

**IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO**

**JUDGE EUGENE A. LUCCI**

<b>CITY OF MENTOR</b>	)	
	)	
Plaintiff	)	
	)	
vs.	)	<b>CASE NO. 00CV001662</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	
	)	
Defendant	)	
<hr style="border-top: 1px dashed black;"/>		
<b>CITY OF MENTOR</b>	)	
	)	
Plaintiff	)	
	)	
vs.	)	<b>CASE NO. 00CV001663</b>
	)	
<b>NORFOLK SOUTHERN RAILWAY CO.</b>	)	
	)	
Defendant	)	

**JUDGMENT ENTRY**  
**[FINDINGS OF FACT AND CONCLUSIONS OF LAW]**

**INTRODUCTION**

{1} The court has considered the petition of the City of Mentor for the construction of an at-grade crossing at Plaza Boulevard over the railroad tracks of CSX Transportation, Inc. and Norfolk Southern Railway Company, and based upon the evidence and for the reasons set forth in this judgment entry, grants the petition.

**STATEMENT OF THE CASE**

{2} On October 17, 2000, the City of Mentor ("City") filed two petitions pursuant to R.C. §4957.30 *et seq.* seeking permission from this court to construct a new highway-railroad at-grade crossing over three mainline railroad tracks in connection with a proposed extension of Plaza Boulevard north from the intersection of Mentor Avenue to

St. Clair Avenue in Mentor. The City named CSX Transportation, Inc. (“CSXT”), a railroad company with its principal place of business in Jacksonville, Florida as a defendant in Case Number 00CV001662, and Norfolk Southern Railway Company (“NSR”), a railroad company with its principal place of business in Norfolk, Virginia as a defendant in Case Number 00CV001663. These actions were consolidated before this court by order dated September 21, 2001.

{3} In the petition, the City stated that the “public demands relief from congestion and delay and that it is in the public interest to extend Plaza Boulevard” north from Plaza Boulevard to the Clover Avenue/St. Clair Avenue intersection. The City also stated, “All costs involved in the construction of the new at-grade crossing, including the flasher light signals, roadway gates, crossing pavement and attendant signal line work, pavement markings and advance warning signs is the sole responsibility of the plaintiff so that no cost should be ascribed to the defendant.” The City pled, “Plaintiff further says that the high cost of separating grades does not justify any other crossing except at grade at this location.”

{4} On April 1, 2003, this court granted the motion of the Ohio Rail Development Commission (“ORDC”) to intervene in this case. ORDC is a state agency duly created by the legislature on October 29, 1995, by operation of Chapter 4981 of the Ohio Revised Code.

{5} The parties mediated this dispute in April 2003, before trial, but were not able to settle the controversy.

{6} This case was tried to the court from April 14, 2003 through April 28, 2003. The parties stipulated at the beginning of the trial that the court would hear and decide all issues raised by the city’s petition except the question of what compensation would be due to the railroads for the taking of any property owned by the railroads if the court allows an at-grade crossing to be constructed. The parties stipulated that this latter issue would be heard, if necessary, in a later proceeding.

## **ISSUES**

{7} Is the construction of an at-grade crossing over the three mainline railroad tracks of Defendants CSX Transportation, Inc. and Norfolk Southern Railway Company at Plaza Boulevard reasonably required for good and sufficient reasons? Would an at-grade crossing at Plaza Boulevard substantially or unnecessarily interfere with the reasonable use of the railroads' property? Does the Interstate Commerce Commission Termination Act ("ICCTA") preempt R.C. §4957.31, or does it otherwise preempt the court's action in granting the petition in this case?

## **WITNESSES AND EVIDENCE**

{8} The court heard about 62 hours of testimony from the following witnesses: Julian Suso (Mentor city manager), John W. Konrad, P.E. (Mentor city engineer), Richard L. Harvey (Mentor fire chief), Daniel W. Llewellyn (Mentor police chief), Clyde C. Hadden, P.E., P.S., (engineer with C.T. Consultants), Robert M. Shiner (Mayor, City of Mentor, and Ward 1 council member), Scott J. Marn (Mentor City Council member, Ward 2), Roger D. Ritley, ASA, MAI, CRE (urban land economist and real estate appraiser), Wilford Lawrence Farnham, P.E., (electrical engineer and specialist in railroad signaling and crossing equipment and systems), Ivan Horodyskyj, P.E. (civil engineer and specialist in traffic and transportation engineering), Ronald W. Eck, P.E., Ph.D. (civil engineer with C.T. Consultants and specialist in traffic and transportation engineering), Christopher J. Burger (expert in railroad management), George M. Vredevelde, Ph.D. (economist), James P. Young (NSR Assistant Division Superintendent), Larry Schuck (NSR special agent in charge railroad police), Garry E. Grimwood (NSR expert on train operations), John Robinson (NSR district claims agent), Harry C. Crawford Jr. (CSXT district superintendent, Collinwood Yard), John Connelly III (CSXT terminal superintendent), Thomas E. Knuckles (CSXT assistant chief dispatcher), Michael W. Fitzgerald (CSXT locomotive engineer), Eric G. Peterson, P.E. (CSXT assistant chief engineer in signal design and construction), Gilbert E. Carmichael (former Federal Railroad Administrator), Susan J. Kirkland (ORDC manager of safety programs), and Danny Gilbert (NSR assistant manager for grade crossing safety).

{9} The parties prepared about 484 exhibits containing in excess of 10,000 pages for the trial. Of this, the parties collectively used 220 exhibits at trial, 219 of which were admitted. The court did not admit City’s Exhibit Number 212. The admitted exhibits are set forth below.

	1	28	57	91	139	195	102-B	E-1	J-4	T-8	
	2	29	58	92	140	196	104-A	E-10	J-7	T-9	
	3	30	59	93	141	199	104-B	F-1	K-1	U-1	
	4	31	60	94	142	201	105-A	F-10	K-2	U-2	
	5	32	61	95	143	202	105-B	G-1	K-3	U-4	
	6	35	62	96	145	203	106-A	G-10	K-4	U-8	
	7	36	63	97	146	206	106-B	G-2	K-8	U-9	
	8	39	65	98	150	207	209-518509U	G-3	L-1	V-1	
	9	40	66	115	152	208	209-518510N	G-9	L-3	V-4	
	14	43	68	116	153	209	209-518520U	H-1	L-9	V-6	
	15	45	69	117	155	210	209-518530A	H-10	M-1	V-9	
	16	46	70	120	171	211	209-A	H-3	M-3	W-2	
	17	47	74	121	173		210-142367M	H-6	M-4	W-3	
	18	48	76	122	174	213	A-1	H-8	M-5	W-5	
	19	49	77	123	176	214	A-6	I-1	M-8	X-4	
	20	50	81	124	178	215	A-9	I-2	N-4	X-5	
	21	51	83	125	179	216	B-10	I-3	O-3	Y-5	
	22	52	86	126	181	100-L	C-10	I-4	O-5	Y-9	
	23	53	87	128	183	101-A	C-3	I-5	P-4	Z-3	
	24	54	88	130	186	101-C	D-1	I-8	R-5	Z-5	
	25	55	89	133	189	101-D	D-10	J-1	S-7	Z-8	
	26	56	90	134	190	102-A	D-5	J-2	T-3	Z-9	

{10} The court visited the site just before the trial to better understand the testimony and exhibits.

**STIPULATIONS**

{11} The parties stipulated that all exhibits are authentic. The parties agreed not to get into overpass proposals because of the impracticality and expense of an overpass at this location, and that the court should consider only at-grade, underpass, or no

crossing at all alternatives. The parties stipulated that the permanent negative right-of-way impact costs that the City of Mentor must incur for the at-grade crossing alternative is \$200,000 versus \$250,000 for the underpass alternative. This figure excludes any amount for any taking from The Cleveland Electric Illuminating Company. The parties also stipulated that: (1) Martin Gareau would testify as to the contents of Plaintiff's Exhibit Number 45, and that the standard industrial classifications were used in arriving at the figures and information in the last two columns of that exhibit; (2) Richland Engineering Ltd has rendered an opinion for the defense that an underpass would cost \$11,962,900 to construct, using retaining walls between the two railroads on the inside aspects, but not the outside, and not including any estimate to relocate any underground fiber optics, but does includes rail traffic run-arounds to maintain railroad traffic during construction; (3) David Lemon would testify for CSXT about the R.C. §5589.21 provision against trains obstructing highway-rail crossings longer than five minutes, where fines could be up to \$1,000; that CSXT was fined in northern Ohio in the last one and a half years at the rate of 25 to 100 citations per month; and that during that time there were no citations to CSXT in Mentor.

### **BURDEN OF PROOF**

{12} There is a predicate issue of law raised by the parties: What is the burden of proof in this case, and who bears it?

{13} R.C. §4957.31 states in pertinent part:

If *satisfied* that such construction is reasonably required . . . for other good and sufficient reasons, the court shall make an order permitting such crossing at a grade or diversion to be established.

{14} The city has argued that the court should apply the “preponderance of the evidence” standard of proof in this matter. Defendants, however, have asserted that the standard of proof that should be employed by the court is “clear and convincing evidence.”

{15} Initially, the court wonders why it is necessary to channel the word “satisfied” into either “preponderance of the evidence,” or “clear and convincing,” or “beyond a reasonable doubt.” The statute appears to set the standard of proof as whether the

court is “satisfied.” However, if for no other reason, this court will channel the “satisfied” degree of proof into one of the time-established and well-recognized degrees, so that the parties will know to what degree this court is satisfied with the proof that was made in this court. Based upon controlling Ohio authority and the plain meaning and context of the words used, the court concludes that the city must satisfy this court by “clear and convincing” evidence.

{16} The City argues that R.C. §4957.31 does not set forth the appropriate standard of review to be employed by the court, and that the generally accepted standard in civil cases of preponderance of the evidence should be employed. See *Cincinnati Bar Ass’n v. Young* (2000), 89 Ohio St. 3d 306, 314, 731 N.E.2d 631, 2000-Ohio-160; *Jones, Stranathan & Co. v. Greaves* (1874), 26 Ohio St. 2. The City’s reliance on this line of reasoning is flawed, however, because R.C. 4957.31 provides this court with guidance regarding the applicable standard of review.

{17} As noted above, R.C. §4957.31 provides that the court must be “satisfied” that a grade crossing is necessary as alleged in the petition. Ohio courts have equated the terms “satisfied” and “to satisfy” with the clear and convincing standard of proof. In *Detroit & I. R. Co. v. Wahl* (Henry 1927), 27 Ohio App. 9, 160 N.E. 638, the court of common pleas reviewed an application for a grade crossing pursuant to Section 8895 of the General Code (later recodified at R.C. §4957.31). The court was not satisfied that the establishment of the grade crossing would be conducive to the public welfare “but was evidently satisfied that it would be dangerous, and therefore should not be permitted.” *Id.* at 12.

{18} While the City of Mentor properly notes that the appellate court could not review *Wahl* on appeal as the appeal was untimely, the court nevertheless stated, “if this court were invested with jurisdiction to do so, the order of the court of common pleas would be affirmed.” *Id.* While not controlling, the court’s opinion is, nevertheless, persuasive.

The court explained:

‘To satisfy’ means to free the mind from doubt and uncertainty, and signifies something more than a belief founded on a preponderance of the evidence. The language thus used in this statute emphasizes the attitude

of the state toward the establishment of grade crossings, and an examination of the record in the instant case fails to convince this court that the court of common pleas erred in making the order of which plaintiff complains.

*Id.* Thus, *Wahl* serves as persuasive authority that this court should apply the clear and convincing standard in this matter.

{19} The case of *City of Fostoria v. CSX Transportation*, No. 13-91-3 (3<sup>rd</sup> Dist. Ct. App., Seneca, 12-18-1991) 1991 WL 271709, also is instructive as to the correct standard of proof to be applied in this case. In *City of Fostoria*, the court applied the clear and convincing standard when determining the issues presented by R.C. §4957.31. The City of Mentor has argued that this case is distinguishable because the parties in *City of Fostoria* stipulated as to the application of the clear and convincing standard of proof.

{20} A careful review of the opinion in *City of Fostoria*, however, does not reflect that the parties stipulated to the standard of review at trial. On appeal, the court noted:

In its second assignment of error, defendant argues that the trial court applied the wrong standard of review. The parties agree that the city was required to prove its case by clear and convincing evidence. Inasmuch as there is nothing in the record to demonstrate that the trial court imposed an incorrect burden of proof on the plaintiff, we must presume that the trial court imposed the proper burden of proof upon the plaintiff. See 5 Ohio Jurisprudence 3d (1978) Appellate Review, Section 553. Accordingly, the second assignment of error is overruled.

As for the third assignment of error, defendant argues that the decision of the trial court was against the manifest weight of the evidence. We will not reverse the trial court's decision where we conclude that a rational trier of fact could have found all the essential elements of the case by clear and convincing evidence.

*Id.* at 4-5.

{21} The court stated only that the parties “agree that the city was required to prove its case by clear and convincing evidence.” The present tense of the court's language suggests that the parties agreed on appeal that the clear and convincing standard was appropriate. Furthermore, the appellate court upheld the trial court's decision because

there was no evidence that the trial court did not apply the clear and convincing standard. Despite the City of Mentor's arguments to the contrary, the holding in *City of Fostoria* is, indeed, persuasive authority in this case.

{22} The reasoning in *Wahl* and *City of Fostoria* echoes the sound reasoning of the Supreme Court of Ohio in *Cole v. McClure* (1913), 88 Ohio St. 1, 102 N.E. 264, another case arising under an Ohio statute. In *Cole*, the court reviewed the meaning of the words "satisfactory proof" and "to be satisfied" in the context of a case arising under the "lost will" statute. The court explained:

By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind, beyond a reasonable doubt. 1 Greenleaf on Evidence (16<sup>th</sup> Ed.), §2. Evidence is said to satisfy the mind when it is such as frees the mind from doubt, suspense, or uncertainty. *Baines v. Ullman*, 71 Tex. 537, 9 S.W. 545 (1888). To "satisfy" a body of men of the truth of a disputed fact requires much more than a preponderance of the evidence. Clear and convincing evidence must be adduced. Bradbury, J., in *Kelch v. State*, 55 Ohio St. 146, 45 N.E. 6, 39 L.R.A. 737, 60 Am. St. Rep. 680 (1896).

*Id.*

{23} The Supreme Court of Ohio has revisited the issues raised in *Cole* on several occasions and has affirmed the *Cole* decision in each instance. See *In re: Estate of Haynes* (1986), 25 Ohio St. 3d 101, 495 N.E. 2d 23; *In re: Estate of Tyler* (1953), 159 Ohio St. 492, 112 N.E. 2d 668. Thus, *Cole* continues to serve as controlling authority regarding the court's interpretation of the words "to satisfy" and "to be satisfied" as requiring proof by at least clear and convincing evidence.

{24} The Brown County Court of Appeals explained the *Cole* decision in the case styled *In Matter of the Estate of Bernice Bohrer*, No. CA95-01-001 (12<sup>th</sup> Dist. Ct. App., Brown, 10-9-1995), 1995 WL 591236. The court noted:

The *Cole* court held that the presumption could be rebutted by 'clear and satisfactory' proof, construing the phrase "satisfactory proof" as meaning 'clear and convincing' evidence, not merely a preponderance of the evidence. *Id.* at 7, 10-11. Likewise, in applying the lost will statutes, the *Cole* court defined the term 'satisfied' as used in the statutes as equivalent to 'clear and convincing' evidence, thus requiring a higher standard of proof before a lost, spoliated, or destroyed will could be admitted to



probate. *Id.* See, also, *Goodale v. Murray*, 227 Iowa 843, 289 N. W. 450 (Iowa 1940) (one who seeks to establish a lost will should be required to produce evidence that is 'clear, convincing, and satisfactory').

*Id.* at 8-9.

{25} The court recognizes that G.C. Section 8895 and later, R.C. §4957.31, operate as a rebuttable presumption against at-grade crossings. If the proper standard of proof were preponderance of the evidence, the presumption would be meaningless, since the proponent of the at-grade crossing has the burden of proof anyway. The degree of proof necessary to rebut a presumption depends upon whether the party also bears the burden of proof on the issue. If that party does not bear the burden of proof on the issue, the party need only introduce evidence which counter-balances the evidence supporting the presumption. Otherwise, the party must rebut the presumption with evidence sufficient to meet their burden of proof on the issue. *State v. Myers* (1971), 26 Ohio St.2d 190, 201, 271 N.E.2d 245, citing *Kennedy v. Walcutt* (1928), 118 Ohio St. 442, 161 N.E. 336; *Matter of Estate of Mayer v. Markwood*, No. L-90-299 (6<sup>th</sup> Dist. Ct. App., Lucas, 3-31-1992) 1992 WL 66585.

{26} Clear and convincing evidence is evidence that will produce in the fact finder's mind a firm belief or conviction as to the facts sought to be established. See *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118. R.C. §4957.31 requires that the court be "satisfied" that a grade crossing is appropriate in this instance. The word "satisfied" must be interpreted as requiring a firm belief, by clear and convincing evidence, and that is the standard the court has applied in this case to the plaintiff's burden.

{27} There is another statute at issue in this case, R.C. §719.01(A), which has a different analysis regarding the applicable burden of proof and which party carries that burden. In accordance with well-established appropriation case law, the defendants, and not the plaintiff, have the burden of proving under R.C. §719.01(A) that the proposed crossing "unnecessarily interferes" with their operations. The question of unnecessary interference includes the issue of whether the proposed at-grade crossing is unreasonably unsafe and imposes an undue liability on the railroads' operations in

the remote event that a crossing accident occurs. Thus, the defendants have the burden of proving that the proposed crossing is unreasonably unsafe. Furthermore, the term "satisfy" is irrelevant to the analysis under R.C. §719.01(A) because that term does not appear in that statutory section. Consequently, the burden of proof by a preponderance of the evidence is applicable to any findings made under R.C. §719.01(A).

### **FINDINGS OF FACT**

{28} Plaintiff City of Mentor, consisting of about 28 square miles, is Lake County's largest city and is centrally located in Lake County. The city is divided into two halves, east and west, by Center Street, also known as State Route 615. It is divided into two halves, north and south, by a railroad corridor. Center Street is grade separated, by an overpass, from the railroad corridor.

{29} On the east half of the city, there are two north-south corridors, namely Heisley Road and Hopkins Road. The next nearest north-south corridor to the east of Heisley Road is State Route 44 in the City of Painesville, approximately two miles from Heisley Road, and about one mile from the eastern Mentor city limits.

{30} The west half of the city has only one north-south corridor, the railroad grade separated underpass of Reynolds Road, also known as SR-306. The nearest north-south corridor to the west of Reynolds Road is Pelton Road in the City of Willoughby, an at-grade crossing within the City of Willoughby, approximately 1.5 miles west of Reynolds Road, and almost one mile west of the Mentor city limits.

{31} The railroad corridor which divides the city in half, consists of two independent railroads, CSX Transportation, Inc. and Norfolk Southern Railway Company. CSXT operates two mainline tracks on the north side of the railroad corridor, and NSR operates one mainline track 102 feet south of the CSXT lines.

{32} CSXT operates approximately 50 to 60 trains per day through Mentor. NSR operates approximately 8 to 12 trains per day through Mentor. CSXT operates with a 50 mile per hour speed limit for its freight trains, 60 miles per hour for its intermodal trains, and 79 miles per hour for the Amtrak trains. NSR operates its trains at a

maximum of 50 miles per hour for freight and 60 miles per hour for intermodal. CSXT trains can be from 6,000 to 8,000 feet in length, with a few over 8,000 feet, and are commonly 6,000 feet or less. NSR trains are commonly 5,200 feet or less.

{33} The city proposes to create a second north-south corridor in the western half of the city by extending Plaza Boulevard from the south over the two railroads, with an at-grade crossing, through to Clover Avenue and then to Tyler Boulevard to the north. The City proposes to treat the two railroads' three mainlines as a unit, with one grade crossing controlled by a single four quadrant gate and signaling safety system. Plaza Boulevard has already been extended from its former terminus, Mentor Avenue, northward up to the railroad corridor.

{34} Mentor is Ohio's fifth largest retail center, larger than Toledo, Youngstown, Canton, Parma, and Dayton. The biggest concentration of retail activity is at and near the Great Lakes Mall, located at the southeast corner of Plaza Boulevard at Mentor Avenue, and Erie Commons, located at the southwest corner of Plaza Boulevard at Mentor Avenue.

{35} In support of its petition for an at-grade crossing over the railroad corridor, the City asserts the streets and highways and intersections on the west side of the city are at gridlock during peak times, and that the level of service, that is, the ability of the streets to accommodate peak traffic loads, is at or close to a level of failure. The City also asserts that response times for its police and fire safety forces could be improved by the addition of the at-grade crossing. The City further asserts that in a study for its long-term transportation planning, the streets and intersections on the west side of the city will fail, and increase the hazards and risks of traffic injuries and fatalities, without the additional north-south corridor on the west side.

{36} The railroads oppose the petition for the at-grade crossing on the grounds that it so interferes with their railroad operations that the City's action is preempted by the ICCTA; that an at-grade crossing would be at least as costly as any other alternative; that an at-grade crossing cannot be made safe; and that another north-south corridor at Plaza Boulevard is unnecessary.

{37} It is state and federal policy to eliminate current at-grade crossings and to discourage and prevent future at-grade crossings. Indeed, Ohio law creates a presumption against the construction of new at-grade crossings unless a common pleas judge is satisfied that one is appropriate and reasonably necessary.

**I. The City of Mentor's Traffic Congestion Poses a Significant Risk to the Health, Safety, and Welfare of Mentor's Residents**

**A. Traffic Congestion**

{38} The City of Mentor's congestion poses a significant risk to the health, safety, and welfare of Mentor's residents.

{39} The City of Mentor is a growing and prosperous community in Lake County, Ohio and has experienced significant commercial, industrial, and residential development over the last several decades.

{40} As a direct result of this commercial, industrial, and residential development, the City of Mentor is now the fifth largest retail center in the State of Ohio, surpassing several other Ohio cities with much larger populations such as Dayton and Youngstown.

{41} The City of Mentor's traffic network and infrastructure must accommodate not only its rising population, but also the significant number of visitors and employees that come to the City on a daily basis to shop, work, and do business.

{42} As evidenced by the *City of Mentor Transportation System Assessment Study*, the City of Mentor Comprehensive Plan, and its annual Capital Improvement Programs, the City of Mentor has been diligently planning for its present needs and future growth by heavily investing in its transportation infrastructure.

{43} In January 1995, the City of Mentor expended approximately \$80,000 and retained an independent agency, the Northeast Ohio Areawide Coordinating Agency ("NOACA"), to evaluate the operational performance of the City's entire transportation system, provide information about existing traffic conditions, and forecast possible traffic conditions for horizon years 2000, 2005, and 2015.

{44} The NOACA study took almost one year to complete and was conducted with significant assistance from the City of Mentor and its employees in terms of time and expense.

{45} The purpose of the NOACA Study was set forth as follows:

The purpose of this study is to help City officials make informed and effective decisions regarding the efficient use of resources to maintain or improve the transportation system. It also serves the purpose of programming and prioritizing capital and non-capital improvements to the system.

The study can best be described as evaluative. It portrays the existing and potential operational performance of the transportation system in terms of level of efficiency of its various components. Such levels of efficiency are given grades (A through F), which signify levels-of-service, with level-of-service "A" representing the best traffic flow conditions (smooth flow) and level-of-service "F" representing the worst flow conditions (forced flow).

{46} Although the City of Mentor strives for level-of-service "B" on its roadways, with "C" being acceptable and "D" being the absolute minimum level-of-service that the City will tolerate for the health, safety, and welfare of its citizens, NOACA found that several intersections in the southwest portion of the City (Ward 2) were operating at or below level-of-service "D" at that time and predicted that the City of Mentor's traffic problems would continue to get worse in the future despite implementation of recommended capital improvements to those intersections.

{47} NOACA therefore recommended a subsequent study to further analyze deficient intersections, develop improvement alternatives for possible implementation, and enhance intersections operating at unsatisfactory levels-of-service (level-of-service "D" or less) in order to improve overall traffic flow.

{48} In accordance with NOACA's recommendation for further analysis regarding its traffic problems and development of improvement alternatives, the City of Mentor retained another independent company, URS Consultants, and expended an additional \$60,000 to fund the City of Mentor Comprehensive Plan in June 1997.

{49} Similar to the NOACA study, the Comprehensive Plan took almost one year to complete and was conducted with significant assistance from the City of Mentor and its employees in terms of time and expense.

{50} URS Consultants noted that the City of Mentor had a rich history of planning for the future and the purpose of the Comprehensive Plan was set forth as follows:

Planning for the future has been a tradition in Mentor since the 1950's when the community recognized that its tremendous potential for growth carried with it the potential for equally tremendous physical and social impacts. This document represents the work of the Mentor community in carrying that planning tradition into the next decade and century of prosperous growth and wise community development. Their work of study and analysis have culminated in the following Master Plan for Mentor. This plan succeeds the Comprehensive Development Plan prepared in the 1980's.

This new plan charts the City's course into the twenty first century. It sets goals tempered by the realities of time, opportunity and resources. It is a realistic plan which incorporates a feasible program of implementation designed to bring the community to where it wants to be in the foreseeable future. In today's climate of limited resources and its contradictory goals it is clear that a plan cannot answer all problems and opportunities. This plan is intended to focus on those community needs over the next 1-5 years and the direction that development will take for areas of the City where major changes are likely to occur. The plan outlines strategies for capitalizing on opportunities and resolving the conflicts. The plan requires a commitment to 1) the concepts outlined in this document, 2) to an implementation program, and 3) to continued pragmatic planning. This will result in a city which retains the characteristics which its residents value, and leads to the resolution of many of the challenges of the present.

{51} After a series of neighborhood meetings designed to solicit comments and suggestions from City of Mentor's residents, URS Consultants described the City of Mentor's traffic problems as follows:

Population growth only accounts for some of the noted increase in traffic volumes over the years. The remainder of the increase results from some unique characteristics of Mentor, namely Mentor's high percentage of households with two or more vehicles, and its attractiveness for commercial/industrial development.

The average amount of traffic generated by a household is also influenced by the lack of a significant mass transportation system serving Mentor which forces a heavier reliance on the automobile for transportation. Mentor is very much an automobile oriented community which makes the design and maintenance of its street system a matter of critical concern.

“Traffic Count Comparison” – Table 4-7, page 4-67, indicates the volume of traffic carried on the average day (1991-93) for selected major arterials in Mentor. The information is also compared with the volumes carried by those streets in 1964, 1980 and projected to the horizon year 2015. In every case there has been a substantial increase in the total number of vehicles on the streets. In most instances the traffic has doubled or tripled, and the intersections of SR 84 and 306 will experience a seven-fold increase.

{52} Thus, URS Consultants found that traffic was the greatest single issue facing the City of Mentor and its residents:

This is a major issue which affects almost every resident. The development of Mentor as a regional shopping area has taxed local arterial and street capacities. Current City, NOACA and ODOT studies indicate a multitude of proposed street widenings, alignment changes and new interchanges to accommodate the traffic which exists now. Even with these changes, NOACA still projects a level-of-service F (the lowest) for exiting ramp traffic and turning movements around the SR 2 interchanges for the year 2015.

{53} In addition to the fact that the City of Mentor continued to experience rapid growth as Lake County’s and the region’s premier retail center, URS Consultants also confirmed that the layout of the City’s transportation network resulted in constraint on the overall traffic system and congestion in the City’s retail/commercial center located in the southwest portion of the City.

{54} URS Consultants noted that traffic congestion in the City of Mentor’s retail/commercial center, which is demarcated by SR-306 to the west, SR-615 to the east, SR-2 and Tyler Boulevard to the north, and US-20 to the south, continued to be compounded by the development of industrial parks with major employers in the industrial corridor and the expansion of the Great Lakes Mall, which resulted in the

development of the Erie Commons, Great Lakes Plaza, and numerous other multi-tenant retail stores in the area.

{55} Traffic problems in the southwest portion of the City are also compounded by the fact that the railroad tracks owned by CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”) bisect the City’s roadway network and cross the City in an east-west direction dividing the City of Mentor into two halves with few north-south roads connecting the two halves.

{56} Given the fact that there are few north-south roadways that cross these tracks and link the two halves of the City, the east-west roads connecting these north-south roadways have become congested as drivers converge upon the few available crossings.

{57} In order to address these traffic problems and relieve traffic congestion, URS Consultants recommended the implementation of a number of intersection, road widening, and new alignment improvements in accordance with the City of Mentor’s capital improvement budget.

{58} The extension of Plaza Boulevard north to Tyler Boulevard via Clover Avenue (the “Plaza Boulevard Connector”) was included as one of the recommended improvements to remedy traffic concerns in the southwest portion of the City.

{59} Thus, URS Consultants acknowledged the City of Mentor’s need for another north-south connector linking the two halves of the City in order to reduce traffic congestion in the southwest portion of the City.

{60} The City of Mentor has implemented many of the intersection, road widening, and new alignment improvements outlined by URS Consultants in the 1997 Comprehensive Plan in an effort to alleviate its on-going traffic congestion.

{61} The City of Mentor’s efforts in this respect are evidenced by the fact that it has made \$93 million in capital improvements over the last ten years at a cost to the City of \$20 million.

{62} Despite the City of Mentor’s efforts to accommodate existing and future traffic levels, however, it is undisputed that current traffic levels are exceeding the



transportation network's capacity and the City's transportation system is unable to service the growing community.

{63} Based upon the City of Mentor's diligent planning and studies, which the City has conducted over the last ten years, traffic congestion and occasional gridlock in Mentor is the single most critical issue which it currently faces.

**B. Hundreds of Traffic Accidents Are Caused Each Year in the City of Mentor as a Result of Traffic Congestion**

{64} Hundreds of traffic accidents are caused each year in the City of Mentor as a result of traffic congestion.

{65} NOACA also analyzed traffic accidents in the City of Mentor as part of the *City of Mentor Transportation System Assessment Study* and noted:

Roadway safety, in any driving environment, should be a constant concern to responsible public officials. Crash-prone areas must be improved to reduce or eliminate vehicular crashes as the human and/or financial costs of crashes are often devastating. Traffic crashes are the leading cause of death in the country. The cost to the public, expended through their local and/or state governments, could be astronomical, particularly in high traffic-crash jurisdictions, where governments become obligated to dedicate more resources to increase their emergency crews, equipment, and police force among their other obligations.

Therefore, a periodic review of the operational performance of the transportation system from the safety aspect is a desirable practice in order to address deficient locations and exercise fiscal and human responsibility.

{66} NOACA listed the highest crash locations in the City of Mentor ranked by crash rate and found that, based on traffic figures from 1995, there was one traffic accident every 5 days at the intersection of SR-306 and US-20; one traffic accident every 8-10 days at the intersection of SR-615 and Tyler Boulevard; one traffic accident every 20 days at the intersection of US-20 and Plaza Boulevard; and one traffic accident every 15 days at the intersection of SR-615 and US-20.

{67} These accident rates, which are due mainly to the significant traffic congestion at these intersections, have risen since 1995 due to the increase in traffic levels throughout the City of Mentor.

{68} There are literally hundreds of accidents that occur annually at or near these main intersections in the City of Mentor, causing injuries ranging from bumps and bruises to death.

{69} There have been 27 automobile-related fatalities in the City of Mentor since 1991.

{70} Allowing traffic congestion at these intersections to become worse will result in more accidents and fatalities.

{71} The railroads' own expert, Gilbert Carmichael, the former Federal Railroad Administrator, admitted that an increase in traffic congestion equals an increase in both accidents and wear and tear on the roadway system.

{72} In addition, the longer the distances motorists must travel, the more likely they are to have a traffic accident.

{73} Thus, those residents that are required to drive a more circuitous route to go north-south in the City of Mentor, face a much higher risk of an accident than if they had a more direct connection.

{74} Accordingly, the probability of an accident occurring on the City of Mentor's roadways is far greater than the remote possibility of an at-grade crossing accident.

{75} The residents of the City of Mentor and the Lake County motoring public in general, spend approximately \$4,103,172 annually for the costs associated with traffic accidents in the southwest portion of the City at the intersections of US-20 and SR-306, SR-306 and Tyler Boulevard, US-20 and Plaza Boulevard, US-20 and SR-615, SR-615 and Tyler Boulevard, and Tyler Boulevard and Clover Avenue. {76} If steps are not taken to alleviate traffic problems in the southwest portion of the City, accident costs will rise to approximately \$5,245,310 per year by the year 2022 due to increased traffic levels.

{77} Many of the intersections along these arterials have reached the limit of their capacity, and provide very little ability to service the growing area.

**C. As a Result of the Traffic Congestion and Lack of an Additional North-South Connection, Emergency Response Times Are Below the Recommended National Standards**

{78} As a result of the traffic congestion and lack of an additional north-south connection, emergency response times are below the recommended national standards.

{79} The City of Mentor's Fire Department and EMS personnel respond to thousands of emergency calls annually, and this number continues to rise as the City grows and develops.

{80} The City of Mentor's fire and EMS response times to certain parts of the City, however, have on average exceeded the national standard.

{81} This poses a serious and significant threat to the health, safety, and welfare of Mentor's residents, as every additional second it takes in response time may be the difference between life and death.

{82} The national standard is to strive for fire response times of 3.5 minutes or less to industrial/commercial areas like the City of Mentor's retail/commercial center in the southwest portion of the City.

{83} The national standard for EMS response time is 4.0 minutes for all locations.

{84} Fire and EMS response times in and around the industrial corridor in the southwest portion of the City have averaged between four to six minutes due to traffic congestion and a lack of direct access to the area.

{85} The majority of the areas where fire and EMS response times are inadequate are areas where a north-south roadway at the Plaza Boulevard location will help improve deficient response times.

{86} These inadequate response times will get worse as traffic levels increase throughout the City of Mentor.

{87} If nothing is done to alleviate traffic and provide more direct access to this industrial corridor, the City of Mentor would have to consider constructing a sixth fire station which will cost approximately \$5 million to build and \$1 million to operate annually.

{88} Although the City of Mentor's police response times to the southwest portion of the City are adequate at the present time, anticipated increases in traffic levels throughout the City will have a negative impact on response times in the future.

{89} The police department strives to be better than merely "adequate" when responding to emergencies.

{90} Police response times and patrols will benefit from less congestion on the City of Mentor's roadways and more direct access to the southwest portion of the City.

{91} Traffic congestion poses a threat to Mentor's residents as a result of its impact on police response time because there are occasions where response time is delayed as a result of that congestion and every second may be the difference between life and death.

{92} Traffic congestion causes more accidents to occur, which in turn requires more fire, EMS, and police responses, which in turn raises the average response time.

{93} Alleviating traffic congestion in the City of Mentor will reduce the number of accidents, which will reduce the number of response calls, which will reduce the average response times.

**D. The Plaza Boulevard Connector is Needed to Protect the Health, Safety, and Welfare of Mentor's Residents**

{94} The Plaza Boulevard Connector is needed to protect the health, safety, and welfare of Mentor's residents.

**(i) History**

{95} The concept of constructing the Plaza Boulevard Connector in order to relieve traffic congestion in the southwest portion of the City and to protect the residents' safety first arose in the early 1990's.

{96} The Master Street Program Committee, a group comprised of city council members, planning commission members, and City of Mentor residents which identified street improvements and new streets that would help alleviate current traffic flow problems, recommended the construction of the Plaza Boulevard Connector to the Mentor City Council as early as June 1990.

{97} Although the Master Street Program Committee assumed that the Plaza Boulevard Connector would consist of a bridge over the railroad tracks, the city engineer determined, based on his years of engineering experience and familiarity with grade separation projects, that a bridge at this location was inappropriate and not within the City of Mentor's financial means because of questions of feasibility, the considerably higher construction and right-of way costs, and the "taking" of local businesses that would be required to construct such a structure at the Plaza Boulevard location.

{98} The Master Street Program Committee members did not independently analyze the physical or economical feasibility of a grade separation at this location.

**(ii) The CT Consultants, Inc. Feasibility Study Recommended the Construction of an At-grade Crossing at Plaza Boulevard**

{99} The CT Consultants, Inc. Feasibility Study recommended that an at-grade crossing at Plaza Boulevard be constructed to protect the health, safety, and welfare of Mentor's residents.

{100} In accordance with the Master Street Program Committee's recommendation and NOACA's suggestion for a subsequent study to analyze deficient intersections and develop improvement alternatives, the City of Mentor retained CT Consultants, Inc. in 1995 to study the feasibility of constructing the Plaza Boulevard Connector at-grade and the impact that this new connection would have on improving the traffic congestion at nearby intersections.

{101} CT Consultants, Inc. is an independent consulting firm with expertise in the area of roadway construction and traffic congestion analysis.

{102} The CT Consultants, Inc. feasibility study confirmed that several intersections in the southwest portion of the City were operating at poor levels-of-service and that the

creation of a third alternate for north-south traffic at the Plaza Boulevard location, besides SR-306 and SR-615, would ease traffic flow along US-20 and portions of SR-615 and SR-306 by diverting approximately 15,000 vehicles per day from the existing streets and thereby improving traffic flow throughout the area.

{103} CT Consultants, Inc. also found that the creation of a north-south roadway at the Plaza Boulevard location would significantly decrease travel times throughout the City of Mentor.

{104} Thus, CT Consultants, Inc. recommended that the new north-south roadway be constructed at-grade over the railroad tracks at the Plaza Boulevard location.

{105} Due to existing development, terrain, and infrastructure, and the location of the Great Lakes Mall, the Plaza Boulevard site is an ideal location for the construction of an additional north-south road in order to alleviate traffic congestion in the southwest portion of the City of Mentor with minimal disruption to existing homes and businesses.

{106} CT Consultants, Inc.'s finding that an additional north-south roadway at the Plaza Boulevard location would alleviate traffic congestion was not based upon a ramp connection being made between SR-2 and Clover Avenue.

**(iii) The CT Consultants, Inc.'s Updated Feasibility Study Also Recommended the Construction of the Plaza Boulevard Connector At-grade**

{107} The CT Consultants, Inc.'s updated Feasibility Study also recommended the construction of the Plaza Boulevard connector at-grade.

{108} CT Consultants, Inc. subsequently updated the feasibility study it conducted for the City of Mentor regarding the Plaza Boulevard Connector in 2002 by, among other things, gathering new traffic counts in the southwest portion of the City.

{109} Based upon this new traffic data, CT Consultants, Inc. determined current traffic congestion levels in the southwest portion of the City and forecasted congestion levels in this area for the year 2022.

{110} The updated study found that traffic congestion problems in the southwest portion of the City of Mentor were worse than they had been in 1995 when the original traffic data was compiled, and that the transportation network was failing in this area.

{111} Specifically, CT Consultants, Inc. found that the intersection of US-20 and SR-306 was already at level-of-service “F” with an average delay of 135 seconds at that one intersection.

{112} In addition, CT Consultants, Inc. also projected that the intersection of US-20 and SR-615 intersection reached level-of-service “F” at the beginning of the year 2003, and that the intersections of SR-615 and Tyler Boulevard and US-20 and Plaza Boulevard will reach level-of-service “F” by the year 2006 if nothing is done.

{113} Thus, due to current traffic congestion levels in the southwest portion of the City of Mentor and the lack of another north-south connection, the City’s residents and visitors incur several millions of dollars in delay costs each year.

{114} These delay costs will continue to rise if immediate steps are not taken to alleviate traffic congestion problems in the City of Mentor.

{115} Specifically, as a result of the delay from traffic gridlock at the City of Mentor’s major intersections, the City’s motorists incur \$5,536 per hour in delay and fuel costs.

{116} In addition, as a result of the circuitous route which the City of Mentor’s motorists are forced to take to go north-south, which may result in an additional few miles traveled each and every day, Mentor’s motorists expend approximately \$5,087,160 per year in excess fuel and time costs.

{117}. The fuel and delay costs were calculated using the same methodologies as the defendants’ experts.

{118} For these reasons, CT Consultants, once again, recommended that the Plaza Boulevard connector be constructed at-grade.

**(iv) The Plaza Boulevard Connector Will Help Alleviate Traffic Congestion**

{119} The Plaza Boulevard connector will help alleviate traffic congestion.

{120} CT Consultants, Inc. analyzed the impact that the Plaza Boulevard Connector and other roadway and intersection improvements would have on alleviating both current and future traffic congestion levels in this area.

{121} The Plaza Boulevard Connector and the additional roadway and intersection improvements suggested by CT Consultants, Inc. are part of an overall traffic improvement plan for the southwest portion of the City of Mentor.

{122} Due to the severity of the traffic congestion problems in the southwest portion of the City of Mentor, neither the Plaza Boulevard Connector nor the additional roadway and intersection improvements alone will fully address the traffic problems in this area.

{123} Rather, both the Plaza Boulevard Connector and the additional roadway and intersection improvements are needed to remedy the traffic congestion problems on a long-term basis.

{124} CT Consultants, Inc. found that the level of service at all intersections in the area can be maintained at an acceptable level through the year 2022, if the Plaza Boulevard crossing is constructed and the other capacity improvements are performed.

{125} These additional roadway and intersection improvements are needed regardless of whether the crossing at Plaza Boulevard is constructed at-grade or as a grade separation.

{126} One of those improvements, an SR-2 ramp access with Clover Avenue, has been proposed by the City.

{127} Even without the ramp access to SR-2, however, the Plaza Boulevard connector will still help address the City's critical needs.

{128} If an SR-2 ramp access with Clover Avenue is constructed, it will enhance the effectiveness of the grade crossing at Plaza Boulevard.

{129} The results of the updated traffic analysis by CT Consultants, Inc. are set forth below:



**Existing Volumes (2002 Peak Hour)**

Intersection	Existing Traffic Volumes (Including I90/615 Interchange) Level of Service/Seconds of Delay	
	Without Connector	With Connector and Intersection Improvements
US 20 / SR 306	F / 135.4	D / 42.7
SR 306 / Tyler Boulevard	C / 34.0	C / 34.0
US 20 / Plaza Boulevard	E / 64.5	C / 34.1
US 20 / SR 615	E / 76.7	D / 38.8
SR 615 / Tyler Boulevard	E / 64.4	C / 34.8
Tyler Boulevard / Plaza-Clover	B / 15.2	C / 31.5

**Design Year Traffic Volumes (2022 - Peak Hour)**

Intersection	Design Year Traffic Volumes Level of Service/Seconds of Delay	
	Without Connector	With Connector and Intersection Improvements
US 20 / SR 306	F / 217.5	D / 47.1
SR 306 / Tyler Boulevard	D / 45.0	D / 39.6
US 20 / Plaza Boulevard	F / 129.0	D / 35.6
US 20 / SR 615	F / 129.2	D / 48.8
SR 615 / Tyler Boulevard	F / 120.2	D / 39.7
Tyler Boulevard / Plaza-Clover	B / 16.4	D / 41.1

{130} Despite the amount of train traffic on the railroad tracks through Mentor, the Plaza Boulevard Connector and additional roadway improvements will alleviate traffic congestion in the southwest area of the City.

{131} Given the fact that the Plaza Boulevard Connector and additional roadway improvements will reduce traffic congestion and improve traffic flow, accident rates at the major intersections and along the roads in the area will likewise be reduced, and the

millions of dollars expended by Mentor's motorists as a result of those accidents will likewise be reduced.

{132} By providing another north-south roadway across the railroad tracks and reducing traffic congestion in the City of Mentor, and thereby also reducing the number of accidents needing responses, the Plaza Boulevard Connector will improve police, fire, and EMS response times to the southwest portion of the City.

{133} For these reasons, the Plaza Boulevard Connector and additional roadway improvements will also reduce response times to other areas of the City.

{134} In addition to reducing traffic congestion, accident rates, and emergency response times, the Plaza Boulevard Connector and additional roadway and intersection improvements will also significantly reduce the more than \$13,147,576 million that the City of Mentor's residents and motoring visitors incur annually in excess travel costs, delay damages, and fuel expenses.

{135} Although the Plaza Boulevard Connector may be inaccessible approximately 10% of the time due to the gates being down for passing trains, 90% access across the tracks via the Plaza Boulevard Connector is better than the 0% access that currently exists.

{136} The City of Mentor and its motorists have experience with similar delays at grade crossings throughout the City.

{137} Thus, an at-grade crossing at the Plaza Boulevard location meets the City of Mentor's critical need for reducing traffic congestion and gridlock in and around the southwest portion of the City and providing another north-south alternate for vehicular traffic in this area.

{138} The construction of an at-grade crossing over the three mainline railroad tracks of Defendants CSX Transportation, Inc. and Norfolk Southern Railway Company at Plaza Boulevard is reasonably required to accommodate the public.

## **II. An Underpass Is Not Physically or Economically Feasible at the Plaza Boulevard Location**

{139} An underpass is not physically or economically feasible at the Plaza Boulevard location.

**A. The Underpass is not Economically Feasible**

{140} Although either an at-grade crossing or a grade separation at the Plaza Boulevard location will alleviate the traffic congestion and provide an additional north-south roadway for vehicular traffic in the southwest portion of the city, a grade separation is not economically feasible.

{141} The parties stipulated that the underpass alternative was the least expensive grade separation alternative from a purely economic standpoint, and thus, the defendants did not offer any evidence on an overpass at that location. The parties indicated to the court that an overpass would cost between \$37 million and \$97 million, depending upon the type of construction and the larger extent of permanent taking, according to exhibits they prepared, and that it was not a reasonably feasible alternative in this case.

{142} The construction costs alone for the underpass, however, greatly exceed the costs for an at-grade crossing.

{143} The City of Mentor retained CT Consultants, Inc., which has extensive experience in roadway and grade separation design projects in the Lake County area, to estimate the total construction costs for each construction alternative.

{144} CT Consultants, Inc. helped design the overpasses at the Heisley Road location in the City of Mentor which will be completed in 2004 and also designed an at-grade crossing in Stark County at SR-241.

{145} CT Consultants, Inc. prepared preliminary designs for each of the construction alternatives and estimated the total probable cost for each alternative.

{146} CT Consultants, Inc. estimated that the construction period for the at-grade crossing alternative would be approximately six to nine months versus at least a 30-month construction period for the underpass alternative.

{147} Based upon its experience with similar projects and knowledge regarding cost of materials in this area, CT Consultants, Inc. determined that the at-grade crossing

alternative at the Plaza Boulevard location will cost the City of Mentor approximately \$1,623,000 million in additional construction costs.

{148} This figure includes \$600,000 for the cost of the signals and safety protection devices including four-quadrant gates, median barriers, and a constant warning device, if those would be required at the proposed highway-rail grade crossing.

{149} CT Consultants, Inc. also determined that the underpass alternative at the Plaza Boulevard site, if physically feasible, will cost the City of Mentor approximately \$14,970,000 million in construction costs.

{150} These estimates are exclusive of right of way costs and any expenses associated with unknown railroad facility adjustments associated with each of the various construction alternatives.

{151} The defendants' own expert opined that the construction cost for an underpass was \$11.9 million, which did not include full retaining walls or the cost to move any underground fiber optic cables.

{152} CT Consultants, Inc.'s cost for the retaining walls and movement of fiber optic cables exceeded \$3 million.

{153} These underpass costs were also expressed in current dollars and did not account for any inflation if the project is constructed at some future date.

**B. There will be Significant Right-of-Way Costs from an Underpass**

{154} There will be significant right-of-way costs from the construction of an underpass.

{155} The City of Mentor must purchase right-of-way from local business owners and residents in order to construct either an at-grade crossing or an underpass at the Plaza Boulevard location.

{156} Both the temporary and permanent right-of-way requirements are listed on the design drawings prepared by CT Consultants, Inc. for each construction alternative.

{157} Although no formal appraisals of the affected properties have been done (since the design drawings prepared by CT Consultants, Inc. are preliminary), Roger Ritley, a certified appraiser with extensive knowledge regarding the local real estate market in the City of Mentor and the properties that will be affected by each of the construction

alternatives, was able to assess the permanent negative right-of-way impact the construction alternatives would have on these properties and to describe the temporary impacts as well.

{158} The parties stipulated that the permanent negative right-of-way impact costs that the City of Mentor must incur for the at-grade crossing alternative is \$200,000 versus \$250,000 for the underpass alternative.

{159} Although the City of Mentor has already acquired surface rights from CEI for the at-grade alternative, it is unclear whether CEI will allow the City of Mentor to bisect its underground utility corridor at this location in order to construct an underpass and how much the City would be required to pay CEI for these subsurface rights.

{160} The \$250,000 figure for the permanent negative right-of-way impact costs for the underpass alternative does not include the compensation that must be paid to the Cleveland Electric Illuminating Company (“CEI”) for subsurface rights needed for the underpass alternative.

{161} In terms of temporary negative right-of-way impacts during construction, there will be no real impact during the 6-9 month construction period for the at-grade alternative.

{162} However, there will be extensive temporary right-of-way impacts on several properties during the 30-month construction period for the underpass alternative.

{163} For example, the construction of the underpass alternative may not only interfere with the business operations of the commercial properties along Mentor Avenue and Plaza Boulevard by restricting ingress and egress to these properties, but it also may require extensive reconstruction of existing buildings in the area due to the much larger construction limits.

{164} Thus, the City of Mentor may be forced to pay right-of-way damages to these property owners for disruption to their properties and interference with their business operations during construction.

{165} These right-of-way damages could exceed \$1 million.

{166} The railroads did not offer any fact or expert evidence or testimony rebutting these right-of-way damages.

**C. There will be Significant Economic Impact Costs from an Underpass**

{167} There will be significant economic impact costs from the underpass.

{168} In addition to the considerably higher construction costs and right-of-way damages, the construction of the underpass alternative would result in extensive temporary disruption to existing businesses in the area during the 30-month construction period from an economic impact standpoint.

{169} The City of Mentor retained the University of Cincinnati's Economics Center for Education and Research (the "Economics Center") to conduct an economic impact analysis to assess the economic impacts of constructing the various grade separation alternatives and the at-grade alternative at the Plaza Boulevard location.

{170} The Economics Center was provided with detailed information from the City of Mentor regarding the number and types of businesses that would be impacted by the construction of each alternative, total number of employees at each of the affected businesses, estimated earnings tax paid by each of the affected businesses, appraised value of each of the affected properties, and the annual real property tax paid by each of the affected property owners.

{171} In addition, the Economics Center was also provided with detailed information regarding the duration and extent of disruption for each alternative both during and after construction.

{172} The Economics Center then utilized the U.S. Bureau of Economic Analysis' Regional Input-Output Model ("RIMS II") and information regarding the City of Mentor's local economy to measure both the direct and indirect economic impacts of constructing the various construction alternatives at the Plaza Boulevard location.

{173} The Economics Center has performed similar economic impact studies for both public and private entities in Ohio and across the country using this accepted methodology.

{174} Although the Economics Center found that both the underpass alternative and the at-grade alternative would have the same permanent economic impacts to certain businesses after construction, the economic impacts on the 45 affected businesses and 600 employees differed greatly for these two alternatives during their respective construction periods.

{175} The Economics Center determined that during the 9-month construction period for the at-grade alternative, approximately two full time equivalent positions would be lost, employees would lose approximately \$72,989 in earnings, businesses would lose approximately \$31,345 in profits, and the City of Mentor would lose approximately \$1,460 in tax revenues.

{176} Due to the extensive disruption to existing businesses during the 30-month construction period for the underpass alternative, however, the Economics Center found that approximately 167.3 full time equivalent positions would be lost, employees would lose approximately \$5,764,668 in earnings, businesses would lose approximately \$2,439,845 in profits, and the City of Mentor would lose approximately \$115,293 in tax revenues.

{177} The Economics Center also found that by expending nearly \$15 million for the construction of the underpass alternative, the City of Mentor will not be able to spend that money on other crucial projects throughout the City where public spending can leverage private investment.

{178} Studies have found that this leveraging can result in a return to the City from at least 3 to 1 up to 30 to 1.

{179} Thus, the City of Mentor, by unnecessarily spending \$15 million on an underpass, may lose an additional \$45 million to \$450 million in investment dollars.

{180} Thus, the underpass alternative will have a much greater negative economic impact than the at-grade alternative upon the 45 affected businesses, the 600 employees, and the City of Mentor itself.

{181} When construction costs and economic impacts are taken into account, the total estimated cost for the at-grade crossing alternative at the Plaza Boulevard site is

approximately \$1,900,000 versus at a minimum \$23,000,000 for an underpass, assuming an underpass is physically feasible.

{182} These figures do not include the permanent and temporary right-of-way costs and damages that must be paid to affected business owners in connection with the underpass alternative.

**D. The City of Mentor Cannot Afford to Pay for an Underpass**

{183} The City of Mentor cannot afford to pay for an underpass.

{184} Each year, the City of Mentor publishes a comprehensive list of major public improvement projects which exceed \$50,000 and are proposed for the City within the next 5 years.

{185} The 2003-2007 Capital Improvement Plan provides: “[i]n a growing community like Mentor, the Capital Improvement Program is vital for anticipating and planning for the physical assets of the City that will be required for the safety, health, and welfare of the people.”

{186} Capital improvement projects in the City of Mentor include: Facility Construction and Improvements, Roadway Construction and Improvements, Traffic Control Improvements, Sidewalk and Bike Improvements, Park Acquisition, Development and Improvement, and Major Capital Equipment Acquisition and Replacement Programs.

{187} The City Council for the City of Mentor has \$3-5 million to devote to all capital improvement projects and programs within the City annually.

{188} Thus, the City of Mentor has \$15-20 million over the next 5 years to pay for over \$55 million in capital improvement projects.

{189} Although the City of Mentor issues bonds for some capital improvement projects such as the construction of facilities and buildings, it has a sound fiscal policy of not issuing bonds for road improvement projects such as the Plaza Boulevard Connector.

{190} Instead, the City of Mentor funds its roadway improvement projects internally through its annual Capital Improvement Program budget.

{191} This fiscal policy is even more important given the current economic climate and the recent decrease in revenues.



{192} Specifically, the City of Mentor experienced a 5% decrease in revenues in 2002.

{193} Despite this decrease in revenues, the City of Mentor's expenditures have continued to rise.

{194} These expenditures include unfunded mandates from the federal and state governments.

{195} Thus, the City of Mentor will expend approximately \$7-9 million more in 2003 than it will receive in revenues.

{196} In light of the City's limited capital improvement funds and the vast number of other projects to which these funds must be devoted, the City simply does not have the financial resources needed to finance the construction of a grade separation structure at Plaza Boulevard.

{197} The railroads did not offer any fact or expert evidence rebutting the City's inability to pay for an underpass at the Plaza Boulevard location.

{198} Indeed, it would be fiscally irresponsible for the city to spend millions of its own taxpayers' dollars on an underpass at Plaza Boulevard.

{199} Although the City of Mentor has vast experience in securing funding from all available outside funding sources for capital improvements to its roadways and traffic network, the proposed at-grade crossing at Plaza Boulevard will be a local connector which is outside the Interstate and State highway systems and therefore would not be a candidate for sufficient outside funding.

{200} Thus, grant money from the State of Ohio and the federal government, which has been used to help fund other grade separation projects in the City including the one at Heisley Road, is not available for this project.

{201} The city engineer, John Konrad, is an expert on funding availability for municipal projects, and has served on NOACA's board and committees in deciding similar issues.

{202} The fact that the Connector does not currently exist and that significant dollars were recently made available for the Heisley Road grade separation, reduces the availability of additional funds from these governmental sources for the foreseeable future.

{203} Additionally, seeking outside funding for a grade separation at the Plaza Boulevard location would negatively impact the City of Mentor's ability to secure outside funding for other capital improvement projects in the City, including improvements to SR-2 and a grade separation at Hopkins Road.

{204} Hopkins Road is a higher priority for a grade separation structure due to the significant vehicular and school bus traffic on that roadway.

{205} Once the at-grade crossing is constructed and the Plaza Boulevard Connector is an existing roadway, the City of Mentor's chances of securing funding for a grade separation at this location will increase because it will be a part of the Interstate, State, and County highway systems and therefore would be a candidate for outside funding.

{206} Thus, the at-grade construction alternative is the only economically feasible and realistic alternative available to the City for reducing congestion and delay in the southwest portion of the City.

{207} If the Plaza Boulevard Connector is not built at-grade, then it is likely that no connector will be built, and the City of Mentor's traffic congestion in this area will go unabated.

**E. There is No Clear Evidence that an Underpass is Physically Feasible**

{208} There is no clear evidence that an underpass is physically feasible.

{209} There are many unanswered issues regarding the physical feasibility of designing and constructing a functional underpass at the Plaza Boulevard location.

{210} It is unclear whether an underpass can be constructed with the appropriate grade of 6% and still go sufficiently below the existing tracks.

{211} As set forth above, there are also questions about whether CEI will allow the City of Mentor to acquire subsurface rights for the underpass alternative and bisect its underground utility corridor at this location.

{212} In addition, before it can be determined whether the underpass alternative is even feasible, soil boring tests, wetlands delineations, and an environmental assessment must be completed.

{213} The underpass alternative will also require the installation of a temporary railroad track detour between the railroad tracks at the Plaza Boulevard location during the 30-month construction period.

{214} CSXT and NSR have advised the City that they will not permit a temporary railroad track detour unless it allows them to maintain their current level of operations.

{215} There is a serious question as to whether this can be physically and economically accomplished given the fact that the detour may require the construction of three new tracks thousands of feet long in a very narrow area.

{216} The costs for this type of detour project generally include right-of-way damages for the affected businesses in the location of the additional tracks, engineering costs, and labor and material to install the detour tracks.

{217} In a similar situation, the City of Berea has dropped its plans to construct an underpass under the railroad tracks owned by CSXT and NSR due to the high construction costs and difficulties in designing temporary railroad track detours that would allow both of the railroads to maintain their current levels of train operations.

{218} Thus, in the City of Berea's case, the underpass was not physically feasible, and the City of Mentor would face the same types of issues.

{219} Thus, it is unclear whether an underpass can be constructed at the Plaza Boulevard location, and CSXT's own expert has safety concerns regarding the construction of the temporary railroad detour tracks given the close proximity to the mainline tracks of CSXT and NSR in this area.

### **III. The Proposed At-grade Crossing at Plaza Boulevard Will Be One of the Safest in the State of Ohio Because it Will Have the Highest Form of Protective Devices**

{220} The proposed at-grade crossing at Plaza Boulevard will be one of the safest in the State of Ohio because it will have the highest form of protective devices.

#### **A. Highway-Rail Grade Crossing Accidents Have Decreased Because of Protective Device Upgrades**

{221} In general, there has been a steady and significant decline in the total number of highway-rail grade crossing accidents throughout the United States over the past 20 years due, in part, to the improvement in safety devices and technology at highway-rail grade crossings.

{222} Most recently, the number of fatalities has decreased to 400 in the entire United States.

{223} There has been such a decrease that the railroads' own expert, Gilbert Carmichael, states that it is rare for such an accident to occur.

{224} During this same time period, however, there were approximately 40,000 fatalities per year across the country on the roadway system.

{225} Accidents involving trespassers on railroad property are currently more of a concern than at-grade crossings accidents.

{226} Mr. James Young, NSR's Assistant District Superintendent for the Pittsburgh Division, testified that there were approximately 500 trespasser-related fatalities in 2002 across the country.

{227} There have been 22 grade-crossing accidents in the City of Mentor since 1976.

{228} The Public Utilities Commission of Ohio's ("PUCO") grade crossing statistics, however, indicated that there had not been an accident in the City of Mentor in the last 10 years.

{229} Not one of these accidents, however, occurred at a crossing that was equipped with the state-of-the-art safety devices and technology that the City of Mentor has proposed for use at the proposed Plaza Boulevard crossing.

{230} Many of these accidents occurred at crossings with no gates.

{231} Several of these accidents occurred at passive crossings with no flashing lights or gates.

**B. The City Is Proposing an At-Grade Crossing with State-of-the-Art Protective Devices, Including Four-Quadrant Gates and Median Barriers**

{232} The City is proposing an at-grade crossing with state-of-the-art protective devices, including four-quadrant gates and median barriers.

{233} The City of Mentor is committed to making the Plaza Boulevard at-grade crossing as safe as possible and has offered to equip the crossing with protective devices and technology which exceed current safety standards and which have been proven to drastically reduce accidents and traffic violations at highway-rail grade crossings.

{234} The City of Mentor has also offered to cooperate with CSXT, NSR and the State of Ohio in order to address all safety concerns raised by the construction of the proposed at-grade crossing.

{235} The appropriate traffic control system at all highway-rail grade crossings “should be determined by an engineering study involving both the highway agency and the railroad company;” however, the City of Mentor has not performed a final engineering analysis regarding the safety devices that will be installed at the proposed at-grade crossing.

{236} An engineering study conducted between the railroad and the relevant highway authority or municipality is how both CSXT and NSR have always operated to help insure that all safety issues are addressed.

{237} Thus, input and cooperation from CSXT and NSR would be needed for the final engineering analysis and design of the proposed at-grade crossing in order to address all pertinent safety issues and considerations.

{238} The City of Mentor has provided a conceptual design of the proposed crossing which envisions the installation and use of four-quadrant gates, median barriers, vehicle presence detectors to prevent vehicles from getting trapped between the gates, interconnected constant warning devices that activate the lights and gates whenever a train is approaching on any of the three tracks, an advanced warning system which will notify motorists that the crossing is blocked and to use an alternate route, and traffic improvements at nearby intersections to prevent traffic from queuing back onto the train tracks.

{239} Whether the at-grade crossing prohibits semi-tractor-trailer or pedestrian traffic, prohibits certain left-hand turns, or employs certain types of traffic control devices, is a matter of future cooperative engineering study.

**C. Four-Quadrant Gates and Median Barriers Are Currently the Highest Form of At-Grade Crossing Protection**

{240} Four-quadrant gates and median barriers are currently the highest form of at-grade crossing protection.

{241} Four-quadrant gates are devices which block all of the approach and exit lanes to the highway-rail grade crossing and prevent motorists from driving around the standard two-quadrant gate system.

{242} NSR's System Manager for Grade Crossing Safety, Danny Gilbert, testified that four-quadrant gates help motorists make better decisions at highway-rail grade crossings.

{243} In addition, NSR's Assistant District Superintendent for the Pittsburgh Division, James Young, testified that four-quadrant gates are the best active safety devices available for highway-rail grade crossings.

{244} Thus, in terms of ranking of safety devices at highway-rail grade crossings, crossbucks or stop signs at passive crossings are the lowest form of safety devices, and four-quadrant gates are currently the highest form of active devices.

{245} NSR and CSXT both operate over thousands of crossings protected only by passive crossings.

{246} The crossing proposed by the City of Mentor will be much safer than those thousands of crossings.

{247} Despite the fact that Susan Kirkland, the ORDC's Manager of Safety Operations, testified that four-quadrant gates are experimental in the State of Ohio because public funds have not yet been used to install such a system, there is a grade crossing in Putnam County, Ohio which has had four-quadrant gates for some time.

{248} In addition, the Surface Transportation Board (“STB”) has recommended the use of four-quadrant gates at NSR crossings in the State of Ohio where it has concerns regarding safety.

{249} Ms. Kirkland also admitted that the State of Ohio will implement four-quadrant gates in the future because they are better than other available alternatives and are an improvement over the standard two-quadrant gates.

{250} Similarly, median barriers are devices that prevent motorists from driving across the center of the roadway in order to drive around gates.

{251} Median barriers definitely help reduce traffic violations and accidents at highway-rail grade crossings.

{252} Both four-quadrant gates and median barriers are used to prevent motorists from disobeying traffic signals and safety devices at highway-rail grade crossings.

{253} Specifications for the use of four-quadrant gating and median barriers are contained in the Federal Highway Administration’s *Manual on Uniform Traffic Control Devices, Millennium Edition*.

{254} They are not experimental devices despite the testimony of Ms. Kirkland to the contrary.

{255} Experimental devices are not accepted in the Manual on Uniform Traffic Control Devices.

{256} The Ohio Department of Transportation is in the process of adopting the Manual on Uniform Traffic Control Devices, including the section on four-quadrant gates.

{257} In fact, the federal government has conducted several studies regarding safety devices at highway-rail grade crossings, including the use of four-quadrant gates and median barriers.

{258} Specifically, the Federal Railroad Administration conducted a nationwide study of supplemental safety devices used at highway-rail grade crossings and found that four-quadrant gates and median barriers have an effectiveness rate of 92%.

{259} “Effectiveness” was defined in the federal study as follows:

The effectiveness of a supplemental safety measure in reducing the probability of a collision at the public highway-rail grade crossing.

Effectiveness is indicated by a number between zero and one which represents the safety measure when compared to the same crossing equipped with conventional automated warning systems of flashing lights, gates and bells. Zero effectiveness means that the supplementary safety measure provides no reduction in the probability of a collision (there is not effectiveness) while an effectiveness rating of one means that the supplementary safety measure is totally effective in reducing collisions. Measurements between zero and one reflect the percentage by which the supplementary safety measure reduces the probability of a collision. (Thus, a supplementary safety measure with an effectiveness of .38 reduces the probability of a collision by 38 percent.

{260} Four-quadrant gates and median barriers reduce the risk associated with the standard two-quadrant gates by 92%.

{261} In addition, the Federal Railroad Administration also conducted a study in North Carolina regarding safety devices at highway-rail grade crossings and issued a report to the U.S. Congress with its findings.

{262} The North Carolina study stated that four-quadrant gates and median barriers have an effectiveness rate of 92%.

{263} The North Carolina study also found that four-quadrant gates and median barriers reduced driver violations of traffic signals and safety devices at highway-rail grade crossings by 98%.

{264} The railroads' experts had high opinions of the qualifications of the persons who conducted the North Carolina study.

{265} Four-quadrant gates and median barriers have been installed at the Sugar Creek Road crossing in Charlotte, NC which spans two mainline tracks and a siding track separated by approximately 100 feet.

{266} The Sugar Creek Road crossing has approximately 22,100 vehicles per day (4% of which are trucks), 22 trains per day with a maximum speed limit of 79 mph, and 58 school buses per day.

{267} There have been no highway-rail grade crossing accidents at the Sugar Creek Road crossing since the installation of four-quadrant gates in 1995.



{268} In light of the safety devices used at the Sugar Creek Road crossing, the risk of a fatality at that crossing is .004, or one fatality every 200 years.

{269} The North Carolina study also provided information regarding the cost of installing four-quadrant gates and median barriers at grade crossings and found that the total cost of four-quadrant gates at a new crossing is approximately \$250,000 while the cost of median barriers is approximately \$10,000 per location.

{270} In addition, the North Carolina study found that the results of its research were transferable to other rail lines across the country:

We believe the results of the assessment study of the NC DOT “Sealed Corridor” Phase I program are transferable to most, if not all, designated [High Speed Rail] corridors nationwide. The experiences found along the “Sealed Corridor” in North Carolina are similar to freight corridors across the country and these techniques and innovations can be applied to these types of corridors as well.

{271} About four regular-sized automobiles will fit in and can occupy the 102 feet of space between the CSXT and NSR lines.

{272} Although four-quadrant gates may present a risk of cars getting trapped in between the gates, there are several things that can be done to prevent this from happening.

{273} First, there is a standard equation called the “Greenshield Formula” which is used to calculate how long the descent of the exit gates should be delayed in a four-quadrant gate system.

{274} Based upon this formula, the exit gates at the proposed at-grade crossing would be delayed 14 seconds from the time the approach gates begin their descent to provide vehicles with enough time to get across the crossing and ensure they do not get trapped between the gates.

{275} In addition to delaying the descent of the exit gates, vehicle presence detectors can also be installed at grade crossings to prevent the exit gates from descending if a vehicle is detected in the space between the tracks, to allow vehicles to exit the crossing.

{276} Additional space between the outside track and the gate can also be provided so that if the exit gate is down, a trapped car can still fit between the gate and outside track. A vehicle emergency turn-out lane can be established in the area between the CSXT and NSR tracks.

{277} Traffic preemption devices in the road pavement can also be used to turn an intersection light green to prevent any queuing of vehicles between the gates.

{278} Traffic intersection improvements such as dedicated left hand turn lanes, can also be used to prevent any queuing of vehicles between the gates.

{279} All of these are reasonable measures proposed by the City which can be taken to prevent trapping and which are feasible at the Plaza Boulevard location.

**D. An Interconnected Constant Warning System Is Feasible at the Plaza Boulevard Grade Crossing**

{280} The City of Mentor has also proposed that the at-grade crossing at the Plaza Boulevard location be equipped with an interconnected constant warning device system.

{281} A constant warning device detects a train approaching the highway-rail grade crossing, determines the speed of the train, calculates the amount of time needed to activate the safety devices at the crossing, activates the safety devices at the crossing, and provides a minimum of at least 20 seconds warning time to motorists of the approaching train.

{282} Constant warning devices are designed in a “fail-safe manner,” to better ensure safety.

{283} When a highway-rail grade crossing traverses more than one railroad track, the constant warning devices for each railroad track can be interconnected so that the safety devices at the crossing will be activated if a train is approaching on any of the tracks.

{284} The City of Mentor retained Larry Farnham, a licensed electrical engineer who has designed constant warning devices and train detection equipment for use at highway-rail grade crossings, to determine the feasibility of interconnecting the constant

warning devices of the two mainline tracks owned by CSXT with the single mainline track owned by NSR at the Plaza Boulevard location.

{285} For 30 years, Mr. Farnham worked as a Chief Technical Engineer and Project Manager for Harmon Industries, one of the leading manufacturers of constant warning devices in the United States.

{286} Mr. Farnham has interconnected constant warning devices at highway-rail grade crossings with multiple tracks that are similar to the proposed at-grade crossing at the Plaza Boulevard location.

{287} Mr. Farnham is aware of crossings in the United States that have as many as eight interconnected tracks with more than 245 feet between the two-quadrant gate arms.

{288} In Mr. Farnham's expert opinion, the interconnection of the constant warning devices of the two mainline tracks operated by CSXT with the single mainline track operated by NSR at the Plaza Boulevard location is feasible and can be done in a safe manner with little difficulty so that the safety devices at the proposed crossing will activate if a train is approaching on any of the three tracks but will not activate if a train approaches the crossing and stops short of the crossing for staging purposes.

{289} It is feasible to install an interconnected constant warning system at the proposed Plaza Boulevard grade crossing.

{290} CSXT's expert on safety and signaling systems at highway-rail grade crossings testified that he has never been in a situation where he was unable to design a warning system at a highway-rail grade crossing that was acceptable to all parties.

{291} The cost of the constant warning devices at the proposed at-grade crossing is approximately \$15,000 per track, with an additional \$270,000-\$425,000 for the cost of the circuitry that must be extended 1-1.3 miles in both directions from the proposed grade crossing in order to adequately detect trains approaching the crossing.

{292} These figures are within the \$600,000 figure that CT Consultants, Inc. estimated for the cost of the safety devices and signaling system at the proposed highway-rail grade crossing at the Plaza Boulevard location.

{293} The final costs will be dependent upon the engineering study's findings as to the appropriate advance warning time.

**E. An Advanced Warning System at Mentor Avenue and Plaza Boulevard Will Help with Delay and Does Not Have to Be Interconnected with the Railroads' Signals**

{294} The City of Mentor has also proposed the use of an advanced warning system which will notify the traveling public when the crossing is closed due to train traffic and will advise motorists to use alternate routes.

{295} Similar to the advanced warning system at the Hopkins Road at-grade crossings, the advanced warning system at the Plaza Boulevard crossing will be activated by the flashing lights at the proposed at-grade crossing and display a message to motorists on Mentor Avenue and Tyler Boulevard that the crossing is blocked by train traffic.

{296} Thus, the City of Mentor does not need to be tied into the signals of either CSXT or NSR for the proper functioning of the advanced warning system.

{297} The advanced warning system feature will reduce the total number of vehicles stopped at the crossing while the gates are closed and therefore reduce the opportunity for motorists to violate the traffic control devices.

{298} In addition, the reduction in total number of vehicles stopped at the crossing will also reduce delay for the traveling public.

{299} The advanced warning system will also assist police, fire, and EMS in deciding whether to use the proposed at-grade crossing at the Plaza Boulevard location or to use an alternate route.

**F. Traffic Signal Preemption at the Intersections Is Not Required, but the City Is Willing to Provide Such Interconnection to Enhance Safety**

{300} In order to prevent vehicles from lining up or queuing back onto a highway-rail grade crossing while they are stopped at nearby intersections, traffic signal preemption can be used to change the signal displayed at the intersection and keep the vehicles moving.

{301} Traffic signal preemption can take the form of underground vehicle sensors which detect the number of vehicles queuing at an intersection and change the traffic signal accordingly to prevent cars from lining up.

{302} The highway authority and railroads can also provide for advanced traffic signal preemption where the traffic signals at adjacent intersections are connected to the railroad's signal and the traffic signals at the intersections are changed whenever a train approaches the highway-rail grade crossing.

{303} Given the distances between the proposed at-grade crossing and the nearest intersections in the area, however, traffic queuing from adjacent intersections is unlikely.

{304} Since the nearest intersections to the proposed at grade crossing are 900 feet and 1,100 feet, neither traffic signal preemption nor advanced traffic signal preemption are required by the federal Manual on Uniform Traffic Control Devices.

{305} The Manual on Uniform Traffic Control Devices provides as follows:

The highway agency with jurisdiction, the regulatory agency with statutory authority, if applicable, and the railroad company should jointly determine the preemption operation at highway-rail grade crossings adjacent to signalized highway intersections.

When a highway-rail grade crossing is equipped with a flashing light signal system and is located within 60 m (200 ft) of an intersection or mid-block location controlled by a traffic control signal, the traffic control signal should be provided with preemption in accordance with Section 4D.13.

Coordination with the flashing-light signal system should be considered for traffic control signals located farther than 60 m (200 ft) from the highway-rail grade crossing. Factors to be considered should include traffic volumes, vehicle mix, vehicle and train approach speeds, frequency of trains, and queue lengths.

{306} Thus, all that is required for the proposed at-grade crossing at the Plaza Boulevard location under the federal guidelines is that "coordination" between the flashing-light signal system and the traffic control signals be considered.

{307} "Coordination" could include the construction of left hand turn lanes at nearby intersections to keep traffic moving, the installation of "No Left Turn" signs to prevent cars from turning at nearby intersections and blocking traffic in that direction, or the

installation of underground vehicle sensors which change the signal displayed at a given intersection based upon the total number of cars waiting.

{308} As an extra safety measure, the City of Mentor has proposed the use of each of these methods to prevent traffic from queuing back onto the proposed at-grade crossing.

{309} The City is also willing to interconnect the intersection traffic lights with the activation of the crossing safety devices.

{310} This interconnection, however, does not require additional advanced warning time, but may be triggered upon the activation of the flashing lights.

{311} Thus, there was no basis for the defendants' experts (who were not traffic experts) to speculate that the City of Mentor would require advanced warning time in excess of one minute at the Plaza Boulevard grade crossing.

{312} Instead, the defendants' own original calculations provided for advanced warning time of less than one minute, which they have designed for other locations.

**G. The Proposed Grade Crossing at Plaza Boulevard Will Be the Safest in the City of Mentor and One of the Safest in the Entire State of Ohio.**

{313} The proposed grade crossing at Plaza Boulevard will be the safest grade crossing in the City of Mentor and one of the safest in the entire State of Ohio.

{314} Although the defendants' safety experts argued that the proposed Plaza Boulevard crossing will not be safe, each of these experts admitted that there are numerous crossings across the State of Ohio and in Northeast Ohio itself which are very complicated and have similar and/or worse characteristics than the proposed crossing.

{315} These include crossings that CSXT and NSR have made more complicated and increased the risk of an accident occurring by double-tracking and/or increasing the number and speed of trains.

{316} The PUCO has the statutory obligation to target crossings for closure that it deems unsafe.

{317} Not one of these complicated crossings, however, has been targeted by the PUCO for closure.

{318} In addition, not one of these complicated grade crossings has the state-of-the-art safety devices that have been proposed by the City of Mentor for installation at Plaza Boulevard.

{319} James Young, who serves as the Chairman of NSR's Grade Crossing Safety and Trespass Section, admitted that the only difference between the proposed crossing at Plaza Boulevard and the Hopkins Road crossings that currently exist in the City of Mentor today is that the proposed crossing will have four-quadrant gates as opposed to the two-quadrant gates that are currently in place at Hopkins Road.

{320} Neither CSXT nor NSR, however, has ever approached the City of Mentor and suggested upgrading the safety devices at the Hopkins Road grade crossing due to its physical characteristics or safety concerns.

{321} In addition, neither CSXT nor NSR has offered the City of Mentor any money to improve the safety devices at the Hopkins Road grade crossings.

{322} When the effectiveness rate for the four-quadrant gates and median barriers is applied to crossings with gates that have the highest risk of an accident, those crossings then become some of the safest in the entire State of Ohio.

{323} The City of Mentor retained Professor Ronald Eck, a licensed civil engineer with a Ph.D. in civil engineering and a specialization in transportation engineering, to determine whether the proposed at-grade crossing could be designed in such a way that the crossing would be safe.

{324} Professor Eck has vast experience in highway-rail grade crossing safety and design and has given hundreds of presentations, guest lectures, seminars, and workshops regarding safety and design related issues.

{325} In addition to authoring numerous books, articles, and research reports regarding highway-rail grade crossing safety issues, Professor Eck has also been the principal investigator regarding the effectiveness of safety measures at grade crossings.

{326} Thus, Professor Eck has devoted the majority of his professional career to developing methods to making grade crossings as safe as possible for the traveling public.

{327} After considerable investigation of the facts and circumstances of this case, including a thorough review of the physical characteristics of the proposed grade crossing at the Plaza Boulevard location and other grade crossings on the railroad tracks through the City of Mentor, it is Professor Eck's expert opinion that the proposed at-grade crossing at the Plaza Boulevard location can be designed to be reasonably safe.

{328} This is especially true in light of the state-of-the-art safety devices and technology that the City of Mentor has proposed for use at this crossing including four-quadrant gates, median barriers, vehicle presence detectors, interconnected constant warning devices, an advanced warning system, and traffic improvements at nearby intersections to prevent traffic from queuing back onto the train tracks.

{329} Similarly, Ms. Kirkland admitted that the City of Mentor has proposed reasonable, doable, and feasible devices for installation at the proposed Plaza Boulevard grade crossing.

**H. The City of Mentor Believed That the ORDC Was Unopposed to the Proposed At-grade Crossing Project, and Recently Reversed its Position**

{330} The City of Mentor reasonably believed that the ORDC was unopposed to the proposed at-grade crossing, and that recently, the ORDC changed its position.

**I. During the Conrail Acquisition, the ORDC was Aligned with the City of Mentor's Interests**

{331} In response to a request from the ORDC, the City of Mentor raised concerns regarding the acquisition of Conrail's assets by CSXT and NSR in the form of a letter to the ORDC dated July 7, 2000 from the city engineer.



{332} In the July 7, 2000 letter, the City of Mentor informed the ORDC of its intention to grade separate the at-grade crossings at Heisley Road and that an at-grade crossing was needed at the Plaza Boulevard location to provide traffic relief in that area.

{333} The July 7, 2000 letter was subsequently filed by the ORDC with the STB as part of the ORDC Executive Director's affidavit on local municipal impacts. This affidavit was filed as part of the Conrail acquisition proceedings.

{334} ORDC never communicated to the City of Mentor that it was opposing the request for an at-grade crossing or that such proposal was unsafe.

{335} In its Reply Brief filed with the STB, NSR argued the following with respect to the City of Mentor's request for an at-grade crossing at the Plaza Boulevard location:

[a]ny determination of the need for a new at-grade crossing or a grade separation must be made by the Ohio county court system, in the case of at-grade crossings, and by the State, in the case of grade separations, not by the railroads. Therefore, NS recommends that the City of Mentor apply to the ORDC and other appropriate Ohio authorities and to Governor Taft's grade separation program for the requested grade crossings. Further action by the Board is not necessary.

{336} Similarly, CSXT argued in its Reply Brief filed with the STB that there was no basis for the STB to intervene in the City of Mentor's request for an at-grade crossing at the Plaza Boulevard location and noted: "[w]e do not believe that any of the specific local issues raised by the Ohio communities presents a reasoned basis for intervention by the Board."

{337} The railroads did not argue to the STB that it needed to intervene because the proposed crossing and its effect on their operations was preempted, but instead the railroads essentially took the exact opposite position.

{338} In response to arguments raised by CSXT and NSR in their respective Reply Briefs, the ORDC submitted a letter on behalf of all Ohio communities to the Secretary of the STB, the Honorable Vernon A. Williams, and argued that "ORDC takes strong exception to assertions that there is no basis for the Board to consider any further environmental conditions or studies in the Oversight Proceeding...."

{339} In fact, the ORDC went even further and noted:

. . . [f]rankly, Ohio is appalled by assertions in NS' Reply Statement that the Board should not concern itself with serious transaction relation problems that are by no means resolved. At this juncture, the fact that Ohio felt compelled to establish a \$200 Million grade separation program as a direct result of division of Conrail lines should demonstrate the urgent need for the Board to investigate the adequacy of environmental conditions adopted under existing criteria and to consider environmental issues in Ex Parte 582 (Sub-No. 1) as urged by DOT, Ohio and other participants in that proceeding.

{340} The STB accepted the arguments raised by CSXT and NSR in their Reply Briefs and chose not to address the City of Mentor's need for an at-grade crossing at the Plaza Boulevard location.

{341} Based on the fact that the ORDC transmitted its July 7, 2000 letter to the STB as part of its Executive Director's affidavit filed in connection with the Conrail proceedings, and the ORDC's subsequent response to the Reply Briefs filed by CSXT and NSR, the City of Mentor reasonably believed that it had the ORDC's support for the Plaza Boulevard Connector and that the ORDC was aligned with the City of Mentor in this project.

**(i) ORDC Changed its Position Regarding the Plaza Boulevard Crossing Without Adequate Consideration of the City of Mentor's Justifications for That Crossing**

{342} ORDC changed its position regarding the Plaza Boulevard crossing without adequate consideration of the City of Mentor's justifications for that crossing.

{343} A few years after the Conrail proceeding, without ever visiting the site of the proposed grade crossing or analyzing the extent to which the crossing would reduce traffic problems in the area and benefit the City of Mentor and its residents, the ORDC informed the City of Mentor that it had safety concerns regarding the proposed grade crossing at Plaza Boulevard.

{344} Although the City of Mentor's plan for an at-grade crossing at Plaza Boulevard was discussed by the ORDC in November 2002, the City of Mentor was not given notice of this meeting and was not given a full opportunity to present any facts to the Commission regarding its proposal.

{345} Rather, the ORDC discussed the City of Mentor's proposal at the November 2002 meeting in executive session.

{346} A month after its executive session, the Executive Director of the ORDC informed the City of Mentor that the Commission was considering a resolution to intervene in this lawsuit.

{347} In response to Executive Director Seney's December 2002 letter, the City of Mentor's city manager and city engineer met with two ORDC staff members in January 2003 and requested that its proposal for a grade crossing at Plaza Boulevard be put on the agenda for the ORDC's March meeting.

{348} In the meantime, however, the ORDC once again discussed the City of Mentor's at-grade crossing proposal at its January 2003 meeting.

{349} As with the November 2002 meeting, however, the City of Mentor was not given notice of the January 2003 meeting and was not given an opportunity to present any facts to the Commission regarding its proposal.

{350} Although the Plaza Boulevard grade crossing project was placed on the agenda for the ORDC's March 2003 meeting, and the City was given a limited opportunity to present its proposal, it was apparent that the ORDC had already made its decision that it would intervene in this litigation and oppose the City of Mentor's plan for a crossing.

{351} Susan Kirkland admitted that the members of the Commission did not review the materials submitted by the City of Mentor at the March 2003 meeting before voting on the resolution to intervene in this matter.

{352} Ms. Kirkland also admitted that she herself did not know any of the specifics regarding the City of Mentor's traffic congestion problems in the southwest portion of the city, the accident rates at the major intersections in the area, the number of fatalities on the city's roadways over the last ten years, the excess travel and delay costs incurred by the city's residents and motorists, or the city's current EMS response times before she made her opinions in this case.

{353} The first time Ms. Kirkland visited the site of the proposed grade crossing was in December 2002, well after the ORDC's April 2002 letter opposing the construction of the crossing.

{354} Thus, the ORDC looked at the crossing in a vacuum, without any consideration of why the City of Mentor needed that crossing or other considerations set forth in R.C. §4957.31.

{355} The ORDC has also suggested that it changed its position because there is a possibility that the railroad lines through the City of Mentor may be considered as a candidate for a high-speed rail corridor designation sometime in the future.

{356} No application has been filed, however, for a high-speed rail corridor designation for the tracks that run through the City of Mentor.

{357} The ORDC also failed to present any evidence that such designation is reasonably likely to occur in the next 5 to 10 years.

{358} There are 72 at-grade crossings in Lake County, 28 of which cross the CSXT lines, and 44 of which cross the NSR line, all of which must be grade separated to create the high-speed rail corridor. Nine of the grade crossings are in Mentor.

{359} The railroads' own expert admitted that although it has been 20 years since the railroad line from New York to Boston was designated a high-speed rail corridor, there are many highway-rail grade crossings on that line that have not yet been grade separated.

{360} The ORDC takes the position – as do each of the defendant railroads and the railroads' expert witnesses – that there is no new at-grade crossing that can be constructed today and be reasonably safe or reasonably required for any good and sufficient reasons. This is a factual determination by the court, taking into consideration, among other things, the credibility of the witnesses and the court's perception that the defendants' witnesses were biased on this issue.

**J. Neither the ORDC Nor the Railroad Defendants Can Reasonably Claim That the Proposed Crossing Is Unreasonably Unsafe in Light**

**of the Double Tracking and Capacity Improvement Projects Which Have Occurred in Ohio.**

**(i) Installation of New Crossings and Increasing Risk at Existing Crossings**

{361} Despite their assertions in this case that they are opposed to the construction of all new at-grade crossings, both CSXT and NSR have each entered into agreements where they have agreed to the construction of a new at-grade crossing in order to service a new customer or in exchange for the elimination of an existing crossing.

{362} In addition, prior to acquiring the assets of Conrail, CSXT, NSR, and the ORDC entered into agreements that allowed both CSXT and NSR to install additional mainline railroad tracks over hundreds of existing highway-rail grade crossings in Northeast Ohio and throughout the State as part of “capacity improvement projects.”

{363} The railroads’ own expert, Gilbert Carmichael, admitted that these projects doubled the safety risks at each of the grade crossings that were traversed by the additional mainline tracks.

{364} In addition, Susan Kirkland admitted that the double tracking done by both CSXT and NSR increased the hazard risk at each of the affected grade crossings and also increased the probability of an accident occurring at those crossings.

{365} Despite the fact that these projects doubled the risk at these grade crossings and increased the probability of an accident, however, the ORDC did not oppose CSXT’s and NSR’s plans to add additional mainline tracks throughout the State of Ohio and did not even suggest that any of the affected crossings be grade separated.

**(ii) CSXT’s Capacity Improvement Results in over 100 New At-grade Intersections of Mainline Tracks and Major Streets, Resulting in Many Complicated Crossings in the Middle of Ohio’s Cities**

{366} As part of its capacity improvement project, CSXT installed a second, and in some cases a third, mainline track from Berea, Ohio to Chicago.

{367} The stated goal of the project was to increase not only the number of trains that CSXT could operate over this segment of track, but also the speed of those trains.

{368} In some cases, these additional mainline tracks were constructed across the main roadways in the middle of cities in Ohio.

{369} The installation of additional tracks in some instances required existing gates to be moved farther apart from each other.

{370} For example, CSXT installed a second mainline track over the Main Street highway-rail grade crossing in Grafton, Ohio which is traversed by approximately 7,000 vehicles and 61 trains per day.

{371} In addition, at one location in Fostoria, Ohio, this capacity improvement project created an intersection of two mainline tracks operated by CSXT and two mainline tracks operated by NSR.

{372} As part of this capacity improvement project, CSXT also replaced, upgraded, and/or installed the signal and train detection system across this entire stretch of track and installed new control points every ten miles and intermediate signals every 10,000 feet.

{373} The entire project was completed under CSXT's direction and supervision over the course of 10 months, for which CSXT was given numerous national awards.

{374} For the segment of track from Berea to Greenwich, Ohio, and from Greenwich to the western Ohio border, CSXT entered into agreements with the PUCO and the ORDC regarding the safety devices that would be installed at the highway-rail grade crossings that were traversed by these new mainline tracks.

{375} These agreements listed the highway-rail crossings that were scheduled to be upgraded from passive crossings to active crossings with two-quadrant gates and flashing lights and devoted a lump sum amount for all crossing improvements.

{376} The agreements, however, did not include preliminary or final designs for the safety devices that were to be installed at these highway-rail grade crossings.

{377} Neither Susan Kirkland nor CSXT's assistant chief engineer for signal design and construction, Eric Peterson, know whether any of the designs were completed prior to

the installation of the additional mainline tracks over these existing highway-rail grade crossings across the state.

{378} The ORDC entered into these agreements believing that the upgrades in safety devices would make the crossing reasonably safe even though there was not yet a final design of the safety devices.

{379} Although Mr. Peterson had safety concerns regarding the installation of the additional mainline tracks over existing at-grade crossings with high vehicular and train traffic and physical characteristics which made those crossings “complicated,” those concerns were answered for him because some crossings were merely upgraded to two-quadrant gates and flashing lights.

{380} Ms. Kirkland’s safety concerns were also answered without having any preliminary or final designs for the safety devices at these crossings.

{381} Due to the lack of available funding, these highway-rail grade crossings were not grade separated.

{382} The economics of grade separating these crossings was one of the primary factors considered by CSXT during its extensive capacity improvement project.

**(iii) NSR’s Capacity Improvement Project Also Increases the Risk at Existing Crossings**

{383} Similarly, NSR’s capacity improvement project consisted of the expansion of four different rail corridors in the State of Ohio to accommodate a greater volume of train traffic that was expected as a result of the Conrail acquisition proceedings.

{384} As CSXT did with its capacity improvement project, NSR entered into an agreement with the PUCO and the ORDC regarding the safety devices that would be installed at the affected grade crossings.

{385} The affected highway-rail grade crossings were located in the following areas: Lakewood, Ohio; Lake and Ashtabula Counties; the Columbus-Bellevue, Ohio area; and the Bellevue-Oak Harbor, Ohio area.

{386} Although the agreement specified that the affected crossings would be upgraded with active warning devices in the form of crossing gates and flashing lights, it did not include designs for the safety devices that were to be installed at these grade crossings.

{387} Despite the fact that the final designs of the safety devices at these crossings were not submitted to the ORDC prior to the execution of the agreement, the ORDC's safety concerns were adequately addressed based upon the fact that flashing lights and gates were being installed at the affected crossings.

{388} NSR's capacity improvement project also included the installation of additional main lines over existing roads at-grade.

{389} Because of the complicated design of some of these crossings at which NSR was increasing the safety risks by increasing capacity, the STB recommended that certain safety mitigation steps be taken, including the installation of four-quadrant gates and median barriers.

#### **IV. The Proposed Crossing will not have a Significant Impact Upon the Train Operations of Either CSXT or NSR**

{390} The proposed crossing will not have a significant impact upon the train operations of either CSXT or NSR.

{391} This is a factual determination by the court, taking into consideration, among other things, the credibility of the witnesses and the court's perception that the defendants' witnesses engaged in hyperbole and exaggeration.

##### **A. CSXT's Movement of Trains Through Mentor**

{392} CSXT currently operates a total of 50-60 trains per day through the City of Mentor, including both westbound and eastbound.

{393} Although there was no documentary evidence introduced in support of CSXT's claim that its trains averaged 7,000 to 8,000 feet, there were records introduced into evidence which showed a significant percentage of trains were below one mile in length, and a very small percentage over 8,000 feet in length.



{394} CSXT controls the movement of its trains by both its wayside signaling system, which includes control points and intermediate signals, and by radio communications from train dispatchers to locomotive engineers and conductors.

{395} A control point ("CP") is a location where signals are given to trains indicating whether and how the train should proceed on the tracks.

{396} Control points are located every four to five miles on CSXT's double mainline tracks in Northeast Ohio and the signals displayed on control points are positioned approximately ten feet above the railroad tracks so that locomotive engineers can see the signal from far distances.

{397} For instance, the signals on CP 162 in the City of Mentor can be seen from approximately two miles away in regular conditions.

{398} Intermediate signals are located between control points and indicate what signal the next control point will display.

{399} Train dispatchers control the signal that is displayed at the various control points on the double mainline track through the City of Mentor by computer from a centralized command center in Indianapolis, Indiana.

{400} Thus, CSXT stops its trains through the use of control point signals that are located at various points along its double mainline track.

{401} CSXT also stops its trains via the signals displayed at intermediate signals and through the use of radio communications from train dispatchers to the locomotive engineers and conductors.

{402} In each of these circumstances, CSXT train dispatchers give the locomotive engineers and conductors advance notice by radio communication that they will be stopping at a given location so they can safely stop the train.

{403} Regardless of whether the train is stopped via control point, intermediate signal, or radio communication, however, the locomotive engineer has discretion regarding the exact location where he will stop the train in order to avoid blocking highway-rail crossings.

{404} Thus, CSXT does not have any rules that trains must stop at control points.

{405} When a train is stopped at a given location and has a clear line of sight to the nearest control point, the locomotive engineer proceeds based upon the signal indication displayed at the control point.

{406} When the locomotive engineer does not have a clear line of sight to the nearest control point, however, the dispatcher will assist the locomotive engineer in proceeding to the next control point.

{407} Although CSXT train dispatchers may not tell locomotive engineers what signal is actually displayed at a given control point, they are permitted to instruct the engineers that they have requested a certain signal to be displayed at that control point and to proceed accordingly.

{408} The locomotive engineer then proceeds at restricted speed, which is not to exceed 15-20 mph, until the nearest control point is within sight.

{409} In any event, it generally takes 20 minutes for the average train to reach the speed of 15 mph.

{410} Once the control point is within sight, the locomotive engineer can then proceed at regular speed.

#### **B. CSXT's Holding and Staging of Trains**

{411} CSXT deals with train congestion on its double mainline tracks by either slowing the speed of its approaching trains ("staging") or by actually stopping its trains at a given location ("holding").

{412} CSXT prefers staging a train as opposed to holding a train because it keeps the train moving, and this is done 50% of the time to deal with congestion.

#### **C. Collinwood Yard**

{413} Generally, CSXT's westbound trains going through Mentor stop at Collinwood Yard, which is located ten miles west of the City of Mentor in Cleveland, Ohio, to receive fuel and other services.

{414} After it acquired the assets of Conrail, CSXT expanded the fueling operations at Collinwood Yard and began fueling more trains at this location due in part to the fact that the State of Ohio has lower fuel taxes than New York.

{415} By increasing the number of trains that get refueled at Collinwood Yard, CSXT increased the train congestion at the yard.

{416} CSXT looked into the congestion issue at Collinwood Yard in September 2001 and determined that congestion could be reduced by the construction of an additional fueling platform at a cost of \$1.3 million.

{417} Despite the fact that it made approximately \$400 million in profits in 2002, CSXT determined that its budget was too tight to spare the money for the construction of an additional fueling platform.

**D. At Most, CSXT Holds On Average One Westbound Train Per Day in the City of Mentor**

{418} Contrary to CSXT's prior sworn affidavit, there are other locations between the City of Mentor and Cleveland that are uninterrupted by grade crossings where CSXT can and does hold its trains without blocking existing at-grade crossings.

{419} For example, CSXT holds trains inside Collinwood Yard itself, between CP 171 and Lloyd Road which is a span of approximately 3 miles, and between CP 167 and Beidler Road which is a span of approximately 9,000 feet.

{420} CSXT holds as many as five trains per day between CP 171 and Lloyd Road.

{421} In addition, CSXT has no preference between holding a train in the City of Mentor at CP 162 versus the location between CP 167 and Beidler Road if the train is 8,000 feet or less.

{422} Both of these locations are closer to the point of congestion, i.e., Collinwood Yard, than CP 162 in the City of Mentor.

{423} CSXT did not produce any documentation during the trial showing that it definitely uses the 3.8 mile stretch of track in the City of Mentor that is uninterrupted by grade crossings to hold its trains or how often it uses this stretch of track for those purposes.

{424} Rather, the train documents produced by CSXT only identified trains that traveled through the City of Mentor, CP 155 (East Mentor) and CP 162 (West Mentor), at less

than maximum authorized speed and included trains that were merely slowing down as they traveled through the City of Mentor.

{425} More than a quarter of the trains that were listed as having been held in the City of Mentor were eastbound trains despite the fact that CSXT does not hold eastbound trains at CP 162.

{426} Many of these identified trains were also less than one mile in length.

{427} In addition, many of these trains appear to have only slowed down and not stopped.

{428} Thus, it is difficult to determine exactly how many trains CSXT holds in the City of Mentor on a daily basis.

{429} The listing also does not identify where any specific train actually stopped or was held in the City of Mentor.

{430} It is undisputed, however, that each of the trains CSXT identified in the documents it produced in this litigation as being held or slowed down in the City of Mentor could have been held in other locations throughout Northeast Ohio where CSXT currently holds trains on a regular basis.

{431} CSXT failed to identify one single train that could not have been held at another location.

#### **E. CSXT Holds and Stages Trains Throughout Northeast Ohio**

{432} There are several places throughout Northeast Ohio where CSXT can and does hold its trains, other than CP 162 in the City of Mentor.

{433} In addition to Collinwood Yard, CP 171, and CP 167, CSXT also holds trains at various locations east of the City of Mentor including, but not limited to, CP 155 in Painesville, CP 148 in Perry, CP 130 in Ashtabula, CP 128 in Ashtabula, and CP 124 in Ashtabula.

#### **F. CSXT's Coal Train Operations Do Not Require CSXT to Hold Trains at the Site of the Proposed Crossing**

{434} CSXT's coal train operations do not require CSXT to hold trains at the site of the proposed crossing.

{435} CSXT services First Energy's Eastlake, Ohio facility and occasionally provides the plant with coal that comes from Pennsylvania or the Powder River Basin in Wyoming.

{436} Westbound coal trains enter the First Energy facility at either CP 162 or CP 167 and eastbound coal trains enter the facility at CP 171 or CP 167.

{437} Westbound trains entering at CP 162 do not have to stop at the proposed crossing site if CP 162 has a clear signal.

{438} Eastbound coal trains can also back their trains into the First Energy facility at CP 162, but this is a rare occurrence.

{439} During the entire month of January 2002, all eastbound coal trains that serviced the First Energy facility in Eastlake accessed the facility via CP 171 or CP 167.

{440} Indeed, CSXT did not identify one instance where a train specifically backed in at CP 162 as compared to using CP 167 or CP 171.

{441} Even if they were to back in at CP 162, those trains can stop east of the proposed crossing and then reverse direction without blocking the proposed crossing site.

#### **G. The Proposed At-grade Crossing at Plaza Boulevard Will Not Significantly Impact CSXT's Operations**

{442} The proposed at-grade crossing at Plaza Boulevard will not significantly impact CSXT's operations.

{443} CSXT will still have a three-mile stretch of uninterrupted track in the City of Mentor after the proposed at-grade crossing is constructed between the site of the proposed crossing at milepost 161.3 and the Hopkins Road crossing at milepost 158.3.

{444} Thus, CSXT will be able to hold its longest trains and several smaller trains in this location after the proposed at-grade crossing is constructed at Plaza Boulevard.

{445} To the extent that CSXT had any concerns regarding losing space to hold trains in the City of Mentor as a result of the construction of the proposed crossing at Plaza Boulevard, those alleged concerns have now been nullified by the City's decision to

grade separate the crossings at Heisley Road, construction of which is scheduled to begin later this year.

{446} After the Heisley Road crossings are grade separated, even with the proposed crossing, CSXT will have more track space to hold its trains than it currently has today.

{447} CSXT currently has 3.8 miles of space between CP 162 (milepost 162.1) and Hopkins Road (milepost 158.3).

{448} After the proposed at-grade crossing is constructed at Plaza Boulevard and Heisley Road is grade separated, CSXT will have 0.8 miles between CP 162 (milepost 162.1) and Plaza Boulevard (milepost 161.3), 3.0 miles between Plaza Boulevard (milepost 161.3) and Hopkins Road (158.3), and 3.7 miles between Hopkins Road (milepost 158.3) and Newell Street (milepost 154.6).

{449} CSXT not only stops trains at intermediate signals such as the one that currently exists at Hopkins Road, but also stops trains at road crossings without intermediate signals by radio communication from the train dispatcher to the locomotive engineer.

{450} Consequently, after the Plaza Boulevard grade crossing is constructed and the Heisley Road crossing is grade separated, CSXT will be able to hold and stage trains in the City of Mentor in the same manner as it does today.

{451} Thus, the City of Mentor is not requesting that CSXT do anything differently in terms of holding trains than it already does each and every day at the thousands of at-grade crossings along its tracks.

{452} There is no engineering or operational need to move CP 162 or install a new control point as a result of the construction of the proposed at-grade crossing at Plaza Boulevard.

{453} As set forth above, the signals at CP 162 can be viewed from approximately two miles away in regular conditions and can be seen from the site of the proposed Plaza Boulevard crossing.

{454} Thus, in those cases where a train is stopped short of the proposed Plaza Boulevard crossing and the locomotive engineer has a clear line of sight to the signals displayed on CP162, the engineer will be able to proceed at regular speed.

{455} In the rare instance where a train is stopped at the Plaza Boulevard crossing and the locomotive engineer does not have a clear line of sight to the signals at CP 162, the CSXT locomotive engineers will proceed as they do at similar locations on this very line by receiving assistance from train dispatchers and proceeding at restricted speed until they can see the signal displayed at CP 162.

{456} There are numerous locations in Northeast Ohio similar to the proposed Plaza Boulevard location where engineers currently stop their trains short of control points and intermediate signals in order to avoid blocking highway-rail grade crossings.

{457} CSXT deals with existing at-grade crossings thousands of times every day on the thousands of miles of track that they operate over in the United States.

{458} For instance, CSXT locomotive engineers stop their trains 1.5 miles before CP 154 in order to accommodate the City of Painesville's residents and avoid blocking the highway-rail grade crossing at Fobes Road.

{459} CSXT engineers also stop their trains short of highway-rail grade crossings at Elm Street in Painesville, Main Street in Perry, and Columbus Avenue, Sill Road, and Cook Road in Ashtabula.

{460} At some of these locations, the locomotive engineers have a clear line of sight to the nearest control point, and at some locations, the engineers do not have a clear line of sight to the nearest control point.

{461} CSXT did not introduce any evidence on what percentage of time a train is held in the City of Mentor and there exists the rare occurrence that there is no clear line of sight.

{462} Indeed, the only time CSXT's operations expert, Mr. John Connelly, was at the proposed site, he had a clear line of sight to CP 162.

{463} CSXT did not introduce any evidence of any cost that will be incurred based upon those rare occasions when a held train will have to proceed at restricted speed because of no visibility to CP 162.

{464} In fact, there is no cost incurred because railroad schedules already account for those types of occurrences by allowing for enough time to get from point A to point B even when trains are being held or staged.

{465} CSXT will be able to stop its westbound trains short of the proposed crossing based upon the two intermediate signals before CP 162.

{466} In addition, Eric Peterson testified that the intermediate signal at milepost 158 can be reconfigured at a minimal cost so that it can display an advance approach signal and therefore give a locomotive engineer an ample distance of three miles to stop the train safely before the proposed Plaza Boulevard crossing.

{467} The City of Mentor retained Chris Burger to analyze what impact the Plaza Boulevard grade crossing would have on CSXT's train operations in Northeast Ohio.

{468} Mr. Burger has been involved in the railroad industry for 39 years and has held various train dispatching, operations, and management positions during his career.

{469} Mr. Burger has done consulting work for various railroads and the South African government in the area of improving train operations and efficiency.

{470} Mr. Burger has performed over 300 hours of investigation in this case, reviewing all discovery materials and deposition transcripts regarding CSXT's train operations including CSXT's operating rules, train schedules, timetables, and track charts for the double mainline through the City of Mentor.

{471} In addition, Mr. Burger has also high-railed (rode a train) the segment of track from the City of Mentor to Cleveland.

{472} Based upon all of the facts and circumstances presented, it is Mr. Burger's expert opinion, which this Court accepts, that the construction of the proposed grade crossing at the Plaza Boulevard location will have an insignificant impact on CSXT's train operations in this area.

#### **H. NSR's Movement of Trains Through Mentor, Ohio**

{473} NSR currently operates a total of 8-12 trains per day, including westbound and eastbound, on its single mainline through the City of Mentor.



{474} Although NSR claimed that its trains averaged 6,000 to 8,000 feet, the documentation did not support this and instead showed that a majority were under one mile in length.

{475} NSR has a 15-20 mile segment of double mainline track just west of the City of Mentor that spans from Euclid to its Rockport facility on the west side of Cleveland, Ohio.

{476} NSR controls the movement of its trains by both its wayside signaling system, which includes control points and intermediate signals, and by radio communications from train dispatchers to locomotive engineers and conductors.

{477} NSR encourages communication between its train dispatchers and locomotive engineers and conductors through the use of two-way radios as a method of increasing safety.

{478} Thus, NSR stops its trains via the signals displayed at control points and intermediate signals, and through the use of radio communications from train dispatchers to the locomotive engineers and conductors.

{479} In each of these circumstances, NSR train dispatchers give the locomotive engineers and conductors advance notice by radio communication that they will be stopping at a given location so they can stop the train safely.

{480} Regardless of whether the train is stopped via control point, intermediate signal, or radio communication, however, the locomotive engineer has discretion regarding the exact location where to stop the train in order to avoid blocking highway-rail crossings and find a place to fit.

{481} Thus, NSR does not have any rules that trains must stop at control points.

{482} NSR also stops and holds trains at intermediate signals and at locations that do not have any signals whatsoever, such as at-grade road crossings.

{483} When a train is stopped at a given location and has a clear line of sight to the nearest control point, the locomotive engineer proceeds based upon the signal displayed at the control point.

{484} A locomotive engineer can see the signals displayed on a control point from two miles away in regular conditions.

{485} When the locomotive engineer does not have a clear line of sight to the nearest control point, however, NSR dispatchers will assist the locomotive engineer in proceeding to the next control point.

{486} Although NSR train dispatchers may not tell locomotive engineers what signal is actually displayed at a given control point, they are permitted to instruct the engineers that they have requested a certain signal to be displayed at that control point and to proceed accordingly.

{487} The locomotive engineer then proceeds at restricted speed until he sees the nearest control point.

{488} Once the control point is within sight, the locomotive engineer can then proceed at regular speed based upon the signal displayed at the control point.

#### **I. NSR's Holding and Staging of Trains**

{489} NSR deals with train congestion by either staging its trains or holding its trains at a given location.

{490} NSR prefers to slow a train down as opposed to stop or hold a train because it keeps the train moving.

{491} In addition, NSR also deals with congestion by coordinating train meets on its various siding tracks located throughout Northeast Ohio and its 15-20 mile segment of double mainline track from Euclid to the Rockport facility.

{492} NSR coordinates train meets on its siding tracks by instructing one train to proceed off of the single mainline and onto the siding track, while a train moving in the opposite direction passes through on the mainline.

{493} In general, the smaller train will proceed onto the siding track while the longer train passes through on the mainline track.

{494} NSR prefers to conduct rolling train meets, where both trains continue in motion during the train meet, so that neither train has to stop.

{495} NSR coordinates train meets on its 15-20 mile segment of double mainline track from Euclid to Rockport by arranging for two trains to arrive on that segment of track at the same time.

{496} NSR prefers to move its trains as close to the congestion point as possible in order to keep the trains moving and to foster easier coordination of train movements.

#### **J. NSR's Rockport Yard**

{497} NSR currently handles the majority of its switching operations in Northeast Ohio at its Rockport Yard facility which is located on the west side of the City of Cleveland.

{498} Those switching operations were recently moved to the Rockport facility from NSR's East 55<sup>th</sup> Street Yard in Cleveland, Ohio.

#### **K. At Most, NSR Holds One Small Train on Mentor's Siding Every Few Weeks, Which Will Not Be Impacted in Any Way by the Proposed Crossing**

{499} At most, NSR holds one small train on Mentor's siding every few weeks, which will not be impacted in any way by the proposed crossing.

{500} As was the case with CSXT, NSR was also unable to produce any documentation at trial showing that it definitely uses these areas in the City of Mentor to hold its trains or how often it uses these stretches of track for those purposes.

{501} Rather, the documents produced by NSR that purportedly showed trains that were held in the City of Mentor only identified trains that traveled through the City at less than maximum speed.

{502} Gary Grimwood, the NSR train dispatcher who compiled the data for these train documents, admitted that the documents contained several errors and included trains that did not even slow down as they passed through the City of Mentor.

{503} Mr. Grimwood also indicated that the trains included ones that were held at places other than in Mentor.

{504} In addition, 58 of the 72 trains identified by NSR as being held in the City of Mentor from January 1, 2002, through September 12, 2002, were trains that were involved in train meets on the siding track located in the City of Mentor.

{505} It is undisputed, however, that the proposed crossing at Plaza Boulevard will not interfere with NSR's ability to conduct train meets on the siding track in the City of Mentor because it will not bisect the siding.

{506} It is also undisputed that all of the trains listed in these documents could be held in other locations in Northeast Ohio where NSR currently holds trains.

{507} The proposed at-grade crossing at Plaza Boulevard will not significantly impact NSR's operations.

**L. NSR Holds and Stages Trains at Other Locations in Northeast Ohio**

{508} As is the case with CSXT, there are several places throughout Northeast Ohio where NSR can and does hold its trains other than in the City of Mentor.

{509} For instance, there is a 3-mile stretch of useable track space in Ashtabula that NSR currently uses to hold trains.

{510} NSR also holds trains and conducts train meets on the siding tracks located in Willoughby, Painesville, Madison, and Ashtabula.

{511} In addition, NSR does hold and stage trains on the 15-20 mile stretch of double mainline track from Euclid to the Rockport facility.

{512} NSR does not have any written rules or orders that trains are not to be held or staged in the alleged high crime area in East Cleveland.

{513} NSR trains have stopped innumerable times in this area and continue to do so regularly.

{514} There is no restriction on the length of train that can be held or staged on the double mainline track in the East Cleveland area.

{515} Although NSR's intermodal trains are more likely to get vandalized due to the type of cargo they carry, these trains are the least likely to stop in the East Cleveland area because they are high priority trains.

{516} Despite their concerns about vandalism and looting in the East Cleveland area, NSR has not implemented any preventative measures to deal with these issues like it has done in other legitimate high crime areas throughout its rail network such as Chicago.

{517} Specifically, NSR has not permanently increased the number of police officers in the Cleveland area to patrol this segment of track, it has not installed fencing to deter potential trespassers, it does not have any K-9 units in the Cleveland area to further deter criminal activity, it has not installed video surveillance, and it has not instituted its Trespasser Abatement Program in this area despite the fact that the program has been proven to reduce trespassing in problem areas.

{518} There have been no requests in the past five years to heighten security measures in the East Cleveland area and there are no plans to do so in the future.

{519} During the entire year of 2002, NSR police responded to a total of three calls for service in East Cleveland (one each for illegal dumping, train delay, and vandalism) versus one call for service in Mentor (a DUI car-train accident at a crossing).

{520} In addition, there are segments of double mainline track between Euclid and the Rockport facility where NSR does not have any concerns regarding vandalism and looting of trains and NSR does hold trains in these areas on a regular basis.

{521} For instance, NSR has a 3-mile stretch of double mainline track between CP 180 and CP 183 that is uninterrupted by grade crossings where it has no concerns regarding vandalism.

{522} NSR holds trains on this 3-mile stretch of double mainline track on a daily basis.

{523} These areas of double mainline track are closer to Rockport Yard than the City of Mentor.

{524} Thus, from an operational standpoint, it is better to hold trains on the double mainline track between Euclid and the Rockport facility than in the City of Mentor because the segment of double mainline track is closer to Rockport Yard.

**M. The Proposed At-Grade Crossing at Plaza Boulevard Will Not Have any Significant Impact Upon NSR's Operations**

{525} Although it is unclear whether NSR holds trains in the City of Mentor, the Plaza Boulevard crossing (milepost 162.4) will not interfere with the holding of eastbound trains between the Joyce control point (milepost 162.8) and Pelton Road (milepost 164.3) because the proposed crossing will not bisect this stretch of track.

{526} In addition, NSR will still be able to hold westbound trains between the Daniels control point (milepost 163.7) and Plaza Boulevard (milepost 162.4) and between Plaza Boulevard (milepost 162.4) and Hart Street (milepost 160.5) after the proposed crossing is constructed.

{527} The signals at control points can be viewed from approximately two miles away in regular conditions, and Daniels control point can therefore be seen from the site of the proposed Plaza Boulevard crossing.

{528} Thus, in those cases where a train is stopped short of the proposed Plaza Boulevard crossing, and the locomotive engineer has a clear line of sight to the signals displayed on the Daniels control point, the engineer will be able to proceed at regular speed.

{529} In those instances where a train is stopped at the Plaza Boulevard crossing and the locomotive engineer does not have a clear line of sight to the signals at the Daniels control point, the NSR locomotive engineers will proceed as they do at similar locations on this very line in the City of Mentor by receiving assistance from train dispatchers and proceeding at restricted speed until they can see the signal displayed at the Daniels control point.

{530} This is the exact procedure that NSR locomotive engineers currently use when they hold their trains between the Heisley Road crossing (milepost 158.6) and the Jackson Street crossing (milepost 156.9).

{531} Lastly, as set forth above, the Plaza Boulevard grade crossing will not interfere with NSR's ability to conduct train meets on the siding track in the City of Mentor because it will not bisect the siding.

{532} As is the case with CSXT, NSR's alleged concerns regarding losing space to hold or stage trains in the City of Mentor as a result of the construction of the proposed at-grade crossing at Plaza Boulevard have been erased by the City's decision to grade separate the Heisley Road crossing on NSR's single mainline through the City of Mentor.

{533} In addition to the areas mentioned above where NSR will be able to hold both its eastbound and westbound trains even after the proposed crossing is constructed, the Heisley Road grade separation project will open a 2.5-mile stretch of track between Hopkins Road (milepost 159.4) and Jackson Street (milepost 156.9).

{534} Thus, after the Plaza Boulevard grade crossing is constructed and the Heisley Road crossing is grade separated, NSR will have as much space for holding trains as it does now, and it will be able to hold and stage trains in the City of Mentor in the same manner as it does today.

{535} It is undisputed that once the Heisley Road grade crossing is separated, NSR will have added operational flexibility in this area.

{536} For this same reason, any maintenance and liability cost associated with the new crossing at Plaza Boulevard will be more than offset by the elimination of the two grade crossings at Heisley Road since neither CSXT nor NSR will have any grade-crossing-related maintenance or liability costs at the Heisley Road crossings once construction is completed in 2004.

{537} Mr. Burger was also retained by the City of Mentor to analyze what impact the Plaza Boulevard grade crossing would have on NSR's train operations in Northeast Ohio.

{538} Mr. Burger performed the same type of exhaustive analysis for NSR's operations as he did with CSXT's operations by reviewing all discovery materials and deposition transcripts regarding NSR's train operations including NSR's operating rules, train schedules, timetables, and track charts for the mainline track through the City of Mentor.

{539} Mr. Burger has also high-railed the segment of track from the City of Mentor to Cleveland.

{540} Based upon all of the facts and circumstances presented, it is Mr. Burger's expert opinion, which this Court accepts, that the construction of the proposed grade crossing at Plaza Boulevard will have no significant impact on NSR's train operations in this area.

**N. The Balancing of Relevant Factors Justifies the Proposed Plaza Boulevard At-Grade Crossing**

{541} The City of Mentor has a long history of constructing grade separations when feasible, as evidenced by the underpass at SR-306, the overpass at SR-615, and the Heisley Road grade separation project which will be completed in 2004.

{542} After the Heisley Road project is completed, the City of Mentor has plans to grade separate the Hopkins Road at-grade crossings due to the significant vehicular and school bus traffic at that location.

{543} After the Heisley Road and Hopkins Road at-grade crossings are grade separated, the City of Mentor will have four fewer at-grade crossings than it has currently.

{544} Although the federal government and the State of Ohio have policies in favor of eliminating at-grade crossings, both envision circumstances where the construction of a new at-grade crossing is justified by public necessity.

{545} CSXT, NSR and ORDC have used the same types of balancing of relevant factors to justify the creation of new crossings or the double or triple-tracking of existing crossings.

{546} The railroads' own expert, Gilbert Carmichael, the former Federal Railroad Administrator, testified that he agreed with the concept of allowing the construction of a highway-rail grade crossing in exchange for the elimination of an existing grade crossing, as the City of Mentor proposed in this case with the grade separation of the two Heisley Road grade crossings.

{547} Mr. Carmichael is aware of hundreds of occasions where that type of agreement has been made.

{548} CSXT just reached such an agreement for a new crossing with the City of Wilmington, Ohio.

{549} Mr. Carmichael admitted that public highway-rail grade crossings have benefits, and that the decision of whether or not to construct a grade crossing is a balancing of all relevant factors including the impact that the crossing would have on traffic congestion,



surrounding businesses, EMS response times, and the level of safety devices being considered at the proposed crossing.

{550} On balance, the safety of grade crossings in Mentor will be improved overall even with the new crossing because of the state-of-the-art protective devices and the elimination of the two Heisley Road crossings.

{551} None of the safety experts that testified in this case for CSXT, NSR, or the Ohio Rail Development Commission (“ORDC”) analyzed the impact that the proposed grade crossing would have on alleviating traffic congestion, delay, accident rates, excess travel costs, and EMS responses times in the southwest portion of the City of Mentor.

{552} In this case, considering the substantial difference in construction and right-of-way costs, the adverse economic impact that the underpass alternative will have on the City of Mentor and the surrounding business community, the questions of an underpass’s physical feasibility, and the lack of available funding sources, a grade separation at the Plaza Boulevard location is not reasonably feasible and is therefore not a viable alternative.

{553} Thus, the City of Mentor’s only realistic alternative for reducing traffic congestion and these other related problems in the southwest portion of the City is the creation of an at-grade crossing at the Plaza Boulevard location.

{554} The City of Mentor’s elected officials testified that in weighing these relevant factors, the overall public health and safety of the City’s residents will be enhanced by the construction of a new crossing in contrast to having no crossing at all.

## **CONCLUSIONS OF LAW**

### **I. Legal Standard**

#### **A. R.C. §4957.30**

{555} Under R.C. §4957.30, a municipal corporation (or a railroad) is given the authority to petition the court of common pleas for the creation of an at-grade crossing.

{556} Section 4957.30 of the Revised Code states in pertinent part:

When it is desired by a railroad company constructing a new railroad or in changing or altering the location of one previously constructed, or by any municipal corporation or authority constructing a new highway, that the

railroad or highway should be so constructed that they will cross each other at the same grade, or if it is desired to divert, change, or alter an existing public highway, a petition shall be presented by the party desiring such construction or diversion, to the court of common pleas of the county within which the crossing or diversion is situated.

{557} Once a petition is filed under this section, the court of common pleas must order the construction of an at-grade crossing if it is satisfied that the construction is reasonably required to accommodate the public; or to avoid excessive expense, in view of the small amount of traffic on the highway or railroad, and considering the future uses to which the highway may be adapted; or in view of the difficulties of other methods of construction; or for other good and sufficient reasons.

{558} In addition to determining whether the City of Mentor is entitled to an order authorizing the construction of the proposed at-grade crossing under R.C. §4957.31, the parties have also stipulated that this court should also determine the interrelated issue of whether the proposed at-grade crossing will unnecessarily interfere with the reasonable use of the defendants' property pursuant to R.C. §719.01(A).

{559} The question of unnecessary interference includes the issue of whether the proposed crossing will be unreasonably unsafe so as to unduly expose the railroads to potential liability for grade crossing accidents.

{560} The proper measure of damages payable to CSXT and NSR as a result of the City of Mentor's appropriation of their property pursuant to R.C. §163.01 *et seq.*, however, will be decided after the trial of this matter if the crossing is allowed to proceed, in order to avoid unnecessary appraisal costs and related fees and expenses for all parties.

**B. R.C. §719.01(A)**

{561} Specifically, Section 719.01(A) of the Revised Code provides:

Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits: (A) For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose, the municipal corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use

of such property, and for obtaining material for the improvement of streets and other public places.

## **II. Burden of Proof**

### **A. The Burden of Proof Under R.C. §719.01(A) is Preponderance of the Evidence**

{562} In accordance with well-established appropriation case law, CSXT and NSR, and not the City of Mentor, have the burden of proving under R.C. §719.01(A) that the proposed crossing at Plaza Boulevard “unnecessarily interferes” with the reasonable use of their property and train operations.

{563} Because that includes the question of whether the crossing is unreasonably unsafe, the railroads, and not the City of Mentor, have the burden of proving that the proposed crossing will be unreasonably unsafe.

{564} The term “satisfy” is irrelevant to the analysis under R.C. §719.01(A) because that term does not appear in that statutory section.

{565} Consequently, the burden of proof of preponderance of the evidence is applicable to any findings made under R.C. §719.01(A).

### **B. The Burden of Proof under R.C. §4957.31 Is Clear and Convincing Evidence**

{566} As to the second statute, the term “satisfy” in R.C. §4957.31 means that the burden of proof is by clear and convincing evidence, for the reasons the court stated earlier.

### **C. Defendants Have Not Met the Burden of Proof under R.C. §719.01(A) by a Preponderance of the Evidence**

{567} When a municipality seeks to appropriate land for a public purpose, the burden of proof is on the property owner to establish that the appropriation constitutes an unnecessary interference. *City of Mentor v. Osborne*, No. 98-L-226 (11<sup>th</sup> Dist. Ct. App., Lake, 5-25-2001), 2001 WL 567622.

{568} Thus, CSXT and NSR have the burden of proof under §719.01(A) to show that the proposed at-grade crossing will unnecessarily interfere with the reasonable use of their property and train operations.

{569} The question of whether the proposed crossing will unnecessarily interfere with the operations includes the issue of whether the crossing is unreasonably unsafe; thus, the railroads bear the burden of proving that the crossing is unreasonably unsafe. See *Village of Coldwater v. Cincinnati Northern R. Co.* (Mercer C.P., 1944), 14 Ohio Supp. 14.

{570} The applicable burden of proof under R.C. §719.01(A) is by a preponderance of the evidence.

{571} CSXT and NSR mistakenly argue that the City of Mentor has that burden of proof, and that such burden is by clear and convincing evidence.

{572} The railroads apparently base their argument on the "satisfy" language of R.C. §4957.31.

{573} However, the plain language of R.C. §719.01(A) does not mention the word "satisfy."

{574} CSXT and NSR cite no authority for the proposition that the City has the burden of proof under R.C. §719.01(A), and that such burden is anything more than by a preponderance of the evidence.

{575} As noted above, it is well settled in Ohio that the burden of proof in civil cases is by a preponderance of the evidence. *Cincinnati Bar Assn, supra.*

{576} CSXT and NSR have not met their burden of proof under §719.01(A) that the proposed crossing will substantially or unnecessarily interfere with the reasonable use of their property and train operations.

### **III. The City of Mentor Is Entitled to an Order under R.C. §4957.31 Granting its Petition for an At-grade Crossing at the Plaza Boulevard Location.**

{577} Ohio courts have granted similar requests for at-grade crossings and there is ample authority supporting the City of Mentor's request for an at-grade crossing at the Plaza Boulevard location. See *Columbus, Delaware & Marion Electric Co. v. Board of*

*County Commissioners of Marion Co.* (1928), 118 Ohio St. 501; *City of Fostoria v. CSX Transportation, Inc.*, No. 13-91-3 (3<sup>rd</sup> Dist. Ct. App., Seneca, 12-18-1991), 1991 WL 271709; *Village of Coldwater v. Cincinnati Northern R. Co.* (Mercer C.P., 1944), 14 Ohio Supp. 14, 1944 WL 2553.

{578} For example, in *Village of Coldwater*, *supra*, the village sought permission to construct an at-grade crossing over the railroad tracks of two different railroad companies because the northeast quarter of the village was developing rapidly and had only one access route. *Id.* at 15-17.

{579} This lack of access resulted in traffic congestion, inconvenience, and interference with emergency vehicle access in the northeast quarter of the village. *Id.*

{580} The *Village of Coldwater* court began its analysis of the village's petition for an at-grade crossing by examining the language of Section 8899 of the General Code, the prior version of R.C. §4957.31.

{581} Specifically, the court examined the meaning of the phrase "if satisfied that such construction is reasonably required." *Id.* at 15.

{582} The court found the term "reasonable" to mean "what is reasonable is not necessarily what is best, but what is fairly appropriate to the purpose under all the circumstances." *Id.*

{583} After considering all of the facts of the case and noting that the Village of Coldwater was a thriving, growing, and aggressive village, the court held that it was satisfied that the extension of the street at-grade over the defendants' rights of way was "reasonably required" to accommodate and protect the public. *Id.* at 17.

{584} The *Village of Coldwater* Court reasoned:

Figuratively speaking the evidence shows that the northeast quarter of the village is closed to the outside world on the east, west and north sides thereof. Leaving but one avenue of ingress and egress, namely, East Main Street, which is but one of four outlets to the entire village.

Such being true, how can it be said that the proposed improvement is not "reasonably required to accommodate the public."

What is reasonable is not necessarily what is best, but what is fairly appropriate to the purpose under all the circumstances.

*Id.*

{585} Similarly, in *City of Fostoria v. CSX Transportation, Inc.*, No. 13-91-3 (3<sup>rd</sup> Dist. Ct. App., Seneca, 12-18-1991), 1991 WL 271709, the court of appeals for the Third Appellate District analyzed the City of Fostoria's petition for an at-grade crossing pursuant to R.C. §4957.31.

{586} The trial court granted Fostoria's petition to construct an at-grade crossing over CSXT's railroad track, and CSXT appealed. *Id.* at \*1.

{587} CSXT argued that the trial court's decision was contrary to Ohio's clear public policy against at-grade crossings and was against the manifest weight of the evidence. *Id.* at \*2.

{588} In affirming the trial court's decision, the Third District Court of Appeals held that while Ohio's public policy favors elimination of grade crossings, the city's petition fell into the statutorily defined exceptions to that policy under R.C. §4957.31. *Id.* at \*3-4.

{589} The court of appeals further found that the trial court's decision was not against the manifest weight of the evidence and determined that all witnesses who addressed the economics of constructing an underpass or an overpass agreed that the cost of such a construction would be excessive and that the grade crossing would accommodate the public. *Id.* at \*4-5.

{590} Likewise, in this case, it is clear that the proposed crossing is "reasonably required" to accommodate the City of Mentor, Lake County, and their residents and motorists, and to protect their health, welfare, and safety. See R.C. §4957.31; *Village of Coldwater*, supra; *City of Fostoria*, supra.

{591} There is no dispute among the parties that current traffic levels in the southwest portion of the City of Mentor are exceeding the transportation network's capacity, and the City's transportation system is unable to service the growing community.

{592} This traffic congestion contributes to the hundreds of accidents that occur annually at or near the main intersections in the southwest portion of the City of Mentor,

the \$4,103,172 in annual accident costs in this area, and the 27 automobile-related fatalities in the city since 1991.

{593} In addition, current traffic levels and the lack of an additional north-south roadway in the southwest portion of the city have resulted in inadequate fire and EMS response times to this area and millions of dollars per year in excess travel and delay costs for the City of Mentor's residents and its motoring visitors.

{594} It is also undisputed that if nothing is done to alleviate traffic congestion in this area, each of these problems will become worse.

{595} Because of the severity of the traffic congestion problems in the southwest portion of the City of Mentor, neither the proposed crossing nor the additional roadway improvements alone will fully address the traffic problems in this area.

{596} Rather, both the proposed crossing and the additional roadway improvements must be constructed to adequately alleviate traffic congestion in this area.

{597} By constructing the proposed crossing and additional roadway improvements, however, traffic can be maintained at acceptable levels for the next twenty years.

{598} In addition, by reducing traffic congestion and providing an additional north-south roadway at Plaza Boulevard, police, fire, and EMS response times in the southwest portion of the city will be reduced as well as accident rates, accident costs, delay and fuel costs, and excess travel costs.

{599} In addition, it is clear that the proposed crossing is "reasonably required" to avoid excessive expense, in view of the difficulties of constructing an underpass at this location.

{600} An underpass is not economically feasible considering the substantial difference in construction and right-of-way costs, the adverse economic impact that the underpass alternative will have on the City of Mentor and the surrounding business community, and the lack of available funding sources.

{601} In addition, there are also several outstanding issues regarding whether a functional underpass is physically feasible and can even be constructed at the Plaza Boulevard location.

{602} For these reasons, not only are there difficulties of construction with an underpass whose total cost and damages would exceed at least \$23 million, there is also no proof that an underpass can physically be constructed at this location.

{603} Further, it is clear that the proposed crossing is reasonably required for other good and sufficient reasons.

{604} The City of Mentor has diligently formulated a plan over the last ten years to address its critical traffic problem.

{605} This included grade separating the two Heisley Road crossings and installing the new crossing at Plaza Boulevard.

{606} The plan also includes grade separating Hopkins Road in the future, if and when funding becomes available because of the high volume of vehicular and school bus traffic.

{607} CSXT was aware of the City's plan when it acquired the rail lines going through Mentor.

{608} NSR was also aware of this plan when it undertook its capacity improvement project in Northeast Ohio.

{609} The City is proposing to use state-of-the-art protective devices at the proposed grade crossing which will make it one of the safest in the State of Ohio.

{610} The crossing will include four-quadrant gates and a median barrier, which final design will be based upon an engineering study that both the City of Mentor, CSXT, and NSR will jointly cooperate and participate in for purposes of finalizing all aspects of that design.

{611} Overall, the safety of the City of Mentor's and Lake County's residents and motorists will be improved because of the closing of the two Heisley Road crossings and the use of four-quadrant gates and median barriers at the Plaza Boulevard crossing.

{612} Railroads, including CSXT and NSR, have agreed to new crossings in exchange for the closing of another crossing countless times in the past.



{613} Thus, based upon the evidence presented, this court is “satisfied” that the proposed crossing is “reasonably required” for several different reasons, including to accommodate the public, to avoid excessive expense, in view of the difficulties of other methods of construction, and for other good and sufficient reasons. See R.C. §4957.31; *Village of Coldwater* and *City of Fostoria*.

{614} Each of these reasons provides a separate basis to order the proposed crossing under R.C. §4957.31.

{615} The court is “satisfied” that the at-grade Plaza Boulevard crossing is reasonably required for good and sufficient reasons.

**IV. The City of Mentor Is Entitled to an Order under R.C. §719.01(A) Finding That an At-grade Crossing at Plaza Boulevard Will Not Unnecessarily Interfere with the Reasonable Use of the Defendants’ Property**

{616} In *Village of Coldwater*, supra, the village also sought a determination from the court on the related issue of whether the at-grade crossing would unnecessarily interfere with the railroads’ reasonable use of their property under Section 3677 of the General Code, the prior version of R.C. §719.01(A).

{617} Similar to the arguments raised by CSXT and NSR in this case, the railroads in *Village of Coldwater* argued that the proposed at-grade crossing would be dangerous and hazardous based on its proposed design and “peculiar characteristics.” *Id.*

{618} In addition, the railroads also argued that the crossing would interfere with their daily train operations because they were two separate and distinct railroad companies operating their respective trains according to their own schedule. *Id.*

{619} The *Village of Coldwater* court began its analysis of this issue by examining the meaning of the phrase “will not unnecessarily interfere.” *Id.* at 16.

{620} The court defined the term “unnecessary” as “not necessary; not required under the circumstances; useless; needless.” *Id.*

{621} Similarly, the court found the term “interfere” to mean “to come into collision; to clash; also to be in opposition; to run cross purposes.” *Id.*

{622} The court then noted that “every crossing whether it be a highway crossing or a railroad crossing interferes in a measure with the use of the property.” *Id.* at 18.

{623} The court also noted, however, that an at-grade crossing does not “unnecessarily interfere” with the reasonable use of a railroad’s property merely because it will inconvenience the railroad company or subject it to additional expense in transacting business or operating its road. *Id.*

{624} The *Village of Coldwater* court reasoned:

It is only the unnecessary interference that will preclude the municipality from extending its street across the railroad company’s right of way. The mere fact that the extension of the street as proposed will inconvenience the plaintiff, or interfere with the reasonable use of its property, or subject it to additional expense in transacting its business or operating its road, constitutes no ground for the interference of a court of equity (*Little Miami & Columbus & Xenia R.R. Co. v. Dayton*, 23 Ohio St. 510-519). It is only unnecessary interference with the use of its property that will allow a court of equity to intervene and prevent the appropriation of a right of way across its property.

*Id.* at 18-19 quoting *Cleveland Terminal & Valley R. Co. v. Akron*, 6 O.N.P., N.S., 81.

{625} In addition, the court found that the proposed crossing could be designed to alleviate the railroads’ safety concerns. *Village of Coldwater*, 14 Ohio Supp. at 18.

{626} After taking all of the facts and circumstances of the case into account and noting that the cost of an underpass would be prohibitive, the *Village of Coldwater* court held that the proposed at-grade crossing would not “unnecessarily interfere” with the reasonable use of the railroads’ property. *Id.* at 19.

{627} Specifically, the court found:

Surveying the whole picture, and taking into consideration that the Village of Coldwater is a thriving, growing, prosperous village of 2000 inhabitants, with 80% of its residential improvements in the northeast quarter of the village during the past ten years, that it would not be fair for this Court to say to Coldwater, “you must not grow, you must not expand in the northeast quarter of the Village, you must come in the front door, you must pass out the front door, you must put up with congestion, inconvenience and danger, you are hemmed in on three sides, there is no help.

*Id.*

{628} In this case, it is also clear that the proposed grade crossing at Plaza Boulevard will not “unnecessarily interfere” with the railroads’ train operations or the reasonable use of their property. See *R.C. §719.01(A); Village of Coldwater*.

{629} It is undisputed that all of the trains that CSXT and NSR alleged were held in the City of Mentor during the course of this litigation could be held in other locations in Northeast Ohio where they currently hold trains on a regular basis.

{630} In addition, after the Plaza Boulevard grade crossing is constructed and the Heisley Road crossings are grade separated, both CSXT and NSR will have more track space available for holding and staging trains in the City of Mentor than they currently have for such purposes.

{631} Thus, both CSXT and NSR will be able to hold trains in the City of Mentor in the same manner that they do today without changing their operations.

{632} Since control points can be viewed from approximately two miles away in regular conditions, both CSXT and NSR trains that are stopped short of the Plaza Boulevard crossing will be able to see the signals displayed at their respective control points and proceed at full speed based upon those signals.

{633} On those rare occasions when trains have stopped short of the Plaza Boulevard crossing and cannot see the nearest control point, both CSXT and NSR trains can proceed as they do at other various other locations on these very same tracks by getting assistance from their respective train dispatchers regarding the signal displayed on the nearest control point and proceeding at restricted speed until they see the signal.

{634} In the event that trains need additional warning time to stop safely before the Plaza Boulevard crossing, both CSXT and NSR can continue their practices of having train dispatchers give locomotive engineers and conductors advance notice of train stoppages by radio communication.

{635} In addition, as to CSXT, the signals displayed at intermediate signals in the vicinity of the Plaza Boulevard crossing can be reconfigured at a minimal cost so that they display an advance approach signal and give the locomotive engineers ample time to stop their trains short of the proposed crossing.

{636} Overall, even with the new Plaza Boulevard grade crossing, there will not be an increase in maintenance and liability costs because CSXT and NSR will no longer have any maintenance or liability costs at the Heisley Road grade crossings once construction of the overpasses at that location are completed in 2004.

{637} Also, when equipped with the state-of-the-art safety devices and technology proposed by the City of Mentor in its conceptual design, including four-quadrant gates and median barriers, the Plaza Boulevard grade crossing can be designed to be reasonably safe.

{638} The fact that the City of Mentor has not presented any definite or final plans regarding the safety features of the proposed crossing is not in any way fatal. See *City of Mentor v. Osborne*, No. 98-L-226 (11<sup>th</sup> Dist. Ct. Spp., Lake, 5-25-2001), 2001 WL 567622 (the fact that the appropriating authority did not create "definite or specific plans" with respect to the land's eventual use, outside of the stated purpose of parks, recreation, and environmental concerns, was not dispositive since there is no authority in Ohio requiring an appropriating agency to first prepare a development program for land prior to its acquisition, especially where the city provides a valid public purpose for the appropriation).

{639} Thus, based upon the evidence presented, this court finds that the proposed Plaza Boulevard grade crossing will not substantially or "unnecessarily interfere" with CSXT's and NSR's train operations or the reasonable use of their property. See R.C. §719.01(A); *Village of Coldwater*, supra.

**V. R.C. §4957.31 Is Not Preempted by the Interstate Commerce Commission Termination Act**

{640} The railroads are judicially and collaterally estopped from raising their preemption argument in light of the fact that the City of Mentor's request for an at-grade crossing was presented to the STB in connection with the Conrail acquisition proceedings and the railroads successfully argued that there was no basis for the STB to intervene in the City's request.

{641} The doctrine of judicial estoppel forbids a party “from taking a position that is inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.” *Teledyne Industries, Inc. v. NLRB* (6<sup>th</sup> Cir. 1990), 911 F.2d 1214, 1217, *quoting Reynolds v. Commissioner* (6<sup>th</sup> Cir. 1988), 861 F.2d 469, 472-73.

{642} “Judicial estoppel is an equitable doctrine that preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment.” *Teledyne Industries, Inc.*, *supra*, 911 F.2d at 1218.

{643} In addition, the judicial estoppel doctrine is applicable to proceedings before administrative agencies such as the STB. *Smith v. Montgomery Ward & Co.* (6<sup>th</sup> Cir. 1968), 388 F.2d 291, 292.

{644} The application of the judicial estoppel doctrine to administrative proceedings is justified on the grounds that “the truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.” *Rissetto v. Plumbers & Steamfitters Local 343* (9<sup>th</sup> Cir. 1996), 94 F.3d 597, 604.

{645} The judicial estoppel doctrine also applies when a party makes inconsistent jurisdictional arguments. *See Selected Risks Ins. Co. v. Kobelinski* (E.D. Pa. 1976), 421 F.Supp. 431, 434.

{646} In this case, both CSXT and NSR argued before the STB that this local grade crossing issue did not provide a reasoned basis for intervention by the STB and instead should be decided by the local state court.

{647} The STB accepted CSXT’s arguments and determined that this matter was properly in the Ohio state court system.

{648} Both CSXT and NSR now argue, however, that the R.C. §4957.31 is federally preempted by the ICCTA, the federal statute which the STB has exclusive jurisdiction to enforce. *See* 49 U.S.C. §10501.

{649} The railroad defendants’ arguments, however, are fatally inconsistent with their earlier argument to the STB that this court had jurisdiction over the City’s petition and that the STB lacked jurisdiction.

{650} Thus, CSXT and NSR are judicially estopped from arguing that R.C. §4957.31 is federally preempted by the ICCTA. See *Selected Risks Ins. Co.*, supra, 421 F.Supp. at 433.

{651} Based upon these facts, CSXT and NSR are also collaterally estopped from arguing that R.C. §4957.31 is federally preempted by the ICCTA.

{652} “Collateral estoppel, or issue preclusion, prevents a party from relitigating an issue of fact or law which was necessarily decided by a previous final judgment.” *Davis v. Washington County Open Door Home* (S.D. Ohio Sept. 21, 2000), 2000 U.S. Dist. LEXIS 20007, at \*29.

{653} Like the doctrine of judicial estoppel, collateral estoppel has also been applied to decisions made by administrative agencies. *Drummond v. Commissioner of Social Sec.* (6<sup>th</sup> Cir. 1997), 126 F.3d 837, 840; *Davis*, 2000 U.S. Dist. LEXIS 20007, at \*29.

{654} Thus, CSXT and NSR are precluded from relitigating in this court the issue of whether R.C. §4957.31 is preempted by the ICCTA and whether the STB has jurisdiction in this case. *Davis*, 2000 U.S. Dist. LEXIS 20007, at \*29.

{655} In addition, CSXT and NSR have also waived their arguments that R.C. §4957.31 is federally preempted by the ICCTA because of their previous arguments to the STB and because they both have argued to this court that: (1) this court does indeed have jurisdiction to consider the City of Mentor’s petitions for the proposed grade crossing and (2) the STB lacks jurisdiction over the construction of the proposed at-grade crossing in this case.

{656} The argument by the railroads that there is no estoppel or waiver because they are only asserting preemption in effect (which is allegedly consistent with their prior statements before the STB), is without merit.

{657} Before the STB, both railroads asserted that there was no reasoned basis for intervention by that agency in the City of Mentor’s request for the Plaza Boulevard grade crossing.

{658} If the proposed crossing would interfere with the railroads’ operations to the extent that R.C. §4957.31 would be preempted by federal law because of that negative

effect, then there would have been a reasoned basis for the STB to intervene in that matter to address this issue.

{659} The railroads, however, argued that the STB should not intervene and thus, at a minimum, implicitly asserted that there was no argument of preemption in effect.

{660} This conclusion is consistent with relevant case law regarding the STB's lack of authority or jurisdiction over the construction of new at-grade crossings. See *Bar Technologies, Inc. v. Conemaugh & Black Lick R.R. Co.* (W.D. Penn. 1999), 73 F.Supp.2d 512, 517(denying the defendant's motion to dismiss on the grounds that the STB has no jurisdiction over the construction or installation of a new grade crossing).

{661} Notwithstanding the railroads' prior legal maneuvering, their preemption arguments are without merit.

{662} It is well established that a federal statute may only be interpreted as preempting traditional state powers if such result is the clear and manifest purpose of the Congress. *Wheeling & Lake Erie Railway Co. v. Pennsylvania Public Utility Commission* (2001), 778 A.2d 785, 791, citing *Department of Revenue v. ACF Industries, Inc.* (1994), 510 U.S. 332, 127 L.Ed.2d 165, 114 S.Ct. 843.

{663} "As a general rule, preemption of the states' traditional police power by the federal statute is not favored." *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 791, citing *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210.

{664} Accordingly, "it has been consistently held that the states have the traditional police power reserved by the Constitution to regulate the public safety of the rail-highway grade crossings and allocate the costs of constructing, maintaining and improving such crossings." *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 791.

{665} Furthermore, the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10101 *et seq.*, is inapplicable to the present case.

{666} The ICCTA was created by Congress to decrease regulatory controls over the railroad industry and has been interpreted as preempting state law where the law at issue requires the railroad to undergo substantial capital improvements, such as

upgrading its class of track, relocating its yards, or upgrading speed along its wyes. *CSX Transportation, Inc. v. City of Plymouth* (E.D. Mich. 2000), 92 F.Supp.2d 643, 659.

{667} As set forth above, however, the construction of the proposed at-grade crossing at the Plaza Boulevard location will not require CSXT or NSR to undergo any substantial capital improvements.

{668} Specifically, there is no need for either CSXT or NSR to move any of its control points, intermediate signals, siding tracks, or crossover switches due to the construction of the proposed crossing.

{669} Although a single intermediate signal on CSXT's track at milepost 158 may have to be reconfigured for the convenience of its locomotive engineers and conductors so that they will have more advance notice of stopping at CP 162, this can be done at a minimal cost which the City of Mentor has offered to pay as part of the costs of constructing the proposed crossing.

{670} This can hardly be considered a "substantial" capital improvement given its minimal cost and the fact that the City of Mentor has offered to pay for the improvement. *City of Plymouth*, 92 F.Supp.2d 643, 659.

{671} Thus, based upon the evidence presented, this court finds that R.C. §4957.31 is not preempted by the ICCTA since the construction of the proposed crossing will not regulate the railroads in an economic sense nor require them to undergo any substantial capital improvements.

{672} The defendants also argue that the ICCTA preempts R.C. §4957.31 in this case because of the impact that the proposed crossing would have on their respective train operations.

{673} As set forth above, however, the proposed crossing will have only an insignificant impact on CSXT's and NSR's train operations and will not unnecessarily interfere with the reasonable use of their property. See R.C. §719.01(A).

{674} In fact, not only will both CSXT and NSR have more track space to conduct their holding and staging operations in the City of Mentor after the proposed grade crossing is constructed and the Heisley Road crossings are grade separated, but it is undisputed



that each train that the defendants claim were held in the City of Mentor during the course of this litigation could be held in various other locations throughout Northeast Ohio and in the City of Mentor itself where they currently hold and stage trains on a regular basis.

{675} Thus, based upon the evidence presented, this court finds that R.C. §4957.31 is not preempted by the ICCTA since the proposed at-grade crossing at Plaza Boulevard will have only an insignificant impact on CSXT's and NSR's train operations and will not unnecessarily interfere with the reasonable use of their property.

{676} Lastly, the argument raised by CSXT and NSR that R.C. §4957.31 is preempted by the ICCTA because the construction of the proposed crossing at Plaza Boulevard will require the City of Mentor to appropriate an easement over their respective tracks is also misplaced.

{677} Contrary to the railroads' arguments in this case, both the courts and the STB itself have recognized that the ICCTA does not preempt all state and local regulations that affect railroads and their operations. See *Florida East Coast Railway Co. v. City of West Palm Beach* (S.D. Fla. 2000), 110 F.Supp.2d 1367, 1376-1377, *aff'd.*, 266 F.3d 1324 (holding that the application of a city's zoning ordinances to safeguard the health and safety of its citizens was not preempted by the ICCTA); See also *New York Susquehanna and W. Ry. Corp.* (Sept. 9, 1999), STB Fin. Docket No. 33466, 6 (holding that a local law protecting the health and safety of the community and prohibiting railroads from dumping their wastes into the local waterways was not preempted by the ICCTA).

{678} Thus, it is clear that statutes and ordinances such as R.C. §4957.31, which are designed to protect the health, safety, and welfare of local communities, are not per se preempted by the ICCTA as the railroads suggest. See *Florida East Coast Railway Co. v. City of West Palm Beach*, 110 F.Supp.2d at 1376-1377; *New York Susquehanna and W. Ry. Corp.*, STB Fin. Docket No. 33466, 6.

{679} Indeed, the United States Court of Appeals for the Eleventh Circuit noted the following with respect to the ICCTA:

In this regard, [Florida East Coast Railway Company's ("FEC")] argument suggesting a conflict between the application of the West Palm Beach ordinances in this case and the federal railroad policy is particularly inapt. FEC's claim of pre-emption is based essentially on the supposed interference of West Palm Beach with the railroad's efficient allocation of its resources (by leasing its property to Rinker instead of performing such services itself). This microeconomic focus is not consistent with the stated purposes of the ICCTA. In reducing the regulation to which railroads are subject at state and federal levels, the ICCTA concerns itself with the efficiency of the industry as a whole across the nation. See 49 U.S.C. § 10101 (1994 & Supp. 1998). No statement of purpose for the ICCTA, whether in the statute itself or in the major legislative history, suggests that any action which prevents an individual firm from maximizing its profits is to [be] pre-empted. Naturally, at some level, all regulation places constraints on firms' profit-maximizing behavior; to allow FEC's argument to prevail would subsume all local regulation to the profit-maximizing priorities of individual railroad companies. The nationwide efficiency of the railroad industry, however, may still be preserved without necessarily denying the possibility of all local regulation.

*Florida East Coast Railway Co. v. City of West Palm Beach* (11<sup>th</sup> Cir. 2001), 266 F.3d 1324, 1339.

{680} Thus, the railroads' argument in this case that R.C. §4957.31 is preempted by the ICCTA if the proposed crossing has any impact whatsoever on their operations or profitability is clearly wrong. *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324, 1339.

{681} In addition, it is clear that the ICCTA does not specifically address the area of eminent domain and that the STB's jurisdiction does not extend to this area, which has historically been reserved to the states. See *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota* (S.D. S. Dakota 2002), 236 F.Supp.2d 989, 1011-1012 (holding that only those provisions of South Dakota's appropriation law which are regulatory in nature are preempted by the ICCTA).

{682} In this case, R.C. §4957.31 is clearly not regulatory on its face nor as applied to the particular facts in this case since the proposed crossing at Plaza Boulevard will only have an insignificant impact on the railroads' operations and will not unnecessarily interfere with the reasonable use of their property.

{683} In fact, neither CSXT nor NSR have cited a single case where a court has determined that a statute authorizing the construction of a new grade crossing was preempted by the ICCTA because the local highway authority was required to appropriate an easement over the railroad's track.

{684} Rather, the two cases cited by CSXT and NSR in support of this argument are clearly distinguishable from the present case.

{685} For instance, in *Wisconsin Central Ltd. v. The City of Marshfield* (W.D. Wisc. 2000), 160 F.Supp.2d 1009, the City of Marshfield sought to condemn and remove an entire "passing track" in order to realign an existing state highway. *Id.* at 1011.

{686} Thus, the District Court for the Western District of Wisconsin held that the use of state law to condemn the railroad's entire passing track was preempted by the ICCTA. *Id.* at 1013-1014.

{687} In this case, the City of Mentor has not sought to condemn an entire passing track as was the case in *Wisconsin Central Ltd.*, but rather would only require an easement over the railroads' tracks for the limited purpose of constructing a roadway that will not interfere with the railroads' reasonable use of their property.

{688} Similarly, in *Columbiana Cty. Port Authority v. Boardman Twp. Park Dist.* (N.D. Ohio 2001), 154 F.Supp.2d 1165, the Park District had previously appropriated a parcel of land which it believed included the rights to a railroad right-of-way and attempted to compel the discontinuation of rail service over that portion of track. *Id.* at 1179.

{689} However, the District Court for the Northern District of Ohio held that the state appropriation process was preempted to the extent that it was being used to prevent railroads from using their tracks to service customers. *Id.* at 1181.

{690} Thus, the District Court held that "the Park District lacks any legal or equitable basis for claiming ownership of the easement and may not legally bar CCPA and CCPR from providing rail service using the track." *Id.*

{691} Unlike the Park District in *Columbiana Cty. Port Authority*, the City of Mentor in this case has not sought to use the State of Ohio's appropriation statutes to compel the discontinuation of rail service by CSXT and NSR through the City of Mentor.

{692} Rather, the City has petitioned the court for permission to construct a grade crossing over the defendants' railroad tracks in an effort to alleviate traffic congestion in the city and protect the health, safety, and welfare of its citizens.

{693} Indeed, there has been no suggestion by either CSXT or NSR that the proposed crossing at Plaza Boulevard would prevent them from using their mainline tracks through the City of Mentor or that they would have to discontinue rail service through this area.

{694} Instead, the proposed crossing will have only an insignificant impact on their operations and will not unnecessarily interfere with the reasonable use of their property.

{695} Thus, based upon the evidence presented in this case, this court finds that R.C. §4957.31 is not preempted by the ICCTA merely because the construction of the proposed crossing at Plaza Boulevard will require the City of Mentor to appropriate an easement over their respective tracks.

### **CONCLUSION**

{696} The City of Mentor's traffic congestion poses a significant risk to the health, safety, and welfare of Mentor's residents and motorists. The Plaza Boulevard Connector is needed to protect the health, safety, and welfare of Mentor's residents and motorists. An underpass is not physically or economically feasible at the Plaza Boulevard location. The proposed at-grade crossing at Plaza Boulevard will be one of the safest in the State of Ohio because it will have the highest form of protective devices currently available. The proposed crossing will not have a significant impact upon the train operations of either CSXT or NSR.

{697} Accordingly, the construction of an at-grade crossing over the three mainline railroad tracks of Defendants CSX Transportation, Inc. and Norfolk Southern Railway Company at Plaza Boulevard is reasonably required to accommodate the public, in view of the difficulties and excessive expense of other methods of construction, and considering that once an at-grade crossing is constructed, federal, state, and railroad funding may be available to construct an underpass if it is found to be feasible and appropriate, and for other good and sufficient reasons. An at-grade crossing at Plaza

Boulevard would not substantially or unnecessarily interfere with the reasonable use of the railroads' property. The Interstate Commerce Commission Termination Act does not preempt R.C. §4957.31 or the court's action in granting the petition in this case.

{698} For these reasons, the City of Mentor is entitled to an order granting its petition for an at-grade crossing at the Plaza Boulevard location and finding that the crossing will not unnecessarily interfere with the railroads' train operations.

**ORDER**

{699} The petition of the City of Mentor under R.C. §4957.30 to construct a new highway-railroad at-grade crossing at Plaza Boulevard across the CSX Transportation, Inc. and Norfolk Southern Railway Company tracks is granted. The court will set a hearing on the measure of damages for the appropriation of the railroads' property under R.C. §163.01 *et seq.* at the court's earliest convenience.

{700} **IT IS SO ORDERED.**

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**JUDGE EUGENE A. LUCCI**

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