



OFFICE OF CITY ATTORNEY

949 E. 2ND AVENUE

DURANGO, COLORADO 81301

TEL: (970) 375-5007

Email: dirk.nelson@durangogov.org

March 7, 2019

Jackie Miller
1900 Grant Street #725
Great Outdoors Colorado
Denver, CO 80203

Sent via email: Jmiller@goco.org

Re: Construction of Animas River Trail North

Dear Ms. Miller,

I have been provided with correspondence from Tim Wolf to you in the form of an email dated March 1, 2019. This letter is provided as the City of Durango's response to the false assertions contained in that email that the City has used the threat of condemnation to acquire trail easement.

In his email, Mr. Wolf implies, without explicitly saying so, that the City has taken actions that may be in breach of its agreement with Great Outdoors Colorado regarding the acquisition of right of way for the construction of the Animas River Trail North (the Trail).

I am sure you are aware that Mr. Wolf has been a vocal and tenacious opponent of the construction of the Trail in its planned location. He has raised numerous objections over the years and none of his attempts, either in the political or legal arenas have been successful. This must be seen as just another last minute effort to hold up an important and popular project that has been contemplated for more than ten years.

The right of way for much of this trail project was obtained by the City through a contract with the Durango and Silverton Narrow Gauge Railroad Company (the Railroad). Interestingly, that agreement was entered almost exactly ten years ago on February 17, 2009. That agreement was subject to an amendment dated February 17, 2009 and by a second amendment dated April 7, 2009. Copies of each of those documents are attached for your reference.

The agreement with the Railroad required it to defend any challenges to the validity of the conveyance of the trail easement to the City. The original agreement provided for a last resort remedy of condemnation in the event the Railroad could not clear up any challenges to the grant

of the easement to the City. However, the second amendment to the agreement added a provision that made it clear that the City Council retained the exclusive discretionary authority to make all determinations about the necessity of a condemnation, and that no such action could be taken without affirmative approval of the Council.

Mr. Wolf's continued challenges to the conveyance of the easement to the City caused the Railroad to file suit in La Plata County District Court in 2011, seeking a declaratory judgment from the Court to determine that the Railroad had the right to convey the trail easement to the City. That action did not in any way involve condemnation. Rather, it was based on the inherent authority of the Railroad to convey that right to the City.

The District Court ruled in June of 2012 that the Railroad was legally entitled to convey the easement to the City and that such conveyance was consistent with the scope of the Railroad's easement. That ruling was appealed by Mr. Wolf to the Colorado Court of Appeals, and the District Court ruling was affirmed by the Court of Appeals in August of 2013. The Colorado Supreme Court denied a petition for certiorari from Mr. Wolf, thereby ending that dispute. Those rulings affirmed the City's right to use the easement from the Railroad to construct and operate the trail as planned.

The outcome in the Declaratory Judgment action and the affirmation of that Order by the Court of Appeals clarified the ownership of the easement by the City and the right to construct the trail. The Railroad had met its duty under the contract to defend the easement and there was never any hint that any further legal action of any kind would be required to support that conveyance. That outcome eliminated any further need to negotiate with Mr. Wolf or to pay any further compensation of any kind to use the easement on his land.

The City is fully aware of the Constitutional prohibition of the use of GOCO funds for condemnation of property for use in a project. The City did not ever threaten the use of the powers granted to it as home rule municipality to complete this project, and the language in the agreements make it clear that the Railroad had no authority to threaten any kind of condemnation action without the explicit consent of the City Council. No request was ever made by the Railroad to engage in those discussions and there was never any consideration of that kind of action by the City Council. It simply was not necessary following the above referenced court rulings.

The only payment made by the City to acquire easement on the Wolf property was to the Railroad, and there have been absolutely no funds expended in any manner by the City that are in any way related to condemnation. Any assertion otherwise is false and misleading.

While the facts are different than the current situation in Durango, the Court of Appeals ruling in *Town of Silverthorne v. Lutz*, 370 P.3d 368 (Colo. App. 2016) is very instructive as to the issues related to the acquisition of a trail easement by the Town of Silverthorne. The Court in that case

soundly rejected a challenge from a disgruntled landowner that the Town had improperly used GOCO funds in a manner to support the threat of condemnation.

In conclusion, absolutely no funds of any kind and particularly no GOCO funds of any kind were used by the City to threaten or otherwise support an effort to condemn property to build this trail. And, no such efforts were taken by the Railroad on the City's behalf. There has been no violation of the certification contained in the GOCO application and no breach of the provisions of the GOCO grant agreement.

I trust that this will answer your questions, but if not, please feel free to contact me and I will be happy to provide you with additional information.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Dirk W. Nelson', with a long horizontal flourish extending to the right.

Dirk W. Nelson
Durango City Attorney

Section 2: a. The City shall grant a parking lease to the Railroad for the property it owns at College and Camino for a period of five years, effective from February 2007 at the rate of \$1 per year, with an option in favor of the City to terminate the Lease anytime after November 1, 2009 upon 180 days notice, should the property be needed by the City for other purposes.

b. The Railroad wishes to avail itself of the benefits of a 1031 tax exchange. Therefore, the City shall pay to an intermediary, Cooney and Associates, Inc. the sum of \$1,000,000 in good funds payable in installments of \$250,000 per year payable on or before February 28, 2009 and on the 28th day of February of each year thereafter until paid in full; subject, however, to the condition hereinafter set forth within this Section 2b. The balance of \$750,000 will be evidenced by a standard non-interest bearing promissory note payable according to the foregoing terms to Cooney and Associates, Inc.

The Railroad agrees that it shall promptly resolve any and all challenges, title disputes or encroachments that would impair or prevent the City's use of the trail easement granted pursuant to Section 1 of this Agreement. Further, the Railroad acknowledges and understands that the City cannot complete necessary design work for the trail segment to be constructed until such time as the easement location has been finally determined. Accordingly, the parties agree that the payments otherwise due under the promissory note payable to Cooney & Associates, Inc. may be deferred, if necessary, until such time as the title disputes, challenges, encroachments or other issues related to the City's unconditional right to utilize the trail easement have been resolved and determined, whether by negotiation, litigation or otherwise, or, alternatively, until the Railroad has acquired possessory rights in the portion of the right-of-way proposed for use by the City through a Court order pending further determination of the issues. Should the Railroad need to condemn property interests in order to remove encumbrances or title issues relative to the granted easement, the City agrees to cooperate in any such condemnation proceedings, including allowing such condemnation action(s) to be pursued in the name of the City; provided, however, all legal work relative to the title underlying the granted easement, including potential costs of condemnation, shall be borne exclusively by the Railroad.

Section 3: The trail shall be constructed or and reconstructed by the City in conformity with the City's plans and specifications as well as those prescribed by the Chief Engineer of the Railroad and in such manner and according to such plans as said Chief Engineer may reasonably deem best for the safety and proper protection of the tracks, roadbed and premises of the Railroad.

All work performed on said right-of-way in connection with the construction, or reconstruction of the trail shall be completed under the supervision of the Railroad. In addition, such activities shall be performed at times so as not to interrupt or interfere with the scheduled train services. Further, if any disturbance resulting from trail construction is detected in the track bed or other interference with the Railroad's service, construction will be halted immediately. The City acknowledges and agrees that notwithstanding the Railroad's supervisory rights set forth herein, nothing contained within this Agreement shall preclude the Railroad from participating in the public bidding process pertaining to the trail construction work at such time that bids are requested by the City.

The City shall pay to the Railroad, within 15 days after bills shall have been rendered therefor, all expenses incurred by the Railroad in connection with the supervision of the construction or

reconstruction of the trail (including the Chief Engineer's time), which expenses shall include all costs plus SEVENTEEN PERCENT (17%) to cover general administrative and overhead expenses .

Section 4. The City shall notify the Railroad at least 48 hours in advance of the commencement of any work except routine maintenance or repairs upon said right-of-way in connection with maintenance or repair of the trail segments, except in cases of emergency when work is necessary to avert loss or damage to the property of the City or the Railroad . In case of emergency work, the City will notify the Railroad of the emergency as soon as practical to allow the Railroad to have its employees on site.

Section 5: Except as otherwise provided herein, the City, shall bear all costs and expenses, incurred in connection with the maintenance or repair of the trail, including any and all expense which may be incurred by the Railroad in connection therewith for supervision or inspection, or otherwise, consistent with the terms of this Agreement.

Section 6: If the City fails to maintain the trail, the Railroad shall have the right after written notification to the City, if it so elects, though it shall be under no obligation whatsoever to do so, to make necessary or proper repairs, or to reconstruct said trail, notwithstanding the obligation of the City to maintain and repair said trail. In the event the Railroad at any time elects to repair or reconstruct said trail, the City shall, upon presentation of estimate, either advance such sum of money as the Chief Engineer of the Railroad may deem necessary for such repair or reconstruction work or perform the work with City personnel within a time frame acceptable to the Railroad . If the Railroad performs the work, it shall submit a billing for work performed and the City shall reimburse the Railroad for the reasonable costs of such repair or reconstruction, including general administration and overhead expenses as described in Section 3.

The optional right of the Railroad at any time to make repairs or to reconstruct said trail, shall in no manner or degree relieve the City from responsibility to the Railroad for the failure of the City to properly maintain or repair said trail.

Section 7: The Railroad shall, at its sole expense, make any and all modifications or changes in the trail, or move all or any part thereof to such new location as may be reasonably required by the Railroad at any time, in connection with the construction, maintenance, repair, use, operation, change, modification or relocation of railroad tracks or other appurtenances necessary for the proper operation of the railroad as a passenger train facility.

All the terms, conditions, and stipulations of this agreement with reference to the construction, maintenance, repair or reconstruction of the trail on said right of way, in the location herein before described, shall apply to the trail as modified, changed or relocated within the contemplation of this section.

Section 8: City shall fully pay for all materials, joined or affixed to, and labor performed upon, said right-of-way in connection with the maintenance or repair, of the trail, and shall not permit or suffer any mechanics' or material men's liens of any kind or nature to be enforced against said right-of-way for any work done or materials furnished thereon, at the instance or request, or on behalf

of the City. The City shall indemnify and hold harmless the Railroad from and against any and all liens, claims, demands, costs and expenses of whatsoever nature, in any way connected with or growing out of such work done, labor performed, or materials furnished.

Section 9: In the event the City shall take down any fence of the Railroad or in any manner move or disturb any of the other property of the Railroad in connection with the construction, maintenance, repair, or reconstruction of the trail, then and in that event the City shall, as soon as possible, and at its sole expense, restore such fence and/or such property to the same condition as it was in before such fence was taken down or such other property was moved or disturbed, and the City shall indemnify and save harmless the Railroad from and against any and all liability, loss, damages, claims, demands, costs and expenses of whatsoever nature, including court costs and attorney's fees, which may result from injury to or death of persons whomsoever or damage to or loss or destruction of property whatsoever, when such injury, death, damage, loss or destruction grows out of or arises from the taking down of any fence or the moving or disturbing of any of the other property of the Railroad .

Section 10: The City shall indemnify and hold harmless the Railroad from and against any and all liability, loss, damage, claims, demands, cost and expenses of whatsoever nature, including court costs and attorney's fees, which may result from injury to or death of persons whomsoever (including employees and passengers of the Railroad), or damage to or loss of or destruction of property whatsoever (including damage in the roadbed, tracks, equipment, or other property of the Railroad or property in its care or custody) if such injury, death, loss, destruction or damage grows out of or arises because of the existence of the trail or the operation, construction, maintenance, repair, modification, reconstruction, revision, or relocation of the trail, or any part thereof.

Neither the right of supervision by the Railroad of the location, construction, maintenance, repair, reconstruction or relocation of the trail, nor the exercise or failure to exercise said right, nor the approval or failure to disapprove by the Railroad of the location, construction, maintenance, repair, or reconstruction of said trail, nor the election of the Railroad to repair or reconstruct the whole or any part of said trail shall be deemed a waiver of the obligation of the City contained in this section, or a release therefrom or from any other obligation of this contract resting upon said City that is hereinbefore or hereinafter expressed or implied.

Section 11: The waiver by the Railroad of a breach of any condition, covenant, or agreement herein contained to be kept, observed and performed by the City, shall in no way impair the right of the Railroad to avail itself any subsequent breach thereof.

Section 12. Special Provisions:

A. It is the intent of the parties to grant the City the right to build a pedestrian and bicycle trail within a non-exclusive easement 14 feet in width, together with a temporary construction license as required of sufficient width to allow construction of the trail segments extending from 32nd Street northward to the north end of the City limits at what is known as the Iron Horse Inn property. It is understood that the temporary license may exceed 14 feet in width where necessary to build retaining walls in certain areas of the trail. Provided, however, no structure shall be built within nine (9) feet from the edge of the Railroad ties.

B. The trail may be constructed within the Railroad's right-of-way on either side of the centerline of the railroad tracks. If this occurs, it will require a number of railroad crossings. The crossings will be limited to pedestrian and bicycle uses, and maintenance vehicles of the City, as well as those of the Railroad. There are also some existing crossings for private property owners, which crossings may be utilized by the City as part of the trail easement.

C. Upon completion and construction of the trail, a specific as-built non-exclusive trail easement will be granted to the City stated by metes and bounds or other appropriate designation.


D. In the event it becomes necessary in the future to change the location of the trail easement, the appropriate modification will be made and the parties agree to the sign the same after such modification has been finalized and constructed.

E. In the event any property owner over which the Railroad's right-of-way traverses (whether such right-of-way be in the form of fee title, easement, or right-of-way agreement) challenges the City's right to acquire or utilize the trail easement, the Railroad will, at its sole expense, defend any such challenge, or negotiate a resolution of such claim or challenge acceptable to all parties, including the City. In the event it becomes necessary for the City to condemn any section of the trail easement in order to have a continuous trail from 32nd Street to the end of the Iron Horse property as contemplated by this agreement, the Railroad will engage special counsel to prosecute such condemnation action in the name of the City and shall pay for the costs associated with such condemnation, including but not limited to, costs, expenses, attorneys fees and payment of the condemnation awards. However, if these costs, expenses, fees and/or award collectively exceed the sum of \$300,000, the Railroad shall have the right to terminate this Agreement and the trail easement. In this event, the Railroad may record a document declaring this Agreement and the trail easement void and of no further force and effect. In such event, any obligations otherwise due and owing from the City pursuant to the promissory note described in Section 2.b. or this Agreement shall be cancelled and forgiven.

F. The Railroad will post a cash bond in the amount of \$300,000 in the form of a Certificate of Deposit, Letter of Credit or other security for a period of time equivalent to the statute of limitations applicable to challenges to the grant of easement herein described which is acknowledged to be a period of 18 years from the date of use by the City, or until such time as the Railroad has obtained a decree quieting title to the right-of-way over which the easement is granted, whichever should first occur, to ensure payment of the Railroad's obligations pursuant to subsection E. of this Section 14.

Section 13: This Agreement shall take effect as of the date of its execution by the last party to sign said Agreement, and shall continue in full force and effect, and shall survive the conveyance, granting and recording of the as-built trail easement.

Section 14. NOTICES: All notices required to be given in this Agreement shall be in writing and hand delivered and receipted for or by depositing same in the United States mail, certified or registered, with postage prepaid thereon, and addressed to the parties at their respective addresses

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5.19.9


set forth below:

The Durango & Silverton
Narrow Gauge Railroad Company
479 Main Avenue
Durango, Colorado 81301

City Manager
City of Durango
949 East 2nd Avenue
Durango, Colorado 81301

Section 15. TERMS APPLICABLE TO CONSENT OR APPROVAL AND APPLICABLE TO INDEMNIFICATIONS. Wherever within this Agreement consent or approval of either party is suggested or required, it is understood and agreed that such consent or approval shall be subject to a standard of reasonableness and shall not be unreasonably withheld.

Wherever within this Agreement the City agrees to indemnify the Railroad or hold the Railroad harmless, it is understood and agreed that such obligation is subject to the monetary limits and protections of the Colorado Governmental Immunity Act and that nothing within this Agreement shall be construed or interpreted as a waiver or impairment of the rights and protections under said Act.

Section 16: The parties agree that this Agreement shall not be recorded, but a Memorandum thereof may be recorded with the Clerk and Recorder's office of La Plata County.

Section 17. SINGULAR AND PLURAL, MASCULINE AND FEMININE: All terms and words used in this Agreement, regardless of the number and gender in which they are used, shall be construed to include any other number, singular or plural, and any other gender, masculine, feminine, or neuter, as the context or sense of this Agreement or of any paragraph of this Agreement may require, as if such words had been fully and properly written in the appropriate number and gender.

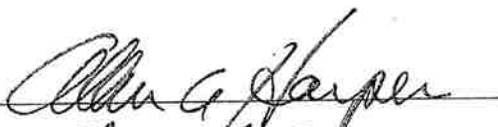
IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate as of the date first herein written.

GRANTOR:

GRANTEE:

THE DURANGO & SILVERTON
NARROW GAUGE RAILROAD COMPANY

CITY OF DURANGO

By: 
Chair/CEO

By: 

2008-13
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**AMENDMENT TO
ANIMAS RIVER TRAIL AGREEMENT**

THIS Amendment to Animas River Trail Agreement is made and entered into by and between The Durango & Silverton Narrow Gauge Railroad Company, a corporation of the State of Colorado, 479 Main Avenue, Durango, Colorado 81301 (hereinafter "Railroad") and the City of Durango, Colorado, a Municipal Home-Rule Corporation, 949 East 2nd Avenue East 2nd Avenue, Durango, Colorado 81301 (hereinafter "City").

WHEREAS, the parties have contemporaneously herewith executed that certain agreement titled Animas River Trail Agreement; and

WHEREAS, it is the mutual desire of the parties to supplement specific provisions within said Agreement;

NOW, THEREFORE, in consideration of the execution of the Animas River Trail Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby expressly acknowledged, the parties agree as follows:


1. The provisions set forth within subsection E. of Section 12 (Special Provisions) of the Animas River Trail Agreement are supplemented by the amendment of the last sentence of said subsection E. to read as follows:

In such event, any obligations otherwise due and owing from the City pursuant to the promissory note described in Section 2.b. of this Agreement shall be cancelled and forgiven, and all sums previously paid to the Railroad by the City pursuant to this agreement shall be promptly refunded to the City.

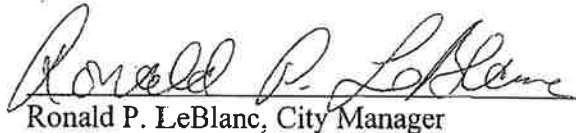
2. Except as herein modified, all remaining terms of the Animas River Trail Agreement are hereby ratified and confirmed.

Executed at Durango, Colorado this 17th day of February, 2009.

The Durango & Silverton Narrow Gauge
Railroad Company, a Colorado corporation


Allen A. Harper, Chair/CEO

City of Durango, Colorado, a Municipal
Home-Rule Corporation


Ronald P. LeBlanc, City Manager

**SECOND AMENDMENT TO
ANIMAS RIVER TRAIL AGREEMENT**

This Second Amendment to Animas River Trail Agreement is made and entered into by and between the Durango & Silverton Narrow Gauge Railroad Company, a corporation of the State of Colorado, 479 Main Avenue, Durango, Colorado 81301 (hereinafter "Railroad") and the City of Durango, Colorado, a Municipal Home-Rule Corporation, 949 East 2nd Avenue, Durango, Colorado 81301 (hereinafter "City").

WHEREAS, the parties have previously executed an agreement titled Animas River Trail Agreement under date of February 17, 2009 (hereinafter the "Agreement"), providing for the purchase by the City and the sale by the Railroad of an easement along the Railroad right-of-way for an extension of the Animas River Trail from 32nd Street northward to the city limits of the City of Durango; and

WHEREAS, the parties also executed an Amendment to Animas River Trail Agreement on February 17, 2009 (hereinafter the "Amendment"); and

WHEREAS, it is the mutual desire of the parties to further supplement specific provisions within the Agreement, as heretofore modified or supplemented by the prior Amendment;

NOW, THEREFORE, in consideration of the prior execution of the Animas River Trail Agreement and the Amendment to said Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby expressly acknowledged, the parties agree as follows:

1. Notwithstanding anything to the contrary which may be stated or implied within the Agreement or the Amendment, the parties acknowledge and agree that representatives of the City shall be participants in all discussions and/or negotiations with property owners whose property adjoins or is traversed by the proposed trail alignment along the Railroad right-of-way.
2. Section 12.E. of the Agreement is modified and supplemented to provide that in the event there is a request by the Railroad to utilize the condemnation authority of the City due to an inability to negotiate a reasonable resolution of issues that may arise relative to the existence of or use of the Railroad's right-of-way for purposes of granting the easement for the pedestrian and bicycle trail as described in the Agreement, it is understood and agreed that the City Council of the City of Durango shall retain the exclusive discretionary authority to make the determination as to whether the proposed condemnation of a private property interest is both necessary and consistent with the overall health, safety and welfare of the public. Should the Council determine that use of condemnation authority is either inappropriate or inconsistent with the health, safety and welfare of the public, such authority shall not be available for use by the Railroad.


Except as herein modified or supplemented, the terms, conditions and provisions of the Animas River Trail Agreement, as modified by the Amendment to said Agreement dated February 17, 2009, are hereby ratified and confirmed.

IN WITNESS WHEREOF, the parties have executed this Second Amendment to Animas River Trail Agreement this 7 day of April, 2009.

The Durango & Silverton Narrow Gauge
Railroad Company, a Colorado corporation


Allen A. Harper, Chair/CEO

City of Durango, Colorado, a Municipal
Home-Rule Corporation


Ronald P. LeBlanc, City Manager