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VIA Electronic Filing

Anne K. Quinlan, Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20024

Re: STB Docket No. AB-290 (Sub. No. 210X), Norfolk Southern Railway  
Company - Abandonment - In Atlanta, Fulton County, Georgia - Notice of  
Exemption

Dear Ms. Quinlan:

Enclosed for electronic filing with the Board in the captioned proceeding is  
Norfolk Southern Railway Company's reply to the petition for stay filed January 2, 2009  
by the Georgia Department of Transportation in this proceeding.

Very truly yours,

A handwritten signature in cursive script that reads "James R. Paschall".

James R. Paschall

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. AB-290 (SUB-NO. 210X)  
NORFOLK SOUTHERN RAILWAY COMPANY  
- ABANDONMENT EXEMPTION -  
IN ATLANTA, FULTON COUNTY, GEORGIA

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NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY  
TO GEORGIA DEPARTMENT OF TRANSPORTATION'S  
PETITION FOR STAY AND OTHER RELIEF

-----  
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(757) 629-2759  
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Attorney for Norfolk Southern Railway  
Company

January 7, 2009

Before the  
Surface Transportation Board

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STB Docket No. AB-290 (Sub-No. 210X)

Norfolk Southern Railway Company  
- Abandonment Exemption -  
In Atlanta, Fulton County, Georgia

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Norfolk Southern Railway Company's Reply  
To Georgia Department of Transportation's  
Petition for Stay and Other Relief

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This is Norfolk Southern Railway Company's ("NSR") reply to the petition for stay and other relief filed January 2, 2009 by the Georgia Department of Transportation ("GA DOT") in this proceeding.

NSR filed a notice of exemption under 49 U.S.C. § 10502 and 49 CFR § 1152.50 for the abandonment of a 4.30-mile railroad line between mileposts DF 633.10 and DF 637.40, in Atlanta, Fulton County, Georgia and a concurrent petition for exemption from the Offer of Public Assistance ("OFA") and public use provisions of 49 U.S.C. §§ 10904 and 10905. GA DOT does not contend that the notice of exemption did not satisfy the criteria of 49 CFR § 1152.50. Instead GA DOT argues that the Purchasers (Grantees) of the real estate underlying the line's right-of-way in 2004, and their successor purchaser, NE Corridor Partners, LLC<sup>1</sup>, acquired too much control over the line due to

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<sup>1</sup>Atlanta Development Authority (the "Authority"), a corporate body public and politic of the State of Georgia and instrumentality of the City of Atlanta, is the current record owner of the property. The Authority just recently acquired this property from NE Corridor Partners, LLC, a quasi-public entity controlled by the City of Atlanta. The Authority intends to develop the

an inartful clause in the reservation of a railroad easement to NSR in NSR's 2004 deeds to the non-carrier purchasers and became common carriers as a result. The clause states that the Grantees can request that NSR file papers with the Board for approval or exemption to abandon or discontinue service over the railroad easement. Since the parties' Purchase and Sale Agreement ("Sale Agreement") was not presented to the Board for a jurisdictional determination in 2004, GA DOT argues that the effective date of the exemption should be stayed and this determination should be made now.

The easement stated in the same paragraph with the abandonment clause that:

no railroad tracks or other railroad facilities shall be removed from the easement areas without the written approval of Grantor, or its successors or assigns, and only if authorized by any and all appropriate governmental agencies...

This apparent ambiguity or contradiction between clauses in the same paragraph is reconcilable. It shows the parties effectively acknowledged that NSR could not be required to abandon the line without STB approval. In this case, the original Purchasers simply preferred that abandonment filing be deferred until a later, more convenient time rather than have NSR file an exemption notice with the Board immediately. NSR commonly would file such a notice in connection with a sale of its fee interest in the real estate to a purchaser which did not intend to provide railroad service over the line. The delay in filing presumably would allow for the Purchasers to develop outparcels and wide sections of the property and to deal with uses of the corridor connected with the

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property as part of the Atlanta BeltLine project, a public use project described in earlier filings.

NE Corridor acquired the Line from the seven (7) entities shown in the deed and reserved easement attached to the GA DOT Petition. These "Purchasers" were created by the original purchaser, Madison Ventures, Ltd., a venture formed to develop the real estate.

BeltLine project later. The reserved easement provided for the unlikely reactivation of rail service over the line, recognized the Board's jurisdiction and reserved a corridor for the BeltLine project. The line had already been out of service for at least four years and there were no prospects for reactivated rail freight service over the line. The parties understood that the line would qualify for the abandonment class exemption and that no future reasonable request for rail service was likely. The parties had in mind the timing of a filing for exemption to abandon an out of service line, not an active line. The Board has found control over abandonment of an active line objectionable in other cases.

The Sale Agreement as amended has similar language to the deed. However, the amended Sale Agreement contains no other language that gives the Purchasers any right to interfere with the railroad easement, control the use of the easement by NSR or conduct common carrier operations over the line. The transaction included no operating restrictions on NSR and no operating agreement of any sort.

In 2007, outside counsel for the Purchasers advised that the wording in the deeds was ambiguous and unsatisfactory and should be changed. As a result, NSR and the Purchasers entered into a "Supplemental Agreement" which changes the abandonment clause set forth in Exhibit B to the Deed and includes this key provision:

1.1 The parties acknowledge that no local or overhead traffic has moved over the Easement Corridor for at least two years prior to the date of this Supplemental Agreement. If no rail freight operations occur in the future, Seller may, unless requested otherwise by Purchasers, utilize the procedures of 49 C.F.R. Part 1152, Subpart F to obtain an exemption to abandon or discontinue rail service on the Easement Corridor.

This language reverses the abandonment language of the deed. The parties recognized that the abandonment of the line qualified for the class exemption. NSR, not

the Purchasers, would have the right to determine whether to file a notice of exemption to abandon the line (1) "if no rail freight operations occur in the future" and (2) "unless otherwise requested by the Purchasers." This clarifies that NSR controlled any filing for abandonment of the line. Purchasers and their successors now only have the contractual right to request NSR *not* to file for an abandonment exemption for the line.<sup>2</sup>

The sale of real estate underlying an out of service rail line right-of-way should not raise the issues and concerns about common carrier obligations and continued freight rail service that might arise from the sale of the real estate of an active rail line. The purchaser might use an active line or control its operation to a greater or lesser extent, which is the usual "State of Maine/Maine DOT" situation. In any event, regardless whether the errant abandonment language might be interpreted to have brought the transaction within the ambit of Board review in 2004, we are convinced the Board would have dismissed the matter for lack of jurisdiction, and at most would have required the parties to clarify the abandonment provision similarly to their voluntary change of that clause in the Supplemental Agreement. GA DOT would not have had the opportunity to use the OFA or public use condition procedures at that time, nor

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<sup>2</sup>The Supplemental Agreement also contains provisions intended to give the Purchasers rights to acquire the easement or to receive any compensation for the easement (but not the track and materials) that might be received by NSR if the easement were to be transferred to a third party. The parties provided that the Supplemental Agreement not be recorded. We have not been able to ascertain the reason for this provision. On the other hand, the abandonment language probably should have been omitted from the easement reservation in the first place. Termination of the easement clearly could not have been accomplished without STB approval or exemption. The supplemental agreement language more accurately reflects the intention of the parties.

We regret that due to holiday vacations, no one at NSR who knows about this matter was available to respond to GA DOT's request last week for further information.

would such a proceeding have affected GA DOT's current ability (if any) to use either such procedure. GA DOT's attempt to connect them to a review of the sale transaction or to argue that it has been deprived of any right to use these procedures would be puzzling and not sustainable even if further review of the sale transaction occurred.

The Sale Agreement, Amendment and Supplemental Agreement are brief and uncomplicated. They are attached as Exhibits A, B and C in slightly redacted form (omitting financial information irrelevant to the issues in this proceeding – which could be presented under a protective order and confidentiality agreement if deemed relevant.) The Board need not delay the effective date of the exemption or conduct any further proceedings to conclude that the Purchasers and their successors did not acquire an unfettered right to dictate abandonment of the line or any interest in or ability to control the railroad operation. The Purchasers did not intend to acquire a common carrier obligation to provide rail service over the line. Neither the Purchasers nor their successors have ever held themselves out to do so. Unlike the circumstances in a few other recent proceedings, in this case the amended Sales Agreement, the transaction, the Purchasers' and successors' intentions and the long out-of-service status of the line do not show that the latter parties became common carriers, do not show that the Board has jurisdiction over the real estate sale transaction and do not raise other issues warranting further consideration.

The factors to be considered in addressing a petition for stay are: (1) whether there is a strong likelihood that petitioner will prevail on the merits of any challenge to the action sought to be stayed; (2) whether petitioner will suffer irreparable harm in the

absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest.<sup>3</sup> A party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief.<sup>4</sup> The issuance of a stay is "extraordinary relief,"<sup>5</sup> that should not be granted lightly.

Likelihood of Success on the Merits. GA DOT will not succeed on the merits. GA DOT does not contend much less show that the line does not qualify for the Board's class exemption for abandonment of out-of-service lines and does not ask that the exemption be denied or revoked. No traffic has moved over the line for at least eight years. No known prospective shippers are located on the line. Surrounding land uses are becoming more commercial and residential. GA DOT only seeks to have the purchasers and NSR be required to engage in additional proceedings to allow more time to discuss post-abandonment use of the property before the exemption ultimately becomes effective. We show in this reply that those proceedings are unnecessary. This rationale does not support the requested relief in any event. Despite references to the OFA procedures, GA DOT does not argue that it could use those procedures because there is no freight service on the line for any offeror to acquire the line to

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<sup>3</sup> *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>4</sup> *Trinidad Railway, Inc. – Abandonment Exemption – In Las Animas County, CO*, STB Docket No. AB-573X (STB served January 15, 2002), slip op. at 3 (denying the petition for stay); *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

<sup>5</sup> *San Joaquin Valley Railroad Co. – Abandonment Exemption – in Tulare and Kern Counties, CA*, STB Docket No. AB-398 (Sub-No. 5X) (STB served April 3, 1998), slip op. at 4.

continue and GA DOT's interest is in commuter rail service outside the Board's jurisdiction. GA DOT refers to the public use condition provisions, but since the Authority intends to put the corridor to public use in connection with the BeltLine project, GA DOT can not trump that public use or use a public use condition to accomplish anything but delay of the proceedings and the effective date of the exemption.

GA DOT wishes the Board to stay the exemption merely to allow it to study and explore possible acquisition of the right-of-way for commuter rail service under plans it has been formulating, revising and negotiating on and off for over 15 years. Even if this were a proper basis for staying or giving GA DOT some other procedural rights in this proceeding, which it is not, the Georgia state and local governments have never been willing to commit the funds required to implement the planned rail service, which has been on the drawing board since at least 1994. Under current economic and budgetary circumstances, GA DOT does not have and cannot reasonably expect to have adequate funding in the foreseeable future for all of its existing projects and programs, much less a new program with lukewarm political and public support. Neither the Board's regulations nor its governing statute provide for stays of abandonment proceedings or the effective date of abandonment exemptions for reasons connected with the post-abandonment use of a line for non-freight railroad purposes outside STB jurisdiction.<sup>6</sup>

Harm to Petitioner. GA DOT has not demonstrated that it will be irreparably

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<sup>6</sup> See *New York Central Lines, LLC - Abandonment in Berkshire County, Massachusetts*, STB Docket No. AB-565 (Sub-No. 3X) (STB served September 5, 2001); *Illinois Central Gulf Railroad Company Abandonment Between Dwight Livingston County, and Washington, Tazewell County, Illinois*, 360 I.C.C. 188, 199 (1979) (abandonment should not be delayed until issues concerning sale of right-of-way and post-abandonment use of the property are settled).

harmful in the absence of a stay. GA DOT and other Georgia transportation agencies or authorities have had many years to negotiate with NSR concerning the acquisition or use of the subject line. GA DOT still lacks the funding, and possibly even the political support, to initiate and operate its proposed commuter rail system. The long history of GA DOT and other GA railroad authorities plans, lack of progress and their past and current funding problems are shown in excerpts from GA DOT's web site and local newspaper articles in Exhibit D. Under current economic circumstances, it is less likely than ever that GA DOT would have sufficient funds to initiate the commuter projects. Moreover, since the City plans to preserve a corridor as part of the BeltLine project, GA DOT can negotiate with the Authority and the City of Atlanta concerning post-abandonment use of the right-of-way without holding up the abandonment of the freight rail service common carrier obligation or otherwise prolonging this proceeding.

Harm to Others. Issuance of a stay in this matter could substantially harm NSR and the Authority, and thus the City of Atlanta. Granting GA DOT's petition and its implied requirement for unnecessary further Board proceedings could result in a significant delay in the effective date of the exemption to abandon a line that has carried no traffic for more than 9 years now. NSR could incur opportunity and holding costs and liabilities in connection with the easement and the track and materials on the line, which will be subject to further deterioration, without earning revenue from it. Any delay in ultimately making the abandonment exemption for the subject line effective that would be occasioned by a stay for the reasons submitted by GA DOT is plainly contrary to the statutory directive that the Board should expedite conclusions to abandonment

proceedings.<sup>7</sup> The 180-day time limitation and the substantive limitation on public use conditions in 49 U.S.C. § 10905 also show Congressional intent to limit the delay in concluding abandonment proceedings and in allowing line abandonments to become effective for the purpose of public use condition negotiations. The Authority and the City of Atlanta will be harmed by a stay since they will undoubtedly need to delay the implementation of their plans for the subject property. The Authority has already begun implementing the BeltLine master plan. A stay would prolong uncertainty concerning use of the property for purposes of the BeltLine plan and interfere with the Authority's desire to assume full control of the property as soon as possible.

The Public Interest. No current or prospective shippers are located on the line. Thus, and no shipper will lose service as a result of the abandonment of the line. No shipper has objected to the proposed abandonment. Because the line has not been used for over 9 years, and no future use of the line for freight service can be expected, the public interest does not support a stay. Abandonment of the common carrier obligation to provide freight service on the line and of NSR's easement will clear the way for public projects connected with the Atlanta BeltLine Project. Delay of a fully formulated public use project in order to allow a governmental entity interested in a different but much less certain public use would not be in the public interest.<sup>8</sup>

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<sup>7</sup> See H.R. Rep. No. 1430, 96th Cong., 2d Sess. 125 (1980). See also *New York Central Lines, LLC - Abandonment in Berkshire County, Massachusetts*, STB Docket No. AB-565 (Sub-No. 3X) (STB served September 5, 2001). NSR had no reason to express urgency in the notice of exemption in view of the Congressional and Board policies and the fact that the notice of exemption process takes 50 days to complete and is almost never delayed.

<sup>8</sup> See, Docket No. AB-55 (Sub-No. 562X), *CSX Transportation, Inc. – Abandonment*

Request to Deny OFA and Public Use Provisions Exemptions. In addition to its request for stay of the abandonment exemption, GA DOT asks that the OFA and public use exemptions be denied. However, GA DOT presents no persuasive argument for this relief. GA DOT plainly states that its interest in the right-of-way is for potential commuter rail service. An OFA can only be made for continued rail freight service. Not only is GA DOT not interested in providing freight service over the line, there is no freight service on the line to continue.

The Authority, the current owner of the real estate underlying the line's right-of-way is a public agency that will put the property to public use under the BeltLine Project. A public use condition is not imposed for the benefit of any one potential purchaser. It provides an opportunity for any interested person to negotiate to acquire a railroad right-of-way to be abandoned to be used for public purposes. A public use condition would not require NSR to deal exclusively with GA DOT or any other entity with respect to post-abandonment public use of the property.<sup>9</sup> Provision for future public use of the line already has been made. A public use condition is only effective for 180 days and cannot be extended. GA DOT would derive no benefit from a public use condition here.

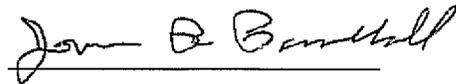
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*Exemption – in Rocky Mount, Nash County, NC, served December 30, 1999, slip op. at 4 (delay to public project that would result from the issuance of a stay).*

<sup>9</sup> See e.g. *Gauley River Railroad, LLC – Abandonment and Discontinuance of Service – in Webster and Nicholas Counties, WV*, STB Docket No. AB-559 (Sub-No. 1X) (STB served June 23, 2000), embracing *CSX Transportation, Inc. – Discontinuance of Service – Webster and Nicholas Counties, WV*, STB Docket No. AB-55 (Sub-No. 572X); *CSX Transportation, Inc. – Abandonment Exemption - Between Athens and Little Hocking, In Athens and Washington Counties, OH*, ICC Docket No. AB-55 (Sub-No. 342X) (ICC served Date October 3, 1990).

For the foregoing reasons, NSR requests that the Board deny GA DOT's petition for stay and for other relief.

Respectfully submitted,



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Norfolk, Virginia 23510-2191  
(757) 629-2759  
Fax (757) 533-4872

Attorney for Norfolk Southern Railway  
Company

Dated: January 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Petition for Stay was served upon the following party, by e-mail attachment on January 7, 2009:

Mr. Kevin M. Sheys  
Ms Janie Sheng  
K&L Gates LLP  
1601 K Street, NW  
Washington, DC 20006

Attorneys for Georgia Department of Transportation

Charles A. Spitulnik  
Allison I. Fultz  
Kaplan, Kirsch & Rockwell, LLP  
1001 Connecticut Ave., NW  
Suite 800  
Washington, DC 20036

Attorneys for Atlanta Development Authority and Atlanta BeltLine, Inc., an implementation agent hired by the Authority for the BeltLine project

I hereby certify that a copy of the foregoing Reply to Petition for Stay was served upon the following person by express delivery on January 7, 2009:

Mr. Drew Galloway  
AVP State and Commuter Partnerships –  
Eastern Region  
AMTRAK  
30<sup>th</sup> Street Station, Box 20  
Philadelphia, PA 19104

  
James R. Paschall

Exhibit A

**AGREEMENT FOR PURCHASE AND SALE**

THIS AGREEMENT, made and entered into as of this 5th day of October, 2004, by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation (herein referred to as "Seller"), and MADISON VENTURES, LTD, a \_\_\_\_\_ corporation (hereinafter referred to as "Purchaser");

WITNESSETH, THAT:

In consideration of the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows:

**SECTION 1. DEFINITIONS AND EXHIBITS.**

**1.1 Definitions.** For purposes of this Agreement, each of the following terms, when used herein with an initial capital letter, shall have the meaning ascribed to it as follows:

Agreement. This Agreement for Purchase and Sale.

Closing. The closing and consummation of the transactions contemplated hereby.

Closing Date. The date on which the Closing occurs.

Closing Documents. This term is defined in Section 10.2 below.

Conditions. All of the conditions to either party's obligations hereunder described or referred to in Section 11 hereof.

Disclosure. A written disclosure from Seller to Purchaser of any material changes in any of the representations or of any breaches of any of the warranties or agreements made by Seller in Section 8 hereof.

Earnest Money. The amounts deposited in escrow by Purchaser with Escrow Agent as earnest money pursuant to the terms of Section 3.1 hereof.

Effective Date. The date of actual receipt in the case of a notice which is hand delivered or sent by overnight courier service or the date of receipt or rejection as evidenced by the return receipt if sent by registered or certified mail.

Engineering Reports. Soil reports, geotechnical reports, wetland reports and evaluations, environmental reports and other results of tests and reports issued by engineers with respect to the Land.

Escrow Agent. JWB Realty Services, LLC acting pursuant to the terms and conditions of Section 3.4 hereof.

Execution Date. The date that the last party executes this Agreement as shown next to the signatures for Seller and Purchaser below.

Hazardous Material. Any substance which is controlled, regulated or prohibited under any Hazardous Material Law.

Hazardous Material Law. Any local, state and federal law relating to the environment and environmental conditions, including, without limitation, the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et seq., the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§9601-9637, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.A. §6901, et seq., the Federal Water Pollution Control Act, 33 U.S.C. §§1251 et ., the Clean air Act, 42 U.S.C. §§741 et seq., the Clean Water Act, 33 U.S.C. §7401 et seq., the Toxic Substances Control Act, 15 U.S.C. §§2601-2629, and the Safe Drinking Water Act, 42 U.S.C. §300f-300j.

Insurable. Such title to the Property as is insurable by the Title Insurer at its standard rates on a standard ALTA 1987 Form B owner's title insurance policy subject to standard preprinted exceptions. Such title insurance policy may contain an enumeration of the matters that are shown the survey of the Property that the Purchaser intends to obtain, provided that none of such matters otherwise causes the title to the Property to be unmarketable.

Land. All that tract or parcel of land depicted on the drawing, dated, \_\_\_\_\_, \_\_\_\_\_, attached hereto as Exhibit "A," and being Seller's Decatur line of railroad between the Buford Highway Connector and DeKalb Avenue in Atlanta, Georgia, being approximately 4.25 miles long and containing 64.46 acres, more or less.

Owner's Affidavit. An affidavit signed by an individual with personal knowledge of the Property substantially in the form of Exhibit "B" attached hereto and made a part hereof.

Property. The Land, together with the plants, trees and shrubbery located thereon, together with all rights, privileges, members, licenses, and easements appurtenant to the Land now or hereafter existing.

Purchase Price. The purchase price for the Property described in Section 4.

Title Insurer. Chicago Title Insurance Corporation or other nationally recognized title insurance company.

**1.2 Exhibits.** Attached hereto and forming an integral part of this Agreement are Exhibits "A" and "B", all of which are incorporated into this Agreement as fully as if the contents thereof were set out in full herein at each point of reference thereto.

## SECTION 2. PURCHASE AND SALE AGREEMENT.

Subject to and in accordance with the terms and provisions hereof, Seller agrees to sell to Purchaser, and Purchaser agrees to purchase, the Property.

## SECTION 3. PURCHASER'S PAYMENTS.

**3.1 Earnest Money.** Within three (3) days of the Execution Date, Purchaser shall deposit with Escrow Agent the sum of [REDACTED] which shall be deemed earnest money. In the event Purchaser does not terminate this Agreement pursuant to Section 6.3 herein, Purchaser shall deposit an additional [REDACTED] with Escrow Agent within ninety-three (93) days of the Execution Date which shall be deemed Earnest Money.

**3.2 Nature of Earnest Money.** All deposits made pursuant to Section 3.1 hereof shall constitute the Earnest Money hereunder and shall be deposited with Escrow Agent and shall be held, invested, and disbursed pursuant to the respective terms and provisions hereof. Whenever the Earnest Money is by the terms hereof to be disbursed by Escrow Agent, Seller and Purchaser agree promptly to execute and deliver such notice or notices as shall be necessary or, in the opinion of Escrow Agent, appropriate, to authorize Escrow Agent to make such disbursement.

**3.3 Interest.** All interest which shall accrue on the Earnest Money from the Execution Date hereof through the date on which the Earnest Money is disbursed by Escrow Agent shall become part of and included in the Earnest Money. Such interest shall be disbursed by Escrow Agent to the party entitled to such Earnest Money as and when the Earnest Money is disbursed hereunder. The Escrow Agent shall invest the Earnest Money in a money market account insured by the Federal Deposit Insurance Corporation maintained at a banking institution in the metropolitan Atlanta, Georgia area.

### 3.4 Earnest Money Disbursements.

**3.4.1** The Earnest Money shall be disbursed by the Escrow Agent on the following terms:

- (a) If the Closing of the Property takes place under this Agreement, the Escrow Agent shall deliver and pay the balance of the Earnest Money to Seller on the Closing Date of the Property.
- (b) If this Agreement is terminated in accordance with the terms hereof, then the Escrow Agent shall deliver the Earnest Money to, or upon the instructions of, the party entitled thereto within the time periods set forth herein.
- (c) If the Closing does not take place under this Agreement by reason of the failure of either party to comply with its obligations hereunder, the Escrow Agent shall deliver the Earnest Money to the party entitled thereto in accordance with the provisions of this Agreement; except that if this Agreement is terminated by Purchaser pursuant to the provisions of Section 6.3 hereof, then Escrow Agent

shall remit to Seller the sum of [REDACTED] as Seller's consideration for entering into this Agreement and remit to Purchaser the remainder of the Earnest Money.

**3.4.2** The Escrow Agent is acting as a stakeholder only with respect the Earnest Money. If there is any dispute as to whether the Escrow Agent is obligated to deliver the Earnest Money or as to whom the Earnest Money is to be delivered, the Escrow Agent may refuse to make any delivery, and may continue to hold the Earnest Money until receipt by the Escrow Agent of an authorization in writing, signed by Seller and the Purchaser, directing the delivery of the Earnest Money, or, in the absence of authorization, the Escrow Agent may hold the Earnest Money until a final determination of the rights of the parties in an appropriate judicial proceeding. If such written authorization is not given, or a proceeding for such determination is not begun, within thirty (30) days of the last day for the date of the Closing hereunder, the Escrow Agent may bring an appropriate action or proceeding for leave to deposit the Earnest Money in a court of competent jurisdiction pending such determination. The Escrow Agent shall be reimbursed for all costs and expenses of such action or proceeding, including, without limitation, reasonable attorneys' fees and disbursements, by the party determined not to be entitled to the Earnest Money. Upon delivery of the Earnest money in the manner herein provided, the Escrow Agent shall have no further liability or obligation hereunder. Seller and Purchaser recognize that Escrow Agent's duties hereunder are only as specifically provided herein and are purely ministerial in nature; and the Seller and Purchaser therefore agree that Escrow Agent shall, so long as it acts in good faith, have no liability to either Seller or Purchaser in connection with its duties as escrow agent except for its willful misconduct or gross negligence. Seller and Purchaser hereby further indemnify the Escrow Agent against, and agree to hold, save, and defend Escrow Agent harmless from, and against any costs, liabilities, and expenses incurred by Escrow Agent in discharging its duties hereunder except for those arising out of its gross negligence or willful misconduct.

#### **SECTION 4. PURCHASE PRICE.**

##### **4.1 Purchase Price.**

**4.1.1** The purchase price for the Property shall be [REDACTED]

**4.1.2** Purchaser shall pay such Purchase Price to Seller at Closing less credits for amounts received by Seller as payment of Earnest Money as set forth in Section 3.1 and Section 3.4.1(a) hereof, respectively, (including any interest earned upon the Earnest Money) and subject to prorations and adjustments expressly contemplated in this Agreement by Federal Funds, wire transfer or Federal Revenue Fund check.

**4.2 Prorations.** The following items shall be prorated between Seller and Purchaser as of midnight of the day immediately preceding the Closing Date:

- 4.2.1 City, state, and county ad valorem taxes for the calendar year of Closing based on the ad valorem tax bill for the Property if then available, for such year, or if not, then on the basis of the ad valorem tax bill for the immediately preceding year. (Should such proration prove to be inaccurate on receipt of the ad valorem tax bill for the year of Closing, either Seller or Purchaser may demand by written notice, the Effective Date of which is any time within one (1) year after Closing, a payment from the other correcting such malapportionment);
- 4.2.2 Sanitary sewer, water and utility charges and assessments, if any, provided, however, either party may elect, prior to Closing, to require that the meters for all utility charges, if any, be read and new accounts therefor established as of midnight of the day prior to Closing whereupon the Seller shall be responsible for and shall pay for all such charges first accruing or relating to the period prior to the date of Closing and shall indemnify Purchaser and hold Purchaser harmless from and against any and all losses, costs, expenses, charges and liabilities (including, without limitation, court costs and attorneys' and accountants' fees) arising out of or connected with failure of the Seller so to pay such utility charges.
- 4.2.3 Rents and other lease payments pursuant to any current leases or current occupancy or possessory agreements relative to the Property.
- 4.2.4 All such other taxes, utilities, charges and assessments customarily prorated in a commercial real estate transactions in the Atlanta, Georgia geographic area.

## **SECTION 5. TITLE TO THE PROPERTY.**

**5.1 Form of Conveyance.** At Closing, Seller shall convey the Property to Purchaser by Special Warranty Deed as to property owned by Seller in fee simple and by Quitclaim Deed as to all other property interests owned by Seller subject to the following:

- (a) General real estate taxes for the year of closing and subsequent years not yet due and payable;
- (b) Applicable zoning laws and regulations; and
- (c) All easements, conditions, reservations, leases, licenses and restrictions as may appear of record or be apparent by an inspection or survey of the Property and affect the Property as of the Execution Date.

**5.2 Title Examination.** The Purchaser shall have ninety (90) days after the Execution Date to examine title to the Property and to furnish Seller with a written statement of objections affecting the marketability and insurability of said title. Seller shall have thirty (30) days after receipt of such objections to satisfy them. If Seller does not satisfy such objections within the

prescribed time, then, at Purchaser's option evidenced by written notice to Seller, Purchaser may either (i) terminate this Agreement or (ii) waive any or all objections not cured by Seller and proceed to close hereunder without diminution in the Purchase Price. In the event this Agreement is terminated, Purchaser shall be entitled to a refund of the Earnest Money and neither party shall be liable to the other for damages on account of the termination. Upon Purchaser's failure to terminate this Agreement under this Section 5.2, it shall be deemed that Purchaser has accepted Seller's title to the Property as Insurable as of that date.

**5.3 Liens and Mortgages.** Any money liens, mortgages or trusts encumbering the Property shall not be considered a title defect as provided for in Section 5.2; however, Seller expressly covenants that before Closing, it will secure whatever releases are required to free the Property from all such money liens, mortgages or trusts.

**5.4 Title Policy.** Purchaser may, at its expense, elect to obtain a standard A.L.T.A. owner's policy of title insurance pursuant to which title to the Property shall be insured.

## **SECTION 6. PURCHASER'S INSPECTION, REZONING OF THE PROPERTY AND TERMINATION.**

**6.1 Inspection.** Purchaser shall have the privilege at any time during the existence of this Agreement of going upon the Land with Purchaser's agents, representatives or designees to inspect, examine, survey and make test borings, soil bearing tests and other engineering, environmental, or landscaping tests or surveys which it may deem necessary on the Land; provided, however, that no grading shall be done and no trees or bushes shall be cut except for bushes necessary to clear the view for survey purposes. The Seller shall in no way be liable or responsible for any activities of the Purchaser upon the Land. Should anyone attempt to file a lien against the Land by reason of the Purchaser's activities, the Purchaser shall have the same canceled and discharged of record within ten (10) days after actual notice thereof. Purchaser hereby indemnifies and agrees to hold Seller and its corporate affiliates, and its and their officers, employees, and directors, harmless from and against any and all liens which may arise as a result of Purchaser's activities on the Land and against any and all claims for death or injury to persons or properties arising out of or as a result of Purchaser's going upon the Land pursuant to the provisions of this Section 6.1 or otherwise. Purchaser shall promptly restore the Land to its condition on the date hereof to the extent practicable after all such tests or surveys. This indemnity by Purchaser shall survive closing or the termination of this Agreement.

**6.2 Rezoning.** Purchaser may file and diligently pursue an application for the rezoning of the Property during the pending of this Agreement. The filing of the rezoning application and all costs of rezoning shall be at Purchaser's expense. Seller agrees to cooperate and assist Purchaser in its attempt to rezone the Property, including, without limitation, executing whatever documents are required or necessary to effect the rezoning.

**6.3 Termination.** Purchaser may terminate this Agreement at any time within ninety (90) days of the Execution Date, and if Purchaser elects to terminate this Agreement, Escrow Agent shall refund to Purchaser the Earnest Money, less the sum of \_\_\_\_\_ which shall be paid to Seller as Seller's consideration for entering into this Agreement and

neither party hereto shall have any further rights or obligations hereunder except for those that by the express terms hereof survive any termination of this Agreement. Upon termination of this Agreement by Purchaser, Purchaser agrees to deliver to Seller any Engineering Reports and Feasibility Studies obtained by Purchaser.

## **SECTION 7. SURVEY.**

**7.1 Survey.** Within ninety (90) days of the Execution Date, Purchaser may cause, at its expense, a survey to be conducted of the Land by a land surveyor duly registered under the laws of the State of Georgia. Such survey shall include all areas designated as flood plain or wetlands located within the Property. Purchaser shall prepare an accurate legal description of the Land from such survey and such legal description shall be used in the Quitclaim Deed pursuant to which title to the Property shall be conveyed at Closing. Provided, however, said survey and legal description are subject to the approval of Seller, which approval shall not be unreasonably withheld. Upon agreement of the parties hereto, Purchaser may elect to acquire the Property based on legal descriptions based on Seller's valuation maps and property records.

**7.2 Survey Title Exceptions.** If the survey prepared on behalf of Purchaser reveals any matters which cause the title to the Property not to be marketable or Insurable, then Purchaser shall have those rights and remedies with respect thereto as are set forth in Section 5.2 above.

**7.3 Subdivision.** In the event the conveyance contemplated hereunder shall constitute a subdivision, and if as a prerequisite to the recording of such conveyance it shall become necessary to comply with applicable subdivision ordinances and regulations, Purchaser agrees that it will, with reasonable diligence, arrange and pay for the filing of any necessary plat with the appropriate authorities. Purchaser will assume the entire cost of whatever streets, sewers, and utilities are required in connection with such subdivision, and will do all other acts and file such other papers as may be necessary to obtain any and all required approvals thereof. Seller agrees to execute such documents and plats as are reasonably necessary to accomplish such subdivision. All costs, expenses and attorney's fees incurred in complying with any such subdivision ordinances and regulations, including, without limitation, dedication and installation of streets, sewers, and utilities, shall be borne solely by Purchaser and Purchaser agrees that Purchaser will indemnify and save Seller harmless from any and all claims, demands, suits, costs or expenses arising or in any way growing out of any failure by Purchaser to fully comply with such subdivision ordinances and regulations.

## **SECTION 8. REPRESENTATIONS.**

Seller hereby represents and agrees with Purchaser as follows with respect to the Property:

**8.1 No Litigation.** Seller has no actual knowledge of any pending or threatened litigation or proceeding by any organization, person, individual or governmental agency against Seller with respect to the Property or against the Property, nor does Seller know of any basis for any such action; and Seller has no actual knowledge, nor has Seller received any notice, of any violations of law, municipal or county ordinances, or other legal requirements with respect to the Property

(or any part thereof) or with respect to the use, occupancy, or construction thereof, nor does Seller know of any basis for such violations.

**8.2 Assessments.** To Seller's actual knowledge, no assessments have been made against the Property that are unpaid (except ad valorem taxes for the current year), whether or not they have become liens.

**8.3 Boundary Lines of Land.** To Seller's actual knowledge, there is no pending litigation concerning the location of the lines and comers of the Land.

**8.4 No Condemnation.** To Seller's actual knowledge, there is no pending (or to Seller's knowledge, threatened) condemnation, expropriation, eminent domain, change in grade of public street or similar proceeding affecting all or any portion of the Property. Seller has not received any written or oral notice of any of the same.

**8.5 No Violations.** Seller has received no notice of any alleged violation of, and, to the Seller's actual knowledge, there is no violation by Seller or the Property of, any federal, state or local law, rule or regulation affecting the Property.

**8.6 Other Agreements.** Seller has no actual knowledge that the execution and delivery of this Agreement and the documents described herein, and the consummation of the transactions contemplated hereby, will violate any order, judgment, writ or other agreement by which Seller is bound, or the partnership agreement, articles of incorporation or other organizational documents of Seller or any partner of Seller; subject to the statement in Section 8.7, the parties executing this Agreement and the documents described herein on behalf of Seller have, or at the time of execution of such documents, shall have, the authority to bind Seller in accordance with the terms hereof and in accordance with such documents.

**8.7 Authorization.** Seller has taken all necessary corporate action to authorize the execution of this Agreement, and those persons executing this Agreement on behalf of Seller are authorized to do so; provided, however, that no officer, director, shareholder, beneficial owner, agent or employee of Seller shall be personally liable for any obligation hereunder.

**8.8 Disclaimer.** Other than as expressly set forth in this Agreement, Seller has not and does not hereby make any express or implied representation or warranty or give any indemnification of any kind to Purchaser concerning the Property, its condition or suitability or its compliance with any statute, ordinance or regulation, including, but not limited to, those relating to the environment. Purchaser acknowledges that neither Seller nor any of its agents or representatives have made, and Seller is not liable for, or bound in any manner by, any express or implied warranties, guarantees, promises, statements, inducements, representations or information pertaining to the Property or any part thereof, the physical condition, size, zoning, income potential, expenses or operation thereof, including, without limitation, any existing or prospective leasing or occupancy of all or any part thereof, unless expressly set forth in this Agreement. Purchaser shall perform at its own expense and rely solely upon its own independent investigation concerning the physical condition of the Property (including, but not limited to, an environmental assessment) and compliance of the Property with any applicable law and

regulations. Purchaser agrees to purchase the Property "as is" and acknowledges that Seller has not made any express or implied representation or warranty, except for any limited warranty of title as may be contained in any Special Warranty Deed, other than as expressly set forth in this Agreement, with respect to the condition or suitability of the Property, including, but not limited to, the condition of the soil, the presence of hazardous materials, substances, wastes or other environmentally regulated substances, or other contaminants in the soil or improvements, whether known or unknown.

## **SECTION 9. ADDITIONAL COVENANTS.**

Seller does hereby covenant and agree with respect to the Property as follows:

**9.1 Governmental Compliance.** From and after the Execution Date to the date and time of Closing, Seller shall, at its expense, comply with all requirements of all laws, orders, ordinances, rules, and regulations of any governmental authority, or agency or instrumentality thereof, having jurisdiction over the Property or the use or occupancy thereof, and with any direction pursuant to law, or any public officer or officers that shall impose any duty upon Seller with respect to the Property or the use, occupancy, or control thereof, the conduct of any business therein, or the construction thereof or of any alterations thereto.

**9.2 No New Encumbrances.** From and after the Execution Date to the date and time of Closing, Seller shall not, without the prior written consent of Purchaser which may be unreasonably withheld, convey any portion of the Property or any rights therein, nor enter into any conveyance, security documents easement, or other agreement or amendment to agreement granting to any person or entity any rights with respect thereto or any part thereof, or any interest whatsoever therein, or any option thereto, unless such conveyance, right or other interest is subordinate to the rights of Purchaser under this Agreement, and any such conveyance or other agreement entered into in violation of this Section 9.2 shall be null and void and of no force or effect. Seller further agrees that from and after the Execution Date, Seller shall not fail to make any payments to any person or entity who, as a result of such failure would have the right to claim any lien rights with respect to any of the Property or any interest of Seller therein. Seller shall have the right to contest any such payment so long as Seller bonds off any liens filed with respect thereto or provides Purchaser with reasonably adequate security with respect thereto.

**9.3 Confidentiality.** Seller and Purchaser agree that the terms and conditions of this Agreement and all other matters related thereto are confidential and that neither party shall, without the prior written consent of the other, disclose the terms and conditions of the purchase and sale to any parties except (a) parties owning an interest in the Property and whose interest will be affected by the transfer of the Property to Purchaser, (b) the other parties' lawyers, accountants, financial institution representatives and other professionals engaged by that party to assist in the transfer of the Property, and (c) disclosures as required by applicable law. In the event of any such communication permitted by the preceding sentence, each party agrees to obligate the party(ies) to such communication to be bound by the same confidentiality requirements set forth in this Section 9.3. Notwithstanding anything in this Agreement to the contrary, this Section 9.3 shall be binding on Seller and Purchaser and each party shall have the right to enforce the provisions hereof by an action in law or in equity.

## **SECTION 10. CLOSING.**

**10.1 Time and Place.** The Closing shall be held at a mutually agreeable time and location within the metropolitan Atlanta, Georgia area on or before December 30, 2004. Except as hereinafter set forth, neither party shall have the right to postpone the Closing. The date and time of Closing may only be postponed pursuant to an agreement by Seller and Purchaser in writing, but not otherwise.

**10.2 Closing Documents.** For and in consideration of, and as a condition precedent to Purchaser's delivery to Seller of the Purchase Price, Seller shall deliver at Seller's expense, on the Closing Date set forth in Section 10.1 herein (all of which shall be duly executed and acknowledged where required and shall survive the Closing) the following:

**10.2.1** A Special Warranty Deed and a Quitclaim Deed conveying the Property to Purchaser as provided in Section 5.1 above;

**10.2.2** An Owner's Affidavit in the form attached hereto as Exhibit B;

**10.2.3** A Closing Statement which shows the Purchase Price, the various credits to each of Seller's and Purchaser's accounts contemplated hereby, the disbursements made from the proceeds of each of Seller and Purchaser as are contemplated by this Agreement, and such other agreements as Seller and Purchaser may approve;

**10.2.4** An affidavit with respect to Seller's non-foreign status sufficient to comply with the requirements of Section 1445 of the Internal Revenue Code, and all regulations applicable thereto;

**10.2.5** A certificate of incumbency evidencing the authority of the individual officer executing the closing documents on behalf of Seller.

**10.2.6** An agreement assigning all agreements affecting the Property to Purchaser except those agreements relating to rail operations on the Property.

**10.2.7** An affidavit that the Seller is not a "non-resident" within the meaning of O.C.G.A. § 48-7-128 (or if Seller is a "non-resident" within the meaning of such code section, that Seller will do all things necessary to comply at Closing with the provisions of O.C.G.A. § 48-7-128).

**10.3 Delivery of Purchase Price.** Subject to the other terms hereof, Purchaser shall deliver the Purchase Price at the Closing in accordance with the terms of Section 4 above.

**10.4 Costs.** At Closing, Seller and Purchaser shall pay their own respective costs incurred with respect to the consummation of the transactions contemplated hereby. Notwithstanding the foregoing, it is expressly agreed that the Seller shall pay any and all transfer taxes, or similar charges incident to the conveyance of title to the Property to Purchaser. Purchaser shall pay the

cost of recording the Limited Warranty Deed, the costs of examination of title to the Property, the premiums on any title insurance policy it purchases, and all costs incurred by Purchaser with respect to its examination of the Property including the fees and expenses of architects and engineers employed by the Purchaser. Each party shall pay their respective attorney's fees.

## **SECTION 11. CONDITIONS.**

**11.1 Purchaser's Conditions.** All of the following shall be conditions to Purchaser's performance hereunder and must be satisfied, or waived by Purchaser, at or prior to the Closing:

- 11.1.1** Any conditions regarding title to the Property set forth in Section 5 above shall have been satisfied;
- 11.1.2** Subject to any Disclosures which are acceptable pursuant to the terms hereof or to which Purchaser has not objected, the representation and warranties of Seller set forth in Section 8 above shall be true, accurate and complete, and shall not fail to state any material facts which are necessary to make them true and not materially misleading as of the Closing Date;
- 11.1.3** Seller shall have executed and delivered the documents and instruments contemplated by Section 10.2 above;
- 11.1.4** Purchaser shall not have exercised any right to terminate this Agreement pursuant to the express terms hereof;
- 11.1.5** Seller shall have performed and complied fully with all other agreements and requirements that are required by this Agreement to be performed or complied with by Seller.

**11.2 Default.** In the event of default by Purchaser to purchase the Property under the terms of this Agreement, Seller's sole remedy shall be to retain the Earnest Money as liquidated damages, in which event this Agreement shall become null and void, all parties hereto shall thereupon be released of all further liability hereunder, except for any liability or indemnity pursuant to any Section hereof, that by its terms survives any termination of this Agreement. It is hereby agreed that, without resale, Seller's damages will be difficult to determine and that the Earnest Money constitutes a reasonable liquidation thereof and is intended not as a penalty, but as full liquidated damages. In the event of a default by Purchaser of the other terms of this Agreement, including those obligations that will survive Closing, Seller shall retain all remedies available in law or equity. In the event of a default by Seller under the terms of this Agreement, Purchaser shall have the right to (i) terminate this Agreement by notice to Seller, in which event Purchaser shall be entitled to a refund of the Earnest Money from the Escrow Agent, or (ii) to enforce this Agreement by action of specific performance of Seller's obligations under this Agreement or otherwise.

## **SECTION 12. CONDEMNATION.**

**12.1 Risk of Loss.** Prior to Closing, Seller shall bear all risk of loss or damage to the Property by fire, other casualty or condemnation prior to the Closing.

**12.2** If, at any time prior to the Closing, any action or proceeding is filed under which the Property, or a substantial portion thereof, may be taken pursuant to any law, ordinance or regulation or by condemnation or the right of eminent domain, then, at the option of Purchaser, (a) this Agreement shall be terminate and the earnest money, without interest, shall be returned to Purchaser or (b) this Agreement shall remain in full force and effect and Seller, at the time of closing hereunder, shall transfer and assign to Purchaser all of Seller's right, title and interest in any proceeds received or which may be received by the taking, or a sale in lieu thereof, said option to be exercisable by Purchaser by delivering to the other written notice of such exercise on or before the thirtieth day following the day on which the Purchaser receives notice that such suit has been filed.

**12.3 Notice of Condemnation.** If at any time prior to the Closing all or any portion of the Property is taken by condemnation or eminent domain or any proceeding in condemnation or eminent domain or Seller becomes aware of the threat of such taking, Seller shall promptly give written notice thereof to Purchaser.

#### **SECTION 13. ASSIGNMENT.**

Purchaser shall have the right to assign its rights and delegate its duties under this Agreement to any entity in which Purchaser is a general partner, member or shareholder. Simultaneously therewith, Purchaser shall provide to Seller a notice of such assignment and a copy of the instrument whereby such assignee assumes the obligations of Purchaser hereunder. Upon such assignment and assumption, Purchaser shall be relieved of all duties and obligations hereunder. Seller expressly reserves the right to assign or delegate all or any part of Seller's rights and duties hereunder with respect to all or any portion of the Property to one or more third parties, including a qualified intermediary as defined by Treasury Regulation Section 1.1031(K)-k(g)(4).

#### **SECTION 14. BROKERAGE COMMISSION.**

Seller shall pay all broker's commissions, finder's fees and the like for agent, brokers and other finders arising through Seller, including without limitation any compensation, if any, that may become due to JWB Realty Services, LLC pursuant to a separate agreement. Seller and Purchaser hereby represent each to the other that, except as set forth in the immediately preceding sentence, they have not discussed this Agreement or the subject matter thereof with any real estate broker, agent, or salesman, so as to create any legal right in any such broker, agent, or salesman to claim a real estate commission or similar fee with respect to the conveyance of the Property and the other transactions contemplated by this Agreement. Seller and Purchaser hereby indemnify each other against and agree to hold each other harmless from and against any and all claims (including, without limitation, court costs and reasonable attorneys' fees incurred in connection with any such claims) for any real estate commissions or similar fees arising out of or in any way connected with any claimed agency relationship with the

indemnitor and relating to the conveyance of the Property and the other transactions contemplated by this Agreement.

## SECTION 15. NOTICES.

Wherever any notice or other communication is required or permitted hereunder, such notice or other communication shall be in writing and shall be delivered by telecopier or facsimile transmission, overnight courier or by hand delivery or sent by U.S. registered or certified mail, return receipt requested, postage prepaid, to the addresses set out below or at such other addresses as are specified by written notice delivered in accordance herewith (any notice given by telecopier or facsimile transmission shall be followed by overnight courier, hand-delivery or U.S. Registered or Certified Mail):

SELLER: C. V. Baker  
Vice President - Real Estate  
Norfolk Southern Corporation  
1200 Peachtree Street  
Atlanta, Georgia 30309-3592  
Facsimile: (404) 962-5874

With copy to: Jerry L. Causey  
General Attorney - Real Estate  
1200 Peachtree Street  
Atlanta, Georgia 30309-3592  
Facsimile: (404) 962-5874

PURCHASER: Wayne H. Mason  
Madison Ventures, Ltd.  
1505 Lakes Parkway, Suite 130  
Lawrenceville, Georgia 30043  
Facsimile: (770) 979-3748

Thomas J. Andersen, Esq.  
Andersen, Tate, Mahaffey & McGarity  
1505 Lakes Parkway, Suite 100  
Lawrenceville, Georgia 30043  
Facsimile: (770) 822-9680

## SECTION 16. SELLER'S RESERVATIONS.

**16.1 Fiber Optics Easement.** At Closing, Seller shall retain a ten (10) foot wide easement, being five (5) feet wide on each side of all existing parallel fiber optic occupations on the Property.

**16.2 Railroad Easement.** At closing, Seller shall retain the railroad tracks located on the Property and a thirty (30) foot wide easement, being fifteen (15) feet wide on each side of the

centerline of the railroad tracks located on the Property for all railroad related purposes. Following closing and at the direction and sole option of Purchaser, Seller shall, at no cost to Purchaser, either (a) transfer all rights to provide passenger rail service to Purchaser or Purchaser's designee or (b) file and diligently pursue all appropriate petitions and other documents for approval or exemption to abandon or discontinue service over the railroad line on the Property with the Surface Transportation Board and any other agency having jurisdiction; provided, however, no railroad tracks shall be removed from the Property until authorized by the appropriate governmental agency.

## **SECTION 17. MISCELLANEOUS.**

**17.1 Rules of Construction.** This Agreement shall be construed and interpreted under the laws of the State of Georgia. The titles of sections and subsections herein have been inserted as a matter of convenience of reference only and shall not control or affect the meaning or construction of any of the terms or provisions herein. All references herein to the singular shall include the plural, and vice versa.

**17.2 Remedies Cumulative.** Except as otherwise expressly provided herein, all rights, powers, and privileges conferred hereunder upon the parties hereto shall be cumulative and in addition to all other rights, powers, and remedies hereunder and those available at law or in equity. All such rights, powers, and remedies may be exercised separately or at once, and no exercise of any right, power, or remedy shall be construed to be an election of remedies or shall preclude the future exercise of any or all other rights, powers, and remedies granted hereunder or available at law or in equity, except as expressly provided herein. In the event any claim is asserted by or against any of the parties hereto with respect to this Agreement or the subject matter hereof, the party or parties prevailing in any litigation resulting from such claim shall be entitled to receive reasonable attorneys' fees incurred by such prevailing party or parties in such litigation from the party or parties who fail so to prevail.

**17.3 No Waiver.** Neither the failure of either party to exercise any power given such party hereunder or to insist upon strict compliance by the other party with its obligations hereunder, nor any custom or practice of the parties at variance with the terms hereof shall constitute a waiver of either party's right to demand exact compliance with the terms hereof.

**17.4 Entire Agreement.** This Agreement contains the entire agreement of the parties hereto with respect to the Property, and the subject matter hereof, and no representations, inducements, promises, or agreements, oral or otherwise, between the parties not embodied herein or incorporated herein by reference shall be of any force or effect.

**17.5 Binding Effect.** This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective personal representatives, successors and assigns.

**17.6 Amendments.** No amendment to this Agreement shall be binding on any of the parties hereto unless such amendment is in writing and is executed by the party against whom enforcement of such amendment is sought.

**17.7 Time of Essence.** Time is of the essence of this Agreement.

**17.8 Possession.** Possession of the Property shall be granted at Closing, subject to the Permitted Title Exceptions.

**17.9 Survival.** This Agreement shall survive Closing.

**17.10 Governing Law.** This Agreement shall be governed by the laws of the State of Georgia.

**17.11 Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all such counterparts together shall constitute one and the same instrument, except that in the event that any date or deadline set forth in this Agreement occurs on a Saturday, Sunday or legal holiday, such date or deadline shall automatically be extended to the next date which is not a Saturday, Sunday or legal holiday; provided, however, that the Closing must occur no later than December 31, 2004.

IN WITNESS WHEREOF, each of the parties hereto have duly signed and sealed this Agreement, effective as of the day and year first above written.

**NORFOLK SOUTHERN RAILWAY  
COMPANY**

By

*C.V. Baker*  
\_\_\_\_\_  
Real Estate Manager

**MADISON VENTURES, LTD**

By Wayne Mason

*Wayne M. Mason*  
\_\_\_\_\_  
Title:

JLC:swm/1070847 SaleK\$2 Redline  
8-25-04/Rev. 9-28-04

IM#246645v1

OWNER'S AFFIDAVIT

STATE OF GEORGIA  
COUNTY OF FULTON

Personally came before me, the undersigned attesting officer, \_\_\_\_\_, who after first being duly sworn, did depose and aver the following:

Affiant is the General Attorney - Real Estate of Norfolk Southern Railway Company ("Owner"), the owner of land described in Exhibit "A", which is attached hereto and made a part hereof (property), which is being sold to Madison Ventures, LTD ("Buyer").

Affiant avers that to his knowledge, Owner is in open, notorious, continuous, adverse and peaceable possession of said property and knows of no one claiming any adverse interest in said property, except as set out below.

Affiant further avers that to his knowledge there are no suits, judgments, bankruptcies executions pending against Owner in any court whatever that could in any way affect the title to said property, or constitute a lien thereon, and that Owner is not surety on any bond that through default of the principal therein a lien would be created superior to any conveyance executed by Owner, nor are there any loan deeds, trust deeds, mortgages or liens of any nature whatsoever unsatisfied against said property, except as set forth of record.

Affiant further avers that to his knowledge there are no unpaid bills of any nature, either for services of any architect, engineer, or surveyor, or for labor or materials, for any recent improvements that may have been placed on said property, either in the construction or repair of any of the improvements thereon.

Affiant further avers that to his knowledge there are no liens for past due taxes, paving, sidewalk curbing, sewer or any other street improvements of any kind against said property.

Affiant further avers that neither he nor Owner are foreign persons as defined by Internal Revenue Code Section No. 1445 (PL 98-369, Sec. 129 at 98 Stat 655) dated July 18, 1984.

Affiant further avers that this Affidavit is made for the benefit of Buyer.

Further the Affiant saith not.

Sworn to and subscribed  
before me, this \_\_\_\_\_ day  
\_\_\_\_\_, 20\_\_\_\_.

NORFOLK SOUTHERN RAILWAY COMPANY  
By

\_\_\_\_\_  
General Attorney - Real Estate

\_\_\_\_\_  
Notary Public  
My commission expires: \_\_\_\_\_

Exhibit B

AMENDMENT TO AGREEMENT FOR PURCHASE AND SALE

THIS AMENDMENT IS MADE AND ENTERED THIS 21 day of December, 2004, between NORFOLK SOUTHERN RAILWAY COMPANY ("Seller") and MADISON VENTURES, LTD. ("Purchaser").

RECITALS

WHEREAS, Seller and Purchaser are parties to that certain Agreement for Purchase and Sale dated as of October 5, 2004, which by this reference is incorporated herein and is hereinafter referred to as the "Agreement"; and

WHEREAS, the parties desire to amend the Agreement.

NOW, THEREFORE, in consideration of the agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree that effective December 8, 2004, the Agreement is hereby amended as follows:

1. Section 4.1.1 of the Agreement is hereby deleted and is replaced with the following:

4.1.1 The purchase price for the Property shall be [REDACTED]

2. Section 5.2 of the Agreement is hereby deleted and is replaced with the following:

**5.2 Title Examination.** The Purchaser shall have until December 23, 2004, to examine title to the Property and to furnish Seller with a written statement of objections affecting the marketability and insurability of said title. Seller shall have five (5) days after receipt of such objections to satisfy them. If Seller does not satisfy such objections within the prescribed time, then, at Purchaser's option evidenced by written notice to Seller, Purchaser may either (i) terminate this Agreement or (ii) waive any or all objections not cured by Seller and proceed to close hereunder without diminution in the Purchase Price. In the event this Agreement is terminated, Purchaser shall be entitled to a refund of the Earnest Money and neither party shall be liable to the other for damages on account of the termination. Upon Purchaser's failure to terminate this Agreement under this Section 5.2, it shall be deemed that Purchaser has accepted Seller's title to the Property as Insurable as of that date.

3. Section 6.3 of the Agreement is hereby deleted and is replaced with the following:

**6.3 Termination.** Purchaser may terminate this Agreement at any time prior to December 23, 2004, and if Purchaser elects to terminate this Agreement Escrow Agent shall refund to Purchaser the Earnest Money, less the sum of [REDACTED] which shall be paid to Seller as Seller's consideration for entering into this Agreement and neither party hereto shall have any further rights or obligations hereunder except for those that by the express terms hereof survive any termination of this Agreement. Upon termination of this Agreement by

Purchaser, Purchaser agrees to deliver to Seller any Engineering Reports and Feasibility Studies obtained by Purchaser.

4. The following Section 11.1.6 is hereby added to the Agreement:

**11.1.6** (a) Prior to Closing, Purchaser may make application to the Environmental Protection Division of the Georgia Department of Natural Resources for inclusion of any portion of the Property into the "brownfields program" pursuant to the Georgia Hazardous Site Reuse and Redevelopment Act (O.C.G.A. 12-8-200 et seq.). If Purchaser makes application for inclusion of any portion of the Property into the Georgia brownfields program, all of Purchaser's contingencies and conditions set forth in this Agreement shall be deemed to be satisfied and Purchaser shall be required to purchase the Property pursuant to the terms of this Agreement. If Purchaser makes application for inclusion of any portion of the Property into the Georgia brownfields program and fails to purchase the Property as set forth herein, then Seller shall be entitled to retain all of the Earnest Money in accordance with Section 11.2.

(b) (i) Purchaser agrees to purchase the Property "as is" and acknowledges that Seller has not made any express or implied representation or warranty with respect to the condition or suitability of the Property, including, but not limited to, the condition of the soil, the presence of hazardous materials, substances, wastes or other environmentally regulated substances, or other contaminants in the soil or improvements -- whether known or unknown (referred to herein as "contamination of the Property") and other physical characteristics. Purchaser shall perform at its own expense and rely solely upon its own independent investigation concerning the physical condition of the Property (including, but not limited to, an environmental assessment) and compliance of the Property with any applicable law and regulations.

(ii) Following Purchaser's purchase of the Property, Purchaser expressly renounces and waives any claim or cause of action it may have against Seller under any existing or future theory of law (federal, state or local, or by common law) for any cleanup, response or remedial action costs incurred (whether voluntarily or otherwise) by Purchaser which arises directly or indirectly out of any contamination of the Property, including, but not limited to, costs incurred under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act.

5. Section 16 of the Agreement is hereby deleted and replaced with the following:

#### **SECTION 16. SELLER'S RESERVATIONS.**

**16.1 Fiber Optics Easement.** At Closing, Seller shall retain a ten (10) foot wide easement, being five (5) feet wide on each side of all existing fiber optic occupations on the Property together with all rents received by Seller for the use of such reserved easement by third parties. Seller shall cooperate with Purchaser if Purchaser determines that any portion of fiber optic cables or conduits require relocation.

**16.2 Railroad Easement.** (a) At Closing, Seller shall retain all railroad tracks and railroad facilities, including but not limited to, the roadbed, ballast, culverts, bridges, tunnels,

communications and signal facilities, fixtures and all other railroad appurtenances, located on the Property and a thirty (30) foot wide easement, being fifteen (15) feet wide on each side of the center line of the main line railroad tracks located on the Property and twenty-three (23) feet above the top of rail for all freight and passenger related railroad purposes. No railroad tracks or other railroad facilities shall be removed from the Property without the written approval of Seller and only if authorized by any and all appropriate governmental agencies. Wherever possible, the reserved railroad easement and/or fiber optic easement shall be shifted so that the fiber optic easement will encumber no more property than the railroad easement.

(b) Purchaser, for itself and its successors and assigns, agrees that it will not disturb any portion of the reserved railroad easement without the prior written consent of Seller. No grade crossings shall be constructed by Purchaser, or its successors, assigns, permittees, lessees or licensees without the consent of Seller and the execution of Seller's standard grade crossing agreement. No pipelines or wirelines shall be constructed under, over or upon the reserved railroad easement without the prior written consent of Seller.

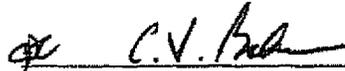
(c) Purchaser acknowledges that Seller currently uses the portion of the Property north of the Clear Creek bridge located approximately 250 feet south of Milepost 633 in its freight operations. Following Closing and at the request and/or consent of Purchaser, Seller shall negotiate the joint use of the reserved railroad easement lying south of the Clear Creek bridge as described above with an entity qualified to operate rail passenger service. Seller shall not be entitled to any compensation for the transfer of said passenger service rights. Seller shall not negotiate the use of the reserved railroad easement with any party without the prior consent of Purchaser. Following Closing and at the request of Purchaser, Seller shall, at no cost to Seller, file and diligently pursue all appropriate petitions and other documents for approval or exemption to abandon or discontinue service over that portion of the railroad line lying south of the Clear Creek bridge as described above with the Surface Transportation Board and any other agency having jurisdiction. Nothing contained in this Agreement shall require Seller to abandon or permit the use by a third party of the reserved railroad easement lying north of the Clear Creek bridge as described above.

6. This Amendment may be executed in several counterparts, each of which shall be deemed an original, and all of such counterparts together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have hereunto set their hands and affixed their seals, the day and year first above written. This Amendment may be executed via facsimile which each party shall deem to be an original.

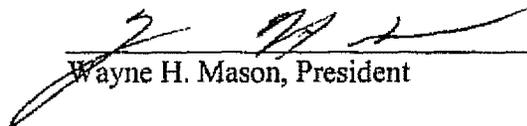
**NORFOLK SOUTHERN RAILWAY COMPANY**

By

  
\_\_\_\_\_  
Real Estate Manager

**MADISON VENTURES, LTD.**

By

  
\_\_\_\_\_  
Wayne H. Mason, President

JLC:swm/1070847 Amend  
12-08-04

copy

**SUPPLEMENTAL AGREEMENT**

**THIS SUPPLEMENTAL AGREEMENT**, made and entered into as of this 22 day of June, 2007, by and between **NORFOLK SOUTHERN RAILWAY COMPANY**, a Virginia corporation, successor to the Georgia Air Line Railway Company, the Atlanta and Richmond Air Line Railway Company, Richmond and Danville Railroad Company, the Atlanta and Charlotte Air Line Railway Company and Southern Railway Company (“Seller”) and **ANSLEY NORTH BELTLINE, LLC**, a Georgia limited liability company, **ANSLEY SOUTH BELTLINE, LLC**, a Georgia limited liability company, **PIEDMONT BELTLINE, LLC**, a Georgia limited liability company, **NORTH AVENUE BELTLINE, LLC**, a Georgia limited liability company, **CORRIDOR BELTLINE, LLC**, a Georgia limited liability company, and **CORRIDOR EDGEWOOD, LLC**, a Georgia limited liability company (“Purchasers”).

**RECITALS:**

By Deed dated December 30, 2004 (the “Deed”), and recorded in the Office of the Clerk of Superior Court of Fulton County, Georgia, in Deed Book 39115, page 430, Seller sold and conveyed to Purchasers seven parcels of property identified in Exhibit A to the Deed.

Seller reserved unto itself, among other things, all railroad tracks and railroad facilities on the property and an easement for all passenger and freight railroad purposes as described in Exhibit B to the Deed (“Easement Properties”).

Exhibit B to the Deed provides, in relevant part, that Seller, at the request of the Purchasers, shall, at no cost to Seller, seek approval or exemption from the Surface Transportation Board (“STB”) to abandon or discontinue railroad service over the reserved easement areas, except the easement area over Parcel 1 (“Easement Corridor”).

The parties now desire to supplement the abandonment provisions set forth in Exhibit B to the Deed as set forth in this Supplemental Agreement.

**NOW, THEREFORE,** it is agreed by and between the parties hereto as follows:

**SECTION 1. ABANDONMENT OR DISCONTINUANCE OF RAIL OPERATIONS**

- 1.1 The parties acknowledge that no local or overhead traffic has moved over the Easement Corridor for at least two years prior to the date of this Supplemental Agreement. If no rail freight operations occur in the future, Seller may, unless requested otherwise by Purchasers, utilize the procedures of 49 C.F.R. Part 1152, Subpart F to obtain an exemption to abandon or discontinue railroad service on the Easement Corridor.
- 1.2 Purchasers may elect to have Seller seek an exemption from the offer of financial assistance ("OFA") provisions set forth in 49 U.S.C. § 10904 at the time Seller seeks authority to abandon the Easement Corridor. In that event, Seller shall file a petition pursuant to 49 C.F.R. Part 1152, Subpart G seeking an exemption from the provisions of 49 U.S.C. §§ 10903 and 10904.
- 1.3 In the event a third party submits to Seller either a formal expression of intent to file an OFA or an OFA after the commencement of any abandonment or discontinuance proceeding involving all or part of the Easement Corridor, Seller shall promptly notify Purchasers of such submission. In the event Purchasers or any financially responsible affiliate or designee of Purchasers (collectively "OFA Designee") shall late-file an OFA with the STB, Seller shall support that OFA and request that the STB accept the tendered OFA for filing.
- 1.4 In the event Seller receives more than one OFA from offerors found to be financially responsible, Seller shall select and transact business with the OFA Designee or any other offeror designated by Purchasers. In the event the OFA Designee shall satisfy the requirements of

applicable laws and regulations to acquire all of Seller's rights and interests in the Easement Corridor for continued rail service, Seller shall convey such rights and interests to the OFA Designee for an amount equal to the net liquidation value ("NLV") of the track, track materials and railroad facilities located on the Easement Corridor (the "Track Materials"). In the event the parties are unable to agree on the NLV of the Track Materials, the parties shall select a qualified appraiser to calculate the NLV of the Track Materials and such appraisal shall be binding on the parties ("Appraised Value"). In no event shall Purchasers or their OFA Designee be obligated to consummate any transaction to acquire Seller's rail line operations pursuant to the OFA process.

1.5 Purchasers acknowledge that Seller may be required by Federal law to convey all or part of Seller's rights and interests in the Easement Corridor to a third party for continued rail service. In the event Seller is required to convey its Track Materials and real property interests to a third party, not affiliated with Purchasers, Seller shall assume the burden of defending the value of the Track Materials and the real property interests in the course of any OFA proceeding. Seller agrees to allow Purchasers' consultants and attorneys to participate with Seller in any such OFA proceeding. If requested by Purchasers, Seller shall seek to have its abandonment or discontinuance filing withdrawn from the STB. In the event the STB does not permit the withdrawal of the filing and Seller is required to sell the Track Materials and its real property interest in the Easement Corridor to any third party, not affiliated with Purchasers, Seller will be entitled to the proceeds received for the Track Materials and Seller will transfer to Purchasers the proceeds received for Seller's real property interests in the Easement Corridor.

1.6 In the event Seller commences an abandonment proceeding and Purchasers or a designee of Purchasers files a request with the STB for issuance of a Notice of Interim Trail Use ("NITU") to negotiate a rail banking arrangement pursuant to the provisions of the National

Trails Systems Act, 16 U.S.C. § 1247(d), Seller agrees to consent to the issuance of a NITU. In the event a NITU is not precluded by the OFA process, Seller agrees to transfer its remaining real property interests in the Easement Corridor, including the right to reactivate rail service, to Purchasers or Purchasers' designee for the consideration of ten dollars (\$10.00) pursuant to standard terms and conditions for rail banking under the National Trails Systems Act and a conforming quitclaim deed. Purchasers or Purchasers' designee will have the burden of obtaining approval from the STB for the transfer from Seller to Purchasers or Purchasers' designee of the right to reactive rail service on the Easement Corridor. In no event shall Seller agree to the issuance of a NITU on behalf of a third party without the written consent of Purchasers.

## **SECTION 2: RIGHT OF FIRST REFUSAL**

In the event a third party seeks to acquire all or portions of the Easement Properties from Seller, Seller shall provide Purchasers written notice of such offer ("Seller Notice"). Within forty-five (45) days of the Seller Notice, Purchasers shall have the right of first refusal to acquire the Easement Properties. If, within forty-five (45) days of the Seller Notice, Purchasers elect to acquire the Easement Properties, Seller shall sell to Purchasers the Easement Properties for an amount equal to the NLV of the Track Materials or, if the parties are unable to agree on NLV, the Appraised Value. Closing shall take place within thirty (30) days of date Purchasers elect to acquire the Easement Properties or the date of the Appraisal Value, whichever is later.

## **SECTION 3: FEEDER LINE APPLICATION**

In the event a third party files with the STB an application under 49 U.S.C. § 10907 seeking to acquire the Easement Properties and Purchasers or any financially responsible affiliate or designee of Purchasers (collectively "Feeder Line Designee") files a competing application,

Seller shall select and transact business with the Feeder Line Designee. In the event the Feeder Line Designee shall satisfy the requirements of applicable laws and regulations to acquire all of Seller's rights and interests in the Easement Properties for continued rail service, Seller shall convey such rights and interests to the Feeder Line Designee for an amount equal to the NLV of the Track Materials or, if the parties are unable to agree on NLV, the Appraised Value. In no event shall Purchasers or their Feeder Line Designee be obligated to consummate any transaction to acquire the Easement Properties pursuant to Section 10907.

**SECTION 4. EFFECTIVE DATE**

This Supplemental Agreement shall be effective as of the day and year first above written.

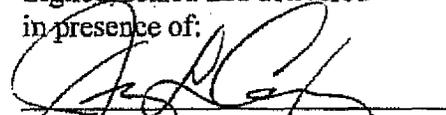
**SECTION 5. AGREEMENT SUPPLEMENTAL**

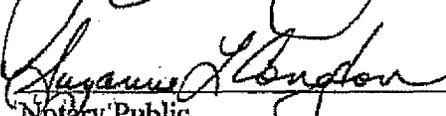
This Agreement is supplemental to the Deed, as herein amended, and nothing herein contained shall be construed as amending or modifying the Deed except as herein specifically provided. This Supplemental Agreement shall not be recorded.

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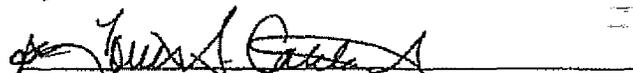
IN WITNESS WHEREOF, each of the parties hereto have duly signed and sealed this Agreement.

Signed, sealed and delivered in presence of:

  
\_\_\_\_\_  
Witness

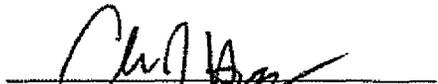
  
\_\_\_\_\_  
Notary Public  
Suzanne L. Congdo.  
Notary Public, Cobb County, State of G.

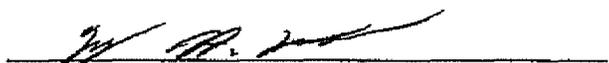
NORFOLK SOUTHERN RAILWAY COMPANY  
By

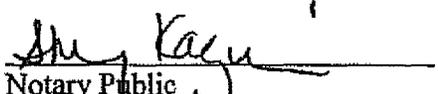
  
\_\_\_\_\_  
Real Estate Manager

My Commission Expires April 25  
Signed, sealed and delivered in presence of:  
By

ANSLEY NORTH BELTLINE, LLC,  
ANSLEY SOUTH BELTLINE, LLC,  
PIEDMONT BELTLINE, LLC,  
NORTH AVENUE BELTLINE, LLC,  
CORRIDOR BELTLINE, LLC,  
CORRIDOR EDGEWOOD, LLC  
By

  
\_\_\_\_\_  
Witness

  
\_\_\_\_\_  
Wayne Mason, Member

  
\_\_\_\_\_  
Notary Public  
Notary Public, Gwinnett County, Georgia  
My Commission Expires March 6 2011

## Exhibit D

### Excerpts from Georgia DOT web site and Recent Georgia Newspaper Articles On Commuter Rail Plans and Transportation Budget Constraints

As noted on the GA DOT web site,<sup>1</sup> in 1993, GA DOT contracted with a team of consultants led by LS Transit Systems, Inc., to conduct a commuter rail feasibility study. The study concluded that establishment of the commuter rail lines was feasible if the commuter service used mostly existing freight railroad rights-of-way with some upgrading and additional track. The GA DOT web site still states the following with respect to the commuter rail plan resulting from this study:

Phase I envisions starting the Athens, Senoia, and Bremen lines first - by year 2000 - providing a geographic mix, diversity of host freight railroads and a relatively low initial capital investment. These three lines would serve a downtown transfer station and 20 stations in 12 counties, carrying more than 6,300 riders daily (2,600 daily one-way trips). Capital cost would be \$243 million, and annual operating assistance would be \$9 million.

The GA DOT web site further states concerning this plan:

In Phase 2, the lines to Madison, Gainesville, and Canton would be added, with the first trains running in year 2010. These lines would carry more than 7,850 passengers a day (15,700 daily one-way trips). Capital cost would be \$265 million, and the additional annual operating assistance needed would be \$8 million.

Projected capital costs for the northern Georgia commuter rail project were \$543,750,000 in 1994 dollars.

*Railway Age* reported in October 2002:

But the battle won't be easily won, if the program's history is any indication. There are issues of jurisdiction, timing, and competition for state and federal

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<sup>1</sup><http://wwwb.dot.state.ga.us/dot/plan-prog/intermodal/Rail/Reports/Rpt/commuterrail.shtml>

money in a down economy. In 1995, when first formally proposed, the seven-line, 394.1-mile Georgia commuter rail system was to have been completed by 2010. As it stands today, only the first route, the 107-mile Macon-Atlanta line, is expected to be finished before that (in 2006). The second, the 68.3-mile Athens line, could be in operation by 2011. The five remaining lines (Madison, 69.6 miles; Gainesville, 53.4 miles; Canton, 43.7 miles; Bremen, 52.1 miles, and Senoia, 37.7 miles) would be completed over the next decade....

Despite the expectation that the first route would be finished by 2006, no progress has been made at all on construction and establishment of the proposed commuter rail system since that article was written.

After Governor Perdue was elected to succeed Governor Barnes a month after the *Railway Age* article was written, negotiations between Norfolk Southern and Georgia governmental entities with respect to the use of NSR freight rail lines for the Georgia commuter rail projects ceased because the new administration had other spending priorities. A report in the April 11, 2003 edition of the *Macon Telegraph*, posted on its web site on April 10, 2003, stated:

Georgia Gov. Sonny Perdue told the chairman of Norfolk Southern Corp. on Friday that Georgia is too cash-strapped to buy the rail line between Atlanta and Macon. The decision deals a blow to plans for establishing a passenger-rail link to Middle Georgia from the state capital.

According to a story in the August 31, 2008 edition of the *Atlanta Journal-Constitution*, in December 2007, R.L. Banks & Associates delivered a study updating the now seven commuter rail line plans for the TPB [Transit Planning Board], Metro Atlanta Chamber of Commerce, and Georgia Department of Transportation showing that "a substantial investment of public dollars will be necessary - from \$100 million to \$500 million per line in start-up costs" to get the proposed commuter rail lines into operation." To be more specific, the R. L. Banks study showed proposed capital costs of

\$1.532 billion and operation and maintenance costs of \$87.3 million for the establishment of the seven proposed Atlanta area commuter rail lines.

The same August 31, 2008 *Atlanta Journal-Constitution* article described potential obstacles to implementation of the commuter rail plan as follows:

#### POTENTIAL OBSTACLES

- Many area freight lines are at capacity; trackage rights and other issues must be negotiated with freight railroads.
- Extensive track and other upgrades are necessary to increase capacity and train speeds for passenger service.
- Cost objections are likely; the seven proposed lines could require \$1.5 billion in total start-up costs and \$89 million in total annual operating expenses to benefit about 20,000 commuters.
- Community opposition is possible. Earlier this decade, some DeKalb County residents objected to a plan for commuter trains to Emory University.
- Backing for transit has been spotty: The state is moving to sell 6 acres at Atlantic Station that could have been a commuter rail stop; a July 15 straw poll found Gwinnett voters narrowly opposed to a MARTA extension; and Gov. Sonny Perdue only recently endorsed the idea of a pilot commuter rail line, to Griffin.

As noted in the above article, Governor Perdue recently endorsed a pilot commuter line south to Griffin, Georgia from Five Points in downtown Atlanta, but this line would not include the right-of-way of the line that is the subject of this proceeding.

The State currently faces severe revenue shortfalls and budgets for existing transportation systems must be cut. The *Atlanta Journal-Constitution* reported on Monday, January 5, 2009 that: "Just about every top Georgia transportation official is scheduled to be at a meeting Wednesday to discuss the state's transportation funding crisis." The paper further stated:

The immediate action on everyone's plate is budget and project cuts. Tad Leithead, head of the Transportation and Air Quality Committee of the Atlanta Regional Commission, said the region will probably have to cut three-quarters of the money from the current year's project list.

In the short term, Georgia officials hope for federal stimulus dollars, and for the state Legislature to approve a measure allowing referendums to raise transportation funding. Longer term, transportation experts recommend a shift from the gas tax as a form of user fee, perhaps to an odometer tax.

Slated to attend Wednesday's meeting are the boards of the DOT, the Georgia Regional Transportation Authority, the State Road and Tollway Authority, MARTA, the Atlanta Regional Commission, and a board set up to plan for mass transit in the Atlanta region.

In a second article in the *Atlanta Journal-Constitution* on Monday, January 5, 2009, the paper reported on MARTA's [Metropolitan Atlanta Rapid Transit Authority] rising deficit problem. The paper stated: "The agency now expects a \$57 million operating deficit this year, despite cutting \$11 million in operational spending last month, said Davis Allen, MARTA's assistant general manager of finance. Over the next 10 years, the agency's financial picture appears to be \$588 million worse than thought last fall, officials said." As the *Atlanta Journal-Constitution* earlier reported on December 16, 2008, MARTA appealed to the Georgia General Assembly for help with its fiscal problems. The paper stated in that article: "MARTA officials revealed Monday they will have to make "draconian" cuts to services if they can't fill a \$60 million funding gap."

These recent reports in the *Atlanta Journal-Constitution* show that GA DOT's budget problems will affect its ability to finance new projects. In the October 17, 2008 edition of *Macon.com*, the following is reported:

The Georgia Department of Transportation has everything it needs to start a commuter rail line from Atlanta to Griffin, except for an agreement to actually use existing rail lines, \$107 million in construction funding, federal sign-offs for

the plan, enough money to fund annual operations, land for the train stations or actual train cars to carry passengers.

To put it another way, a 2011 start date for the service is "very ambitious, but it is possible," the department's chief engineer, Gerald Ross, said during Thursday's meeting of the DOT's decision making board, which met in Perry as part of its routine practice of meeting outside of Atlanta.

Still, commuter rail remains a high priority for DOT Commissioner Gena Evans, and the line from Atlanta to Griffin has the support of Gov. Sonny Perdue. Macon Mayor Robert Reichert has said he hopes that means the line will eventually extend to Macon, as was planned years ago. To make any 2011-~~1~~ timeline, the DOT needs to figure out how to fund operations by April, Ross told board members Thursday.

That's means finding a replenishable supply of potentially millions of dollars to cover the difference in what it will cost to run the passenger trains and how much riders are likely to pay. No one is saying the line would be self-sufficient, and state leaders have tried to get communities along the lines to help cover costs. So far, no deals are in place, and former state Rep. Larry Walker, who represents much of Middle Georgia on the State Transportation Board, said the Legislature is unlikely to pick up the whole tab.

There is quite a bit of money in place for construction, though. The federal government has pledged about \$84 million in taxpayer funding for the line. But that leaves the project at least \$107 million short in construction costs alone, Ross said. And a new, more detailed, cost estimate is being done.

"I've never seen one of our estimates go down," Commissioner Evans said Thursday."

The federal funds referenced in the above article have remained available and unspent for over a decade. All indications are that the significant additional funds required will not be available, especially for expenditure on a part of the project that is not included in the first part of the project supposed to be undertaken. The unlikelihood that State funds would be committed to the commuter rail projects is confirmed by yet another story in the January 5, 2009 edition of the *Atlanta Journal-Constitution*, which reads in part:

With the state facing a \$2 billion to \$2.5 billion shortfall this fiscal year and possibly worse financial news next year, lawmakers are searching for ways to fill gaps to avoid slashing education, public safety and health care programs in coming months. They are also looking for money for new programs.

But lawmakers hoping to raise extra revenue when the 2009 session starts Monday will run headlong into a conservative statehouse political climate that could doom their efforts. That's especially true at a time in which some of the key Capitol players are thinking of running for governor, lieutenant governor or other higher offices in 2010.

"I'm a no-new-taxes kind of guy," Lt. Gov. Casey Cagle, the Senate's president and a likely candidate for governor in 2010, told reporters Monday. "I would be very reluctant to identify revenue enhancements to address the significant shortfall. The time is not for raising taxes, the time is for right-sizing state government."

House Speaker Glenn Richardson (R-Hiram), has told House Republicans much the same thing.

The excerpts from newspaper articles included in this exhibit were downloaded from the internet on January 6, 2009. In the interest of reducing the number of pages in the exhibit and focusing only on the relevant excerpts from the articles, we have included only these excerpts and descriptive or connecting language, not the entire articles with all of the accompanying ads and other language that would appear on the pages for each article.