

CITY OF SANTA ROSA
CITY COUNCIL

TO: MAYOR AND CITY COUNCIL
FROM: JASON NUTT, ASSISTANT CITY MANAGER
CITY MANAGER'S OFFICE
SUBJECT: JENNINGS AVENUE AT-GRADE BICYCLE AND PEDESTRIAN
RAILROAD CROSSING REAL PROPERTY LICENSE
AGREEMENT WITH THE SONOMA MARIN AREA RAIL TRANSIT
DISTRICT

AGENDA ACTION: MOTION

RECOMMENDATION

It is recommended by the City Manager's Office, Transportation and Public Works Department and the City Attorney's Office that the Council consider, by motion, taking one of the following actions relating to the license agreement proposed by staff of SMART for use and construction of the at-grade crossing of SMART's Right-of-Way at Milepost 54.96 in the City of Santa Rosa at Jennings Avenue: 1) direct the City Manager to execute the version of the license agreement proposed by SMART's staff after the remaining Exhibits have been provided by SMART in a form to be approved by the City Attorney, and return the executed agreement to the SMART Board of Directors for consideration and notify the CPUC; or 2) direct the City Manager to execute a revised license agreement containing more balanced liability and indemnity language after the remaining Exhibits have been provided by SMART in a form to be approved by the City Attorney, and return the executed agreement to the SMART Board of Directors for consideration and notify the CPUC; or 3) reject the license agreement proposed by SMART's staff and direct the City Manager to notify the CPUC and SMART that the City retracts its application to construct an at-grade bicycle and pedestrian crossing at Jennings Avenue.

EXECUTIVE SUMMARY

On September 20, 2016, the California Public Utilities Commission (CPUC) issued Decision No. 16-09-002 granting the City's application for an at-grade crossing of SMART's rail line at Jennings Avenue. Since that date, staff for the City and SMART have been in protracted negotiations over the terms and conditions of a License Agreement under which SMART would allow the City to utilize its property to construct an at-grade bicycle and pedestrian crossing of the rail lines at Jennings Avenue.

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL
PROPERTY LICENSE AGREEMENT WITH SMART
PAGE 2 OF 7

The License Agreement proposed by SMART staff requires the City to assume all operational costs associated with the crossing and liability resulting from the location, design, establishment or maintenance of the at-grade crossing even if resulting solely from SMART's negligence, except for liability ultimately determined by the courts to be due to the gross negligence or willful misconduct of SMART. Additionally, the License Agreement proposed by SMART staff requires the City to pay the attorneys' fees and costs associated with defending SMART against any claims resulting from the location, design, establishment or maintenance of the at-grade crossing, even if the courts ultimately determine that the claims resulted from SMART's gross negligence or willful misconduct.

The Honorable Gerald F. Kelley, Administrative Law Judge with the CPUC, is aware that both SMART and the City will be bringing proposed License Agreement language focused on the duty to defend and indemnify to their respective legislative bodies in April 2024. Absent confirmation to the CPUC of a fully executed License Agreement to build the crossing, Judge Kelley has indicated his intent to schedule a hearing to address whether the Commission should continue to grant any further extensions of the time to build the crossing and to determine a deadline for an agreement to be effectuated.

In light of the pending CPUC hearing, Staff recommends that the City Council determine at this time whether the City should execute the draft License Agreement proposed by SMART staff, execute a modified version of that draft License Agreement with a more balanced approach to liability and indemnity, or retract the City's application to the CPUC to construct the at-grade crossing across the SMART tracks at Jennings Avenue.

BACKGROUND

Prior to November 30, 2015, when SMART installed fencing from W. College Avenue to Guerneville Road closing an unauthorized and unimproved at grade crossing of the rail tracks at Jennings Avenue, approximately 100 pedestrians and cyclists per day used Jennings Avenue to cross the railway to get to school, public transportation, a grocery store and work. Following the closure of the crossing, pedestrians and cyclists must utilize a ½-mile detour to Guerneville Road and back to Jennings Avenue on the other side of the tracks. Formalizing this connection was identified as a high priority in the 2010 North Station Area Plan and Bicycle and Pedestrian Master Plan and a contingency of neighbors continue to urge the City and SMART to complete the approved crossing.

The California Public Utilities Commission (CPUC) issued Decision 16-09-002 on September 20, 2016, granting the City's application for an at-grade crossing of SMART's rail line at Jennings Avenue and has since approved the City's two subsequent Petitions to extend the authorization period for construction of the crossing (Decision 19-10-002 and Decision 21-10-003).

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL
PROPERTY LICENSE AGREEMENT WITH SMART
PAGE 3 OF 7

The City finalized construction drawings that incorporated additional safety measures requested by SMART, and received design approval from the CPUC's Rail Safety Division (RSD) on June 1, 2017. With that action, the project was approved and ready to fund and construct.

Throughout the 2016 proceedings with the CPUC, SMART actively supported the City's application for the at-grade crossing, noting the crossing's importance for bicycle and pedestrian travel and safe routes to schools.

On June 21, 2017 SMART suddenly reversed its position and notified the City that it was no longer willing to consider the project unless the City entered into an unrelated agreement associated with Quiet Zone improvements. The City declined to connect the two initiatives and SMART issued a letter on August 20, 2018, opposing construction of the Jennings Avenue crossing improvements.

Since that time, and through several different initiatives, the City has made continuous efforts to negotiate reasonable terms and conditions with SMART that would allow the City to proceed with construction of the crossing. SMART and the City jointly held a community meeting on March 2, 2023, where the City provided an update on the at-grade crossing design and SMART described their concerns with the at-grade crossing and inquired about community support for a grade-separated crossing. During that meeting SMART and the City publicly agreed to continue the negotiations associated with the at-grade crossing.

Following a series of informal discussions between the City and SMART staff, on September 25, 2023, SMART provided the City with a draft real property license agreement. That original agreement has evolved over the past six months with a handful of changes City staff made in redline to address typographical errors in the document itself. Provided as Attachment 1 is the version with redlined changes that reflect the City's correction of those typographical errors.

PRIOR CITY COUNCIL REVIEW

Not applicable.

ANALYSIS

Although SMART staff has moved away from its previous demand for unilateral indemnification from the City and all other users of the City's proposed right-of-way across the track at Jennings Avenue, the liability and indemnification language SMART staff continues to demand remains extremely one-sided in SMART's favor. It also appears clear that SMART staff will not agree to further modifications to the draft License Agreement that would minimize the City's significant liability risk.

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL
PROPERTY LICENSE AGREEMENT WITH SMART
PAGE 4 OF 7

Under the License Agreement as currently proposed by SMART's staff, the City must assume all operational costs associated with the crossing and liability resulting from the location, design, establishment or maintenance of the at-grade crossing, except for liability ultimately determined by the courts to be caused by gross negligence or willful misconduct by SMART or its directors, officers, employees or agents. Under the language SMART proposes, the City would be liable even when the damage, death, or injury was caused by SMART's sole ordinary negligence. Notably, gross negligence refers to severe, reckless, careless misconduct, and is considered the most actionable form of negligence, whereas ordinary negligence refers to a "reasonable person" failing to exercise reasonable care.

Additionally, under the proposed License Agreement, the City has an absolute duty to defend SMART through a final non-appealable judgment. That means the City cannot recoup the attorney's fees or litigation costs it spends providing SMART with a defense even if the court ultimately rules that the damage, death, or injury was caused by the "gross negligence" or "willful misconduct" of SMART.

The City would have insurance coverage for some of the additional liability under the License Agreement SMART staff proposes. The City's memorandum of understanding with the California Joint Powers Risk Management Authority (CJPRMA), includes the City's Self Insurance Retention (SIR) – or "deductible" – at \$1 million dollars for each occurrence. Any settled claim or judgement arising from the at-grade crossing, absent a final judicial finding of SMART's "gross negligence" or "willful misconduct", would be the City's responsibility, and any claims that exceed the City's \$1 million per occurrence SIR would be covered by CJPRMA. But increases in the number and dollar value of claims the City makes with CJPRMA will result in CJPRMA increasing the City's future insurance premiums.

City staff had unsuccessfully attempted to negotiate more fair and balanced liability and indemnity provisions in the draft License Agreement throughout the course of negotiations with SMART staff. Staff has provided as Attachment 2 a revised version of the License Agreement proposed by SMART's staff to incorporate a far more balanced level of risk to the City. Specifically, unlike the License Agreement proposed by SMART staff, the revised agreement does not impose liability on the City for SMART's sole negligence. Nor under the revised agreement does the City have an absolute duty to defend SMART through a final non-appealable judgment with no ability to recoup its attorneys' fees and litigation costs even if the Court ultimately rules that the damage, death or injury was caused by the gross negligence or willful misconduct of SMART.

Both License Agreement versions reference the License Area, which defines the physical boundaries where the Agreements will apply. Based on other rail crossing agreements, it is assumed that the License Area will be consistent with the area containing improvements, safety and warning equipment and features associated with the at-grade crossing within the SMART right-of-way. A map showing the License Area will be attached as Exhibit A before any version of the License Agreement is executed.

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL
PROPERTY LICENSE AGREEMENT WITH SMART
PAGE 5 OF 7

Additionally, both Agreements will provide in the body of the agreement and in more detail in Exhibit B a description of how the duties and responsibilities for the construction, inspection, repair and maintenance of the at-grade crossing improvements, safety and warning equipment and features are divided between SMART and the City. It is anticipated that Exhibit B, which will be attached before any version of the License Agreement is executed, will include delegations substantially similar to the examples provided below, should the decision be made by the City and SMART to proceed with construction of the at-grade crossing:

SMART will:

- Develop a Master Reimbursement Agreement to facilitate the construction of the crossing which will include, at a minimum, language describing the following:
 - Construction of the Work: The Project will be constructed by SMART Contractors. SMART Contractors will complete the work based upon the design developed by and provided by City and system's engineering work required.
 - Contract Administration: SMART shall administer the construction contract and shall be responsible for inspecting Project construction within the SMART and SWA right-of-way.
- SMART shall own and maintain, at its cost, the rail line, structural rail supports, ballast where it exists beyond the dedicated pedestrian area and communication and interconnect lines between signal houses.
- Routine Operation and Maintenance: SMART will operate, repair and maintain the improvements, safety features and facilities within the License Area at City's cost.
- Should it become necessary to temporarily close the Jennings at-grade crossing, SMART shall notify and consider input from the City prior to making such modifications unless the closure is determined by the SMART to be required for safety, in which case it may be closed immediately.

City will:

- Final Plans and Specifications: Finalize construction documents, ensure compliance with CEQA, provide engineering support during construction, perform materials testing, perform construction staking and resolving and utility conflicts that arise.
- Public Outreach: City shall perform all public outreach associated with the Project that City deems necessary to make the public and surrounding community aware of construction activities.

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL
PROPERTY LICENSE AGREEMENT WITH SMART
PAGE 6 OF 7

- Costs: City is responsible for all construction costs: construction costs, reasonable SMART construction management costs, permitting costs and unanticipated costs that may arise as a result of implementing the work.
- Ownership and Maintenance:
 - City shall own all improvements, safety features and facilities including fencing, crossing gates and arms, signal house, surface materials associated with the at-grade crossing, striping and signing associated with the at-grade crossing.
 - City will compensate SMART for routine and emergency inspections and maintenance activities of the City improvements listed above, with all work performed by SMART's agents or assigns.
 - City will compensate SMART for repair or replacement of aging or damaged improvements, safety and warning equipment or facilities.

FISCAL IMPACT

The City's memorandum of understanding with the California Joint Powers Risk Management Authority (CJPRMA), includes the City's Self Insurance Retention (SIR) – or “deductible” – at \$1 million dollars for each occurrence. Increases in the City's future insurance premiums could result depending on the number and nature of the claims.

Under the terms defined in SMART's proposed agreement, any settled claim or judgement absent a final judicial finding of SMART's “gross negligence” or “willful misconduct”, would be the City's responsibility, and any claims that exceed the City's \$1 million per occurrence SIR would be covered by CJPRMA. With the City's absolute duty to defend, SMART ultimately controls its defense litigation through counsel retained by the City, including negotiating demands against the City. If the City is also named in the same lawsuit, then the City incur additional but separate costs for its own legal defense with internal resources or outside counsel support.

The terms defined in the City's revised agreement incorporate shared financial responsibility with SMART by requiring SMART to bear liability for its own “sole negligence,” “gross negligence” or “willful misconduct”. While this Option also establishes a duty for the City to defend and indemnify SMART with reasonable attorney fees, if it is determined that SMART is “solely negligent,” “grossly negligent” or acted with “willful misconduct,” then SMART would be responsible for paying for its own defense, settlements and costs.

Should the City and SMART eventually agree to proceed with construction of the at-grade crossing, both the Option 1 and Option 2 agreements contain a duty for the City to pay for the cost of construction as well as an annual License Fee of \$5,039 as described in Section 5 of both agreements, which includes the average cost of routine inspections, testing, maintenance and operations of the facilities and equipment associated with the crossing.

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL
PROPERTY LICENSE AGREEMENT WITH SMART
PAGE 7 OF 7

Current project funds for construction of the at-grade crossing equal \$1,166,414. If Council eventually decides to proceed with construction of the Jennings Avenue Crossing, additional funds will be required with a rough total project estimate of approximately \$4,000,000. This project is grant eligible and several grant funding cycles are quickly approaching.

ENVIRONMENTAL IMPACT

This action is exempt from the California Environmental Quality Act (CEQA) because it is not a project which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, pursuant to CEQA Guideline section 15378.

BOARD/COMMISSION/COMMITTEE REVIEW AND RECOMMENDATIONS

The Bicycle and Pedestrian Advisory Board continues to support the construction of an at-grade bicycle and pedestrian crossing as a high-priority project.

NOTIFICATION

Not applicable.

ATTACHMENTS

- Attachment 1 – Real Property License Agreement proposed by SMART with redline changes to address typographical errors
- Attachment 2 – Alternative Real Property License Agreement

PRESENTER

Jason Nutt, Assistant City Manager