



Date: May 25, 2023

To: Deborah Ortega, Councilmember-at-large; LUTI committee (Committee Chair Sandoval, Vice Chair Herndon, and Councilmembers Torres, Black, Kashmann, Clark, CdeBaca).

From: Laura E. Aldrete, Executive Director, Community Planning and Development
Adam Phipps, Executive Director, Department of Transportation and Infrastructure
Matt Mueller, Director, Office of Emergency Management
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CC: Josh Laipply, Chief Projects Officer, Mayors Office
Jeannine Shaw, Legislative Director, Mayors Office

Re: **CB 22-1102 regarding development near freight railways**

We are grateful to Councilwoman Ortega’s continued service to the City and collegial spirit in working with the departments on numerous issues that have resulted in the betterment of our city and assistance to our residents over the years. We also admire the Councilwoman’s passion toward rail safety, as is evident in both her request for a Freight Railroad Safety Study and in the introduction of council bill 22-1102 regarding development near freight railways. The study that was conducted to summarize existing rail conditions and risk factors in Denver and to subsequently provide recommendations for future mitigation measures. City staff did participate in a multi-departmental working group to contribute to the study.

While the Councilwoman’s bill was initially introduced in late 2022, it was postponed for action until the study was fully complete and recommendations could be considered. It is now scheduled for LUTI committee action June 6. Given the quickly approaching committee date, leadership and staff from agencies that carry subject matter expertise in development, infrastructure, and emergency management that would also be largely responsible for implementing requirements related to CB 22-1102, wanted to take the opportunity to formally share feedback with the bill sponsor and LUTI committee members. Community Planning and Development (CPD), Department of Transportation and Infrastructure (DOTI), Denver Fire Department and Office of Emergency Management (OEM) have reviewed proposed CB 22-1102, in the form available as of the date of this communication, which is the same bill that was introduced in late 2022, before the study was complete.

Development near railways is a key component of Denver’s growth strategy – which directly connects to our region’s investment in light and commuter rail service. Denver has 35 light and commuter rail stations, adjacent to freight railways, all of which have a different character and expected density. The city’s adopted growth strategy in Blueprint Denver, which was passed by Denver City Council in 2019, as well as Denver’s TOD Strategic Plan, rely on leveraging significant private investment and new development around our rail stations. To be clear, overall health and safety are critical to all that we do, and we share these comments and questions with the goal of finding meaningful solutions to the challenges and opportunities facing our city as we continue to grow.

CPD and DOTI comments

1. **Unclear connection to identified risks:** the study and ordinance note that there are three main risks associated with freight rail – railway incidents, derailments, and hazardous material releases. Each of these risks have a variety of potential mitigations, and there is not one mitigation that clearly addresses all three. Yet the proposed ordinance seems to only address risks around derailment, without addressing other major risks including railway incidents and the release of hazardous materials. The greatest risk mitigation is achieved at the Federal level (Federal Rail Administration) in conjunction with the railroads.
2. **Impacts on private development and review times:** adoption of an ordinance like this, should require greater stakeholder discussion around the impact it will have on development outcomes and on development review times. The requirements in this ordinance will add new steps for development near rail (including cost), adding significant time to the development review process. There should be testing of the requirements on actual sites near rail so that the impact of the ordinance is fully understood. It is unclear how it will be implemented. For example, the ordinance calls for OEM to review all projects, but OEM does not have staff for development review and is not already part of the development review process. Many of the other specified agencies do not review zone use permits unless the property is part of the site development plan process (but again OEM does not).
3. **Negative impacts on the public realm and pedestrian safety:** the ordinance asks private development to mitigate in ways that would cause more everyday harm to our public realm through such requirements as T -walls and berms along the tracks and elevating the finished floor elevation above the railroad right-of-way grade. More testing and analysis of these impacts should be required with studies of actual sites close to the rail.
 - a. The addition of walls/berms will create long blank walls and unsafe spaces adjacent to the railroad tracks. The walls/berms required by the bill will also attract graffiti and create maintenance problems.
 - b. The ordinance also requires occupied areas of buildings to be elevated above railways. This will lead to a deterioration in street level activation in areas where pedestrian activation is encouraged. Buildings that are not designed to front and interact with the sidewalk will seriously deteriorate our public realm and a sense of safety on our streets.
 - c. Raising occupied areas of buildings above railways, and other requirements noted above, may also have the unintended consequence of 1) increasing building heights which may then be limited due to either heights limited through view plane protection or the allowed height in the zone district, and 2) the *perceived* ‘density’ of development as seen from the perspective of adjacent neighborhoods.
4. **Applicability:** The ordinance has unclear language in Section 10-433 about when it applies and could be perceived to not allow the issuance of permits for things such as equipment replacement without compliance with its requirements. Given the requirements for mitigation outlined in Section 10-433(b), this would be best applied to new construction.
5. **Not implementable and lacking in detail:** Some of the required mitigations do not have enough detail to allow departments to effectively implement, such as the requirement to construct berms/walls, the requirement for structural reinforcement and the required analysis of emergency vehicle access. As written, it would be next to impossible to implement the provisions of this ordinance without further detail through rules and regulations.
 - a. The buffer is only defined horizontally with no vertical limit and does not anticipate the piecemeal implementation of development over time. Additionally, what happens in

situations where the freight rail tracks are elevated above adjacent property – it would not make sense to elevate new development above the rail in these instances.

- b. There is not a mechanism for weighing the costs and benefits of berms/walls or structural reinforcement of buildings against other solutions which could provide the same safety outcomes (benefits) at a lower cost.
6. **Prioritization of Rail Safety ordinance not aligned with CPD or City-wide Safety Priorities:** Per the ordinance, CPD would be required to prioritize ill-defined mitigation strategies, and rules and regulations over other key projects including mobile home parks and former chapter 59. Specific to prioritization of accidental deaths due to freight railroad accidents (3 in 2021) versus those due to drug overdoses, suicides, and roadway vehicle (traffic) accidents (411, 156, 96 respectively for 2021) CPDs planning work with partner agencies would be best focused on impacting those categories that see the greatest fatalities.

OEM Comments

1. **Risk in relation to scope and frequency:** hazardous materials transported by rail pose a moderate risk to the City and County of Denver per Denver Hazard Mitigation Plan and this risk is certainly worth mitigating to the greatest degree practical. Numerous hazardous materials related rail incidents across the country have demonstrated that a threat to life and property exists near heavy rail. However, this risk should also be put into context given the scope and frequency of impacts in relation to other hazards threatening Denver.
2. **Limited mitigation impacts:** the type and extent of hazards that could occur in relation to a railroad incident are vast: environmental, derailment, at-grade crossing conflicts, hazardous materials. While portions of the proposed regulations could help during a major rail hazmat incident, similar to the one in East Palestine, Ohio, the proposed measures in the bill would not have fully mitigated the impacts. The initial evacuation zone for the East Palestine incident was one mile, which is well beyond the 100 ft buffer proposed in the legislation. Further, this legislation would not mitigate against long-term environmental impacts.
3. **Limited cost-effective mitigation measures:** given the limited frequency of major rail incidents involving hazardous material and the cost to implement significant mitigation actions in densely populated urban areas, cost effective mitigation options are limited.
4. **Cost benefit analysis needed:** a cost benefit analysis for the structure requirements listed in the proposed legislation is needed before this rule is approved. It is important that these mitigation measures buy down the risk to a level that exceeds the implementation costs. Equity should also be considered given that Denver's heavy rail lines transverse some of the most disadvantaged neighborhoods in Denver, and this legislation could result in increased building costs or decreased property values for owners in these areas.
5. **Opportunities to enhance citywide emergency planning:** OEM does support some of the other recommendations in the rail safety report that were not included in the legislation to include development of a citywide mass evacuation plan and community outreach on rail and hazardous materials. Legislation is not required to enact the planning and outreach exercise.

DFD Comments

1. **100' Setback concerns:** The Denver Fire Department appreciates Councilwoman Ortega's continuous support of Public Safety during her tenure with the City Council. However, understanding that hazardous materials incidents can span large distances, supporting unnecessary code changes that do not provide life safety or proactive mitigation of an emergency is difficult. The 100' setback could possibly create a false sense of security for the public and may not be reflective of life safety efforts used by Fire Operations for hazard mitigation. An additional item of concern is the impact on the underserved communities along the rail corridor; most notably impacted by this bill would be the current construction processes addressing multifamily affordable housing projects—any changes to the code result in expenses from delayed review times and increased inspections.
2. **Existing Safety Methods:** With a proper risk assessment, the department has accurate information concerning its impact on Fire Inspection resources and review times. Additional impacts could include the Fire Department's continued responsibility after the Certificate of Occupancy process. The bill would affect review and inspection in building perpetuity and add the complication of differing review and inspection for buildings based on year of construction. Many methods exist for the Fire Department, from Evacuation Plan review to FSA Programs and annual inspections without additional legislation. Hazard mitigation and evacuation plans for buildings in weather emergencies and other dangers require Fire Department approval.
3. **Best served by reactive measures:** The Denver Fire Department feels we are better served through reactive measures for response to incidents that create a better opportunity than relying on unproven standards for reactive requirements (Hazmat tools, HMIS Software for soft target hazards). Funding could be better allocated to current hazardous materials mitigation and regulations to proactively reduce active hazmat releases in the City and County of Denver. Jurisdictional communication with the Rail Companies would also be of great benefit when addressing the hazards presented along the rail line. These pro-active measures do not require legislation.
4. **FRA recommendations:** An additional item of note is previous legislation passed in 2009, listing 27 factors carriers should consider in risk assessments along rail routes. These factors include population densities, trip lengths, track types, maintenance schedules, and previous rail accidents associated with hazmat on the rail lines. The existing rules limit the transport of materials that fall into the "poison inhalation hazard" category to routes determined to be the safest and most secure. It also requires rail carriers to assess risks on all hazmat routes annually. At the time, the Federal Railroad Administration estimated carriers would spend \$20 million over 20 years to comply with the new requirements.



In conclusion, we stand with Councilwoman Ortega’s focus on safety of our residents. We believe the current and local regulations regarding railroad safety is appropriate when assessing all risk factors affecting the residents of Denver. As a next step, the departments of CPD, DOTI, DFD and OEM commit to continue to utilize the greatest risk factors for Denver citizens as a guide to create and implement plans that ensure a safe Denver. This next step would include robust stakeholder engagement and while it would not require legislation, we would welcome council’s participation as part of the stakeholder engagement process. We respectfully request that this council bill not move forward into legislation.