

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re. Emergency Application of the Department of Transportation of the Commonwealth of Pennsylvania and the City of Pittsburgh for approval to abolish the public above grade crossing and remove the bridge carrying the abandoned cartway of Pittsburgh & West Virginia Railway Company (and the West Side Belt Railroad Company) above S.R. 0051, DOT Number 472 968G in the City of Pittsburgh, Allegheny County and the allocation of costs incident thereto.

PUC Docket No. A-2024-3048837

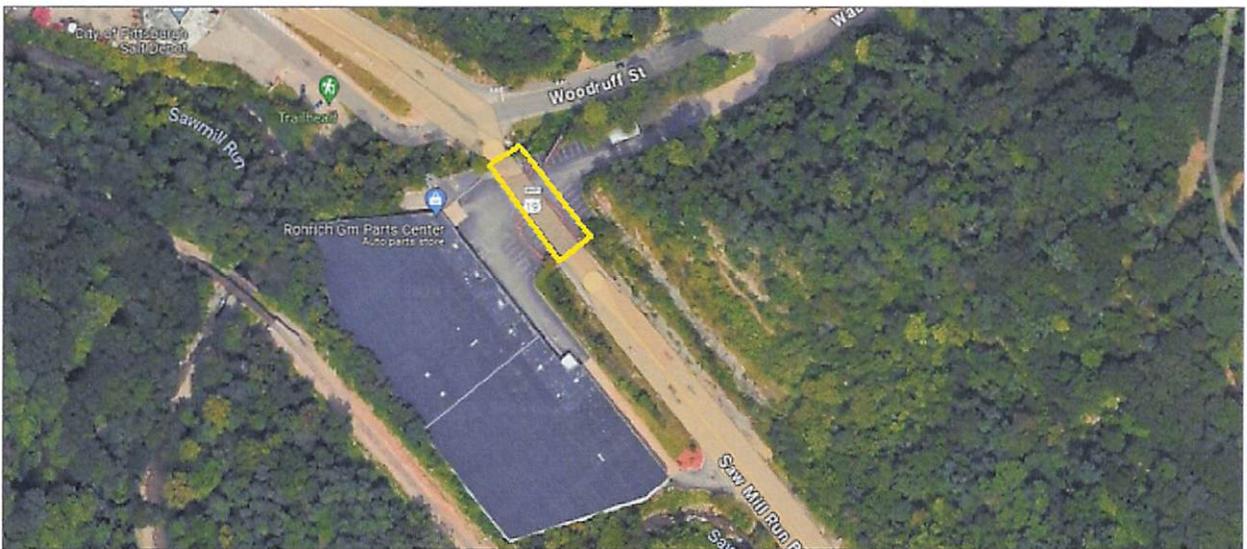
**CONSOLIDATED PRELIMINARY OBJECTIONS OF WABASH PROPERTIES, LLC,
TO THE EMERGENCY APPLICATION AND PETITION FOR SPECIAL RELIEF OF
THE DEPARTMENT OF TRANSPORTATION AND THE CITY OF PITTSBURGH**

Wabash Properties, LLC submits these Consolidated Preliminary Objections to the Pennsylvania Department of Transportation's and the City of Pittsburgh's Emergency Application and Petition for Special Relief Under 66 Pa.C.S. §2702(f), stating as follows:

BACKGROUND

1. The above-captioned Application and Petition before the Court arise from the joint plan of Petitioners the City of Pittsburgh ("the City") and the Pennsylvania Department of Transportation ("PennDOT") to demolish the City-owned Wabash Bridge ("the Bridge").
2. The Bridge serves as a critical means for Wabash Properties, LLC ("Wabash"), as well as the hundreds of local daily delivery vehicles and customers that access Wabash's business, to come and go from its property bordering the Bridge, which currently operates as a automobile parts distribution center that employs sixty individuals.

3. As depicted below, the Bridge spans across Saw Mill Run Boulevard/State Route 51, which runs under the Bridge and traverses Wabash's property. In the aerial view image pasted below, the approximate location of the Bridge is outlined in yellow:



4. There is no dispute that the City owns the Bridge. Application, ¶10.

5. The City has owned the Bridge since its construction nearly a century ago. The City constructed the Bridge when it extended Saw Mill Run Boulevard over and through property

owned by Wabash's predecessor in interest, the Pittsburgh & West Virginia Railway Company ("the Railroad").

6. In its present condition, as depicted in the aerial view above, the surface of the Bridge is incorporated into the access road and parking lot serving Wabash's property. When the City originally constructed the Bridge, railroad tracks crossed the surface of the Bridge. Petition ¶18-19.

7. When the Railroad contracted with the City to build Saw Mill Run Boulevard over and under the Railroad's property in 1929, the Railroad received consideration in return including, *inter alia*, (1) the construction of the Bridge itself, so that the parts of the Railroad's property were not inaccessible; (2) a recorded right of way across the Bridge, so that its railway could cross it; and, *importantly*, (3) the City's agreement to maintain the Bridge in perpetuity. Petition ¶10 and Exhibit 3.

8. The City's duty to maintain the Bridge was so important to the Railroad that it was memorialized in two City ordinances which explicitly obligated the City to maintain the Bridge "forever." Petition ¶19 and Petition Exhibit 3.

9. The Railroad abandoned the railway crossing over the Bridge more than sixty years ago. Application ¶9, Petition ¶6.

10. The parcel where the Bridge is located and the property adjacent to the Bridge was sold in 1961 by the Railroad to the Hahn Furniture Company, a non-railroad entity, and was ultimately acquired by Wabash in 2004. Petition ¶7 and Petition Exhibit 2.

11. Wabash is a successor in interest to the Railroad and all benefits and consideration the Railroad received from the City pursuant to the agreement to build Saw Mill Run Boulevard and the Bridge, most importantly the duty to maintain the Bridge.

12. A Wabash affiliate currently operates an automobile parts distribution center there (“the Facility”), identified as “Rohrich GM Parts Center” in the aerial view above. Petition ¶16.

13. Wabash, as the current holder of the recorded right of way over the Bridge, as well as the myriad of employees and businesses relying on the jobs and parts being provided by the Facility, also rely on the Bridge as the critical means of ingress, egress and regress to the Wabash property.

14. On October 26, 2022, the City informed Wabash of its intent to shut down the Bridge.

15. The City and PennDOT have now scheduled bids for the demolition of the Bridge for April of 2024.

16. On December 5, 2023, the City informed Wabash that PennDOT would be immediately closing the Bridge to all vehicular and pedestrian traffic.

17. Without the Bridge and the right of way across it, the Facility cannot operate as desired as it has for decades, nor can the tractor trailer trucks that utilize the Facility appropriately access the same. In short, the proposed demolition of the Bridge will mean the closure of Wabash’s facility.

18. The decision to demolish the Bridge was made after the City had intentionally and willfully neglected its duties to maintain the Bridge for decades, and despite ample notice from Wabash and other interested parties, including PennDOT itself, that the Bridge required maintenance.

19. Presently, access across the Bridge is blocked by concrete barriers installed by the City and PennDOT. Petition ¶21 and Petition Exhibit 7.

20. Frustratingly, the Bridge's condition is *not* beyond repair: Wabash has, at its own expense, obtained engineering expert reports which opine that the Bridge can not only be repaired, but repaired at a cost comparable to the proposed cost to demolish it.

21. Nevertheless, the City and PennDOT remain adamant in their decision to demolish the Bridge, despite the reasonable alternatives laid before them.

22. To rush that plan to fruition, on May 2, 2024, the City and PennDOT filed a joint "Emergency Application" ("the Application") with the Public Utility Commission ("the Commission") seeking to (1) abolish the long-abandoned railway crossing and (2) "remove" the Bridge.

23. Shortly thereafter, on May 15, 2024, the City and PennDOT filed a "Petition for Special Relief" ("the Petition") with the Commission seeking to further expedite removal of the Bridge, premised on a theory that there is an "immediate danger to the safety and welfare of the public" because of the Bridge's condition.

24. The Application and Petition were filed while litigation is pending in the Commonwealth Court over the City's refusal to maintain the Bridge and the continuing harm caused to Wabash by that refusal.

25. In the Commonwealth Court action, Wabash seeks an order compelling the City to repair the Bridge, among other things.

26. By seeking approval of the Bridge's demolition from the Commission here, the City and PennDOT have subverted the original jurisdiction of the Commonwealth Court, which is the sole arbiter of the legal dispute between Wabash and the City and PennDOT.

27. Notwithstanding these jurisdictional barriers, the Public Utility Code (“the Code”) does not empower the Commission to order the demolition of the Bridge under the circumstances here.

28. As the City and PennDOT admit, the railway crossing was abandoned decades ago, leaving no stakeholders in this dispute who are utilities subject to the Commission’s regulatory hand.

29. For that reason, Wabash raises these Preliminary Objections to the Application and Petition. Those Preliminary Objections are presented in consolidated form given their common issues of fact and law.

ARGUMENT

I. Preliminary Objection Under 52 Pa. Code §5.101(a)(1) for Lack of Commission Jurisdiction

30. Wabash incorporates by reference the averments of the preceding paragraphs as if set forth more fully herein.

31. The Commission’s procedural rules provide that preliminary objections are available to the parties for lack of commission jurisdiction. 52 Pa. Code §5.101(a)(1).

32. Here, the Commonwealth Court has exclusive jurisdiction over the legal controversy between Wabash and the City and PennDOT.

33. Specifically, the Application and Petition seek two approvals: (1) abolishment of the long-abandoned railway crossing and (2) the expedited removal of the Bridge.

34. To the extent the City and PennDOT seek a formal abolishment of a railway crossing that, as a practical matter, has not existed for more than sixty years, Wabash does not oppose such a decision.

35. As the Petitioners aver, the crossing was effectively abolished long ago in 1961, when the Railroad abandoned it. Petition ¶¶48-49.

36. But abolishing an abandoned railway crossing and ordering the demolition of the Bridge are separate issues, the latter of which involves an adjudication of Wabash's legal rights to access and support across the Bridge.

37. Therein lies the controversy at center of this dispute: the City's and PennDOT's refusal to comply with specific, express *legal* duties—both contractual and by ordinance and state law—to maintain the Bridge.

38. Wabash filed suit seeking to enforce those duties in the Court of Common Pleas of Allegheny County (GD-23-2842) seeking, *inter alia*, a declaration of the City's obligations to repair the Bridge and an injunction prohibiting the Bridge's demolition.

39. By Order dated March 22, 2024, PennDOT was joined as a Defendant in that action, an act which divested the Court of Common Pleas of jurisdiction under 42 Pa.C.S. §761(a)(1), which vests the Commonwealth Court with original jurisdiction over “all civil actions or proceedings ... [a]gainst the Commonwealth government, including any officer thereof.”

40. By Order dated April 25, 2024, the matter was transferred to the Commonwealth Court, where that litigation is currently pending.

41. In the Commonwealth Court action Wabash asserts claims for breach of contract, Mandamus, Declaratory Judgment and an Injunction, seeking enforcement of the City's and PennDOT's obligations to maintain the Bridge, confirmation of Wabash's access rights across the Bridge and the enjoinder of the Bridge's demolition by the City and PennDOT. A copy of the Amended Complaint is attached hereto as Exhibit A.

42. Despite their knowledge that the Bridge's fate will be determined by the Commonwealth Court—which has exclusive jurisdiction over that matter—the City and PennDOT have attempted to circumvent that litigation by applying for approval of the Bridge's demolition from the Commission in this proceeding.

43. For that reason alone, the Petition should be stricken and the Application should be dismissed for lack of jurisdiction over the legal dispute between Wabash and the Applicants/Petitioners.

44. Any other outcome would be contrary to the Common Pleas Court's order transferring the litigation to the Commonwealth Court.

WHEREFORE, Wabash Properties, LLC, respectfully requests that the Court sustain its Preliminary Objections and dismiss the Application and strike the Petition for failure to comply with 52 Pa. Code §5.101(a)(1).

II. Preliminary Objection Under 52 Pa. Code §5.101(a)(4) for Legal Insufficiency of a Pleading

45. Wabash incorporates by reference the averments of the preceding paragraphs as if set forth more fully herein.

46. As discussed above, the Commission does not have jurisdiction to order the demolition of the Bridge given the Commonwealth Court's original jurisdiction over the legal dispute between Wabash and the City and PennDOT.

47. Jurisdictional barriers aside, the sections of the Code the City and PennDOT rely upon do not authorize the Commission to demolish the Bridge.

48. Specifically, the Application and Petition are founded upon the purported existence of a railway crossing, to which the regulations contained in §2702 apply.

49. Yet, as the City and PennDOT aver in the Application and Petition, the Bridge has not operated as a railroad crossing for more than sixty years. Application ¶9, Petition ¶48.

50. All rail facilities, including rails, ties, and warning devices, were removed from the Bridge at some point in the 1960s. Petition ¶40.

51. No railroad company has had any ownership or operating rights over the Bridge since at least 1961. Petition ¶48.

52. Apparently, the Railroad did not apply to the PUC or its predecessor, the Public Service Commission (PSC) to abolish the crossing, despite completely abandoning it. Petition ¶8.

53. For that reason, the Commission's role here is to make official what has been a reality for more than half a century: no railway exists, and therefore no utility has a stake in this dispute.

54. The City and PennDOT understand this and, despite the commerce and jobs at stake, as a matter of strategy have consistently claimed both in the pending civil litigation and in this PUC proceeding that the Bridge serves only "one private property owner". PennDOT Prehearing Memorandum ¶VI.

55. Therefore, the City and PennDOT have argued, their duties to maintain the Bridge have been extinguished.

56. Of course, they cannot have it both ways: the City and PennDOT cannot claim in the civil litigation that the Bridge is a private parking lot for Wabash's Facility solely providing vehicular access to the Facility, and at the same time seek the Commission's approval to demolish a railway crossing in these proceedings.

57. The Bridge has not been a railway crossing for decades, regardless of whether the Railroad applied to have the Commission formally abolish it.

58. Without a railroad interest at stake any relief afforded by §2702(c) or (f) evaporates.

59. What remains is a private legal dispute between Wabash and the City over a contract which the Commission cannot enforce. See *Adams v. PUC*, 819 A.2d 631, 636 (“the PUC lacks jurisdiction over private contractual disputes”).

WHEREFORE, Wabash Properties, LLC, respectfully requests that the Court sustain its Preliminary Objections and dismiss the Application and strike the Petition for failure to comply with 52 Pa. Code §5.101(a)(4).

III. Preliminary Objection Under 52 Pa. Code §5.101(a)(6) for Pendency of a Prior Action

60. Wabash incorporates by reference the averments of the preceding paragraphs as if set forth more fully herein.

61. The Commission’s procedure rules provide that preliminary objections are available to the parties for pendency of a prior proceeding. 52 Pa. Code §5.101(a)(6).

62. On March 1, 2023, Wabash filed a Complaint in the Court of Common Pleas, Allegheny County (GD-23-2842) seeking, *inter alia*, a declaration of the City’s obligations to repair the Bridge and an injunction prohibiting the Bridge’s demolition.

63. As set forth above, on March 22, 2024, the Court of Common Pleas of Allegheny County ordered the joinder of PennDOT as a Defendant in that action and then on April 25, 2024, the case was transferred to the Commonwealth Court on jurisdictional grounds.

64. The ongoing civil litigation is a prior pending action, wherein the legal obligations owed by the City and PennDOT to Wabash will be determined.

65. The relief sought by the City and PennDOT from the Commission is an attempt to “cut the line” in hopes of securing permission to demolish the Bridge before the Commonwealth Court has rendered its decision.

66. The risk of inconsistent judicial determinations is therefore heightened: an outcome favorable to Wabash at the Commonwealth Court would be moot if the Bridge had already been demolished.

67. That is the expedited outcome the City and PennDOT seek here, in hopes of avoiding a declaration that the City and PennDOT must repair the Bridge.

68. Inconsistencies of that variety are precisely what the prior pending action Preliminary Objection is meant to avoid.

WHEREFORE, Wabash Properties, LLC, respectfully requests that the Court sustain its Preliminary Objections and dismiss the Application and strike the Petition for failure to comply with 52 Pa. Code §5.101(a)(6).

Respectfully submitted,

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Counsel for Wabash Properties, LLC

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WABASH PROPERTIES LLC,

NO. 279 MD 24

Plaintiff,

AMENDED COMPLAINT

vs.

FILED ON BEHALF OF:

CITY OF PITTSBURGH and
COMMONWEALTH OF
PENNSYLVANIA,
DEPARTMENT OF
TRANSPORTATION,

Wabash Properties, LLC, Plaintiff

COUNSEL OF RECORD:

Defendants.

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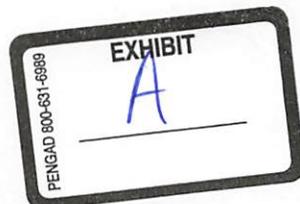
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WABASH PROPERTIES LLC,)	
)	
Plaintiff,)	
)	
vs.)	NO. 279 MD 24
)	
CITY OF PITTSBURGH and)	AMENDED COMPLAINT
COMMONWEALTH OF)	
PENNSYLVANIA, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Defendants.)	

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Amended Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE(S) SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Central Pennsylvania Legal Services,
Inc.
213-A North Front Street
Harrisburg, PA 17019
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Dauphin County Bar Association
213 North Front Street
Harrisburg PA 17101
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WABASH PROPERTIES LLC,)
)
 Plaintiff,)
)
 vs.) NO. 279 MD 24
)
 CITY OF PITTSBURGH and) AMENDED COMPLAINT
 COMMONWEALTH OF)
 PENNSYLVANIA, DEPARTMENT)
 OF TRANSPORTATION,)
)
 Defendants.)

AMENDED COMPLAINT

AND NOW, comes the Plaintiff, Wabash Properties LLC, by and through its counsel of record, Jenna R. DiFrancesco, Esquire, Jonathan M. Kamin, Esquire, and Jonathan G. Preston, Esquire, and files the within Amended Complaint, averring as follows:

INTRODUCTION

1. This is an action for Breach of Contract, Declaratory Judgment, Mandamus, Violation of Due Process and an Injunction, arising from a dispute between Plaintiff Wabash Properties, LLC (“Wabash”) and the City of Pittsburgh (“the City”) over the City’s planned demolition of the Wabash Bridge (“the Bridge”), which it intends to perform in conjunction with the Commonwealth of Pennsylvania, Department of Transportation (“PennDOT”).

2. As depicted below, the Bridge spans across Saw Mill Run Boulevard/State Route 51, which runs under the Bridge and traverses Wabash's property. In the aerial view image pasted below, the approximate location of the Bridge is outlined in yellow:



3. The City has owned the Bridge since its construction nearly a century ago. The City constructed the Bridge when it extended Saw Mill Run Boulevard

over and through property owned by Wabash's predecessor in interest, the Pittsburgh & West Virginia Railway Company ("the Railroad")

4. In its present condition, as depicted in the aerial view above, the surface of the Bridge is incorporated into the access road and parking lot serving Wabash's property. When the City originally constructed the Bridge, railroad tracks crossed the surface of the Bridge.

5. When the Railroad contracted with the City to build Saw Mill Run Boulevard over the Railroad's property, the Railroad received consideration in return including, *inter alia*, (1) the construction of the Bridge itself, so that the parts of the Railroad's property were not inaccessible; (2) a recorded right of way across the Bridge, so that its railway could cross it; and, *importantly*, (3) the City's agreement to maintain the Bridge in perpetuity.

6. The City's duties to maintain the Bridge were so important to the Railroad that they were memorialized in two City ordinances which explicitly obligated the City to maintain the Bridge "forever."

7. Wabash purchased the property adjacent to and on both sides of the Bridge in 2004. Therefore, it is a successor in interest to the Railroad and all benefits the Railroad received from the City pursuant to the agreement to build Saw Mill Run Boulevard and the Bridge.

8. A Wabash affiliate currently operates an automobile parts distribution center in the entire building, identified as “Rohrich GM Parts Center” in the aerial view above.

9. In October of 2022, the City informed Wabash of its intent to close and then raze the Bridge because the Bridge’s allegedly deteriorated condition supposedly rendered it unsafe to motorists traveling below on Saw Mill Run Boulevard.

10. That decision was made after the City had intentionally and willfully neglected its duties to maintain the Bridge for decades, and despite ample notice from Wabash and other interested parties, including PennDOT itself, that the Bridge required necessary and routine maintenance.

11. Wabash, as the current holder of the recorded right of way over the Bridge, relies on the Bridge as the critical means of ingress, egress and regress to its property. Without the Bridge and the right of way across it, the automobile parts distribution warehouse cannot operate as desired, nor can the tractor trailer trucks that utilize the warehouse appropriately access the same.

12. Frustratingly, the Bridge’s condition is *not* beyond repair: Wabash has, at its own expense, obtained engineering expert reports which opine that the Bridge can not only be repaired, but can be repaired at a cost that is less than the proposed cost to demolish it.

13. Nevertheless, the City and PennDOT remain adamant in their decision to abolish the Bridge, despite the reasonable alternatives laid before them.

14. Faced with this existential threat to its business operations, Wabash must now seek Court intervention to protect its right of way across the Bridge and force the City to comply with its legal duties and obligations to maintain the Bridge.

THE PARTIES, JURISDICTION AND VENUE

15. Wabash is a Pennsylvania limited liability company having an address of 2020 West Liberty Avenue, Pittsburgh, Pennsylvania 15226.

16. The City is a municipality classified as a Second-Class City with its municipal offices at the City-County Building, 414 Grant Street, City of Pittsburgh, County of Allegheny, Commonwealth of Pennsylvania 15219.

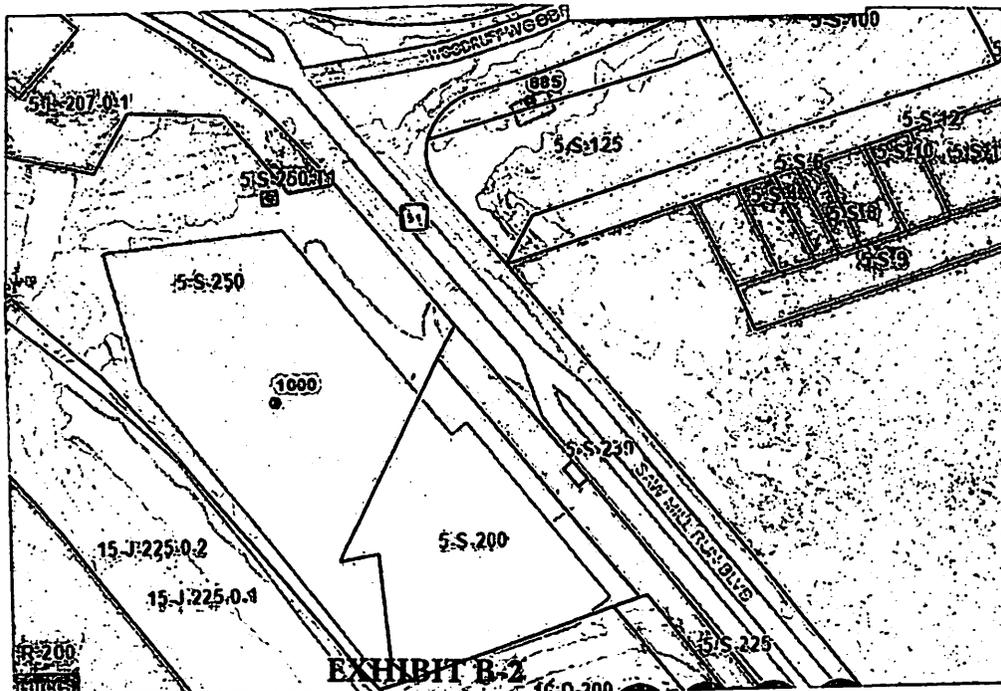
17. PennDOT is a governmental entity that oversees transportation issues throughout the Commonwealth of Pennsylvania pursuant to powers vested by the Pennsylvania Administrative Code, with a principal office located at Exit 247 of the Pennsylvania Turnpike System, in Lower Swatara Township, Dauphin County, Pennsylvania.

18. Jurisdiction and venue are proper with the Commonwealth Court pursuant to 42 Pa.C.S. 761 because PennDOT, an agency of the Commonwealth, is a defendant.

FACTUAL BACKGROUND

History of the Relevant Properties and the Bridge

19. Wabash is the record title owner of three parcels of land situate in the 19th Ward of the City of Pittsburgh, Allegheny County, Pennsylvania: 5-S-125; 5-S-200; 5-S-250 (collectively “the Property”), the plot map for which is below and the vesting deed for the Property is attached hereto as **Exhibit “A”**.



20. The relevant history of those parcels begins more than a century ago, at a time when the Railroad owned the entirety of the Property in fee.

21. At that time, the City expressed a desire to extend Saw Mill Run Boulevard in a manner that would run through the Railroad’s property.

22. The Railroad and the City entered into an agreement wherein the Railroad would allow the City to excavate a large portion of a rocky hillside for the construction of Saw Mill Run Boulevard.

23. In exchange for this access and the rights associated therewith, the City agreed to construct the Bridge to connect the severed portions of the Railroad's property that were adjacent to the excavated area, which could then be accessed by a right of way across the Bridge spanning Saw Mill Run Boulevard.

24. Before the Bridge was constructed the City enacted Ordinance No. 72, 1925 ("1925 Ordinance") and Ordinance No. 247, 1929 ("1925 Ordinance", "the 1929 Ordinance" and collectively "the Ordinances"). The Ordinances are attached hereto as **Exhibit "B."**

25. The Ordinances provide: "[t]he cost of construction, maintenance of the tunnel and sewer provided herein shall be *forever* at the expense of the City" and "the said City of Pittsburgh *shall be responsible for the support of the tracks and roadbed of the Railway Company during such construction and shall be responsible at all times thereafter for any insufficiency or failure of the subway structures erected by the City to furnish adequate support*" (emphasis added).

26. In addition to the obligations contained in the City Ordinances, the City also entered into a contract with the County of Allegheny ("County") dated April 2,

1929, setting forth the responsibilities of both parties regarding the Bridge (the “City-County Contract”).

27. The City-County Contract obligates the City to “maintain and keep the Saw Mill Run Boulevard, including all structures incidental to the improvement...in good repair”, to “assume and become liable for all damages occasioned by reason of this improvement by the opening, locating, relocating, widening, establishing or re-establishing of grades required for the aforesaid improvement of the Saw Mill Run Boulevard” and to “assume and become liable for all damages to property, including surface and sub-surface structures, caused by said improvement of the Saw Mill Run Boulevard, including damages to person or property occasion from any obstruction on said roadway or part thereof”. The City-County Contract is attached hereto as **Exhibit “C”**.

28. By 1961 the Railroad had ceased usage of the tracks on the Bridge. The Railroad and the City—which had acquired a portion of the Property in 1927 in consideration and contemplation of the construction of the Bridge—sought to divest themselves of ownership of their respective portions of the current-day Property.

29. The parcels that now constitute the Property were unified in 1961 by two separate deeds: the first from the City to Hahn Furniture-Company and the second from the Railroad to Hahn Furniture-Company (“Hahn”). Those deeds are attached hereto as **Exhibit “D”**.

30. Importantly, the City granted Hahn an express 35' easement over certain land it retained adjacent to Saw Mill Run Boulevard, so that Hahn could access Saw Mill Run Boulevard from the properties it had purchased from the City and the Railroad.

31. Equally important, that easement was appurtenant to the land which was simultaneously being conveyed from the Railroad to Hahn, so that the unified parcels could all access Saw Mill Run Boulevard.

TOGETHER with an easement or right-of-way for ingress, egress and regress only over a strip of land, 35 feet wide, bounded and described as follows:

BEGINNING at a point at the southeasterly corner of the land above described; thence along said land, North 39° 10' 35" West, 35.00 feet to a point; thence North 72° 25' 45" East, 37.64 feet to a point on the southwesterly side of Saw Mill Run Boulevard; thence along said side of Saw Mill Run Boulevard, South 39° 10' 35" East 35.00 feet to a point; thence by other land of the City of Pittsburgh, South 72° 25' 45" West, 37.64 feet to the place of beginning.

THE ABOVE EASEMENT OR RIGHT-OF-WAY shall be appurtenant to the land above described and also appurtenant to the land conveyed by The Pittsburgh & West Virginia Railway Company to Hahn Furniture Company, the Grantee herein, by Deed dated August 25, 1961, and to be recorded.

32. Critically, without the Bridge, certain portions of the now consolidated Hahn Plan would be alienated and unable to use the easement, as shown below in a survey of the Hahn Plan. That survey is attached hereto as **Exhibit "E"**. The easement has been highlighted yellow and the Hahn Plan, which includes the area above the Bridge, is highlighted blue:



33. Relying upon access across both the express easement and the Bridge, Hahn then built the 2.3-acre under-roof warehouse facility (“Facility”) from which Wabash currently operates its automobile parts distribution business.

34. The Bridge has therefore been continuously used for commercial purposes to transport goods for sale to and from the Facility since the Facility was constructed in the 1960’s.

35. Wabash purchased the Property in 2004. The vesting deed for the Property contains the following language regarding the right of way over the Bridge, which the deed refers to as a “viaduct”¹:

TOGETHER WITH a right of way over the aforesaid viaduct for ingress, egress, and regress, for pedestrian and vehicular traffic to the Grantee herein, its successors and assigns.

36. Wabash is therefore successor in interest and title to all prior owners of the Property, as well as beneficiary of those rights and obligations imposed upon the City through the Ordinances and City-County Contract.

Wabash's Operations and Reliance on the Bridge

37. The Property is zoned for commercial use and is currently being used to operate an automobile parts wholesale distribution business at the Facility.

38. The Facility employs approximately 60 employees and facilitates the distribution of automobiles and automobile parts to 1,000 dealerships, auto body and repair shops.

¹ At various times the instruments of record identify the Bridge as a “viaduct,” a “subway” or a “tunnel.” They are referring to the same structure, which the City, PennDOT, Wabash and other stakeholders call the Bridge for the purposes of this litigation and the dispute from which it arises.

39. For twenty years the Bridge is and has remained the critical means of ingress, egress and regress for large delivery vehicles to access the Property and the only location for Wabash's employees and customers to park their vehicles while working at or visiting the Facility, all of which are necessary for the operation of Wabash's business.

40. Every day, over 350 daily local deliveries, 20 wholesale deliveries, 6 daily straight truck deliveries and 5 daily tractor-trailers access the Facility using the Bridge for ingress, egress and regress to and from the Property.

41. Not only is the location of the Property integral for the business operation located at the Facility, but Wabash also leases the Facility to various entities associated with Rohrich Automotive.

42. Moving the location of the Facility would have far-reaching impacts to the South Hills Rohrich dealerships and repair shops, as well as multiple other South Hills' automobile dealers and repair shops.

43. Additionally, Wabash is subject to various other agreements with car manufacturers like GM and Toyota that will not permit Plaintiff to relocate the Facility to another location.

44. In sum, the Property is the only feasible location for Wabash to operate its business from the Facility, and it can only use the Property through access across the Bridge.

Controversy Giving Rise to this Action

45. From the date of the Ordinance through the filing of the herein action, the City has failed and refused to fulfill its maintenance and repair obligations associated with ownership of the Bridge.

46. Because of the City's refusal to perform any maintenance or repair to the Bridge per the National Bridge Inspection Standards ("NBIS"), the Bridge went from having routine inspections every 2 years to now being inspected every 3 months, which is not only a waste of taxpayer funds, but also diverts money towards inspection costs, rather than maintenance, repair, construction or reconstruction projects in the City.

47. Between April 2019 and October 2022, seven (7) NBIS inspections were performed at the Bridge. The City and PennDOT receiving federally-mandated

Bridge Inspections Reports for each inspection which included notice of thirty-one (31) priority deficiencies needing immediate attention by the City. The priority deficiency letters sent for each aforementioned NBIS inspection is attached hereto as **Exhibit “F.”**

48. Although the same maintenance and repair recommendations have repeatedly been made in the Bridge Inspection Reports, the City has completely failed to act on all of these recommendations, never correcting one single deficiency in the Bridge, allowing a 100-year-old Bridge to deteriorate to a point where it supposedly must be demolished.

49. On October 26, 2022, the City informed Wabash of its intent to shut down the Bridge. The October 26, 2022, letter from the City is attached hereto as **Exhibit “G.”**

50. Upon information and belief, the current condition of the Bridge according to NBIS is such that the current closure and future demolition of the Bridge are not warranted. Wabash’s engineers have determined that repairing the Bridge is not only feasible, but the cost of repairing it is comparable to, or less than, the cost of demolishing it.

51. Wabash obtained multiple bids from reputable construction companies that regularly do work for PennDOT and the City, the average of which evidences the cost to repair the Bridge is approximately \$3.1 million. This is not only

significantly less than the money currently budgeted to rehabilitate the Structure, but well below the amount of funding being provided by the federal government to repair the Bridge.

52. Despite PennDOT and the City's refusal to use funds to fix the Bridge, the repair and rehabilitation of the Bridge is the only approved usage of over \$5 million in federal construction funds already allocated in the 2023 and 2024 City of Pittsburgh Capital Budgets to repair and rehabilitate the Bridge, a structure which is also on the regional Transportation Improvement Program.

53. The City and PennDOT are not being asked to do anything other than that which the City has held themselves out to the federal government and local taxpayers as doing with capital bond funds and surface block grant construction dollars.

54. Following ongoing negotiations between Wabash and the City—during which the only resolution offered by the City was Wabash taking ownership of the Bridge—the City informed Wabash on December 5, 2023, that PennDOT would be immediately closing the Bridge to all vehicular and pedestrian traffic.

55. In its current state, access across the Bridge is blocked entirely by concrete barriers installed across the Bridge by the Defendants.

56. At the time of closing the Bridge on the night of December 6-7, 2023, the exact scope and nature of necessary repairs to the Bridge had been known to and ignored by both PennDOT and the City since at least June 13, 2019.

57. Further, the Bridge closure has dramatically reduced the ability of vehicles to deliver and transport materials to and from the Facility.

58. Rather than utilizing the Bridge for traffic accessing the Facility from the entrance adjacent to the Wabash Tunnel and Woodruff Street, the concrete barriers have forced vehicles to access the property from Saw Mill Run Boulevard by passing, and then reversing up, the inclined driveway that connects the Property to Saw Mill Run Boulevard, pictured below:



59. Once at the top of the inclined driveway, the vehicles must then make a difficult series of “K” turns to position themselves for delivery or acceptance of goods.

60. Notwithstanding the logistical nightmare it poses for Wabash, this sole means of access is a threat to public safety: should a delivery vehicle, such as a semi-truck, become disabled while undertaking the arduous task of reversing up such a steep driveway, emergency vehicles would have no means to access the Facility.

61. Finally, and most critically, the proposed demolition plans submitted by the City and Wabash will decrease that area where delivery vehicles currently perform the difficult “K” turn described above. Should that occur, commercial vehicles will no longer be able to deliver or accept goods at the Facility.

62. The City and PennDOT have now scheduled bids for the demolition of the Bridge for April of 2024. For that reason, Wabash seeks the relief requested below.

COUNT I – BREACH OF CONTRACT

Wabash v. the City

63. Plaintiff incorporates by reference herein the foregoing paragraphs.

64. The City and Wabash’s predecessor in interest, the Railroad, entered into a contract wherein, *inter alia*, the City agreed to construct and then maintain the Bridge and provide the Railroad with a right of way over it.

65. In return, the Railroad conveyed to the City certain property for the purposes of building Saw Mill Run Boulevard.

66. The construction and maintenance of the Bridge, and right of way over it, were essential terms of the contract between the City and the Railroad.

67. As a successor to the Railroad, the City owed Wabash the same contractual obligations to maintain the Bridge and provide Wabash with a right of way over it.

68. The City has breached the contract by its decades-long failure to maintain the Bridge, purportedly rendering it a candidate for demolition.

69. When it purchased the Property, Wabash reasonably expected that the City would fulfill its contractual obligations and maintain the Bridge.

70. In short, Wabash would not have purchased the Property, and spent the next two decades developing a successful automobile parts distribution facility thereon, absent the necessary ingress, egress and regress over the Bridge.

71. As a result of the actions and/or inactions of the Defendants, Wabash's property is continuing to suffer damages.

72. The only remedy that sufficiently cures the City's breach of contract is specific performance of its maintenance obligations.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order compelling the City to fulfill its contractual maintenance obligations and repair the Bridge, along with other such relief and/or damages as the Court deems appropriate.

COUNT II – MANDAMUS
Wabash v. the City and PennDOT

73. Wabash incorporates by reference herein the foregoing paragraphs.

74. A mandamus action is the proper remedy used to compel performance of a ministerial act or a mandatory duty. *Borough of Plum v. Tresco*, 606 A.2d 951, 953 (Pa. Cmwlth. 1992).

75. To succeed in a mandamus action, the Plaintiff must demonstrate a clear legal right, that the Defendant has a corresponding duty, and finally that the Plaintiff is without any other appropriate or adequate remedy. *Timothy F. Pasch, Inc. v. Springettsbury Twp. Bd. of Sup'rs*, 825 A.2d 719, 723 (Pa. Cmwlth. 2003).

76. Wabash possesses a right of way over the Bridge, as granted by that certain deed from the City of Pittsburgh, dated August 16, 1961, and recorded September 1, 1961 at Deed Book Volume 3923.

77. Wabash, as the successor in interest to Pittsburgh & West Virginia Railway Company, possesses a clear legal right to access and/or support across the City-owned Bridge and PennDOT's highway Saw Mill Run Boulevard, as expressly set forth in the instruments of record.

78. PennDOT and the City have acknowledged this obligation by spending funds over the years to maintain the Bridge and by including forecasted repairs for the same in its adopted Capital Budgets.

79. The City has a corresponding duty to maintain the Bridge and provide support and access to Wabash across the Bridge, which duty is likewise set forth in the instruments of record.

80. PennDOT has a corresponding duty to provide support for Wabash over the Bridge, which duty is imposed upon PennDOT as the dominant estate holder of the easement through Wabash' Property for Route 51.

81. Wabash cannot access certain portions of the Property or make reasonable use of the Facility housed thereon unless the City fulfills its obligations to repair and maintain the Bridge and PennDOT fulfills its obligation to provide support to the Property.

82. Further, when it purchased the Property and began operating its business thereon, Wabash reasonably expected that the City and PennDOT would fulfill their legal obligations to maintain and repair the Bridge and ensure access and support of the Property.

83. In so doing, Wabash entered into numerous contracts and other agreements with a wide range of automobile dealerships and repair facilities, which contracts and agreements were conditioned upon Wabash operating its business from

the Facility located on the Property.

84. The City's failure to maintain and repair the Bridge, and PennDOT's failure to provide support to the Property, now threaten the economic viability of Wabash's operations at the Property.

85. The City and PennDOT are further obligated to comply with their own rules and regulations, as well as the state and federal agencies discussed above.

86. The City has neglected the legal duties imposed by the City Ordinances, the City-County Contract and the relevant local, state and federal regulations governing the Bridge.

87. PennDOT has neglected its legal duties imposed by its ownership of the easement for Route 51, as well as its legal duties for safety of all state-controlled highways and relevant local, state and federal regulations governing the Bridge.

88. Unless compelled by this Court to fulfill those duties to repair and maintain the Bridge, the City and PennDOT will simply continue to ignore those duties and ultimately demolish the Bridge.

89. This is so despite the fact that Wabash has offered reasonable, economically viable, and safe alternatives to demolishing the Bridge.

90. But for the Mandamus sought here, Plaintiff is without any other appropriate or adequate remedy at law and will sustain irreparable harm.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order

compelling the City and PennDOT to fulfill their maintenance obligations and repair the Bridge, along with other such relief and/or damages as the Court deems appropriate.

COUNT III – DECLARATORY JUDGMENT

Wabash v. the City and PennDOT

91. Wabash incorporates the averments of the preceding paragraphs as if set forth at length herein.

92. As set forth above, the contracts and instruments of record create an express duty upon the City, as owner of the Bridge, to maintain and repair it.

93. The City is obligated by the terms of the City Ordinances and City-County Contract to construct, maintain, renew and keep in good repair the Bridge forever at the City's sole expense.

94. For many years the City has failed to fulfill those obligations, which has allowed the condition of the Bridge to deteriorate significantly. The City neglected those duties despite ample notice from Wabash and other interested parties of the Bridge's worsening state.

95. The City, under the terms of the City Ordinances, is responsible for the support of the Wabash's Property adjacent to the Bridge and accountable at all times for any insufficiency or failure of the structures erected by the City to furnish adequate support for the Property.

96. By failing to maintain and closing the Bridge, the City has violated the terms of the Ordinances and City-County Contract and failed to perform its obligations thereunder.

97. After years of neglect the City has now stated its intent to demolish the Bridge while simultaneously denying that it has any duty to repair it, despite the express duties contained in the City Ordinances, the City-County Contract and other instruments of record.

98. A declaration is warranted that the terms of the unrepealed City Ordinances are binding obligations upon the City and require the City to forever maintain the Bridge.

99. A declaration is warranted that the ongoing failure of the City to repair or maintain the Bridge, and the City's continued efforts to demolish the Bridge violate the terms of the City Ordinances.

100. Wabash, as a successor-in-title to the Railroad and the property owner vested with the servient estate to the City's easement for the Bridge; whose business relies upon ingress, egress and regress over the Bridge, has the beneficial right to effectuate the intention of the parties to the City-County Contract pursuant to the herein stated compelling circumstances, which indicate that the City intended to give Plaintiff the benefit of the promises and obligations made by the City in the City-County Contract.

101. In closing and demolishing the Bridge, the City and PennDOT will violate the terms of the Ordinances, the contract between the City and Wabash's predecessor in interest and the City-County Contract.

102. Wabash, as a third-party beneficiary having a direct, substantial and present interest in and to the City-County Contract, is engaged in an actual controversy with the City regarding the City's current and future breaches of the terms of the City-County Contract.

103. PennDOT has a corresponding duty to provide support for Wabash over the Bridge, which duty is imposed upon PennDOT as the dominant estate holder of the easement through Wabash' Property for Route 51.

104. A justiciable controversy exists between Wabash and the City concerning the City's obligations to repair and maintain the Bridge pursuant to the Ordinances, contracts and other instruments of record.

105. A justiciable controversy therefore exists between Wabash and PennDOT concerning PennDOT's obligations imposed by its ownership of the easement for Route 51, as well as its legal duties for safety of all state-controlled highways and relevant local, state and federal regulations governing the Bridge.

106. A justiciable controversy exists between Wabash and the City and PennDOT concerning the legality of their proposed demolition of the Bridge.

107. For the reasons set forth above, Wabash is entitled to a judgment

declaring that the City and PennDOT must repair and maintain the Bridge, consistent with its obligations contained in the instruments of record and duties imposed by law.

WHEREFORE, Plaintiff requests a declaratory judgment in their favor and against Defendants, in the following form:

- a. declaring and adjudging the City's rights and obligations under the Ordinances, the City-County Contract and the instruments of record with respect to the maintenance and repair of the Bridge;
- b. granting Wabash specific performance of those repair and maintenance obligations set forth in the City Ordinances and the City-County Contract;
- c. declaring and adjudging the City's and PennDOT's proposed demolition of the Bridge is prohibited;
- d. declaring that PennDOT, as holder of a dominant easement estate for Route 51, owes Plaintiff a duty to keep the Bridge in a safe and proper condition;
- e. for money damages in an amount to be determined at trial, together with pre-judgment and post-judgment interest;
- f. for the cost of suit; and
- g. for such other and further relief as the Court deems just and necessary.

**COUNT IV – VIOLATION OF DUE PROCESS CLAUSE OF THE
FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION (42 U.S.C. §
1983) AND THE PENNSYLVANIA CONSTITUTION (ARTICLE 1 §§ 1, 26)**

Wabash v. the City and PennDOT

108. Wabash incorporates the averments of the preceding paragraphs as if set forth at length herein.

109. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that the government shall not “deprive any person of life, liberty, or property without due process of law.” U.S. Const. Amend. XIV.

110. The corresponding portions of the Pennsylvania Constitution provide, “[a]ll men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” PA. Const. Art. I, § 1.

111. The fundamental components of procedural due process are notice and the opportunity to be heard.

112. The key factor in determining whether procedural due process is denied is whether the party asserting the denial of due process suffered demonstrable prejudice.

113. There can be no claim of a denial of due process, either substantive or procedural, absent deprivation of either a liberty or a property right.

114. At all times relevant hereto Wabash possessed a vested property right of access across the Bridge as well a right to the support of its property by the Bridge.

115. The Bridge, and Wabash's rights of access and support associated with it, are critical to the operations at the Facility for the numerous reasons set forth at length above.

116. Without those rights of access and support Wabash has been, and will continue to be, deprived of its freedom and liberty to conduct its business at the Facility in the manner it has for decades.

117. Those vested property rights have been denied without due process by the City and PennDOT, acting under the color of state law, in their concerted efforts to close the Bridge to all vehicular traffic and then schedule its demolition.

118. The decision to close and demolish the Bridge comes after the City and PennDOT have violated or ignored numerous state and federal laws governing the maintenance and repair of the Bridge, as well as the measures necessary to close it.

119. The City and PennDOT did not afford Wabash adequate notice of their intent to close the Bridge, which prevented Wabash from taking appropriate measures to protect its property rights and freedom to operate its business at the Facility.

120. The prompt closure of the Bridge occurred without proper notice to Wabash, in the middle of the night and without an opportunity to be heard by a neutral decision maker.

121. The City and PennDOT have deprived Wabash of its vested property rights and freedom to operate its business by failing to provide Wabash with proper notice of their intent to close and demolish the Bridge.

122. For the aforesaid reasons, as a matter of law, the City's and PennDOT's actions denied Wabash due process protection of the law, in violation of the United States Constitution, Amendment XIV and the Pennsylvania Constitution.

WHEREFORE, Plaintiff requests a judgment in their favor and against Defendants, in the following form:

- a. the Defendants' closure of the Bridge is a violation of the Plaintiff's constitutional rights of due process;
- b. the Defendants' planned demolition of the Bridge is a violation of the Plaintiff's constitutional rights of due process;
- c. the Defendants are restrained from taking any further action in violation of Plaintiff's constitutional rights of due process;
- d. the Defendants must specifically perform those repair and maintenance obligations required by the Ordinances, the City-County Contract and

Pennsylvania and Federal law, so to preserve Plaintiff's constitutional rights;

- e. the Defendants are liable to Plaintiff for costs associated with this action, including attorney fees;
- f. the Defendants are liable to Plaintiff for money damages in an amount to be determined at trial, together with pre-judgment and post-judgment interest;
- g. for such other and further relief as the Court deems just and necessary.

COUNT V – INJUNCTION
Wabash v. the City and PennDOT

123. Wabash incorporates the averments of the preceding paragraphs as if set forth at length herein.

124. The instruments of record, including the Ordinances and City-County Contract, establish that the City, as owner of the Bridge, has a duty to repair and maintain the Bridge while preserving Wabash's access across it.

125. PennDOT has a corresponding duty to provide support for Wabash over the Bridge, which duty is imposed upon PennDOT as the dominant estate holder of the easement through Wabash' Property for Route 51.

126. Wabash has a direct, substantial and present interest in and to the Bridge, as it is the only means of crossing Wabash's Property and is crucial for its

business at the Facility.

127. As such, the demolition of the Bridge will result in irreparable harm to Wabash.

128. On the other hand, enjoining the City and PennDOT from demolishing the Bridge and compelling them to repair it would merely oblige the City and PennDOT to do something they should have done years ago.

129. Such an outcome would restore the parties to the status that existed before the City and PennDOT threatened the demolition of the Bridge, namely affording Wabash its right to operate its business while exploring means to repair the Bridge.

130. Wabash is likely to prevail in its claim to enforce the City's and PennDOT's duties to repair the Bridge, given the unambiguous nature of the obligations set forth in the Ordinances, City-County Contract, the instruments of record and Pennsylvania law.

131. Further, the provisions of the NBIS require the City and PennDOT to repair and maintain the Bridge in compliance with the Bridge Safety Inspection Reports.

132. The City and PennDOT have known, or should have known, for many years that the Bridge was deteriorating, yet failed to maintain the Bridge despite ample notice.

133. Wabash has suffered and will continue to suffer irreparable harm by the City's and PennDOT's refusal to comply with their maintenance obligations, as well as the City's and PennDOT's planned demolition of the Bridge.

134. Wabash has no adequate remedy at law, or otherwise, for the harm and damage being done, because access across the Bridge is a condition of its business operations at the Property.

135. Irreparable harm, damage, and injury will follow and be done to Wabash unless the acts and conduct of the City and PennDOT are enjoined.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order compelling the City and PennDOT to comply with their duties to repair the Bridge and enjoining them from demolishing the Bridge, and other such relief and/or damages as the Court deems appropriate.

RESPECTFULLY SUBMITTED,

BY:  _____

JENNA R. DIFRANCESCO, ESQUIRE

JONATHAN M. KAMIN, ESQUIRE

JONATHAN G. PRESTON, ESQUIRE

Counsel for Plaintiff Wabash Properties, LLC

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

SUBMITTED BY: COUNSEL



SIGNATURE: _____

NAME: JONATHAN G. PRESTON

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by e-mail, this 22nd day of May, 2024, on the following:

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