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Quick Reference Guide to Property-Based Regulations

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Real estate management invariably requires an understanding of economic principles and a certain artistic approach in dealing with persons and other interests involved. Beyond those having a direct interest in our leased properties and development sites, every property owner should understand the regulatory structure in place applicable to a particular project or site.

> "It will be of little avail to the people…if the laws are so voluminous that they cannot be read, or so incoherent that they cannot be understood…" – James Madison

While the rail industry, including those real estate holdings used or reserved for railroad purposes, is subject to the exclusive regulatory authority of the Surface Transportation Board, it does not mean that property managers are entirely exempted from having to deal with regulations outside of Federal railroad laws. Some, such as Federal environmental regulations, are held in full force and effect against railroad properties, and will come into play regardless of the parcel location or scope of the project. Others may apply indirectly, such as the necessity for trucking and transportation permits for local construction projects. And most managers, at one time or another, have tales of dealings with overzealous municipalities who seek to involve themselves in rail interests for various reasons.

The myriad of regulatory authorities that may apply to railroad real estate development continues to be an evolving universe. Completing the Federal government's deregulation of the rail industry, the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101, et seq., was enacted in 1995 and created the STB as the new sole, railroad regulatory body. Over the past 22 years, the new standards for preemption of local regulation have continued to develop through guidance issued by the STB and those court cases which have challenged its limits.

The summaries contained below attempt to categorize the most common forms of issues which property managers may encounter as part of the ownership, management, and development of railroad properties:

1. **Environmental Impact Assessment under NEPA and Clean Water Act (Section 404) Permits**. Railroad development project sites must undergo an assessment for any potential impact on wetlands and other bodies of water. If such wetlands or bodies are governed under the Clean Water Act (CWA) and are impacted by the project, permits may be required. Most common in rail construction projects, a Section 404 permit is required where owners seek to backfill wetlands or otherwise discharge dredged or fill material into designated navigable waters. In some cases, nationwide permits may be assembled to address potential impacts from the development. However, the discretionary issuance of the CWA permit by a federal agency does trigger a full environmental review under the National Environmental Policy Act (NEPA). NEPA requires the permitting agency to conduct an environmental assessment or environmental impact statement, which could add time and significant cost to a development project.

Outside of NEPA requirements, state and local governments may be preempted from requiring additional environmental review or permitting for railroad projects. As stated in the decision in *City of Auburn v. U.S.*, 154 F.3d 1025 (9th Cir. 1998), local authorities have no jurisdiction over rail construction, whether intended as economic regulations or for some other purpose.

2. **Drainage Features for Trackbed & Bridge Design**. Railroad trackbed drainage is a subject that is expressly regulated by Federal law (*see* 49 CFR § 213.33), and neither the government nor adjoining property owners can compel carriers to modify track and structure design to implement floodwater control for adjoining properties. *See Tubbs v. STB*, 812 F.3d 1141 (8th Cir. 2015). However, adjacent owners may bring an action against a carrier for damage caused by the redirection of natural water flows. Owners who alter the flow of surface water on their property must act with due care and in good faith to avoid unnecessary damage to adjoining property. In addition, rail carriers are responsible for maintaining existing water control features in good repair. Allowing culverts, levees, and other structures to become clogged or fall into disrepair can serve as the basis for civil litigation over flooding claims.

3. **Zoning & Local Building Permits**. Shortly after ICCTA was enacted, the STB expressly declared zoning regulations preempted against railroads in *Borough of Riverdale v. N.Y. Susquehanna & Western*, Finance Docket No. 33466 (Sept. 9, 1999). Since that time, several court decisions have applied the STB's reasoning to exempt railroads from traditional building permit application processes. (*See, for example, Ridgefield Park v. N.Y., Susquehanna & Western*, 750 A.2d 57 (N.J. Sup. Ct. 2000); *see also Soo Line v. City of Minneapolis*, 38 F.Supp.2d 1585 (D. Minn. 1998) (exempting the railroad from needing to undergo historical status review or obtain demolition permits). Buildings and other facilities constructed on railroad property may still be required to comply with local health and safety requirements such as building and electrical codes, and carriers must provide access for inspection, but any process for preapproval which could delay or condition approval is preempted.

   However, note that as with grade crossings, local governments are granted wide latitude to regulate public health and safety along public roads. Federal motor vehicle regulations and permitting procedures apply to federally-funded roadways, but secondary roads are often governed by local law. While municipalities are foreclosed from regulating rail facility building projects directly, attempts to exert control and general revenue through local road permitting fees for overweight vehicles is gaining popularity.

   In addition, zoning and other local regulations *may* still be enforced against lessees of railroad property and used to restrict non-railroad used by third parties. A number of challenges have been brought by local governments against transloading facility development. These challenges have failed in cases where the facility is developed, owned, and used by rail carriers in direct support of the transportation of bulk products and intermodal operations in interstate commerce. (*See, for example, Green Mountain RR v. Vermont*, 404 F.3d 638 (2nd Cir. 2005); *Norfolk Southern v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010).) By contrast, the development of facilities owned or operated by third parties or for purposes which are considered ancillary to railroad transportation are subject to local regulation. (*See FEC v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).)

4. **Property Maintenance**. Most local ordinances regulating property maintenance, such as those which require property owners to cut grass, control weeds, and prohibit dumping (or rather, require owners to clean up after trespassers illegally dump), are generally preempted. However, it is important to note that many states regulations on public grade crossings require clear lines of sight, which may be impacted by shrubbery and weeds and are not preempted. Similarly, if

maintenance issues or debris and refuse creates a separate hazard to the public or adjoining property, it can result in liability for the carrier. In the case *Emerson v. KCS*, 503 F.3d 1126 (10th Cir. 2007), the court allowed a civil claim for flooding allegedly caused by discarded railroad ties which blocked a drainage ditch.

5. **Eminent domain (Fee Simple Takings, Easements, & Crossings)**. Eminent domain proceedings by state and local governments are considered a form of regulation, and typically preempted under ICCTA. However, defending against such takings requires an analysis of the proposed effect on rail transportation. If the condemning body can prove that the taking will not adversely burden interstate commerce, it may be allowed to proceed. Generally, requests to acquire broad parcels of railroad operating property outright through condemnation are not permitted. (*See, for example, Union Pacific v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011) (local transit authority could not obtain excess right of way for its own use); *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) (land sought by city for drainage improvements and pedestrian trail preempted).)

   Partial takings, however, such as those used for easements and crossings, are routinely permitted. The authority to build roads and regulate vehicular traffic has long been recognized as a power necessarily reserved to state and local governments. Grade crossings and public safety regulations relating thereto have historically been granted wide exception from preemption arguments. *See Iowa, Chicago, & Eastern v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004). These principles have been expanded to require the granting of other forms of governmental and quasi-governmental easements as well. "Routine crossings with non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, and sewer crossings, are not preempted so long as they would not impede rail operations or pose undue safety risks." *Eastern Alabama Railway v. City of Sylacauga*, Finance Docket No. 35583 (STB, Mar. 9, 2012). This is not to say, however, that all crossing requests must be granted. Compatibility with rail operations and safety concerns still control, and in the event of unreasonable interference, a carrier may be able to deny a crossing request. *See City of Ozark, Ark. v. Union Pacific*, Finance Docket No. 36104 (STB, July 26, 2017).

6. **Adverse Possession**. Many states allow parties to claim title to real estate after having wrongfully possessed it for some term of years, commonly called adverse possession. Such claims against railroad operating property are considered state-law regulation of railroads, and are preempted on their face. *See Jie Ao & Xin Zhou v. Port of Seattle*, Finance Docket No. 35539 (STB, June 6, 2012).

7. **Noise and Nuisance Claims**. Ordinances which prohibit loud noise and other behaviors which may disturb neighbors are not enforceable against railroad operations. In *Guckenberg v. Wisconsin Central*, 178 F.Supp.2d 954 (E.D. Wisc. 2001) the court granted summary judgment against claims resulting from noise from switching operations.

While there are many nuances to the field of railroad regulation, the decisions noted above provide direction on how outside regulations may or may not apply. These principles continue to develop and become clearer as the STB issues new guidance and more cases are challenged by both claimants and carriers. As is often the case with real property, many of these issues inherently involve special circumstances which could lead to fact-based exceptions, so it is always best to consult with your law department for further information on particular matters.

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