

NORTH CAROLINA
CUMBERLAND COUNTY

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION

DATE: January 31, 2019

AND

CROSSING CLOSURE AGREEMENT

CSX TRANSPORTATION, INC.

TIP: B-4490

WBS: 33727

AND

NORFOLK SOUTHERN RAILWAY COMPANY

AND

CITY OF FAYETTEVILLE

This **CROSSING CLOSURE AGREEMENT** ("Agreement") is made and entered into on the last date executed below, by and among the North Carolina Department of Transportation, an agency of the State of North Carolina, hereinafter referred to as the "Department;" CSX Transportation, Inc., a corporation of Virginia, hereinafter referred to as "CSXT;" Norfolk Southern Railway Company, a corporation of Virginia, hereinafter referred to as "NSR;" and the City of Fayetteville, a local government entity, hereinafter referred to as the "Municipality." Individually, each shall be referred to as "Party," and collectively, as "Parties."

WITNESSETH:

WHEREAS, the Department is planning on replacing Bridge #116 over CSXT and NSR rail lines on NC 24/210 in Cumberland County under Project B-4490; and,

WHEREAS, in order to construct Project B-4490, and improve and promote safer and more efficient rail and highway operations along active railroad corridors, the Parties have identified the municipal at-grade crossing on Hillsboro Street (CSXT Crossing No. 629 904K, milepost AE 209.03 and NSR Crossing No. 465 915R, milepost VF 42.61; hereinafter referred to individually as the "CSXT Crossing," "NSR Crossing," and collectively as the "Crossings") for closure, which is within the municipal corporate limits and is hereinafter referred to as the "Project;" and,

WHEREAS, the governing board of the Municipality executed a Resolution on the ____ day of _____, 201_ (attached as Exhibit A) that ordered the permanent closure of the municipal at-grade CSXT Crossing on Hillsboro Street, and was properly recorded with the Office of the Register of Deeds in Cumberland County, in accordance with N.C. Gen. Stat. § 160A – 299; and,

WHEREAS, the Department has programmed funding in the approved State Transportation Improvement Program (STIP) for the Project; and,

WHEREAS, this Agreement is made for purpose of participating in the planning and construction of the Project, as approved by the Board of Transportation, and pursuant to the authority granted to the Department by the North Carolina General Assembly including, but not limited to, the following legislation: N.C. Gen. Stat. §§ 136-18, 20, and 66.3; and,

WHEREAS, the Parties agree to participate in the cost of the Project and/or to assume the maintenance responsibilities as addressed in this Agreement; and,

NOW, THEREFORE, this Agreement states the promises and undertakings of each Party as herein provided, and the Parties do hereby covenant and agree, each with the other, as follows:

1. PROJECT SCOPE AND CONSTRUCTION

a. SCOPE OF PROJECT

The Project shall consist of the permanent closure of the Crossing, which work shall include, but not be limited to, the removal of timbers, approaches, debris, signage, pavement markings and stop bars, signals, warning devices, whistle posts and all necessary materials related to the rail crossings and approaches (hereinafter, the "Crossing Closure").

b. CONSTRUCTION BY THE DEPARTMENT

The Department, and/or its agents, at no cost to CSXT, NSR, or the Municipality, shall construct the Project in accordance with the approved Project plans and specifications, and all federal and State policies and procedures. Specific construction work to be performed by the Department shall include, but not be limited to, the following:

- (1) removal of applicable roadway approaches and subsequent debris;
- (2) removal of all applicable crossing related signage; and
- (3) installation of red diamond "end of road" (OM4-3) signage, barricades, and landscaping at the specified location.

c. CONSTRUCTION AUTHORIZATION

CSXT, NSR, and the Municipality may proceed with the construction of the Project located within their respective right(s)-of-way upon that Party's receipt of a written Construction Authorization from the Department.

d. CONSTRUCTION BY CSXT

All Project work performed within the right(s)-of-way of CSXT, NSR, and/or their agents, shall be performed at no cost to the Department nor the Municipality, in accordance with the approved Project plans and specifications, and adhere to all federal and State policies and procedures.

Specific work to be performed by CSXT and NSR shall include, but not be limited to, the following:

- (1) removal of all pavement, timbers, and cross bucks at the Hillsboro Street Crossing Closure; and
- (2) providing any necessary railroad flagging.

2. STANDARD PROVISIONS

a. ENVIRONMENTAL/PLANNING DOCUMENTATION

The Department shall prepare the environmental and/or planning document, including any environmental permits, needed to construct the Project, in accordance with the National Environmental Policy Act (NEPA) and all other appropriate environmental laws and regulations. If required, the Department will design an erosion control plan for the Project.

b. DESIGN

The Department, and/or its agent, shall prepare the Project's plans, specifications, and a professional estimate of costs (PS&E package) needed to construct the Project. All work will be done in accordance with applicable federal and State standards, specifications, policies, and procedures. Project plans shall be submitted to CSXT, NSR, and the Municipality for review and comment. All comments shall be submitted to the Department in writing within sixty (60) days of receipt of the plans from the Department. If no comments are received from CSXT, NSR, or the Municipality within sixty (60) days, the Department and CSXT, NSR, and the Municipality shall conduct a conference call meeting within five (5) business days thereof to discuss the status of the plans review.

c. UTILITIES

(1) UTILITY CONFLICTS

It is understood that there are no utilities in conflict with the Project or associated improvements. In the event utility conflicts are discovered within the Project area, the Department shall be responsible, at their sole expense, for the relocation and adjustment of the utilities.

(2) MUNICIPAL UTILITY CONFLICTS

The Municipality shall exercise any rights which it may have under any franchise to effect all necessary changes, adjustments, and relocation of telephone, telegraph, and electric power lines; underground cables, gas lines, and other pipelines or conduits; or any privately or publicly owned utilities. Utilities shall be promptly adjusted so that Project construction by the Department and CSXT is not delayed.

(3) UTILITY RELOCATION POLICY

All utility work shall be performed in a manner satisfactory to and in conformance with applicable State and federal rules and regulations, prior to the Department and/or CSXT beginning construction of the Project. Utilities shall be relocated and adjusted in accordance with the Right of Way Acquisition Policy contained in the Federal-Aid Policy Guide, Title 23 of the Code of Federal Regulations, Part 710, Subpart B.

d. RIGHT OF WAY (ROW) and RIGHT OF ENTRY (ROE)

(1) ROW FOR THE CROSSING CLOSURE

It is understood that all work for the Crossing Closure shall be contained within the existing right of way of CSXT, NSR, and the Municipality.

(2) ROE FROM CSXT TO DEPARTMENT

CSXT, subject to its right to operate and maintain its railroad over and along its right-of-way, hereby grants the Department and the Municipality a Right of Entry for access to any necessary CSXT owned or operated property in order to perform the Crossing Closure work and any improvements as defined by the Project plans. The Department and/or Municipality, and/or their contractors, shall provide notice to CSXT of their proposed entry onto CSXT right-of-way or property, and shall secure CSXT's approval to enter such right-of-way or property. The Department and/or Municipality shall coordinate with CSXT to ensure appropriate protection is in place for any such entry.

(3) ROE FROM NSR TO DEPARTMENT

NSR, subject to its right to operate and maintain its railroad over and along its right of way, hereby grants the Department and the Municipality a Right of Entry for access to any necessary NSR owned or operated property in order to perform the Crossing Closure work and any improvements as defined by the Project plans. The Department and/or Municipality, and/or their contractors, shall provide notice to NSR of their proposed entry onto NSR right-of-way or property, and shall secure NSR's approval to enter such right-of-way or property. The Department and/or Municipality shall coordinate with NSR to ensure appropriate protection is in place for any such entry.

(4) ROE FROM THE MUNICIPALITY TO THE DEPARTMENT, CSXT, AND NSR

The Municipality hereby grants the Department, CSXT, and NSR a Right of Entry for access to any necessary municipally-owned street or property in order to perform the Crossing Closure work and any additional Improvements as defined by the Project plans.

e. CONSTRUCTION PROCEDURES

(1) CONTRACTOR PROCUREMENT

In accordance with Federal-Aid Policy Guide, Title 23 Code of Federal Regulation, Part 646, Subpart B, a railroad is allowed to accomplish construction by the following: (1) railroad force account; (2) contracting with the lowest qualified bidder based on appropriate solicitation; (3) existing continuing contracts at reasonable costs; or (4) contract without competitive bidding, for minor work, at reasonable costs.

A. Force Account

CSXT and NSR may use its own forces or an existing continuing contract to perform the construction work. If CSXT and NSR elect to use railroad force account or an existing service contract, CSXT and NSR shall notify the Department and provide the Department with requested justification documentation. It is understood that CSXT and NSR intend to use railroad force account or an existing continuing contract for any construction work hereunder.

B. Advertising for Bids

If CSXT and NSR advertises for construction bids, CSXT and NSR shall follow applicable federal procedures according to Title 49 of the Code of Federal Regulations, Part 18.36 and Title 23 of the Code of Federal Regulations, Part 633, Subpart A, and Part 646 Subpart B.

C. Construction Subcontractor Requirement:

In the event the performance under this Agreement is financed in whole or in part by federal funds, any contract entered into with another party to perform work associated with the requirements of the Agreement shall contain appropriate provisions regarding the utilization of Disadvantaged Business Enterprises (DBEs), or as required and defined in Title 49 Part 26 of the Code of Federal Regulations and the North Carolina Administrative Code.

(2) CONTRACTOR COMPLIANCE

CSXT, NSR, and Municipality, and/or their agents, shall be responsible for ensuring that its contractor complies with all of the terms of the contract and any instructions issued by the Department as a result of any review or inspection made by said representatives.

(3) RIGHT TO INSPECT

The Department may inspect any portion of the work being performed by CSXT, NSR, and Municipality, and/or their contractors, to ensure compliance with the provisions of this Agreement. Any deficiencies inconsistent with approved plans and specifications found during an inspection must be corrected.

(4) CHANGE ORDERS

If any changes in the Project plans are necessary, the Department shall approve such changes prior to the work being performed.

(5) E-VERIFY COMPLIANCE

E-Verify is the federal program operated by the United States Department of Homeland Security and other Federal agencies, or any successor or equivalent program, used to verify the work authorization of newly hired employees pursuant to federal law. The Parties warrant that they and any subcontractor performing work under this Agreement: (i) uses E-Verify if required to do so by North Carolina

law; and (ii) otherwise complies with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes. A breach of this warranty by any Party will be considered a breach of this Agreement, which entitles the other Parties to terminate this Agreement, without penalty, upon notice to the breaching Party.

f. MAINTENANCE

- (1) The Municipality shall be responsible for the maintenance of all roadway improvements located on municipal streets, at no expense to the Department, NSR, nor CSXT, upon completion and acceptance of the Project by the Department, NSR, and CSXT.
- (2) CSXT shall be responsible for the maintenance of all improvements done within CSXT's operating right-of-way, at no expense to the Department or the Municipality.
- (3) NSR shall be responsible for the maintenance of all improvements done within NS's operating right of way, at no expense to the Department or the Municipality.

3. OTHER PROVISIONS

a. PERMANENT CLOSURE

The Department, CSXT, NSR, and Municipality fully recognize that the Crossing Closure covered under this Agreement is intended to be perpetual, and that one Party shall not petition any other Party or entity to reopen the subject at-grade crossing. It is also agreed by the Department, CSXT, NSR, and Municipality that no new at-grade public or private crossing will be opened in the vicinity of the closed crossing.

b. CONFLICT OF INTEREST

No member, officer, or employee of the Department, CSXT, NSR, or Municipality shall have any interest, direct or indirect, in this Agreement or the proceeds therefrom.

c. AGREEMENT MODIFICATIONS

Any modification to this Agreement shall be agreed upon in writing by all Parties prior to being implemented.

d. TRANSFER OF RESPONSIBILITIES

The Department shall approve any assignment or transfer of responsibilities of CSXT, NSR, and the Municipality set forth in this Agreement prior to an assignment or transfer of responsibilities to other entities.

e. INDEMNIFICATION

To the extent authorized by State and federal claims statutes, the Parties shall be responsible for their respective actions under the terms of this Agreement and indemnify and save harmless the other Party(ies) for any claims for payment, damages, and/or liabilities arising as a result of such action.

f. DEBARMENT POLICY

It is the policy of the Department not to enter into any agreement with another party that has been debarred by any government agency (Federal or State). By execution of this Agreement, CSXT, NSR, and the Municipality certify that to its knowledge neither it nor its agents or contractors are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by any federal or State department or agency and that it will not knowingly enter into agreements with any entity that is debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction.

g. AVAILABILITY OF FUNDS

All terms and conditions of this Agreement are dependent upon, and subject to, the allocation of Departmental funding and fiscal constraints, and the Agreement shall automatically terminate if funds cease to be available.

h. AUDITS

In accordance with OMB Circular A-133, "Audits of States, Local Governments and Non-Profit Organization," dated June 27, 2003, and the Federal Single Audit Act Amendment of 1996, the Municipality shall arrange for an annual independent financial and compliance audit of its fiscal operations and grants administration. The Municipality shall furnish the Department with a copy of the annual independent audit report within thirty (30) days of completion of the report, but not later than nine (9) months after the Municipality's fiscal year ends.

i. TERMINATION OF PROJECT

- (1) The Department shall have the right to abandon the Project at any time it sees fit prior to the time CSXT, NSR, or Municipality has been called upon to perform any part of this Agreement.
- (2) If CSXT, NSR, or the Municipality decides to terminate the Project without the concurrence of the Department, the terminating party shall reimburse the Department one hundred percent (100%) of all costs expended by the Department and associated with the Project.

j. FAILURE TO COMPLY

Failure on the part of CSXT, NSR, or the Municipality to comply with any of the provisions of this Agreement will be grounds for the Department to terminate participation in the costs of the Project and, if applicable, seek repayment of all cost expended by the Department, provided, however, that the Department shall first notify CSXT, NSR, and/or the Municipality of such failure and provide CSXT, NSR and/or the Municipality an opportunity to cure the same.

k. COMPLIANCE

CSXT, NSR, and the Municipality, and/or their agents, shall comply with the following Federal policies:

- (1) conflict of interest laws in 18 U.S.C. §§ 201 through 219;
- (2) all Federal Equal Employment Opportunity laws; and
- (3) Title VI Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

I. ETHICS PROVISION

By Executive Order 24, issued by Governor Perdue, and N.C. Gen. Stat. § 133-32, it is unlawful for any vendor or contractor (i.e. architect, bidder, contractor, construction manager, design professional, engineer, landlord, offeror, seller, subcontractor, supplier, or vendor), to make gifts or to give favors to any State employee of the Governor's Cabinet Agencies (i.e., Administration, Commerce, Cultural Resources, Environment and Natural Resources, Health and Human Services, Public Safety, Revenue, Transportation, and the Office of the Governor).

IT IS UNDERSTOOD AND AGREED that the approval of the Project by the Department is subject to the conditions of this Agreement, and that no expenditures of funds on the part of the Department will be made until the terms of this Agreement have been complied with on the part of CSXT, NSR, and the Municipality.

IN WITNESS WHEREOF, this Crossing Closure Agreement has been executed, the day and year heretofore set out below, on the part of the Department, CSXT, NSR, and Municipality by authority duly given.

N.C. Gen. Stat. § 133-32 and Executive Order 24 prohibit the offer to, or acceptance by, any State Employee of any gift from anyone with a contract with the State, or from any person seeking to do business with the State. By execution of any response in this Agreement, you attest, for your entire organization and its employees or agents, that you are not aware that any gift in violation of N.C. Gen. Stat. § 133-32 and Executive Order 24 has been offered, accepted, or promised by any employees of your organization.

WITNESS

CSX TRANSPORTATION, INC.

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: _____

DATE: _____

DATE: _____

SEAL

FEDERAL TAX IDENTIFICATION NUMBER

CSX TRANSPORTATION, INC.

MAILING ADDRESS

CSX Transportation
4900 Old Osbourne Tpke, Ste. 200
Richmond, VA 23231
ATTN: Troy J. Creasy
Project Manager II

IN WITNESS WHEREOF, this Crossing Closure Agreement has been executed, the day and year heretofore set out below, on the part of the Department, CSXT, NSR, and Municipality by authority duly given.

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WITNESS

NORFOLK SOUTHERN RAILWAY
COMPANY

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: _____

DATE: _____

DATE: _____

SEAL

Federal Tax Identification Number

53-6002016

Norfolk Southern Railway Company

MAILING ADDRESS

Norfolk Southern Corporation

1200 Peachtree Street, NE

Box 36

Atlanta, Georgia 30309

ATTN: Cayela Wimberly

Email Address

IN WITNESS WHEREOF, this Crossing Closure Agreement has been executed, the day and year heretofore set out below, on the part of the Department, CSXT, NSR, and Municipality by authority duly given.

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WITNESS

CITY OF FAYETTEVILLE

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: _____

DATE: _____

DATE: _____

SEAL

Approved by the City Council of the City of
Fayetteville as attested to by the signature of:

City Clerk,

(Date)

FEDERAL IDENTIFICATION NUMBER

City of Fayetteville

MAILING ADDRESS

City of Fayetteville
433 Hay Street
Fayetteville, North Carolina 28301
ATTN: Pamela Megill, City Clerk

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ATTEST

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION

BY: _____

BY: _____

NAME: Elizabeth Smith

NAME: Julie White

TITLE: Processing Agent

TITLE: Deputy Secretary for Multi-Modal
Transportation

DATE: _____

DATE: _____

MAILING ADDRESS:

North Carolina Department of Transportation
Rail Division, Engineering Coordination &
Safety Branch
1556 Mail Service Center
Raleigh, North Carolina 27699-1556
ATTN: Nancy Horne, PE
Project Engineer

APPROVED BY BOARD OF TRANSPORTATION ITEM O: May 5, 2016
(Date)

EXHIBIT A