

**CONSTRUCTION AND FUNDING AGREEMENT****SONOMA-MARIN AREA RAIL TRANSIT DISTRICT AND CITY OF SANTA ROSA****CONSTRUCTION OF JENNINGS AVENUE CROSSING**

THIS CONSTRUCTION AND FUNDING AGREEMENT ("Agreement") is entered into as of \_\_\_\_\_, 202X, by and between the **SONOMA-MARIN AREA RAIL TRANSIT DISTRICT** ("SMART" or "District"), a public entity duly established under the laws of California, and **City of Santa Rosa**, a California municipal subdivision ("CITY"), collectively (the "Parties").

**Recitals**

- A. The SMART rail corridor, historically known as the Northwestern Pacific Railroad Authority (NWPRA), generally parallels Highway 101 running north-south in Sonoma and Marin Counties. The corridor is owned by the District from Milepost (MP) 84 in Cloverdale southward to MP 11.4 in Corte Madera;
- B. District has completed California Environmental Quality Act (CEQA) review and designed and constructed a passenger rail service, stations and accompanying multi use path along an approximately 48-mile existing rail corridor which will eventually extended to 70-miles from Cloverdale in Sonoma County, California, to Larkspur, Marin County, California (the "SMART Rail and Pathway Project");
- C. CITY applied to the California Public Utilities Commission ("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 Crossing") in CPUC Proceeding No. A15-09-014;
- D. CITY prepared Environmental Review documents and certified its Final Environmental Impact Report for the Jennings Avenue Crossing as complete, adequate and prepared in compliance with the California Environmental Quality Act ("CEQA");
- E. In CPUC Proceeding No. A15-09-014, the CPUC authorized the CITY'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 CITY's Final Environmental Impact Report;
- F. The District has recommended either a grade separated crossing or no crossing at all at the Jennings Avenue location.
- G. CITY has determined that it would in the best interests of the citizens of Santa Rosa to construct the Jennings Avenue Crossing, and intends to cause the construction of the

Jennings Avenue Crossing of SMART's tracks at Milepost 54.96 in the City of Santa Rosa at Jennings Avenue (CITY's Project);

- H. CITY has designed the Jennings Avenue Crossing to include enhanced safety features;
- I. CITY has provided construction drawings for the civil portion of the Jennings Avenue Crossing. The final designs are subject to final approval by the CPUC prior to commencement of construction.
- J. CITY has requested District to obtain bids for construction of CITY Project;
- K. As part of CITY's Project, District, at CITY's sole cost and expense, will obtain proposals for the design and construction of the at-grade crossing warning system that will be integrated into the District's Enhanced Automatic Train Control system;
- G. CITY is committed to paying for the full cost and expense of the entire CITY Project, which includes design, permitting, construction, construction management, testing, inspection, operation and maintenance of the pedestrian at grade crossing. The parties desire to enter into this Agreement so that the CITY's Project can be constructed as a separate stand-alone City Project, at the City's sole cost and expense;
- H. CITY through this Agreement has agreed to pay for all costs for the design, permitting, construction management, construction, testing and inspection of the CITY Project, currently estimated to be \$4,000,000 in order to design, construct, implement and commission the Jennings Avenue Crossing;
- L. CITY acknowledges and understands the Parties will need to enter into a separate License Agreement independent form this Agreement for the use of the Jennings Avenue Crossing by CITY, its invitees, and users of the crossing, including members of the public utilizing the crossing.

## **Agreement**

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, CITY and District agree as follows:

### **1. RECITALS**

- A. The above recitals are true and correct and are hereby incorporated in and expressly form a part of this Agreement.

### **2. COORDINATION**

- A. District's and CITY's Representative for purposes of this Agreement shall be:

<b>District</b>	<b>CITY</b>
Bill Gamlen	Jason Nutt
Chief Engineer Sonoma Marin Area Rail Transit (SMART) 5401 Old Redwood Highway, Suite 200 Petaluma, California 94954	Assistant City Manager; City of Santa Rosa 69 Stony Circle Santa Rosa, CA
Phone: 707.794.3330	Phone: 707.543.3895
Email: <a href="mailto:bgamlen@sonomamarintrain.org">bgamlen@sonomamarintrain.org</a>	Email: <a href="mailto:jnutt@srcity.org">jnutt@srcity.org</a>

### 3. **SCOPE OF WORK**

- A. Proposed Improvements/CITY's Project. Construct a signalized at-grade pedestrian and bicycle crossing at Jennings Avenue in Santa Rosa. The concept, location and civil design and engineering has been prepared by CITY depicting the improvements is included as Exhibit A. The work will include installing concrete panels across the tracks for the path-of-travel, modifying and constructing cast-in-place concrete path-of-travel, designing and installing active pedestrian warning devices, signal control house, emergency swing gates, fencing, and integrating the crossing warning devices into SMART's Enhanced Automatic Train Control system.

### 4. **DISTRICT'S RESPONSIBILITIES**

District agrees to perform the following:

- A. Construction Management: The District will manage the CITY Project with regard to any additional design requirements (civil and system design), construction and testing, at CITY's cost. This may include hiring a contract manager, designer and a contractor to implement the CITY Project as well as coordinating work in the active railroad right-of-way, at CITY's cost. Contract Manager and District personnel will manage the design and construction, secure work access permits, coordinate shutdowns of the railroad and oversee testing and commissioning of the CITY Project, at CITY's cost. Costs to the District of administration of the project are payable under this Agreement pursuant to Section 5.H.
- B. Design: The District will incorporate the necessary requirements for an at-grade crossing warning system that will be integrated into SMART's Enhanced Automatic Train Control system into the bid construction documents, and any additional civil design that may be necessary to

integrate the pedestrian at-grade crossing into SMART's Enhanced Automatic Train Control System, at CITY's cost.

- C. Construction: District shall cause the construction of CITY's Project contemplated herein to be let in accordance with District's rules and procedures and all applicable laws, rules and regulations at CITY's cost.
- D. Construction Inspection: The District or its contractor shall provide inspection and oversight during the construction, implementation and commissioning of the CITY's Project for permanent improvements that are adding to or modifying District's infrastructure at CITY's cost.
- E. Contracting:
  - i. District shall cause the work contemplated herein to be let in accordance with District's rules and procedures and all applicable laws, rules and regulations. The District will prepare a construction package that incorporates the City's civil construction documents. The package will be competitively bid to hire a construction contractor. All costs for which District anticipates reimbursement in accordance with the terms hereof ("District Estimated Expenses") are attached hereto as Exhibit B. As set forth in section 5I, below, the parties hereto understand and agree that at the time of the execution of this Agreement, the estimated cost of the City Project is \$4,000,000.00, as shown in Exhibit B. This amount does not represent a "cap" on costs for the CITY's Project. CITY shall be responsible for all the costs of constructing the CITY Project. Actual construction costs will be determined by the bidding process. The parties agree that Exhibit B to this Agreement will be updated and amended with actual costs.
  - ii. District shall provide to CITY a copy of all proposals and an estimate of all CITY's civil design, District's system design, administrative, construction and all other costs for which District anticipates reimbursement in accordance with the terms hereof ("District Estimated Expenses"). CITY shall have thirty (30) calendar days to determine whether to proceed with the CITY's Project. In the event that within such thirty (30) calendar day period CITY notifies District, in writing, that CITY has elected not to proceed with the CITY Project ("CITY Termination Notice"), CITY shall reimburse District for all costs and expenses of the CITY Project incurred by District prior to the date of the CITY Termination Notice as set forth in Section 6. Upon receipt of the CITY Termination Notice, District shall perform no further work on the CITY Project and shall not proceed to enter into any construction, material purchase or other contracts or agreements relating thereto for which District will seek reimbursement from CITY.

## 5. CITY'S RESPONSIBILITIES

CITY agrees to perform the following:

- A. Crossing Authority: Prior to the start of construction, CITY will ensure it has obtained an extension of time on its authority to construct the Jennings crossing, and will obtain approval of the final designs by CPUC staff. CITY agrees to comply with all CPUC requirements.
- B. Design: CITY will update CITY'S civil construction drawings attached as Exhibit A, to incorporate the path-of travel approach work that was previously struck from the drawings, incorporate CITY identified safety enhancements and re-seal the drawings by the designer of record. The parties agree that Exhibit A will be updated and amended with Final Designs.
- C. Construction Support: The City shall make the designer of record of the City's civil construction drawings (Exhibit A) available directly to SMART during construction to address Requests for Information (RFI) from the contractor, address inconsistencies between the drawings and field conditions and resolve issues during construction. This construction support shall be contracted by and paid for by the CITY.
- D. Environmental Documentation: District has previously completed California Environmental Quality Act (CEQA) review for the construction of a passenger rail system, accompanying Stations and ancillary multi use path. CITY previously prepared Environmental Review documents and certified its Final Environmental Impact Report for the Jennings Avenue Crossing as complete, adequate and prepared in compliance with CEQA. CITY shall provide all additional environmental clearance review for the CITY project if needed. CITY shall be responsible for the costs associated with any additional analysis, compliance documentation, permits or other entitlements as may be required under CEQA (collectively "environmental clearances").
- E. Changes: The CITY shall be responsible for all costs resulting from changes initiated by the CITY, the District or resulting from differing site conditions.
- F. Site Access: City shall issue an encroachment permit and any other required permits at no cost for District and contractor to access the SMART right-of-way from CITY's property and store materials and equipment (if needed) on CITY's property as part of constructing the CITY Project.

- G. Additional Permitting or Mitigation: CITY to perform any additional permitting or mitigation needed for CITY'S project, if any, prior to construction.
- H. Notification to CPUC: Within 30 days of completion of construction, CITY will notify the CPUC of the completion of construction by submitting a Form G to the CPUC. CITY will notify CPUC staff at least 30 days prior to the opening of the crossing.
- I. Payment:
  - i. The CITY is responsible for all costs associated with the CITY Project, including but not limited to: engineering, design, construction, permitting, mitigation, environmental remediation, project management, inspection and administration and unanticipated costs that may arise as a result of implementing the CITY Project. The parties hereto understand and agree that at the time of the execution of this Agreement, the estimated cost of the City Project is \$4,000,000.00, as shown in Exhibit B. This amount does not represent a "cap" on costs for the CITY's Project. CITY shall be responsible for all the costs of constructing the CITY Project. Actual construction costs will be determined by the bidding process. The parties agree that Exhibit B to this Agreement will be updated and amended with actual costs. The City shall commit contingency funds in the amount of ten (10) percent of the construction cost for unknowns, differing site conditions, inconsistencies in the construction documents, and other unexpected conditions.
  - ii. CITY shall pay District invoices within thirty (30) calendar days of receiving an invoice.

## **6. ADDITIONAL REQUIREMENTS**

- A. Amendments to Agreement: This Agreement may be amended only by the mutual written consent of both parties.
- B. Indemnification and Insurance: CITY shall indemnify, fully defend, hold harmless and release District, its officers, agents and employees, from and against any judgment, awards, claims, loss, damages causes of action, liability, regulatory proceedings, penalties, fines, costs or expense (including attorneys' fees and cost) of any nature caused by the design of CITY's Project /improvements, or any acts or omissions of CITY or CITY's failure to fulfill its obligations under the Agreement. CITY agrees to require its contractor for the design of the CITY Project/improvements to include District as an

additional insured and indemnify District to the maximum extent permitted by such contracts. This indemnification obligation shall survive the termination of this Agreement.

District agrees to require its contractor for the construction of the CITY Project to include CITY as an additional insured and indemnify the CITY per the standard requirements of the District. CITY agrees to fully cooperate with District concerning securing protection against liability for the CITY pursuant to this provision.

Nothing in this Agreement is intended to modify or may be construed to modify the CITY's assumptions of risk, or liability concerning the Jennings Crossing/CITY's Project, pursuant to the Separate License Agreement between CITY and SMART. The CITY's indemnification under this Agreement shall not reduce or limit the CITY's obligations under the License Agreement. Nothing set forth herein relative to this Agreement shall affect, or be construed to affect, any immunities held by District hereto.

- C. Termination: Either party may terminate this Agreement by giving 30-days prior written notice to the other party, in the manner described in Section 6.D of this Agreement, of its intent to terminate. In the event of termination, CITY shall pay District for all expenses associated with the proportion of work completed as of the termination date and any additional payments, (including but not limited to additional any cost, loss profit, claims or liability due to contractor(s) as a result of the CITY's termination.
- D. Notice: Unless otherwise requested by a party, all notices, demands, requests, consents or other communications which may be or are required to be given by either party to the other shall be in writing and shall be deemed effective upon service. Notices shall be deemed to have been properly given when served on the party to whom the same is to be given by hand delivery or by deposit in the United States mail addressed to the party as follows:

District: Bill Gamlen, P.E  
Chief Engineer  
Sonoma-Marin Area Rail Transit District  
5401 Old Redwood Highway  
Petaluma, CA 94954

City: Jason Nutt  
Assistant City Manager  
City of Santa Rosa  
69 Stony Circle

When a notice is given by a generally recognized overnight courier service, the notice, invoice or payment shall be deemed received on the next business day. When a notice or payment is sent via United States Mail, it shall be deemed received seventy-two (72) hours after deposit in the United States Mail, registered or certified, return receipt requested, with the postage thereon fully prepaid. In all other instances, notices, and payments shall be effective upon receipt by the recipient. Changes may be made in the names and addresses of the person to whom notices are to be given by giving notice pursuant to this paragraph.

- E. Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the State of California. Venue shall be the County of Sonoma.
- F. Integration Clause: Entire Agreement & Modification: This Agreement constitutes the complete expression of the agreement between District and CITY with regard to the subject matter hereof, and supersedes all prior agreements, oral or written, proposals, and all other communications between District and CITY 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, CITY acknowledges and understands that the Parties will need to enter into a separate License Agreement for the use of the Jennings Avenue Crossing by CITY, its invitees, and users of the crossing, including members of the public utilizing the crossing.
- G. This Agreement shall only become effective upon the execution and effectiveness of a separate License Agreement between CITY and District which memorializes CITY's assumption of risk and liability regarding the Jennings crossing and use of District property. If no such agreement is executed, this Agreement shall be null and void and of no force or effect.
- H. 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 the District's Board of Directors and fully executed by the individuals shown below.
- I. No Waiver of Breach: The waiver by any of the Parties of any breach of any term or promise contained in this Agreement shall not be deemed to be a waiver of such term or provision or any subsequent breach of the same or any other term or promise contained in this Agreement.



- J. Time of Essence: Time is and shall be of the essence of this Agreement and every provision hereof.
- K. Construction: To the fullest extent allowed by law, the provisions of this Agreement shall be construed and given effect in a manner that avoids any violation of statute, ordinance, regulation, or law. The parties covenant and agree that in the event that any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby. CITY and District acknowledge that they have each contributed to the making of this Agreement and that, in the event of a dispute over the interpretation of this Agreement, the language of the Agreement will not be construed against one party in favor of the other. CITY and District acknowledge that they have each had an adequate opportunity to consult with counsel in the negotiation and preparation of this Agreement.
- L. Consent: Wherever in this Agreement the consent or approval of one party is required to an act of the other party, such consent or approval shall not be unreasonably withheld or delayed.
- M. No Third-Party Beneficiaries: Nothing contained in this 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 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.
- N. Captions: The captions in this Agreement are solely for convenience of reference. They are not a part of this Agreement and shall have no effect on its construction or interpretation.
- O. Acceptance of Electronic Signatures and Counterparts: Signatures delivered by scanned image as an attachment to electronic mail or delivered electronically through the use of programs such as DocuSign must be treated in all respects as having the same effect as an original signature. Each party further agrees that this Contract may be executed in two or more counterparts, all of which constitute one and the same instrument.

IN WITNESS WHEREOF, the District and the CITY have executed this Agreement as of the date first above written.

City of SANTA ROSA:

SONOMA-MARIN AREA RAIL TRANSIT  
DISTRICT

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

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

APPROVED AS TO FORM:

APPROVED AS TO FORM FOR DISTRICT:

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

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

, SMART Counsel

Attachments: Exhibit CITY's Project  
Exhibit B: District estimated expenses

EXHIBIT A

CITY'S CIVIL CONSTRUCTION DRAWINGS  
*(To be updated once designs are final)*

DRAFT

EXHIBIT B

ESTIMATED PROJECT COST

To be amended with actual construction costs once determined by the bidding process.

ITEM	ESTIMATED COST
Construction Contract	\$3,350,000
Contract Administration/ Construction Management	\$67,000
PG&E Service	\$167,500
Contingency	\$50,000
	\$335,000
<b>TOTAL</b>	<b>\$3,969,500</b>