

**From:** [JLDuncan](#)  
**To:** [City Council Public Comments](#)  
**Subject:** [EXTERNAL] Agenda Item 3.1 Closed Session - CPUC Application A. 15-05-014  
**Date:** Monday, April 8, 2024 3:52:22 PM  
**Attachments:** [Agenda Item 3.1.pdf](#)

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The written comment for "Agenda Item 3.1 Closed Session - CPUC Application A. 15-05-014" is attached as a pdf.

Thank you so much.

James L. Duncan



To: Mayor and Santa Rosa City Council Members,  
From: James L Duncan  
Re: Closed Session Item 3.1, Santa Rosa City Council Meeting, April 9, 2024,  
California Public Utilities Commission Proceeding A.15-05-014, extension of the approval of the  
Jennings Avenue pedestrian and bicycle crossing of the SMART tracks.  
Date: April 8, 2024

I hope the following will assist the Council in extending the CPUC Jennings Crossing approval  
so as to build and reopen the crossing:

- The California Constitution bars SMART from regulating the safety or construction of the approved Jennings Crossing. Under California Constitution, Article 12, §8, a public body may not regulate matters over which the Legislature grants regulatory power to the Public Utilities Commission. Public Utilities Code §§ 1201-1202 and § 99152 grant the PUC exclusive authority over rail crossings.
- Only the PUC has the authority to approve the location and terms of installation, operation, maintenance, use, and protection of railroad crossings - not SMART. Public Utilities Code § 1202 mandates: “The [Public Utilities] commission has the **exclusive power**: (a) To determine and prescribe the manner, including the particular point of crossing, and the **terms of installation, operation, maintenance, use, and protection of each crossing** ... of a railroad by a street ....” (Italics and emphasis added.) The Public Utilities Commission has statutory exclusive jurisdiction over all aspects of rail crossing safety (Public Utilities Code §§1202, 99152.)
- The SMART Real Property License Agreement is contrary to the California Constitution and the Public Utilities Code and is illegal, void at inception, and is unenforceable. “That is not lawful which is: 1. Contrary to an express provision of law;.... ” (Civil Code § 1667) A malum prohibitum contract is one that is illegal in that it is contrary to a statute. (*Russell City Energy Co., LLC v. City Of Hayward* (2017) 14 Cal.App.5th 54, 71.) Contracts that are in violation of a statute are void at inception. (*Sixells, LLC v. Cannery Business Park* (2008) 170 Cal.App.4th 648, 655 [contract in violation of Subdivision Map Act was void at inception].)
- The PUC directed SMART to cooperate in good faith to reach a construction agreement for the Jennings Crossing. In PUC Decision D.19-10-002, the Commission directed that “SMART shall comply with D.16-09-002 and **cooperate in good faith with the City to reach an agreement regarding the construction of the approved crossing at Jennings Avenue.**” (Italics and emphasis added.)
- The SMART Real Property License Agreement is a purported “License Agreement for the use of the Licensed Area” - not an agreement to construct the Jennings Crossing. The SMART Real Property License Agreement expressly states “this Agreement is a License Agreement for the use of the Licensed Area, and not a construction agreement”. (See Recitals, par. J, p. 2, also see par. Q, p. 2, par. 7 and 8, p. 5, par. d, p. 8, par. k, p. 12.)

- The PUC has recently specified that the “agreement” to be reached between the City and SMART is a construction agreement - not a Real Property License Agreement. The PUC Ruling, November 15, 2023, in PUC proceeding A.15-05-014, specifies that the “agreement” to be reached with SMART is “an agreement to construct the [Jennings] rail crossing”

- Abandonment of the Jennings Crossing would have to fulfill all procedures and requirements mandated by State law.

“Abandonment of a street must be accomplished in the manner provided by statute since streets are in law the property of all the people of the state.” *City of Imperial Beach v. Algert* (1962) 200 Cal.App.2d 48, 51

“Third, the procedure for abandoning or vacating a public street is statutory and exclusive. (Sts. & Hy. Code, § 8300 et seq.; and see *County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 823 [186 P.2d 124] [“if the Legislature has provided a method by which a county or city may abandon or vacate roads, that method is exclusive”]; *Ratchford. v. County of Sonoma* (1972) 22 Cal.App.3d 1056, 1070 [99 Cal.Rptr. 887] [same]; *Gross v. City of San Diego* (1932) 125 Cal.App. 238, 247 [13 P.2d 820] [where strip of land had become a public way upon approval of map of subdivision, city could not subsequently divest itself of its easement except by appropriate proceedings taken in accordance with the law].)” *Wright v. City of Morro Bay* (2006) 144 Cal. App. 4th 767, 772-773

In 1969, the Santa Rosa City Council approved Resolution No. 8910, Ordering the Abandonment and Vacation of the Tenth Street Railroad Crossing. The City Council, as set forth in Resolution No. 8910, acted in accord with the statutes which were then current. (See Attachment) If the City Council were to decide to initiate the vacation of the Jennings crossing, it would be required to act in accord with those same requirements as set forth in current statutes. The procedures and requirements for proposed street vacation currently mandated by statutes in the Streets and Highways Code and the Government Code are:

Streets and Highways Code § 8312 ... a city legislative body may vacate, pursuant to this part, all or part of a street ... or public service easement within the city ....

Streets and Highways Code § 8313 (a) If the proposed vacation of a street, ... or public service easement is within an area for which a general plan is adopted by a local agency, the legislative body of the public entity shall consider the general plan prior to vacating the street, highway, or public service easement. (b) The procedure prescribed in Section 65402 of the Government Code shall be followed if that section applies to the proposed vacation.

Government Code § 65402 (a) If a general plan or part thereof has been adopted, ... no street shall be vacated or abandoned ... if the adopted general plan or part thereof applies thereto, until the location, purpose and extent of such ... such street vacation or abandonment ha[s] been submitted to and reported upon by the planning agency as to conformity with said adopted general plan or part thereof. The planning agency shall render its report as to conformity with said adopted general plan or part thereof within

forty (40) days after the matter was submitted to it, or such longer period of time as may be designated by the legislative body.

#### Streets and Highways Code § 8320

(a) The legislative body of a local agency may initiate a proceeding under this chapter in either of the following ways:

(1) On its own initiative, where the clerk of the legislative body shall administratively set a hearing by fixing the date, hour, and place of the hearing and cause the publishing and posting of the notices required by this chapter.

(2) Upon a petition or request of an interested person, at the discretion of the legislative body, ... , where the clerk of the legislative body shall administratively set a hearing by fixing the date, hour, and place of the hearing and cause the publishing and posting of the notices required by this chapter.

(b) The notices required by this chapter shall contain both of the following:

(1) A description of the street, ... , or public service easement proposed to be vacated and a reference to a map or plan, that shows the portion or area to be vacated and includes a statement that the vacation proceeding is conducted under this chapter. In the case of a street ... , the description shall include its general location, its lawful or official name or the name by which it is commonly known, and the extent to which it is to be vacated. In the case of a public service easement, the description shall identify it with common certainty. The map or plan showing the location of the street, ... , or public easement proposed to be vacated is sufficient compliance with this paragraph.

(2) The date, hour, and place for hearing all persons interested in the proposed vacation. The date shall not be less than 15 days after the initiation of proceedings.

Streets and Highways Code § 8322 (a) ... notice of the hearing on the proposed vacation shall be published for at least two successive weeks prior to the hearing in a daily, semiweekly, or weekly newspaper published and circulated in the local agency conducting the proceeding and which is selected by the legislative body for that purpose or by the clerk or other officer responsible for the publication where the legislative body has not selected any newspaper for that purpose.

Streets and Highways Code § 8323 At least two weeks before the day set for the hearing, the legislative body shall post conspicuously notices of vacation along the line of the street, ... , or public service easement proposed to be vacated. The notices shall be posted not more than 300 feet apart, but at least three notices shall be posted. If the line of the street, ..., or public service easement proposed to be vacated exceeds one mile in length, the legislative body may, in lieu of posting not more than 300 feet apart, post notices at each intersection of another street or highway with the street, ... , or public service easement to be vacated and at one point approximately midway between each intersection, but at least three notices shall be posted.

Streets and Highways Code § 8324 (a) At the hearing, the legislative body shall hear the evidence offered by persons interested. (b) If the legislative body finds, from all the evidence submitted, that the street, ... , or public service easement described in the notice of hearing or petition is unnecessary for present or prospective public use, the legislative

body may adopt a resolution vacating the street, ... ,or public service easement. The resolution of vacation may provide that the vacation occurs only after conditions required by the legislative body have been satisfied and may instruct the clerk that the resolution of vacation not be recorded until the conditions have been satisfied.

Streets and Highways Code § 8325 (a) The clerk shall cause a certified copy of the resolution of vacation, attested by the clerk under seal, to be recorded without acknowledgment, certificate of acknowledgment, or further proof in the office of the recorder of the county in which the property is located. No fee shall be charged for recordation. (b) Upon such recordation, the vacation is complete.

Not only must the legislative body find, from all the evidence submitted, that the street is unnecessary for present or prospective public use, it must additionally find that the abandonment is in the public interest. “Case law has imposed a second condition upon the abandoning of a public road; the abandonment must be in the public interest.” *Heist v. County of Colusa*, 163 Cal. App. 3d 841, 849 (1984)

Any such findings regarding the Jennings crossing would be contrary to its inclusion in the *Santa Rosa General Plan, Bicycle and Pedestrian Master Plan*, and the *Santa Rosa North Station Area Plan*. Further, such findings would be contrary to statements by Santa Rosa’s attorneys in the record of the CPUC Jennings application. The Agreement to build the approved Jennings crossing is the ultimate expression of the fact that the Jennings crossing is necessary for present and prospective public use and its continued use is in the public interest.

Additionally, California courts have held “that the right to intramunicipal travel is a basic human right protected by the United States and California Constitutions as a whole. Such a right is also implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law.” This “right is not absolute and may be reasonably restricted in the public interest” but government actions that “unreasonably burden or restrict the right to travel are constitutionally impermissible.” *Halajian v. D & B Towing* 209 Cal.App.4th 1, 11-12 (2012)

Previous City Councils have resolved that a way should be found to build and reopen the CPUC approved crossing - with or without SMART. This City Council is urged to continue that resolve.

James L. Duncan



## RESOLUTION NO. 8910

## RESOLUTION ORDERING THE ABANDONMENT AND VACATION OF THE TENTH STREET RAILROAD CROSSING WHEN A CROSSING IS CONSTRUCTED AT PINER ROAD

WHEREAS, the Council of the City of Santa Rosa did on the 28th day of January, 1969 adopt Resolution No. 8881, declaring its intention to consider the vacation and abandonment of the Tenth Street Railroad Crossing, subject to certain conditions relative to the construction of a railroad crossing at Piner Road in the County of Sonoma, State of California; and

WHEREAS, said Resolution No. 8881 fixed the 18th day of February, 1969, at the hour of 8:00 p. m. in the Council Chambers, City Hall, Santa Rosa California, as the time and place for hearing all persons interested in or objecting to the proposed abandonment of the Tenth Street Railroad crossing; and

WHEREAS, said notice to consider abandonment and vacation was duly published as required by law and at least three notices of such proposed abandonment and vacation were duly posted at the crossing proposed to be abandoned, which notices recited that the said resolution had been adopted and stated the time and place of hearing; and

WHEREAS, the Council of the City of Santa Rosa has duly held the hearing at the time and place above stated and there being no objections submitted by persons interested in the vacation and abandonment of the said portion of right of way, or all objections being hereby overruled;

NOW, THEREFORE, IT IS RESOLVED by the Council of the City of Santa Rosa that that certain railroad crossing designated as the Tenth Street Railroad Crossing, will be declared unnecessary for public use and will be abandoned and vacated when a railroad crossing is constructed at Piner Road; SAVING AND EXCEPTING, that there is hereby reserved to all public utilities the right to maintain, repair, construct or reconstruct sewers, water pipes, gas pipes, power lines, and other public utility facilities now in place at said crossing, street or road, and the right of all necessary entry therefor.

IT IS FURTHER RESOLVED, that the City Clerk be and is hereby directed to cause a certified copy of such order of abandonment to be recorded in the office of the Sonoma County Recorder, when the crossing is constructed on Piner Road and the Tenth Street Crossing may be finally abandoned and vacated.

IN COUNCIL DULY PASSED this 18th day of March, 1969

AYES: (5) Mayor Meyers, Councilmen Cadding, Downey, Poznanovich, Hyersen

NOES: (0)

ABSENT: (0)

APPROVED: LEWIS A. MEYERS

Mayor

ATTEST: AGNES M. BICK  
City Clerk



I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF A RESOLUTION DULY AND REGULARLY ADOPTED BY THE COUNCIL OF THE CITY OF SANTA ROSA AT A REGULAR MEETING THEREOF HELD March 18, 1969.

Agnes M. Bick  
City Clerk

L 13184

City of Santa Rosa  
RECORDED AT REQUEST OF  
AT 14 MIN. PAST 11 A M  
SONOMA COUNTY, CALIFORNIA

*H. H. ...* RECORDER

MAR 24 1969

OFFICIAL RECORDS

BOOK 2385 PAGE 27

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