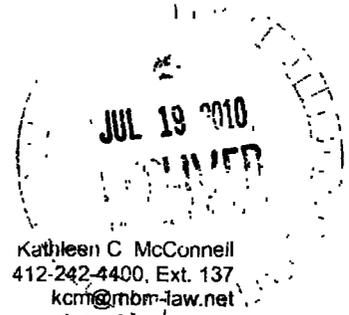




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Chief, Section of Administration
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: Allegheny Valley Railroad Company – Petition for Declaratory Order –
William Fiore, Finance Docket No. 35388

SOUTH HILL
7500 BROOKLINE DRIVE
WENTZEL, PA 15090
TEL: 724-935-6990

Dear Sir/Madam:

This law firm represents Mr. William Fiore, who has a direct interest in the above-referenced Petition.

As the parties have requested and agreed to an expedited handling of the Petition, please accept for filing the enclosed original and ten copies of Mr. William Fiore's Reply to Allegheny Valley Railroad Company's Petition for Declaratory Order.

Please do not hesitate to contact the undersigned with any questions regarding the enclosed.

Respectfully submitted,

Kathleen C. McConnell

Enclosures

cc w/encl.: Counsel for all parties of record
Mr. William Fiore

RECEIVED
Office of Proceedings

JUL 19 2010

Part of
Petition 35388

197547.11543.2



BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 35388

**ALLEGHENY VALLEY RAILROAD COMPANY-
PETITION FOR DECLARATORY ORDER –
WILLIAM FIORE**

**REPLY OF WILLIAM FIORE
TO
PETITION FOR DECLARATORY ORDER FILED BY
ALLEGHENY VALLEY RAILROAD COMPANY**

ENTERED
Office of Proceedings
JUL 16 2010
Part of
Public Record

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Attorneys for William Fiore

Date: July 14, 2010

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 35388

**ALLEGHENY VALLEY RAILROAD COMPANY-
PETITION FOR DECLARATORY ORDER –
WILLIAM FIORE**

Petitioner, William Fiore (“Fiore”), by and through counsel, replies to the Petition for a Declaratory Order filed by Allegheny Valley Railroad Company (“AVRR”) as follows:

Fiore respectfully requests that this Board disregard and strike all of the AVRR Petition apart from the request for an advisory opinion, pursuant to the Consent Order signed by the Honorable Judge Ronald W. Folino, dated June 21, 2010, entered in the pending state court action captioned William Fiore v. Allegheny Valley Railroad Co., et al, GD-10-001721, Court of Common Pleas of Allegheny County, Pennsylvania, a copy of which consent order is attached as Exhibit C to the AVRR Petition.

AVRR sought to dismiss Mr. Fiore’s state court action by filing Preliminary Objections in March, 2010 (attached as Exhibit B to the AVRR Petition) alleging, among other things, that the preemptive jurisdiction of the Surface Transportation Board under 49 USC § 10501(b) prevents the state court from hearing Mr. Fiore’s Complaint. Mr. Fiore filed a Brief and Response arguing against federal preemption of the state court’s

jurisdiction in this matter, copies of which are attached hereto as Exhibits 1 and 2. At the June 15, 2010 hearing on the matter, the parties consented to AVRR's request that the Court seek an advisory opinion from this Board on the jurisdictional question only.

The Fiore Complaint alleges that Mr. Fiore is in possession of his lot, and that AVRR operates within the railroad right of way, as both are shown on the deeds and subdivision plans of public record, and that both have done so, each without obstructing or interfering with the other, for the past 10 years. Fiore and AVRR have stipulated by consent in State Court to maintain the *status quo* while litigation of the state court action proceeds (a copy of the stipulation is attached hereto as Exhibit 3). AVRR's arguments regarding obstruction or interference with railroad operations all concern the prospective and speculative future use of its right of way for a private passenger rail venture (see Peterson Aff't annexed to Exhibit B of the AVRR Petition, at ¶ 4).

Fiore does not dispute or challenge AVRR's current or future use within AVRR's lawful property lines, whether for freight or passenger rail service. However, if a taking of Mr. Fiore's property is necessary for this proposed conversion to passenger rail use, or has occurred, then the Eminent Domain Code of the Commonwealth of Pennsylvania should apply and Mr. Fiore should be entitled to due process and appropriate damages.

The Fiore Complaint seeks a determination under Pennsylvania law as to the width and location of the lawful property rights of Fiore and AVRR, which determination will be based on factual findings (public deed records, evidence and testimony) and legal findings under state law. The Complaint further seeks a finding of de-facto taking or inverse condemnation under the Constitution and Eminent Domain Code of the Commonwealth of Pennsylvania, in the event AVRR has taken or must take property that

lawfully belongs to Mr. Fiore. This Board recently held (in a matter involving the same 1995 deed from Conrail to AVRR that is at issue in the Fiore Complaint) that:

“Lastly, the parties dispute the width of the easement. As noted in oral argument, this matter is better settled by a Pennsylvania state court. This is a question of property law and it should be handled by a tribunal that frequently addresses such matters.”

-Decision served June 15, 2010, Allegheny Valley Railroad - Petition for Declaratory Order, Finance Docket No. 35239, p. 9.

The Fiore Complaint involves only Pennsylvania property law claims.

A careful reading of the AVRR Petition shows that all of AVRR’s arguments invoking the preemptive jurisdiction of this Board *allege and presume as fact* that AVRR holds lawful title to the disputed property area and property lines, even though it is not currently in occupancy or use of the area. Yet this is the very dispute that Mr. Fiore in good faith has asked the state court to resolve under Pennsylvania law. Until the lawful property rights of the parties are determined, AVRR’s legal arguments based on a presumption of ownership of the disputed area should be disregarded.

Fiore respectfully requests that this Board disregard as being inaccurate the erroneous and misstated summary of the Complaint set forth in the AVRR Petition and in Exhibit B attached thereto. The Complaint is attached as Exhibit A to the AVRR Petition and speaks for itself, and clearly alleges only state property law claims against AVRR. There are no claims for ejectment, adverse possession, or claims regarding abandonment of right of way in the Fiore Complaint. If a question requiring the expertise of this Board should arise, and Fiore does not anticipate that it will, Fiore respectfully requests this Board remain available for referral of such a question by the state court.

Fiore respectfully requests that this Board also disregard AVRR's erroneous emphasis on, and references to, the Pennsylvania common law theory of consentable lines, which is *not* alleged as a cause of action in the Fiore Complaint, but rather is a minor element of the claim to quiet title (see Exhibit A to the AVRR Petition at ¶38). This state law theory can be applied, for example, toward resolution of discrepancies, mistakes or vagaries in public deed and survey records, if proved. In this case it appears from the filings to date that AVRR's claims to Mr. Fiore's property are based predominately on AVRR's interpretation¹ of a metes-and-bounds line call from a 1956 deed from a now-defunct railroad to a now-defunct steel mill, which deed also references a survey not yet in evidence, and which deed has contradictory calls within the same description (see Exhibit 1 attached hereto, at page 6). The injunction claim, filed as an alternative pleading in accordance with Pennsylvania law, would enforce only the lawful property rights of the parties as determined by the Court – if inverse condemnation were necessary the injunction would not lie against the property condemned as set forth in the Complaint, nor therefore would it interfere with railroad operations. The state law slander of title claim results in monetary damages only, which do not constitute interference with railroad operations or facilities.

All of AVRR's arguments regarding interference or obstruction either (or both) presume ownership of disputed property areas, and allege only interference or obstruction with a prospective, speculative future use. AVRR has not presented grounds to justify its request that this Board exercise its discretionary jurisdiction to hear a controversy, or preemptive jurisdiction under 49 USC § 10501(b), nor has AVRR shown that the state

¹ Mr. Fiore intends to prove that this AVRR interpretation of the call is erroneous through expert surveyor testimony.

court action, in which the parties have stipulated to maintain a satisfactory status quo, interferes with or obstructs its railroad operations.

Delays and obfuscation of the issues in this dispute substantially prejudice and harm Mr. Fiore, a retired owner of a small glass and mirror business that he built up himself, who cannot sell or lease the property while the AVRR dispute and property claims are pending. It has taken from January to date to address this jurisdictional issue posed by AVRR, and now AVRR is attempting to open a second set of pleadings on the matter before this Board by virtue of its Petition, which will further delay resolution of the dispute.

The policy of the United States set forth in 49 USC §10101 includes "...(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required; ...(7) to reduce regulatory barriers to entry into and exit from the industry; (8) to operate transportation facilities and equipment without detriment to the public health and safety; (9) to encourage honest and efficient management of railroads..." The Fiore Complaint, which seeks protection of Mr. Fiore's due process and property rights under state law, does not seem to impede or run afoul of any of the purposes set forth in Title 49.

The power of eminent domain, and the specialized jurisdiction of the Surface Transportation Board, give great rights and powers to railroads. A railroad should, therefore, be held to a standard whereby it exercises these powers with responsibility, reason, discretion, respect, candor and consideration for the rights of individuals and the various states' laws and constitutions. AVRR received this Board's opinion regarding jurisdiction over state property law disputes, in connection with the same Conrail deed at

issue in this matter, on June 15, 2010 yet proceeded with its jurisdictional objections and this Petition. The AVRR Petition appears to greatly exceed the scope of the consent order of referral entered in the state court action. AVRR neglected to advise this Board of the stipulation agreement between the parties maintaining the operational status quo between the properties while the state court litigation is pending. For these reasons it appears that AVRR is using the jurisdictional dispute to some extent to delay and complicate the Fiore matter, rather than seeking a judicially efficient resolution of the property line dispute.

WHEREFORE, Fiore respectfully requests that the Board deny those portions of AVRR's Petition that seek to initiate additional proceedings or pleadings before this Board, and issue an advisory opinion to the Honorable Ronald W. Folino stating that:

(a) The preemptive jurisdiction of the Surface Transportation Board pursuant to 49 USC §10501(b) does not automatically or as a matter of course preempt state court jurisdiction to hear state property law disputes involving a railroad such as: (i) actions to quiet title and determine lawful property line locations or easement widths under applicable state law; or (ii) actions under state laws of eminent domain, including claims alleging a de-facto taking or inverse condemnation by a railroad and appropriate damages; (iii) actions for injunctive relief to enforce a declaration of property rights provided such an injunction would not obstruct or interfere with railroad operations; or (iv) a tort action for slander of title and appropriate damages.

(b) AVRR has not demonstrated that this Board's jurisdiction under 49 USC § 10501(b) preempts the state court causes of action set forth in the Fiore Complaint.

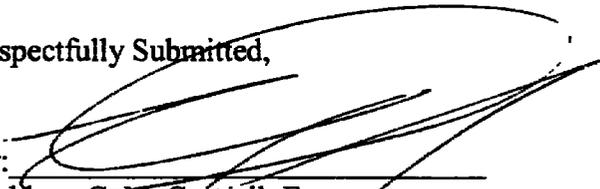
(c) AVRR has not shown sufficient cause for this Board in its discretion to preempt the state court action that has been filed and is pending in order to eliminate a controversy or remove uncertainty pursuant to 5 USC §554(e) and 49 USC §721.

(d) That the Board remain available to the state court for referral of any questions requiring the expertise of the Board should they arise.

Fiore respectfully joins in AVRR's request that the instant AVRR Petition regarding the jurisdictional question be expedited, and decided under the modified procedures of the Board based on the written AVRR Petition, this Reply and the attachments submitted therewith.

Dated: July 14, 2010

Respectfully Submitted,


By: Kathleen C. McConnell, Esq.
Maiello, Brungo & Maiello, LLP
Attorneys for William Fiore
3301 McCrady Road
Pittsburgh, Pennsylvania 15235
(412) 242-4400
Fax (412) 242-4377
kcm@mbm-law.net

I, William Fiore, declare under penalty of perjury that the foregoing is true and correct.
Further, I certify that I am qualified and authorized to file this pleading.

Executed on July 14, 2010



William Fiore

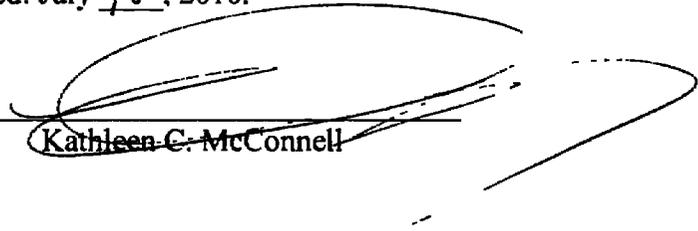
I hereby certify that on July 15, 2010, I caused the foregoing Reply of William Fiore to Allegheny Valley Railroad Company's Petition for Declaratory Order to be served, via US mail, postage prepaid, on all parties of record and on the following:

Richard R. Wilson, Esq.
518 North Center Street, Suite 1
Ebensburg, PA 15931

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Buchanan, Ingersoll & Rooney, PC
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301 Grant Street, 20th Floor
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Russell P. Mills, Esq.
Mills & Henry
200 Benedum Trees Building
223 Fourth Avenue
Pittsburgh, PA 15222

Dated: July 15, 2010.

By: 

Kathleen C. McConnell

Table of Exhibits

- | | |
|------------------|---|
| Exhibit 1 | William Fiore Brief in Response to the Preliminary Objections filed by Allegheny Valley Railroad Company |
| Exhibit 2 | William Fiore Response to the Preliminary Objection filed by Allegheny Valley Railroad Company |
| Exhibit 3 | Stipulation Between William Fiore and Allegheny Valley Railroad Company |

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WILLIAM FIORE,

Plaintiff,

v.

ALLEGHENY VALLEY RAILROAD
COMPANY, a Pennsylvania corporation,
CONSOLIDATED RAIL
CORPORATION, a Pennsylvania
corporation, PETER D. FRIDAY,
SUSAN F. DALTON, and ROBERT L.
WISEMAN,

Defendants.

CIVIL DIVISION

NO. GD 10-1721

**PLAINTIFF'S BRIEF IN RESPONSE
TO PRELIMINARY OBJECTIONS
RAISING QUESTIONS OF FACT
FILED BY DEFENDANT ALLEGHENY
VALLEY RAILROAD**

Filed on Behalf of:

Plaintiff, William Fiore

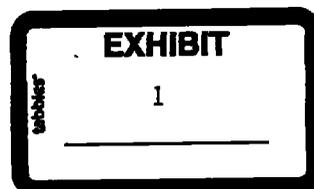
Counsel of Record for this Party:

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

WILLIAM FIORE,)	
)	
Plaintiff,)	NO. GD 10-1721
)	
v.)	
)	
ALLEGHENY VALLEY RAILROAD)	
COMPANY, a Pennsylvania corporation,)	
CONSOLIDATED RAIL)	
CORPORATION, a Pennsylvania)	
corporation, PETER D. FRIDAY,)	
SUSAN F. DALTON, and ROBERT L.)	
WISEMAN,)	
)	
Defendants.)	

PLAINTIFF'S BRIEF IN RESPONSE TO PRELIMINARY OBJECTIONS
RAISING QUESTIONS OF FACT FILED BY DEFENDANT
ALLEGHENY VALLEY RAILROAD

Plaintiff William Fiore ("Fiore"), by and through his undersigned counsel, submits this Brief in Response to the Brief In Support of Preliminary Objections filed by Defendant Allegheny Valley Railroad ("AVRR").

BRIEF SUMMARY OF FACTS

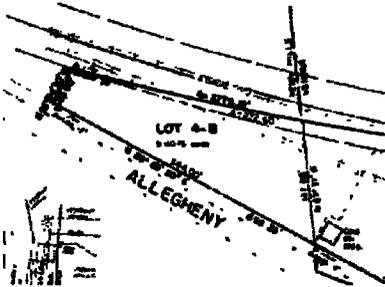
Plaintiff William Fiore filed the Complaint in this matter against, *inter alia*, Defendant Allegheny Valley Railroad Company ("AVRR") alleging that AVRR is wrongfully claiming fee simple title to a portion of a subdivided lot (Lot 4-B) owned by Mr. Fiore; for slander to title; and in the alternative, that AVRR has exercised a de-facto taking, under color of a right of eminent domain, condemning Lot 4-B without notice, due process or compensation in violation of applicable law.

Mr. Fiore acquired Lot 4-B in 1997 by virtue of a general warranty deed, a copy of which is attached as Exhibit A to the Complaint (the "Fiore Deed"). He constructed and operated the Fiore Glass and Mirror business on Lot 4-B for approximately a decade, and has now retired and is trying to sell or lease his building.

The legal description in the Fiore Deed is derived from, and consistent with, four (4) subdivision maps of record, copies of which are attached as Exhibits B, D, E and F to the Complaint (the "Subdivision Plans"), which subdivided land is currently the Verona Shopping Center. The Subdivision Plans show a 66 foot wide railroad right of way running along the Western side of the shopping center, behind what are currently a Giant Eagle, a McDonalds, a Monro Muffler, and the Fiore Building on Lot 4-B.

AVRR acquired rights and interests to the former Consolidated Rail Corporation ("Conrail") railroad right of way and track in 1995 by virtue of an indenture, a copy of which is attached as AVR Exhibit C to the Preliminary Objections filed by Defendant AVRR (the "Conrail Deed").

Lot 4-B, and a portion of a parcel conveyed to AVRR by virtue of the Conrail Deed, share a common fee simple boundary line. The exact location of this boundary line is in dispute. This boundary line is depicted by metes and bounds description with verifiable reference points on the Subdivision Plans, and is also depicted (without metes and bounds calls) on pages 232 -233 of the deed into AVRR, AVR Exhibit A. The following excerpts from the USSCC Subdivision Map and the Conrail Deed show that their description of Lot 4-B and the railroad right of way location is fairly consistent:

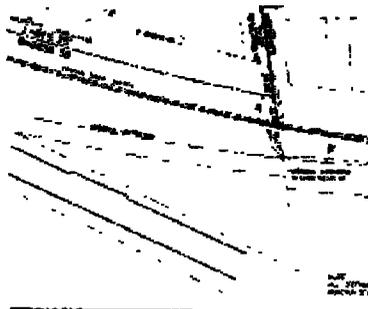


Excerpt - Pitf Exhibit B A to Complaint
First Revised USSCC Subdivision Map Lot 4-B
Recorded November, 1985, Plan Bk Vol. 138,
p. 19-20 at 20, Allegheny Co. Dept. of Real Estate

Excerpt - AVR Exhibit C to Prelim Obj.
Conrail Deed to AVRR, pp 232 -233
(spliced) Recorded October, 1995,
Deed Bk Vol. 9571, p. 204 at 232-233,
Allegheny County Dept. of Real Estate

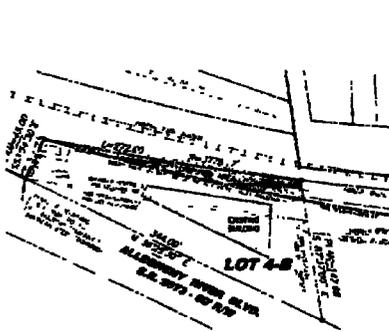
As these excerpts show, the Subdivision Plans and the Conrail Deed show Lot 4-B as a quadrilateral shape – having **4 sides**.

In November of 2005, AVRR and its representative Liadis Engineering & Surveying, Inc. ("Liadis"), unknown to Mr. Fiore, recorded a subdivision plan of public record for the AVRR parcel adjacent to Lot 4-B that shows Lot 4-B, at best, as a triangular shape – having **3 sides**, excerpted below.

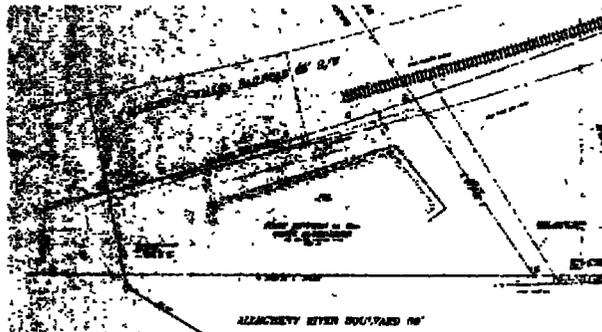


Excerpt - Plaintiff Exhibit M, Fagens-AVR Subdivision and Consolidation Plan
Prepared by Liadis and recorded November, 2005, Plan Bk Vol. 252, p. 55,
Allegheny Co. Dept. of Real Estate

AVRR and its representative Liadis have now submitted to this Court as AVRR Exhibit B a sketch depicting Lot 4-B as a quadrilateral having 4 sides (the "Liadis Drawing"), but which differs from the Subdivision Plans and the Tait Engineering survey of Lot 4-B (attached to the Complaint as Pltf Exhibit C B) as to the location of the westerly lot line, the Liadis Drawing and Tait survey of Lot 4-B are both excerpted here:



**Excerpt – AVRR Exhibit B
Liadis Drawing dated 3/8/2010**



**Excerpt – Pltf Exhibit C B
Tait Engineering As-Built Survey dated 11/2/1998**

The details of the discrepancy cannot be determined from the Liadis Drawing, but according to the factual summaries and affidavits submitted by AVRR and Liadis in support of the Preliminary Objections, the Liadis Drawing is intended to illustrate that the property line dividing the AVRR parcel and Lot 4-B is in a different location than that shown on the Subdivision Plans, taking land approximately 20 feet in width at its widest point away from the subdivided Lot 4-B (Kalina Affidavit at paragraph 7).

As alleged in the Complaint, Mr. Fiore has at all times since his purchase of Lot 4-B maintained possession, control and use of Lot 4-B as it is shown on the Subdivision Plans of record; while AVRR has at all times since Fiore's lot purchase operated its railroad operations within the 66' railroad right of way lines shown on the Subdivision Plans.

ARGUMENT

(III(B)) PRELIMINARY OBJECTIONS BASED ON LACK OF SUBJECT MATTER JURISDICTION – Pa. R.C.P. 1028(a)(1), 49 U.S.C. § 10501(b)

Summary of Argument and the Nature of the Dispute

In 1995 AVRR took title to land via the Conrail Deed, which shows a quadrilateral Lot 4-B. In 1997 Mr. Fiore took title to Lot 4-B, shown as a quadrilateral lot on the Subdivision Plans. In 2005 – 2006, without notice to or knowledge of Mr. Fiore, AVRR published sworn statements of public record showing Lot 4-B as having, at best, a small triangular shape, with a railroad right of way running right through the building. AVRR and its agent Liadis now submit sworn testimony to this Court admitting that Lot 4-B is in fact a quadrilateral, but not quite the quadrilateral shown on the Subdivision Plans (see Kalina Affidavit at paragraph 8).

AVRR recorded a subdivision plan in 2005 showing a right of way running through Mr. Fiore's building. AVRR has now submitted proof to this Court by affidavit that AVRR did not have right or title to the right of way shown on the 2005 map that AVRR recorded. As alleged in the Complaint at paragraphs 25-29, a sale of Lot 4-B fell through as a result of AVRR's actions, and the property is in effect condemned. This Court has jurisdiction over such matters, as "an award of just compensation for an alleged taking of the property...would not unreasonably interfere with rail operations and would not be preempted." Surface Transportation Board's decision cited at AVRR Brief p.10, *Mark Lange – Petition for Declaratory Order*, STB Finance Docket No. 35037 (2008).

If for some reason AVRR is not found to have wrongfully condemned the lot in a de facto taking without due process, then a primary determination of fact in this action in order to quiet title will be whether Liadis is correct in its various depictions of Lot 4-B's boundary lines; or whether the Subdivision Plans of record, the Tait Engineering survey,

and Plaintiff's expert witnesses are correct as to the depiction of Lot 4-B's boundary lines. All of AVRR's arguments over jurisdictional objections presume a disputed fact: that Liadis is accurate in its most recent depiction of the right of way.

According to the filings to date by AVRR, the railroad's dispute is based upon the Liadis reading of a 1956 deed (Kalina Affidavit at paragraph 5), which deed by its terms is based on a survey not yet in evidence (see AVR Exhibit E)¹. Liadis' use of the 1873 AH Rowland Plan as a basis for locating Lot 4-B (which map is over 130 years old and which is not in the chain of title to either Lot 4-B or the disputed AVRR parcel), as opposed to using the map attached to the 1995 Conrail Deed into AVRR (which conflicts with the Rowland Plan), will also come into question (See Plaintiff Exhibit M and AVR Exhibit B).

Interpretation of legal descriptions and deeds conveying fee simple title to land and the determination as to the veracity of witnesses including surveyors and experts is a matter properly before and within the competency and expertise of this Court – and such a judicial determination does not constitute an unreasonable interference with or regulation of 'railroad operations'.

AVRR mischaracterizes the jurisdiction of the Surface Transportation Board (the "STB") in support of its preliminary objections under Pa RCP §§ 10228(a)(1), (a)(2) and (a)(7). Defendant would have this Court adopt a knee-jerk reaction that if a claim involves a railroad, the State Court must decline jurisdiction. The STB has *discretionary* authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to preempt state or local action, if **such action would unreasonably interfere with interstate railroad operations**. The *exclusive* jurisdiction of the STB pursuant to 49 USC § 10501(b)(2) is over "the

¹ Plaintiff has requested production of this 1956 survey referenced in the deed from AVRR and Consolidated Rail Corporation.

construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks, or facilities...”

Pennsylvania Legal Precedent Regarding STB Jurisdiction

The Commonwealth Court of Pennsylvania in 2001 found that 49 USC § 10501 did not preempt State action by the Pennsylvania Utilities Commission in regulating railroad bridge and highway crossings. *Wheeling & Lake Erie Railway Co. v. P.U.C.*, 778 A.2d 785, 790-91 (2001). The Court held that “it is clear that in Section 10501(b) of the ICC Termination Act, the Congress intended to preempt only the states’ previous authority to economically regulate the rail transportation within their borders with respect to such matters as the operation, rates, rules, routes, service, tracks, facilities and equipment...” *Id.* at 793. The Court noted that a state has the authority to regulate the railroads on a local basis regarding safety issues, as long as the regulation is not in conflict with the federal statute, and does not unduly burden interstate commerce. *Id.*, citing *CSX Transportation v. City of Plymouth*, 92 F. Supp. 2d 643 (ED Mich 2000).

In the *Wheeling* case, the Commonwealth Court also notes that “railroad” is defined under the ICC Termination Act as “the road used by a rail carrier and **owned by it or operated under an agreement.**” *Id.* citing 49 USC § 10102(6)(A) [*emphasis added*]. By this statutory definition, AVRR cannot invoke federal jurisdiction over the disputed land until ownership and title to the disputed land is determined. AVRR has argued no basis to find a conflict between a State Court determination as to fee simple title records and the federal jurisdiction of the STB to regulate railroad operations.

The Eastern District Court of Pennsylvania addressed the nature of the jurisdiction of the STB in connection with a dispute over demurrage tariffs, noting that “No fixed formula exists for applying the doctrine of primary jurisdiction. In every case, the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular

litigation....In general, a court should refer a matter to an administrative agency for resolution if it appears that the matter involves technical or policy considerations that are beyond the court's ordinary competence..." *Union Pacific Railroad v. FMC Corporation, et als.*, 2000 U.S. Dist. LEXIS 1019 (ED Pa 2000), citing *US v. Western Pacific RR Co.*, 352 US 59, 3, 1 L.Ed. 2d 12, 77 S. Ct. 161 (1956), and *Consolidated Rail Corp. v. Certainteed Corp.*, 835 F.2d 474, 478 (3rd Cir. 1987).

The Pennsylvania Superior Court, in *Birsdboro Municipal Authority v. Reading Company and Wilmington & Northern RR, et als*, 2000 Pa Super 231, 758 A.2d 222 (2000), app. den., 565 Pa. 633, 771 A.2d 1276 (2001), substantively addresses an action to quiet fee simple title and a right of way easement dispute between a property owner and a railroad, on appeal of a decision of the Court of Common Pleas of Berks Co.; however, STB jurisdiction over the matter, preemptive or otherwise, is not addressed by the Court and appears not to have been necessary or required.

The action before this Court involves Pennsylvania law applicable to real property boundary line determinations, eminent domain proceedings requirements, and tort actions such as slander of title. In the *Union Pacific Railroad* case, the court retained jurisdiction of the dispute, but referred three specific questions regarding railroad tariff regulations to the STB for determination and return. *Union Pacific, supra*. 2000 U.S. Dist. LEXIS at 14. In this case no such questions requiring the expertise of the STB have been raised by Defendant AVRR, and AVRR has not sought a remedy of a stay and referral for any such questions. As alleged in the Complaint, it is possible that such a question may subsequently arise in connection with the eminent domain claims, such as in the event AVRR alleges it must claim more land than it is currently lawfully entitled to for its speculative passenger rail project, but such a question has not been raised by AVRR in its pleadings.

Precedent in Other Jurisdictions

A North Carolina federal court, in a case of first impression for the district, summarizes in text covering over 3 pages various judicial rulings across the nation regarding the jurisdiction of the STB. *PCS Phosphate Company, Inc. v. Norfolk Southern Corporation*, 520 F. Supp 2d 705, 713 – 718 (EDNC, Eastern Div. 2007). The North Carolina Court concluded that the standard is whether the litigation will unreasonably interfere with or prevent railroad operations, and that the standard is applied on a case by case basis. *PCS Phosphate, supra.* at 717. The court retained jurisdiction over claims for breach of contract, breach of easement covenants, and unjust enrichment, and declined jurisdiction only over an unfair and deceptive trade practices claim regarding a petition to abandon track filed by the railroad defendant with the STB. *Id.* at 718.

In the STB ruling in *Maumee & Western RR et als.*, STB Finance Docket No. 34354 (3/2/2004)(regarding a RR objection to an eminent domain proceeding), the STB summarizes the standard as "...this broad Federal preemption does not completely remove any ability of state or local authorities to take actions that affect railroad property...routine, non-conflicting uses...are not preempted... so long as they would not impede rail operations or pose undue safety risks....crossing cases are typically resolved in state courts....courts can, and regularly do (sometimes with input from the Board through referral), make determinations as to whether proposed eminent domain actions would impermissibly interfere with railroad operations...the concerns...raised here are generalized and of the type that the courts are well-suited to address. Should the court request Board assistance in assessing those issues, the Board remains available." *Maumee, Id.* at 2.

In the instant case, AVRRI has not set forth allegations sufficient to invoke STB preemption for unreasonable interference with railroad operations. The Complaint

alleges that Fiore has operated on Lot 4-B as constructed, and that AVRR has operated within its 66' wide right of way shown on the Subdivision Plans and Conrail Deed, for at least a decade. The Russell Peterson Affidavit so states, and then continues, "[f]uture economic development plans for the AVRR right of way also entail projected use of the right of way adjacent to Lot 4-B for rail facilities associated with the reestablishment of a second track and passenger rail service into downtown Pittsburgh" (Peterson Affidavit at paragraph 4). AVRR's speculative need for additional land to accommodate future plans for additional track, and a future conversion from freight rail use to local passenger train use, does not render a request to quiet title an 'unreasonable interference with rail operations or with interstate commerce.

All AVRR arguments in support of invoking the jurisdiction of the STB presume that the disputed property is "AVRR's property", and that the Complaint attempts to "dispossess AVRR of its property" (AVRR Brief pp 6, 8-14). The case law cited by AVRR in support of its objections involve cases where the railroad's title to the land was clearly not in dispute, but rather adjacent owners disputed the continued use, possession, or disposition after abandonment of land owned, or operated under an agreement, by a railroad. Thus the bulk of the case law cited by AVRR is not on point or applicable to the claims in this action.

The Complaint alleges that AVRR's actual track and use occurs within the undisputed 66' right of way shown on the Subdivision Plans. AVRR at its brief p. 7 lightly touches on clearance requirements in conjunction with its future need of additional right of way for a proposed passenger rail. The AVRR brief at p. 8 appears to allege that a Lot 4-B line as shown on the Subdivision Plans would come within 15 feet of the existing track (it is unclear whether AVRR refers here to the disputed lot line which would not be relevant in terms of identifying clearance, or to the railroad right of way line shown on the Subdivision Plans, which would be relevant).

Regardless, this allegation by AVRR is not sufficient to prove interference or to invoke the jurisdiction of the STB, as (i) Pa Code § 33.122(j) provides for minimum side clearance of 8 feet from the center of track, and Pa Code § 33.122(b) provides for minimum side clearance for structures above the rail of 12 feet; (ii) the allegation is not factually supported by the evidence of record, as the Liadis Drawing shows no applicable line distances or scale; (iii) the pleadings and exhibits are contrary to this allegation as to the width of the existing right of way; (iv) AVRR has operated within the 66' right of way area shown on the Subdivision Plans for at least the past decade as alleged in the Complaint; and (v) any such insufficiency as to the 66' right of way would also apply to the 66' right of way as it runs behind the remainder of the Verona Shopping Center, which does not appear to be of issue to AVRR.

The doctrine of a consentible line, in that the prior owners in the chains of title to both the railroad and Lot 4-B parcels had established an agreed boundary and right of way line shown on the Subdivision Plans (as opposed to the Liadis explanation of a 1956 deed error, see Kalina Affidavit *passim*), is not a theory of adverse possession and AVRR's objections should be denied.

**(III(C)) FAILURE TO EXHAUST STATUTORY ADMINISTRATIVE REMEDIES
Pa. R.C.P. 1028(a)(7)**

As to AVRR's objection for failure to exhaust administrative remedies under Pa. R.C.P. 1028(a)(7), AVRR argues in support of this objection only that the STB has exclusive jurisdiction all matters alleged in the Complaint, which argument is thoroughly addressed above. There is no requirement under Pennsylvania law that the Plaintiff must seek its remedies through the STB.

(III(D)) FAILURE TO CONFORM TO LAW OR RULE OF COURT Pa. R.C.P. 1028(2)

AVRR's objection under Pa R.C.P. 1028(2) for failure to conform to law or rule of court is based on a lengthy explanation that AVRR is not actually in possession of the

disputed land; that AVRR is not using or occupying the disputed land; but that based on a presumption that AVRR has good title to the disputed land there is therefore a presumption under federal law that AVRR is in use and possession of the disputed land (AVRR Brief pp 11-14). This argument makes no logical sense, as title to the disputed land is the question before this Court and therefore cannot be presumed to be in AVRR.

In fact, the pleadings allege that Lot 4-B is titled in Mr. Fiore, that Mr. Fiore is in possession and use of Lot 4-B, and that AVRR is wrongfully attempting to dispossess Mr. Fiore (Complaint paragraphs 9-12, 29-31). Using the standard of review set forth in AVRR's Brief at p. 6, the pleadings should be considered true in deciding AVRR's objections, including the pleading that title to the subdivided Lot 4-B rests with Mr. Fiore. Based on the pleadings and evidence submitted to date, a claim for ejectment or abandonment against AVRR is not required or proper.

Pursuant to Pa R.C.P. No. 1001, a civil action as filed herein is the appropriate remedy in this case². In Pennsylvania, under Rule 1001 "a party must respond to all averments regardless of the substantive categorization of the claim", *Wolfskill v. Egan*, 350 Pa. Super. 223, 227 (Pa. Super. Ct. 1986).

**(III(E)) LEGAL INSUFFICIENCY – COUNT II – Pa. R.C.P. 1028(a)(4)
SLANDER OF TITLE**

Contrary to AVRR's objection to the pleadings and facts alleging slander of title, the pleadings, evidence of public record and the affidavits filed by AVRR support the slander cause of action. Regardless of whether Mr. Fiore's Lot 4-B is determined by this Court to be configured in conformity with the Fiore Deed, Subdivision Plans and the Tait survey, or in conformity with the Liadis Drawing, it will be determined to have a quadrilateral shape, with 4 sides. In 2005 Liadis and AVRR publicly recorded the Fagens-AVR Plan (Plaintiff Exhibit M), under oath, showing that AVRR owned the bulk

² Rule 1001 was established in 1984, and post-dates the case law cited by AVRR in support of its objection.

of the Fiore Lot 4-B apart from a small triangular shape at best. The public record also shows that AVRR subsequently recorded a deed having attached as exhibits correspondence to at least 4 governmental agencies further publicizing this triangular configuration of the Fiore Lot 4-B (Plaintiff Exhibit N). This was not exercise of conditional privilege, but publication of known false information.

The evidence and pleadings show that AVRR had actual and constructive knowledge of the quadrilateral configuration of the Fiore Lot 4-B as early as 1995 based on the Conrail Deed, the public record, and as early as 1997 by its own admission in Peterson Affidavit paragraph 5. It would be rare for this Court to see such a clear case of an admission of a knowing, intentional, public slander and cloud placed on the title to the land of another.

In addition, Plaintiff will prove that the Fagens-AVR Plan prepared by Liadis violated the Penn Hills Ordinances governing subdivision plans, including §§ 1240.4(a), 1240.06, 1246, et seq. established pursuant to 53 P.S. § 10503, and the 1999 minimum survey detail requirements and standards of the American Congress on Surveying and Mapping and the American Land Title Association (ACSM/ALTA), giving rise to arguments in support of a *per se* finding of knowing falsehood.

(III(F)) LEGAL INSUFFICIENCY – COUNT IV – Pa. R.C.P. 1028(a)(4) FAILURE TO PLEAD A LEGALLY SUFFICIENT CLAIM FOR A DE FACTO TAKING

AVRR's arguments presume the accuracy of the Liadis Drawing, which is disputed. Count IV of Fiore's Complaint is pled in the alternative, as rulings in favor of Plaintiff on the other causes of action could result in Fiore retaining clear and quiet title to Lot 4-B as it is shown on the Subdivision Plans, and issuance of a permanent injunction preventing AVRR from further interfering with Fiore's rights or title. Fiore has sufficiently pled facts at Complaint paragraphs 53-58 to support a finding of a de facto

taking without due process by AVRR, entitling Mr. Fiore to compensation and damages under the eminent domain statutes, including 26 P.S. § 1-502.

(III(G)) LEGAL INSUFFICIENCY – COUNTS I, II, III and IV – Pa. R.C.P. 1028(a)(4)

AVRR's argument regarding the language in the Fiore Deed is specious. The Conrail Deed, AVR Exhibit C, also reads that the conveyance from Conrail to AVRR is: "under and subject to...any easements or agreements of record or otherwise affecting the Premises/Easement areas, and to the state of facts which a personal inspection or **accurate survey** would disclose....should a claim adverse to the title hereby quitclaimed or granted be asserted and/or proved, no recourse shall be had against the Grantor...." [emphasis added]. Both deeds reference and are subject to the public record including the Subdivision Plans, and Plaintiff's pleading alleges that the public records find title to Lot 4-B, as it is shown on the Subdivision Plans and an accurate Tait survey, clearly in Mr. Fiore. As argued above, Fiore does not dispute the current or continued AVRR use and occupancy of the 66' wide right of way shown on the Subdivision Plans. The Complaint sufficiently alleges that the right of way shown on the Subdivision Plans is the right of way of public record, and the visible evidence of railroad occupancy to which Mr. Fiore's deed is subject is consistent with the Subdivision Plans, and is not in dispute.

The remainder of AVRR's arguments are a factual dispute as to surveyor testimony regarding the location of the lot line better left for determination on the merits of the claim.

WHEREFORE, Plaintiff prays that this Court overrule the Preliminary Objections of AVRR.

RESPECTFULLY SUBMITTED:
MAIELLO, BRUNGO & MAIELLO, LLP
/s/ Kathleen C. McConnell
John H. Prorok, Esquire
Lawrence J. Maiello, Esquire
Kathleen C. McConnell, Esquire
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the Plaintiff's Brief in Response to Preliminary Objections Raising Questions of Fact Filed By Defendant Allegheny Valley Railroad was sent by First Class Mail, Postage Prepaid, this 8th day of June, 2010.

Richard R. Wilson, P.C.
518 N. Center Street, Ste 1
Ebensburg, PA 15931

Consolidated Rail Corporation
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Philadelphia, PA 19103

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Buchanan, Ingersoll & Rooney
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Pittsburgh, PA 15219

/s/ Kathleen C. McConnell
Kathleen C. McConnell

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WILLIAM FIORE,

Plaintiff,

v.

ALLEGHENY VALLEY RAILROAD
COMPANY, a Pennsylvania corporation,
CONSOLIDATED RAIL
CORPORATION, a Pennsylvania
corporation, PETER D. FRIDAY,
SUSAN F. DALTON, and ROBERT L.
WISEMAN,

Defendants.

CIVIL DIVISION

NO. GD 10-1721

**PLAINTIFF'S RESPONSE TO
PRELIMINARY OBJECTIONS
RAISING QUESTIONS OF FACT OF
DEFENDANT ALLEGHENY VALLEY
RAILROAD**

Filed on Behalf of:

Plaintiff, William Fiore

Counsel of Record for this Party:

JOHN H. PROROK, ESQUIRE
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LAWRENCE J. MAIELLO, ESQUIRE
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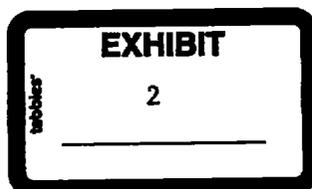
TO DEFENDANT ALLEGHENY
VALLEY RAILROAD CO.:

You are hereby notified to file a written
Response to the enclosed Preliminary
Objection to Preliminary Objections
within twenty (20) days from service
hereof or a judgment may be entered
against you.

/s/ John H. Prorok

John H. Prorok, Esq.
Counsel for Plaintiff William Fiore

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(412) 242-4400



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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

WILLIAM FIORE,)
)
 Plaintiff,) NO. GD 10-1721
)
 v.)
)
 ALLEGHENY VALLEY RAILROAD)
 COMPANY, a Pennsylvania corporation,)
 CONSOLIDATED RAIL)
 CORPORATION, a Pennsylvania)
 corporation, PETER D. FRIDAY,)
 SUSAN F. DALTON, and ROBERT L.)
 WISEMAN,)
)
 Defendants.)

PLAINTIFF'S RESPONSE TO PRELIMINARY OBJECTIONS
RAISING QUESTIONS OF FACT OF DEFENDANT
ALLEGHENY VALLEY RAILROAD

AND NOW, comes the Plaintiff, William Fiore, by and through his counsel John H. Prorok, Esquire, Lawrence J. Maiello, Esquire, Kathleen C. McConnell, Esquire and Maiello, Brungo & Maiello, LLP and files the within Response to Preliminary Objections Raising Questions of Fact filed by Defendant Allegheny Valley Railroad Co. ("AVRR") averring as follows:

PRELIMINARY OBJECTIONS TO AVRR'S PRELIMINARY OBJECTIONS.

(a) Plaintiff objects to Defendant AVRR's Preliminary Objections on the grounds that the pleading fails to comply with Pa R.C.P. No. 1022. Defendant AVRR has pled more than one material allegation in each of paragraphs 1 through 10 of its Preliminary Objections, making responses difficult and burdensome.

(b) Plaintiff objects to consideration of the affidavits and drawings submitted by Russell Peterson and David Kalina of Liadis Engineering, Inc. The affidavits and drawings are inconsistent with previously filed and sworn documents of record and fail to

assert facts sufficient to support Defendant AVRR's Preliminary Objections pursuant to Pa R.C.P. No. 1028(a)(1) and (a)(7), and as such are scandalous and impertinent pursuant to Pa R.C.P. No. 1028(a)(2), as more fully set forth in Paragraphs 51 - 57 hereinbelow and Plaintiff's Exhibits M and N attached hereto.

RESPONSES TO PRELIMINARY OBJECTIONS

1. Plaintiff admits that this case arises out of a property line dispute between AVRR and Plaintiff. Plaintiff denies AVRR's characterization of the nature of AVRR's interest in title, and of the lawsuit. Plaintiff denies AVRR's inference that the Complaint against AVRR does not include allegations of improper taking and inverse condemnation. Plaintiff admits that ICC Finance Docket No. 32783 dated Nov. 17, 1995, attached as AVRR Exhibit A to AVRR's Preliminary Objections is a document of public record, which speaks for itself. Plaintiff denies knowledge or information sufficient to form an opinion as to the accuracy of or basis for such document. Plaintiff admits that indenture dated October 27, 1995 from Consolidated Rail Corporation ("Conrail") to AVRR, attached as AVRR Exhibit C to AVRR's Preliminary Objections (the "Conrail Deed"), is a document of public record, which speaks for itself. Plaintiff denies knowledge or information sufficient to admit or deny AVRR's characterizations as to AVRR's operations or authority and demands AVRR submit proof of same.

2. Plaintiff denies the characterization of the subject matter of the dispute as involving only AVRR 'track and right of way'. To the contrary, as stated in Paragraph 1 of AVRR's Preliminary Objections, this case arises out of a property line dispute. Plaintiff admits that AVRR has an interest in railroad tracks between the Municipality of Penn Hills and Verona Borough. Plaintiff admits the properties which are the subject matter of the Complaint herein are located adjacent to each other in the Municipality of Penn Hills, along and South of the municipal boundary between Penn Hills and Verona. Plaintiff denies the accuracy of, integrity of, and any evidentiary or probative value of, the

AVRR Exhibit B drawings attached to AVRR's Preliminary Objections prepared by Liadis Engineering (See discussion at Paragraphs 51 - 57 below).

3. Plaintiff denies knowledge or information sufficient to deny or admit Paragraph 3 of AVRR's Preliminary Objections, and further denies that this allegation is relevant to the litigation.

4. Plaintiff lacks knowledge or information sufficient to deny or admit the accuracy of AVRR's characterization of the conveyance of title into Conrail and demands proof of same. Plaintiff admits the indenture from Conrail to AVRR, attached as AVRR Exhibit C to AVRR's Preliminary Objections (the "Conrail Deed"), is a document of public record which speaks for itself. Plaintiff admits that a railroad right of way, as such right of way is depicted on the subdivision plans attached as Plaintiff's Exhibits B, D, E and F to the Complaint in this matter, and which depiction is consistent with the 1995 Conrail Deed into AVRR, has been and currently is in use for railroad purposes. Plaintiff denies that AVRR has any possession of, or makes any use of, the Fiore Lot 4-B as the same is described in the Complaint in this matter. Plaintiff denies that the Conrail Deed description of the railroad right of way conveyed therein (as depicted on pages 232-233 of the Conrail Deed, attached as AVRR Exhibit C to the AVRR Preliminary Objections) contradicts the Plaintiff's deed, title records, or the subdivision maps of record attached as Plaintiff's Exhibits B, D, E and F to the Complaint.

5. Plaintiff lacks knowledge or information sufficient to deny or admit the 1862 acquisition of railroad right of way by the defunct former Allegheny Valley Railroad and demands proof of same. Plaintiff denies that AVRR is in any way related to the defunct original Allegheny Valley Railroad. Plaintiff denies that AVRR is a successor to any prior railroad interests apart from such title or rights obtained through the 1995 quit claim Conrail Deed attached as AVRR Exhibit C to AVRR's Preliminary Objections, and demands proof of same. Plaintiff admits that deed from Lucy Haworth to Pennsylvania

Railroad Company dated in 1920, attached as AVRR Exhibit D to Defendant's Preliminary Objections (the "Haworth Deed"), is a document of public record, which speaks for itself. Plaintiff denies that all of the property described in the Haworth Deed comprises a 'right of way', as upon information and belief the bulk of this property was used as a lumber yard which subsequently ceased operations and was sold by the Pennsylvania Railroad. Plaintiff denies AVRR's characterization of the legal calls in the Haworth Deed. Plaintiff denies that the original railroad right of way and track was not subsequently relocated on more than one occasion. Plaintiff denies that AVRR retains title to all of the property conveyed by the Haworth Deed (See Plaintiff's Exhibits M and N attached hereto and Paragraphs 51 - 57 *infra*). Plaintiff denies the accuracy of AVRR's interpretation regarding the legal description set forth in the Haworth Deed.

6. Plaintiff admits that the Pennsylvania Railroad Company conveyed real estate to American Steel Foundries by deed dated June 25, 1956, a copy of which is attached as AVRR Exhibit E to AVRR's Preliminary Objections (the "PARR Deed"), which document is public record and speaks for itself. Plaintiff denies AVRR's interpretation regarding the legal description set forth in the PARR Deed (See *also* Paragraphs 51 - 57, *infra*), and objects to Defendant AVRR's use of selective excerpts of, and material omission of, elements of the legal description contained in the PARR Deed in its Objection and the supporting affidavits and exhibits .

7. Plaintiff admits that American Steel Foundries conveyed real estate to Rospec Realty in 1959. Plaintiff denies AVRR's interpretation regarding the legal description set forth in the American Steel Foundries Deed to Rospec Realty, a copy of which is attached hereto as Plaintiff's Exhibit L.

8. Plaintiff denies AVRR's interpretation and allegations as to the chain of title and legal descriptions.

9. Plaintiff admits to the extent that Russell Peterson claimed to Plaintiff in or about 1998, after completion of Fiore building construction, that the Lot 4-B pavement would interfere with an Alcosan underground vault located on Lot 4-B (See AVRR Exhibit F). Plaintiff denies that this 1998 claim made by Russell Peterson was correct or justified. Plaintiff denies the remainder of AVRR's allegations in its paragraph 9.

10. Plaintiff admits that correspondence attached as AVRR Exhibit G to AVRR's Preliminary Objections was mailed and received by Plaintiff or his counsel where they are indicated as a recipient. Plaintiff denies that these are complete copies of such correspondence. Plaintiff denies that the referenced correspondence constitutes a chain of title. Plaintiff denies the accuracy of AVRR's characterization as to title in its paragraph 10. Plaintiff denies the allegations regarding disclosure by AVRR of any plans for future use and development of its railroad right of way.

11. Denied.

12. Plaintiff denies knowledge or information sufficient to admit or deny whether any railroad since 1862 filed to abandon the subject track and demands proof of same.

LACK OF SUBJECT MATTER JURISDICTION – PARCP 10228(a)(1)

13. Plaintiff incorporates its responses to paragraphs 1 through 12 herein.

14. Plaintiff admits that Pa R.C.P. No. 1028(a)(1) permits the filing of preliminary objections.

15. Denied, however, it is specifically denied that the Complaint seeks to cause AVRR to pay for property which is used by AVRR and is necessary for the current and future provision of common carrier railroad service in interstate commerce. Plaintiff admits that the Complaint seeks judicial and equitable remedies including damages.

16. Plaintiff denies AVRR's characterization as to AVRR's title to real estate. Plaintiff denies that AVRR acquired title to its right of way interests in real estate through

any instrument apart from the 1995 Conrail Deed. Plaintiff lacks knowledge or information sufficient to form an opinion as to the basis for the approval granted in ICC Finance Docket No. 32783 and demands proof of same, including but not limited to all relevant and current railroad right of way maps and plans submitted to the ICC in connection therewith. Plaintiff denies the AVRR legal conclusions regarding the nature and extent of the jurisdiction of the Surface Transportation Board. Plaintiff denies that the relevant provisions of 49 U.S.C. § 10501 are quoted by AVRR. Plaintiff admits that the Surface Transportation Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to preempt state or local action, if such action would unreasonably interfere with interstate rail operations. Plaintiff denies that AVRR has set forth allegations sufficient to invoke such preemption over this litigation by the Surface Transportation Board.

17. Plaintiff incorporates herein its response to Paragraph 16 above as though set forth in full.

**FAILURE TO EXHAUST STATUTORY ADMINISTRATIVE
REMEDIES – PARCP 1028(a)(7)**

18. Plaintiff incorporates its responses to Paragraphs 1 through 17 as though fully set forth herein.

19. Plaintiff denies AVRR's characterization as to the nature of its title to the real estate at issue, and denies AVRR's interpretations of the deed records. Plaintiff denies that the Conrail Deed is a general warranty deed, as it is clearly states it is and constitutes a 'remise, release and quit claim deed' with no general warranty as to title, which is "under and subject, however, to ...any easements or agreements of record or otherwise affecting the Premises/Easement Areas, and to the state of facts which a personal inspection or accurate survey would disclose..." (See AVRR Exhibit C).

Plaintiff admits that AVRR acquired limited easement rights and interests to a railroad right of way by virtue of the Conrail Deed.

20. Plaintiff denies AVRR's characterization of the jurisdiction of the Surface Transportation Board. Plaintiff denies that petition to the Surface Transportation Board is an obligation of Plaintiff, or a required administrative remedy in this litigation. Plaintiff denies that its Complaint asserts claims over AVRR's actual operating right of way. Plaintiff admits as alleged in its Complaint that, *after* determination by this Court to quiet title to the property lines in dispute; and *in the event* this Court finds that AVRR's right of way is not determinable from the deed records of the Allegheny County Department of Real Estate; *then* petition to the Surface Transportation Board may be necessary (subject to the discretion of the Board whether it elects to hear the case) to determine the railroad right of way location necessary for AVRR's operations. Plaintiff's claims for damages would at all times remain within the jurisdiction of this court.

21. Plaintiff denies that it has failed to avail itself of administrative remedies before the Surface Transportation Board, particularly as said Board does not have authority or jurisdiction to adjudicate Plaintiff's claims to quiet title, or for inverse condemnation damages. Plaintiff denies that the jurisdiction of the Surface Transportation Board is exclusive. Plaintiff denies that this litigation interferes in any way with the use by AVRR of its operating right of way, as said right of way is shown on the instruments of record in this matter, and as same is used and operated by AVRR, and demands proof of same. Plaintiff denies that the Board's discretionary jurisdiction preempts all state law claims.

22. See Responses to Paragraphs 18 through 21 above which are incorporated herein by reference.

FAILURE TO CONFORM TO LAW OR RULE OF COURT – PARCP 1028(2)

23. Plaintiff incorporates its responses in paragraphs 1 through 22 above.

24. Plaintiff admits that AVRR has right of way interests on property adjacent to Lot 4-B. Plaintiff denies that AVRR has possession, use or occupancy of any portion of Lot 4-B as said lot is depicted on subdivision plans of record, apart from the use of the right-of-way line shown on the subdivision maps of record (see Plaintiff Exhibits B, D, E and F to the Complaint) which right of way line and railroad use is not in dispute by Plaintiff.

25. Plaintiff denies that AVRR is or has been in possession or use of the disputed area of Lot 4-B, and avers in its Complaint that Plaintiff has possession and use of the lot. Plaintiff denies that the Complaint seeks to eject AVRR from the AVRR right of way.

26. Plaintiff incorporates in full its response to paragraph 25 above by reference.

27. Plaintiff incorporates in full its response to paragraph 25 above by reference.

LEGAL INSUFFICIENCY COUNT I – PARCP 1028(a)(4)

28. Plaintiff incorporates its responses to Paragraphs 1 through 27 herein.

29. Plaintiff admits the Complaint claims damages for slander of title, and denies the remainder of the objections in AVRR's paragraph 29 (*see also* discussion as paragraphs 51 - 57 below).

30. Plaintiff denies the objections in AVRR's paragraph 30.

31. Plaintiff denies the objections in AVRR's paragraph 31.

32. Plaintiff denies the objections in AVRR's paragraph 32.

33. Plaintiff denies the objections in AVRR's paragraph 33.

LEGAL INSUFFICIENCY COUNT II – PARCP 1028(a)(4)

34. Plaintiff incorporates responses 1 through 33 above.

35. Plaintiff denies characterization of Pennsylvania Railroad as AVRR's 'predecessor in interest' except with respect to title. Plaintiff admitted the PARR Deed of record in accordance with Paragraph 6 above, and incorporates herein by reference its response to Paragraph 6 above.

36. Plaintiff denies the characterization of Pennsylvania Railroad as AVRR's 'predecessor in interest' except with respect to title. See also response to Paragraph 35 above incorporated herein by reference. Plaintiff denies that it is required to allege defect or mistake in its' pleading with respect to the PARR Deed, but admits upon information and belief that there is a substantial likelihood of discrepancies, defects and/or mistakes in the deeds attached as AVRR Exhibits D and E to AVRR's Preliminary Objections.

37. Plaintiff objects to Paragraph 37 as it is unclear and confusing. Notwithstanding the foregoing, Plaintiff denies this allegation to the extent this paragraph purports to allege that Plaintiff failed to plead the existence of the deed for Lot 4-B into Plaintiff, which is attached as Plaintiff Exhibit A to the Complaint and which is fully pled and set forth in paragraphs 9-13 of the Complaint in this matter.

38. Plaintiff denies AVRR's characterization of the location of the lot boundary lines, and to the characterization of its interests in title as "fee simple". Plaintiff admits that AVRR was grantee of the Conrail Deed, which is attached as AVRR Exhibit C to AVRR's Preliminary Objections. Plaintiff denies the metes and bounds description quoted by Plaintiff is contained or referenced in the Conrail Deed.

39. Plaintiff denies that AVRR acquired title through, or was grantee of, any deed other than the 1995 Conrail Deed. Plaintiff denies AVRR has a "fee simple estate" in title to the property adjacent to the Fiore Lot 4-B.

40. Plaintiff lacks information or belief regarding whether and railroad has sought abandonment of the right of way at issue. Plaintiff admits that railroad tracks

have been in use, although not in the same locations, in the right of way as said right of way is depicted on the subdivision maps of record (Plaintiff's Exhibits B, D, E and F to the Complaint) during the period that Plaintiff has held title to Lot 4-B.

41. Plaintiff denies that AVRR acquired title through any deed other than the 1995 Conrail Deed. Plaintiff denies that the Conrail Deed was a "general warranty deed". Plaintiff denies that the Conrail Deed located a right of way, or that railroad operations occurred in any right of way, other than within the right of way shown on the subdivision plans attached as Plaintiff Exhibits B, D, E and F to the Complaint, which are consistent with the 1995 Conrail Deed, and which are consistent with the Lot 4-B boundaries pled by Plaintiff, since at least 1956.

42. Plaintiff denies paragraph 42 in its entirety. *See also* discussion at paragraphs 51 - 57 below.

43. Plaintiff denies paragraph 43.

LEGAL INSUFFICIENCY – COUNTS I, II, III and IV

44. Plaintiff incorporates its responses to Paragraphs 1 through 43 herein.

45. Plaintiff denies that the AVRR right of way of record is otherwise than that shown on the subdivision maps of record (Plaintiff Exhibits B, D, E and F to the Complaint), which maps are consistent with the right of way line shown in the Conrail Deed.

46. Plaintiff admits the AVRR right of way is correctly shown on the subdivision maps of record, attached as Plaintiff Exhibits B, D, E and F to the Complaint, which are consistent with the Conrail Deed of record. Plaintiff denies that the AVRR right of way of record is otherwise than that shown on the subdivision maps of record and the Conrail Deed.

47. Plaintiff admits that the AVRR right of way is correctly shown on the subdivision maps of record, attached as Plaintiff Exhibits B, D, E and F to the Complaint,

which are consistent with the Conrail Deed. Plaintiff denies that the AVRR right of way of record is otherwise than that shown on the subdivision maps of record and the Conrail Deed.

48. Plaintiff denies that it is required to allege invalidity of any deed in Defendant's chain of title to support its cause of action.

49. Plaintiff denies that the instruments of record support Plaintiff's allegations as to the property line and right of way location. Plaintiff denies AVRR's interpretation of the 1956 deed descriptions. Plaintiff denies that AVRR's railroad right of way is described solely by 1920 and 1956 deeds, rather than by the 1995 Conrail Deed into AVRR. Plaintiff denies the Defendant's conclusory opinion that Defendant's affidavits determine a property line location 'as a matter of law' as this is a disputed issue of fact for determination at trial (*see* discussion regarding the integrity of the Peterson affidavit and the Kalina affidavit and drawings in paragraphs 51 - 57 below).

50. Plaintiff denies the remedy requested by Defendant is appropriate or just.

**PLAINTIFF'S PRELIMINARY OBJECTIONS PURSUANT
TO PA R.C.P. No 1028(a)(2) TO THE AFFIDAVITS OF
RUSSELL PETERSON AND DAVID KALINAS;
AND TO THE DRAWINGS SUBMITTED AS AVRR EXHIBIT B**

51. AVRR has submitted an Affidavit of Russell A. Peterson (the "Peterson Affidavit") and an Affidavit of David M. Kalina (the "Kalina Affidavit") with AVRR Exhibit B Drawings, in support of its Preliminary Objections.

52. The Peterson Affidavit and Kalina Affidavit purport to prove title to a small, disputed area of land based on deeds from 1920 and 1956 (largely ignoring the 1995 Conrail Deed into AVRR), but are rife with legal opinion and conclusions as to why AVRR should be declared the owner of the disputed property area.

53. Neither the Peterson Affidavit nor the Kalina Affidavit aver sufficient facts relevant to a determination of AVRR's Preliminary Objections regarding subject matter jurisdiction or failure to exhaust administrative remedies.

54. The Kalina Affidavit primarily consists of conclusions of fact and law regarding title more properly left to the Court and fact finder in this litigation, and which conclusions of fact and law Plaintiff denies.

55. The Peterson Affidavit avers that railroad operations occur and continue in the railroad right of way "adjacent" to Lot 4-B (Peterson Affidavit ¶¶ 2-4), but does not allege the interference with or disruption of railroad operations necessary for the Surface Transportation Board to exercise its jurisdiction.

56. The Exhibit B Drawings, in conjunction with the Kalina Affidavit and Peterson Affidavit, directly contradict certifications made of record as recently as 2005-2006 by AVRR and Liadis Engineering & Surveying, Inc. regarding the disputed property area (see Plaintiff's Exhibits M and N attached hereto).

57. The Court should disregard the Peterson Affidavit and Kalina Affidavit with the AVRR Exhibit B drawings as impertinent since they are submitted solely to opine as to disputed facts that are within the province of the fact finder in the case.

WHEREFORE, Plaintiff prays that this Court dismiss and deny the Preliminary Objections of AVRR in their entirety, and such other and further relief as this Court may deem just and proper.

RESPECTFULLY SUBMITTED:
MAIELLO, BRUNGO & MAIELLO, LLP

/s/ John H. Prorok

John H. Prorok, Esquire
Lawrence J. Maiello, Esquire
Kathleen C. McConnell, Esquire
Attorneys for Plaintiff

LIST OF EXHIBITS

Plaintiff Exhibit L (the "Rospec Deed")

Plaintiff Exhibit M (the "Fagens Map").

Plaintiff Exhibit N (the "Fagens Deed")

VERIFICATION

I, William Fiore, verify that the statements and averments made in this RESPONSE TO PRELIMINARY OBJECTIONS are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

Date: 4/5/10

/s/ William Fiore
William Fiore

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April 2010, a true and correct copy of the attached **PLAINTIFF'S RESPONSE TO PRELIMINARY OBJECTIONS RAISING QUESTIONS OF FACT OF DEFENDANT ALLEGHENY VALLEY RAILROAD** was served by United States Mail, first-class postage prepaid, upon the following:

Richard R. Wilson, Esq.
Richard R. Wilson, PC
518 N. Center Street, Ste 1
Ebensburg, PA 15931

Consolidated Rail Corporation
1717 Arch Street, 32nd Floor
Philadelphia, PA 19103

Eugene Giotto, Esq.
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219

MAIELLO, BRUNGO & MAIELLO, LLP

/s/ Kathleen C. McConnell
Kathleen C. McConnell, Esquire
Attorney for William Fiore

all of such coal and, in that connection, damage may result to the surface of the land and any house, building or other structure on or in such land. (This notice is set forth in the manner provided in Section 1 of the Act of July 17, 1957, P.L. 984.)
with the appurtenances: TO HAVE AND TO HOLD the same unto and for the use of the said party of the second part her heirs and assigns forever,
AND the said grantors, Joseph C. Stofke and Mildred Stofke, his wife, for themselves, their heirs, executors and administrators covenant with the said party of the second part her heirs and assigns against all lawful claimants the same and every part thereof to Warrant and Defend.

WITNESS the hands and seals of the said parties of the first part.
ATTEST:
Rose M. Morgano Joseph C. Stofke (SEAL)
Joseph U. Esper Mildred Stofke (SEAL)

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY)
On this the 28th day of May, A.D. 1959, before me Notary Public the undersigned officer, personally appeared JOSEPH C. STOFKE and MILDRED STOFKE, his wife, known to me (or satisfactorily proven) to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.
IN WITNESS WHEREOF, I hereunto set my hand and official seal.
Ray W. House, Notary Public (N.P. SEAL)
My Commission expires January 7, 1963
Braddeek Hills, Pa. Allegheny County

CERTIFICATE OF RESIDENCE

I, Joseph U. Esper, Esq. do hereby certify that grantee's precise residence is 520 Price Avenue, North Braddeek, Pa.
WITNESS my hand this 28th day of May, 1959.
Joseph U. Esper, Esq.

Registered in Allegheny Co. June 3, 1959.
No. 31748. Recorded May 29, 1959. Time 1:22 PM
Written by Pfarr Compared Y. Dickey & Peters

American Steel Foundries)
to)
Respec Realty Company, Inc.)
as Grantor AND RESPEC REALTY COMPANY, INC., a Pennsylvania corporation (hereinafter sometimes referred to as "Grantee").
DEED
MADE this 28th day of May, 1959
BETWEEN AMERICAN STEEL FOUNDRIES, a New Jersey corporation (hereinafter sometimes referred to as "Grantor") and RESPEC REALTY COMPANY, INC., a Pennsylvania corporation (hereinafter sometimes referred to as "Grantee").

WITNESSETH THAT in consideration of the sum of One hundred and ninety thousand dollars (\$190,000--), receipt whereof is hereby acknowledged, Grantor does hereby grant and convey to Grantee, its successors and assigns:

that certain parcel or tract of land situate partly in the Borough of Verona and partly in the Township of Penn Hills (formerly Township of Penn), Allegheny County, Pennsylvania, bounded and described as follows: (All measurements in the following description are Verona Standard measure, 100 feet Verona Standard is equivalent to 100.10 feet United States Standard).
BEGINNING at a concrete monument in the Borough of Verona on the westerly side of Allegheny River Boulevard 60 feet in width, as presently located, at the northeasterly corner of the parcel hereby described, said concrete monument being the following courses and distances from the easterly side of Jones Street at the southerly terminus of said Street as said southerly terminus was established by Ordinance No. 1 of 1959, of the Borough of Verona, of record in the Office of the Recorder of Allegheny County, Pennsylvania in Deed Book Volume 3731, page 258; South 8° 30' West a distance of 7.52 feet, South 79° 4' West a distance of 56.55 feet, and South 59° 12' 20" East a distance of 15.27 feet; thence along the westerly side of Allegheny River Boulevard as presently located, the following courses and distances: South 16° 43' 20" West a distance of 728.25 feet more or less, by a curve to the right having a radius of 969.53 feet an arc distance of 333.40 feet; South 36° 25' 30" West a distance of 311.98 feet, more or less, to a concrete monument on the line dividing the Borough of Verona on the north from the Township of Penn Hills on the south, thence continuing along the westerly side of Allegheny River Boulevard as presently located South 36° 25' 30" West a distance of 343.66 feet to an iron pin on the line common to the lands formerly of Farmers Investment Company and The Pennsylvania Railroad Company; thence by the line of lands formerly of The Pennsylvania Railroad Company North 53° 34' 30" West a distance of 44.96 feet to an iron pin on the easterly side of the right of way of the Conemaugh Division of The Pennsylvania Railroad, formerly the Allegheny Valley Railroad; thence northwardly by a curve to the left having a radius of 2,852.07 feet a distance of 365 feet, more or less, to a point of intersection with the center line of said Railroad; as described in Deed dated November 16, 1926 from Verona Steel Castings Company to Grantor, of record in the Office of the Recorder of Allegheny County, Pennsylvania in Deed Book Volume 2382, page 259; thence continuing by said center line northwardly by a curve to the left having a radius of 2,862.07 feet a distance of 325 feet, more or less, to a point of tangent in said center line; thence continuing by said center line North 8° 30' East a distance of 919.66 feet, more or less, to the line common to the lands of Woodings-Verona



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Tool Works and Grantor herein; thence along the line of lands of Woodings-Verona Tool Works South 82° 46' East a distance of 329.06 feet, more or less, to the westerly side of Jones Street in the Borough of Verona; thence along the line commencing to the southerly terminus of Jones Street, as said southerly terminus was established by Ordinance No. 1 of 1959, of the Borough of Verona, of record in the Office of the Recorder of Allegheny County, Pennsylvania in Deed Book Volume 3731, page 258 and the parcel hereby described South 82° 46' East a distance of 50.01 feet to the easterly side of Jones Street; thence South 8° 30' West a distance of 7.52 feet to a point; thence South 79° 4' East a distance of 56.55 feet, more or less, to a point; thence South 59° 12' 20" East a distance of 15.27 feet to the place of beginning. Containing 9.737 acres, more or less.

BEING (a) part of Tracts Nos. 1 and 2 conveyed to Grantor by Verona Steel Castings Company by Deed dated November 16, 1926 of record in the Office of the Recorder of Allegheny County, Pennsylvania in Deed Book Volume 2383, page 259, and including (b) that certain tract or parcel conveyed to Grantor by Woodings-Verona Tool Works by Deed dated June 21, 1937 of record in the aforesaid Office in Deed Book Volume 2565, page 444, (c) that certain tract or parcel conveyed to Grantor by Farmers Investment Company by Deed dated January 15, 1954 of record in the aforesaid Office in Deed Book Volume 3323, page 275, (d) that certain tract or parcel conveyed to Grantor by The Pennsylvania Railroad Company by Deed dated June 25, 1956 of record in the aforesaid Office in Deed Book Volume 3591, page 63 and (e) that certain tract or parcel consisting of a portion of Jones Street vacated by the Borough of Verona by Ordinance No. 1 of 1959 enacted February 10, 1959, and of record in the aforesaid Office in Deed Book Volume 3731, page 258.

TOGETHER with all of the improvements and appurtenances thereunto belonging.

SUBJECT to (1) existing easements and agreements, if any, for poles and pole lines underground gas lines and switch and spur tracks, (2) Oil and gas lease from John Hayworth, et al., to S.W. Say dated September 23, 1884 of record in the aforesaid Office in Deed Book Volume 503, page 365, Oil and Gas Lease authorized by the Orphans' Court of Allegheny County, Pennsylvania in the Estate of Richard M. Dewhurst, a minor, at No. 137, April Term, 1900, (3) Waiver of damages as set forth in the aforesaid Deed dated June 25, 1956 from The Pennsylvania Railroad Company, (4) Mortgage dated September 5, 1874 from Allegheny Valley Railroad Company to the Commonwealth of Pennsylvania of record in the aforesaid Office in Mortgage Book Volume 198, page 16, to the extent that the same may affect a portion of the premises conveyed by the aforesaid Deed dated June 25, 1956 from The Pennsylvania Railroad Company, (5) Water courses, slope and fill rights and all streets and the right-of-way of The Pennsylvania Railroad Company to the extent that the premises hereby conveyed extends to the center line thereof and (6) public and private rights, if any, not extinguished by the above-mentioned vacation proceedings of the Borough of Verona.

PARCEL NO. 2

All that certain parcel or tract of land situate partly in the Borough of Verona and partly in the Township of Penn Hills (formerly Township of Penn) Allegheny County, Pennsylvania, bounded and described as follows: (All measurements in the following description are Verona Standard distances. 100 feet Verona Standard is equivalent to 100.10 United States Standard).

BEGINNING at a concrete monument in the Township of Penn Hills at the intersection of the easterly side of Allegheny River Boulevard 60 feet in width, as presently located and the southerly side of a proposed street 50 feet in width as described in Deed dated November 16, 1926 from Verona Steel Castings Company to Grantor, of record in the Office of the Recorder of Allegheny County, Pennsylvania, in Deed Book Volume 2382, page 259, said point of intersection being at the northwesterly corner of the parcel hereby described; thence South 59° 12' 20" East along the southerly side of said proposed street a distance of 255.23 feet to a concrete monument; thence South 0° 35' West a distance of 1,116.42 feet to a concrete monument; thence North 87° 37' West a distance of 732.52 feet to a point on the easterly line of Allegheny River Boulevard as presently located; thence along the easterly side of Allegheny River Boulevard as presently located, the following courses and distances: North 36° 25' 30" East a distance of 271.50 feet, by a curve to the left having a radius of 1029.47 feet an arc distance of 354.01 feet, North 16° 43' 20" East a distance of 713.21 feet, more or less, to the place of beginning. Containing 11.718 acres, more or less.

BEING part of Tracts Nos. 1 and 2 conveyed to Grantor by Verona Steel Castings Company by Deed dated November 16, 1926, of record in the aforesaid Office in Deed Book Volume 2383, page 259.

TOGETHER with all of the improvements and appurtenances thereunto belonging, including all right, title and interest of Grantor in and to a certain fifty-foot unopened street laid out and dedicated to public use by Susan Jones and Verona Steel Castings Company, and referred to in Deed dated July 19, 1917 from Susan Jones to Verona Steel Castings Company of record in the aforesaid Office in Deed Book Volume 1893, page 331.

SUBJECT to (1) existing easements and agreements, if any, for poles and pole lines (2) water courses, slope and fill rights and all streets to the extent that the premises hereby conveyed extends to the center line thereof and (3) minor encroachments, if any, over the perimeter of the premises hereby conveyed by adjoining owners, occupants and others.

PARCEL NO. 3.

All that certain parcel or tract of land situate partly in the Borough of Verona and partly in the Township of Penn Hills (formerly Penn Township) Allegheny County, Pennsylvania, bounded and described as follows: (All measurements in the following description are Verona Standard measure. 100 feet Verona Standard is equivalent to 100.10 United States Standard).

BEGINNING on the easterly side of Jones Street in the Borough of Verona at a point on the southwesterly corner of the Margaret A. Ledwith Plan of record in the Office

of the Recorder of Allegheny County, Pennsylvania in Plan Book Volume 28, page 85; thence along the easterly side of Jones Street in a southerly direction a distance of 143.44 feet to the line of land now or formerly of Giacometti Ermengildo; thence by said land South 81° 25' East a distance of 92.60 feet, more or less, to the westerly side of Allegheny River Boulevard 60 feet in width, as presently located, thence along the westerly side of Allegheny River Boulevard in a northerly direction 143.55 feet, more or less, to the southerly line of the Ledwith Plan; thence by the southerly line of said plan North 81° 25' West a distance of 97.60 feet, more or less, to the place of beginning. Containing 0.312 acres, more or less.

BEING the same premises conveyed to Grantor by Mary Atchko, widow, by Deed dated November 15, 1944, of record in the aforesaid Office in Deed Book Volume 2806, page 674.

TOGETHER with all of the improvements and appurtenances thereunto belonging.

SUBJECT to (1) existing easements and agreements, if any, for poles and pole lines, (2) water courses, slope and fill rights and all streets to the extent that the premises hereby conveyed extends to the center line thereof and (3) the restrictions, if any, created by the following language in Deed from Verona Steel Castings Company to Mike Atchko, et ux., dated October 15, 1924, of record in the aforesaid Office in Deed Book Volume 2234, page 445; "It is expressly covenanted and agreed that no public garage, or bar, or place for the sale of beverages shall ever be erected or conducted on the above premises or any part thereof."

PARCEL NO. 4.

ALL that certain parcel or tract of land situate partly in the Borough of Verona and partly in the Township of Penn Hills (formerly Township of Penn), Allegheny County, Pennsylvania, bounded and described as follows: (All measurements in the following description are Verona Standard distances. 100 feet Verona Standard is equivalent to 100.10 United States Standard).

BEGINNING on the easterly side of Jones Street in the Borough of Verona at a point thereon distant 676.62 feet and South 8° 30' West from the southerly side of Grant Street in said Borough, at southwesterly corner of land now or formerly of Giacometti Ermengildo; thence by said land South 80° 50' East a distance of 90.50 feet, more or less, to the westerly side of Allegheny River Boulevard 60 feet in width, as presently located, thence along the westerly side of Allegheny River Boulevard in a southerly direction a distance of 162.70 feet, more or less, to the northeasterly corner of Parcel No. 1, herein above described; thence along said Parcel the following courses and distances to the easterly side of Jones Street: North 59° 12' 20" West a distance of 15.27 feet, North 79° 04' West a distance of 56.55 feet and North 8° 30' East a distance of 7.52 feet; thence along the easterly side of Jones Street a distance of 146.67 feet, more or less, to the place of beginning. Containing 0.292 acres, more or less.

BEING the same premises conveyed to Grantor by the following deeds and including that certain tract or parcel consisting of a portion of an unopened street vacated by the Borough of Verona by Ordinance No. 1 of 1953, enacted January 12, 1953 and of record in the aforesaid Office in Ordinance Volume 4, page 258; Deed from Kier W. Bwing, et ux, to Grantor dated October 26, 1943 of record in the aforesaid Office in Deed Book Volume 2783, page 359; and Deed from J. Clark Stewart, et ux, to Grantor dated January 21, 1952, of record in the aforesaid Office in Deed Book Volume 3160, page 243.

TOGETHER with all of the improvements and appurtenances thereunto belonging.

SUBJECT to (1) existing easements and agreements, if any, for poles and pole lines, (2) Water courses, slope and fill rights and all streets to the extent that the premises hereby conveyed extends to the center line thereof, (3) the aforementioned restrictions, if any, created in Deed dated October 15, 1924, from Verona Steel Castings Company to Mike Atchko, et ux., and (4) public and private rights, if any, now extinguished by the above-mentioned vacation proceedings of the Borough of Verona.

PARCEL NO. 5

ALL that certain parcel or tract of land situate in the Borough of Oakmont, Allegheny County, Pennsylvania, bounded and described as follows: (All measurements in the following description are United States Standard measure).

BEGINNING at a point on the northerly right-of-way line of the Plum Creek Branch of The Pennsylvania Railroad Company in line dividing land herein described and land now or formerly of Jefferson J. Blancke, said point being distant 45.71 feet North 60° 50' West from the center line of tracts of the said Plum Creek Branch of The Pennsylvania Railroad Company, thence along said dividing line North 60° 50' West a distance of 589.62 feet to a point; thence still by said dividing line South 45° 29' West a distance of 11.44 feet to a corner common to the said land now or formerly of Jefferson J. Blancke, and lands now or formerly of Pittsburgh Cold Rolled Steel Company and the parcel hereby described; thence along the projection of the line common to the said lands now or formerly of Jefferson J. Blancke and Pittsburgh Cold Rolled Steel Company North 21° 19' West a distance of 12.59 feet to a point; thence still along line of land now or formerly of Pittsburgh Cold Rolled Steel Company and land now or formerly of John Kletsly, et al, North 71° 43' West a distance of 108.24 feet to an iron pin on the southerly side of a 60-foot street known as Dark Hollow Road; thence along the line of said street North 45° 43' East a distance of 228.86 feet to a point on the southerly side of said street; thence continuing along the line of said street North 71° 41' East a distance of 142.85 feet to a point on the southerly side of said street; thence continuing along the line of said street North 84° 20' East a distance of 318.07 feet to a point on the line of land now or formerly of Elisabeth Kletsly, et al, thence along the line of said land South 67° 09' 50" East a distance of 822.75 feet, more or less, to a point on the northerly right-of-way line of the said Plum Creek Branch of The Pennsylvania Railroad Company; and thence along the northerly right-of-way line of the said Plum Creek Branch of The Pennsylvania Railroad Company South 72° 56' 30" West a distance of 773.56 feet, more or less, to a point at the place of beginning. Containing an area of 9.139 acres, more or less.

BEING part of Tract No. 3 conveyed to Grantor by Verona Steel Castings Company by Deed dated November 16, 1926, of record in the aforesaid Office in Deed Book Volume 2383, page 259, and premises conveyed to Grantor by Elizabeth S. Kletaly, widow, et al, by Deed dated August 15, 1951 of record in the aforesaid Office in Deed Book Volume 2702, page 209.

TOGETHER with all of the improvements and appurtenances thereunto belonging. SUBJECT to (1) Water courses, slope and fill rights and all streets and rights-of-way to the extent that the premises hereby conveyed extends to the center line thereof, (2) right-of-way for a 12-inch line for the conveyance of water created by John Kletaly in favor of Suburban Water Company by instrument dated November 1, 1901, of record in the aforesaid Office in Deed Book Volume 1802, page 73 and (3) right-of-way for poles, etc., created by John Kletaly, et ux, in favor of The Allegheny County Light Company by instrument dated November 25, 1916 of record in the aforesaid Office in Deed Book Volume 1855, page 511.

GRANTOR covenants that it will WARRANT generally the property hereby conveyed. THIS Deed is made under and by virtue of a Resolution of the Board of Directors of the Grantor duly passed on the 24th day of March, 1959, a full quorum being present, authorizing and directing the same to be made and done.

IT is the intention and purpose of Grantor to grant and convey unto Grantee, its successors and assigns, the entire fee simple title to the above-described parcels or tracts of land including all coal and minerals, if any, now owned by Grantor therein. The following paragraph is inserted only for the purpose of compliance with Section 1 of the Act of the General Assembly of Pennsylvania of July 17, 1957, P.L. 984, and is not intended as an exception or reservation of any mineral estate in the coal underlying said land, viz.:

"THIS DOCUMENT MAY NOT SELL, CONVEY, TRANSFER, INCLUDE OR INSURE THE TITLE TO THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED OR REFERRED TO HEREIN, AND THE OWNER OR OWNERS OF SUCH COAL MAY HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL AND, IN THAT CONNECTION, DAMAGE MAY RESULT TO THE SURFACE OF THE LAND OF ANY HOUSE, BUILDING OR OTHER STRUCTURE ON OR IN SUCH LAND."

WITNESS the due execution hereof the day and year first above written.
ATTEST: AMERICAN STEEL FOUNDRIES (CORP. SEAL)
O.B. Garver By J.B. Lauterman
Secretary President

(§ 209.00 U.S.I.R.S. CANCELLED)
(§ 945.95 Pa. Real Estate T.T.S. CANCELLED)
(§ 52.00 Fern Hills Twp. School Dist. D.T.T.S. CANCELLED)

STATE OF ILLINOIS) On this, the 28th day of May, 1959, before me, a
COUNTY OF COOK)SS: Notary Public, the undersigned officer, personally
appeared J.B. LAUTERMAN, who acknowledged himself
to be the President of AMERICAN STEEL FOUNDRIES, a corporation, and that he as such
President, being authorized to do so, executed the foregoing instrument for the purposes
therein contained by signing the name of the corporation by himself as President.
IN WITNESS WHEREOF, I hereunto set my hand and official seal.
Geo. Wilton, Notary Public (N.P. SEAL)
My Commission expires May 21, 1961

CERTIFICATE AS TO RESIDENCE

THE undersigned hereby certifies that the precise residence of the Grantee herein named is as follows: 1560 Electric Ave., East Pittsburgh, Pa.
By Frank H. Glaser

Registered in Allegheny Co. June 5, 1959.
No. 32445. Recorded June 2, 1959. Time 3:07 PM
Written by Pfarr Compared by *Peters & Hokeby*

Gibson & Jamison Construction, Inc.) THIS INDENTURE
to) MADE the 11th day of March in the year of
William E. Caldwell et ux) our Lord, one thousand nine hundred and
fifty-nine (1959).

BETWEEN GIBSON & JAMISON CONSTRUCTION, INC., a Corporation under the Laws of the Commonwealth of Pennsylvania, having its domicile in the City of Pittsburgh, County of Allegheny, in said Commonwealth, party of the first part, and WILLIAM E. CALDWELL and INGE J. CALDWELL his wife, of the Borough of Monroeville, Allegheny County, Pennsylvania, parties of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of FOURTEEN THOUSAND (\$14,000.00) Dollars, lawful money of the United States of America, to it in hand paid by the said parties of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, released, conveyed and confirmed, and by these presents does grant, bargain, sell, release, convey and confirm, unto the said parties of the second part, their heirs and assigns, forever,

All that certain lot or piece of ground situate in the Borough of Monroeville, Allegheny County, Pennsylvania, being Lot No. Eleven Hundred Twelve (1112) in BURKE GLEN RIGHTS PLAN NO. 6, as recorded in the Recorder's Office of Allegheny County, Pennsylvania, in Plan Book Vol. 66, pages 83, 84, 85 and 86.



Allegheny County
Valerie McDonald Roberts
Recorder of Deeds
Pittsburgh, PA 15219

Instrument Number: 2006-13164

Recorded On: May 01, 2006 As-Deed

Parties: ALLEGHENY VALLEY RAILROAD CO
To FAGENS INC

of Pages: 9

Comment:

****DO NOT REMOVE-THIS PAGE IS PART OF THE RECORDED DOCUMENT****

Deed 53.00
Pages > 4 4
Names > 4 0
Total: 53.00

Realty Transfer Stamp

Affidavit Attached-No	Stamp Num-T259896
PENN HILLS	
Ward-99-NO WARD	
Blk/Lot-385N172	Value 10,000.00
Commonwealth of Pennsylvania	100.00
Munic-Penn Hills Municipality	150.00
School District-Penn Hills	50.00
	300.00

Deed Registry Stamp

Valerie McDonald Roberts, Manager - BLOCK AND LOT NUMBER

Valerie McDonald Roberts

Date: / / - Int. By: COMBINE W/385-N-186

A.C.N. 20100 61W

I hereby certify that the within and foregoing was recorded in the Recorder's Office in Allegheny County, PA

****DO NOT REMOVE-THIS PAGE IS PART OF THE RECORDED DOCUMENT****

File Information:

Document Number: 2006-13164
Receipt Number: 668185
Recorded Date/Time: May 01, 2006 02:58P
Book-Vol/Pg: BK-DE VL-12829 PG-458
User / Station: A Matthews - Cash Station 25

Record and Return To:

SEBRING & ASSOCIATES
2735 MOSSIDE BLVD
MONROEVILLE PA 15146



Valerie McDonald Roberts
Valerie McDonald Roberts Recorder of Deeds

SIBRING & ASSOCIATES
2735 MORGAN BLVD
MONROEWILLE, PA 15146

Page 7
365 N 172

①

DEED

THIS DEED, made the 27 th day of April 2006, between Allegheny Valley Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having its principal place of business at P.O. Box 127, 760 Allegheny River Boulevard, Verona, PA 15147 (hereinafter, the "Grantor"), and FAGEN'S, INC., a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having its principal place of business at 9000 Brooktree Road, Wexford, PA 15068 (hereinafter, the "Grantee");

WHEREAS, Grantor owns certain real property and a railroad right-of-way that runs along the Allegheny River between Pittsburgh, Pennsylvania and Arnold, Pennsylvania; and

WHEREAS, Grantee owns a parcel of land that lies along a portion of Grantor's real property in the Municipality of Penn Hills, Pennsylvania, on which Grantee formerly operated a lumber yard that was served by a side track from Grantor's railroad; and

WHEREAS, pursuant to a Deed of Easement dated March 8, 2005, and recorded in the Office of the Recorder of Deeds of Allegheny County in Deed Book Volume 12372, Page 431, Grantor granted onto Grantee a permanent easement for a private grade crossing of Grantor's tracks and real property, and removed the aforementioned side track; and

WHEREAS, also pursuant to the aforementioned Deed of Easement, Grantor has agreed to sell, and Grantee has agreed to purchase, a portion of the real property situate in the Municipality of Penn Hills, County of Allegheny, Commonwealth of Pennsylvania, which is identified as 'property of Allegheny Valley Railroad Company to be conveyed to and consolidated with property of Fagen's Inc.' in the Fagens-AVR Subdivision and Consolidation Plan, recorded November 2, 2005, in the Office of Recorder of Deeds of Allegheny County at Plan Book Volume 252, Page 55 (hereinafter, collectively, the "Real Estate" and as more particularly described in Exhibit A attached hereto); and

WHEREAS, Grantor has provided written notice of its agreement to sell the Real Estate to Grantee to the Municipality of Penn Hills by a letter and subdivision application dated April 20, 2005 (a copy of which is attached hereto as Exhibit B), and to the Pennsylvania Department of Transportation, the Pennsylvania Game Commission, the Pennsylvania Department of Environmental Protection, the Pennsylvania Fish and Boat Commission, and the Pennsylvania Department of Conservation and Natural Resources by letter dated June 22, 2005 (a copy of which is attached hereto as Exhibit C), all as required by 66 Pa.C.S. § 2709; and

WHEREAS, as of the date of this Deed, neither the Municipality of Penn Hills nor any agency of the Commonwealth has offered to purchase the Real Estate pursuant to 66 Pa.C.S. § 2709;

NOW, THEREFORE, Grantor, for and in consideration of the sum of Ten Thousand and no/100 Dollars (\$10,000.00) lawful money of the United States of America paid by Grantee, and for and in consideration of certain other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Grantor does hereby grant and convey unto Grantee, its

successors and assigns, all right, title and interest of Grantor, in and to the Real Estate, which is more particularly described in Exhibit A hereto .

UNDER AND SUBJECT, however, to (1) all prior grants and reservations of coal, oil, gas, mining rights, as may appear in prior instruments of record, (2) Fiber Optic easement rights granted from Consolidated Rail Corporation to CRC Properties, Inc., by Indenture dated September 15, 1995, and (3) the Deed of Easement dated March 8, 2005, and recorded in the Office of the Recorder of Deeds of Allegheny County in Deed Book Volume 12372, Page 431.

TOGETHER with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion or reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, property, claim, and demand whatsoever of it, the said Grantor as well at law as in equity or otherwise howsoever, of, in, and to the same and every part thereof.

BEING a portion of the same premises which Consolidated Rail Corporation by Deed dated October 27, 1995 and recorded in the Office of Recorder of Deeds of Allegheny County at Deed Book Volume 9571, Page 204, released and quitclaimed to Allegheny Valley Railroad Company.

TO HAVE AND TO HOLD all and singular the said Real Estate, together with the appurtenances, unto the Grantee, its successors and assigns forever.

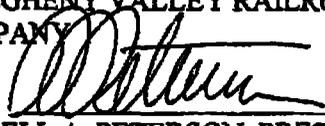
AND the said Grantor for itself, its successors and assigns, hereby warrants specially the property hereby conveyed.

NOTICE: THIS DOCUMENT MAY NOT/ DOES NOT SELL, CONVEY, TRANSFER, INCLUDE OR INSURE THE TITLE TO THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED OR REFERRED TO HEREIN, AND THE OWNER OR OWNERS OF SUCH COAL MAY HAVE/ HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL AND, IN THAT CONNECTION, DAMAGE MAY RESULT TO THE SURFACE OF THE LAND AND ANY HOUSE, BUILDING OR OTHER STRUCTURE IN ON OR IN SUCH LAND. THE INCLUSION OF THIS NOTICE DOES NOT ENLARGE, RESTRICT OR MODIFY ANY LEGAL RIGHTS OR ESTATES OTHERWISE CREATED, TRANSFERRED, EXCEPTED OR RESERVED BY THIS INSTRUMENT. [This notice set forth in the manner provided in Section 1 of the Act of July 17, 1957, P.L. 984, as amended, and is not intended as notice of unrecorded instruments, if any.]

IN WITNESS WHEREOF, Grantor has caused this Deed to be signed in its name and behalf by Russell A. Peterson, its President, being duly authorized to do so.

Attest:

ALLEGHENY VALLEY RAILROAD COMPANY

By: 
RUSSELL A. PETERSON, PRESIDENT

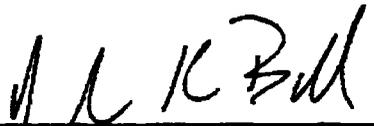

Print Name: John K. Baillie

EXHIBIT A

Being all that certain strip of land situate in the Municipality of Penn Hills, County of Allegheny and Commonwealth of Pennsylvania, being more particularly described as follows:

Beginning at a point on the southerly line of a 1 foot wide reserved strip adjacent to the most southerly alley, as shown on the Plan of Lots Laid Out by Arch H. Rowand, Jr., as recorded in Plan Book Volume 5, Pages 78 and 79, now known as Verona Alley, said line also being the municipal dividing line between the Borough of Verona and the Municipality of Penn Hills, said point being distant along said line, South 89° 09' 45" West, a distance of 33.80 feet from a point on the original centerline of the Allegheny Valley Railroad, at centerline station 512+81.95; thence from said point of beginning and continuing along the southerly line of the 1 foot wide reserved strip adjacent to the most southerly alley, as shown on the Plan of Lots Laid Out by Arch H. Rowand, Jr., as recorded in Plan Book Volume 5, Pages 78 and 79, now known as Verona Alley, and also being along the municipal dividing line between the Borough of Verona and the Municipality of Penn Hills, South 89° 09' 45" West, a distance of 33.28 feet to a point on the line of lands now or formerly of Fagan's, Inc. as recorded in Deed Book Volume 7216, Page 244; thence by the line of lands of said Fagan's, Inc., South 26° 21' 45" West, a distance of 1100.00 feet to an angle point in said line; thence continuing by the line of Fagan's, Inc., South 29° 18' 45" West, a distance of 200.00 feet to a point at the most southwesterly corner of the Fagan's, Inc. property; thence through property of the Allegheny Valley Railroad, South 60° 41' 15" East, a distance of 35.07 feet to a point being located westwardly, 30 feet, at right angles from the existing track of the Allegheny Valley Railroad; thence continuing through the property of the Allegheny Valley Railroad, by a line parallel to and distant westwardly 30 feet at right angles from the centerline of the existing Allegheny Valley Railroad track, North 28° 35' 21" East, a distance of 803.48 feet to a point of curvature on line; thence continuing by a line concentric with the centerline of the said railroad track, continuing through the property of the Allegheny Valley Railroad, by a line parallel to and distant westwardly 30 feet radially from the centerline, by the arc of a circle curving to the left, having a radius of 2859.58 feet, an arc distance of 515.24 feet to a point, said curve being subtended by a chord bearing North 23° 25' 39" East, a chord distance of 514.56 feet, said point being on the aforementioned southerly line of a 1 foot wide reserved strip adjacent to the most southerly alley, as shown on the Plan of Lots Laid Out by Arch H. Rowand, Jr., as recorded in Plan Book Volume 5, Pages 78 and 79, now known as Verona Alley, said line also being the municipal dividing line between the Borough of Verona and the Municipality of Penn Hills, said point being at the true place of beginning of the herein described property.

Property Area: 59,141 sq. ft. or 1.358 acres, more or less.

AVR**ALLEGHENY VALLEY RAILROAD**P.O. Box 127, Verona, PA 15147
(412) 426-2200 Fax: (412) 426-4000

April 20, 2005

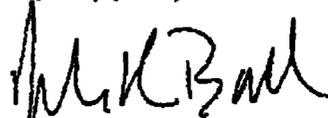
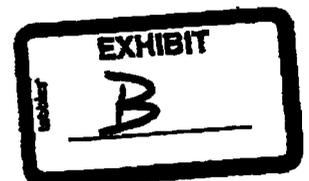
Via Hand DeliveryMr. Christopher Blackwell, Principal Planner
Dept. of Planning & Economic Development
Municipality of Penn Hills
12245 Frankstown Road
Pittsburgh, PA 15235Re: Subdivision of Allegheny Valley Railroad Co. at former site of Fagen's Lumber
Block/Lot # 172-D-395

Dear Mr. Blackwell:

I have enclosed an application to subdivide the Allegheny Valley Railroad Company's right-of-way at the former site of Fagen's Lumber Yard along Allegheny River Boulevard near the Penn Hills - Verona border. I have also enclosed a check for \$400.00 to cover the application fee, and two surveyor's plans, one showing the boundaries of the land to be subdivide, and another showing the intended future use of the land.

I understand that this application will be considered by the Planning Commission at its meeting in late May. If you have any questions or concerns about this in the meantime, please do not hesitate to call me at 412/426-4200.

Very truly yours,

John K. Baillie
General Counsel

AVR**ALLEGHENY VALLEY RAILROAD**P.O. Box 127, Verona, PA 15147
(412) 426-2300 Fax: (412) 426-4000

June 27, 2005

Pennsylvania Department of Transportation
Keystone Building
400 North Street
Harrisburg, PA 17120Pennsylvania Game Commission
2001 Elmerton Avenue
Harrisburg, PA 17110-9797Pennsylvania Department of Environmental
Protection
16th Floor
Rachel Carson State Office Bldg.
P.O. Box 2063
Harrisburg, PA 17105-2063Pennsylvania Fish & Boat Commission
1601 Elmerton Avenue
Harrisburg, PA 17110Department of Conservation and Natural
Resources
Rachel Carson State Office Building
400 Market Street
P.O. Box 8767
Harrisburg, PA 17105-8767Re: Sale of Real Property Including a Portion of a Railroad Right-of-Way, located in
the Municipality of Penn Hills, Allegheny County

Dear Sir or Madam:

As purportedly required by 66 Pa.C.S. § 2709, Allegheny Valley Railroad Company hereby gives notice that it has agreed to transfer to Fagen's, Inc. ("Fagen's") certain real property (the "Property") located in the Municipality of Penn Hills, Allegheny County, as part of a transaction that also includes the sale of an easement for a private road/railroad crossing and the rehabilitation of that private crossing. The Property is a strip thirty-three or more feet wide and approximately 1,300 feet long, covering 59,141 square feet. I have attached maps showing the approximate location of the Property as Exhibit A for your reference.

The sale of the Property will not adversely affect AVR's ability to provide freight rail service along its right-of-way. Although a portion of the Property is within AVR's right-of-way, AVR will still be operating on a right-of-way that is more than sixty feet wide after the Property is transferred.

The Municipality of Penn Hills received notice of the intended transfer by AVR's Subdivision application, which was filed on or about April 20, 2005, and which was approved by the Penn Hills Planning Commission on May 26, 2005. The Municipality of Penn Hills did not make an offer to purchase the Property within 60 days of receiving notice of the transfer.

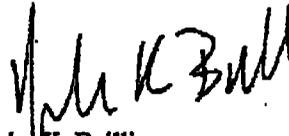


June 27, 2005
Page 2 of 2

Notably, AVR understands that Fagen's has agreed with the Municipality of Penn Hills to set aside a twenty-five-foot-wide easement over its property for a recreational trail. The trail easement will essentially parallel AVR's right-of-way, but will be adjacent or closer to the Allegheny River. Thus, the transaction will not foreclose the possibility of recreational trail development in the area.

Please be aware that because of the long business relationship between the owners of AVR and Fagen's, AVR has no intention of selling the Property to anyone other than Fagen's. Nevertheless, if you wish to discuss the transaction, please call me at (412) 426-4200.

Very truly yours,



John K. Baillie
General Counsel

bcc(w/exhibit): Timothy M. Hazel, Esq.

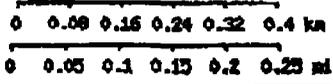
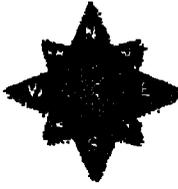


EXHIBIT
A

Date: 2-19-2010



Richard R. Wilson, Esquire
528 N. Center Street, Suite 1
Ebensburg, PA 15931
Attorney for Allegheny Valley
Railroad company

Date: 2-22-2010



Kathleen C. McConnell, Esquire
MAIELLO, BRUNGO & MAIELLO, LLP
One Churchill Park
3301 McCrady Road
Pittsburgh, PA 15235
(412) 242-4400
Attorney for William Fiore

177079

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February 2010, a true and correct copy of the Joint Stipulation was served by United States Mail, first-class postage prepaid, upon the following:

Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19101-1419

Peter D. Friday
468 Beaver Road
Sewickley, PA 15143

Susan F. Dalton
51 Litchfield Drive
Carlisle, Massachusetts 01741

Robert L. Wiseman
Forbes Trail Development
4642 Hatfield Street
Pittsburgh PA 15201

MAIELLO, BRUNGO & MAIELLO, LLP



Kathleen C. McConnell, Esquire
Attorney for William Fiore