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Sent via Email to slyons@boxeldercounty.org

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Box Elder County Planning Commission
1 South Main Street
Brigham City, Utah 84302

Re: Northshore Rail Services LLC's Petition to Vacate a Portion of Road at Approximately 18400 West East Promontory Road at the Southernmost End of Promontory Point.

Dear Planning Commission Members:

In anticipation of the Box Elder County Planning Commission meeting scheduled for Thursday, September 15, 2016 at 7:00 p.m., and pursuant to your request to receive input on the above-referenced petition, a soon-to-be owner of property that abuts the above-referenced County road, Promontory Point Resources, LLC ("PPR"), by and through its undersigned legal counsel, respectfully responds as follows:

Background

PPR is under contract to purchase the Promontory Point Landfill, located at 18900 W East Promontory Road on the South Western portion of Promontory Point (the "PPR Property"). The Property directly abuts the above-referenced County road ("Promontory Road") on both its Southern and Western borders. Moreover, Promontory Road is the principal access road in the area that provides ingress and egress to the PPR Property.

On August 18, 2016, Northshore Rail Services, LLC ("Northshore") submitted a Petition to Vacate a portion of Promontory Road (the "Petition"). More particularly, Northshore's Petition requests that a large portion of Promontory Road just East of the PPR Property be vacated. Northshore desires to vacate this portion of Promontory Road in order to construct a rail spur and loop track for its railroad operations.

Comments and Legal Analysis

That portion of Promontory Road that the Petition requests to vacate is of critical importance to both PPR and to the Public. Any loss of access to Promontory Road, whether temporary or permanent, would cause material injury to PPR and the Public. Therefore, to ensure access to the Property, PPR requests that no vacation take place until the proposed extension of Promontory Road is dedicated, fully constructed and open to the traffic. Completion must include the physical construction of the road along with the formal dedication of a public right-of-way prior to any vacation of Promontory Road.

Utah Code § 17-27a-609.5 provides that “[t]he legislative body may adopt an ordinance granting a petition to vacate some or all of a public street, right-of-way, or easement if the legislative body finds that: (a) good cause exists for the vacation; and (b) neither the public nor any person will be materially injured by the vacation.” As is explained below, material injury occurs when a property owner’s right of access is unreasonably encumbered.

The right of access is generally considered a property right, see *Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1324 (Utah Ct. App. 1988), and any material interference with such right is ordinarily held a special injury, differing in kind from injury suffered by the public, and consequently an injury for which a property owner may prosecute a proceeding for a private remedy. *Wright v. Wabash R. Co.*, 160 S.W. 549 (1913). Indeed, this property right of ingress and egress is within the constitutional provision that private property shall not be taken from public use without just compensation. *Hampton v. State Road Comm’n*, 445 P.2d 708, 712 (1968). Obstructions or encroachments in streets, which unreasonably hamper or destroy access to or egress from abutting property in whole or in part, are generally held to cause such special injury or damage as will support a private action either at law or in equity. *Humphrey v. Dunnells*, 131 P. 761 (1913). This rule has been applied to various types of obstructions and encroachments, including those licensed or permitted by the municipal authorities, and those which are not continual or continuous. *Gates v. City of Bloomfield*, 53 N.W.2d 279 (1952).

In addition to a private property right, there is also a public injury that would be incurred by an encumbrance to access to the Property. The PPR Property is subject to a Class 1 landfill permit. Recently, Box Elder County approved an amendment to Chapter 3-8 of the Box Elder County Land Use Management and Development Code replacing the Municipal Solid Waste Zone with the Solid Waste Zone. This amendment changed the zoning of the PPR Property from municipal solid waste to solid waste. Landfills are necessary for the public welfare. Loss of access to the PPR Property would adversely affect the public in that PPR would be unreasonably obstructed from pursuing its planned business of disposing of public waste.

CONCLUSION

PPR is very concerned that the vacation of Promontory Road will take place prior to the dedication and completion of the Promontory Road extension. If Promontory Road is vacated prior to the completion of the extension, Promontory Landfill together with the general public that benefits from its services will suffer an unreasonable encumbrance of the loss of access to the Property. As explained above, such a loss of access to a crucial road would be considered a material injury contrary to Utah Code § 17-27a-609.5.

Therefore, PPR respectfully requests that no vacation take place until the Promontory Road extension has been dedicated and is entirely completed. Moreover, PPR requests that "completion" be defined to include the physical construction of the road along with the formal dedication of a public right-of-way prior to any vacation of Promontory Road.

Sincerely,
SMITH HARTVIGSEN, PLLC



J. Craig Smith

