

CITY OF SANTA ROSA  
CITY COUNCIL

TO: MAYOR AND CITY COUNCIL  
FROM: JASON NUTT, ASSISTANT CITY MANAGER  
SUBJECT: JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD  
CROSSING REAL PROPERTY LICENSE AGREEMENT AND  
CONSTRUCTION AND FUNDING AGREEMENT WITH THE  
SONOMA MARIN AREA RAIL TRANSIT DISTRICT AND  
APPROPRIATION OF FUNDS TO CONSTRUCT THE CROSSING

AGENDA ACTION: MOTION

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RECOMMENDATION

The City Manager's Office recommends that the Council, by motion, approve and delegate authority to the City Manager to negotiate and execute both the Real Property License Agreement and Construction and Funding Agreement in substantially the same form as the attached drafts, subject to approval as to form by the City Attorney, and return the executed agreements to the SMART Board of Directors for consideration. This item has no impact on current fiscal year budget.

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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 Real Property 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.

At the direction of the CPUC and City Council, the City and SMART have resumed negotiations and developed a draft Real Property License Agreement and Master Reimbursement Agreement that are acceptable to both City and SMART staff. In light of this milestone, staff recommends that the Council determine whether the City should execute these documents as presented.

GOAL

This item relates to Council Goal #2 - Invest in the Development and Maintenance of the City's Infrastructure and proposes to complete critical bicycle and pedestrian infrastructure consistent with the City's adopted 2025 Active Transportation Plan and 2010 North Station Area Plan.

## BACKGROUND/PRIOR COUNCIL REVIEW

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 has been identified as a high priority in the 2025 Active Transportation Plan and 2010 North Station Area Plan.

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 approved two subsequent Petitions to extend the authorization period for construction of the crossing (Decision 19-10-002 and Decision 21-10-003).

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.

On August 9, 2023, the City submitted a Petition to the CPUC to extend the authorization period for construction of the crossing. Administrative Law Judge Kelly requested an in-person status update, scheduled for November 28, 2023. Judge Kelly cancelled the in-person update on November 15, 2023, and instead requested that the City provide a written status update by March 1, 2024, on development of an agreement to construct the at-grade crossing with SMART.

## Real Property License Agreement

City and SMART staff met on several occasions between June 2023 and February 2024, discussing and exchanging draft language for development of a Real Property License Agreement. The January 26, 2024, version of that agreement, which contained several provisions SMART staff insisted upon that would impose substantial liability on the City for SMART, was presented to Council on April 9, 2024, along with an alternative version of the agreement containing more balanced indemnification language. The alternate version made changes that focused on three primary areas of concern:

- The "but for" clause in Section 14.
  - Under the January 26, 2024, License Agreement proposed by SMART's staff, the City would assume all operational costs associated with the crossing and liability resulting from the location, design, establishment or

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL  
PROPERTY LICENSE AGREEMENT  
PAGE 3 OF 6

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 proposed, the City would be liable even when the damage, death, or injury was caused by SMART's sole ordinary negligence.

- The “absolute” duty to defend SMART in Section 15.
  - Under the January 26, 2024, License Agreement, the City had an absolute duty to defend SMART through a final non-appealable judgment. That would mean 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 clarification and addition of sole negligence, gross negligence and willful misconduct in Sections 15 and 19.
  - 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. The January 26, 2024 License Agreement did not include “sole negligence” which would mean that the City would be liable even when SMART is solely responsible for the cause of the incident.

Council ultimately directed the City Manager to respond to SMART and the CPUC with the version containing the alternative language proposed by City staff. This version was forwarded to SMART's General Manager and Judge Kelly on April 24, 2024, and May 2, 2024, respectively.

The City did not receive any response from either the CPUC or SMART until August 13, 2025, when Judge Kelly requested that both the City and SMART appear at a Status Conference scheduled for October 9, 2025, to discuss the current status of negotiations and reasoning for the excessive delay in arriving at an agreement. Prior to the Status Conference, this matter was transferred from Judge Kelly to Administrative Law Judge Greenburg. At the conclusion of the Status Conference, Judge Greenburg directed the City and SMART to complete negotiations and provide written progress updates on November 3 and November 24 and appear for an in-person status update on December 8.

#### Construction and Funding Agreement

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.

On June 9, 2017, the City Manager executed and delivered the Master Reimbursement Agreement developed by SMART to present to their Board of Directors for approval at their next meeting; however, on June 21, 2017, SMART 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

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL  
PROPERTY LICENSE AGREEMENT  
PAGE 4 OF 6

two initiatives and SMART issued a letter on August 20, 2018, opposing construction of the Jennings Avenue crossing improvements.

As a component of the requirements issued by Judge Greenburg on October 9, 2025, the City and SMART have re-engaged on revising the Construction and Funding Agreement, recognizing that SMART's operating conditions have significantly changed and the cost of construction has increased over time.

## ANALYSIS

### Real Property License Agreement

City and SMART staff recently met on two occasions, October 14, 2025 and October 23, 2025 to discuss and exchange language to complete negotiation on the Real Property License Agreement language. On October 29, 2025, SMART provided a version that address all issued raised by City staff. The proposed language that makes the indemnity language less unfavorable to the City in the following ways:

- Eliminates the objectional "but for" clause in the indemnity provision in Section 14 when SMART is "solely negligent," "grossly negligent" or through their "willful misconduct".
- Incorporates "sole negligence," "gross negligence" and "willful misconduct" relating to SMART in Sections 15 and 19 adding more balance to the indemnification language by holding SMART accountable for its actions; and
- Incorporates mitigating language in Section 15 associated with the City's "absolute" duty to defend SMART in litigation unless a court finds SMART "solely negligent," "grossly negligent" or accountable for "willful misconduct" by giving the City a right in the case of a settlement to require binding arbitration to determine whether one of those exceptions to the City's obligation to defend applies. This new provision provides a way for the City to enforce the important exception to its duty to defend by holding SMART accountable for its own attorney's fees and litigation costs through reimbursement.

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 "sole negligence," "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 could result in CJPRMA increasing the City's future insurance premiums. Additionally, the lack of comparable agreements have raised concerns about whether CJPRMA would cover claims where the City is found solely liable.

### Construction and Funding Agreement

Primary consideration points:

JENNINGS AVENUE BICYCLE AND PEDESTRIAN RAILROAD CROSSING REAL  
PROPERTY LICENSE AGREEMENT  
PAGE 5 OF 6

- City will pay all costs for design, permitting, construction and testing.
- City to obtain approval of finalized designs from the CPUC Rail Safety Division.
- City to update civil construction drawings to incorporate additional crossing safety equipment as mutually agreed to between the City and SMART.
- SMART to manage construction at the City's cost. May be performed by SMART staff or contractor.
- SMART to incorporate necessary revisions to the civil construction drawings to integrate the at-grade crossing warning systems into the Enhanced Automatic Train Control System at City cost.
- SMART to issue request for bids, award construction contract, award construction management contract (as needed) and provide project management and inspection at City cost.

FISCAL IMPACT

The approval of this action does not have a fiscal impact on the General Fund. Additional council action will be required to fund the project upon final execution of the Master Reimbursement Agreement by SMART.

Should the City and SMART eventually agree to proceed with construction of the at-grade crossing, the agreement contains a duty for the City to pay for the cost of construction as well as an annual License Fee of \$5,144 as described in Section 5, which includes the average cost of routine inspections, testing, maintenance and operations of the facilities and equipment associated with the crossing.

This is currently not included in previously adopted budgets; however, upcoming budget adoptions for fiscal years beginning with the first day of operation will include this expense going forward.

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.

The terms defined in the 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 SMART with reasonable attorney's fees and litigation costs, should it be determined that SMART is “solely negligent,” “grossly negligent” or acted with “willful misconduct,” SMART would be responsible for reimbursing the City for its defense, settlements and costs.

ENVIRONMENTAL IMPACT

Pursuant to CEQA Guidelines Section 15378(b)(4), the creation of government funding mechanisms and other fiscal activities that do not involve a commitment to a specific project with potential to result in a physical change in the environment is not a “project”

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

under CEQA. Additionally, CEQA Guidelines Section 15378(b)(5) excludes organizational and administrative activities of governments that will not result in direct or indirect physical changes to the environment.

The potential environmental effects of the project to be constructed were adequately analyzed through a Council certified Final Environmental Impact Report (EIR) for the Jennings Avenue Pedestrian and Bicycle Rail Crossing Project on March 17, 2015; State Clearinghouse Number 2013112019. The Final EIR adequately identifies and analyzes the environmental effects of the project and the alternatives, was completed in compliance with the requirements of the California Environmental Quality Act (CEQA) Guidelines Section 15162 and the City of Santa Rosa City Code and represents the independent judgment and analysis of the Council.

BOARD/COMMISSION/COMMITTEE REVIEW AND RECOMMENDATIONS

No applicable.

NOTIFICATION

Not applicable.

ATTACHMENTS

- Attachment 1 – Draft Real Property License Agreement
- Attachment 2 – Draft Construction and Funding Agreement

PRESENTER(S)

Jason Nutt, Assistant City Manager  
Adam Abel, Assistant City Attorney