WORK SESSION

I. ITEMS FOR DISCUSSION ONLY:

a. Discussion regarding regulation of short-term rentals within the City of Creede;
b. Discussion regarding the utilization of the old RR ROW for vehicle parking;
c. Discussion regarding the annual 4th of July event:
    i. Vendor Parking along Rio Grande Ave.;
    ii. Fireworks;
d. Discussion regarding trash pickup associated with non-city events;

TOWN OF NEDERLAND, COLORADO

ORDINANCE NUMBER 798

AN ORDINANCE AMENDING ARTICLE V OF CHAPTER 6 OF THE NEDERLAND MUNICIPAL CODE, CONCERNING BUSINESS LICENSING, TO ESTABLISH A SHORT-TERM RENTAL LICENSING PROGRAM AND IMPOSE A PENALTY FOR VIOLATIONS THEREOF, AND AMENDING CHAPTER 16 OF THE NEDERLAND MUNCIPAL CODE, CONCERNING SHORT-TERM RENTAL AS AN ACCESSORY USE

WHEREAS, the Town of Nederland, Colorado ("Town") is a statutory municipality, duly organized and existing under the laws of the state of Colorado; and

WHEREAS, pursuant to C.R.S. § 31-15-501, the Town possesses the authority to regulate the operation and licensing of businesses within its jurisdiction; and

WHEREAS, the Town Board of Trustees ("Board") finds that there exists within the Town from time to time, residential dwelling units that are offered for rent for the purpose of vacation or other short-term stays of less than 30 days; and

WHEREAS, the Board recognizes the existence of studies and reports that conclude that short-term rental of residential property creates adverse impacts to the health, safety, and welfare of communities, including but not limited to, increase in housing costs and depletion of residential housing opportunities for persons seeking full-time accommodations in order to maintain employment and businesses with the Town; and

WHEREAS, the Board recognizes that a shortage of long-term residential housing opportunities exists when compared to prior years; and

WHEREAS, the Board recognizes that long-term residential housing costs have increased when compared to prior years; and

WHEREAS, the Board has received public comment related to a desire to preserve the residential character of the Town; and

WHEREAS, the Board desires to create regulations for the health, safety, and welfare of Town residents and visitors by adoption and enforcement of ordinances for fire safety, trash removal, parking, and other provisions that support reasonable operating standards of short-term rentals; and

WHEREAS, in discussion with the Planning Commission at a joint work session on August 24, 2016, the Board determined it prudent to establish regulations governing such uses, so as to protect the health, safety and welfare of residents of the Town, and so directed the Planning Commission to draft related policy for the Board's consideration; and

WHEREAS, the Planning Commission has made certain recommendations to the Board of Trustees regarding amendments to Chapters 6, Licensing, of the Town of Nederland Municipal Code ("Code"), related to the short-term rental of housing units and related licensing; and

WHEREAS, after due and proper notice as required by C.R.S. §§ 31-23-304 and 305, the Planning Commission held a continuing public hearing at many meetings, including on June 27, 2018; and

WHEREAS, in order to protect residential integrity within the Town, the Board finds and determines it is necessary to adopt licensing regulations and restrictions on the renting or leasing of real property for residential occupancy of less than 30 days; and

WHEREAS, the Board finds that the establishment of a licensing program will accomplish this goal, protect the health, safety, and welfare of the public, and prevent adverse impacts to adjacent properties, neighborhoods and quality long-term rental housing units within the Town.

NOW THEREFORE, BE IT ORDAINED by the Board of Trustees of the Town of Nederland, Colorado, as follows:

Section 1. Findings and Intent. The above and foregoing recitals are incorporated herein by reference and adopted as findings and determinations of the Town Board of the Town of Nederland.

Section 2. Article V of Chapter 6 of the Code, concerning "Rental Property," is repealed and replaced as follows:

ARTICLE V

Short-term Rental Licensing

Sec. 6-91. Purpose.

The purpose of this Article is to:

1. Reasonably regulate and allow limited short-term rentals of residential real property;

2. Preserve the residential character of the Town and establish operating standards to reduce impacts on adjacent neighbors resulting from short-term rentals;

3. Provide a licensing process for the Town to track and enforce these requirements as needed and ensure appropriate collection of taxes and

4. Establish the regulations for four (4) types of short-term rental licenses: Primary Residence, Class A, Class B, and Class C.

Sec. 6-92. Definitions.

For the purposes of this Article, the following definitions shall apply:

Accessory dwelling unit shall have the same meaning as set forth in Section 16-6 of the Nederland Municipal Code.

Advertise means any act, method or means of drawing attention to a short-term rental for purposes of promoting the same for rent or occupancy.

Dwelling unit shall have the same meaning as set forth in Section 16-6 of the Nederland Municipal Code.

Host means any person who is the licensee of a primary residence and who offers a dwelling unit, or portion thereof, for short-term rental.

Hosting platform means a manner through which a host may offer a dwelling unit, or portion thereof, for short-term rental. A hosting platform includes, but is not limited to, an internet-based platform that allows a host to advertise and potentially arrange for temporary occupation of the dwelling unit, or portion thereof, through a publicly searchable website, whether the short-term renter pays rent directly to the host or to the hosting platform.

Host present or *host presence* means the host is actually and physically remaining on the licensed premise during the short-term rental period. In the case of a parcel comprised of a single primary unit and one or more authorized Accessory Dwelling Units and/or Accessory Buildings, the host is considered present if he or she is present in any unit on such parcel.

Licensed premise means the dwelling specified in an approved application for a license under this Article.

Licensee shall mean the person to whom a short-term rental license has been issued by the Town Clerk.

Primary residence means a person's fixed, permanent, and principal domicile for more than six months out of each calendar year and to which the person intends to return following any periods of absence. A primary residence is established by the person's actual physical occupancy of the domicile and as demonstrated by at least the following documents: (1) driver's license or Colorado state identification card; and (2) voter registration, motor vehicle registration, or designated residence for income tax purposes. A person shall have only one primary residence.

Rent means allow the use of real property for a period of time. Rent includes such terms as lease, let, and borrow.

Short-term rental means the rent for any form of consideration of a dwelling, dwelling unit, accessory dwelling unit, or portion of any dwelling unit to a particular person or persons for periods of time less than thirty (30) days. A short-term rental is a use that is accessory to the

primary or principal use of such dwelling or dwelling unit. Short-term rental does not apply to or include commercial hotels or motels.

Sec. 6-93. Short-term rental license required.

(a) It shall be unlawful for any person to operate a short-term rental in the Town of Nederland without a license issued under this Article V.

(b) It shall be unlawful for any person to operate a short-term rental not in compliance with any and all Town or state laws.

(c) It shall be unlawful for any person to advertise a short-term rental in the Town of Nederland without a license issued under this Article V.

(d) A license issued under this Article is not required for rentals of residential property for a consecutive period equal to or greater than thirty (30) days.

(e) Property which is deed-restricted as affordable housing shall not be eligible for a short-term rental license.

(f) Only one license of any type (Primary Residence, Class A, Class B, or Class C) license may be issued to a person.

Sec. 6-94. Primary Residence short-term rental license.

(a) A Primary Residence short-term rental license may be issued to a person who owns a dwelling unit and is the primary resident of such dwelling unit.

(b) Short-term rental duration and required residency timeframes for a Primary Residence license:

(1) A licensed premise with a host present may be rented as a short-term rental for an unlimited number of days during the calendar year.

(2) Whole house rentals: A licensed premise with no host present shall not be rented more than one-hundred eighty (180) days per calendar year. It shall be unlawful to operate a short-term rental of a licensed premise with no host present for one-hundred eighty-one (181) or more days in a calendar year.

Sec. 6-95. Operating standards and requirements.

A short-term rental is allowed only if it conforms to each of the operating standards and requirement set forth in this Section:

(a) In the licensed premise, the licensee shall post in a prominent place in the dwelling unit a notice containing the following:

(1) Licensee's contact information;

(2) Emergency contact information if the licensee cannot be reached;

(3) Information on the Town's garbage and refuse regulation;

(4) Trash and recycling schedule, if applicable;

(5) Parking restrictions, if applicable;

(6) Water restrictions, if applicable;

(7) Fire restrictions, if applicable;

(8) Information on the Town's regulations against hunting and feeding wildlife;

(9) Evacuation directions in the event of fire or emergency;

(10) Location of the fire extinguisher;

(11) Town contact information for purposes of complaints concerning the licensed premises; and

(12) Any other information deemed necessary by the Town Clerk or Town Administrator to ensure the public's health and safety.

(b) There shall be a licensee or emergency contact who is available full time to manage the property during any period which the property is occupied as a short-term rental. The licensee or emergency contact shall be required to respond to an active guest within two (2) hours by phone or in person.

(c) The licensee shall equip the licensed premise with the following operational equipment: smoke detector, carbon monoxide detector, fire extinguisher, and other life safety equipment as required by the Town Clerk.

(d) The licensee shall display the license number on all hosting platforms and advertising listings of the licensed premises.

(e) The licensee shall pay all sales taxes and fees owed to the Town in a timely manner.

(f) The maximum occupancy of a dwelling unit rented as a short-term rental shall not exceed the lesser number of two (2) people per bedroom or the capacity of the septic system for the dwelling unit.

(g) The operating standards and requirements in this Section apply to all four types of licenses: Primary Residence, Class A, Class B, and Class C.

Sec. 6-96. Application for a short-term rental license.

(a) License application. Applicants for a short-term rental license, including renewal applicants, shall submit a completed application form to the Town Clerk on a form provided by the Town. Such form shall require, at a minimum, the following information:

(1) The full name, residential address, and telephone number for the licensee applicant.

(2) The full name, address, and telephone number for the emergency contact who will be available to respond to guest inquiries within two (2) hours.

(3) The address of the proposed licensed premises including a description or illustration of the area(s) that will be used for short-term rental purposes with a total number of bedrooms and an illustration of the off-street parking plan for the short-term rental.

(4) Documentation that the applicant has lawful possession of the licensed premises as demonstrated by the deed or lease agreement on the property.

(5) Documentation of primary residency by at least the following documents: (1) driver's license or Colorado state identification card; and (2) voter registration, motor vehicle registration, or designated residence for income tax purposes.

(6) Proof of liability insurance sufficient to compensate renters for injuries that may be sustained in the dwelling unit proposed to be rented within the coverage limits as determined by the Town Clerk.

(7) An application fee in an amount as established by resolution pursuant to Section 4-151 of this Code.

(8) A certification by the applicant that the dwelling unit is equipped with operational smoke detectors, carbon monoxide detectors, fire extinguishers, and other life safety equipment as required by the Town Clerk.

(9) A signed and completed short-term rental self-inspection form, which form is available from the Town Clerk.

(10) An acknowledgement that the licensed premises of the dwelling unit may be subject to a request for a pre-arranged inspection by building, fire, and zoning officials, and that a failure to allow such pre-arranged inspection

shall, in the discretion of the Town Clerk, result in a suspension of the short-term rental license pursuant to Section 6-101 of this Code.

(11) Such other information determined necessary by the Town Clerk to evaluate the compliance of the applicant, licensed premises or proposed short-term rental activity with the requirements of this Code.

(b) If any of the information in the license application changes or is no longer valid, the licensee shall notify the Town Clerk within ten (10) days after knowledge of the changed information.

(c) The Town Clerk is hereby authorized to promulgate any necessary rules or regulations associated with the license application.

(d) A short-term rental license is valid for a term of one (1) year and shall expire at the end of the calendar quarter during which the original license was issued. The licensee shall be responsible for renewing the license each year.

Sec. 6-97. Class A short-term rental license for accessory dwelling unit-detached.

(a) A person who owns an accessory dwelling unit-detached which is established on September 16, 2019, may apply for a Class A short-term rental license provided the requirements of this Section and Section 6-96 are met.

(b) An accessory dwelling unit-detached with a Class A license may be rented as a short-term rental for an unlimited number of days during the calendar year.

(c) To apply for a Class A license, a person shall demonstrate compliance with all the requirements of Section 6-96 and shall demonstrate compliance with the following requirements:

(1) The principal dwelling unit was legally established and constructed as evidenced by a certificate of occupancy dated on or before April 16, 2019;

(2) Documentation that the person has operated the accessory dwelling-unit detached as a short-term rental before April 16, 2019;

(3) If the accessory unit is licensed for short-term rental, only the accessory unit and not any other dwelling unit on the same property may be licensed or used as a rental;

(4) If a principal dwelling unit is licensed for short-term rental, then no accessory unit on the same property may be licensed or used as a rental;

(d) An applicant may apply for a Class A short-term rental license until September 16, 2020 at 5:00 p.m. Following such date and time, Class A short-term rental licenses will no longer be available.

(e) Class A licenses are not available for the principal dwelling unit.

Sec. 6-98. Class B short-term rental license for non-primary resident premises.

(a) A person who owns a non-primary residence may apply for a Class B short-term rental license provided the requirements of this Section and Section 6-96, with the exception of the primary residency requirement, are met.

(b) A premise with a Class B license may be rented as a short-term rental for forty-five (45) days during a calendar year. It shall be unlawful to operate a short-term rental of a licensed premise for forty-six (46) or more days in a calendar year.

(c) To apply for a Class B license, a person shall demonstrate compliance with all the requirements of Section 6-96, with the exception of Section 6-96(a)(5) (primary residency requirement), and shall demonstrate compliance with the following requirements:

(1) The premise was legally established and constructed as evidenced by a certificate of occupancy dated on or before September 16, 2019;

(2) Documentation that the person has operated the dwelling-unit as a short-term rental since at least April 16, 2019.

(d) An applicant may apply for a Class B short-term rental license until September 16, 2020 at 5:00 p.m. Following such date and time, Class B short-term rental licenses will no longer be available.

Sec. 6-99. Class C short-term rental license for non-primary resident premises in certain zoning district.

(a) A person who owns a dwelling unit in the zoning districts of Central Business District (CBD), General Commercial (GC), or Industrial (I) may apply for a Class C license for a short-term rental to operate a short-term rental.

(b) To apply for a Class C license, a person shall demonstrate compliance with all the requirements of Section 6-96, with the exception of Section 6-96(a)(5) (primary residency requirement).

Sec. 6-100. License nontransferable.

All short-term rental licenses are nontransferable. It shall be unlawful to transfer or assign the license to another person or location and such conduct shall render the license subject to suspension or revocation.

Sec. 6-101. Suspension and revocation; enforcement.

(a) The Town shall have the authority to suspend or revoke a short-term rental license and assess administrative penalties for a violation of this Article.

(b) The Town Clerk or designee will investigate non-anonymous complaints. The subject of the complaint may include, without limitation, such things as parking, trash, noise, or other concerns related to the short-term rental.

(c) Upon a determination that a violation exists, the Town Clerk will issue a notice of suspension or notice of revocation with the associated penalty in accordance with the following procedures:

(1) the Town Clerk will serve a notice of suspension or notice of revocation by first class and certified mail to the address of the licensee. The notice shall identify:

a. the name of the licensee and the license number;
b. the applicable section of the violation together with a description of the violation;
c. the action, if any, required to correct the violation;
d. the amount of the penalty; and
e. the effective date of the suspension or revocation which shall commence no earlier than fifteen (15) days after the date of the notice.

The notice shall inform the licensee of the right to appeal the decision appeal right as set forth herein.

(2) The licensee may appeal the suspension/revocation notice by filing an appeal with the Town Clerk within ten (10) days of the date of the notice. An appeal shall stay the suspension or revocation until a final written decision is issued. The appeal shall state in writing why a suspension or revocation is not warranted, which may include a statement contesting the violation itself and information addressing how the licensee has taken measures to address the violation.

(3) Upon receipt of the appeal, the matter shall be set for a hearing before the Town Administrator or his/her designee. Notice of the hearing shall be provided to the licensee. At the hearing, the licensee and the Town may present evidence and testimony concerning the violation and the appeal. In determining whether to uphold the suspension or revocation, or modify its terms, consideration shall be given to the criteria set forth in Section 6-102(b) for renewal of a license. Following the conclusion of the hearing, the Town Administrator or designee shall issue a written decision which shall constitute the final decision.

(d) Any properties used for short-term rental purposes in violation of this Article, shall be subject to the following penalties in addition to those set forth in Section 6-103 of this Article:

(1) First offense: thirty (30) day suspension of the short-term rental license together with a fine as set by a Board of Trustee Resolution.

(2) Second offense within a twelve (12) month period: one (1) year suspension of the short-term rental together with a fine as set by a Board of Trustee Resolution.

(3) Third offense within a twelve (12) month period: revocation of license without possibility of reapplication for five (5) years together with a fine as set by a Board of Trustee Resolution.

Failure to pay the penalty shall constitute another violation of this Article, which shall subject the license to suspension or revocation;

Sec. 6-102. Renewal.

(a) Upon receipt of a timely renewal application, the Town Clerk shall review the application and shall administratively approve the renewal of the license, provided that in the year immediately preceding the date of renewal the following conditions are satisfied:

(1) the property has not been in violation of this Article;

(2) the property has not had its short-term rental license suspended; and

(3) the property has not been the subject of a nuisance violation conviction or plea of guilty or no contest.

If any one of the conditions are not satisfied, the Board of Trustees shall review, upon the property owner's request, the renewal application at a public hearing. The Town Clerk or designee shall deliver notice of the public hearing by first class mail to the owners of all properties within 200 feet of the subject property, and post the notice of the hearing at a conspicuous location on the subject property.

(b) At the public hearing, in deciding whether to renew the license, the Board of Trustees shall consider the severity of the violation(s), the culpability of licensee, any measures taken to remedy the violation to ensure it will not reoccur. The Board of Trustees may consider information provided by Town staff, the property owner and/or operator of the short-term rental property, and the neighbors subject to the 200-foot notice.

(c) If a renewal application is denied, no application for a short- short-term rental license shall be accepted for such property for one (1) year.

Sec. 6-103. Violation and Penalty.

(a) Short-term rental of property without a short-term rental license constitutes a civil infraction punishable in the Municipal Court or any court of competent jurisdiction. The minimum penalty for such a violation is set by a Board of Trustee Resolution.

(b) Each separate act in violation of this Article is a separate offense. Each calendar day that a violation exists shall be a separate offense and violation of this Article. In addition to the suspension and revocation proceedings pursuant to section 6-101, violations of this Article may be punishable in the Municipal Court. Any person who violates the requirements of this Article may be punished in accordance with the general penalty provisions set forth in Section 1-72 of this Code.

Secs. 6-104-6-110. Reserved.

Section 3. Section 16-82 of the Code, concerning "Rental of Rooming Units," is repealed and replaced as follows:

Sec. 16-82. Short-term rental.

A short-term rental of a dwelling unit is an accessory use of residential property.

(a) The short-term rental shall be clearly incidental and customary to and commonly associated with the operation of the residential household living use;

(b) The short-term rental shall be operated by the person or persons holding the short-term rental license.

(c) The short-term rental shall not include simultaneous rental to more than one party under separate contracts.

(d) The short-term rental shall be conducted pursuant to and governed by the licensing requirements in Article V of Chapter 6 of this Code.

Section 4. Should any one or more sections or provisions of this Ordinance or of the Code provisions enacted hereby be judicially determined invalid or unenforceable, such judgment shall not affect, impair or invalidate the remaining provisions of this Ordinance or of such Code provision, the intention being that the various sections and provisions are severable.

Section 5. Any and all Ordinances or Codes or parts thereof in conflict or inconsistent herewith are, to the extent of such conflict or inconsistency, hereby repealed; provided, however, that the repeal of any such Ordinance or Code or part thereof shall not revive any other section or part of any Ordinance or Code provision heretofore repealed or superseded.

Section 6. Effective Date. After adoption by the Board of Trustees, this ordinance shall take effect on March 16, 2020.

INTRODUCED, ADOPTED AND ORDERED PUBLISHED THIS 1 DAY OF 10, 2019.

TOWN OF NEDERLAND, COLORADO

Kristopher Larsen, Mayor

ATTEST:

Miranda Fisher, Town Clerk

APPROVED AS TO FORM:

Jennifer Madsen, Town Attorney

I hereby certify that the above Ordinance was adopted by the Board of Trustees of the Town of Nederland at its meeting of 10/1/2019, and ordered published by title only by The Mountain Ear newspaper on 10/10/2019, 2019.

Miranda Fisher, Town Clerk

CHAPTER 5.28 Short-Term Rental of Residential Structures

5.28.010 Intent and scope.

This Chapter is intended to address the renting or leasing for residential occupation of residential structures for periods of time less than twenty-nine (29) days in duration. This Chapter does not apply to the furnishing of lodging services in hotels, motels, or bed-and-breakfast inns.

(Ord. No. 7 , § 2, 2020)

5.28.020 Definitions.

As used in this section, the following terms are defined:

Bed and breakfast inn: A commercial establishment other than a hotel or motel, where, for compensation, lodging and/or meals are provided for guests, as defined in Section 17.20.070(a).

Short-term rental: The renting or leasing of a residential structure, with or without provision of meals, for less than twenty-nine (29) consecutive days.

Street segment: That portion of a street between intersecting cross streets.

(Ord. No. 7 , § 2, 2020)

5.28.030 Short-term rentals restricted.

Short term rentals are permitted in any zone district in the Town where residential occupancy is permitted, provided however, no commercial space shall be used for short term rental.

(Ord. No. 7 , § 2, 2020)

5.28.040 Permit required; eligibility; procedure; appeals.

(a) Permit required. Prior to January 31, 2017 all owners of short-term rentals must obtain a permit from the Town Administrator. Conducting a short term rental without a valid permit is a violation of this Chapter. The permit application must include owner name and address, property address, maximum occupancy of rental guests, owner representative and contact information, a parking plan for guests, evidence of adequate property and liability insurance, evidence of HOA approval, if required, and be accompanied with the application fee required by Appendix A (Fees and Charges).

(b) Eligibility. All applicants for a short term rental must demonstrate ownership of the subject property for at least two (2) years prior to the date of application. Applicant must submit an acknowledgement, signed by both property owner and the local agent (if different) that they have read and understand all of the requirements of this Chapter.

(c) Term of permit. Permits expire at the end of the calendar year when issued, except for permits issued after October 1, which expire December 31 of the following year.

(d) Notice of application. Before issuing as short term rental permit, the Town shall notify the Town Marshal and all owners of real property within three hundred (300) feet of the proposed short term rental property of

their opportunity to make comment or objection on the application. The notice shall contain the property location, that the full application may be copied and reviewed at the Town Hall, and the date (at least fifteen (15) days from the date of the notice) by which comments must be received. The notice shall be posted on the property and at the Town Hall, and mailed at the applicant's expense.

(e) Action on permit. The Town Administrator, after reviewing the permit application and any public comments or objection, shall have authority to approve, approve with conditions, renew, renew with conditions, deny, or revoke the short term rental permit. The Town Administrator shall issue the decision within fifteen (15) days after the date by which comments must be received.

(f) Notification of renewal application to adjacent property owners. Upon renewing a short term rental permit, the Town Administrator shall post notice of the permit on the property and at the Town Hall. The notice shall state that the full application may be reviewed at Town Hall, and the date (at least fifteen (15) days from the date of the notice) by which comments must be received, and the time during which an appeal may be filed.

(g) Appeals. Either the applicant or a property owner within three hundred (300) feet of the proposed short term rental property as described in subsection (d) above may appeal the Town Administrator's decision to issue, issue with conditions, renew, renew with conditions, revoke or deny a short term rental permit. Such appeal shall be filed with the Town Clerk in writing within fifteen (15) days of the decision being appealed and shall be heard by the Board of Selectmen. The Board of Selectmen shall hear and decide upon all appeals, after fifteen (15) days public notice of the time, date and location of the appeal hearing being posted on the subject property and at the Town Hall. The decision of the Town Administrator (if not appealed) or of the Board of Selectmen (if appealed), is the final decision of the Town for purposes of judicial review.

(h) Annual inspection. All permitted short-term rental units are subject to annual inspection under Section 5.28.080(d). Permits may be revoked or not renewed by the Town Administrator if permit conditions and requirements are not met, or if more than three (3) violations of permit conditions or the requirements of this Chapter are found in any one (1) permit year.

(i) No transfer. Short-term rental permits are not transferrable.

(Ord. 6 §1, 2016)

(Ord. No. 12 , §§ 1—3, 2018; Ord. No. 7 , § 2, 2020)

5.28.050 Limitations.

(a) Ward limits. No more than the following percentages of the single-family residential units in each Ward of the Town (as estimated in the most recent DRCOG community profile) may be eligible for short term rental permits without additional action by the Board of Selectmen to amend this Section:

(1) Ward I: Five (5) percent.

(2) Ward II: Seven (7) percent.

(3) Ward III: Seven (7) percent.

When the Town Administrator determines the limit has been reached in any Ward, no further permits shall be issued in the Ward. This limitation shall not apply to short-term rental properties which are occupied year-round by the owner thereof.

(b) Proximity limits. The following limitations apply to all short term rentals:

(1) In Wards I, II, and III, not more than one (1) short term rental shall be located on all properties or lots that abut any street segment. For corner lots, this standard applies to both street segments that abut

that corner lot and only one (1) short term rental is permitted on the corner lots that abut the intersection. Short term rental homes that were legally permitted and have been legally maintained prior to the effective date of this subsection, shall be considered as the allowed unit for that applicable street segment

(2) A second short term permit may be allowed on a street segment with a special use permit if, in addition to the other applicable standards of this Chapter, it is demonstrated that:

a. The second short term rental home is the primary residence of the property owner and the short term rental home use is part time, the limits of which will be established as part of the special use permit process.

b. The second short term rental home is located on a street segment with more than five (5) separate residential parcels fronting on the street segment; in no case shall a second short term rental be allowed on a street segment with five (5) or fewer residential parcels fronting on it.

c. For short term rental permits located in multifamily buildings, the following limitations apply:

1. Maximum two (2) permits per building

2. Maximum one (1) permit for each six units in a building

(Ord. 6 §1, 2016; Ord. 8 §1, 2018)

(Ord. No. 3 , § 1, 2019; Ord. No. 7 , § 2, 2020)

5.28.060 Lodging and sales tax.

All owners of short term rentals are required to collect and remit lodging tax and sales tax. Evidence of issuance of a state sales tax license number is required as a condition of the Town Administrator considering a short term rental property license application to be complete.

(Ord. No. 7 , § 2, 2020)

5.28.070 Business license.

The owner of a short term rental property must possess a current Town business license for each such short term rental property. The business license must be renewed annually for every year the owner desires to let the premises as a short term rental. The business license number must be included in all listings of the rental for advertising and webhosting services (VRBO, AIR BnB, etc.) The business license may be denied or revoked if the owner is not in compliance with the terms and conditions of the short term rental permit, as well as other applicable laws.

(Ord. No. 7 , § 2, 2020)

5.28.080 Safety and operations.

All short term rentals shall comply with the following safety and operational requirements:

(1) Owner/renter information. There shall be an owner representative within Clear Creek County who is on call full time (twenty-four (24)/seven (7)) available to respond in person or by telephone within sixty (60) minutes to manage the property during any period within which the property is occupied as a short term rental. The name, address, and phone number of the owner representative shall be listed on the business license, which is on file at Town Hall, and shall be prominently posted at the rental

property. It is the responsibility of the owner representative to inform short term rental tenants regarding Town ordinances including but not limited to pets, parking, trash, and noise.

(2) The owner shall post a notice or brochure inside the property informing all renters of:

a. Name, address and phone number of the owner's representative;

b. Identification of all parking spaces associated with the unit;

c. Description of locations not permitted for renter parking;

d. Location, time and rules for trash pick-up;

e. Town and owner rules regarding pets, parking, snow and ice removal, trash and noise.

(3) No trash or garbage shall be left outside the unit.

(4) Parking plan.

a. The owner shall ensure that all guest parking required under the permit is located on the subject property. No on-street parking is permitted.

b. No trailers or oversize vehicles which do not physically fit into a single designated parking space for the short term rental may occupy such spaces, unless special arrangements are made with another property owner (ex: Town event parking) and approved in advance by the Town.

(5) A life safety inspection shall be ordered by the owner, at the owner's expense, and provided to the Town prior to issuance of the initial license, and prior to each annual renewal. The inspection may be conducted by a certified inspector approved by the Town or by the Town's Building Official, at the owner's option. Such inspection shall determine the following:

a. Adequate fire extinguishers shall be installed and maintained;

b. Commercial smoke alarms and CO alarms shall be installed as required by the International Residential Code or the International Building Code, as applicable;

c. Maximum occupancy notice(s) shall be clearly posted based on square footage; and

d. Emergency egress pathways are in compliance with the International Residential Code or the International Building Code, as applicable.

(6) Occupancy. No more than two (2) persons age eighteen (18) and above may occupy a single bedroom devoted to the short term rental purpose.

(Ord. No. 7 , § 2, 2020)

5.28.090 Enforcement.

The Town may enforce the requirements of this Chapter by any or all of the following:

(1) Warning letter. The Town Administrator shall issue a warning letter to persons conducting a short term rental without a permit.

(2) License suspension. The Town Administrator may suspend a short term rental permit when the permittee is found by the Administrator to be operating in violation of any requirement of this Chapter.

(3) Revocation. The Town Administrator may revoke or refuse to renew a short-term rental permit for any one (1) or more of the following reasons:

a. The permittee is operating in violation of any requirements of this Chapter;

b. The permit has been suspended more than once during the preceding twelve (12) months;

c. The permitee has failed to pay water or wastewater fees due for the permitted property.

d. The property is not actually rented for that purpose for one (1) permit year.

The owner may not re-apply for a license for one (1) year following this revocation.

(4) Municipal Court. Persons found by the Municipal Court to be in violation of the requirement to have a valid short term rental permit shall be punished by a fine only; such fine not to be less than nine hundred ninety nine dollars ($999.00) for the first conviction and two thousand six hundred fifty dollars ($2,650.00) for each subsequent conviction with respect to the same property. The Municipal Court may suspend a portion of the fine if the Court finds mitigating circumstances.

(Ord. No. 7 , § 2, 2020)

5.28.100 Implementation.

This Chapter 5.28 was adopted and effective on January 31, 2017. The amendments to this Chapter made by Ordinance No. 7 (Series 2020), are effective on December 23, 2020 and shall apply to all short term rentals as of that date, provided however the occupancy limitations of new Subsection 5.28.080(6) shall take effect on March 31, 2021.

(Ord. No. 7 , § 2, 2020)

ORDINANCE NO. 2021-02

AN ORDINANCE REVISING MUNICIPAL REGULATIONS CONCERNING THE USE OF RESIDENTIAL PROPERTY AS VACATION RENTALS

WHEREAS, pursuant to the authority conferred via C.R.S. §31-23-301, the Town of Silverton through its Board of Trustees ("Town"), is empowered to regulate and restrict the use of buildings, structures and land within its statutory jurisdiction, so long as such restraints are determined necessary to promote the general health, safety and welfare of the community; and

WHEREAS, through such authority, the Town has held allowing Vacation Rentals may be permitted within certain zoning districts only after prior approval has been granted through an established Vacation Rental application process; and

WHEREAS, the Town of Silverton has adopted regulations related to the occupancy and types of construction for the zoning districts per Municipal Code, Chapter 16; and

WHEREAS, the Town Board, upon witnessing increased interest in Vacation Rentals by property owners, along with a growing number of complaints from neighborhood residents, has noted that Ordinance No. 2017-09 is inadequate in fully addressing the impacts associated with Vacation Rentals, and

WHEREAS, the utilization of single-family and multi-family homes as Vacation Rentals within residential zoning districts has negatively impacted the utilization, enjoyment, quality of life and the intent of residential zoning protections; and

WHEREAS, property owners within residential zones have requested Town Staff to assist in finding workable solutions to problems that are occurring with the operation and management of residential properties utilized as Vacation Rentals; and

WHEREAS, the proliferation of Vacation Rentals has decreased the availability of long-term rentals, for housing of employees and residents who desire to live and work in the community; and

WHEREAS, there is acknowledgement that there are zones within the community that can better accommodate Vacation Rentals; and

WHEREAS, the Board of Trustees deems it in the best interest of the Town to place restrictions and limitations on the number of Vacation Rentals in certain zoning districts within the Town of Silverton.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF TRUSTEES OF THE TOWN OF SILVERTON, COLORADO:

Amendment 1: Municipal Code Section 16-1-60 is hereby repealed in its entirety and the Town adopts the following language in its place:

16-1-60 Vacation Rental Permit Applications

1. Purpose: The purpose of this section is to: preserve the character and ambience of Silverton's neighborhoods; to allow Vacation Rentals as short-term visitor accommodations within certain zone districts; to minimize the negative impacts attributable to Vacation Rentals and the associated increase in the negative intensity of their use; and to ensure compatibility with the existing surrounding land uses. These provisions are intended to address concerns regarding the use of residential units as Vacation Rentals on a short-term basis by regulating guest turnover rates, housekeeping/maintenance activities, traffic, noise, overcrowding, health/safety concerns, on-street parking, and other adverse neighborhood impacts.

2. Definition: "Vacation Rental" is defined as a residential dwelling unit, including either a single-family home or multi-family dwelling unit, or the residential portion of a mixed-use building, assessed and taxed as a residential dwelling unit, and rented for the purpose of transient lodging or transient living accommodations. A Vacation Rental is defined as a residentially taxed unit which is rented for less than 30 days. Hotels, motels, lodges, inns, bed and breakfasts, RV spaces, and campsites are not Vacation Rentals. Additionally, bedrooms within a single-family dwelling, multi-family unit, or mixed-use building are prohibited from being utilized as Vacation Rentals.

3. Planning and Zoning: New and existing Vacation Rentals shall comply with the following requirements and restrictions:

a. Permit Required: Property owners are required to obtain a Vacation Rental Permit to operate a Vacation Rental within the Town of Silverton.

b. Non Transferrable: Vacation Rental Permits are non-transferable when a change in property ownership occurs. All Vacation Rental Permits shall be granted solely to the property owner or legal entity for the residential dwelling unit at the address shown on the application.

c. Caps by Zone: Vacation Rentals within the R1, R2, and ED zones are capped at a maximum of 8 Vacation Rentals in each of these three zoning districts.

d. Prohibitions: Vacation Rentals within the BA, R-1A and P zoning districts, and in the red zone of the Avalanche Hazard Overlay District, are prohibited. NOTE: As of the date of this Ordinance, the number of Vacation Rentals authorized within the R-1A zone is one (1) and shall be reduced to zero (0) through attrition, with no new Vacation Rentals allowed within the R-1A zone, and the number of Vacation Rentals within the R1 and R2 zones shall be reduced to 8 each through attrition. No Vacation Rental applications will be accepted by the Town of Silverton in any zoning district involving a structure that does not yet exist and/or has not yet received a Certificate of Occupancy (C.O.).

e. Separation Distance: No Vacation Rental application for a structure in the R1, R2, or ED zones will be approved if the proposed Vacation Rental is within a 100 foot radius (measured from the nearest property line) of a currently permitted Vacation Rental (measured to the nearest property line of an existing Vacation Rental), excluding adjacency to any permitted BP zone Vacation Rentals. There shall be no minimum separation distance for Vacation Rentals in the BP zone.

f. Appearance: Vacation Rentals shall not materially change the residential character/architecture of the outside of a dwelling unit as a result of its utilization as a Vacation Rental. The following are non-exhaustive illustrations of changes in residential character/architecture that are not allowed: advertising signage and lighting; the construction of accessory structures that are not of the same architectural character as the residence; the emission of noise, glare, flashing lights, vibrations, or odors not commonly experienced in the underlying zoning district. Any additional exterior lighting shall be "zero cut-off" night sky preserving lighting and be approved by Town Staff prior to installation to ensure that it does not create undue illumination on adjacent properties.

g. Parking: Guests shall park their vehicles and trailers on-site within a designated parking area and/or on the public street directly adjacent to or nearest available space to the Vacation Rental, complying with the neighborhood parking pattern (i.e. perpendicular, angle, parallel). Parking shall not block fire hydrants, alleyways or through traffic lanes, and are subject to Snow Route parking regulations. The availability of guest parking, on-site and on-street (as provided for in this paragraph), shall be considered in calculating the allowable and appropriate capacity of the Vacation Rental. Consideration shall be given by the Applicant to avoid limiting impacts to adjacent land owner parking, impeding traffic, creating safety hazards (traffic & pedestrian). Violations of Town traffic laws, snow removal regulations, the designated OHV Route, and other applicable Municipal Codes will be considered in the calculation.

h. Signage: Vacation Rentals are allowed sign(s) that do not exceed a total of two square feet. The sign shall identify the residential unit's name (wording commonly utilized in promoting the Vacation Rental) in a way similar to other residential properties that are not Vacation Rentals.

An example of this would be "Randall's Rest," which is a person's last name, with one or two descriptive words to follow. Any commercial identification wordings, such as "Vacation" or "Rental" are not allowed. A residential appearance is encouraged with decorative elements that are compatible with the character/architecture of the Vacation Rental and neighborhood. Town Staff shall approve the proposed signage as a component of the application reviews for new and renewing Vacation Rentals. Vacation Rentals shall not have advertising signage other than that referenced above. Town required street addressing numbers shall also be prominently displayed. No signage is allowed to identify and/or reserve Vacation Rental tenant or guest parking within the public right-of-way (limited signage, preapproved by Town Staff is allowed to identify onsite parking and driveways). Vacation Rentals within the BP Zone are allowed signage that complies with Section 16-6-10 to 16-6-70 Signs and Outdoor Advertising Devices.

i. There shall be no Variance Applications approved by the Town Board of Adjustment for the purpose of allowing a proposed Vacation Rental where prohibited by the regulations described within this Ordinance.

j. Vacation Rentals that are located off of the adopted Town OHV Route are forbidden from allowing any guests to access the property with OHVs that are not stored on a trailer. Three reported OHV violations shall result in suspension or revocation of the Vacation Rental Permit.

4. Application Requirements: All new Vacation Rentals require the submittal of a complete and accurate Vacation Rental Permit Application and associated fee.
a. Utilize the Vacation Rental Permit Application form provided by the Town of Silverton, fill out all required information, and list attachments for a complete application form and submission.
b. Project Narrative: A text description of the project, existing site characteristics, what is proposed, and how the proposal meets the applicable requirements of the Municipal Code.
c. Required maps and plans (with graphic bar scale):

1. Vicinity Map - Vicinity map or aerial photo that clearly identifies, with text labels, the property, local blocks, lots, streets, and alleys.
2. Adjacent Land Owner Map - Provide a map with a 300 foot radius circle from the center-point of the Vacation Rental property that indicates the adjacent land owner notification area. Indicate neighboring properties by name or other indicator tied to notification mailing list.
3. Site Plan - Provide a drawn-to-scale Site Plan of the property, indicating with text labels all existing buildings, decks, walkways, trash bin, propane tanks, snow storage areas, onsite parking space(s), and other relevant site features, and any proposed improvements within the property boundaries.

4. Parking Plan - At an identifiable scale, indicate the availability of guest parking, both on street and onsite parking, provided for evaluation of tenant capacity. Indicate a proposed parking area for one passenger pickup with attached trailer.
5. Floor Plans - At an identifiable scale, sketch the residential unit's existing floor plans that includes all habitable areas, including but not limited to; the number of bedrooms, baths, and other rooms, and their use names, and fire extinguisher location(s).
6. Proposed Improvements Plan - At an identifiable scale, sketch any changes which are proposed in the use of all habitable areas of the structure, including but not limited to; the number of bedrooms, baths, kitchen and other rooms and their use names, and any modification or additions that are proposed to the interior or exterior of the structure. (Any structural changes or additions to the residential unit require a Building Permit per the provisions of Town Building Code).

d. Adjacent Land Owner List - Provide a list of adjacent land owners (according to the current records of the San Juan County Assessor) within a 300 foot radius of the center point of the proposed Vacation Rental property.

e. Adjacent Land Owner Envelopes – The Applicant shall provide one set of pre-addressed envelopes with first class US Mail postage for each of the adjacent property owners to be notified. The envelopes shall be used by the Town Staff to notify the adjacent land owners that a Vacation Rental Permit application is pending, and that they may provide comment to the Town. If an Applicant is being placed on the Waiting List, then "Forever" stamps shall be placed on the envelopes.

f. Manager Contact Information for Adjacent Land Owners - Inside each of the envelopes, the Applicant shall place business card(s), or a one page flyer, providing each of the adjacent land owners with the names and phone numbers of the proposed primary and secondary managers of the proposed Vacation Rental.

g. Deed - Proof of the Applicant's current ownership of the Vacation Rental per a legally recorded document.

h. Insurance - Proof of the Town-required property and liability insurance for operation of the Vacation Rental.

i. Signage and Lighting Drawing - Drawing showing existing and proposed signage and lighting at the site.

j. Management Information – listing of individual(s), owner, manager, management firm, local contact, back-up contact; and all description of all other management requirements per the provisions of this ordinance.

k. Additional reasonable submittal items may be required by the Town Staff, to allow for the proper evaluation of the Vacation Rental Application.

l. Additional submittal items may be required to comply with other Municipal Codes; for example, a proposed Vacation Rental within the Blue Zone of the Avalanche Hazard Overlay District may require a site-specific avalanche study and Indemnification Agreement.

5. Owner Restrictions and Requirements. Owners of Vacation Rentals shall comply with the following:

a. Limitation of Ownership: Only one Vacation Rental Permit shall be allowed per person.

b. Permits and Licenses: Owners of Vacation Rentals shall be required to obtain a Vacation Rental Permit, current business license, and sales tax license. The required permit and licenses shall be obtained prior to operation of the Vacation Rental.

c. Fees: The Vacation Rental Application Fee and Annual Renewal Permit Fee are established by Resolution by the Town Board of Trustees. Vacation Rental owners are required to pay all applicable taxes and fees, including but not limited to the Vacation Rental Application Fee, Annual Permit Renewal Fee, Town lodger's fees and State sales tax.

d. Inspections: Vacation Rentals are subject to safety, fire, code and health inspections and shall be in compliance with all applicable building, fire and zoning codes. Receipt of a Vacation Rental Application constitutes permission by the Property Owner to allow the Town Staff to inspect the Property for compliance with said codes. The structure for which the application is submitted shall be owned by the Applicant, shall possess a Certificate of Occupancy (C.O.), be free from requiring major repairs, be adequately furnished and clean, and be in compliance with all applicable building, fire, and safety codes, prior to tenant occupancy.

e. Insurance: Owners of Vacation Rentals shall obtain and maintain industry standard property and liability insurance required for the operation of the Vacation Rental. Proof of being able to obtain property and liability insurance shall be submitted as part of the Vacation Rental application. Proof of required property and liability insurance coverage for use as a Vacation Rental is required prior to the first tenancy in a new operation, and for renewal of a Vacation Rental Permit.

f. Safety: All Vacation Rentals shall have smoke and carbon monoxide detectors and fire extinguishers as required by Town Building Code. Fire extinguisher(s) location(s) shall be shown and described in posted guest information and supplemented with a floor plan, which shall include an emergency exiting plan. All windows noted for emergency egress and rescue shall be operational. All heating appliances shall be properly installed and combustion gases vented per code (no "vent-less" combustion heating units are allowed). The Building Inspector/Fire Inspector may identify other issues required to be addressed prior to the issuance of the Vacation Rental permit.

g. Registration: Guest registration is required for all Vacation Rentals. The registry shall include all tenancies for that licensed year to date, updated with each tenancy. The registration shall include the name and address of the person(s) that has contracted for the Vacation Rental, the number of occupants, and the dates of tenancy. The guest registration shall be kept in the possession of the property manager and/or the property owner and shall be made available upon request by Town Staff for inspection and photocopying.

h. Management Enforcement: It is the responsibility of the Owner and/or manager(s) to self-regulate infractions and violations of this Section, as well as other Town Codes and Laws performed by or caused by the actions of the tenant(s) of the Vacation Rental. Examples of this

include but are not limited to; parking violations, "red alert" snow removal violation, OHVs usage violations, excessive noise, or other infractions that requires law enforcement response or result in a substantiated complaint received by Town Staff or elected officials. "Management" (owner/manager(s)) shall immediately revoke the renter's damage deposit and/or impose a substantial penalty. "Management's" imposed penalty shall be reported in writing (mail or email) to the Town Building Code Enforcement Officer to be placed on file as a positive indication of appropriate management of the Vacation Rental.

i. Town Enforcement: In the absence of self-regulation of tenancy by "Management," Town Staff will collect documentation on infractions and violations of the Municipal Code, Law Enforcement reports, and substantiated complaints for inclusion in the Vacation Rental's file. At permit renewal, or at any time during the calendar year upon receipt of complaints, the Town Staff will review the Vacation Rental's file and determine if further corrective actions are to be taken such as immediate suspension or termination of the Vacation Rental permit.

j. Annual Permit Renewal. Vacation Rental Permits are valid for the calendar year in which the permit is approved. Application for a Vacation Rental Permit shall be submitted each calendar year in accordance with application requirements. Annual permits expire on December 31. Annual renewal applications are due by January 31. The Town Staff may administratively approve, modify, amend or deny renewal permits based on the renewal application and review of documented violations and complaints. Applicant may appeal administrative decisions to the Town Board.

k. Local Contact and Guest Information: Each Vacation Rental shall have a designated local contact person(s). The local contact may be a property management/real estate company, rental agent or other person engaged or employed by the owner to rent, manage and/or supervise the Vacation Rental. A property owner may designate themselves as the local contact person if the owner meets the criteria of this Section. The local contact must reside within a fifteen minute drive of the rental property and be available twenty-four hours a day during tenancies for timely response to guest and neighborhood issues and concerns. An alternate local contact shall be designated, available and meet the criteria of this Section when the primary is not available. All local contacts shall list their name, address and telephone/cell number and shall be posted in a prominent location within the Vacation Rental. Contact information also shall be provided to the Town Code Enforcement Officer. Any change to the local contact(s) name, address or telephone/cell number shall be promptly be updated and submitted to the Town Code Enforcement Officer.

l. Violations: It is unlawful for any person to use or allow the use of Vacation Rental in violation of the provisions of this Section. Failure to be in complete compliance with this Section at any time may be grounds for suspension or revocation of the Vacation Rental Permit and Business License. A suspension or revocation of the license, if necessary, shall be determined at the discretion of Town Staff.

m. Appeal Process: Hearings and appeals shall be made in accordance with the Town of Silverton Municipal Code.

n. Waiting List: Town Staff will create and maintain a Vacation Rental Application Waiting List. The Vacation Rental Application Fee and Business License Fee payment is due when a Vacation Rental Permit application, reasonably completed as determined by Town Staff, is placed on the waiting list. The application fee is non-refundable. A structure inspection may be required before an application is placed onto the waiting list. To remain in good standing on the waiting list, applicants shall pay an annual waiting list fee of $100 due each January 31. If an opening becomes available for a wait-listed application, a structure inspection shall be required prior to tenant occupancy. If a wait-listed applicant is contacted by Town Staff about the availability of a permit, the applicant shall have 30 days to file an updated Vacation Rental Permit application, if necessary, that meets all requirements of Sections 4 and 5.

6. Standards: Vacation Rentals shall comply with the following standards:

a. Occupancy – R1, R2, BP, and ED Zones: Maximum occupancy shall not exceed two persons per bedroom, plus two additional guests. The Town may modify a maximum occupancy based upon the following considerations: location, size, building/fire code requirements, parking and/or other site-specific neighborhood considerations.

b. Tenancies Per Month – In the R1, R2, and ED Zones, no more than five tenancies per month are allowed for Vacation Rentals. There are no limits to tenancies per month in the BP Zone.

c. Tenancy –All Zones: A Vacation Rental owner may choose to rent their Vacation Rental for a longer term than 30 days to one tenant without penalty or loss of their current Town Vacation Rental permit so long as owner remains in compliance with all terms of the Vacation Rental Ordinance.

d. Guest Information: Each Vacation Rental shall include a Guest Information Binder, which shall include but is not limited to local contact(s) information, procedures for use of appliances and heating, safety and exiting, fire extinguisher location(s), emergency services, designated parking, snow route procedures and "Red Alert" notification sign up, OHV route/trailer parking info and mapping, and all other relevant information for the safe and legal occupancy of the rental unit. Include "Tenant Conduct" requirements where violation may result in the termination of the Vacation Rental Permit; i.e. tenants and/or guests shall not create unreasonable noise or disturbances, engage in disorderly conduct, or violate provisions of this Code or any local or state law pertaining to noise, overcrowding, the consumption of alcohol, or the use of illegal drugs, and limiting loud noises and parties after a reasonable hour. Please note clearly "Management's" (owner/manager's) revocation of the renter's damage deposit and/or penalty for violations. The binder may also contain other owner/manager requirements for use such as internet access, condition at end of tenancy, comments, etc.

e. Application Procedure: Only a complete application will be accepted and reviewed by the Town Staff. The Town Staff shall review adjacent land owner comments to assess potential issues with compliance. The Planning Director and Building Inspector will conduct an Administrative Review and make a determination to accept the application, reject the application, or forward it for review to the Planning Commission. The Planning Commission

shall then make a recommendation to approve with conditions, reject the application, or table the application for further specified information. The Planning Commission's recommendation, to approve with conditions or deny the application, shall be forwarded to the Town Board, who shall vote to approve with conditions, deny, or table the application for further specified information. A legal notice is required to be published in the local newspaper at least ten days prior to the Town Board Public Hearing.

f. Appeal Process. Hearings and appeals shall be made in accordance with Town of Silverton Municipal Code.

THIS ORDINANCE was published and posted in full on the 23rd day of April, 2021; and introduced, read and approved at First Reading by the Board of Trustees of the Town of Silverton on the 12th day of April, 2021; and read, approved and adopted at Second Reading following a public hearing and ordered published by the Board of Trustees of the Town of Silverton on this 26th day of April, 2021.

ATTEST:

Kelli Fries, Town Clerk
Date 4/26/21

Sallie Barney, Mayor Pro Tem
Date 4/26/21

38878
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SERVICE DATE – MAY 23, 2008

This decision will be printed in the bound volumes of
the STB printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1014

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION—
ADVERSE ABANDONMENT—IN MINERAL COUNTY, CO

Decided: May 21, 2008

The City of Creede, CO (the City), filed an application for adverse abandonment for a 1-mile portion of rail line within the City limits that is owned and operated by the Denver & Rio Grande Railway Historical Foundation (D&RGHF). For the reasons set forth below, we grant the City's application.

BACKGROUND

History of the Line. The Creede Branch is a 21.6-mile rail line, extending from milepost 299.3 near Derrick to the end of the line near milepost 320.9 at Creede, in Rio Grande and Mineral Counties, CO.[1] In its application, the City provides a history of the Creede Branch,[2] which is not disputed by D&RGHF. According to the City, the Creede Branch was built to serve the mining industry in and around Creede in the last half of the 1800s. However, as mining activity in the area declined, so did freight operations over the Creede Branch. Freight service into the City ceased in 1969 and on the remainder of the Creede Branch by the mid-1980s.

The City states that the 1-mile segment that it seeks to have abandoned is comprised of two rights-of-way (ROWs): the Section 25 ROW and the Section 36 ROW. According to the City, the Section 25 ROW was granted to the Denver & Rio Grande Western Railroad Company (D&RGW) by the Federal Government, pursuant to the Right of Way Act of 1875, while the Section 36 ROW was granted to D&RGW by the Colorado State Land Board in a 1969 agreement.[3] The City states that the interest in the land under the Section 25 ROW was deeded

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[1] See Union Pacific Railroad Company—Abandonment Exemption—in Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X), slip op. at 1 (STB served May 24, 2000) (May 2000 Decision).

[2] See City's Application at 6-7.

[3] The City notes that this 1969 agreement replaced an 1892 agreement between the Colorado State Land Board and D&RGW granting D&RGW the ROW.

to the City in 1901 and the land under the Section 36 ROW was deeded to the City in 1965, and that, in both instances, the deeds were subject to the pre-existing ROWs.[4]

History of the Case. In December 1998, the successor to D&RGW, Union Pacific Railroad Company (UP), filed a notice of exemption with the Board for authority to abandon the Creede Branch in STB Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad Company—Abandonment Exemption—in Rio Grande and Mineral Counties, CO. However, before the abandonment authority could be consummated, D&RGHF submitted an offer of financial assistance (OFA) to acquire the line, pursuant to 49 U.S.C. 10904 and 49 CFR 1152.27.[5] On April 28, 1999, UP and D&RGHF advised the Board that they had reached an agreement for the purchase and sale of the Creede Branch. By decision of the Director of the Office of Proceedings served on May 11, 1999, in STB Docket No. AB-33 (Sub-No. 132X), UP's abandonment exemption was dismissed, effective on the consummation date of the sale, and D&RGHF was authorized to acquire the subject rail line. On May 24, 2000, D&RGHF and UP consummated the sale of the line.

Since D&RGHF's purchase of the line, the City and area residents (collectively, petitioners) have filed three separate petitions to reopen and revoke the OFA sale authorized by the Board in STB Docket No. AB-33 (Sub-No. 132X). Among the arguments raised by the petitioners was the claim that D&RGHF, and its President, Donald Shank, were not financially responsible and thus did not meet the qualifications to be an OFA purchaser. The petitioners also claimed that D&RGHF could not, and would not, conduct freight rail operations and only wanted the line to operate a tourist service. Because the Creede Branch had not been used for rail service for decades, the line required rehabilitation work before service (freight or passenger) could resume, and the petitioners asserted that D&RGHF was unable to fund the necessary repairs. D&RGHF disputed these assertions in each instance.

The Board denied all three petitions to reopen and revoke, in the May 2000 Decision, and in decisions served on June 22, 2004 (June 2004 Decision), and May 3, 2005 (May 2005 Decision).[6] In the June 2004 Decision and May 2005 Decision, the Board noted that repeated

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[4] City's Application at 17. See also City's Application, Exh. 3, for a map of the 1-mile segment, including the boundaries of the Section 25 and Section 36 ROWs.

[5] Another party, Rio Grande & San Juan Railroad Co., also submitted an OFA. When faced with multiple offerors, the railroad may choose the one with which it will negotiate, 49 CFR 1152.27(l)(1), and UP chose to negotiate with D&RGHF.

[6] The City also filed a petition for declaratory order, pursuant to an order of the U.S. District Court for the District of Colorado, referring to the Board three questions related to the issue of Federal preemption of the City's zoning laws as applied to the outer portions of D&RGHF's ROW. The City had adopted a local zoning ordinance that would have classified parts of D&RGHF's ROW for residential use only. The Board issued a decision finding that the City's zoning ordinance was federally preempted under 49 U.S.C. 10501(b). See City of Creede,

(continued . . .)

attacks on the OFA sale were not the appropriate way to address the petitioners' concerns, and it pointed out that, if the petitioners wished to move to take the line out of the national rail system, they were free to file an application for adverse abandonment.

On December 17, 2007, the City filed an application under 49 U.S.C. 10903,[7] requesting that the Board authorize the third-party, or adverse, abandonment of approximately 1.0 mile of rail line at the end of the Creede Branch (extending from near milepost 320.9 to near milepost 319.9), a run-around track, and a spur track, all located in the City limits.[8] In accordance with the procedural schedule set forth in 49 CFR 1152.26, D&RGHF filed its protest to the application on January 31, 2008, and the City filed its reply to D&RGHF's protest on February 15, 2008.[9] On January 31, 2008, the Board received a protest from San Luis & Rio Grande Railroad (SL&RG), opposing the City's adverse abandonment application. The Board also received numerous letters from residents and business owners in and around the City, nearly all of which express support for the City's adverse abandonment application.

PRELIMINARY MATTERS

Motion to Strike. In its protest, D&RGHF argues that the letters submitted by the local area residents and businesses should be stricken as impermissible filings under the procedural schedule. In the alternative, D&RGHF argues that, if the letters are not stricken, the Board should accord them no weight. The City argues in response that these letters are allowed under the procedural schedule and should be considered as evidence that there are no businesses in the City that need or want rail service.

Contrary to D&RGHF's assertion, there is nothing in the procedural requirements of 49 CFR 1152.26, governing abandonment proceedings that prohibits individuals from filing letters in support of, or opposition to, an abandonment application, or that requires that these filings be given no weight. Moreover, the Board has accepted such filings in prior adverse

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(. . . continued)
CO—Petition for Declaratory Order, STB Finance Docket No. 34376 (STB served May 3, 2005).

[7] In a decision served in this proceeding on October 18, 2007 (October 2007 Decision), the City was granted exemptions from several statutory provisions as well as waivers of certain Board regulations at 49 CFR 1152 that would not be relevant to its adverse abandonment application or that called for information not available to the City.

[8] Notice of the City's application was served and published in the Federal Register on January 4, 2008 (73 FR 930-31).

[9] The Board also received a pleading from Wason Ranch Corporation (Wason) on January 31, 2008, requesting that the Board expand the scope of this proceeding to include those portions of the Creede Branch that traverse Wason's property. By a decision served on March 4, 2008, the Board denied this request.

abandonment cases.[10] Accordingly, in the interest of encouraging public participation, D&RGHF's motion to strike, or, in the alternative, that these letters be given no weight, is denied.

Request for Official Notice. On February 14, 2008, D&RGHF filed a request that the Board take official notice of its decision in Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286) (STB served Feb. 14, 2008) (St. Joseph County),[11] which was served after D&RGHF filed its protest. On February 29, 2008, the City filed a reply to D&RGHF's request, stating that D&RGHF's request should be deemed a motion to supplement its protest. The City states that it does not object to such a motion, but argues that it should be permitted to file a reply, which it included as part of its filing. In its reply, the City argues that the St. Joseph County decision is distinguishable from the case here.

The City is correct that it is unnecessary for the Board to take official notice of its own decision, even if it was issued subsequent to a party's submission. Accordingly, D&RGHF's request and the City's request to reply will be denied as moot.

Motions to Supplement. On February 25, 2008, D&RGHF filed a request (February 25 letter) that the Board take official notice of the fact that Railinc, an affiliate of the Association of American Railroads (AAR), issued a railroad reporting mark of "DRGR" and an AAR accounting rule 260 code number 212 to the Denver & Rio Grande Railroad Company, the operating affiliate of D&RGHF. D&RGHF states that this constitutes additional evidence that it is a legitimate rail carrier. On February 29, 2008, D&RGHF filed a request (February 29 letter), asking that the Board take official notice of a newspaper article describing a mining business venture in the Creede area as further evidence of the potential for future traffic. On March 17, 2008, the City submitted a reply to both of these requests. The City argues that these two letters do not meet the criteria of 49 CFR 1114.6, by which the Board takes official notice of corroborative material.

The City is correct that D&RGHF has used an incorrect procedure for what it seeks, which is to supplement its protest. Accordingly, we will treat D&RGHF's February 25 and February 29 letters as motions to supplement its protest. The City does not appear to object to these requests and has submitted a reply to both letters. Because both of D&RGHF's letters provide information that was not available to it at the time of its protest, and the City does not object, we will grant D&RGHF's motions to supplement and include its two letters as part of the record, as well as the City's reply to these letters.

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[10] E.g., Salt Lake City Corporation—Adverse Abandonment—in Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183), slip op. at 1 (STB served Mar. 8, 2002) (Salt Lake City).

[11] A petition for administrative reconsideration of St. Joseph County is pending before the Board.

On March 24, 2008, D&RGHF filed another request (March 24 letter) that the Board take official notice of a newspaper article reporting that two sites near Creede have been proposed as designated sites for environmental cleanup under the Superfund program as evidence of future potential traffic. The City filed a reply to this request on April 14, 2008. Again, we will treat D&RGHF's request as a motion to supplement D&RGHF's protest, and because this motion contains information that was not available to D&RGHF at the time of its protest, it will be granted. The City's reply will also be entered into the record.

OFA Request. In addition to arguing that the Board should deny the City's application, SL&RG requests that the Board permit SL&RG to file an OFA to acquire the abandoned segment if the application is granted.

We will deny SL&RG's request to allow it to file an OFA. The issue of whether or not to permit an OFA in this case has already been addressed. In the October 2007 Decision, slip op. at 4-5, the Board granted the City's request for an exemption from and waiver of the statutory and regulatory OFA provisions, respectively, should the City's adverse application be granted. SL&RG suggests that the Board's finding may have been "inadvertent," which we will take to mean that it was allegedly a material error under 49 U.S.C. 722(c). Accordingly, we will treat SL&RG's request as a petition to reopen the October 2007 Decision.

The Board's finding was not inadvertent, however, nor was it a material error. In the October 2007 Decision, slip op. at 4-5, the Board pointed out that it does not permit OFAs for lines as to which adverse abandonment has been granted because an OFA would be inconsistent with the reasons for granting the adverse abandonment in the first place. As we noted in that decision, "should the Board ultimately find that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, the OFA, feeder line, and public use provisions would be fundamentally inconsistent with the purpose of the Board's adverse abandonment decision." Accordingly, the Board's granting of the City's exemption and waiver requests from the OFA provisions was not material error, and SL&RG's petition to reopen will be denied.

DISCUSSION AND CONCLUSIONS

A. Applicable Legal Standards.

Under 49 U.S.C. 10903(d), the standard governing any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in an adverse abandonment context, we must consider whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests.[12]

[12] See New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004) (New York Cross Harbor); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984). See also (continued . . .)

We have exclusive and plenary jurisdiction over abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.[13] Accordingly, we typically preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.[14] On the other hand, we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding Federal interest exists.[15] In an adverse abandonment case, if we conclude that the PC&N does not require or permit continued operation over the line, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies to force the carrier off a line.[16]

B. PC&N Analysis.

Potential for Freight Service. D&RGHF concedes that there are no current freight operations on the line, given that the line has not yet been restored to operational condition. But the lack of current freight operations alone is not grounds for granting an adverse abandonment application. Under the PC&N test, the Board must also consider the potential for future freight rail traffic.[17]

In its application, the City argues that it is likely that there will never be a shipper that would utilize the 1-mile segment that it seeks to have abandoned. In its protest, D&RGHF identifies four potential shippers and thus claims that its prospects for freight rail service are greater than those in Seminole Gulf, a case in which an adverse abandonment application was denied.

(. . . continued)
Seminole Gulf Railway, L.P.—Adverse Abandonment—in Lee County, FL, STB Docket No. AB-400 (Sub-No. 4) (STB served Nov. 18, 2004) (Seminole Gulf); St. Joseph County.

[13] See Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969, 972 (1981) (Modern Handcraft).

[14] See Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY, 8 I.C.C.2d 773, 779 (1992) (Chelsea), aff'd sub nom., Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994) (Conrail).

[15] See Kansas City Pub. Ser. Frgt. Operation—Exempt.—Aban., 7 I.C.C.2d 216 (1990) (Kansas City). See also CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002) (Grand Trunk).

[16] See Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

[17] Seminole Gulf; St. Joseph County.

In its reply to D&RGHF's protest, however, the City has raised serious questions about the likelihood that any of these alleged shippers would need to use the line for freight rail service. We look at the prospect of each of the prospective shippers that D&RGHF identified.

a. GMCO Corporation (GMCO)

In past Board proceedings, D&RGHF has cited GMCO as a potential shipper when refuting claims that D&RGHF had no interest in providing freight rail service. In those proceedings, the Board found that GMCO's interest in shipping as much as 25 cars of magnesium chloride[18] a year to the governments of Mineral and Hinsdale Counties, CO, represented a reasonable level of commitment to use a rail line that was not yet fully rehabilitated.[19] Here, D&RGHF claims that GMCO "remain[s] interested in shipping magnesium chloride by rail . . . all the way into Creede for both Mineral County and the U.S. Forest Service."[20]

The City provides persuasive evidence, however, that, since those past decisions, the prospect for shipments by GMCO over D&RGHF's line has greatly diminished. First, the City claims that Hinsdale County is no longer interested in receiving magnesium chloride from GMCO, a fact that appears uncontested in that D&RGHF omits Hinsdale County as a potential customer in its reply. Second, the City notes that, in GMCO's letter to D&RGHF, GMCO has lowered the number of possible carloads for shipment to Mineral County from 12-15 (as stated in a 2003 letter from GMCO) to 3-5 carloads. However, even this estimate may be high, as the city manager for Creede has stated that Mineral County uses only one car of magnesium chloride per year.[21] Moreover, there is no evidence that Mineral County seeks service from D&RGHF for even that small amount of magnesium chloride. Unlike in its past submissions, here, D&RGHF does not provide a letter from Mineral County indicating its interest in having its shipment received by rail. The City, in contrast, has submitted evidence that the Commissioners of Mineral County voted unanimously not to write a letter supporting D&RGHF's opposition to the adverse abandonment application.[22] D&RGHF also claims that the U.S. Forest Service is interested in receiving magnesium chloride, but there is no evidence in support of this claim.[23]

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[18] According to the City's application, magnesium chloride is a chemical that is used as a dust suppressant on road surfaces. City's Application at 37.

[19] See June 2004 Decision, slip op. at 7; May 2005 Decision, slip op. at 4-5.

[20] See D&RGHF's Protest, V.S. of Donald H. Shank (Shank), at 18.

[21] See City's Application, V.S. of Clyde Dooley (Dooley), at 3.

[22] City's Reply, Exh. 38.

[23] GMCO's letter to D&RGHF makes no mention of shipping carloads of magnesium chloride to the U.S. Forest Service. See D&RGHF's Protest, Exh. 1. GMCO does mention the possibility of shipping 30 carloads to South Fork, CO, to service Archuleta County, CO, but

(continued . . .)

b. Steven Baxter/Tenco Red Cedar Logs

D&RGHF also identified Steven Baxter, a Creede resident, as another potential shipper. According to D&RGHF, Mr. Baxter is in the formative stages of establishing a company called Tenco Red Cedar Logs (Tenco). The City states that this company would finish cedar logs for use in home construction. D&RGHF claims that Mr. Baxter is interesting in having carloads of cedar logs shipped from out of state to his business in Creede.

Despite D&RGHF's claim, the likelihood that Mr. Baxter would actually need or request freight rail service is highly speculative. The City notes that, in response to a discovery request, the only evidence that D&RGHF could point to of Mr. Baxter's interest in service were e-mails between Mr. Baxter and Mr. Shank. A review of these e-mails shows that Mr. Baxter simply inquired about the possibility of having the cedar logs shipped by D&RGHF.[24] But Mr. Baxter makes no commitment to ship by D&RGHF. Moreover, in response to an inquiry from the city manager of Creede about the possibility that Mr. Baxter would receive shipments by rail, Mr. Baxter states: "I have not made any commitment to [D&RGHF] to purchase rail service at this time. . . . Tenco is in the formative stages and will not require transportation services, truck or rail, for some time to come."[25] Based on this evidence, the potential for D&RGHF to make freight rail shipments to Mr. Baxter is highly speculative.[26] Moreover, the City points out that, even according to D&RGHF, if Tenco were to receive shipments of cedar logs by rail, it would be no more than 1-3 carloads per year.

c. Mining

D&RGHF also argues that there is a possibility that the long-defunct mining industry around the City will resume. D&RGHF specifically alleges that a "wealthy individual" it identifies as Brian Egolf recently purchased over 700 mining claims with plans to press several of the mines into production. D&RGHF claims that these mines represent future freight rail potential.

But D&RGHF's claim that these mines may lead to future freight rail service is even more speculative than its claims regarding GMCO and Mr. Baxter. D&RGHF's references to Mr. Egolf and his plans are extremely vague. D&RGHF does not provide basic information about Mr. Egolf, such as his address, his profession, or his business plan (including any form of

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D&RGHF itself makes no mention of this and the City notes that D&RGHF's line does not go to Archuleta County.

[24] See City's Application, Exh. 12, App. 5.

[25] City's Application, Exh. 23.

[26] See Chelsea, 8 I.C.C.2d at 782 ("[The only potential shipper's] one-sentence letter expressing continuing interest resembles nothing more than an effort to preserve options.").

business organization). Nor does D&RGHF provide any corroborating support from Mr. Egolf that he intends to put these mines back into production, much less ship products from the mines by rail.

Moreover, it is unclear from D&RGHF's protest where these 700 mines are located, other than that they are outside of the City. The City points out that, even if mining activities were to resume in the mountains that surround the City (a claim that D&RGHF has not been able to support), products from these mines would need to be shipped from the mines by truck to the freight trains and then transloaded. The City argues that there is no reason that this transloading could not take place outside of the City limits, on a portion of the Creede Branch not sought for abandonment here.

Based on the record here, it appears that, even if mining activities were to resume, it would be just as easy for the trucks to take the mine products an additional mile or two up the line, especially because there is no transloading facility on the stretch of track for which the City seeks abandonment authority, or anywhere else in the City.[27] Indeed, because the mine products would already have to be loaded on to the trucks, the record suggests that mining companies might elect to take the mining products all the way to their final destination by truck.

In its February 29 letter, D&RGHF cites to a newspaper article indicating that a company called Hecla Mining (Hecla) has entered into a business venture that may result in the resumption of some mining activity in the area around Creede. But, again, even if the mining venture were to result in new mining activity (which, the City claims, is uncertain), D&RGHF does not explain why Hecla would be likely to have the products from these mining activities hauled into the City for transloading.

d. Last Chance Mine

Finally, D&RGHF refers to the Last Chance Mine as a source of potential rail freight. According to D&RGHF, Jack Morris, the owner of the Last Chance Mine, anticipates annually shipping 100 or more carloads of bulk rock, specialty rock, and rock products to markets in Texas and New Mexico and for export to China.

Again, there are several problems with D&RGHF's claim. First, the City notes that the Last Chance Mine is 4 miles from Creede, leading to the same issue about how the freight would be moved from the mine to the City and then transferred to railcars. Second, D&RGHF again does not provide any corroborating evidence of an interest in using freight rail service, such as a letter or verified statement from Mr. Morris. Finally, and most problematic, the City has

[27] See id. (rejecting claim of potential traffic based on the fact that the carrier had no location where it could transload waste to its railcars).

presented evidence showing that the Last Chance Mine appears to be solely a tourist attraction and not an active mine.[28]

e. Other Possible Shippers

In its March 24 letter, D&RGHF points to another newspaper article that reports that two sites approximately 1 mile north of Creede have been proposed for designation as Superfund cleanup sites. D&RGHF states that this development shows additional potential for freight traffic. However, the article explains that at this stage, the two sites are just being proposed as Superfund sites. And even if these sites become Superfund sites, the City states (in its reply to D&RGHF's letter) that, upon further inquiry, it has determined that neither of these clean-up projects would require transportation service.[29] Moreover, as the City notes, even if the two sites were to require transportation service for some reason, there is no evidence that this transportation would occur by rail. D&RGHF's proposal to ship such material on the 1-mile segment of the Creede Branch also seems fraught with potential problems. Having these materials, which may be hazardous, trucked into the City and transloaded there could create serious environmental and safety concerns. If D&RGHF were to ship such products, it might make more sense to do so outside of the City.

In addition to demonstrating that the potential shippers identified by D&RGHF are unlikely to need to use the 1-mile portion of the Creede Branch within the City limits for freight rail service, the City also argues that any unknown shippers are unlikely to materialize. According to the City, more than 90% of the land in Mineral County is Forest Service land owned by the Federal and State Governments. Moreover, according to Creede's city manager, the City is the only town in Mineral County, with a population of only 417 people, and there are no businesses in the City (such as manufacturers) that would require freight rail service.[30] Based on the geography and demographics of the City and surrounding area, we agree with the City

[28] City's Reply, Exh. 37.

[29] In its reply, the City describes in detail (something that D&RGHF failed to do) the nature of these proposed environmental clean-up projects. The City explains that the environmental integrity of the Willow Creek, located north of Creede, is being jeopardized by two sources. The first is the Commodore Waste Rock Pile, a pile of rock left over from mining activity which, if not stabilized, could create debris that blocks the flow of water in Willow Creek. The second is the Nelson Tunnel, which drains water filled with contaminants from several closed mines into Willow Creek. According to the City, the stabilization of the Commodore Waste Rock Pile would be achieved by building a new "cribbing" or retaining wall to stabilize the rock pile. The City states that contamination from the Nelson Tunnel would be remedied through a number of possible options—including redirecting the flow of water around the contaminants, "cap[ping]" the contaminated rock, placing the contaminated rock in a lined repository, or constructing a waste water treatment plant—but not transporting the contaminated rock out of the area.

[30] City's Application, V.S. of Dooley at 1-2.

that there will not likely be any businesses that require freight rail service in the foreseeable future on this line that has not handled freight rail traffic for decades.

In its protest, SL&RG claims that it is has actively worked with numerous potential shippers of "oil and gas field commodities" in the area surrounding Creede. But the City points out in its reply that there are no oil and gas field commodities in the immediate Creede vicinity. Moreover, these alleged prospective shippers were not identified by D&RGHF.

In sum, there appears to be little, if any, potential for freight rail traffic here. The most likely potential shipper is Mr. Baxter, but, his business is still in the formative stages, and if the prospect for traffic were to materialize some day, it would amount to only 1-3 carloads per year, an amount so small it does not weigh against abandonment under the PC&N test.

Because the likelihood for freight rail traffic is almost non-existent, D&RGHF's claim that this case is akin to Seminole Gulf is without merit. In Seminole Gulf, the Board denied an adverse abandonment application, in part, because the carrier presented evidence of potential new shippers—in particular, a letter from a shipper that was interested in service, opposed abandonment, and was capable of generating traffic. Here, in contrast, D&RGHF has claimed that there are potential new shippers, but it has provided no evidence that freight rail traffic would actually materialize, or that there would be enough of this traffic to justify keeping this line in the interstate rail system. Moreover, none of the alleged shippers that D&RGHF has identified (including GMCO or Tenco) has opposed the abandonment.[31]

In Seminole Gulf, the Board also noted that the carrier was "actively" seeking new business for the line. Under the PC&N test, in addition to looking at the potential for freight traffic, we also look to see if the carrier is taking "reasonable steps" to attract traffic.[32] D&RGHF, by its own admission, has done little to solicit freight traffic. According to D&RGHF, it will not "beat the bushes" to attract shippers until it can definitely establish a date on which it can begin providing service,[33] which will not be until the necessary rehabilitation work is complete.

D&RGHF has had over 7 years to seek out potential shippers and to rehabilitate its line. D&RGHF claims that rehabilitation of the line is nearly complete, but again, it provides no evidence to support this contention. Moreover, this claim is disputed by the City, which argues that there is still significant work to be done on the line. By contrast, in Seminole Gulf, slip op.

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[31] See Modern Handcraft, 363 I.C.C. at 971 (in case where adverse abandonment was granted, only party to oppose the adverse abandonment was the carrier); Grand Trunk, slip op. at 6 (in case where adverse abandonment was granted, no shippers protested the application).

[32] See Chelsea, 8 I.C.C.2d at 779.

[33] D&RGHF's Protest, V.S. of Shank at 17.

at 5, there was no dispute that the line was operable, which meant that service could be reinstituted immediately.

There is no bright-line rule establishing a time-frame for an OFA offeror to restore service. In Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, STB Docket No. AB-600, slip op. at 6 (STB served Nov. 19, 2004), after concluding that an adverse abandonment application should be denied, the Board stated that its "finding [was] without prejudice to [the applicant's] seeking to reopen or file a new abandonment application, should the proposed rehabilitation and restoration not occur within a reasonable period of time." Here, it has been 7 years since D&RGHF's acquisition, and D&RGHF has still not been able to identify a realistic prospect for freight rail service and does not appear to have made much effort to do so. Given the circumstances of this case, 7 years is a sufficient "reasonable period of time" for D&RGHF to have accomplished this end.

Based on the facts here, with regard to the issue of potential freight traffic, this case is more analogous to Chelsea than to Seminole Gulf. In Chelsea, the carrier, Conrail, claimed that adverse abandonment should be denied because it needed the line in question to haul waste. However, the Interstate Commerce Commission (ICC) noted that the feasibility of such a proposal was "highly relevant in making a public convenience and necessity ruling" and that it "need not blindly accept Conrail's assertions" that the potential waste-hauling traffic it claimed was legitimate.[34] After performing an in-depth examination of Conrail's plan for waste-hauling, the ICC determined that the applicant had shown that Conrail's waste-hauling plan was not feasible and granted the adverse abandonment application. Here, too, the Board will not unquestioningly accept speculative claims of potential freight traffic.[35]

Having looked closely at D&RGHF's alleged prospects for service, we find its claims of potential freight rail traffic to be unsubstantiated. Accordingly, we find that D&RGHF has not shown any realistic potential for freight traffic over the 1-mile portion of the Creede Branch within the City. And as noted, even if some traffic were to materialize, the remainder of the Creede Branch would still be available to ship such traffic (assuming, of course, that D&RGHF is able to rehabilitate that portion of the line).

Alternative Transportation Options. Even in the unlikely event that demand for freight rail service was to materialize at some point in the future, the City has demonstrated that shippers would have sufficient alternative transportation options. In addition to the fact that freight could be shipped by truck along highways in the area, as we have already discussed, most of the potential shippers identified would need to transload in order to use the D&RGHF line. There is no reason why D&RGHF could not use a location outside of the City, just 1 or 2 miles further up

[34] Chelsea, 8 I.C.C.2d at 780.

[35] D&RGHF also argues that this case is similar to St. Joseph County. In that case, however, the Board found (in the decision served on February 14, 2008) that there is a more realistic potential for freight traffic than exists here.

on the Creede Branch, for transloading. Indeed, as the City notes, there is no transloading facility in the City,[36] and when there was freight service, from 1969 to 1985, freight was shipped to Wason (an area just outside of the City), then transloaded to trucks and hauled into the City. In fact, there has been no freight rail service over the 1-mile portion of the line within the City since 1970 (and before that, trains operated into the City infrequently).[37] Despite this decades-long lack of need for freight rail service, if, for some reason, potential shippers were to materialize in or near the City, the removal of just 1-mile of line at the end of the Creede Branch would not deprive them of the ability to ship by rail.

Citing New York Cross Harbor, D&RGHF argues that a finding that D&RGHF does not need the 1-mile portion of the line because it can provide any service that might be needed in the future by using the remainder of the Creede Branch would impermissibly shift the burden of proof to D&RGHF. D&RGHF is incorrect.

In adverse abandonment proceedings, the burden of proof first lies with the applicant to show that the carrier has no likelihood of success in preserving the line for rail service. When the applicant makes such a showing, the burden then shifts to the carrier to show that there is a realistic potential for rail service. The court in New York Cross Harbor—a case in which the applicant sought adverse abandonment over a route over which traffic was moving—held that, in that proceeding, the agency misapplied the burden of proof by placing it on the carrier. Here, however, the City met its burden by demonstrating that there was no potential for freight rail service on this segment. At that point, the burden properly shifted to D&RGHF to refute the City's showing.

Passenger Service and Speeders. D&RGHF also argues that the 1-mile portion of the Creede Branch within the City limits is needed for a proposed passenger tourist service and for "speeders"[38] used by local residents for recreational purposes. In its protest, SL&RG similarly indicates that its opposition to the adverse abandonment is based on its desire to keep the line in the interstate rail system so that SL&RG can eventually acquire the Creede Branch and provide its own tourist excursion.[39]

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[36] See Grand Trunk, slip op. at 6 ("[S]hippers will not lose routing options or have less efficient, more costly service if [the carrier] is forced to abandon its trackage.").

[37] See City's Application at 7.

[38] According to the City, speeders are small, gas-powered, steel-wheeled vehicles that railroads use to transport maintenance employees and supplies over the track. As a hobby, people acquire speeders that have been discarded by railroads, restore them, and operate them over abandoned or little-used lines. City's Application at 45.

[39] SL&RG claims that it did not have sufficient time to develop evidence of a public need to keep the Creede Branch in service between the date the notice of this proceeding was published in the Federal Register (January 4, 2008) and the date protests were due (January 31, 2008), and, that as a result, the Board should develop a further record on this issue. The City

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Although we have never had an adverse abandonment proceeding where potential passenger service was cited as a reason to keep the line in the national rail system, passenger service could factor into the PC&N analysis if revenue from existing or potential passenger service on a line might make more than a de minimis amount of rail freight service feasible. In the OFA context, in Trinidad Railway, Inc.—Abandonment Exemption—in Las Animas County, CO, STB Docket No. AB-573X, et al., slip op. at 10 (STB served Aug. 13, 2001) (Trinidad Railway), the Board stated that:

> In determining whether there are sufficient traffic prospects to enable [the prospective carrier] to operate the line . . . , we consider all potential income resulting from the operation of the rail line. In this case, that includes income from passenger operations. . . . Thus, rail freight need not provide all of the income that would be needed to cover the cost of owning, maintaining and operating the line. . . .[40]

In this case, however, we have determined that there is no realistic prospect for future freight rail service. Thus, D&RGHF's use of this segment would be primarily if not solely for passenger service, rather than a passenger-freight hybrid, as discussed in Trinidad Railway.[41]

In any event, the record shows that the likelihood of passenger service operating over the 1-mile segment of line in question is dubious. D&RGHF has not identified any prospects for passenger service and the record is devoid of any evidence of how D&RGHF intends to operate its alleged tourist excursion service. As noted, D&RGHF has also not supported its claim that the line is close to being ready to transport passengers safely, and the City has raised serious questions about the extent of rehabilitation work still needed and D&RGHF's ability to continue funding repairs. The City has provided evidence that D&RGHF applied for several million dollars from the Colorado Department of Transportation (Colorado DOT), but that D&RGHF

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correctly notes, however, that SL&RG should have been on notice about this proceeding months prior to publication of the Federal Register notice, as the City filed its petition for waivers and exemptions of the filing requirements on June 7, 2007, and the Board issued a decision on this petition on October 18, 2007. Thus, SL&RG's inability to present a more developed case within the lawfully prescribed time-frame is not a basis to delay a ruling on or deny the City's abandonment application.

[40] See also June 2004 Decision, slip op. at 8 ("D&RGHF intended from the outset to rehabilitate the Creede Branch and subsidize any available freight traffic by running a tourist passenger excursion service on the line.").

[41] For the same reason, we will not consider speeder users as part of our weighing of the relevant factors under the PC&N test. Any revenue from this activity would not be used to support freight rail service—because there will almost certainly be no freight service—and is therefore immaterial to the PC&N analysis.

withdrew its request when it could not meet Colorado DOT's requirements, including a letter of credit.[42] The City also shows that the State of Colorado suspended D&RGHF's charitable registration status since 2004 for failing to report information from fiscal year 2002, meaning that D&RGHF is not permitted to fundraise in Colorado or receive donations from people in Colorado.[43] D&RGHF states that Federal and state funding for rehabilitation is available. But the only evidence in support of this claim is an excerpt from a newsletter stating that another carrier, Columbia Basin Railroad Company, Inc., obtained a $3 million dollar loan from the Federal Railroad Administration.[44] There is no evidence to support the conclusion that D&RGHF would be able to qualify for such a loan were it to apply for one. D&RGHF does not provide evidence of any other sources of revenue (other than from speeder users).

In its protest, SL&RG states that it wishes to acquire the Creede Branch so that it can also provide a tourist excursion, but, as the City notes, SL&RG has only applied for funds from the Colorado DOT to conduct a study to determine ridership levels for passenger service in the area.[45] As the City points out, whether the study will ever be conducted is uncertain, and there is no way to know whether the study will identify a demand for passenger service, and if so, whether the demand for passenger service would be sufficient to make that type of service feasible. The fact that SL&RG still needs to research the prospect of passenger service belies claims by SL&RG and D&RGHF that passenger service is wanted or needed.

Other Arguments. D&RGHF argues that the City's adverse abandonment application should be denied based on the Board's decision in Riverview Trenton Railroad Company—Petition for Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI, STB Finance Docket No. 34040 (STB served Nov. 30, 2007) (Riverview Trenton). In that decision, the Board denied a petition to revoke an acquisition and operation exemption on the grounds that the carrier had made sufficient progress in its attempt to restore rail service, as evidenced by the rehabilitation work the carrier had performed. D&RGHF argues that the steps it has taken to rehabilitate the Creede Branch are greater than those taken by the carrier in Riverview Trenton. Along these lines, D&RGHF also claims that the reason adverse abandonment was granted in Chelsea and Modern Handcraft was that the carrier was making no attempt to restore rail service, while here, D&RGHF has demonstrated through its rehabilitation work that it is trying to restore service.

D&RGHF's reliance on Riverview Trenton is misplaced. Aside from the fact that that case involved a different issue (whether to revoke authority to acquire and operate a rail line for failure to implement the authority the Board had granted), the Board also determined that the

[42] City's Application, Exh. 30.

[43] Id., Exh. 31.

[44] D&RGHF Protest, V.S. of Shank, Exh. 6.

[45] See SL&RG's Protest, V.S. of Edwin Ellis at 6.

petitioner in that proceeding "has made no attempt to show that the Detroit area no longer needs the kind of service that [the carrier] plans to provide, or that [the carrier] could not provide that service."[46] In a prior decision in that proceeding, the Board also found that the carrier "has submitted statements from shippers supporting its project" and "we believe that the statements show that the project is sound enough to attract some significant support under difficult circumstances."[47] Thus, in Riverview Trenton, the need for freight rail service had been adequately demonstrated. Here, in contrast, the City has shown that there is no realistic prospect for freight rail service. As for D&RGHF's claim that this case is distinguishable from Chelsea and Modern Handcraft, although the carriers in each of those cases had not made much effort to rehabilitate or maintain their respective lines, that fact was not the primary basis for the ICC's decisions. Rather, the ICC granted the adverse abandonments in those cases because there was no potential for freight rail service, as is the case here. Accordingly, the fact that D&RGHF evidently has performed some rehabilitation work does not change our finding that there is no likelihood of freight rail service on the line.

D&RGHF also states in its February 25 letter to the Board that its operating affiliate has been granted a reporting mark and accounting code by the AAR's Railinc affiliate, which it claims demonstrates that D&RGHF and its affiliate are "legitimate rail carriers." The City has raised questions about whether D&RGHF properly obtained this reporting mark and accounting code. We need not resolve those questions here because, as the City notes in its reply to this letter, whether D&RGHF is a "legitimate carrier" has no bearing on whether or not there is a potential for rail traffic or, more broadly, whether the City's adverse abandonment application should be granted.[48]

Lastly, SL&RG argues that "the Board should consider the fact that rail is the *only* form of transportation that can combat America's insatiable thirst for oil and its effect on global warming" and that "[g]ranting adverse abandonment applications such as this present[s] a serious threat to the long term viability of the national rail infrastructure by chipping away pieces that are difficult, if not impossible, to restore at a later date."[49] But the 1-mile segment in question is not, and, as we have found, likely will not be, used for freight service, and its use for passenger service is also dubious. Accordingly, this argument provides no basis for keeping this 1-mile segment in the interstate rail system.

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[46] Riverview Trenton, slip op. at 3.

[47] Riverview Trenton Railroad Company—Petition for Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI, STB Finance Docket No. 34040, slip op. at 11 (STB served May 15, 2003), aff'd, City of Riverview v. STB, 398 F.3d 434 (6th Cir. 2005).

[48] See Grand Trunk and Chelsea (granting adverse abandonment applications for lines that were owned by prominent rail carriers).

[49] SL&RG Protest at 5-6.

Public Interest Considerations. In considering the relevant factors in an adverse abandonment case, we also weigh the public interest associated with the City's plans for the property.[50] In its application, the City states that it wants to gain control over the publicly owned land under the 1-mile of railroad ROW because the City desires to: continue the public uses to which the underlying property already has been put; put an end to the controversies over the uses of this land; and plan for the orderly development of the property.

Here, the City has shown that it plans to develop the underlying property for public purposes.[51] The potential public development ideas that the City discusses include expanding the City's park and playground and paving the parking areas, as well as pursuing other economic development, such as constructing a daycare center, expanding the City's one grocery store, or expanding the local theater.[52] The city manager notes that land that is available for development in the City is limited,[53] making the need for land from the ROW particularly important. The City also states that it would like to reconstruct the grandstand and bleachers that were removed by D&RGHF so that it can accommodate the vendors and visitors that attend the City's annual 4th of July celebration, which provides an economic boost to the City.

Here, the City's plans are somewhat less developed than those we have seen in some other cases where adverse abandonments have been granted. But given the essentially non-existent need to preserve this 1-mile segment as part of the national rail system, we find that adverse abandonment would serve the public interest by allowing possible development of public projects.[54]

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[50] See, e.g., Conrail, 29 F.3d at 712 (interests of state agencies in favor of abandonment indicates that adverse abandonment would serve the public interest by allowing possible development of other public projects); Norfolk & W. Ry. Co.—Aban. Exem.—Cinn., Hamilton County, OH, 3 S.T.B. 110, 118-20 (1998) (Cincinnati) (agency will allow displacement of rail service for other public purposes where public interest justifies it).

[51] We do not base our determination that granting adverse abandonment here would be in the public interest on the City's arguments that doing so would advance the City's desire to gain control over the ROW to continue the public uses to which the underlying property already has been put and would put an end to the controversies over the uses of this land. First, this segment of line has not been lawfully abandoned and removed from the interstate rail system, and thus, the City encroached upon the ROW at its own risk. Second, the issue of whether or not D&RGHF is permitted to collect rents from local residents and businesses involves interpretation of the land grant that created the railroad ROW and, thus, is not a matter for the Board, but a question for a court.

[52] City's Application at 19-20; V.S. of Dooley at 7.

[53] V.S. of Dooley at 7.

[54] As we have noted, the only shipper with any potential at all would move 1-3 carloads per year (and even that is highly speculative). The public benefits, although modest, outweigh

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D&RGHF argues that, under Salt Lake City, a carrier's interest in reinstituting rail service outweighs the interests of a local government in public safety and quality of life. But Salt Lake City differs in one major respect from the case here. Although the Board did deny an adverse abandonment application in Salt Lake City, the Board's decision was based on the fact that the carrier was ready, willing, and able to operate over the line in the future, as evidenced by the fact that the carrier had already reinstituted service.[55] Unlike the carrier in Salt Lake City, D&RGHF has not, and as we have discussed, likely will not, reinstitute freight rail service over the line, and D&RGHF's planned passenger service is also dubious and speculative. The facts before us here are more similar to cases such as Chelsea, where the ICC found that the applicants' interest in developing the line for real estate purposes (the same interest now claimed by the City here) outweighed those of the carrier, given that the carrier's alleged plans for potential freight rail service had not been shown to be economically feasible.[56]

Finally, under 49 U.S.C. 10903(d), the Board must consider whether the abandonment will have a serious, adverse impact on rural and community development. Given that there is no realistic potential for freight rail service, removing this line from the interstate rail system would not adversely impact rural and community development. In fact, abandonment would help foster community development, consistent with the public uses that the City has identified in this proceeding.

For these reasons, we find that a balancing of the interests favors the City in this case.

Conclusion. Because the City has met its burden under the PC&N test, its application for adverse abandonment will be granted. The City has argued that, once the Board's jurisdiction is lifted, D&RGHF's property interests will be extinguished under the terms of the agreements by which the two ROWs were created. D&RGHF disputes the City's claim that it has a fee title interest in the land under the ROW for Section 36 (although does not dispute that the City has a fee title interest for the land under Section 25). We make no determination regarding the parties' property rights, which are matters of state law. This decision simply removes the shield of Federal jurisdiction so that the processes of state law may be applied.[57]

(. . . continued)
the interest in keeping the line in place so that it can be available to carry 1-3 carloads per year, particularly since there is no certainty that these carloads will ever materialize.

[55] Salt Lake City, slip op. at 7.

[56] See also Modern Handcraft (finding that the applicants' interest in developing the ROW for mass transit outweighed those of the carrier, given that the carrier had no prospects for freight rail service); Cincinnati (finding that the applicants had shown that the ROW was needed for a valid public purpose, specifically, multi-purpose improvements for the City's downtown area, and that there was no overriding public need for continued rail service).

[57] See Kansas City, 7 I.C.C.2d at 225; Modern Handcraft, 363 I.C.C. at 972.

C. Environmental Matters.

The Board's Section of Environmental Analysis (SEA), in an Environmental Assessment (EA) served on January 29, 2008, considered the potential environmental impacts of the proposed abandonment and found that it would not significantly affect the quality of the human environment. As such, SEA found that the Environmental Impact Statement process is unnecessary in this case. The EA recommended that two environmental conditions be placed on any decision granting abandonment authority. First, SEA recommended: that the City be required to retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the project ROW that are eligible for listing or are listed in the National Register of Historic Places (National Register) (generally, those 50 years old or older) until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), has been completed; that the City report back to SEA regarding any consultations with the Colorado Office of Archeology and Historical Preservation (SHPO) and any other section 106 consulting parties; and that salvage activities related to abandonment (including removal of tracks and ties) not commence until the section 106 process has been completed, and the Board has removed this condition. Second, SEA recommended that notice be given to the National Geodetic Survey at least 90 days prior to the commencement of salvage activities that would disturb or destroy any geodetic station markers.

SEA received one comment on the EA, from Mr. Robert Davis. In his comment, filed on February 14, 2008, Mr. Davis argued, among other things, that an adverse abandonment should not be permitted when a historical group is trying to preserve the rail line. After considering Mr. Davis' comment, SEA continues to recommend imposition of the two environmental conditions discussed above.

We adopt SEA's environmental analysis and recommendations. Accordingly, the conditions recommended by SEA will be imposed. Based on SEA's recommendation, the Board concludes that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

D. Labor Protection.

In approving this application, we must ensure that affected employees are adequately protected. See 49 U.S.C. 10903(b)(2). We have found that the conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), satisfy these statutory requirements, and they will be imposed here.

This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. D&RGHF's motion to strike the letters filed in this proceeding, or, in the alternative, that these letters be given no weight, is denied.

2. D&RGHF's February 14, 2008 request for the Board to take official notice of the St. Joseph County decision and the City's request to reply are denied as moot.

3. D&RGHF's February 25, February 29, and March 24 requests for the Board to take official notice will be treated as motions to supplement its protest. D&RGHF's motions to supplement are granted.

4. SL&RG's request to reopen the October 2007 Decision is denied.

5. The City's adverse abandonment application is granted, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that the City shall: (1) retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the project ROW that are eligible for listing or are listed in the National Register until the section 106 process of the NHPA has been completed; report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties; and refrain from all salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition; and (2) give notice to the National Geodetic Survey at least 90 days prior to the commencement of salvage activities that would disturb or destroy any geodetic station markers.

6. This decision is effective on June 22, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary