

# SMART REAL PROPERTY LICENSE AGREEMENT

DRAFT SMART LICENSE AGREEMENT No.  
 LICENSEE: City of Santa Rosa  
 At/Between Milepost(s) 54.96

## SMART LICENSE AGREEMENT No. \_\_\_\_\_

This License Agreement is entered as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ (~~Effective Date~~) between the SONOMA-MARIN AREA RAIL TRANSIT DISTRICT, a California public agency (hereinafter “SMART”) and the City of Santa Rosa, a California municipal subdivision, (hereinafter “Licensee”), and all together referred to as the “Parties”.

### RECITALS

- A. **WHEREAS**, SMART is the owner and operator of the Railroad right-of-way (“Right-of-Way”), including the ~~Right-of-Way~~ Way of Way in the City of Santa Rosa, in the County of Sonoma, CA (hereinafter “SMART’s Property”);
- B. **WHEREAS**, consistent with policies of the Federal Railroad Administration and the California Public Utilities Commission (“CPUC”), it is SMART’s policy to reduce the number of at-grade crossings on its railroad Right-of Way to reduce hazards associated with at-grade crossings;
- C. **WHEREAS**, Licensee applied to the CPUC for authority for an at-grade pedestrian crossing of SMART’s Right-of-Way at Milepost 54.96 in the City of Santa Rosa at Jennings Avenue (“the Jennings Avenue location”) in CPUC Proceeding No. A15-09-014;
- D. **WHEREAS**, the Licensee prepared Environmental Review documents and certified its Final Environmental Impact Report for the at-grade pedestrian crossing at the Jennings Avenue location as complete, adequate and prepared in compliance with the California Environmental Quality Act (“CEQA”);
- E. **WHEREAS**, in CPUC Proceeding No. A15-09-014, the CPUC authorized the Licensee’s Application for an at-grade pedestrian crossing at the Jennings Avenue location, and made CEQA findings adopting the environmental impacts and proposed mitigation measures set forth in the Licensee’s Final Environmental Impact Report;
- F. **WHEREAS**, Licensee has designed the at-grade pedestrian crossing to include enhanced safety features, which are subject to final approval by the Commission’s Rail Safety Division prior to commencement of construction;
- G. **WHEREAS**, Licensee has requested and desires to use SMART’s Property for use of the at-grade pedestrian crossing at the Jennings Avenue location by Licensee, its invitees, and users of the crossing, including members of the public utilizing the crossing (hereinafter “Licensee invitees”);
- H. **WHEREAS**, SMART has policies regulating and governing the use of its property, including a licensing process requiring a fully executed License Agreement to enable such use;

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- I. **WHEREAS**, Licensee now desires to obtain a License Agreement from SMART for the use of SMART's Property for use of the at-grade pedestrian crossing by Licensee and Licensee invitees; the area being Licensed for said purpose is shown on **Exhibit A** which is attached to this Agreement and incorporated into it by this reference ("Licensed Area");
- J. **WHEREAS**, the Parties understand and agree that this Agreement is a License Agreement for the use of the Licensed Area, and not a construction agreement, and therefore with respect to indemnity, is not subject to California Civil Code § 2782(a);
- K. **WHEREAS**, SMART has recommended either a grade separated crossing or no crossing at the Jennings Avenue location;
- L. **WHEREAS**, the Parties agree that this license to use the License Area for use of a pedestrian at-grade crossing at the Jennings Avenue location is for the benefit of the Licensee;
- M. **WHEREAS**, it is the intent of the Parties that Licensee will assume the risk and liability to the fullest extent allowed by law, as prescribed herein for the establishment and use of an at-grade crossing on the licensed property, including but not limited to any ~~use or~~ misuse of the crossing by Licensee and Licensee invitees;
- N. **WHEREAS**, Licensee's intent to assume the risk and liability as prescribed herein for the establishment and use of an at-grade crossing on the licensed property, was a material inducement and consideration to SMART to enter into this Agreement;
- O. **WHEREAS**, it is also the intent of the Parties that Licensee will comply with any and all requirements of Federal, State and local laws with respect to at-grade crossings including the CPUC's safety requirements;
- P. **WHEREAS**, Licensee's intent to comply with any and all requirements of the law with respect to at-grade crossings including the CPUC's safety requirements was a material inducement and consideration to SMART to enter into this Agreement; and
- Q. **WHEREAS**, Licensee acknowledges and understands that the Parties will need to enter into a separate Construction and Funding agreement for the construction of the at-grade pedestrian crossing facilities at the Jennings Avenue location (the "crossing Facilities" or "Facility") independent of this License Agreement.

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**NOW THEREFORE**, in consideration of the foregoing, and for good and valuable consideration paid to SMART by Licensee, the adequacy and receipt of which are hereby acknowledged, SMART and Licensee hereto mutually agree as follows:

1. **Recitals.** The above recitals are true and correct and are hereby incorporated in and expressly form a part of this Agreement.
2. **License.**
  - a. SMART grants Licensee a personal, revocable, non-exclusive License for the purposes of use of an at-grade pedestrian crossing by Licensee and Licensee invitees; subject to the conditions, covenants and restrictions of this License Agreement and together with the right of ingress and egress over SMART's property, the "Licensed Area", as shown on **Exhibit A**. Licensee acknowledges, understands and agrees that (1) the performance of Licensee's obligations and duties under this Agreement are a material inducement to the execution of the Agreement by SMART and the covenant and agreements herein, and (2) that Licensee shall not have the right to utilize any portion of SMART's Property outside of the License Area under the provisions of this License Agreement.
  - b. The License is for the limited purpose of providing pedestrian and bicycle access (but specifically not vehicle access) for use of the at-grade pedestrian crossing by Licensee and Licensee Invitees.
  - c. Licensee agrees that this License confers no rights on Licensee and Licensee Invitees to use SMART's Property outside of the License Area for any purpose whatsoever. Licensee will reasonably cooperate to prevent unauthorized use of the Licensed Area or any use of SMART's Property outside of the Licensed Area, such as, vandalism and trespassing ("Unpermitted Use"). Licensee will take reasonable steps to prevent and Unpermitted Use of the Licensed Area or SMART's Property.
3. **Assignment and/or Shared Use.** This License is personal and for the use of the Licensee only. Licensee shall not assign nor sublet nor share, in whole or in part, any rights covered by this Agreement, or permit any other person, firm or corporation to use, in whole or in part, any of the rights or privileges granted pursuant to this Agreement, without first obtaining the written consent of SMART, which consent may be denied or given at SMART's sole and absolute discretion. Notwithstanding the foregoing, the Parties acknowledge that the purpose of this License is to locate and establish a public pedestrian at-grade crossing at the Jennings Avenue location and agree that Licensee and Licensee Invitees, may visit and use the Jennings crossing, subject to Licensee's compliance with the requirements of this License.
4. **Limitations on Use & Prior Rights.**
  - a. **Limits on Use Defined by License Agreement.** This License is limited to the specific purpose described in the **Recitals** above, and to the specific Location and Facility shown on **Exhibits A and B** subject to the terms of this Agreement. Breach of any of these items shall be grounds for immediate termination of this License, which to the fullest extent allowed by law, includes termination of Licensee's right of access to SMART's Property, and shall require removal of the

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Facility from SMART's Property by Licensee, at Licensee's sole cost and expense. Licensee agrees that upon Notice by SMART to Licensee of Licensee's failure to comply with the terms of this Agreement and SMART's demand to Licensee to take all necessary actions to seek approval from the CPUC to close or modify the crossing, Licensee will immediately but no later than five business days take all necessary actions to seek approval from the CPUC for authority to modify or close the crossing. Licensee further agrees it shall bear all costs and expenses of seeking such authority and any and all costs and expenses associated with securing and insuring the Jennings crossing until such time as the CPUC can review and issues a final Decision, including but not limited to crossing guards, flaggers, and safety personnel at the sole discretion of SMART.

- b. **Authority of Licensee is Non-Exclusive.** This License is non-exclusive. The Licensee shall respect the rights and property of SMART and other authorized users of the SMART's Property, including but not limited to easements, power poles, streetlight poles, vaults, and conduits.
- c. **Prior Rights.** This License is subject and subordinate to the prior right of SMART, its successors and assigns, to use all SMART property in the performance of its operations. This license is also subject to all previous licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens and claims of title which may affect the property. There is reserved unto SMART, its successors and assigns, the right to construct, reconstruct, maintain and use existing and future facilities and appurtenances in, upon, over, under, across and along the Right-of-Way. This license is subordinate and made subject to all licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens and claims of title that may affect the Right-of-Way and shall not be construed as a covenant against the existence of any of these prior interests.
- d. **Transportation Purpose.** Licensee acknowledges that SMART's Property is used in connection with SMART's railroad and other services to the public and agrees that such uses by SMART are superior in all respects to all uses by Licensee. Licensee's use of the License Area must not in any way interfere with SMART's ability to carry out its functions, in its sole and absolute discretion. SMART shall have the right to access the property as needed by SMART in its sole determination, and without further liability to Licensee, SMART shall have the right to terminate this Agreement pursuant to **Sections 4 and 6 of this Agreement**, in order to carry out its functions, accordingly, as determined by SMART.

- 5. **Annual License Fee Rate.** Licensee shall pay SMART a License Fee per year, which reflects the average cost of routine inspections, testing, maintenance, and operations of the pedestrian at-grade crossing Facilities ("the Annual License Fee"). The Annual License Fee will commence at \$5,144 in 202X~~3~~ and will increase annually based upon the average increase in costs for routine inspections, testing, maintenance, and operations of pedestrian at-grade crossings on SMART's line.

Licensee shall pay SMART for all other costs and expenses for all other repairs, major maintenance, upgrades, and emergency calls out as set forth in paragraph ~~1919178~~, below.

### 6. **License Term, Termination & Relocation.**

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### a. Relocation.

**(i) No Obligation on SMART to Relocate Licensee or re-construct Facilities.** In the event that SMART's Regulators (or SMART) makes changes to its operations, grade or location of its tracks or facilities that SMART in its sole discretion determines is difficult or unreasonable for the existing facilities to be maintained, and to the fullest extent allowed by law, SMART may require the removal of all or part of the Facility from SMART's property at Licensee's sole cost and expense and SMART shall have no further obligations to relocate or provide for an alternate location to Licensee. Licensee agrees that upon Notice to Licensee by SMART of the need to remove or relocate the at grade crossing Facility, and SMART's demand to Licensee to take all necessary actions to seek approval from the CPUC to close or modify the crossing, Licensee will immediately but no later than five business days take all necessary actions to seek approval from the CPUC for authority to modify or close the crossing. Licensee further agrees it shall bear all costs and expenses of seeking such authority and any and all costs and expenses associated with securing and insuring the Jennings crossing until such time as the CPUC can review and issues a final Decision, including but not limited to crossing guards, flaggers, and safety personnel at the sole discretion of SMART.

**(ii) Relocation Costs.** In the event that SMART, in its sole discretion and to the fullest extent allowed by law, is able to provide Licensee with an alternate location on SMART's Property, SMART shall not be responsible for any costs or expenses whatsoever involved in relocating Licensee's Facility, in the event the Facility must be relocated or for any other cost or inconvenience to Licensee, whether direct or indirect.

**b. Waiver of Claims: Termination.** In addition to Licensee's assumption of all risks and waiver of all claims, per Section 14 of this License Agreement, Licensee further acknowledges and agrees that this License is revocable by SMART and in view of such fact, Licensee expressly assumes the risk of making any expenditure in connection with this License, even if such expenditures are substantial. Without limiting any indemnification obligations of Licensee or other waivers contained in this License Agreement and as a material part of the consideration for this License, Licensee fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against, and covenants not to sue, SMART under any present or future laws, statutes, or regulations, including, but not limited to, any claim for inverse condemnation or the payment of just compensation under law or equity, in the event that SMART exercises its right to revoke or terminate this License.

**7. Construction Work.** Licensee acknowledges and understands the Parties will need to enter into a separate Construction and Funding Agreement for the placement, installation and construction of the crossing Facilities. This License Agreement shall only become effective upon the execution and effectiveness of a Construction and Funding Agreement for the Jennings Crossing, pursuant to which the Licensee bears all the costs relating to placing, installing, and constructing the crossing and appurtenances thereto. If no such agreement is executed, this License Agreement shall be null and void and of no force or effect.



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**7.8. Facilities and Improvements.** Subject to the terms of a separate Construction and Funding Agreement, Licensee shall bear all costs relating to placing, installing, constructing, reconstructing, and removing the crossing Facilities on the Property, including the costs and expenses of insuring and securing the crossing when necessary, such as crossing guards and flaggers, at the sole discretion of SMART. Licensee shall not permit any mechanic's or materialman's lien of any kind to be enforced against SMART property for any work done or materials furnished for the Facility on SMART property.

**8.9. Government Laws, Regulations and/or Rules.** Licensee shall comply with all applicable laws, rules and regulations of the Federal, State, County, local governments and all administrative agencies thereof which may have jurisdiction over Licensee's use of the License Area and the existence, use, construction, installation, operation and maintenance of the Facility, and shall furnish proof of such compliance to SMART upon request. Accordingly, Licensee hereby indemnifies SMART from any liability relating to said noncompliance.

**9.10. Americans with Disabilities Act ("ADA").**

- a. **Compliance with ADA.** Licensee covenants and agrees that nothing shall be done by Licensee on the License Area in violation of the Americans with Disabilities Act ("ADA"), and that Licensee shall maintain, repair, and use the Licensed Area and all improvements, fixtures and personal property therein and thereon, and conduct its business within the Licensed Area, in accordance with the requirements of the ADA.
- b. **Responsibility for Costs Associated with ADA Compliance.** In the event that any improvements, alterations or repairs to the License Area are required by governmental authority under the ADA or its implementing regulations or guidelines, Licensee shall be solely responsible for all items due to Licensee's use of the License Area. Licensee covenants and agrees to pay all such costs and expenses to ensure ADA compliance as this is Licensee's sole responsibility, and Licensee hereby agrees to defend and indemnify SMART from any liability relating to noncompliance with the ADA due to Licensee's use of the License Area.

**10.11. Insurance.** Licensee shall, at its sole cost and expense, procure and maintain during the life of this Agreement, Insurance of the type, nature, amounts and with the limits, all as described in **Exhibit C** to this Agreement. On an annual basis, Licensee shall provide updated insurance coverages in its new Certificate of Insurance, of the type, nature, amounts and limits required by SMART at the time of said renewal(s). Such insurance type, nature, amounts and limits are subject to change by SMART at its sole and reasonable discretion.

Licensee's failure to maintain or to provide acceptable evidence that it maintains the Required Insurance shall constitute a material breach of this Agreement, upon which SMART immediately may suspend or terminate this Agreement subject to the terms set forth in paragraphs 4(a) and ~~23.23~~(f) herein. SMART, at its sole discretion, may obtain damages from Licensee resulting from said breach. Alternatively, SMART may purchase the Required Insurance, and without further notice to Licensee,

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pursue Licensee reimbursement.

For purposes of clarity, the Licensee's insurance must at a minimum cover the liability assumed by Licensee in ~~paragraphs~~paragraphs 14 and 15 below, to effectuate the intent of the Parties therein, which is a material inducement and consideration to SMART to enter into this Agreement.

**11.12. Right of Entry.** Should Licensee seek to perform any work within SMART's Property or Licensed Area, Licensee must seek and receive authorization from SMART including a right of entry permit and approval of the project.

**12.13. Notices.** All notices shall be given in writing and shall be delivered personally or by certified U.S. mail. Such notices or payments shall be addressed as follows:

**If to SMART:**                      **Sonoma-Marín Area Rail Transit District**  
5401 Old Redwood Highway, Suite 200  
Petaluma, California 94954  
Attention: Randy Friedland, Real Estate Manager  
(707) 794-3069  
rfriedland@sonomamarintrain.org

**If to Licensee:**                      **City of Santa Rosa**  
100 Santa Rosa Ave, Rm 10  
Santa Rosa, CA 95404  
Attention: City Manager (Licensee Contact)  
707-543-3010

~~**13. Assumption of Risk and Liability.** Licensee agrees to and assumes all risk and liability for determining the location, placement, design and establishment of the pedestrian at-grade crossing, and for any use or misuse of the crossing by Licensee and Licensee Invitees when such damages, expenses, losses, claims, liabilities, injuries or death would not have occurred but for the Licensee's decision to locate, establish and maintain a pedestrian at-grade crossing on the SMART's track at this location, except for the gross negligence or willful misconduct of SMART, its directors, officers, employees, and agents shown by a final non-appealable judgment.~~

**14. Assumption of Risk and Liability.** Licensee agrees to and assumes all risk and liability to the fullest extent allowed by law for determining the location, placement, design, establishment and maintenance of the pedestrian at-grade crossing, and for any use or misuse of the at-grade crossing by Licensee or its officers, employees or agents, or Licensee invitees, except to the extent that injury, death, loss or damage is determined by a court of competent jurisdiction to have been directly caused by the sole negligence, gross negligence or willful misconduct of SMART, its directors, officers, employees, or agents.

**14.15. Indemnification.**

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### Indemnity Provision - Licensed Property.

- ~~a.~~ ~~It is the express intent of the parties that~~ Licensee ~~shall fully~~will fully indemnify, ~~fully~~ defend, and hold harmless SMART ~~for, its directors, officers, employees and agents from~~ all claims, demands, actions, judgments, awards, liabilities, settlements and for any loss or damage to property, (including reasonable attorneys' fees and other defense costs), for injury or death and for loss and damage to any persons property, arising from, related to or resulting from the at-grade pedestrian crossing or use of the Licensed Area including those arising from or related in any manner or resulting from the location design, or establishment of the at-grade pedestrian crossing of SMART's track at this location, for any use of the including but not limited to for those arising from the Licensed Area or Facility (including, but not limited to, environmental claims, noise, nuisance, and Takings/inverse condemnation), and Licensee's negligent acts or failure to act or perform any obligation herein. Licensee further waives any and all rights to any type of express or implied indemnity against SMART, its directors, officer, employees or agents.
- ~~b.a.b.~~ ~~It is the express intent of the parties that~~ Licensee ~~will indemnify, defend and hold harmless SMART, its directors, officers, employees and agents from any and all claims, suits or actions arising from any cause whatsoever as set forth above, regardless of the existence or degree of fault or negligence (if any) on the part of SMART, other than for the gross negligence omissions, or willful misconduct of SMART, on the part of the Licensee or its officers, employees or agents, and Licensee invitees whether or not there is concurrent negligence on the part of SMART or its directors, officers, employees and agents shown by a final non-appealable judgment. The liability assumed by Licensee or agents, except to the extent that such claims are determined by a court of competent jurisdiction to have been when proximately or directly caused by the sole negligence, gross negligence or willful misconduct of SMART or its directors, officers, employees or agents. Licensee's duty to indemnify, defend, and hold harmless SMART, its directors, officers, employees and agents, as contemplated by this Paragraph and as set forth above, shall apply to incidents within, adjacent to, or in connection with the License Area, regardless of whether the incident occurs strictly within the boundaries of the License Area. shall be limited to incidents within the License Area.~~ Licensee's duty to indemnify, defend and hold harmless SMART under this subsection shall remain in effect regardless of whether not be affected by the fact, if it is a fact, that the damage, loss, death, or injury was occasioned caused in part or whole by third parties, Licensee, Licensee's Invitees or partially contributed to by the negligence of SMART, its directors, officers, employees and agents or otherwise, except to the extent that such claims shown by a final non-appealable judgment are proximately or directly caused by the gross negligence or willful misconduct of SMART Licensee's invitees. Licensee further waives any and all rights to any type of express or implied indemnity against SMART, its directors, officers, employees or agents.



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~~e-b~~ The duty to indemnify and save harmless includes the duties to defend as set forth in Section 2778 of the California Civil Code. Licensee agrees that its obligation to defend SMART is immediate and independent requirement, and SMART shall have the ability to control its defense. SMART shall have the right to select its legal counsel, at Licensee's expense, subject to the Licensee's approval, which will not be unreasonably withheld. Licensee further agrees that its obligation to defend SMART shall extend to any and all causes of action or claims asserted against SMART so long as any one cause of action or claim asserted against SMART is subject to the Licensee's defense obligation assumed above. Licensee agrees that its obligation to defend SMART is immediate and independent requirement and shall be controlled by SMART. SMART shall have the right to select its legal counsel at Licensee's expense, subject to Licensee's approval, which shall not be unreasonably withheld. Licensee further agrees that its obligation to defend SMART shall extend to any and all causes of action or claims asserted against SMART so long as any one cause of action or claim asserted against SMART is subject to the Licensee's defense obligation assumed above.

~~d.~~

c. If a settlement of a claim is reached at SMART's request, and before a court of competent jurisdiction (i.e., the trier of fact) makes a determination whether any such claim was directly caused by the sole negligence, gross negligence, or willful misconduct of SMART or its directors, officers, employees or agents, Licensee may initiate binding arbitration, each side to bear its own fees and costs, for the sole purpose of adjudicating the issue whether the claim was directly caused by the sole negligence, gross negligence, or willful misconduct of SMART or its directors, officers, employees or agents as set forth in paragraph 15a above. Prior to initiating arbitration, the Licensee shall first meet and confer with SMART in good faith to resolve the matter informally through negotiations. Licensee will not initiate arbitration unless and until it has participated in such meet and confer process. Licensee shall not initiate arbitration under this section unless Licensee has a good-faith belief that the claim was directly caused by the sole negligence, gross negligence, or willful misconduct of SMART or its directors, officers, employees or agents. Licensee shall be entitled to full reimbursement of the settlement amount it paid on SMART's behalf only should the arbitrator find that the cause of the claim falls within the exception for claims directly caused by was due to SMART's sole negligence, gross negligence, or willful misconduct as set forth in paragraph 15a.

d. SMART agrees that in any contract it enters with a contractor for the construction of the at-grade pedestrian crossing facilities at Jennings, or maintenance thereof, SMART will seek to seek to require its contractor to include Licensee as an additional insured party under any contract per the standard requirements of the SMART contract. ~~SMART agrees and to seek~~

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~~such~~provide the same protections against liability for the Licensee ~~to the maximum extent permitted by such contracts~~as the contract provides to SMART. Licensee agrees to fully cooperate with SMART concerning securing protection against liability for Licensee pursuant to this provision.

**15.16. Immunities.** Nothing set forth herein relative to this Agreement or the Section ~~15.14~~15 above, shall affect, or be construed to affect, any immunities held by SMART hereto, with respect to the use of the Licensed Area and/or SMART's Property.

**16.17. Severability.** If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable under any particular circumstances or for any reason whatsoever (i) the validity, legality and enforceability of the remaining provisions of this Agreement (including, without limitation, all other portions of any section, paragraph or clause of this Agreement that contains any provision that has been found to be invalid, illegal or unenforceable), or the validity, legality or enforceability under any other circumstances shall not in any way be affected or impaired thereby and (ii) to the fullest extent possible consistent with applicable law, the provisions of this Agreement (including, without limitation, all other portions of any Section, paragraph or clause of this Agreement that contains any such provision that has been found to be invalid, illegal or unenforceable) shall be deemed revised, and shall be construed so as to give the maximum effect to the intent manifested by this Agreement (including the provision held invalid, illegal or unenforceable).

**17.18. Survival of Indemnity Provision.** It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement shall survive any termination of this Agreement.

**18.19. Maintenance and Replacement.**

- a. ~~All~~Licensee shall bear the cost of maintaining and replacing all crossing fixtures, equipment, fencing or related crossing Facilities and equipment, which will be at the risk of Licensee only, though Licensee reserves its right to seek reimbursement ~~from SMART~~ if it is determined by a court of competent jurisdiction that any damage, replacement, cost, or repair thereto ~~was~~are proximately or directly caused by the sole negligence, gross negligence or willful misconduct of SMART ~~shown by a final non-appealable judgment or its directors, officers, employees or agents~~. SMART will not be liable for any damage, replacement cost or repair thereto, obsolescence, or for any damage, theft, abuse, criminal activity or vandalism thereof, whether or not due in whole or in part to any act or failure to act by SMART. ~~Licensee must promptly pay except to the extent caused by the sole negligence, gross negligence or willful misconduct of SMART or its directors, officers, employees or agents. Except as otherwise provided in this paragraph, Licensee must promptly pay SMART~~ the cost to replace or repair the damaged fixtures, fencing or related crossing facilities and equipment (including but limited to the cost to secure the crossing with flaggers and crossing guards), though Licensee reserves its right to seek

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- reimbursement from SMART if it is determined by a court of competent jurisdiction that any damage, replacement, cost, or repair thereto was directly caused by the sole negligence, gross negligence or willful misconduct of SMART or its directors, officers, employees or agents.
- b. SMART, at Licensee's sole cost and expense, will perform all required repair and maintenance of the area and equipment as shown on **Exhibit B**, though Licensee reserves the right to seek reimbursement from SMART if it is determined by a court of competent jurisdiction that such repairs or maintenance of the equipment thereto wasare proximately or directly caused by the sole negligence, gross negligence or willful misconduct of SMART or its directors, officers, employees or agents.
- c. At the sole cost and expense of Licensee, Licensee will perform all required inspections, repair and maintenance of the pedestrian crossing surfaces and approaches including but not limited to signage and striping as shown on **Exhibit B**, though Licensee reserves the right to seek reimbursement from SMART if it is determined by a court of competent jurisdiction that such repairs or maintenance of the equipment thereto wasare proximately or directly caused by the sole negligence, gross negligence or willful misconduct of SMART or its directors, officers, employees or agents.
- e.d. Nothing in this Agreement shall be construed to impose on Licensee any inspection, repair or maintenance obligation related to SMART's Property outside of the License Area.

### **19.20. Acceptance of License Area & Waiver of California Civil Code Section 1542.**

- a. **As-Is Condition.** Licensee accepts the License Area in its present physical "AS-IS" condition which includes ~~(an active doubled track railroad traveling a high rate of speed, limited visibility)~~<sup>2</sup>, and agrees to make no demands upon SMART for any improvements or alterations. By signing this Agreement, Licensee represents and warrants that Licensee has independently inspected the License Area and the area immediately surrounding and made all investigations, tests, and observations necessary to satisfy Licensee as to the condition of the License Area, zoning and land use laws, regulations, and ordinances affecting the License Area, and all of the conditions, restrictions, encumbrances, and other matters of record relating to the License Area. Licensee agrees that Licensee is relying solely on Licensee's independent inspection and that SMART has made no warranty or representation with regard to the License Area. SMART shall not be responsible for any latent defect or change in condition in the License Area and Licensee's obligations under this Agreement shall not be diminished on account of any defect in the License Area, any change of condition, or any damages occurring on the License Area. In case of the eviction of Licensee by anyone owning or claiming title to or any interest in the License Area, SMART shall not be liable to Licensee for any damage of any nature whatsoever or to

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refund any moneys paid hereunder.

- b. **Waiver of Rights Under California Civil Code Section 1542.** Licensee hereby releases SMART from all future claims, actions, or demands that Licensee may have or may hereinafter have, known and unknown, in any way relating to the quality, fitness, or condition of the License Area ~~at any time prior to commencement of construction of the at-grade crossing~~, and Licensee specifically waives ~~all such~~ rights under **California Civil Code Section 1542**,

**20.21. Further Assurances.** Each Party will, whenever and as often as it shall be requested so to do by any other Party, cause to be executed, acknowledged or delivered any and all such further instruments and documents as may be necessary or proper, in the reasonable opinion of the requesting Party, in order to carry out the intent and purpose of this Licensee Agreement.

**21.22. No Gift or Dedication to the Public.** This License Agreement is not intended and shall not be construed as a dedication of the License Area for public use or for any public purpose whatsoever, it being the intention of the Parties hereto that this License shall be limited to and for the purposes herein expressed, and each of the Parties hereto shall take whatever steps may be necessary to avoid such dedication, including but not limited to, undertaking those procedures set forth in California Code of Civil Procedure section 813 and California Civil Code section 1008. However, nothing in the immediately preceding sentence shall preclude the use of the Licensed Area by Licensee and Licensee Invitees including members of the public for use of the Licensed Area in accordance with this License Agreement.

**22.23. General Provisions.** Notwithstanding other mention in separate Sections of this License Agreement, where applicable below, Licensee agrees as follows:

- a. **No Implied Waiver.** No waiver of any default or breach of any covenant of this Agreement by either party shall be implied from any omission by either party to take action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other than the default specified in the waiver, and then the waiver shall be operative only for the time and to the extent stated. Waivers of any covenant, term or condition by either party shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by either party to or of any act by either party requiring further consent or approval shall not be deemed to waive or render unnecessary their consent or approval to or of any subsequent similar acts.
- b. **Time of Essence.** Time is of the essence for each and every provision of this Agreement.
- c. **Binding Agreement.** This License Agreement shall be binding on and inure to the benefit of the parties and their successors and assigns, except as may otherwise be provided in this Agreement.
- d. **Survivorship.** To the fullest extent allowed by law, all protections afforded SMART under

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this License Agreement, including but not limited to Indemnity, Waiver of Claims, Costs to Licensee, Relocation of Licensee, Termination of this License Agreement and relating to any other activities and/or actions deemed appropriate by SMART in its sole and absolute discretion, shall survive Termination this Agreement.

- e. **Compliance with Laws.** Notwithstanding other mention in separate sections of this License Agreement, Licensee shall comply, at Licensee's expense, with all applicable laws, regulations, rules and orders with respect to the use of SMART's Property, regardless of when they become or became effective, including, without limitation, those relating to The Americans with Disabilities Act ("ADA"), construction, grading, signage, health, safety, noise, environmental protection, protected and/or endangered species, hazardous materials, waste disposal and water and air quality, and furnish satisfactory evidence of such compliance upon request of SMART. Before beginning work on the Property, Licensee shall also obtain, at Licensee's expense, any and all permits, licenses and approvals required for construction and operation of the Work and shall provide SMART with copies of such approvals.
- f. **Default.** In the event that Licensee fails to perform any obligation under this Agreement, after notice and thirty (30) days in which to cure the default, Licensee shall pay all costs and expenses incurred by SMART in obtaining performance of such obligations, including costs of suit and reasonable attorney's fees. Licensee further agrees that upon Notice by SMART to Licensee, of Licensee's failure perform any obligation under this Agreement and SMART's demand to Licensee to take all necessary actions to seek approval from the CPUC to close or modify the crossing, Licensee will immediately but no later than five business days take all necessary actions to seek approval from the CPUC for authority to modify or close the crossing. Licensee further agrees it shall bear all costs and expenses of seeking such authority and any and all costs and expenses associated with securing and insuring the Jennings crossing until such time as the CPUC can review and issues a final Decision, including but not limited to crossing guards, flaggers, and safety personnel at the sole discretion of SMART.
- g. **Governing Law & Venue.** This Agreement shall be governed, construed and enforced in accordance with the laws of the State of California. If any action is brought to interpret or enforce any term of this Agreement, the action shall be brought in a court of proper jurisdiction situated in the County of Sonoma.
- h. **Attorneys' Fees.** If any legal proceeding should be instituted by either of the Parties to enforce the terms of this Agreement or to determine the rights of the Parties under this Agreement, the prevailing Party in the proceeding shall receive all court costs and reasonable attorneys' fees.
- i. **No Third-Party Beneficiaries.** Nothing contained in this License Agreement shall be construed to create and the Parties do not intend to create any rights in third parties. No incidental beneficiary, whatever relationship such person may have with the Parties, shall



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have any right to bring an action or suit, or to assert any claim against the Parties under this Agreement. Nothing contained in this Agreement shall be construed to create and the Parties do not intend to create any rights in third parties.

- j. Relationship of Parties.** The Parties intend by this Agreement to establish the relationship of Licensor and Licensee only, and do not intend to create a partnership, joint venture, joint enterprise, agency, or any business relationship other than that of Licensor and Licensee.
- k. Integration Clause: Entire Agreement & Modification.** This License Agreement constitutes the complete expression of the agreement between SMART and Licensee with regard to the subject matter hereof, and supersedes all prior agreements, oral or written, proposals, and all other communications between SMART and Licensee related to the subject matter hereof, which are not fully expressed in this Agreement. The parties intend this Agreement to be an integrated agreement. Any modification of or addition to this Agreement must be in writing signed by both Parties. Notwithstanding the foregoing, Licensee acknowledges and understands that the Parties will need to enter into a separate Construction and Funding agreement for the construction of an at-grade pedestrian crossing Facilities independent of this License Agreement.
- l. Interpretation.** The language of this Agreement shall be construed simply according to its plain meaning and shall not be construed for or against either Party.
- m. Authority to Sign.** Each individual signing this Agreement on behalf of a party warrants that the individual has been duly authorized to execute this Agreement and to bind that party on whose behalf the individual is signing. This Agreement is not effective unless and until approved by SMART's Board of Directors and fully executed by the individual shown below.
- n. Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original but both of which shall constitute one and the same agreement.

**[THIS SPACE INTENTIONALLY LEFT BLANK]  
[SIGNATURE PAGE TO FOLLOW]**

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IN WITNESS HEREOF, SMART and Licensee have executed this Agreement by their undersigned officials and officers lawfully authorized to do so.

Licensor:

Sonoma-Marín Area Rail Transit District  
a public agency

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Licensee:

City of Santa Rosa  
a California municipal corporation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM BY SMART  
GENERAL COUNSEL

By:

\_\_\_\_\_  
**Thomas F. Lyons**

Date: \_\_\_\_\_

APPROVED AS TO FORM BY CITY  
CITY ATTORNEY

By:

\_\_\_\_\_

Date: \_\_\_\_\_

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### EXHIBIT A SMART's Property and Licensed Area

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**“License Area” in blue:**

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### EXHIBIT B

DRAFT

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### EXHIBIT C

#### INSURANCE REQUIREMENTS

Upon completion of construction of the at-grade crossing Facilities and prior to opening of the Facilities for use, Licensee shall provide SMART with satisfactory evidence, in the form of a Certificate of Insurance, that Licensee is insured in accordance with the following. Said insurance shall remain in effect throughout the term of this License:

##### Commercial General Liability

Licensee shall procure and maintain Commercial General Liability insurance covering products-completed and ongoing operations, property damage, bodily injury and personal injury using an occurrence policy form, in an amount no less than \$10,000,000 per occurrence.

Said policy shall either include a Railroads CG 24 17 endorsement removing the exclusion of coverage for bodily injury or property damage arising out of construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge, trestle, tracks, roadbeds, tunnel, underpass or crossing, or provide evidence that said policy does not have any railroad exclusions. A follow form Excess Liability policy may be utilized to satisfy the required limits of liability under this section.

Licensee shall file Certificate(s) of Insurance with SMART evidencing the required coverage and endorsement(s) and, upon request, a certified duplicate original of any of those policies. Said endorsements and Certificate(s) of Insurance shall stipulate:

- 1) SMART, its officers and employees, shall be named as additional insured or additional covered party on all policies listed above.
- 2) That the policy(ies) is Primary Insurance and the insurance company(ies) providing such policy(ies) shall be liable thereunder for the full amount of any loss or claim which Licensee is liable, up to and including the total limit of liability, without right of contribution from any other insurance effected or which may be effected by the Insureds.
- 3) The policy shall also stipulate: Inclusion of the Insureds as additional insureds shall not in any way affect its rights either as respects any claim, demand, suit or judgment made, brought or recovered against Licensee. Said policy shall protect Licensee and the additional insureds in the same manner as though a separate policy had been issued to each, but nothing in said policy shall operate to increase the insurance company's liability as set forth in its policy beyond the amount or amounts shown or to which the insurance company would have been liable if only one interest had been named as an insured.



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- 4) Licensee hereby grants to SMART a waiver of any right to subrogation which any insurer of said Licensee may acquire against SMART by virtue of the payment of any loss under such insurance. Licensee agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not SMART has received a waiver of subrogation endorsement from the insurer.

### Deductibles and Retentions

Licensee shall be responsible for payment of any deductible or retention on Licensee's policies without right of contribution from SMART. Deductible and retention provisions shall not contain any restrictions as to how or by whom the deductible or retention is paid. Any deductible or retention provision limiting payment to the name insured is not acceptable.

### Self-Insurance

Licensee's obligation hereunder may be satisfied in whole or in part by adequately funded self-insurance, upon evidence of financial capacity satisfactory to SMART.

### Claims Made Coverage

If any insurance specified above is written on a claims-made coverage form, Licensee shall:

- 1) Ensure that the retroactive date is shown on the policy, and such date must be before the date of this License or beginning of any use under this License;
- 2) Maintain and provide evidence of similar insurance for at least three (3) years following project completion, including the requirement of adding all additional insureds; and
- 3) If insurance is cancelled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to License effective date, Licensee shall purchase "extending reporting" coverage for a minimum of three (3) years after completion of the work.