

Del Mar City Council Special Meeting Agenda

Del Mar City Hall – Via Teleconference Only
1050 Camino del Mar, Del Mar, California

February 7, 2022 City Council Special Meeting

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From: tomgrindle@gmail.com
Sent: Monday, February 7, 2022 8:37 AM
To: 'Dwight Worden'; Terry TG. Gaasterland; 'David Druker'; 'Dan Quirk'; Tracy Martinez
Cc: City Clerk Mail Box
Subject: RED DOT--NCTD License Agreement/Fencing; Closed Session Items A and B1

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Honorable Mayor and City Council Members,

I am writing you about the ongoing situation with NCTD and proposed fencing on the Del Mar Bluffs. My wife and I have deep roots in Del Mar; we have lived in our home on Melanie Way for over 30 years; we have raised both our children here; both of our kids have worked for the City as lifeguards; in fact the street we live on, Melanie Way, was named after our daughter. During this time, I have regularly crossed the bluffs to access the beach.

I have spent my entire 35 year working career as a real property attorney. During that career I've represented some of the largest landowners not only in the county but in the nation. I am extremely familiar with commercial real property license agreements such as the agreement NCTD is asking Del Mar to sign in exchange for reduced fencing. In my experience, that agreement is very reasonable; it is very similar to most such agreements utilized in commercial real property transactions throughout the state.

I understand that the City is concerned about the indemnity clause in the proposed Agreement. I do not believe, however, that this concern is warranted. The indemnity provision in the Agreement is limited and is very reasonable. The City is only required to indemnify NCTD for claims arising: (1) within the License Area (which is defined in the Agreement and presumably would not include the actual railway tracks); (2) from the City's own actions, which is a very common requirement in commercial real property license agreements. So for the indemnity to kick in, the claim would be from something that happened within the License Area (not the actual tracks) AND caused by something the City (or its contractor or employee) did.

To me, this indemnity requirement is a very reasonable requirement to ask of the City – be responsible for what the City does. I would also point out that the City already has this liability exposure as the underlying landowner. Finally, the indemnity clause is mutual, meaning NCTD indemnifies the City from any claims that arise from the actual railroad track area. The City can also (or already has) obtain insurance for this type of liability.

The Agreement does require that the City act reasonably in preventing people to access the tracks. But this requirement does NOT increase the City's current liability exposure. Today, without any agreement in place, if the City acts unreasonably in allowing someone to access the tracks resulting in a train strike injury, the City will be liable directly for the damages resulting from that injury. Likewise, if NCTD is sued for that injury, the City will be liable to NCTD under an equitable indemnification claim. So the agreement does not change the City's ultimate liability.

The Agreement requires the City to obtain insurance to cover claims arising in the License Area. Such insurance, however, would also protect the City against any claims that it acted unreasonably in preventing access to the tracks. Quite frankly this type of insurance is something the City should obtain in any event; indeed, the City's current insurance may already cover this area/requirement.

Likewise some of the other clauses, that although on their face may seem somewhat unfair or one-sided, should not serve as the basis to not sign the agreement. Most, if not all these clauses, are what I typically call a “what if, what if” scenario that realistically will never occur---for example, the anti-vibration waiver (section 17) covers a scenario that will never occur. In Del Mar’s 60+ year history, it has never even considered making such a claim. Therefore that clause has no impact because the City would never make that type of claim in any event.

Although fencing the bluffs is not ideal, the reduced fencing plan offered by NCTD in exchange for the Agreement is a reasonable compromise. I urge you to negotiate the best agreement you can but in the end sign the License Agreement with NCTD so that we can avoid their most extreme fencing threat.

Regards,
Tom Grindle