ORDINANCE NO. 3402

AN ORDINANCE of the City Council of the City of Kent, Washington, granting to the Union Pacific Railroad Company, a Utah corporation, its successors and assigns, the right, privilege and authority to construct, maintain and operate a railroad spur track upon and across South 196th Street in the City of Kent, King County, Washington.

WHEREAS, pursuant to the terms of a franchise ordinance of the City of Kent (Ordinance 2309), passed on September 8, 1981, the Union Pacific Railroad Company, a Utah Corporation ("UPRR") constructed, maintained and operated a railroad spur track at common grade upon and across South 196th Street in the City of Kent, the centerline of said street in the North 1/2 of Section 2, Township 22 North, Range 4 East, W.M., located in King County, Washington; and

WHEREAS, Ordinance 2309, by the terms of its Section 10, was effective as a franchise grant to UPRR for ten years; and

WHEREAS, on or about October 13, 1991, the franchise granted in Ordinance 2309 expired by the terms of Section 10 of that Ordinance; and

WHEREAS, on December 9, 1997, the City passed its Ordinance No. 3380, which extended a new franchise offer to UPRR for ten years, subject to acceptance by UPRR within thirty days of passage; and
WHEREAS, UPRR did not accept the franchise offered by Ordinance No. 3380, therefore voiding that Ordinance before it came into effect; and

WHEREAS, UPRR has been operating and continues to operate the subject spur crossing without a franchise; and

WHEREAS, the City of Kent has determined to re-extend this modified franchise ordinance for UPRR's acceptance; and

WHEREAS, this franchise ordinance was first introduced at the regular City Council meeting held on April 7, 1998; and

WHEREAS, passage of this franchise ordinance is now appropriate; and

WHEREAS, a separation of grade of said crossing is neither practicable or justified; NOW, THEREFORE.

THE CITY COUNCIL OF THE CITY OF KENT, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. The foregoing recitals are incorporated into this Ordinance as if fully set forth herein.

SECTION 2. The City of Kent, Washington, ("City") grants to the Union Pacific Railroad Company, a Utah Corporation, its successors and assigns ("UPRR"), subject to all conditions contained in this ordinance, the franchise and privilege of maintaining and operating one railroad spur track and crossing at common grade upon and across South 196th Street in the City of Kent,
Washington, at the location described in Exhibit A (the "franchise area"), provided that the maintenance and operation of this track and crossing within the franchise area shall be performed in a manner consistent with the terms and conditions of this franchise ordinance and satisfactory to the City's Public Works Director and any other applicable authority.

SECTION 3 UPRR, throughout the ten-year franchise term and at no cost to the City, shall maintain and operate the track and crossing within the franchise area at common grade with South 196th Street as it now exists, subject to the following:

(a) If necessary at any time during the ten-year franchise term, UPRR shall alter, at no cost to the City, the track and crossing within the franchise area to maintain the common grade should the City determine to change the street or grade in any manner. UPRR's obligation to alter the track and crossing within the franchise area exists even though that alteration may also affect adjoining or connecting track(s) and any property and/or property rights either north or south of the crossing. Accordingly, should UPRR's alteration of the track and crossing within the franchise area require alterations to any track(s) or impact any property or property rights north and/or south of the franchise area, UPRR shall, at no cost to the City, alter the track(s) north and/or south of the franchise area and shall further compensate or mitigate all impacts to any private property rights impacted by that alteration.

(b) The City has determined, and UPRR acknowledges, that the public use and necessity require that the City alter the configuration and grade of South 196th Street as it exists on the date of this ordinance in some or all of (but not limited to) the following ways: location, width, elevation, and super elevation. UPRR also acknowledges that the precise changes contemplated for South 196th Street may change after the date of this ordinance. Further, the City and UPRR have determined that, in conjunction with changes contemplated for South 196th Street, UPRR will alter not only the track and crossing
within the franchise area, but also the track(s) north and south of the crossing. Additionally, UPRR shall alter its track and crossing (including any and all track that requires alteration either north or south of the street) at no cost to the City. Design possibilities for alterations of the crossing, and for alterations of track both within the crossing and north and south of the street, have been discussed by the City and UPRR, but have not yet been finalized. The City's Public Works director must ultimately approve the design of any alteration to the track or crossing before UPRR commences construction. UPRR shall coordinate construction of the planned alterations to its track and crossing with the City so as not to delay the City's plans for the street. In any event, UPRR shall complete its spur track work no later than the date the City completes its work on South 196th Street, unless the City gives its written approval to UPRR extending the time for the spur work.

(c) This franchise shall not prevent UPRR from charging any other party to which UPRR may have granted or assigned an interest in this track, crossing or franchise all or a portion of the cost of maintaining, operating or altering this track and crossing, whether within or without the franchise area.

SECTION 4. UPRR, at its sole expense, shall replace the existing crossing pad, or any future crossing pad that may be installed, with a crossing pad of a type and design approved by the City's Public Works Director across the entire right-of-way, including sidewalks, when requested by the City. UPRR shall install signalized gate arms at the track and crossing upon the City's request. UPRR shall install the crossing pad or gate arms within six (6) months from the date it receives notification from the City to make these changes; however, if these changes are subject to prior authorization from the Washington Utilities and Transportation Commission ("WUTC"), then this six (6) month time period shall apply from the date of WUTC authorization or approval.
UPRR's failure to install these items within this six (6) month period shall immediately terminate this franchise ordinance, with no notice required, and UPRR, its customers, agents and assigns, shall immediately lose all right and authority to use the track and crossing within the franchise area. Accordingly, the City may, at its sole option, restrict, block, close or remove the track and crossing within the franchise area.

SECTION 5. UPRR shall not store railroad cars within the franchise area, nor shall UPRR stop cars within the franchise area for switching operations, nor shall UPRR use the franchise area in any manner that unreasonably interferes with travel within the City's right of way. Moreover, UPRR shall not allow railroad traffic to utilize the franchise area from 6:00 a.m. to 9:00 a.m. and 3:00 p.m. to 6:00 p.m. daily. However, the City's Public Works Director is authorized to shorten or remove these time restrictions, either permanently or temporarily, if he or she determines, in his or her sole discretion, that modification of these time restrictions would not impair the public health, safety and welfare.

SECTION 6. The City maintains the same control over South 196th Street within this franchise area as it has over other public streets within the City's jurisdiction. This franchise shall not restrict the rights of the City or other franchise holders in the City to enter upon South 196th Street within the franchise area for the purpose of locating, relocating, constructing, maintaining, repairing, or removing any public works, utilities, or facilities within, under or over the franchise area, but this work shall not unnecessarily interfere with the movements of railroad traffic over the franchise area.

SECTION 7. The City may require signalization, gates, sawbucks, signs, or other traffic flow control, warning or protective devices or measures to protect the public health and safety. UPRR shall construct, operate and maintain these requirements at no cost to the City. Further, UPRR will construct or install these requirements promptly, but in any event within six months from the date the City issues its requirements; however, if
approval of these requirements is subject to prior authorization from the WUTC, then this six month time period shall apply from the date of WUTC authorization or approval.

SECTION 8. UPRR shall defend, indemnify and hold the City, its officers, officials, employees, agents and volunteers harmless from any and all claims, injuries, damages, losses or suits, including all legal costs and attorney fees, arising out of or in connection with the performance of this franchise ordinance, but only to the extent of UPRR's negligence or comparative fault. This indemnification includes liability for crossing design, signalization design, and/or maintenance, and road maintenance within the crossing area. It also includes any failure or omission on the part of UPRR to perform any action required by this franchise.

The City's inspection or acceptance of any of UPRR's work when completed shall not be grounds to avoid any of these covenants of indemnification.

No act, inspection, approval or omission by the City shall affect UPRR's obligation to fully defend, indemnify and hold harmless the City, its officials, officers, employees, agents and volunteers.

UPRR's obligation to defend, indemnify and hold the City harmless shall survive the expiration or termination of this franchise ordinance.

SECTION 9. Nothing granted in this franchise shall release UPRR from obtaining all permits or other authorizations required by the City to maintain, operate, repair or alter the track and crossing either within or without the franchise area or to do any of the work contemplated by this franchise ordinance.

SECTION 10. Except for automatic termination provisions established elsewhere in this franchise ordinance, if the City finds that UPRR has failed to comply with
any term or condition of this franchise, as determined by the City. UPRR's failure to comply shall constitute a breach of this franchise. In the event of UPRR's breach, the City may revoke this franchise after giving UPRR thirty (30) calendar days prior written notice. This notice shall also state the grounds for revocation. Once revoked, UPRR, its customers, agents and assigns, shall immediately lose all right and authority to use this crossing, and the City may, at its sole option, restrict, block, close or remove the track and crossing within the franchise area.

SECTION 11. If the spur crossing that is the subject of this franchise has not been in use for one (1) year or longer, this franchise shall automatically be revoked. Once revoked, UPRR, its customers, agents and assigns, shall immediately lose all right and authority to enter or use the franchise area, and the City may, at its sole option, restrict, block, close or remove the track and crossing within the franchise area.

SECTION 12. The franchise privileges granted in this ordinance shall be effective for ten (10) years from and after the effective date of this ordinance. At the end of this ten-year franchise term, all UPRR's property rights within the franchise area that are granted by this franchise shall expire. Accordingly, upon expiration, the City may, at its sole option, restrict, block, close or remove the track and crossing within the franchise area.

SECTION 13. UPRR shall have no right to receive any award in condemnation, whether direct or inverse, as a result of this franchise.

SECTION 14. UPRR shall pay all the City's reasonable municipal costs, expenses, or liabilities incurred by the City incurred as a result of creating or entering into this franchise.

SECTION 15. The failure of the City to insist upon strict performance of any of the terms and rights contained herein, or to exercise any option herein conferred in
one or more instances, shall not be construed to be a waiver or relinquishment of those
terms and rights and they shall remain in full force and effect

SECTION 16. In any claim or lawsuit for damages arising from either
damages arising from either party's performance of this franchise ordinance, each party shall be responsible for payment
of its own legal costs and attorney's fees incurred in defending or bringing that claim or
lawsuit; however, nothing in this subsection shall limit the City's right to indemnification
under Section 9 of this franchise ordinance.

SECTION 17. No waiver, alteration, or modification of any of the
provisions of this franchise ordinance shall be binding unless in writing and signed by a
duly authorized representative of the City and UPRR.

SECTION 18. Any assignment of this agreement by UPRR without the
written consent of the City shall be void.

SECTION 19. If any one or more sections, subsections, or sentences of this
ordinance are held to be unconstitutional or invalid, such decision shall not affect the
validity of the remaining portion of this ordinance and the same shall remain in full force
and effect.

SECTION 20. UPRR shall, within thirty (30) calendar days from the date
of passage of this ordinance, file with the City Clerk its written acceptance of the terms,
provisions and conditions of this franchise. If UPRR fails to file its written acceptance of
this franchise, without additional conditions, by the end of this thirty (30) calendar day
period, this ordinance will be void and of no further force or effect.

SECTION 21. This ordinance shall not take effect or be in until accepted
by UPRR within the time provided in Section 20. If accepted by UPRR within the time
provided in Section 20, this ordinance shall become effective five (5) days from the time of its passage and publication as provided by law or when accepted by UPRR, whichever is later.

JIM WHITE, MAYOR PRO-TEM

ATTEST:

Brenda Jacober
BRENDA JACOBER, CITY CLERK

APPROVED AS TO FORM:

ROGER A. LUBOVICH, CITY ATTORNEY

PASSED: 5 day of May, 1998.
APPROVED: 5 day of May, 1998.
PUBLISHED: 8 day of May, 1998.

I hereby certify that this is a true copy of Ordinance No. 3402, passed by the City Council of the City of Kent, Washington, and approved by the Mayor of the City of Kent as hereon indicated.

Brenda Jacober (SEAL)
BRENDA JACOBER, CITY CLERK
Ord. 3402

This was not accepted by
URRR

7/7/98

Do Not Record,
per Tom Brubaker