

-BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH-

-----

In the Matter of an Appeal to  
I Road Closure in Draper

)  
)  
)

DOCKET NO. 05-999-02

REPORT AND ORDER

-----

ISSUED: May 27, 2005

SYNOPSIS

The Commission affirms the decision of the Utah Department of Transportation to close the at-grade railroad crossing at 13200 South in Draper, Utah.

By The Commission:

-----

PROCEDURAL HISTORY

On February 2, 2005, the Commission received an email inquiry from a resident of Draper, Utah, requesting information concerning how to appeal a recent decision to close the railroad crossing at 13200 S. 1650 E. in Draper. On February 10, 2005, Draper residents Ken and Laura Kelter (“Kelters”) filed a formal appeal of the Utah Department of Transportation (“UDOT” or “Department”) decision to close the subject railroad crossing. Along with their letter of appeal, the Kelters submitted a compact disk containing an audio recording of Laura Kelter’s October 5, 2004, presentation to the Draper City Council opposing the proposed closure; a paper copy of that presentation; an October 12, 2004, letter from the Kelters to UDOT’s Chief Railroad Engineer, Mike Seely; a February 2, 2005, letter from the Jordan School District Superintendent of Schools, Barry L. Newbold, regarding the anticipated impact to the District of the ordered closure; and forty-four letters and emails written by various Draper residents from August to October 2004 in opposition to the closure.

On February 11, 2005, Daniel K. Thompson, a Draper resident, filed a memorandum supporting UDOT’s decision to close the crossing and a copy of his July 6, 2004, presentation to the Draper City Council regarding the then-proposed closure. Also on February 11, 2005, the Utah Transit Authority (“UTA”) filed a memorandum noting its ownership of the Right of Way, including the property upon which the crossing at issue is constructed, and supporting

UDOT's decision to close the crossing. On February 14, 2005, the Commission received a letter from G. Ray Glad, a Draper resident and purported owner of the land over which 13200 S. runs east of the railroad crossing, concerning his belief that he continues to own this land.

On March 3, 2005, the Commission issued a Notice scheduling an evidentiary and public witness hearing to be held on April 28, 2005, at the Draper City Hall-Council Chambers. On March 11, 2005, the Commission issued a Procedural Notice notifying all parties that written matters such as prepared testimony, briefs, and statements in support or opposition to the closing were to be filed with the Commission not later than April 18, 2005.

On April 18, 2005, UDOT and UTA filed a joint Memorandum in Support of Utah Department of Transportation Order Number 2004-UTA-CX1 with nine attachments. Also on April 18, 2005, a group calling itself "Citizens for Closure of 13200 South UTA Crossing" filed seven letters from Draper citizens regarding safety concerns at the crossing in support of UDOT's decision to close the crossing. On April 19, 2004, Draper City filed a Memorandum of Draper City in Support of Order Number 2004-UTA-CX1 adopting as its own the statements and positions taken by UDOT and UTA in their April 18, 2005, Memorandum.

On April 28, 2005, public hearing on this matter was held before the Commission's Administrative Law Judge. At hearing, UDOT was represented by James H. Beadles, Assistant Attorney General. UTA was represented by Bart W. Simmons, UTA Associate Corporate Counsel. Ken and Laura Kelter and Daniel Thompson appeared on their own behalf and provided sworn testimony. In addition, approximately ninety-five members of the public attended; eighteen testified in support of UDOT's decision while eleven opposed closure. The Administrative Law Judge questioned the parties and witnesses regarding the testimony and evidence presented. The Administrative Law Judge also informed all parties that the Commission would take administrative notice of all filings, submissions, and attachments previously provided to the Commission and would consider them accordingly in deciding this matter.

## BACKGROUND AND DISCUSSION

### A. Factual Background

This docket concerns a railroad crossing located at approximately 13200 South and 1650 East in Draper,

Utah. The United States Department of Transportation inventory number for this crossing is 807-053G. This crossing is “at-grade”, meaning that the road surface of 13200 South intersects the railroad tracks at ground level such that neither the tracks nor the road run along an elevated or underground structure. UTA owns the railroad right of way (“ROW”) at this crossing, as well as the property on which the at-grade crossing has been constructed. The railroad ROW at the crossing sits atop an embankment elevated above the grade of the surrounding terrain, including the grade of 13200 South as it approaches the crossing from both the east and west. The approach from the west is at a grade of over ten percent so that at a distance of thirty feet from the crossing the surface of 13200 South is more than thirty inches lower than the top of the railroad track. The grade approaching from the east has been roughly leveled by the placement of road base as fill. However, this road base is prone to rutting and pot holes, creating a very rough approach to the tracks from the east. The Porter Rockwell Trail, used primarily by pedestrians, is located approximately twenty to twenty-five feet west of the crossing at the bottom of the grade.

Historically, where 13200 South crossed the tracks it was nothing more than an unimproved, one-lane dirt road used by a small number of local residents to access their property located east of the railroad tracks. Since approximately 1995, however, this crossing has been used by an increasing number of people, including construction crews and vehicles, as subdivisions were developed east of the tracks. In September 1995, UDOT sent a letter to Draper City noting UDOT’s surprise that someone, without UDOT authorization, had paved 13200 South west of the tracks with asphalt extending to the tracks themselves, had widened 13200 South at the crossing, and had placed road surface material in the crossing in a substandard manner. This letter also noted previous conversations with the Draper City Engineer in which UDOT had stated its position that if the city wanted to widen the crossing the approach grade of 13200 South on the west side of the tracks would have to be raised to provide better visibility. In addition, UDOT stated its intention to close the crossing once a frontage road had been constructed east of the tracks to connect 13200 South to an underpass at 13800 South.

In October 2002, UDOT issued Departmental Order 02-2 requiring Draper City and UTA to make various changes to the road base, signage, barricades and vegetation at the crossing to improve public safety at the

crossing. This order reiterated UDOT's position that the crossing should be closed due to "overriding safety concerns for the public", and specifically noted that Draper City should not pave the crossing due to the restricted sight distance at the crossing and the use of the crossing by pedestrians on the Porter Rockwell Trail.

Over a period of nearly two years beginning in September 2002, the Draper City Council addressed the issue of the 13200 South crossing on several occasions during Council meetings which were open to the public. Minutes of these meetings confirm that the Council considered such factors as emergency vehicle access and changed traffic flow patterns throughout the city as it debated what to do about this crossing. On July 13, 2004, the Draper City Council issued a resolution finding that the crossing "is poorly maintained, is frequently in a hazardous condition, and represents a danger to the public health, safety and welfare." Based on these findings and the estimate that necessary upgrades to the crossing could cost the City anywhere from \$700,000 to over \$1 million, the Council recommended that the crossing be closed.

Having received from Draper City the input which it had sought for some time regarding the crossing, UDOT began the crossing closure process in August 2004 by twice publishing in the Salt Lake Tribune and Deseret Morning News notice of its proposed closure action. In response to public comments, on September 27, 2004, UDOT held a public meeting attended by approximately forty-three Draper residents to receive public comment concerning the proposed closure.

On October 22, 2004, UTA General Manager and CEO John M. English sent a memorandum to Mr. John Njord, UDOT Executive Director, expressing UTA's position that the crossing should be closed and that UTA had been pursuing closure since purchasing the ROW in 1993. While expressing its continuing belief that the crossing is a private crossing, UTA noted that it had agreed to pursue closure in concert with UDOT through the public crossing closure process and believed that this process had been beneficial in providing an opportunity for parties to thoroughly analyze and address all issues pertaining to closure. UTA noted that, as of October 2004, three issues had dominated the closure discussion: emergency access, impact of future growth on Draper City's transportation system, and the unsafe condition of the crossing. UTA noted that UTA staff, UDOT engineers, consultants, and local citizens had studied these issues at

length and concluded that these studies had consistently supported closing the crossing.

### B. Legal Authorities and Guiding Regulations

*Utah Code Annotated* § 54-4-15(2) gives UDOT “the power to . . . alter or abolish” any crossing of a public road by a railroad. Pursuant to this authority, UDOT has promulgated regulations, codified at *Utah Administrative Code* Rule 930-5, *Establishment and Regulation of At-Grade Railroad Crossings*. Rule 930-5-4 incorporates by reference and adopts as UDOT standards several federal sources of highway and railroad operations and safety guidelines, including 23 CFR Chapter G "Engineering and Traffic Operations" Part 646 "Railroads" Subpart B (April 1, 1995); 23 CFR Chapter 1, Subchapter J "Highway Safety" Part 924 "Highway Safety Improvement Program" (April 1, 1995); the American Association of State Highway and Transportation Officials “Policy on Geometric Design of Highway and Streets”, 1994 Edition (“AASHTO Manual”) ; and the Manual on Uniform Traffic Control Devices, Federal Administration, 1988 edition. Rule 930-5-6(1) authorizes the elimination of “at-grade highway/railway crossings” in order to eliminate “hazards for both vehicles and pedestrians” at these crossings. The rules also provide detailed requirements concerning the design, construction, and maintenance of highway/railway crossings, as well as detailed signage requirements for these crossings.

Rule 930-5-14 details the procedures UDOT must follow when considering the elimination of any existing crossing. These include: notice in a newspaper of general circulation at least twice briefly describing the proposed closure and advising the public that written protests may be filed with UDOT fifteen days from the date of the last publication of the notice. Informal public hearings are then to be held by UDOT upon written request.

*Utah Code Annotated* § 54-4-15(4)(a) gives the Commission “exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of [UDOT]” in closing a railroad crossing. However, this section does not specify the manner by which the Commission should exercise this jurisdiction nor the standard by which the Commission should judge UDOT’s actions. Therefore, prior to deciding this matter on the merits, we must first determine the appropriate standard of review.

### C. Discussion

UDOT, UTA, and Draper City urge the Commission to overturn UDOT's decision only if it is "so without foundation in fact that [it] must be deemed capricious and arbitrary."  These parties argue that such a standard would accord proper deference to the fact-finding and professional judgment of the UDOT personnel who have been invested by statute with the authority to make such decisions in the interests of public safety. As such, in reviewing UDOT's application of highway standards and public safety considerations to the unique characteristics of the subject crossing, we should not substitute our judgment for the findings of the Department but should overturn UDOT's decision only if we determine that those findings are so without foundation that they must be considered arbitrary and capricious, or if we determine that UDOT failed to follow its own established procedures in arriving at its decision. Likewise, at hearing, those opposing closure noted that the issue before the Commission is whether UDOT's decision was reasonable and rational. This approach appears reasonable and we therefore proceed accordingly.

UDOT notes that its decision to close the crossing was based on public safety concerns and by indications from Draper City, as evidenced by its resolution seeking closure of the crossing, that the City did not intend to spend the money necessary to address those safety concerns. Specifically, UDOT was concerned about the limited sight distance caused by the steep grade at the western approach to the crossing. While AASHTO standards mandate a grade producing a vertical difference of no more than three inches between the surface of the track and the approaching roadway at a distance of thirty feet from the tracks , UDOT notes that the grade west of the crossing produces a vertical drop of more than thirty inches at a distance of thirty feet from the crossing. UDOT's own administrative rules mandate an even more conservative standard, requiring the surface of approaching roadways to match the top elevation of the railroad tracks at "a minimum distance of 50 feet, but preferably 100 feet."

According to UDOT, such a severe grade as exists at the subject crossing is dangerous because approaching drivers can often not see what lies on the opposite side of the crossing until they have reached the crossing itself. Furthermore, because this crossing lacks active safety devices or flashing lights, the limited sight distance exacerbates the concern that approaching motorists cannot be certain that no trains are approaching.  Limited sight distance also increases the likelihood of accidents between motorists and pedestrians, especially in the case of a crossing

like the one in question where a heavily-used pedestrian trail lies at the bottom of the grade and very near the crossing. As a rough rule of thumb, UDOT views any pedestrian path less than fifty feet from a crossing as posing additional safety concerns. In this case, the Porter Rockwell Trail lies only twenty-five feet from the subject crossing.

Another safety concern considered by UDOT is the condition of the road surface as it approaches the crossing, particularly from the east. Attempts to level the grade on this approach using a road base fill were largely successful but resulted in a road surface highly susceptible to rutting and pot holes. The road surface quality has continued to decrease as traffic has increased on 13200 South. UDOT and local residents alike testified that pot holes on this approach are large and numerous, so large in fact that drivers are often more concerned about maneuvering their vehicles between the pot holes than they are with ensuring that the road ahead is clear of other motorists or pedestrians. Not only do the residents who testified view this as creating a dangerous situation, but UDOT points out that, according to nationally recognized standards, the “highway traveled way at a railroad crossing should be constructed for a suitable length with all-weather surfacing . . . [i]f the crossing surface is in poor condition, the driver’s attention may be devoted to choosing the smoothest path over the crossing.”

Numerous residents, citing safety concerns, support UDOT’s closure decision. The majority of this support comes from residents who live in the neighborhoods near the crossing. Residents variously noted that the excessive grade on the west side of the crossing has made the crossing an ideal location for drivers to “catch air” as they speed down 13200 South from east to west. Such actions particularly concern residents due to the heavy pedestrian use of the Porter Rockwell Trail just west of the crossing and the fact that, due to the extreme grade, it is very difficult for drivers approaching the crossing from the east to see pedestrians on the Trail until they have nearly reached the railroad tracks. Several members of the public testified that they had either witnessed pedestrians on the Trail almost being struck by oncoming vehicles or had themselves failed to see pedestrians as they approached the crossing in their automobiles until it was almost too late.

Residents who live in other parts of Draper form the bulk of those citizens who oppose closure. The primary reason for their opposition appears to be concern that closure will and already has increased traffic in their

residential neighborhoods. They understand and admit that the safety concerns of UDOT and local residents are real, but they believe that those concerns should be addressed by properly upgrading the crossing rather than closing it. They point out that the increased traffic in their own neighborhoods is not only a nuisance but also decreases the safety of their streets for themselves, their children, and the elderly residents of those neighborhoods. They believe it is unfair to make the area surrounding the crossing at 13200 South more safe by transferring the risks associated with increased traffic to their neighborhoods.

The Kelters, representing residents opposed to the closure, echo these concerns while also arguing that the closure process was itself so flawed that it merits another look by the Draper City Council and UDOT. Laura Kelter acknowledges that the Draper City Council addressed the subject crossing at several meetings open to the public over a period of years, but argues that the Council had not adequately explored the cost of necessary changes to the crossing, the effect of closure on the City's Master Transportation Plan, or the impact of closure on other City roads and neighborhoods before passing its resolution calling on UDOT to close the crossing because she believes the Council felt it really had no say in the matter. She notes that since the placement of barriers on either side of the crossing in February 2005, traffic has already increased significantly on Pioneer Road and 1700 East, far beyond the increase recent traffic studies had projected by the year 2030.

Ms. Kelter also testified that closure would impair the ability of emergency response vehicles to quickly access the neighborhoods west of the crossing while diminishing the quality of life of area residents by increasing their drive time around the closed crossing. Finally, Ms. Kelter urged that the crossing remain open because recent studies of Draper's future growth indicate that traffic throughout the area will increase significantly in the coming years and it makes no sense to close what has become a major east-west road corridor.

In response, the Draper City Manager testified that he has personally spoken with the Assistant Chief of the Unified Fire Authority who assured him that, while not optimal, response times from the new fire station on Highland Drive east of the crossing will be sufficient to enable emergency services to adequately respond to events west of the crossing despite closure of the crossing. He also testified that he has been intimately involved with the Council's



deliberations regarding this crossing and that, contrary to Ms. Kelter's portrayal, the Council was fully aware of what they were doing when they passed the resolution recommending closure.

In addition, UDOT and Mr. Thompson argue that Draper City's decision to support closure was not procedurally flawed, noting that several public meetings were held on the subject, members of the public, including the Kelters, attended these meetings and were afforded the opportunity to speak, and that the minutes of these meetings amply demonstrate the Council's full consideration of safety and cost considerations in arriving at its closure resolution.

There is some controversy over whether the subject crossing is a public or private crossing and, therefore, which entity may properly exercise authority over the crossing. UDOT, viewing 13200 South as a public road, maintains that the crossing is public and therefore subject to its closure order. UTA maintains that the crossing is private, but UTA wants the crossing closed and supports UDOT's decision to close it. Draper City's position is somewhat unclear. It appears that in deliberations leading to its resolution supporting closure, the Council believed that UDOT has the right to close the crossing but it does not appear that the City seriously investigated the nature of the crossing or what options the City might have if the crossing were deemed private. The Kelters, and other members of the public opposed to closure, also maintain that the crossing and that portion of 13200 South east of the crossing is public. They submitted several exhibits including title searches and deeds in support of this position. A local resident, Mr. G. Ray Glad, argues that he retains title to much of the land on which 13200 South east of the crossing to Highland Drive was built and testified that this portion of 13200 South was constructed without his permission to provide access to developers, and later residents, for new homes built on the east side of the railroad tracks. He maintains that the property remains private so there can be no public crossing and he supports closure of the crossing.

It is not the business of this Commission to decide for the parties which of them owns the land underlying 13200 South east of the crossing. It is enough for our purposes in this docket to recognize that there is no dispute that 13200 South west of the crossing is a public way. This public way intersects UTA's ROW and has been continuously used by numerous members of the public to cross the ROW for many years. We therefore treat the crossing as a public crossing subject to UDOT authority.

The record before us amply demonstrates that UDOT adhered to all procedural requirements and that its decision to close the crossing was reasonably based on the evidence before it and in the interest of public safety. Not only did UDOT satisfy the Rule 930-5-14 public notice and hearing requirements prior to its decision, but the residents of Draper were also afforded several opportunities to speak before the Draper City Council prior to the Council making its closure recommendation to UDOT. Although UDOT indicated its desire to close this crossing as early as 1995, it waited patiently for almost ten years for the citizens of Draper to decide through their Council whether to fund required upgrades to the crossing that would have allowed it to remain safely open. During this period, UDOT required the City to make certain upgrades to incrementally improve public safety while maintaining its position that the crossing must be closed unless permanent upgrades guaranteeing public safety were made. Only after the Draper City Council made known its intention in July 2004 to not fund these upgrades and to ask UDOT to close the crossing did UDOT begin the closure process leading to its January 2005 order.

The substantive decision to close the crossing is also supported by the overwhelming weight of the evidence. UDOT gathered technical evidence relating to the grade, restricted sight line, and substandard road surface on the approaches to the crossing and evaluated this evidence against nationally recognized federal guidelines, as well as the Department's own administrative rules, to arrive at the reasonable conclusion that the crossing is unsafe.

Members of the public did not need to look to such technical evidence to conclude that the crossing is unsafe. They relied on their own experience as drivers, pedestrians, and observers and unanimously concluded that the crossing is unsafe. They differ only in whether the expense of making the crossing safe is worth the benefit to be gained by keeping the crossing open. However, the Draper City Council has considered this matter and has declined to assume the cost of the necessary safety upgrades. Both UDOT and this Commission recognize and understand local residents' concerns regarding increased traffic flow in other areas of the City caused by closure of the crossing, but the fact remains that Utah statute authorizes UDOT to close such crossings in the interest of public safety and that is what UDOT has done in this case.

Confronted with the choice of leaving the crossing as is—that is, open but unsafe—or closing it, UDOT made the decision

to close the crossing. We see nothing in the record to convince us that this decision was either procedurally flawed or substantively unreasonable.

Based upon the evidence of record, and in full consideration of this evidence as well as the testimony of concerned members of the public, the Administrative Law Judge enters the following proposed:

### FINDINGS AND CONCLUSIONS

1. Pursuant to *Utah Code Ann.* § 54-4-15(2), the Commission concludes that UDOT retains the authority to close at-grade public railroad crossings in the interest of public safety.
2. The Commission concludes that this matter is properly before it on petition of a party aggrieved by action of the Department and that the Commission retains exclusive jurisdiction for the resolution of this matter pursuant to *Utah Code Ann.* § 54-4-15(4)(a).
3. The Commission concludes that UDOT's decision should only be overturned if it is found to be arbitrary and capricious or procedurally flawed.
4. The Commission concludes that UDOT's decision to close the subject crossing was reasonably based on the interests of public safety as provided in established administrative rules and Department-incorporated, nationally recognized highway safety guidelines, was neither arbitrary nor capricious, and was arrived at in accordance with general principles of due process and the notice and hearing requirements of *Utah Administrative Code* Rule 930-5-14 governing UDOT railroad crossing closing procedures.

Therefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following proposed:

### ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. UDOT Order 2004-UTA-CX1 ordering closure of railroad crossing DOT 807-053G at 13200 South 1600 East, Draper, Utah, is affirmed.
2. Pursuant to Utah Code 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained

by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order.

Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 27<sup>th</sup> day of May, 2005.

/s/ Steven F. Goodwill  
Administrative Law Judge

Approved and Confirmed this 27<sup>th</sup> day of May, 2005, as the Report and Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary

G#44613