

Rail-Served Industrial and Commercial Properties: Tips for Property Owners

The first Law Corner article in February 2013 discussed the growth of passenger-focused, transit-oriented development in the Denver metropolitan area. In this issue, we address some of the unique considerations that arise when acquiring or developing a commercial or industrial site served by freight rail. This ongoing series of articles will explore other emerging development issues; we encourage NAIOP members to suggest topics by emailing us at bsilberstein@kaplankirsch.com.

Rail service provides a high-volume, energy-efficient means of moving supplies, goods and products to and from manufacturing facilities, warehouses, industrial parks, intermodal facilities and mixed use developments. In addition to the expected range of real estate-driven analyses, it is necessary to consider the unique regulatory environment in which railroads operate when evaluating rail service as part of a real property acquisition or development project. When dealing with rail-served properties, it is essential to communicate with the railroad that serves or will serve the property and to determine whether there is any federal jurisdiction over the rail facilities on the site as part of the due diligence phase. This article provides basic tips for property owners contemplating a number of development activities that involve rail service.

Bringing Rail to Your Property

The freight railroad industry is highly regulated by federal law, which governs whether an entity may operate a railroad or sell or acquire property used for rail transportation, and sets forth construction and safety requirements. Federal jurisdiction over rail transportation is broad-ranging and often preempts state and local laws and regulations.

The law governing the federal Surface Transportation Board, which regulates the acquisition and disposition of property used for rail operations and authorizes the construction of rail facilities, exempts incidental facilities such as yard track, industrial spurs and switching track from its regulation. This generally means that although the railroads that serve a particular property are under federal jurisdiction, no approval is required to build a spur track on to the property, and planning and development for the site may incorporate rail access without requiring federal agency approval.

However, to bring new service to a site, it will be necessary to coordinate with the railroad serving the property. Typically, rail facilities within the property boundaries are owned by the owner of the real property, although they may be maintained by the railroad if the property owner has contracted for such services.

If a system of tracks exists on your property or you are planning to install additional rail facilities, the more extensive such a system is – especially if tracks pass through the property rather than terminating there – the more analysis will be necessary to determine whether those rail facilities are subject to federal regulation. If so, federal authority will be required in order to construct rail facilities, but will not necessarily involve a lengthy approval process. For this reason, it is always advisable to analyze the regulatory status of any rail facilities on property you may be considering purchasing or developing.

Types of agreements that are likely to apply if a railroad will be providing rail service on your property include an easement, trackage rights agreement or license to allow the railroad to enter your property, and, if complex or large-scale rail operations are contemplated, an operations agreement.

Eliminating Rail on Your Property

To eliminate existing service and remove the tracks, it will be necessary to coordinate with the railroad serving the property and to determine the extent of federal jurisdiction over the rail facilities. Whether a particular segment of track is under federal jurisdiction or not is determined on a case by case basis. Federal authorization of abandonment of the rail facilities may be required before any demolition work can occur, but in many cases may be subject to an expedited approval process. Additionally, no activities that will interfere with a railroad's ability to provide freight service can take place until federal jurisdiction over any rail facilities is eliminated or determined not to apply.

Routing Utilities across Rail Corridors

Public utilities in Colorado have broad condemnation powers to obtain a right of way over others' property. However, such powers to condemn property used for rail operations may be limited by



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federal law depending on the degree to which the utility would interfere with freight rail operations. It is also important to be aware of where utilities and rail lines may intersect on your property. If the property has existing rail facilities, determine whether the utility has entered into a crossing agreement with the railroad or has agreed in writing to comply with the railroad's specifications for occupancy of the right-of-way. Failure to recognize and solve these issues could delay your development project.

Environmental Considerations

Careful environmental due diligence is in order when dealing with properties that have historically hosted rail operations or for which you are planning rail facilities. Whether looking back in time at historical uses or forward to anticipated activities, be prepared to address the allocation of risk for environmental claims or allocating the cost of remediating known contamination both with the seller and with any railroad that may serve the property.

Rail-Specific Financing Options

In addition to traditional financing mechanisms, a number of state and federal financing programs may be available to support the development of rail-related facilities. At the federal level, two loan programs provide funding for rail infrastructure development projects. Both public and private entities may be eligible for these loans:

- **Railroad Rehabilitation and Improvement Financing:**
The Federal Railroad Administration provides low-interest, long term loans to:
 - ◇ Acquire, improve or rehabilitate intermodal or rail equipment or facilities, including track, components of track, bridges, yards, buildings and shops; and to
 - ◇ Develop or establish new intermodal or railroad facilities.
- **Transportation Infrastructure Finance and Innovation Act Financing:** This program, administered by the U.S. Department of Transportation for the development and improvement of many different kinds of transportation infrastructure, provides direct loans, loan guarantees and standby lines of credit for transportation projects of national and regional significance. Eligible projects include intermodal freight transfer facilities.

Colorado administers economic development programs focused on rail development through the Office of Economic Development and International Trade. These include loans or grants for the development or improvement of rail transportation facilities, including spur tracks.

Site Planning and Rail Crossings

In general, site planning and development of a rail-served site will be subject to the range of state and local zoning and permitting requirements that generally apply to property development. However, a state or local review and permitting process that could interfere with a railroad's ability to provide service would be preempted by federal law.

At-grade roadway and rail crossings present unique issues. States, rather than the federal government, regulate at-grade crossings of both public and private roadways over rails. In Colorado the state Public Utilities Commission establishes the criteria for establishing, maintaining and eliminating at-grade crossings. If your property includes at-grade crossings of any roadway, coordination with the Public Utilities Commission will be necessary to alter those crossings.

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