

Jennings Avenue Bicycle and Pedestrian Rail Crossing Real Property License Agreement

Jason Nutt
Assistant City Manager

April 9, 2024

CPUC Decision Timeline

- September 20, 2016 – CPUC issues decision 16-09-002 granting approval for an at-grade bicycle and pedestrian crossing
- October 10, 2019 – CPUC issues Decision 19-10-002 granting 1st 2-year extension
- October 7, 2021 – CPUC issues Decision 21-10-003 granting 2nd 2-year extension
- August 9, 2023 – City submits 3rd request to extend Decision 16-09-002

Current Bicycle & Pedestrian Route

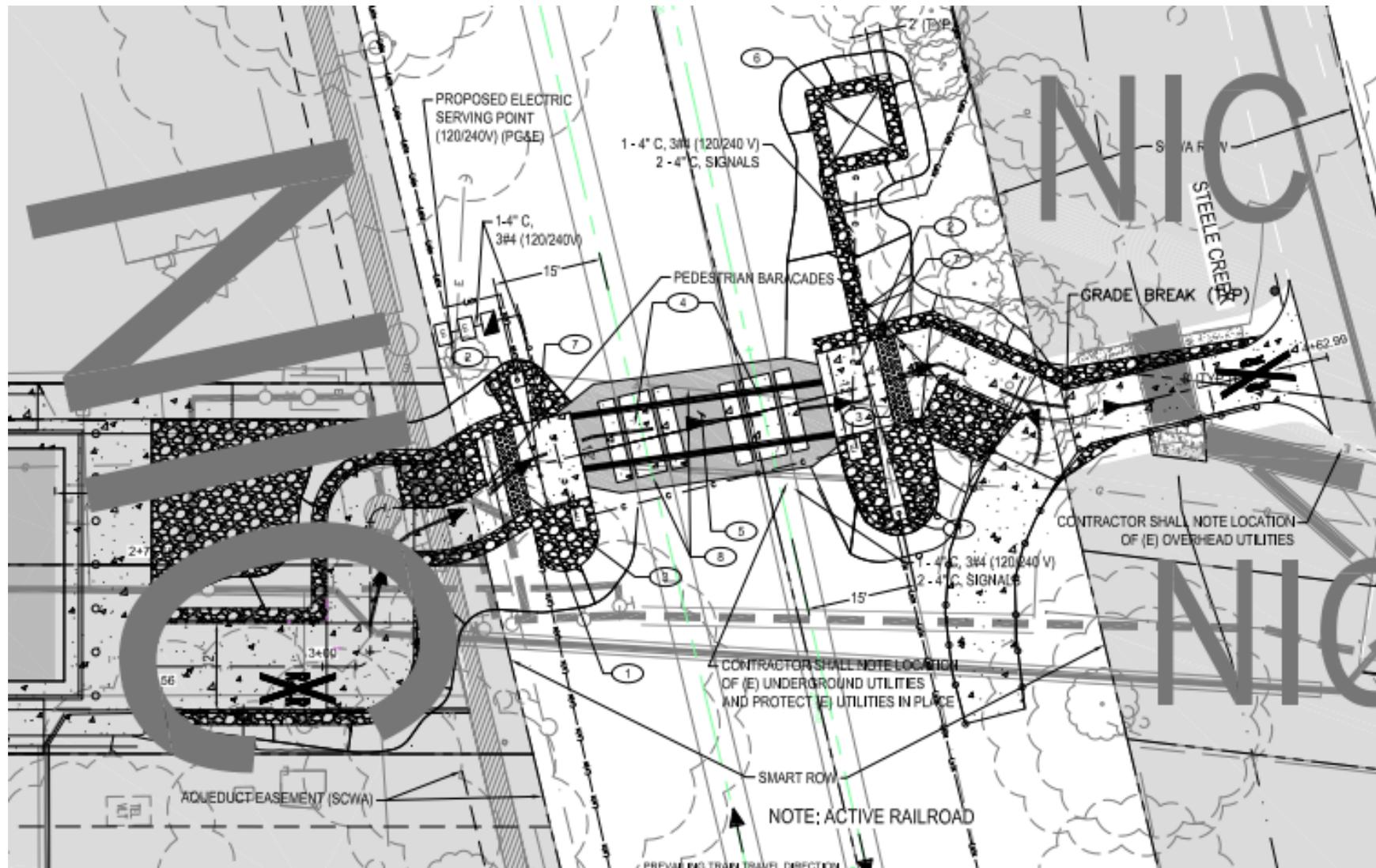
3000+ feet or
over ½ mile

Transit Hub and
Shopping Mall



Helen Lehman School

Proposed At-Grade Crossing



Proposed At-Grade Crossing



Real Property License Agreement

Agreement to work together with the idea that a construction agreement can be reached allowing the City to construct an at-grade bicycle and pedestrian crossing

- March 2, 2023 – Joint public meeting
- Initial Meeting – August 4, 2023
- August 9, 2023 – City submits 3rd extension request
- Initial draft language from SMART – September 25, 2023
- November 15, 2023 – ALJ Kelley defers decision to continue negotiations
- Revised draft language from SMART – January 10, 2024
- Revised draft language from SMART – January 26, 2024

Real Property License Agreement

14. Assumption of Risk and Liability.

The Property License Agreement creates a significant issue of risk control for the City.

The City assumes ALL risk and liability for determining the location, placement, design and establishment of the pedestrian at-grade crossing, including for any misuse of the crossing by anyone, and faces the possibility of losses over which it has little or no control because SMART has essentially transferred all risk to City even for SMART's sole ordinary negligence.

Real Property License Agreement

15.b. Indemnity Provision - Licensed Property

The City shall be responsible for **ALL** losses from any claims, suits, or actions arising from **ANY** cause whatsoever 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.

Real Property License Agreement “Gross” versus “Ordinary” Negligence

“Gross negligence” refers to severe, reckless, careless misconduct, and is considered the most actionable form of negligence.

“Ordinary negligence” refers to a “reasonable person” failing to exercise reasonable care.

SMART is unwilling to accept legal responsibility for its own ordinary negligence, even when the damage, death, or injury was proximately or directly caused by SMART’s *sole* negligence.

Real Property License Agreement

15.c. Indemnity Provision - Licensed Property

The City's duty to defend SMART is absolute. City cannot recoup its attorney's fees and litigation costs even after a non-appealable judgment that the damage, death, or injury through which any claim arises was proximately or directly caused by the gross negligence or willful misconduct of SMART.

Real Property License Agreement Alternate Proposal

- Retains SMART's Real Property License Agreement format and language; however,
- Removes the "but for" clauses relating to the City's decision to locate and construct an at-grade crossing at Jennings Avenue,
- Removes the City's "absolute" duty to defend SMART,
- Provides more balanced indemnity language – excludes City's liability for SMART's "sole negligence",
- Ties indemnification to License Area and limits exposure to crossing activities

Recommendations

By Motion:

1. Direct the City Manager to sign the Real Property License Agreement drafted by SMART on January 26, 2024, as modified, addressing two areas with grammatical errors, return to SMART and notify the CPUC, or
2. Direct the City Manager to sign an alternate Real Property License Agreement containing more balanced indemnity language, return to SMART and notify the CPUC, or
3. Reject the Real Property License Agreement and notify the CPUC that we are retracting the City's crossing extension request.