indemnification provisions were not consistent with the OCTA Cooperative Agreement. Rather, very onerous indemnification requirements were included in the C&M Agreement which conflict with the indemnification language in the OCTA Cooperative Agreement. Like the OCTA Cooperative Agreement, the C&M Agreement's indemnification language requires the City to indemnify and defend the SCRRA for any acts or omissions of the City. This language would certainly be acceptable. However, in direct conflict with the OCTA Agreement, the C&M Agreement goes on to require that the City indemnify the SCRRA for the negligent acts or omissions of SCRRA's contractors, consultants and architects which are retained by the SCRRA in connection with the project.

It is simply unheard of for one party to indemnify another party for the acts and omissions of the indemnified party's agents. In fact, the language in question is so unusual that our City Attorney assumed it was a typographical error. The City has no control over the SCRRA's contractors, consultants or architects, and does not supervise them. Hence, it should not be responsible for their acts or omissions. In contrast, the SCRRA does control and supervise these individuals and is in a position to ensure that they have appropriate insurance coverage. Moreover, the SCRRA is in a position to negotiate indemnification agreements from its contractors, consultants and architects which would protect the SCRRA in the event of their negligence. Indeed, the City believes these contractors, consultants and architects should be required to indemnify the City in the event they act in a negligent fashion.

Compounding the overreaching indemnity provision is the fact the City would not have insurance coverage for the acts of SCRRA's contractors, consultants or architects. Not only would the above-noted exclusion related to railroad operations likely apply, but also the City's Memorandum of Coverage only applies to its officers, agents and employees. SCRRA's contractors, consultants and architects do not fall into this category and rather are the agents of SCRRA.

As a result of the above-noted offending language, the City Council refused to approve the C&M Agreement when it was presented to it in December 2008. City staff thereafter worked with your staffs in the hope that safety enhancements could still be constructed at the PCH crossing in the City of Dana Point. The City staff was advised that if the City were not pursuing the quiet zone designation, then the language of the C&M Agreement could be softened such that it would be more akin to a typical mutual indemnification agreement. Unfortunately, when the City was provided with a revised C&M Agreement that excluded the quiet zone as an option, it did not change the offending language. Instead, it continues to require the City to indemnify SCRRA's

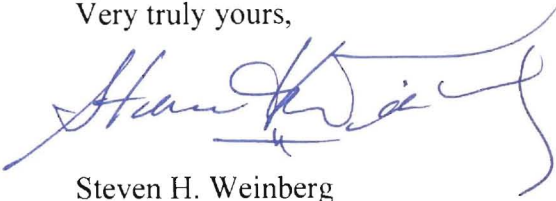
contractors, consultants and architects for their role in designing and/or constructing the safety enhancements in question.

The City, unlike SCRRA, is not in the business of railroad operations. The City, unlike SCRRA, does not have insurance coverage for railroad operations. The SCRRA, unlike the City, is in the unique position to negotiate indemnification agreements whereby its contractors, consultants and architects indemnify not only SCRRA but also the City. For all these reasons, the indemnity language of the C&M Agreement is not appropriate.

The residents of Dana Point deserve the benefit of enhanced safety improvements and a quiet zone crossing. You are regional representatives for the residents of Dana Point in your respective roles. As the Mayor Pro Tem, I ask you on behalf of the City Council to please reconsider the indemnity language of the C&M Agreement discussed above. We only ask that you require the respective parties to indemnify each other for their respective acts and omissions, as is typical in all intergovernmental agency agreements. We specifically suggest that the indemnification language of the OCTA Cooperative Agreement be utilized for this purpose.

Thank you in advance for your anticipated thoughtful consideration of the above issues.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Steven H. Weinberg", with a stylized flourish extending to the right.

Steven H. Weinberg
Mayor Pro Tem
City of Dana Point