



ILLINOIS COMMERCE COMMISSION

January 11, 2010

Fox Valley Park District,
Petitioner,

v.

BNSF Railway Company,
Respondent.

T10-0002

Petition for an Order to install a multi-use pedestrian and bike path under the
BNSF elevated railroad bridge at the Fox River, milepost 38.38 on the Aurora
Subdivision located in the City of Aurora, Kane County, Illinois.

Mr. Gerald K. Hodge
Kinnally, Flaherty, Krentz & Loran, P.C.
2114 Deerpath Road
Aurora, IL 60506

Dear Mr. Hodge:

Receipt is acknowledged of the original and one (1) copy of the Petition filed January 11, 2010 in the above matter.

All future correspondence/pleadings should be filed and addressed to: Mr. Dave Lazarides, Director of Processing, Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, IL 62701 or you may file the original electronically through E-docket if you have an account. To apply for an account, please log on to www.icc.illinois.gov and apply for an E-docket account.

Processing and Information Section

KI

Cc: Staff: Mr. Brian Verduynde, ICC
Mr. Robert Prendergast, BNSF
Mr. W. Douglas Werner, BNSF
Mr. Chad Scherwinski, BNSF
Mrs. Patricia Casler, BNSF
Mayor/Clerk, City of Aurora

ORIGINAL

STATE OF ILLINOIS

RECEIVED

ILLINOIS COMMERCE COMMISSION

JAN 11 2010

Fox Valley Park District,
Petitioner,

Illinois Commerce Commission
RAIL SAFETY SECTION

v.

BNSF Railway Company,
Respondent.

~~T08-~~_____

T10-0002

Petition for an Order to install a multi-use pedestrian and bike path under the BNSF elevated railroad bridge at the Fox River, milepost 38.38 on the Aurora Subdivision located in the City of Aurora, Kane County, Illinois.

PETITION

NOW COMES Fox Valley Park District ("FVPD" or "Petitioner") and respectfully petitions the Illinois Commerce Commission ("Commission") as follows:

1. Petitioner is an Illinois park district organized pursuant to the Illinois Park District Code (70 ILCS 101, et seq.).

2. BNSF Railway Company ("BNSF") is a registered rail carrier operating in the State of Illinois.

3. There is an existing railroad bridge carrying the three mainline tracks of the BNSF over the West Branch of the Fox River, on the Aurora Subdivision at mile post 38.38 in the City of Aurora (the "Bridge Crossing"). The bridge consists of three spans, and there are an average of twenty-nine (29) trains per day.

4. The FVPD requests to install a multi-use pedestrian and bike path crossing under the eastern span of the Bridge Crossing. This will provide an extension of the FVPD trail system from the west bank of the Fox River across to Hurd's Island. It is anticipated that there will be an average of 500 path users per day.

5. The path project is estimated to cost \$2,067,234.00. If approved and constructed, FVPD will bear all costs incurred for the engineering and installation of the proposed multi-use pedestrian and bike path at the Bridge Crossing, as well as installation on the underside of the railroad, all as more particularly set forth in the proposed plat and plans attached as Exhibit A and the proposed license agreement

DOCKETED

JAN 11 2010

between the parties as set forth in Exhibit B attached hereto.

6. FVPD is preparing the project for a bid letting in the Winter of 2009-2010. It is anticipated that the project would then be completed by December 31, 2011.

7. Petitioner requests that its proposed plan attached as Exhibit A and the proposed license agreement between the parties attached as Exhibit B be approved by the Commission as complying with all requirements.

8. A Proposed Agreed Order, attached as Exhibit C, has been prepared by the FVPD and reviewed by the BNSF and staff of the Commission's Rail Safety Section ("Staff"). The Respondent and Staff have reviewed the Proposed Agreed Order and have indicated their acceptance of same as presented.

9. Petitioner requests that the request for a multi-use pedestrian and bike path project as sought in this Petition be granted without a hearing and that the Agreed Order be entered at the earliest Commission Bench session.

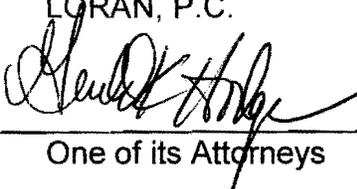
Respectfully Submitted,

January 8, 2010

FOX VALLEY PARK DISTRICT

By: KINNALLY, FLAHERTY, KRENTZ &
LORAN, P.C.

By: _____


One of its Attorneys

SERVICE LIST

ILLINOIS COMMERCE COMMISSION

DOCKET NO.

City of Aurora
Attn: Mayor Thomas Weisner
44 East Downer Place
Aurora, Illinois 60507

Mrs. Patricia Casler
Director - Suburban Services
BNSF Railway Company
547 W. Jackson Blvd. Ste. 1509
Chicago, IL 60661
Patricia.Casler@bnsf.com

Robert J. Prendergast
Daley Mohan Groble, P.C.
55 West Monroe Street, Suite 1600
Chicago, IL 60603
rpredergast@daleymohan.com

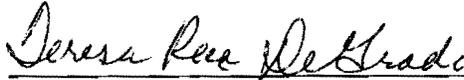
Attorney Gerald K. Hodge
Kinnally, Flaherty, Krentz & Loran, P.C.
2114 Deerpath Road
Aurora, Illinois 60506

VERIFICATION

I, Jeffery Palmquist, first being duly sworn on oath, depose and say that I am duly appointed as Director of Planning, of the Fox Valley Park District, and that I have read the foregoing Petition, know the contents thereof, and that the same is true in substance and in fact to the best of my knowledge and belief.


Jeffrey Palmquist

Subscribed and sworn to before
me this 8th day of January, 2010.


Notary Public



PROOF OF SERVICE

I, Nancy Brothers, of Kinnally, Flaherty, Krentz & Loran, P.C., certify that I have served copies of this Petition to the persons listed on the attached Service List, at the addresses indicated, by depositing the same in the U.S. Mail, postage fully pre-paid at the U.S. Post Office located in North Aurora, Illinois before 5:00 p.m. on JANUARY 8, 2010.

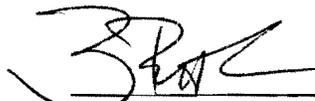

Nancy Brothers

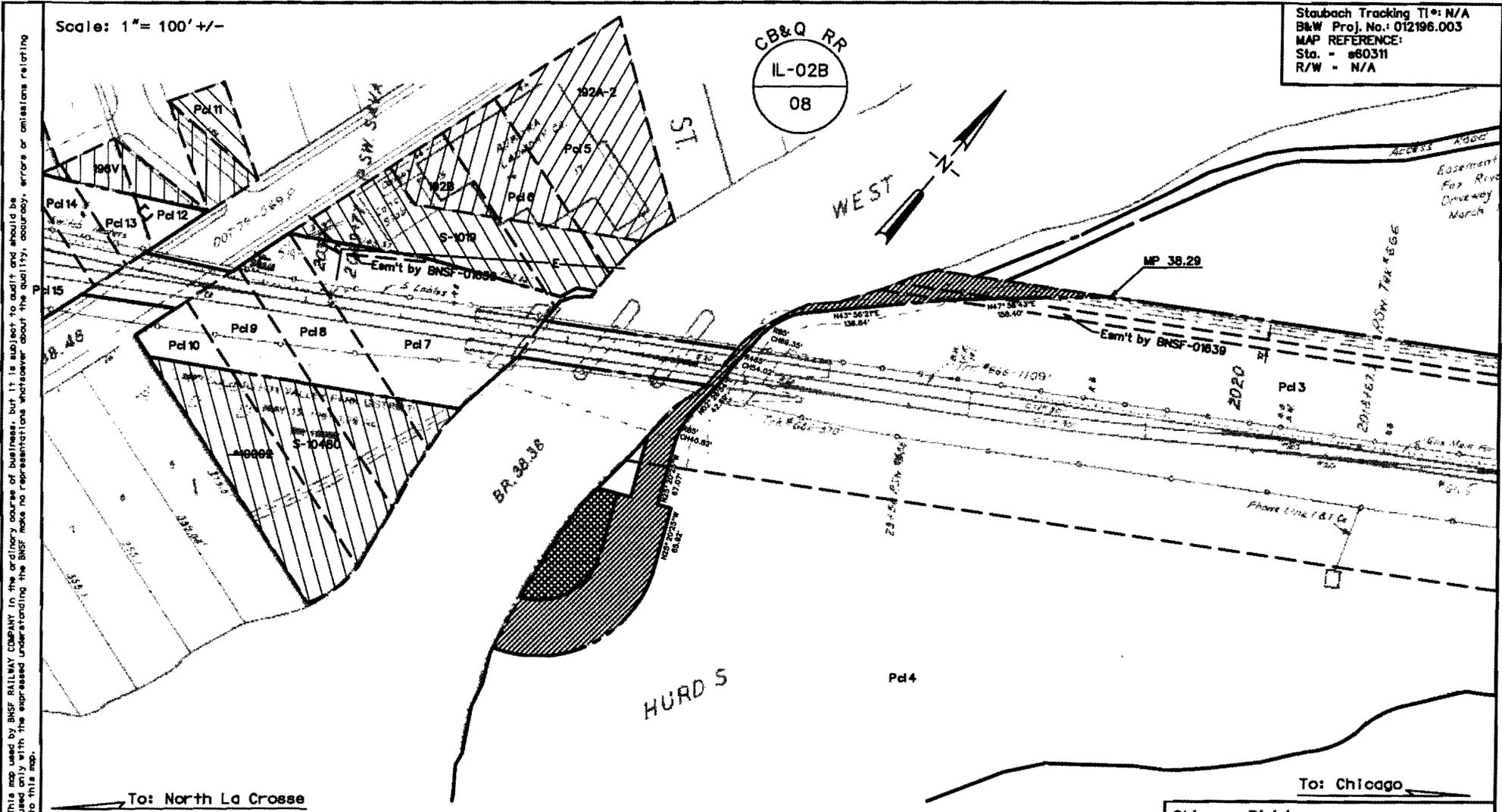
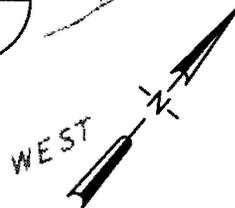
EXHIBIT "A"

Staubach Tracking TI: N/A
 B&W Proj. No.: 012196.003
 MAP REFERENCE:
 Sta. - #60311
 R/W - N/A

Scale: 1" = 100' +/-

This map used by BNSF RAILWAY COMPANY in the ordinary course of business, but it is subject to audit and should be used only with the expressed understanding the BNSF make no representations whatsoever about the quality, accuracy, errors or omissions relating to this map.

CB&Q RR
 IL-02B
 08



To: North La Crosse

To: Chicago

To: Fox Valley Park District
 At: Aurora
 Kane County,
 IL

Legend:
 License
 Temporary license

Chicago Division
 Aurora Subdivision - L.S. 1-1
 Val. Sec. 38013
 CB&Q RR IL-02B, Map 08
 Sec. 28, T38N, R8E 3rd PM
 June 02, 2009 Rev. July 09, 2009
 M.P. 38.29 TR

AGREEMENT

This Agreement (“Agreement”) made and entered into in duplicate as of the ____ day of _____ 2009, by and between **BNSF RAILWAY COMPANY**, a Delaware Corporation, hereinafter called “Railroad”, and the **FOX VALLEY PARK DISTRICT**, a body corporate and politic, hereinafter called “Agency”.

WHEREAS, the Agency proposes to construct a segment of the Fox River Trail alongside the Fox River in Aurora, Illinois. The improvements include construction of a pedestrian/bicycle trail to be placed on the right of way of the Railroad, under existing Railroad bridge on Line Segment 1 Milepost 38.38, Chicago Division, Aurora, Illinois, as shown on Exhibit “A”, attached hereto and made a part hereof, and

WHEREAS, the term “Improvements” as used in this Agreement, refers to any of the above-described work located on the property of the Railroad and constructed in accordance with plans approved by the Railroad and the Agency and such plans when approved are made a part of this Agreement by reference thereto, and

WHEREAS, the parties desire to set forth in this instrument an agreement relating to the construction, maintenance, and allocation of costs of said Improvements and the changes made necessary in connection therewith:

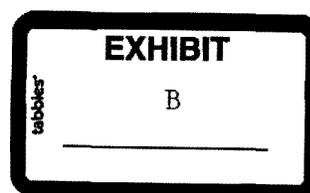
NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE I

In consideration of covenants and conditions to be fulfilled by the Agency as hereinafter set forth, **RAILROAD AGREES**:

1. (a) To give or grant and hereby does give or grant to the Agency, its agents and contractors, a license (the “License”) upon and across Railroad’s right of way, as shown cross-hatched on Exhibit “A”, and the right to enter, locate, construct, use and maintain the Improvements on Railroad’s right of way and other facilities, in accordance with plans and specifications as approved by the Railroad, and the Agency, the Railroad reserving, however, to Railroad, its successors, assigns tenants or lessees, the right to construct, operate, rearrange, and maintain along or across said right of way, such tracks, pipelines, communication lines, signal lines, electric lines and such other facilities as Railroad, its successors, assigns, tenants or lessees may from time to time find necessary or convenient, as will not unreasonably interfere with the use of the premises for said Improvement. Any costs associated with changes in Improvements required by future expansion of the Railway’s tracks within the vicinity of the Improvements will be at the Agency’s sole cost and expense. The term of this License shall be an initial term of twenty (20) years, renewing thereafter from year to year, subject to the termination rights hereinafter set forth.

(b) To give or grant and hereby does give or grant to the Agency, its agents and contractors, the right to enter on and use the premises shown on Exhibit “A” for the construction



of the Improvements. The right to enter upon and use the designated premises for construction purposes shall expire after notification to the Railroad of acceptance by the Agency of all construction on the enhancement project for which this right to enter upon and use is hereby granted.

2. Railroad has agreed to make certain changes and perform certain work to facilitate this project. The estimated cost of this work is \$95,685. The scope and cost estimate for such work is attached as Exhibit B. Such work shall be performed by Railroad employees or its subcontractors at the sole cost and expense of the Agency. The Railroad shall bill the Agency for all work performed, which will include labor, materials, tools, equipment, and additives and the Agency will promptly reimburse Railroad for such actual costs incurred, provided, however, that the Railroad shall obtain written authorization from Agency prior to incurring any costs in excess of twenty percent (20%) of the estimated amount of the total project (such excess limit being \$19,000.00). The parties acknowledge that the bike trail shall not be opened to the public until the Railroad improvements are completed.

3. Railroad shall, immediately after plans are approved, deliver to the Agency a written schedule of its requirement for the number of flagmen and inspectors deemed necessary for the safety of Railroad property or the movement of its trains during the progress of the work while on Railroad right of way, or in connection with operations off Railroad's right of way affecting Railroad safety, and of the method to be used in computing its costs therefor. The Agency shall be liable for such itemized costs and pay all such costs directly to the Railroad for such actual costs incurred.

4. To provide in Exhibit "C", which is attached hereto, its requirements and methods of cost for Agency's contractor.

5. To present insofar as possible final detailed and itemized statement for work performed by Railroad at expense of the Agency within one hundred twenty (120) days after completion thereof, such statement to be on the basis of detailed and itemized cost for items set forth in the amount estimated therefore and any approved additional costs. The Railroad may present periodic itemized progress bills to the Agency for work as completed. Provided all cost overruns are approved by Agency as contemplated under Paragraph 3 of this Article 1., final payment will be made in the amount of the difference between the sum of the monthly payments made and the itemized audited statement for the total amount of the work performed by the Railroad upon completion of the work. In the event of overpayment, Railroad shall refund to the Agency such excess.

ARTICLE II

In consideration of the covenants and conditions to be fulfilled by Railroad as herein set forth, **AGENCY AGREES:**

1. Prior to commencing any work on BNSF's property or right-of-way, Agency must pay BNSF the sum of Forty-Two Thousand and No/100 Dollars (\$42,000.00) as compensation for this License.

2. To prepare all detail plans and specifications, including special provisions, for the Improvements involving the property of the Railroad, which plans and specifications shall be submitted to the Railroad for its approval. Such plans and specifications shall be approved by the Railroad and by the Agency before any contracts are awarded by the Agency and before any work is done by the Railroad. All construction and work done by the parties shall be in accordance with the approved plans and specifications.

3. To secure Illinois Commerce Commission approval of the Improvements and to be solely responsible for any additional Railroad or Agency costs associated with changes that may be required by the Illinois Commerce Commission.

4. To furnish and post signs instructing persons to stay on trail and within fenced area.

5. To secure or cause to be secured all property rights required for or incident to the proposed Improvements, including any property rights required for borrow rights, except that provided for in Section 1 of Article I hereof.

6. To make any and all arrangements with Railroad and others that may be necessary for the location and relocation of wire lines, pipelines, and other facilities not owned by the Railroad; provided, however, that the Railroad (a) shall make or cause to be made such changes and rearrangements in its communication lines, signal lines, signals and other facilities as may be necessary at the expense of the Agency and (b) make or cause to be made such changes and rearrangements in the wire lines, pipelines, or other facilities of its tenants or lessees as may be necessary on account of the construction of the improvement. Any such location or relocation to be at the sole cost and expense of the Agency.

7. To furnish or cause to be furnished all labor, materials, tools and equipment and to construct the Improvements, except such work as is to be performed by Railroad, in accordance with the approved plans and specifications.

8. The Agency shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

- A. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$5,000,000 each occurrence and an aggregate limit of at least \$10,000,000. Coverage must include coverage for, but not limited to, the following:
- ◆ Bodily Injury and Property Damage
 - ◆ Personal Injury and Advertising Injury
 - ◆ Fire legal liability
 - ◆ Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- ◆ It is agreed that any workers' compensation exclusion does not apply to **Railroad** payments related to the Federal Employers Liability Act or a

Railroad Wage Continuation Program or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law.

- ◆ The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.

No other endorsements limiting coverage as respects obligations under this Agreement may be included on the policy with regard to the work being performed under this agreement.

B. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- ◆ Bodily injury and property damage
- ◆ Any and all vehicles owned, used or hired

C. Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

- ◆ Statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
- ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

D. Railroad Protective Liability insurance naming only the **Railroad** as the Insured with coverage of at least \$5,000,000 per occurrence and \$10,000,000 in the aggregate. The policy shall be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to remove any exclusion for punitive damages.
- ◆ No other endorsements restricting coverage may be added.
- ◆ The original policy must be provided to the **Railroad** prior to performing any work or services under this Agreement

Other Requirements:

The Agency and its contractor agree to waive their right of recovery against **Railroad** for all claims and suits against **Railroad**. In addition, their insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against **Railroad** for all claims and suits. The certificate of insurance must reflect the waiver of subrogation endorsement. The Agency and its contractor further waive their right of recovery, and their insurers also waive their right of subrogation against **Railroad** for loss of its owned or leased property or property under The Agency and its contractor's care, custody or control.

The Agency and its contractor's insurance policies through policy endorsement, must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by **Railroad**. The certificate of insurance must reflect that the above wording is included in evidenced policies.

All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) shall include a severability of interest endorsement and **Railroad** shall be named as an additional insured with respect to work performed under this agreement. Severability of interest and naming **Railroad** as additional insured shall be indicated on the certificate of insurance.

The Agency and its contractor are not allowed to self-insure without the prior written consent of **Railroad**. If granted by **Railroad**, any deductible, self-insured retention or other financial responsibility for claims shall be covered directly by the Agency and its contractor in lieu of insurance. Any and all **Railroad** liabilities that would otherwise, in accordance with the provisions of this **Agreement**, be covered by the Agency and its contractor's insurance will be covered as if the Agency and its contractor elected not to include a deductible, self-insured retention or other financial responsibility for claims.

Prior to commencing the Work, the Agency and its contractor shall furnish to **Railroad** an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify **Railroad** in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving Railroad arising out of this agreement, The Agency at its contractor will make available any required policy covering such claim or lawsuit.

Any insurance policy shall be written by a reputable insurance company acceptable to **Railroad** or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provide.

The Agency and its contractor represent that this **Agreement** has been thoroughly reviewed by the Agency and its contractor's insurance agent(s)/broker(s), who have been instructed by the Agency and its contractor to procure the insurance coverage required by this **Agreement**. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above. Not more frequently than once every five years, **Railroad** may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by the Agency and its contractor, the Agency and its contractor shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein, naming **Railroad** as an additional insured, and shall require that the subcontractor shall release, defend and indemnify **Railroad** to the same extent and under the same terms and conditions as the Agency and its contractor are required to release,

defend and indemnify *Railroad* herein.

Failure to provide evidence as required by this section shall entitle, but not require, *Railroad* to terminate this *Agreement* immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of the Agency and its contractor's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by the Agency and its contractor shall not be deemed to release or diminish the liability of the Agency and its contractor including, without limitation, liability under the indemnity provisions of this *Agreement*. Damages recoverable by *Railroad* shall not be limited by the amount of the required insurance coverage.

For purposes of this section, *Railroad* shall mean "Burlington Northern Santa Fe Corporation", "The Burlington Northern and Santa Fe Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

9. AGENCY SHALL AND WILL AND DOES HEREBY AGREE, INSOFAR AS PERMITTED BY LAW, TO ASSUME AND DISCHARGE, AND INDEMNIFY, DEFEND AND SAVE HARMLESS, AND CAUSE AGENCY'S CONTRACTORS AND SUBCONTRACTORS TO ASSUME AND DISCHARGE, AND INDEMNIFY, DEFEND AND SAVE HARMLESS, THE RAILROAD AND THE SUCCESSORS AND ASSIGNS THEREOF, FROM AND AGAINST ANY AND ALL LIABILITY, LOSS, DAMAGE, COST, EXPENSE, CLAIMS, JUDGMENTS, OR ATTORNEY'S FEES FOR OR ON ACCOUNT OF PERSONAL INJURIES TO OR DEATH OF PERSONS OR DAMAGE TO OR LOSS OR DESTRUCTION OF PROPERTY, DIRECTLY OR INDIRECTLY CAUSED BY, DUE TO ARISING OUT OF, OR IN CONNECTION WITH, THE CONSTRUCTION, MAINTENANCE OPERATION, USE, REMOVAL OR EXISTENCE OF THE IMPROVEMENTS, HEREIN DESCRIBED, REGARDLESS OF THE NEGLIGENCE OR ALLEGED NEGLIGENCE OF THE RAILROAD

10. The Agency warrants that it will not levy any special tax nor assessments to pay any claims or judgments referred to in Paragraph 7 of this Article II herein above, which may arise as a direct result of the construction, maintenance operation, use, removal of the Improvements herein described.

11. Prior to commencement of any work on Railroad's property, the Agency shall require its contractor to indemnify and hold Railroad harmless or provided for in Exhibit "C-1" and comply with all terms in Exhibit "C" and all work on said project to be performed in a manner that will not endanger the safety of the Railroad or interfere with the operation thereof. If, in the opinion of the Railroad, the operation of the Agency's contractor is endangering the safety of the Railroad's operation, Railroad may immediately order the termination of further work on Railroad's premises, until the dangerous condition has been corrected, without liability on the Railroad's part.

12. To reimburse the Railroad promptly upon receipt of properly computed and compiled statements for costs incurred for work done by the Railroad in accordance with the provisions of this Agreement.

In the event the Agency shall for any reason cancel or terminate its contract and abandon the construction of said improvement or in the event the Agency's contractor shall stop work thereon for a period of sixty (60) calendar days, other than seasonal suspensions authorized by the Agency, for reason over which the Agency or contractor has control, and the Agency has not prepared to re-let or resume work under the contract, the Railroad shall have the right to restore its property to the condition existing prior to commencement of work on said Improvement. The Agency agrees to reimburse Railroad for all expenses incurred by Railroad for such restoration by Railroad.

ARTICLE III

AGENCY AND RAILROAD MUTUALLY AGREE:

1. That all work contemplated in this Agreement shall be mutually scheduled and coordinated, commenced promptly and completed without undue delay. All work shall be performed in a good workmanlike manner.

2. The parties hereto agree that no benefits will accrue to the Railroad due to the construction or use of said improvements.

3. The maintenance of the Improvements shall be as follows:

A. Agency to inspect, maintain and repair Improvements.

B. Agency will, at its sole cost and expense, remove drift and debris from under Railroad's bridge, within and adjacent to the portion of the bridge containing the trail underpass.

C. Agency will, at its sole cost and expense, remove and obliterate graffiti on Railroad bridge structure, within and adjacent to the portion of the bridge containing the trail underpass, and repair any damage caused by persons using the trail and passing under the structure. Railroad hereby grants an additional access right to Agency for these purposes during the term hereof and for a period of forty-five (45) days after the expiration of the term or termination of this Agreement as long as indemnification obligations and insurance remain in place during which such graffiti removal shall occur.

D. If required by Railroad, Agency will temporarily close the underpass for such time as determined by Railroad and/or remove any portion of trail enclosure that Railroad may deem necessary to be removed, to allow Railroad maintenance of bridge. Agency shall bear all costs associated with the repair, replacement or reinstallation of the Underpass.

E. If at some time Railroad rebuilds Bridge, any additional costs in the design and reconstruction to accommodate the trail will be at the cost of the Agency. Any cost associated with the removal of the trail during the new bridge construction will be by the Agency. Should Railroad ever redesign structure such that ballast could fall unto Improvements, Railroad may require the Agency to modify the Improvements to provide protection from falling debris at Agency's sole cost.

F. Agency will, on an ongoing basis and at its sole cost and expense, promptly remove any loose material on the underside of the Railroad bridge structure, adjacent to the portion of the bridge containing the trail underpass that could fall on any trail user. Agency shall notify Railroad prior to such removals. Railroad hereby grants an additional access right to Agency for these purposes during the term hereof.

4. Either the Railroad or the Agency may terminate the Agreement and License at any time following the initial term for any reason upon 30 days' advanced written notice to the other party. Railroad may immediately terminate the Agreement and License in the event the Agency does not maintain the required insurance as provided for in Section 7 of Article II hereof.

5. If this Agreement or License is terminated by Agency for any reason, or is terminated by Railroad due to (i) Agency's failure to maintain the insurance required in Section 7 of Article II hereof or (ii) Agency's breach of any obligations set forth in this Agreement, all Improvements located upon Railroad's property constructed or suffered by Agency shall, at Railroad's sole option, become Railroad's sole and exclusive property, or upon written notice by Railroad, shall be removed and the subject real property shall be restored to its original condition at the sole cost and expense of Agency, such removal and restoration to be performed by Agency or by Railroad, as Railroad shall in its sole discretion so designate. If this Agreement or License is terminated by Railroad for any reason other than as specified in (i) or (ii) in the preceding sentence, all Improvements located upon Railroad's property constructed or suffered by Agency shall become Railroad's sole and exclusive property, but Agency shall have no obligation to remove such Improvements or to restore the property to its original condition, or to bear the expense thereof.

6. In the event Agency breaches any obligations set forth in this Agreement, which breach is not cured within thirty (30) days from the date of written notice from Railroad to Agency at Railroad's option, and upon written notice to Agency, from Railroad, Agency shall close the trail and prohibit public access to the trail until such breach is cured.

7. For the purposes of this Agreement, all persons, firms and entities on or upon the subject real property shall be deemed Agency's invitees.

8. The books, papers, and accounts of the parties hereto, so far as they relate to items of expense, labor and materials, or are in any way connected with the work herein contemplated, shall at all reasonable times during regular office hours be open to inspection and audit by agents and authorized representative of the parties hereto for a period of three (3) years from the date final payment has been received by the Railroad.

9. This Agreement shall be binding upon and inure to the benefit of the Railroad, its successors and assigns, and upon and to the successors and assigns of the Agency, however, Agency shall not assign this Agreement without the prior written consent of the Railroad.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement in duplicate the day and year first above written.

FOX VALLEY PARK DISTRICT

By: _____

Title: _____

BNSF RAILWAY COMPANY

By: _____

Title: _____

EXHIBIT A
(INSERT DRAWING)

EXHIBIT B
(INSERT COST ESTIMATE)

EXHIBIT "C"

CONTRACTOR REQUIREMENTS

1.01 General

- **1.01.01** The Contractor must cooperate with **BNSF RAILWAY COMPANY**, hereinafter referred to as "Railway" where work is over or under on or adjacent to Railway property and/or right-of-way, hereafter referred to as "Railway Property", during the construction of _____.
- **1.01.02** The Contractor must execute and deliver to the Railway duplicate copies of the Exhibit "C-1" Agreement, in the form attached hereto, obligating the Contractor to provide and maintain in full force and effect the insurance called for under Section 3 of said Exhibit "C-1".
- **1.01.03** The Contractor must plan, schedule and conduct all work activities so as not to interfere with the movement of any trains on Railway Property.
- **1.01.04** The Contractor's right to enter Railway's Property is subject to the absolute right of Railway to cause the Contractor's work on Railway's Property to cease if, in the opinion of Railway, Contractor's activities create a hazard to Railway's Property, employees, and/or operations.
- **1.01.05** The Contractor is responsible for determining and complying with all Federal, State and Local Governmental laws and regulations, including, but not limited to environmental laws and regulations (including but not limited to the Resource Conservation and Recovery Act, as amended; the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, CERCLA), and health and safety laws and regulations. The Contractor hereby indemnifies, defends and holds harmless Railway for, from and against all fines or penalties imposed or assessed by Federal, State and Local Governmental Agencies against the Railway which arise out of Contractor's work under this Agreement.
- **1.01.06** The Contractor must notify the (Agency) at _____ and Railway's Manager Public Projects, telephone number () _____ at least thirty (30) calendar days before commencing any work on Railway Property. Contractors notification to Railway, must refer to Railroad's file _____.
- **1.01.07** For any falsework above any tracks or any excavations located, whichever is greater, within twenty-five (25) feet of the nearest track or intersecting a slope from the plane of the top of rail on a 1 ½ horizontal to 1 vertical slope beginning at eleven (11) feet from centerline of the nearest track, both measured perpendicular to center line of track, the Contractor must furnish the Railway five sets of working drawings showing details of construction affecting Railway Property and tracks. The working drawing must include the proposed method of installation and removal of falsework, shoring or cribbing, not included in the contract plans and two sets of structural calculations of any falsework, shoring or cribbing. All calculations must take into consideration railway surcharge loading and must be designed to meet American Railway Engineering and Maintenance-of-Way Association (previously known as American Railway Engineering Association) Coopers E-80 live loading standard. All drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. The Contractor must not begin work until notified by the Railway that plans have been approved. The Contractor will be required to use lifting devices such as, cranes

and/or winches to place or to remove any falsework over Railway's tracks. In no case will the Contractor be relieved of responsibility for results obtained by the implementation of said approved plans.

- **1.01.08** Subject to the movement of Railway's trains, Railway will cooperate with the Contractor such that the work may be handled and performed in an efficient manner. The Contractor will have no claim whatsoever for any type of damages or for extra or additional compensation in the event his work is delayed by the Railway.

1.02 Contractor Safety Orientation

- **1.02.01** No employee of the Contractor, its subcontractors, agents or invitees may enter Railway Property without first having completed Railway's Engineering Contractor Safety Orientation, found on the web site www.contractororientation.com. The Contractor must ensure that each of its employees, subcontractors, agents or invitees completes Railway's Engineering Contractor Safety Orientation through internet sessions before any work is performed on the Project. Additionally, the Contractor must ensure that each and every one of its employees, subcontractors, agents or invitees possesses a card certifying completion of the Railway Contractor Safety Orientation before entering Railway Property. The Contractor is responsible for the cost of the Railway Contractor Safety Orientation. The Contractor must renew the Railway Contractor Safety Orientation annually. Further clarification can be found on the web site or from the Railway's Representative.

1.03 Railway Requirements

- **1.03.01** The Contractor must take protective measures as are necessary to keep railway facilities, including track ballast, free of sand, debris, and other foreign objects and materials resulting from his operations. Any damage to railway facilities resulting from Contractor's operations will be repaired or replaced by Railway and the cost of such repairs or replacement must be paid for by the Agency.
- **1.03.02** The Contractor must notify the Railway's Division Superintendent _____ at (_____) _____ and provide blasting plans to the Railway for review seven (7) calendar days prior to conducting any blasting operations adjacent to or on Railway's Property.
- **1.03.03** The Contractor must abide by the following temporary clearances during construction:
 - 15' Horizontally from centerline of nearest track
 - 21'-6" Vertically above top of rail
 - 27'-0" Vertically above top of rail for electric wires carrying less than 750 volts
 - 28'-0" Vertically above top of rail for electric wires carrying 750 volts to 15,000 volts
 - 30'-0" Vertically above top of rail for electric wires carrying 15,000 volts to 20,000 volts
 - 34'-0" Vertically above top of rail for electric wires carrying more than 20,000 volts
- **1.03.04** Upon completion of construction, the following clearances shall be maintained:
 - 25' Horizontally from centerline of nearest track
 - 23'-3 ½" Vertically above top of rail
- **1.03.05** Any infringement within State statutory clearances due to the Contractor's operations must be submitted to the Railway and to the (Agency) _____ and must not be undertaken until approved in writing by the Railway, and until the (Agency) _____ has obtained any necessary authorization from the State Regulatory Authority for the infringement. No extra compensation will be allowed in the event the Contractor's work is delayed pending Railway approval, and/or the State Regulatory Authority's approval.
- **1.03.06** In the case of impaired vertical clearance above top of rail, Railway will have the option of installing tell-tales or other protective devices Railway deems necessary for protection of Railway operations. The cost of tell-tales or protective devices will be borne by the Agency.

- **1.03.07** The details of construction affecting the Railway's Property and tracks not included in the contract plans must be submitted to the Railway by (Agency) _____ for approval before work is undertaken and this work must not be undertaken until approved by the Railway.
- **1.03.08** At other than public road crossings, the Contractor must not move any equipment or materials across Railway's tracks until permission has been obtained from the Railway. The Contractor must obtain a "Temporary Private Crossing Agreement" from the Railway prior to moving his equipment or materials across the Railways tracks. The temporary crossing must be gated and locked at all times when not required for use by the Contractor. The temporary crossing for use of the Contractor will be at the expense of the Contractor.
- **1.03.09** Discharge, release or spill on the Railway Property of any hazardous substances, oil, petroleum, constituents, pollutants, contaminants, or any hazardous waste is prohibited and Contractor must immediately notify the Railway's Resource Operations Center at 1(800) 832-5452, of any discharge, release or spills in excess of a reportable quantity. Contractor must not allow Railway Property to become a treatment, storage or transfer facility as those terms are defined in the Resource Conservation and Recovery Act or any state analogue.
- **1.03.10** The Contractor upon completion of the work covered by this contract, must promptly remove from the Railway's Property all of Contractor's tools, equipment, implements and other materials, whether brought upon said property by said Contractor or any Subcontractor, employee or agent of Contractor or of any Subcontractor, and must cause Railway's Property to be left in a condition acceptable to the Railway's representative.

1.04 Contractor Roadway Worker on Track Safety Program and Safety Action Plan

- **1.04.01** Each Contractor that will perform work within 25 feet of the centerline of a track must develop and implement a Roadway Worker Protection/On Track Safety Program and work with Railway Project Representative to develop an on track safety strategy as described in the guidelines listed in the on track safety portion of the Safety Orientation. This Program must provide Roadway Worker protection/on track training for all employees of the Contractor, its subcontractors, agents or invitees. This training is reinforced at the job site through job safety briefings. Additionally, each Contractor must develop and implement the Safety Action Plan, as provided for on the web site www.contractororientation.com, which will be made available to Railway prior to commencement of any work on Railway Property. During the performance of work, the Contractor must audit its work activities. The Contractor must designate an on-site Project Supervisor who will serve as the contact person for the Railway and who will maintain a copy of the Safety Action Plan, safety audits, and Material Safety Datasheets (MSDS), at the job site.

1.05 Protection of Railway Facilities and Railway Flagger Services:

- **1.05.01** The Contractor must give Railway's Roadmaster (telephone _____) a minimum of thirty (30) calendar days advance notice when flagging services will be required so that the Roadmaster can make appropriate arrangements (i.e., bulletin the flagger's position). If flagging services are scheduled in advance by the Contractor and it is subsequently determined by the parties hereto that such services are no longer necessary, the Contractor must give the Roadmaster five (5) working days advance notice so that appropriate arrangements can be made to abolish the position pursuant to union requirements.
- **1.05.02** Unless determined otherwise by Railway's Project Representative, Railway flagger and protective services and devices will be required and furnished when Contractor's work activities are located over, under and/or within twenty-five (25) feet measured horizontally from centerline of the nearest track and when cranes or similar equipment positioned beyond 25-feet from the track centerline could foul the track in the event of tip over or other catastrophic occurrence, but not limited thereto for the following conditions:
- **1.05.02a** When in the opinion of the Railway's Representative it is necessary to safeguard Railway's Property, employees, trains, engines and facilities.

- **1.05.02b** When any excavation is performed below the bottom of tie elevation, if, in the opinion of Railway's representative, track or other Railway facilities may be subject to movement or settlement.
- **1.05.02c** When work in any way interferes with the safe operation of trains at timetable speeds.
- **1.05.02d** When any hazard is presented to Railway track, communications, signal, electrical, or other facilities either due to persons, material, equipment or blasting in the vicinity.
- **1.05.02e** Special permission must be obtained from the Railway before moving heavy or cumbersome objects or equipment which might result in making the track impassable.
- **1.05.03** Flagging services will be performed by qualified Railway flaggers.
- **1.05.03a** Flagging crew generally consists of one employee. However, additional personnel may be required to protect Railway Property and operations, if deemed necessary by the Railways Representative.
- **1.05.03b** Each time a flagger is called, the minimum period for billing will be the eight (8) hour basic day.
- **1.05.03c** The cost of flagger services provided by the Railway, when deemed necessary by the Railway's representative, will be borne by the (Agency) _____. The estimated cost for one (1) flagger is \$600.00 for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. The estimated cost for each flagger includes vacation allowance, paid holidays, Railway and unemployment insurance, public liability and property damage insurance, health and welfare benefits, transportation, meals, lodging and supervision. Negotiations for Railway labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase actual or estimated flagging rates. The flagging rate in effect at the time of performance by the Contractor hereunder will be used to calculate the actual costs of flagging pursuant to this paragraph.
- **1.05.03d** The average train traffic on this route is _____ freight trains per 24-hour period at a timetable speed of _____ MPH and _____ passenger trains at a timetable speed of _____ MPH.

1.06 Contractor General Safety Requirements

- **1.06.01** Work in the proximity of railway track(s) is potentially hazardous where movement of trains and equipment can occur at any time and in any direction. All work performed by contractors within 25 feet of any track must be in compliance with FRA Roadway Worker Protection Regulations.
- **1.06.02** Before beginning any task on Railway Property, a thorough job safety briefing must be conducted with all personnel involved with the task and repeated when the personnel or task changes. If the task is within 25 feet of any track, the job briefing must include the Railway's flagger, as applicable, and include the procedures the Contractor will use to protect its employees, subcontractors, agents or invitees from moving any equipment adjacent to or across any Railway track(s).
- **1.06.03** Workers must not work within 25 feet of the centerline of any track without an on track safety strategy approved by the Railway's Project Representative. When authority is provided, every contractor employee must know: (1) who the Railway flagger is, and how to contact the flagger, (2) limits of the authority, (3) the method of communication to stop and resume work, and (4) location of the designated places of safety. Persons or equipment entering flag/work limits that were not previously job briefed, must notify the flagger immediately, and be given a job briefing when working within 25 feet of the center line of track.
- **1.06.04** When Contractor employees are required to work on the Railway Property after normal working hours or on weekends, the Railroad's representative in charge of the project must be notified. A

minimum of two employees must be present at all times.

- **1.06.05** Any employees, agents or invitees of Contractor or its subcontractors under suspicion of being under the influence of drugs or alcohol, or in the possession of same, will be removed from the Railway's Property and subsequently released to the custody of a representative of Contractor management. Future access to the Railway's Property by that employee will be denied.
- **1.06.06** Any damage to Railway Property, or any hazard noticed on passing trains must be reported immediately to the Railway's representative in charge of the project. Any vehicle or machine which may come in contact with track, signal equipment, or structure (bridge) and could result in a train derailment must be reported immediately to the Railway representative in charge of the project and to the Railway's Resource Operations Center at 1(800) 832-5452. Local emergency numbers are to be obtained from the Railway representative in charge of the project prior to the start of any work and must be posted at the job site.
- **1.06.07** For safety reasons, all persons are prohibited from having pocket knives, firearms or other deadly weapons in their possession while working on Railway's Property.
- **1.06.08** All personnel protective equipment (PPE) used on Railway Property must meet applicable OSHA and ANSI specifications. Current Railway personnel protective equipment requirements are listed on the web site, www.contractororientation.com, however, a partial list of the requirements include: a) safety glasses with permanently affixed side shields (no yellow lenses); b) hard hats c) safety shoe with: hardened toes, above-the-ankle lace-up and a defined heel; and d) high visibility retro-reflective work wear. The Railroad's representative in charge of the project is to be contacted regarding local specifications for meeting requirements relating to hi-visibility work wear. Hearing protection, fall protection, gloves, and respirators must be worn as required by State and Federal regulations. **(NOTE – Should there be a discrepancy between the information contained on the web site and the information in this paragraph, the web site will govern.)**
- **1.06.09** The Contractor must not pile or store any materials, machinery or equipment closer than 25'-0" to the center line of the nearest Railway track. Materials, machinery or equipment must not be stored or left within 250 feet of any highway/rail at-grade crossings, where storage of the same will interfere with the sight distances of motorists approaching the crossing. Prior to beginning work, the Contractor must establish a storage area with concurrence of the Railroad's representative.
- **1.06.10** Machines or vehicles must not be left unattended with the engine running. Parked machines or equipment must be in gear with brakes set and if equipped with blade, pan or bucket, they must be lowered to the ground. All machinery and equipment left unattended on Railway's Property must be left inoperable and secured against movement. (See internet Engineering Contractor Safety Orientation program for more detailed specifications)
- **1.06.11** Workers must not create and leave any conditions at the work site that would interfere with water drainage. Any work performed over water must meet all Federal, State and Local regulations.
- **1.06.12** All power line wires must be considered dangerous and of high voltage unless informed to the contrary by proper authority. For all power lines the minimum clearance between the lines and any part of the equipment or load must be; 200 KV or below - 15 feet; 200 to 350 KV - 20 feet; 350 to 500 KV - 25 feet; 500 to 750 KV - 35 feet; and 750 to 1000 KV - 45 feet. If capacity of the line is not known, a minimum clearance of 45 feet must be maintained. A person must be designated to observe clearance of the equipment and give a timely warning for all operations where it is difficult for an operator to maintain the desired clearance by visual means.

1.07 Excavation

- **1.07.01** Before excavating, the Contractor must determine whether any underground pipe lines, electric wires, or cables, including fiber optic cable systems are present and located within the Project work area. The Contractor must determine whether excavation on Railway's Property could cause damage to buried cables

resulting in delay to Railway traffic and disruption of service to users. Delays and disruptions to service may cause business interruptions involving loss of revenue and profits. Before commencing excavation, the Contractor must contact **BNSF's Field Engineering Representative** (_____). All underground and overhead wires will be considered HIGH VOLTAGE and dangerous until verified with the company having ownership of the line. **It is the Contractor's responsibility to notify any other companies that have underground utilities in the area and arrange for the location of all underground utilities before excavating.**

- **1.07.02** The Contractor must cease all work and notify the Railway immediately before continuing excavation in the area if obstructions are encountered which do not appear on drawings. If the obstruction is a utility and the owner of the utility can be identified, then the Contractor must also notify the owner immediately. If there is any doubt about the location of underground cables or lines of any kind, no work must be performed until the exact location has been determined. There will be no exceptions to these instructions.
- **1.07.03** All excavations must be conducted in compliance with applicable OSHA regulations and, regardless of depth, must be shored where there is any danger to tracks, structures or personnel.
- **1.07.04** Any excavations, holes or trenches on the Railway's Property must be covered, guarded and/or protected when not being worked on. When leaving work site areas at night and over weekends, the areas must be secured and left in a condition that will ensure that Railway employees and other personnel who may be working or passing through the area are protected from all hazards. All excavations must be back filled as soon as possible.

1.08 Hazardous Waste, Substances and Material Reporting

- **1.08.01** If Contractor discovers any hazardous waste, hazardous substance, petroleum or other deleterious material, including but not limited to any non-containerized commodity or material, on or adjacent to Railway's Property, in or near any surface water, swamp, wetlands or waterways, while performing any work under this Agreement, Contractor must immediately: (a) notify the Railway's Resource Operations Center at 1(800) 832-5452, of such discovery; (b) take safeguards necessary to protect its employees, subcontractors, agents and/or third parties; and (c) exercise due care with respect to the release, including the taking of any appropriate measure to minimize the impact of such release.

1.09 Personal Injury Reporting

- **1.09.01** The Railway is required to report certain injuries as a part of compliance with Federal Railroad Administration (FRA) reporting requirements. Any personal injury sustained by an employee of the Contractor, subcontractor or Contractor's invitees while on the Railway's Property must be reported immediately (by phone mail if unable to contact in person) to the Railway's representative in charge of the project. The Non-Employee Personal Injury Data Collection Form contained herein is to be completed and sent by Fax to the Railway at 1(817) 352-7595 and to the Railway's Project Representative no later than the close of shift on the date of the injury.

NON-EMPLOYEE PERSONAL INJURY DATA COLLECTION

INFORMATION REQUIRED TO BE COLLECTED PURSUANT TO FEDERAL REGULATION. IT SHOULD BE USED FOR COMPLIANCE WITH FEDERAL REGULATIONS ONLY AND IS NOT INTENDED TO PRESUME ACCEPTANCE OF RESPONSIBILITY OR LIABILITY.

1. Accident City/St _____ 2. Date: _____ Time: _____
County: _____ 3. Temperature: _____ 4. Weather _____
(if non-Railway location)
5. Social Security # _____
6. Name (last, first, mi) _____
7. Address: Street: _____ City: _____ St: _____ Zip: _____
8. Date of Birth: _____ and/or Age _____ Gender: _____
(if available)
9. (a) Injury: _____ (b) Body Part: _____
(i.e. (a) Laceration (b) Hand)
11. Description of Accident (To include location, action, result, etc.): _____
12. Treatment:
" First Aid Only
" Required Medical Treatment
" Other Medical Treatment
13. Dr. Name _____ 30. Date: _____
14. Dr. Address:
Street: _____ City: _____ St: _____ Zip: _____
15. Hospital Name: _____
16. Hospital Address:
Street: _____ City: _____ St: _____ Zip: _____
17. Diagnosis: _____

**FAX TO
RAILWAY AT (817) 352-7595
AND COPY TO
RAILWAY ROADMASTER FAX**

OVERPASS EXHIBIT "C-1"

Agreement
Between
BNSF RAILWAY COMPANY
and the
CONTRACTOR

BNSF RAILWAY COMPANY
Attention: Manager Public Projects

Railway File: _____
Agency Project: _____

Gentlemen:

The undersigned (hereinafter called, the "Contractor"), has entered into a contract (the "Contract") dated _____, 200_, [***Drafter's Note: Insert the date of the contract between the Agency and the Contractor here **] with _____ [***Drafter's Note: insert the name of the Agency here**] for the performance of certain work in connection with the following project:

_____. Performance of such work will necessarily require contractor to enter BNSF RAILWAY COMPANY ("Railway") right of way and property ("Railway Property"). The Contract provides that no work will be commenced within Railway Property until the Contractor employed in connection with said work for _____ [insert Agency name here] (i) executes and delivers to Railway an Agreement in the form hereof, and (ii) provides insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by a party who is not the Owner, General Partner, President or Vice President of Contractor, Contractor must furnish evidence to Railway certifying that the signatory is empowered to execute this Agreement on behalf of Contractor.

Accordingly, in consideration of Railway granting permission to Contractor to enter upon Railway Property and as an inducement for such entry, Contractor, effective on the date of the Contract, has agreed and does hereby agree with Railway as follows:

Section 1. RELEASE OF LIABILITY AND INDEMNITY

Contractor hereby waives, releases, indemnifies, defends and holds harmless Railway for all judgments, awards, claims, demands, and expenses (including attorneys' fees), for injury or death to all persons, including Railway's and Contractor's officers and employees, and for loss and damage to property belonging to any person, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or any work performed on or about Railway's property or right-of-way. **THE LIABILITY ASSUMED BY CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF RAILWAY, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF RAILWAY.**

THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR INCLUDES ANY CLAIMS, SUITS OR JUDGMENTS BROUGHT AGAINST RAILWAY UNDER THE FEDERAL EMPLOYEE'S LIABILITY ACT, INCLUDING CLAIMS FOR STRICT LIABILITY UNDER THE SAFETY APPLIANCE ACT OR THE BOILER INSPECTION ACT, WHENEVER SO CLAIMED.

Contractor further agrees, at its expense, in the name and on behalf of Railway, that it will adjust and settle all claims made against Railway, and will, at Railway's discretion, appear and defend any suits or actions of law or

in equity brought against Railway on any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by Contractor under this Agreement for which Railway is liable or is alleged to be liable. Railway will give notice to Contractor, in writing, of the receipt or dependency of such claims and thereupon Contractor must proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against Railway, Railway may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railway's discretion, must defend, adjust, or settle such suits and protect, indemnify, and save harmless Railway from and against all damages, judgments, decrees, attorney's fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement survive any termination of this Agreement.

Section 2. TERM

This Agreement is effective from the date of the Contract until (i) the completion of the project set forth herein, and (ii) full and complete payment to Railway of any and all sums or other amounts owing and due hereunder.

Section 3. INSURANCE

Contractor must, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

A. Commercial General Liability insurance. This insurance must contain broad form contractual liability with a combined single limit of a minimum of \$5,000,000 each occurrence and an aggregate limit of at least \$10,000,000. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limit to the following:

- ◆ Bodily Injury and Property Damage
- ◆ Personal Injury and Advertising Injury
- ◆ Fire legal liability
- ◆ Products and completed operations

This policy must also contain the following endorsements, which must be indicated on the certificate of insurance:

- ◆ It is agreed that any workers' compensation exclusion does not apply to **Railroad** payments related to the Federal Employers Liability Act or a **Railroad Wage Continuation Program** or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law.
- ◆ The definition of insured contract must be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Any exclusions related to the explosion, collapse and underground hazards must be removed.

No other endorsements limiting coverage as respects obligations under this Agreement may be included on the policy.

B. Business Automobile Insurance. This insurance must contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- ◆ Bodily injury and property damage
- ◆ Any and all vehicles owned, used or hired

C. Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

- ◆ _____'s statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
- ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

D. Railroad Protective Liability insurance naming only the **Railroad** as the Insured with coverage of at least \$5,000,000 per occurrence and \$10,000,000 in the aggregate. The policy Must be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to remove any exclusion for punitive damages.
- ◆ No other endorsements restricting coverage may be added.
- ◆ The original policy must be provided to the **Railroad** prior to performing any work or services under this Agreement

Other Requirements:

All policies (applying to coverage listed above) must not contain an exclusion for punitive damages and certificates of insurance must reflect that no exclusion exists.

Contractor agrees to waive its right of recovery against **Railroad** for all claims and suits against **Railroad**. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against **Railroad** for all claims and suits. The certificate of insurance must reflect the waiver of subrogation endorsement. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against **Railroad** for loss of its owned or leased property or property under contractor's care, custody or control.

Contractor's insurance policies through policy endorsement, must include wording which states that the policy is primary and non-contributing with respect to any insurance carried by **Railroad**. The certificate of insurance must reflect that the above wording is included in evidenced policies.

All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) must include a severability of interest endorsement and **Railroad** must be named as an additional insured with respect to work performed under this agreement. Severability of interest and naming **Railroad** as additional insured must be indicated on the certificate of insurance.

Contractor is not allowed to self-insure without the prior written consent of **Railroad**. If granted by **Railroad**, any deductible, self-insured retention or other financial responsibility for claims must be covered directly by contractor in lieu of insurance. Any and all **Railroad** liabilities that would otherwise, in accordance with the provisions of this **Agreement**, be covered by contractor's insurance will be covered as if contractor elected not to include a deductible, self-insured retention or other financial responsibility for claims.

Prior to commencing the Work, contractor must furnish to **Railroad** an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) must contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify **Railroad** in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision must be indicated on the certificate of insurance. Upon request from **Railroad**, a certified duplicate original of any required policy must be furnished. Contractor should send the certificate(s) to the following address:

BNSF RISK MANAGEMENT
2500 Lou Menk Drive AOB-1
Fort Worth, TX 76131-2828
Fax: 817-352-7207

Any insurance policy must be written by a reputable insurance company acceptable to *Railroad* or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provide.

Contractor represents that this *Agreement* has been thoroughly reviewed by contractor's insurance agent(s)/broker(s), who have been instructed by contractor to procure the insurance coverage required by this *Agreement*. Allocated Loss Expense must be in addition to all policy limits for coverages referenced above.

Not more frequently than once every five years, *Railroad* may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by contractor, contractor must require that the subcontractor provide and maintain the insurance coverages set forth herein, naming *Railroad* as an additional insured, and requiring that the subcontractor release, defend and indemnify *Railroad* to the same extent and under the same terms and conditions as contractor is required to release, defend and indemnify *Railroad* herein.

Failure to provide evidence as required by this section will entitle, but not require, *Railroad* to terminate this *Agreement* immediately. Acceptance of a certificate that does not comply with this section will not operate as a waiver of contractor's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by contractor will not be deemed to release or diminish the liability of contractor including, without limitation, liability under the indemnity provisions of this *Agreement*. Damages recoverable by *Railroad* will not be limited by the amount of the required insurance coverage.

For purposes of this section, *Railroad* means "Burlington Northern Santa Fe Corporation", "BNSF RAILWAY COMPANY" and the subsidiaries, successors, assigns and affiliates of each.

Section 4. EXHIBIT "C" CONTRACTOR REQUIREMENTS

The Contractor must observe and comply with the provisions, obligations, requirements and limitations contained in the Contract and the Contractor Requirements set forth on Exhibit "C" attached to the Contract and this Agreement, including, but not be limited to, payment of all costs incurred for any damages to Railway roadbed, tracks, and/or appurtenances thereto, resulting from use, occupancy, or presence of its employees, representatives, or agents or subcontractors on or about the construction site.

Section 5. TRAIN DELAY

Contractor is responsible for and hereby indemnifies and holds harmless Railway (including its affiliated railway companies, and its tenants) for, from and against all damages arising from any unscheduled delay to a freight or passenger train which affects Railway's ability to fully utilize its equipment and to meet customer service and contract obligations. Contractor will be billed, as further provided below, for the economic losses arising from loss of use of equipment, contractual loss of incentive pay and bonuses and contractual penalties resulting from train delays, whether caused by Contractor, or subcontractors, or by the Railway performing work under this Agreement. Railway agrees that it will not perform any act to unnecessarily cause train delay.

For loss of use of equipment, Contractor will be billed the current freight train hour rate per train as determined from Railway's records. Any disruption to train traffic may cause delays to multiple trains at the same time for the same period.

Additionally, the parties acknowledge that passenger, U.S. mail trains and certain other grain, intermodal, coal and freight trains operate under incentive/penalty contracts between Railway and its customer(s). Under these arrangements, if Railway does not meet its contract service commitments, Railway may suffer loss of performance or incentive pay and/or be subject to penalty payments. Contractor is responsible for any train performance and

incentive penalties or other contractual economic losses actually incurred by Railway which are attributable to a train delay caused by Contractor or its subcontractors.

The contractual relationship between Railway and its customers is proprietary and confidential. In the event of a train delay covered by this Agreement, Railway will share information relevant to any train delay to the extent consistent with Railway confidentiality obligations. Damages for train delay for certain trains may be as high as \$50,000.00 per incident.

Contractor and its subcontractors must give Railway's representative (____) ____ weeks advance notice of the times and dates for proposed work windows. Railway and Contractor will establish mutually agreeable work windows for the project. Railway has the right at any time to revise or change the work windows due to train operations or service obligations. Railway will not be responsible for any additional costs or expenses resulting from a change in work windows. Additional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project.

Contractor and subcontractors must plan, schedule, coordinate and conduct all Contractor's work so as to not cause any delays to any trains.

Kindly acknowledge receipt of this letter by signing and returning to the Railway two original copies of this letter, which, upon execution by Railway, will constitute an Agreement between us.

(Contractor)

BNSF Railway Company

By: _____
Printed Name: _____
Title: _____

By: _____
Name: _____
Manager Public Projects

Contact Person: _____
Address _____

City: _____ State: _____ Zip: _____
Fax: _____
Phone: _____
E-mail: _____

Accepted and effective this ____ day of ____ 20__.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Fox Valley Park District,
Petitioner,

v.

BNSF Railway Company,
Respondent.

T09-_____

Petition for an Order to install a multi-use pedestrian and bike path under the BNSF elevated railroad bridge at the Fox River, milepost 38.38 on the Aurora Subdivision located in the City of Aurora, Kane County, Illinois.

PROPOSED AGREED ORDER

By Order of the Commission:

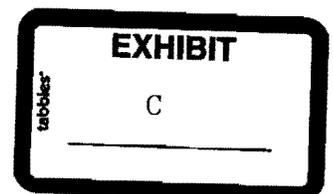
On January _____, 2010, the FOX VALLEY PARK DISTRICT ("FVPD" or "Petitioner") filed the above-captioned verified Petition with the Illinois Commerce Commission ("Commission") naming as Respondent BNSF RAILWAY COMPANY ("BNSF" or "Company") seeking authority to install a multi-use pedestrian and bike path at the elevated railroad bridge which spans the Fox River along the Company's track designated as [AAR/DOT #689 712G] railroad milepost 38.38. FVPD requested that the matter be approved without a Hearing.

PROCEDURAL HISTORY

Included with the Petition was a proposed Agreed order, which was drafted by the FVPD and reviewed by the BNSF and the Commission's Transportation Bureau, Railroad Section ("Staff"). The terms of the Agreed Order are acceptable to all the parties, as documented in the January____, 2010 filing. On _____, 2010, the record was marked "Heard and Taken."

STIPULATED AGREED FACTS

There is an existing railroad bridge carrying the three mainline tracks of the BNSF over the West Branch of the Fox River, on the Aurora Subdivision at milepost



38.38 in the City of Aurora (the "Bridge Crossing"). The bridge consists of three spans, and there is an average of twenty-nine (29) trains per day. In its petition, FVPD is seeking authority to install a multi-use pedestrian and bike path representing an extension of its trail system from the west bank of the Fox River across to Hurd's Island, and under the eastern span of the Bridge Crossing to link up with trail extensions lying to the north and on the east side of the Fox River. It is anticipated that there will be an average of 500 path users per day. A proposed license agreement between the parties was attached to the Petition as Exhibit B, the terms of which are incorporated herein by this reference.

FVPD is preparing the Project for a bid letting in the Winter of 2009-2010. It is anticipated that construction would then be completed by December 31, 2011. The total pedestrian-bike path project is estimated to cost \$2,067,234.00. FVPD will be responsible for all costs associated with the project, including the required railroad bridge underside work. No Grade Crossing Protection Funds are requested or at issue here. Upon completion of the Project, FVPD will be responsible for the maintenance and associated costs for the multi-use pedestrian and bike path. Per the license agreement, this will include the removal of graffiti on the railroad bridge.

RESPONDENT RAILROAD'S POSITION

The Company has no objection to the Petition.

COMMISSION STAFF ANALYSIS AND CONCLUSION

Staff has no objection to the Project, and has reviewed the plans and coordinated with the parties prior to the filing of the Petition.

COMMISSION FINDINGS AND CONCLUSIONS

The Commission, having considered the entire record, finds that:

- (1) The recitals of fact in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact:
- (2) Petitioner Fox Valley Park District is an Illinois Park District, organized and existing under and by virtue of the Park District Code of the State of Illinois.
- (3) Respondent, BNSF Railway Company, is a rail carrier engaged in the transportation of persons and property by rail in the State of Illinois.
- (4) FVPD has filed a Petition for an Order to install a multi-use pedestrian and bike path under the elevated railroad bridge at the Bridge Crossing.

- (5) The Commission has jurisdiction over the Petitioner, Company, and the subject matter of this proceeding.
- (6) The multi-use pedestrian and bike path right-of-way beneath the elevated railroad bridge as requested by the Petitioner, are necessary to promote safety and the convenience of the public, in accordance with the Illinois Commercial Transportation Law, 625 ILCS 5/18c-7401(3).
- (7) The recitals of fact and conclusions of law contained in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law.
- (8) FVPD should construct and install the multi-use pedestrian and bike path per the plans included within the January 8, 2010 Petition.
- (9) FVPD should be responsible for all costs associated with the project. FVPD should be responsible for the future maintenance costs associated with the multi-use pedestrian and bike path as well as graffiti abatement as set forth in the proposed license agreement between the parties.
- (10) The parties should proceed immediately to take the actions they are directed to perform by this Order; all work required of the parties under this Order should be completed by December 31, 2011.
- (11) Any person making a Request for an Extension of Time up to thirty (30) days to complete a Project ordered by the Commission must file a request with the Director of Processing and Information no later than fourteen (14) days in advance of the scheduled deadline. An Administrative Law Judge will consider and decide the request.
- (12) Any person making a Request for an Extension of Time that exceeds thirty (30) days must file a Petition for Supplemental Order with the Director of Processing and Information no later than twenty-one (21) days in advance of the scheduled deadline. The Commission will decide Petitions for Supplemental Orders.
- (13) Requests for Extension of Time and Petitions for Supplemental Orders must include the reason(s) the additional time is needed to complete the work and the time within which the Project will be completed. Prior to submitting a Request for Extension of Time or a Petition for Supplemental Order, the person must notify the Commission's Rail Safety Program

Administrator that it is unable to complete the Project within the ordered time frame.

- (14) The Commission or its Administrative Law Judge reserves the right to deny Petitions for Supplemental Orders and Requests for Extension of Time, if the reason(s) supporting the request is (are) insufficient or where it appears the person has not made a good faith effort to complete the Project within the allotted time. Failure of the Commission or Administrative Law Judge to act on a pleading prior to the deadline means the originally ordered completion date remains in effect.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Fox Valley Park District is authorized and shall, in accordance with the plans incorporated into the Petition, construct the multi-use pedestrian and bike path under the elevated railroad bridge of the BNSF Railway Company which spans the Fox River on the Aurora Subdivision at milepost 38.38. All work shall be completed by the Fox Valley Park District in accordance with Findings (7) through (14).

IT IS FURTHER ORDERED that the Petitioner shall, at six (6) month intervals from the date of this Order until the project has been completed, submit written reports to the Director of Processing in the Commission's Transportation Bureau ("Director of Processing"), describing the progress that has been made toward completing the Project. If the Project is behind schedule, the report shall include a brief explanation of the reason for the delay. Each progress report shall include the Commission Order number; the date the Order was entered; the deadline for completion of the Project established by the Order; the type of improvement; and project manager information (name, title, mailing address, telephone number, and facsimile number) of the employee responsible for the management of the Project.

IT IS FURTHER ORDERED that the Petitioner shall within five (5) days of the completion of the project, file with the Director of Processing a letter advising the Commission of the completion date.

IT IS FURTHER ORDERED that the BNSF Railway Company shall within five (5) days of the completion of the work herein required, submit a completely updated United States Department of Transportation Inventory Form to the Federal Railroad Administration, the Chief of Data Services at the Illinois Department of Transportation, and the Director of Processing and Information, Transportation Bureau of the Illinois Commerce Commission.

IT IS FURTHER ORDERED that the Commission shall retain jurisdiction for the purpose of issuing any supplemental order or orders as it may deem necessary.

IT IS FURTHER ORDERED that in accordance with Chapter 624 ILCS 5/18c-2201 and 5/18c-2206 of the Illinois Commercial Transportation Law, this is a final Order subject to the Administrative Review Law.

By order of the Commission this _____ day of _____, 20__.

CHARLES E. BOX
CHAIRMAN