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**CITY OF SACRAMENTO
CALIFORNIA**

May 4, 1998

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SANDRA G. TALBOTT
ROBERT D. TOKUNAGA

MEMORANDUM

TO: Mayor and Councilmembers

FROM: Samuel L. Jackson, City Attorney
William P. Carnazzo, Assistant City Attorney
RA Richard E. Archibald, Senior Deputy City Attorney

RE: 7th Street Punchthrough

ISSUES PRESENTED

1. Can the City use the power of eminent domain to acquire property for an at-grade crossing of the Union Pacific rail line(s) by 7th Street?
2. Can the City compel the clean-up of the Union Pacific site now?
3. Can the City require UP to pay the costs of clean-up if the City acquires the property?
4. Can the City apply for the at-grade crossing independent of Union Pacific?

BRIEF ANSWERS

1. The City has the legal authority to use the power of eminent domain to acquire property for an at-grade crossing.
2. No. The State Department of Toxic Substance Control (DTSC) is the state agency responsible for overseeing and compelling the remediation of sites such as the Downtown Railyards. The City does not have the independent authority to require the remediation of the site on a different schedule than that established by DTSC, although it has the right to provide input to DTSC on an appropriate remediation schedule.

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3. UP is responsible for remediation of the site, and it is proceeding with remediation through the DTSC process. Whether the City can acquire the property by eminent domain and require UP to pay for the costs of remediation, and if so, the level of remediation that may be required, are issues that cannot be answered at this time and would likely require litigation to resolve. The issue(s) of acquisition by eminent domain of property that is contaminated with hazardous materials, how contamination affects the purchase price, and who bears the cost of remediation are issues that have been, and will continue to be, the subject of a great deal of litigation.

4. Under the Public Utilities Code, the City has the legal authority to apply for an at-grade crossing. Staff has been advised by PUC representatives that at-grade crossings are discouraged, and are rarely granted.

BACKGROUND

Concerns have been expressed about the timing of the "punchthrough" of Seventh Street. At the March 3rd meeting, the Council discussed the issues surrounding the Seventh Street punchthrough, and directed staff to address the questions listed above and to explore the possibility of the City proceeding with the 7th Street punchthrough on its own. The purpose of the City proceeding on its own would be to accelerate the punchthrough.

Under the current remediation scenario, UP will remediate the entire site at once, including the right-of-way for Seventh Street. It is our understanding that UP is currently processing before DTSC the necessary documentation for the remedial action plan (RAP) for soil remediation at the site. This RAP will include the construction of the berm on the northern boundary of the UP site that is intended to have metal-contaminated soil.

Were the City to acquire the right-of-way for Seventh Street, it (the City) would be required to establish the right-of-way as a separate remediation area, and to process a separate RAP for this area. As you are aware, the costs and time involved in preparing a RAP are substantial, as are the costs of implementation. If the remediation of the road is segregated from the remediation of the entire site, additional remediation costs are likely to be incurred.¹ Further, if the processing and approval of RAPs for the Downtown Railyards and the RAP for the Curtis Park Railyards are indicative of the usual costs and time involved in the RAP process, it is questionable whether the City would be able to complete the remediation and road construction

¹ If the Seventh Street Corridor is remediated prior to remediation of the remainder of the site, there is the potential for incurring additional costs to ensure the health and safety of workers as well as members of the public traveling through the area. It is also likely that the cost of clean-up of the remainder of the site will increase, since remediation will be less efficient with an operating road in the middle of the site impeding the work.

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prior to December, 2003, the projected date of completion of remediation and roadway construction.

This memorandum is designed to address the specific issues set forth above; it does not address the overarching issue, which is a mixture of legal and policy concerns, of whether the City should ever take title to property, known to be contaminated, prior to remediation of the hazardous materials.

ANALYSIS

Eminent Domain

From a legal standpoint, the City has the authority to take land from a railroad by eminent domain. Where land is currently devoted to an existing public use (which should be considered to include a railroad line), there may be an issue of whether the uses are compatible, and if not, which is the more necessary public use. Where a proposed new public use is consistent with an existing use and will not unduly interfere with that use, construction of the new public work may proceed without proof of a superior or more necessary use. An example of this situation is a planned road that will cross a highway or a railroad. Oakland v. Schenck (1925) 197 C. 456.

The issues of compatibility of public use and the "ranking" of public uses are fact-based, and often result in litigation. In this instance, while the City enjoys the power of eminent domain, UP would have the right to challenge the City's attempt to acquire the Seventh Street right-of-way on the public use and necessity grounds. Although given some priority in the civil system, eminent domain cases, particularly those of a complex nature such as this one, usually take several years to resolve.²

Theoretically, eminent domain proceedings related to at-grade crossings may be held in Superior Court or before the Public Utilities Commission (PUC). As discussed below, PUC approval is required for any at-grade crossing of a rail line.

Compelling Remediation

In California, the primary responsibility for requiring remediation of contaminated sites lies with the Department of Toxic Substances Control. Through the remedial action plan (RAP) process, the DTSC defines the nature and extent, as well as timing, of remediation of a particular site. As you may recall from the Curtis Park RAP process, the preparation and processing of

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Given DTSC's role and responsibility in remediation of hazardous sites such as the Downtown Railyards, the City should be considered to lack the authority to mandate remediation at an earlier date, although it certainly has the opportunity to voice its concerns with DTSC. It is our understanding that UP and DTSC are currently completing the necessary documentation for lead soil remediation of the site and subsequent placement in the berm.

Costs of Remediation

As a general rule, the party responsible for hazardous contamination of a site is the party who should ultimately be held responsible for the cost of remediation. In this instance, SP was responsible for hazardous contamination of the site over the past century or so, and having acquired SP and the downtown Railyard site, UP should be considered the party responsible for the cost of remediation. However, under CERCLA and other applicable laws, the general rule is that anyone in the chain of title to a contaminated site may be required to pay for the cost of contamination, regardless of his/her responsibility for the contamination, and the agencies responsible for overseeing remediation have not hesitated to compel remediation by current owners or others in the chain of title who may have sufficient funds to cover remediation costs. The party paying for remediation has the right to seek reimbursement from others who are responsible for the contamination, assuming they still exist and have assets.

At-Grade Crossing

Section 1201 of the Public Utilities Code requires approval by the Public Utilities Commission (PUC) of any at-grade crossing, either by a highway or street of an existing rail line, or by a rail line of an existing highway or street. An application may be filed by the railroad or the jurisdiction proposing to construct the highway or street involved in the at-grade crossing. 20 Cal. Code of Regs. Sec. 38 *et seq.* It should be noted that the statutory issues involved in an at-grade crossing are separate and distinct from the "higher public use" issue involved in condemnation proceedings.

Under the Public Utilities Code, the City has the legal authority to apply for an at-grade crossing. Staff has been advised by PUC representatives that at-grade crossings are discouraged, and are rarely granted. We have been advised that one was recently approved for an at-grade crossing in the Bay Area.

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CONCLUSION

The City has the legal authority to pursue the following: acquisition the right-of-way for Seventh Street by eminent domain; PUC approval of an at-grade crossing of the UP rail line; recovery of costs of remediation from UP. Whether the City would prevail in any or all of these tasks cannot be predicted. The amount of time required to undertake the necessary proceedings, including the preparation and processing a RAP for the Seventh Street Corridor, would be substantial and it is questionable whether the City on its own could remediate the Corridor and construct Seventh Street prior to December, 2003, the projected date of completion of remediation and roadway construction.

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