



## **AGENDA: SMART DISTRICT BOARD MEETING**

**February 20, 2008**

**1:30 PM**

Sonoma County Board of Supervisors Chambers  
575 Administration Drive, Suite 102-A, Santa Rosa, California

- I. Call to Order
- II. Minutes of the January 19, 2008 SMART Meeting – **DISCUSSION/ACTION\*\***
- III. Consent Agenda – **DISCUSSION/ACTION\*\***
  - III-1 SMART Financial Update Project Cost Report - **INFORMATION \*\***
  - III-2 General Manager Employment Contract– **ACTION\*\***
- IV. Appointment of 2008 Board Officers and Committee Assignments - **DISCUSSION/ACTION**
  - A. Chair and Vice Chair
  - B. Committee Assignments
- V. Agenda Review
- VI. Board Member Announcements
- VII. Public Comment on Items Not on the Agenda (Comments Limited to 3 Minutes)
- VIII. SMART General Manager Report (Lillian Hames) – **DISCUSSION**
- IX. Real Estate Committee Report (Lucrecia Milla) – **DISCUSSION**
- X. Alcalde and Fay Contract Amendment (Lillian Hames) – **DISCUSSION\***
- XI. White Paper Distribution – (Chris Coursey) – **DISCUSSION/ACTION\***
- XII. Madera Bay Easement – (Lucrecia Milla) – **DISCUSSION/ACTION\*\***
- XIII. Railroad Square Development Update – (John Nemeth) **DISCUSSION/ACTION\*\***
- XIV. Update on Program Management RFP – (Lillian Hames) - **DISCUSSION/ACTION\***

**XV. Closed Session**

a. Closed Session: Conference with Real Property Negotiator (Govt. Code. Section 54956.8)

Property: Northwestern Pacific Railroad (NWP) Right-of-Way NWP Milepost 14.3 in Corte Madera, Marin County.

District Negotiator: Lillian Hames, General Manager

Negotiating Parties: Pollack Investment Group  
Owner: SMART District

b. Closed Session: Conference with Real Property Negotiator (Govt. Code. Section 54956.8)

Property: Northwestern Pacific Railroad (NWP) Right-of-Way at NWP Milepost 53.8 in Santa Rosa, Sonoma County.

District Negotiator: Lillian Hames, General Manager

Negotiating Parties: Railroad Square, LLC  
Owner: SMART District

**XVI. Report on Closed Session**

**XVII. Next Meeting Date: March 19, 2008 San Rafael City Council Chambers –  
DISCUSSION/ACTION**

**XVIII. Adjournment - ACTION**

DISABLED ACCOMMODATION: if you have a disability that requires the agenda materials to be in an alternate format or that requires an interpreter or other person to assist you while attending this meeting, please contact SMART at least 72 hours prior to the meeting to ensure arrangements for accommodation.

\* Information will be provided at the meeting. \*\* Information attached.



**MINUTES OF SMART BOARD MEETING  
January 16, 2008  
San Rafael City Council Chambers  
1400 Fifth Avenue  
San Rafael, California**

**I Call to Order**

Chair Kerns brought the meeting to order. The following Board members were present:

Charles McGlashan  
Debora Fudge  
Al Boro  
Peter Breen  
Jake Mackenzie  
Valerie Brown  
Jim Eddie  
Barbara Pahre  
James Eddie

**II Minutes of the December 19, 2007 SMART Meeting**

Motion was made (Boro/Mackenzie) to approve the minutes of the December 19, 2007 SMART Board meeting. Motion passed unanimously.

Chair Kerns welcomed Supervisor Valerie Brown from Sonoma County as a new member of the SMART Board of Directors.

**III Consent Agenda**

Chair Kerns advised that Consent Agenda Item III-3 will be removed from the Consent Agenda. This item is being referred to the Executive Committee for review and recommendation to the Board for action. With this change, motion was made (McGlashan/Pahre) to approve the Consent Agenda. Motion carried unanimously.

**IV Agenda Review**

Chair Kerns advised that an item was inadvertently left off of the agenda. He further advised that he will continue as Chair until the next meeting when the reorganization of SMART's officers will be on the agenda. Chair Kerns recommended that Vice Chair McGlashan ascend to Chair and that Debora Fudge become Vice-Chair. Chair Kerns called for any comments on the remaining items on the agenda. Motion was made (Boro/Mackenzie) to approve the agenda. Motion carried unanimously.

**V Board Member Matters**

Chair Kerns noted that a new regular item has been added to the agenda at the request of Vice Chair McGlashan. Chair Kerns also requested that the title be changed to Board Member Announcements. This item gives Board members the opportunity to make announcements or bring up matters that are not on the agenda.

Director McGlashan announced the 2008 SMART campaign committee Co-Chairs: Marge Macris, Steve Birdlebough and Cynthia Murray.

Vice Chair McGlashan had a second announcement noting that the Transportation Authority of Marin (TAM) is forming a committee to serve as a working group to analyze financial assumptions in the upcoming ballot measure.

Director Mackenzie advised that a recent poll regarding support for SMART was conducted in Sonoma County. Ms. Hames stated that she will provide a copy of the results to the Board. She also noted that support for SMART was shown at 75 percent in 2006 and in the latest poll taken in late 2007, was polled at 77 percent.

#### **VI Public Comment on Items Not on the Agenda**

David Schonbrunn, TRANSDEF, stated that the Metropolitan Transportation Commission is in the process of developing their Regional Transportation Plan to be released in 2009. He stated that SMART was included in TAM's submittal. Chair Kerns as the new SCTA Chair advised that he will look into this. Mr. Schonbrunn also noted that there will be a hearing on 1/22 regarding a suit against the City of Novato by TRANSDEF.

Steve Birdlebough introduced the new Chair of Friends of SMART, Tanya Narath. Chair Kerns welcomed Ms. Narath. Mike Arnold asked when a response to a City of Novato letter regarding the Los Robles Station would be available. Chair Kerns responded that he recently signed a letter in response. Karen Nygren stated Marge Macris is no longer a member of the Sierra Club. Kay Karchevski asked if the new Seagate Properties parking structure could also include added park and ride spaces for the downtown San Rafael rail station. Lisa Badenfort introduced herself as the new field representative for Assemblyman Jared Huffman noting she is looking forward to working with SMART.

#### **VII SMART General Manager Report**

Ms Hames stated that SMART will be moving on January 30 to their new offices in the San Rafael Corporate Center. After settling in, she will discuss with Seagate Properties the issue of parking for the San Rafael Station.

Ms. Hames continued by noting that she will keep the Board apprised of the move and that phones may be down for a few days. SMART staff members will be available by cell phone. She stated that the new phone numbers will be sent to the public and will also be available on SMART's website.

Concerning TAM's submittal to MTC, Ms. Hames has not seen TAM's submittal.

Lastly, Director Breen asked for an update on Larkspur. Ms. Hames stated that a series of questions were raised at the last meeting held between SMART and the Larkspur City Council. SMART had recently received a letter from the City of Larkspur listing all questions that were raised. Staff is currently preparing a response and subsequently requesting another meeting to be held to continue the discussion.

#### **VIII Real Estate Committee Report**

Ms. Hames noted that the January Real Estate Committee had been canceled and there was nothing to report. She stated that the next meeting will be February 6<sup>th</sup> in Santa Rosa.

### **IX Status Report on the Recent Flooding**

Chair Kerns wanted to thank Mike Strider for his help with regard to the recent flooding on January 4th. Ms. Hames noted that Mr. Strider and NCRA staff and contractors had worked very hard that day to avoid any flooding issues adjacent to Novato Creek. Mr. Strider presented a series of slides that outlined events of the day and the various means used to excavate debris on Novato Creek. Chair Kerns called for questions from the Board. Director Dillon-Knutson questioned what damage occurred that day to Novato Creek. Mike Strider advised that no permanent damage occurred; it was a maintenance effort to prevent further accumulation of debris and washout. He addressed another question concerning the location of where the railroad crosses Miller Creek for Director Dillon-Knutson.

### **X Update on City of Novato v. NCRA et al, Marin County Superior Court, Case No CV074645**

Greg Dion provided the Board with an update on the Novato v. NCRA lawsuit. A recent ruling on the preliminary injunction concluded that NCRA was halted from doing any further repair and maintenance to the line. He went on to note that NCRA may be required to complete a full environmental analysis before continuing it's work because it may be ruled that this work is part of a larger project.

Mr. Schonbrunn stated his concern that NCRA had committed to these rehab projects prior to the filing of any notices of exemptions. Chair Kerns stated this forum was not the appropriate place to argue the pros and cons of the court case.

### **XI Railroad Square Exclusive Negotiating Agreement Extension**

John Nemeth informed the Board that in late 2006 SMART entered into an agreement to negotiate exclusively with New Railroad Square LLC. The agreement has been extended three times and staff is recommending extending the agreement again, this time for a period of six months. During the previous four months, SMART accrued about \$10,000 and has been reimbursed. The developer continues to negotiate with the City and seek other resources to close the project gap. Director Boro recommended an amendment to the agreement that New Railroad Square reimburse SMART on a monthly basis.

With a consensus for the change, a motion was made (Mackenzie/Dillon-Knutson) to approve the amendment. Motion carried unanimously

### **XII Update on the Website**

Chris Coursey informed the Board that SMART will have a new website up and running this spring. The existing SMART website has not been updated in a number of years and no longer meets the needs of the project. Since 2002 The Results Group has overseen the site and is now working with Mr. Coursey to interview several local web designers. Based on these interviews the current provider will no longer be used. Staff has hired Kurland Digital based in Santa Rosa to come up with a design that will better suit SMART's needs. This firm will also host the site. Chair Kerns inquired as to cost. Staff noted that the redesign will cost \$7,000 and the cost to host the site will be approximately \$100/month. Matt Stevens commented that the previous firm was more costly. Director Breen

commented that a large capacity site will be necessary looking forward as the site could experience a great deal of use by internet users.

**XIII Update on White Paper Preparation**

Lillian Hames initiated this item by noting that staff has been preparing the White Papers and working with the Executive Committee to review drafts as they have been developed. She noted that the papers are designed to be brief and easy to read and understand. Chris Coursey distributed a matrix to the Board outlining the status of each paper.

He went on to state that staff was recommending that the White Papers be completed and released at one time. He expected all white papers to be released at the next February Board meeting. He added that each white paper would be posted to the website and distributed to local officials. .

Director Boro suggested copies could also be made available to the public at local libraries. Director Mackenzie recommended that the papers be provided in a ring binder which was easy to display. Director Dillon-Knutson asked if the White Papers will be available by the Board prior to releasing to the public. Director McGlashan noted that once the papers are submitted to the Board, they become public documents. After discussion, it was the consensus of the Board hat all the papers be submitted to the Board at one time, noting that comments or changes can be made as required.

**XIV Resolution 2008-02 of Appreciation for Mike Kerns**

Staff presented a gift of appreciation to Chair Kerns for his service as the Chairman of SMART. A motion was made and seconded (McGlashan/Boro) to adopt Resolution 2008-02 in appreciation of Chair Kerns service. Motion passed unanimously

**XV Closed Session**

The Board moved into Closed Session.

**XVI Report on Closed Session**

Greg Dion reported out on the Closed Session. As to Item a. direction was given to the Chair to sign a new contractual agreement for the General Manager and that it be brought back to the full Board in February. As to item b., staff was directed by the Board to reject the claim.

**XVII Calendar for 2008 SMART Meeting**

The Board and Real Estate Committee schedule was distributed to the Board.

**XVIII Next Meeting Date: February 20, 2008, 1:30 Sonoma County Board of Supervisors Chambers, Santa Rosa.**

Chair Kerns announced that the next meeting would be February 20<sup>th</sup> in Santa Rosa.

**XV. Adjournment**

Meeting was adjourned at 3:15 pm.

**Sonoma Marin Area Rail Transit  
Project Draw-Downs  
November 1, 2000 through January 31, 2008**

<b>Consultants:</b>	<b>HDR Eng.</b>	<b>HDR Eng.</b>	<b>The Results Group</b>	<b>Environmental Consultants</b>	<b>CD&amp;A</b>			<b>Total</b>
<b>TCRP Projects:</b>	<b>Systems Planning</b>	<b>On Call Rail Engineering</b>	<b>Community Outreach</b>	<b>EIS/PE</b>	<b>Station Planning</b>	<b>Final Engineering</b>	<b>Management/ Administration</b>	<b>TCRP Funds Obligated to Date</b>
Estimated Completion (mo/year)	Dec-06	Dec-08	Jun-10	Dec-08	Dec-08	Dec-10	Dec-10	
Total Phase I TCRP Authorization*								<b>7,700,000.00</b>
Contract Amount	239,292.00	935,708.00	1,080,040.00	3,610,847.00	531,935.00	0.00	1,200,000.00	<b>7,597,822.00</b>
Optional/Additional Tasks	0.00	240,000.00	98,076.50	588,299.00	50,000.00	0.00	0.00	<b>976,375.50</b>
Total Contracts	239,292.00	1,175,708.00	1,178,116.50	4,199,146.00	581,935.00	0.00	1,200,000.00	<b>8,574,197.50</b>
Less: Contracts Paid to Date	(239,280.26)	(1,006,758.39)	(1,215,976.08)	(4,169,184.09)	(526,415.67)	0.00	0.00	<b>(7,157,614.49)</b>
Remaining Balance Contracts	11.74	168,949.61	(37,859.58)	29,961.91	55,519.33	0.00	1,200,000.00	<b>1,416,583.01</b>
Additional TCRP Authorization**	0.00	240,000.00	300,000.00	300,000.00	150,000.00	0.00	510,000.00	<b>1,500,000.00</b>
Remaining TCRP Authorization***	0.00	0.00	0.00	0.00	0.00	24,800,000.00	3,000,000.00	<b>27,800,000.00</b>
Less: Other Expenses Paid to Date	0.00	0.00	(2,225.40)	(180,063.25)	(25,000.00)	0.00	(2,431,900.65)	<b>(2,639,189.30)</b>
Less: Right of Way Expenses****	0.00	0.00	0.00	0.00	0.00	0.00	(150,000.00)	<b>(150,000.00)</b>
Remaining Project Balance	11.74	408,949.61	259,915.02	149,898.66	180,519.33	24,800,000.00	2,128,099.35	<b>27,927,393.71</b>

**Project management/administration includes SMART staff time, legal and accounting services, and general office services and supplies**

\* In May 31, 2006 Phase I TCRP Funds were spent in full and the remaining expenses were reimbursed by Measure M funds.

\*\* Additional Phase I TCRP Funding of \$1,500,000 was approved in July 2006

\*\*\* The remaining \$27,800,00 in TCRP Funds (\$3,000,000 for PA&ED and \$24,800,000 for PS&E) was approved by CTC in June 2007

\*\*\*\* Of the original \$7,700,000 TCRP allocation, \$150,000 was re-allocated for ROW expenses



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## MEMORANDUM

**DATE:** February 20, 2008  
**TO:** SMART Board  
**FROM:** Gregory T. Dion, Legal Counsel  
**RE: BOARD AGENDA ITEM: III-2**

### **Staff Report:**

For the Board's consideration is a proposed 4-year employment contract for the General Manager.

### **Analysis**

The Chair and Vice Chair met with Ms. Hames in December 2007 to discuss her performance evaluation and to discuss the terms of a new four year employment contract. The terms of a new four year employment contract were tentatively agreed to at that time, subject to Board approval. The Board conducted Ms. Hames' performance evaluation at its January 2008 Board meeting. At the conclusion of the performance evaluation, the Board directed counsel to prepare a new four year employment contract for the General Manager based upon the terms recommended by the Chair and Vice Chair. Legal Counsel has reviewed the proposed employment contract with the Chairman and is recommending that the contract be ratified.

### **Recommendation**

The Chairman recommends that the Board ratify the General Manager's employment contract.

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AGREEMENT FOR EMPLOYMENT SERVICES  
FOR GENERAL MANAGER  
SONOMA MARIN AREA RAIL TRANSIT

This Agreement is made this 16<sup>th</sup> day of January 2008, by and between the Sonoma-Marine Area Rail Transit, a public entity (hereinafter "SMART") and Lillian Hames (hereinafter "EMPLOYEE"). (SMART and EMPLOYEE shall collectively be referred to as the "parties").

RECITALS:

WHEREAS, on or about January 15, 2001, SMART's predecessor in interest, the Sonoma-Marine Area Rail Transit Commission (the "Commission"), and EMPLOYEE entered into a one (1) year contract for consulting services;

WHEREAS, on or about April 16, 2002, the Commission and the EMPLOYEE entered into a subsequent three (3) year contract for consulting services;

WHEREAS, on or about January 6, 2004, SMART, as successor in interest to the Commission, and the EMPLOYEE entered into a new four (4) year employment contract, superceding the prior contract between the Commission and the EMPLOYEE;

WHEREAS, SMART and the EMPLOYEE subsequently entered into two amendments to the employment contract, primarily to adjust EMPLOYEE's salary in subsequent years;

WHEREAS, SMART and the EMPLOYEE desire to enter into a new four (4) year employment contract;

NOW, THEREFORE, BE IT AGREED by and between the parties as follows:

1. EMPLOYMENT. SMART hereby employs EMPLOYEE in the position of General Manager for a period of four (4) years. The Agreement shall commence on, and be retroactive from, January 2, 2008. This Agreement may be terminated sooner pursuant to the termination provisions as hereinafter provided.

2. TENURE. EMPLOYEE shall serve at the will and pleasure of SMART's Board of Directors and expressly waives and disclaims any right to any pre-termination or post-termination notice and hearing.

3. SCOPE OF SERVICES/JOB DESCRIPTION.

EMPLOYEE shall perform the duties of the General Manager, as provided for in Public Resources Code §105052, in SMART's Administrative Code and in SMART's Personnel Policies and Procedures.

4. TERMINATION/SEVERANCE PAY.

(a) Notwithstanding anything else contained herein to the contrary, SMART may terminate EMPLOYEE'S employment with or without cause.

(b) At any time and without cause, SMART, in its sole discretion, shall have the right to terminate this Agreement by giving EMPLOYEE sixty (60) days written notice of termination. In such event, EMPLOYEE shall be entitled to severance pay in an amount equal to four (4) months salary.

(c) SMART may terminate EMPLOYEE's employment with cause at any time by giving notice of employment discrepancies and an opportunity to respond to such discrepancies prior to termination. Notice is accomplished by SMART depositing a written notice in the United States mail that is addressed to EMPLOYEE at her last known home address. After termination for cause has been effected, EMPLOYEE shall have no further rights under this Agreement or to continued employment with the SMART.

(d) At the expiration of the term of this Agreement, EMPLOYEE'S employment shall automatically cease and terminate, and the SMART shall have no further obligation to compensate or employ EMPLOYEE in any manner or capacity of any nature whatsoever. Such expiration shall be effective regardless of whether EMPLOYEE had or had not performed satisfactorily during the term of this Agreement. EMPLOYEE acknowledges that, other than as provided herein, there is no provision for automatic renewal.

(e) EMPLOYEE acknowledges, understands and warrants that EMPLOYEE shall have no further right or claim to employment after the expiration of the term of this Agreement, and that no other document, handbook, policy, resolution or oral or written representation, of any nature whatsoever, shall be effective or construed to be effective to extend the term hereof or otherwise grant EMPLOYEE any right or claim to continued employment with SMART. This warranty has been relied upon by SMART as a material inducement to enter into this Agreement and, in the absence thereof, SMART would not have entered into this Agreement.

(f) EMPLOYEE may terminate her employment at any time by delivering to the SMART'S Board of Directors her written resignation. Such resignation shall be irrevocable and shall be effective no earlier than sixty (60) calendar days following delivery.

(g) From the date upon which EMPLOYEE either resigns or learns of the SMART's intention to terminate the Agreement to the actual date upon which the resignation, termination or expiration becomes effective, EMPLOYEE shall continue to devote her full time, attention and effort to the duties anticipated hereunder and shall perform the same in a professional and competent manner. If requested, EMPLOYEE shall assist SMART in orienting EMPLOYEE'S replacement and shall perform such tasks as are necessary to effect a smooth transition in the leadership of the SMART. These tasks may also include providing information or testimony regarding matters which arose during EMPLOYEE'S term as Interim General Manager/Project Director for SMART.

(h) SMART's Board of Directors may, in its sole discretion, publish its reasons for termination. In such event, publication shall consist of the reading of a written statement of the Board Chairperson at a regular or special meeting following the disclosure required by Section 54957.1 of the Government Code. A copy of the statement shall be made for EMPLOYEE and kept for her in the office of the Board's Clerk. Within ninety (90) days following the announcement of termination, EMPLOYEE may present a written response to the Board at a public meeting during which it will be read aloud and maintained as a public record.

(i) EMPLOYEE agrees that any concerns that SMART's Board of Directors, or individual members of the Board, have concerning EMPLOYEE's performance are not "specific complaints or charges brought against an employee by another person or employee" as that phrase is used in Government Code § 54957 and that the notice requirement of that section is, under those circumstances, inapplicable.

5. ADMINISTRATIVE LEAVE. The Chair of SMART's Board of Directors may place EMPLOYEE on administrative leave when, in the sole opinion of the Chair EMPLOYEE's temporary removal from office would be in the best interests of SMART. The administrative leave will commence on the Chair's delivery to EMPLOYEE's office of a written notice to that effect. Upon the delivery of the notice to EMPLOYEE's office, EMPLOYEE's duties as General Manager are suspended but all other provisions of this Agreement shall remain in full force and effect. Thereafter, EMPLOYEE's duties as General Manager shall be performed by the employee next in authority, as determined by

the Chair, until further written notice by the Chair. SMART and EMPLOYEE agree that SMART will incur damages, if, during the period of administrative leave, EMPLOYEE performs or attempts to perform any of the duties as General Manager, or in any other way interferes with the administration or operation of SMART. SMART and EMPLOYEE agree that the measurement of these damages would be difficult and speculative and accordingly further agree that if EMPLOYEE performs or attempts to perform any of the duties as General Manager, or in any other way interferes with the administration or operation of SMART that SMART's obligations under this Agreement are discharged for each day during which EMPLOYEE engages in such non-cooperation and/or interference. The administrative leave and the suspension of the duties as General Manager shall terminate on the Chair's delivery to EMPLOYEE's office of a written notice to that effect.

6. COMPENSATION AND BENEFITS.

(a) EMPLOYEE's annual salary shall be \$ \_\_\_\_\_ or as hereafter established by SMART's Board of Directors. SMART shall review EMPLOYEE's performance annually, and based on said review, the Board of Directors may, in its sole discretion, adjust EMPLOYEE's salary upwards by an appropriate percentage amount based upon prior performance.

(b) EMPLOYEE shall be entitled to the fringe benefits as set forth in this Agreement, and those fringe benefits set forth in SMART's Personnel Policies and Procedures. To the extent that there is a conflict between the benefits provided in this Agreement and those provided in SMART's Personnel Policies and Procedures, the provisions in this Agreement shall control.

(c) In addition to EMPLOYEE's base salary, and in addition to any other retirement plan provided for and authorized by SMART, SMART shall deposit an additional 5%, based on EMPLOYEE's bi-weekly salary, into a 401(a) or 457 Deferred Compensation account. The County of Sonoma currently administers SMART's payroll functions, including administering a 401(a) or 457 Deferred Compensation Plan. Nothing herein renders SMART liable to the EMPLOYEE for continuance of the deferred compensation plan in the event of a discontinuance of Internal Revenue Service or Franchise Tax Board approval of a SMART or County of Sonoma deferred compensation plan or portion thereof or the employee becoming ineligible to participate in the deferred compensation plan.

(d) SMART shall provide EMPLOYEE with health, dental and vision insurance coverage at the levels and percentages provided by the County of Sonoma to its Unrepresented Administrative Management Employees.

(e) SMART shall provide for a Term Life Insurance Policy for the EMPLOYEE, based upon the same level of coverage provided to EMPLOYEE under her prior employment contract.

(f) SMART shall provide for a Disability Insurance Policy for the EMPLOYEE, based upon the same level of coverage provided to EMPLOYEE under her prior employment contract.

(g) SMART and EMPLOYEE acknowledge that EMPLOYEE's current salary compensation under this Agreement, as set forth above under subsection (a), already includes reimbursement for automobile expenses, including but not limited to insurance, gas and maintenance. Said compensation shall be in lieu of any expenses allowed for by SMART's Personnel Policies and Procedures. EMPLOYEE shall be responsible for maintaining automobile liability insurance for any owned, hired, and non-owned vehicles utilized by EMPLOYEE. Said insurance shall cover bodily injury and property damage in an amount no less than one million dollars (\$1,000,000) combined single limit for each occurrence. Said insurance shall include coverage for owned, hired, and non-owned vehicles. Said policy shall be endorsed with the following language:

This policy shall not be canceled or materially changed without first giving thirty (30) days prior written notice to the Sonoma-Marín Area Transit.

At any point during the term of this Agreement, SMART may, in its sole discretion, provide EMPLOYEE with a defined reimbursement allowance for automobile expenses of not less than \$317 per bi-weekly pay period or provide EMPLOYEE with an assigned vehicle (i.e. leased vehicle). In the event that SMART provides EMPLOYEE with a defined reimbursement allowance or with an assigned vehicle, EMPLOYEE's salary compensation shall be reduced by \$317 per bi-weekly pay period.

(h) EMPLOYEE shall accrue and may use vacation leave with full pay at the same rate as that provided by the County of Sonoma to its Unrepresented Administrative Management Employees. EMPLOYEE's vacation time shall be taken after notification of the Chair of SMART.

(i) SMART and EMPLOYEE acknowledge that funding for the position of General is currently substantially dependent upon TCRP funding. Accordingly, should said funding be materially reduced or otherwise negatively impacted, SMART and EMPLOYEE agree that the terms of this Agreement may have to be modified. SMART and EMPLOYEE agree that should TCRP funding be materially reduced or otherwise

negatively impacted, SMART and EMPLOYEE shall in good faith meet and confer in an effort to modify the provisions of this Agreement so that the termination provisions set forth in this Agreement do not have to be implemented.

7. RECORDS MAINTENANCE. EMPLOYEE shall keep and maintain full and complete documentation and accounting records concerning all services performed that are compensable under this Agreement and shall make such documents and records available to SMART for inspection at any reasonable time. EMPLOYEE shall maintain such records for a period of not less than five (5) years following completion work hereunder.

8. ASSIGNMENT AND DELEGATION. EMPLOYEE shall not during the term of this Agreement make any assignment or delegation of any of its provisions without the prior written consent of SMART, and no such transfer shall be of any force or effect whatsoever unless SMART shall have so consented.

9. COMPLIANCE WITH LAW. EMPLOYEE shall, during her employment hereunder, comply with all laws and regulations applicable to such employment. Any conviction for an act or omission of EMPLOYEE constituting a public offense involving moral turpitude or a withholding of labor is a material breach of this Agreement relieving SMART of any and all obligations hereunder. Such act or omission shall constitute sufficient grounds for EMPLOYEE'S termination with cause pursuant to Section 4(c) of this Agreement.

10. CONFLICT OF INTEREST: EMPLOYEE covenants that she presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services hereunder. EMPLOYEE further covenants that in the performance of this Agreement no person having any such interest shall be employed. In addition, EMPLOYEE shall complete and file a "Statement of Economic Interest" with SMART disclosing EMPLOYEE's financial interests.

11. CONFIDENTIAL INFORMATION: All data, documents, discussions, or other information developed or received by or for EMPLOYEE in performance of this Agreement are confidential and shall not be disclosed by EMPLOYEE to any person except as authorized by SMART, or as required by law.

12. OWNERSHIP OR WORK PRODUCT: All reports, original drawings, graphics, plans, studies and other data or documents, in whatever form or format,

assembled or prepared by EMPLOYEE or on behalf of EMPLOYEE in connection with this Agreement shall be the property of SMART. EMPLOYEE shall deliver such materials to SMART upon either the expiration or termination of this Agreement in such form or format as SMART deems appropriate, unless directed otherwise by SMART. Such materials shall be and will remain the property of SMART without restriction or limitation.

13. 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.

14. APPLICABLE LAW AND FORUM: This Agreement shall be construed and interpreted according to the substantive law of California excluding the law of conflicts. Any action to enforce the terms of this Agreement or for the breach thereof shall be brought and tried in either the Superior Court for the County of Sonoma or the Superior Court for the County of Marin.

15. 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.

16. NUMBER and GENDER: Wherever used herein, unless the provision or context otherwise requires, the singular number shall include the plural and the plural the singular, and the masculine gender shall include the feminine and neuter.

17. DAY AND BUSINESS DAY: Wherever used herein, the term “day” shall mean any calendar day, and the term “business day” shall mean any calendar day on which the offices of the County are open for regular business.

18. MERGER. This writing is intended both as the final expression of the Agreement between the parties hereto with respect to the included terms and as a complete and exclusive statement of the terms of the Agreement, pursuant to Section 1856 of the Code of Civil Procedure. No modification of this Agreement shall be effective unless and until such modification is evidenced by a writing signed by both parties.

19. PRIOR AGREEMENTS. To the extent that there is any conflict between the provisions set forth in this Agreement and SMART’s Personnel Policies and Procedures, the provisions in this Agreement shall control. Upon execution, this Agreement shall supersede any and all terms set forth in any previously referenced

contracts between EMPLOYEE and either SMART or the Commission, and said contracts shall have no force or effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as set forth below:

SONOMA MARIN AREA RAIL TRANSIT

DATED: \_\_\_\_\_

By \_\_\_\_\_  
Chairman, Board of Directors

EMPLOYEE

DATED: \_\_\_\_\_

\_\_\_\_\_  
Lillian Hames

Approved as to form:

DATED: \_\_\_\_\_

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Gregory T. Dion,  
Deputy County Counsel, County of Sonoma  
Legal Counsel for SMART





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## MEMORANDUM

**DATE:** February 20, 2008  
**TO:** SMART Board of Directors  
**FROM:** Gregory T. Dion, Legal Counsel  
**RE: BOARD AGENDA ITEM: XII**

### **Staff Report: Madera Bay Easement**

#### **Issue Summary**

Before the SMART Board is a proposed Permanent Easement Agreement between SMART and EAH, INC., a California nonprofit public benefit corporation ("EAH"), and MADERA BAY, LLC, ("Madera Bay"). Madera Bay seeks to acquire from SMART a permanent non-exclusive at-grade roadway crossing and utility easement over a portion of the right of way, to provide for access to and from a proposed development of real property owned by Madera Bay. Madera Bay intends to develop the Property as an office complex.

#### **Analysis**

This matter previously came before the Board on October 19, 2005, at which time the Board approved the Agreement. Though the Agreement was forwarded to Madera Bay for execution, Madera Bay did not execute the Agreement. Madera Bay recently approached SMART and requested that the Agreement be executed. Because more than two years has passed since the Board originally authorized execution of the Agreement, it is recommended that the Board reconsider and reauthorize the Agreement, prior to execution by the Chair.

The Agreement was presented to the SMART Board at its December 2007 Board meeting for reconsideration. Shortly before the December 2007 Board meeting, SMART received two letters, one from the Marin Audubon Society and one from the Marin Conservation League, opposing approval of the Easement Agreement. As a result, the Board deferred acting on the Agreement and referred the matter to the Real Estate Committee for review.

At the February 2008 Real Estate Committee, the Committee reviewed the Agreement and the opposition letters. After further consideration, it is the Committee's recommendation that the Easement Agreement be re-approved. The Committee recommends, however, that the Agreement be revised to include a provision that Madera Bay defend and indemnify SMART against any lawsuit pertaining to Madera Bay's project or SMART's approval of the Easement Agreement.

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Additionally, the Real Estate Committee has requested that legal counsel provide a legal opinion on whether SMART is required to conduct any environmental analysis (i.e. CEQA analysis) prior to approving the Easement Agreement. (This is one of the arguments raised by the Marin Audubon Society in its letter of December 18, 2007.) It is legal counsel's opinion that because SMART is only granting an option to purchase the easement, and because the option requires that Madera Bay complete its own environmental analysis and obtain appropriate land use entitlements from local jurisdictions prior to exercising the option, SMART is not required to do any further environmental analysis prior to approving the Easement Agreement. It is legal counsel's opinion that the Easement Agreement (an option to purchase in the future based on meeting other conditions) is not a "project" for purposes of CEQA. (See, *Friends of Sierra Railroad v. Tuolumne Park and Recreation District* (2007) [Court held that transfer of rail line to Me-Wuk Indians was not a "project" for purposes of CEQA because concrete development plans had not been finalized.])

The general terms of the agreement are as follows:

SMART shall grant to Madera Bay an option to purchase a permanent non-exclusive crossing and utility easement to allow it to have access to its property. The property is located in the Town of Corte Madera. Madera Bay intends to construct an affordable and market rate housing development or to construct an office building.

Madera Bay agrees to initially pay SMART the sum of \$50,000 for an option to purchase the easement. The option shall exist for three years. The option may be extended an additional 2 years. If Madera Bay exercises the option, Madera Bay shall pay SMART an additional \$450,000 for the easement. (For a total of \$500,000).

In addition, should SMART reactivate rail transit operations on that portion of the right of way subject to the non-exclusive easement, Madera Bay shall reimburse SMART, up to \$600,000, for safety improvements at the crossing. That amount is increased overtime, up to a maximum amount of \$900,000. Madera Bay is required to provide SMART with a Letter of Credit to secure these future payments.

Madera Bay has agreed that if SMART allows for a Bicycle and/or Pedestrian Pathway on a portion of the right of way, sometime in the future, Madera Bay shall also provide for safety improvements. At a minimum, Madera Bay must provide for a raised crosswalk with stop signs for automobile cross-traffic where Madera Bay's easement intersects with the bicycle and/or pedestrian pathway.

Lastly, as a condition of the easement, SMART is requiring that Madera Bay provide SMART with a Noise Easement over Madera Bay's property so that future purchasers of the property are on notice of the possibility of rail service on the right of way.

### **Recommendation**

The Real Estate Committee recommends that the SMART Board approve the proposed Easement Agreement with Madera Bay.

## **EASEMENT AGREEMENT**

THIS EASEMENT AGREEMENT (“Agreement”), dated for reference purposes as of \_\_\_\_\_, is entered into by and between the SONOMA MARIN AREA RAIL TRANSIT DISTRICT (“Grantor”) and EAH, INC., a California nonprofit public benefit corporation (“EAH”), and MADERA BAY, LLC, a California limited liability company (collectively “Grantee”).

### **RECITALS**

A. Grantor is the owner (as successor in interest to the Golden Gate Bridge Highway and Transportation District (“GGBHTD”)) of a portion of the former Northwestern Pacific Railroad right-of-way within the Town of Corte Madera, County of Marin, State of California, more particularly described on Exhibit “A” which is attached hereto and incorporated herein by this reference (the “Property”).

B. Grantee wishes to acquire from Grantor a permanent non-exclusive at-grade roadway crossing and utility easement over the Property to provide for access to and from a proposed affordable and market rate rental housing development to be constructed on the real property owned by Grantee described on Exhibit “B” attached hereto and incorporated by this reference (“Grantee’s Property”). If Grantee is unable to obtain approval of the rezoning of the Property or any other governmental entitlements necessary for Grantee’s proposed housing development, Grantee intends to develop the Property as an office complex.

C. GGBHTD and Grantee entered into an Easement Agreement dated March 21, 2001 (the “GGBHTD Easement Agreement”) that provided for a permanent non-exclusive at-grade roadway crossing and utility easement over the Property, but the conditions to the effectiveness of the GGBHTD Easement Agreement were not satisfied by Grantee within the

time period specified therein and as a result the GGBHTD Easement Agreement expired on March 23, 2003. Subsequently thereto Grantor acquired the Property from GGBHTD.

D. Grantee has requested that Grantor enter into this Agreement with Grantee granting to Grantee a permanent non-exclusive at-grade roadway crossing and utility easement over the Property to provide for access to and from a proposed development project to be constructed by Grantee on Grantee's Property consisting of either an affordable and market rate housing development or an office building project, referred to as the Madera Bay Project ("Project").

E. If the Project is developed for housing, the affordable housing component of the Project shall be completed by EAH.

F. The parties now desire to establish the terms and conditions by which Grantor shall convey to Grantee a permanent non-exclusive at-grade roadway crossing and utility easement over the Property to provide for access to and from the Project to be developed by Grantee on Grantee's Property.

## **AGREEMENT**

**NOW, THEREFORE**, in consideration of the foregoing, the parties agree as follows:

1. **Grant of Easement**. Subject to satisfaction of the terms and conditions contained in this Agreement, Grantor hereby grants to Grantee a permanent non-exclusive at-grade roadway crossing and utility easement ("Easement") over the Property for access to and from Grantee's Property, and for the installation and maintenance of utilities facilities serving Grantee's Property. The Easement is appurtenant to Grantee's Property and any subdivision thereof. The Easement is made subject and subordinate (1) to the prior and continuing right and obligation of Grantor, its successors and assigns, to use the Property, and (2) to Grantor's right to relocate the Easement if reasonably necessary for public transportation purposes, subject to the

terms and conditions of Section 13 below. There is reserved unto Grantor, its successors and assigns, the right to construct, reconstruct, maintain and use existing and future facilities and appurtenances, including, without limitation, existing and future transportation, communication, railroad tracks and pipeline facilities and appurtenances in, upon, over, under, across and along the Property, provided that such facilities and appurtenances shall not preclude the ability of Grantee to use the Easement granted herein. The Easement is made subject to all existing licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens and claims of title that may affect the Property.

**1.1 Conditions to Effectiveness.**

The effectiveness of the Easement shall be subject to the satisfaction of each of the following conditions precedent:

1.1.1 The Northwestern Pacific Railroad Interagency Task Force shall have approved the Easement;

1.1.2 The Town of Corte Madera shall have issued a development permit to Grantee for the development of the Project on Grantee's Property which shall consist of either an affordable and market rate housing project or an office building project;

1.1.3 All other regulatory approvals necessary to granting of the Easement, including the approval of the California Public Utilities Commission ("PUC"), if necessary, and of the Federal Railroad Administration ("FRA"), if necessary, shall have been obtained;

1.1.4 Grantee shall have delivered to Grantor the purchase price of the Easement specified in Section 3 below;

1.1.5 Grantee shall have delivered to Grantor in accordance with Section 12 hereof security reasonably acceptable to Grantor to secure the performance of Grantee's payment obligations under Sections 4 and 11 hereof.

1.1.6 Grantee shall have delivered to Grantor the certificate(s) of insurance required by Section 15 of this Agreement; and

1.1.7 Grantee shall have obtained at Grantee's expense a policy of title insurance insuring a non-exclusive access easement in favor of Grantee over the property generally described on Exhibit "C."

The first date on which all such conditions have been satisfied shall be referred to herein as the Effective Date.

## **2. Termination.**

**2.1 Termination Date.** This Agreement shall terminate if the conditions to effectiveness established in Section 1.1 above have not been satisfied within three (3) years from the date of this Agreement.

Notwithstanding the foregoing, following said period of three (3) years Grantor shall extend the termination date of this Agreement on a year to year basis, up to a maximum of two (2) additional years, upon the written request of Grantee, provided that the first extension request is received by Grantor on or before the third anniversary of the date of this Agreement, and provided that each of the following extension requests, if delivered by Grantee, is received by Grantor on or before the succeeding anniversaries of the date of this Agreement thereafter; provided further that on the third anniversary of the date of this Agreement, and on each of the two (2) succeeding anniversaries of said date thereafter, the granting of each such annual extension by Grantor shall be conditional upon (a) Grantee providing Grantor with written evidence that Grantee has obtained from the Town of Corte Madera the land use entitlements

that will allow development of the Project on Grantee's Property and that such entitlements are then in effect, or, if Grantee has not yet obtained such entitlements, that Grantee is actively seeking such entitlements, and (b) provided that if such entitlements have been obtained, Grantee confirming in each extension request submitted to Grantor that Grantee is actively seeking all permits necessary for commencement of construction of the Project on Grantee's Property.

**2.2 Event of Default.** Grantee's failure to perform any of its obligations under this Agreement shall constitute an Event of Default by Grantee hereunder. Grantor shall promptly notify Grantee in writing of the occurrence of any Event of Default by Grantee. Grantee shall cure the Event of Default within thirty (30) days after receipt of Grantor's notice, provided that if the Event of Default cannot be cured within said thirty (30) day period, Grantee shall commence to cure the Event of Default within said thirty (30) day period, and thereafter shall diligently prosecute said cure to completion. Failure by Grantee to cure any Event of Default within the timeframe established in this Section 2.2 shall constitute grounds for termination of the Easement by Grantor. Grantor may thereafter terminate this Easement by giving written notice of termination to Grantee.

**3. Easement Purchase Price.**

**3.1 Purchase Price.** The purchase price for the Easement shall be Five Hundred Thousand Dollars (\$500,000) ("Purchase Price"). Grantee shall pay to Grantor a non-refundable deposit in the sum of Fifty Thousand Dollars (\$50,000) (the "Deposit"). The Deposit shall be credited against the Purchase Price. The balance of the Purchase Price (Four Hundred Fifty Thousand Dollars (\$450,000)) shall be due and payable by Grantee upon satisfaction of the conditions to effectiveness set forth in Sections 1.1.1-1.1.6 above. The Deposit, and the Purchase Price Balance when paid, shall be payable in cash, via wire transfer or by other readily available means.

**3.2 Increase in Purchase Price.** In the event the termination date of this Agreement is extended pursuant to Section 2.1, the Purchase Price of Five Hundred Thousand Dollars (\$500,000) shall be adjusted as of the third anniversary of the date of this Agreement and on each of the two succeeding anniversary dates thereafter that the termination date is extended (each an “Adjustment Date”) to an amount equal to the product obtained by multiplying the Purchase Price of Five Hundred Thousand Dollars (\$500,000) (as previously adjusted, if applicable) by a fraction, the numerator of which is the United States Department of Labor, Bureau of Labor Statistics Consumer Price Index, all items, for all Urban Consumers – San Francisco-Oakland-San Jose (1982-84=100), hereafter referred to as the “Index,” most recently published as of the end of the calendar month immediately preceding each Adjustment Date and the denominator of which is the Index for said subgroup published most recently immediately preceding the previous anniversary of the date of this Agreement (the “base Index”); provided that in no event shall said sum be increased on any Adjustment Date to an amount less than two percent (2%) per annum nor more than four percent (4%) per annum, calculated for each individual year from the previous Adjustment Date. When the new Purchase Price amount is calculated as of each Adjustment Date, Grantor shall give Grantee written notice of the new amount and how the new amount was computed in accordance with the foregoing procedure.

**4. Safety Improvements.**

**4.1 Reactivate Transportation Operations.** In the event that following the satisfaction of the conditions set forth in Sections 1.1.1 – 1.1.6 above, Grantor or any other public agency determines to reactivate transportation operations over the Northwestern Pacific Right of Way south of Corte Madera Creek, then following completion of construction by Grantor or such other public agency of the safety improvements to the Property required on account of the Easement that are described hereafter, Grantee shall pay to Grantor within thirty



(30) days after receipt by Grantee of a written request therefor, an amount equal to (1) the actual total costs incurred by Grantor in the construction of said safety improvements, or (2) the sum of Six Hundred Thousand Dollars (\$600,000), as adjusted as hereafter provided, whichever of (1) or (2) is less. Said payment shall be made by Grantee to Grantor, in cash, via wire transfer or other readily available means. The safety improvements shall consist of safety/traffic control devices such as crossing signals, gates or other improvements on the Property (or if the Easement is relocated pursuant to Section 12 below, on the property of the relocated Easement) as may be required by law, regulation or order of federal, state and/or local agencies with jurisdiction over the proposed operations or relevant safety standards. Said sum of Six Hundred Thousand Dollars (\$600,000) shall be adjusted annually commencing with the first anniversary of the date of this Agreement and continuing on each anniversary of the date of this Agreement thereafter during the term of this Agreement (each an "Adjustment Date") until said sum is paid by an amount equal to the product obtained by multiplying said sum of Six Hundred Thousand Dollars (\$600,000) by a fraction, the numerator of which is the United States Department of Labor, Bureau of Labor Statistics Consumer Price Index, all items, for all Urban Consumers – San Francisco-Oakland-San Jose (1982-84=100), hereafter referred to as the "Index," most recently published as of the end of the calendar month immediately preceding each Adjustment Date and the denominator of which is the Index for said subgroup published most recently as of the end of the calendar month immediately preceding the calendar month in which this Agreement is entered into (the "base Index"); provided that in no event shall said sum be increased on any Adjustment Date to an amount less than two percent (2%) per annum, nor more than four percent (4%) per annum, calculated for each individual year from the previous Adjustment Date. When the new amount of the maximum contribution by Grantee to the cost of the safety improvements is calculated as of each Adjustment Date, Grantor shall give Grantee written notice of the new

amount and how the new maximum amount was computed in accordance with the foregoing procedure.

In the event the actual total costs incurred by Grantor in the construction of said safety improvements exceed said sum of Six Hundred Thousand Dollars (\$600,000), as said sum is adjusted as provided above, following completion of construction Grantee shall pay to Grantor, in cash within thirty (30) days after the receipt by Grantee of a written request therefor, and receipt by Grantee of documentation reflecting the increase in the construction costs, an additional amount equal to (1) fifty percent (50%) of the amount by which the actual total costs incurred by Grantor in the construction of said safety improvements exceed Six Hundred Thousand Dollars (\$600,000), or (2) Three Hundred Thousand Dollars (\$300,000), whichever of (1) or (2) is less.

If Grantor is required by the terms of the construction contract entered into by Grantor for the construction of the safety improvements to make progress payments to the contractor during construction, or if Grantor is otherwise required to expend funds relating to the safety improvements prior to completion of construction thereof, the parties shall renegotiate the timing of the payments to be made by Grantee pursuant to this Section 4 in order to enable Grantor to make the required payments in a timely manner.

**4.2 Bicycle and/or Pedestrian Pathway.** In the event that following the satisfaction of the conditions set forth in 1.1.1-1.1.6 above, Grantor, or any successor in interest to Grantor, allows a bicycle and/or pedestrian pathway on a portion of Grantor's right of way south of Corte Madera Creek, then Grantee shall provide for, at its sole expense, a crossing for the pathway across Grantee's easement. At a minimum, Grantee shall provide, at its sole expense, a pathway crossing in the form

of a raised crosswalk with stop signs for automobile cross-traffic where Grantee's easement intersects with the bicycle and/or pedestrian pathway. Grantee shall be responsible for preparing any design plans for such safety improvements and shall be responsible for obtaining any required regulatory permits or approvals. Grantor shall not in any way be responsible for or obligated to pay for any safety improvements for a bicycle and/or pedestrian pathway, unless otherwise explicitly agreed to by Grantor in writing. If for any reason, Grantee fails to perform the required safety improvements in a timely manner, Grantor may perform or contract for such improvements and Grantee shall be responsible to reimburse Grantor for any costs or expenses.

The location of any bicycle and/or pedestrian pathway shall be determined exclusively by Grantor. The design of any safety improvements shall be subject to Grantor's sole discretionary approval.

The inclusion of the foregoing provisions regarding a potential bicycle and/or pedestrian pathway on a portion of Grantor's right of way, in no way obligates Grantor to grant an easement, license, permit, or otherwise grant a right or property interest in Grantor's right of way to any person or entity for such a purpose. Further, nothing in this Agreement grants to any person or entity a third party beneficial interest in this Agreement.

**5. Necessary Approvals.** Grantee shall apply for and obtain at its sole cost and expense all approvals necessary for the construction of the at-grade crossing road improvements and any other improvements to the Property required for the at-grade crossing in accordance with

Section 6 below (other than the safety improvements referred to in Section 4 above) (collective, the “at-grade crossing road improvements”), including, without limitation, (a) approvals from the Town of Corte Madera and any other local authorities with jurisdiction over the Project, and (b) approval by PUC and the FRA, if needed, of the at-grade crossing road improvements.

**6. Design and Construction.** Grantee shall design and construct the at-grade crossing road improvements at Grantee’s sole cost and expense. The at-grade crossing permitted hereunder shall be limited to two lanes for vehicular traffic and a single lane pedestrian/bicycle crossing only. Nothing herein shall be deemed to grant to Grantee, or to the Town of Corte Madera, the right to expand the crossing beyond the configuration referred to above without Grantor’s prior approval, which approval may be withheld in Grantor’s sole and absolute discretion.

All designs for the at-grade crossing road improvements shall be subject to the approval of Grantor, which approval shall not be unreasonably withheld or delayed, and shall comply with (a) all applicable rules and regulations of the Federal Railroad Administration (“FRA”) and the PUC regarding railroad facilities, (b) all applicable American Railway Engineering and Maintenance of Way and Standards (“AREMA Standards”), (c) Grantor’s then existing design, construction, safety and operational standards, if any, and (d) common practices followed by the railroad industry. Any revisions or amendments to the approved plans pertaining to work on the Property must be approved in writing by Grantor. Grantee shall not begin any work on the Property until Grantee is notified in writing by the Grantor that Grantee’s plans have been approved. Approval by Grantor for these limited purposes shall not relieve Grantee from any liability arising out of the design, construction, or maintenance of the at-grade crossing road improvements or lead to an assumption of design or construction responsibility on

the part of the Grantor. Approval by Grantor shall not constitute a warranty by Grantor that such plans conform to applicable federal, state, and/or local codes and regulations.

Notwithstanding the property rights to be acquired by Grantee hereby, any contractor of Grantee shall, prior to entering onto the Property in connection with the design, construction, or maintenance of the at-grade crossing road improvements, sign and deliver to Grantor Grantor's then current right of entry permit, provide to Grantor a certificate of insurance reflecting compliance with the insurance requirements established in said right of entry, and pay any applicable fees.

7. **Utility Relocations.** Grantee shall be solely responsible, at its own cost and expense, for identifying the location of all pipelines (including, without limitation, gas and water pipelines), fiber optic lines and all other utilities of whatever nature, both overhead and underground, on or over the Property (collectively, "Facilities") and for relocating or arranging for the relocation of all said Facilities which would interfere with construction of the at-grade crossing road improvements. Grantee shall be responsible for contacting and working with the owners of these Facilities to identify their exact location and arrange for relocation as needed.

8. **No Delay Claims.** Grantor shall cooperate with Grantee to the end that the design and construction of the at-grade crossing road improvements may be performed in an efficient manner, but neither Grantee nor Grantee's contractor(s) shall have any claim for damages or extra compensation against Grantor in the event its work is delayed or disrupted on account of work by Grantor or by Grantor's or Grantee's contractors, or as a result of Grantor's operations, maintenance or construction activities, including, without limitation, the review of design and construction documents.

9. **Quality of Work.** Design and construction of the at-grade crossing road improvements shall be performed in a good and workerlike manner in accordance with the plans

and specifications to the reasonable satisfaction of the parties, and each portion of the work shall be promptly commenced and thereafter diligently prosecuted to completion in its logical order and sequence.

**10. Hazardous Material.**

**10.1 Existing Conditions.** Grantee has satisfied itself or will satisfy itself prior to the Effective Date of the Easement on all matters respecting the usability and condition of the Property, and Grantee is accepting the Easement in its “as is, where is” condition. Grantor shall be immune from, and Grantee shall pay and be solely responsible for, all costs, liability, and any other obligations enforceable by law against an owner, operator, or user of real property, due to the presence of any Hazardous Material or any other environmental condition on or about the Property (whether such condition is existing as of the date hereof, or subsequently occurring), arising as a result of Grantee’s use of the Property, including without limitation, those identified or revealed during the environmental assessment for or construction of the at-grade crossing road improvements, or arising out of any act or omission of Grantee, its agents, contractors, licensees, invitees, successor or assigns (collectively, “Environmental Condition”) and including, without limitation, the costs of investigating, reporting, remediating or otherwise responding to such Environmental Condition (collectively, all such liability and obligation is referred to herein as “Environmental Response”). In implementing any such Environmental Response, Grantee will utilize a qualified environmental engineering consultant experienced in handling Hazardous Material, and such consultant shall be reasonably acceptable to Grantor. Except in an emergency, in which event no prior approval is required, all Environmental Response measures involving the investigation or remediation of the Environmental Condition shall be set forth by Grantee in a written work plan or other proposal jointly approved in advance by Grantor and Grantee.

**10.2 Covenants.** Grantee hereby covenants that during the term of the Easement, no Hazardous Material shall be created, stored, used, disposed of, brought to or handled at any time upon the Property, except Hazardous Material contained in or used in connection with construction equipment that will be used for work which is authorized on the Property under the Right of Entry to be entered into pursuant to Section 6 above. In conducting any operations on the Property, Grantee shall at all times comply with all applicable federal, state or local laws, statutes, ordinances, rules, regulations or orders of whatever kind or nature (collectively, "Laws") and pay all costs of such compliance, including, without limitation, complying with any Laws relating to the presence, use, storage, generation, handling, transport and disposal of materials on the Property (whether or not hazardous), regardless of whether such costs are incurred by Grantor, Grantee or any other party, including fines or judgments levied against Grantor or its property. Grantee shall immediately notify Grantor upon learning of, or having reason to believe that, an Environmental Condition exists on the Property or a release of Hazardous Material has occurred in, on or about the Property. The term "release" or "threatened release" when used with respect to Hazardous Material shall include any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in, on, under or about the Property. Grantee shall further comply with all laws requiring notice of such releases or threatened releases to governmental agencies, and shall take all action necessary to mitigate the release or minimize the spread of contamination. In the event that Grantee, or its agents or invitees, causes a release of Hazardous Material on the Property, Grantee shall, without cost to Grantor and in accordance with all laws and regulations, return the Property to the condition immediately prior to the release. In connection therewith, Grantor shall have the right to participate in all discussions with governmental agencies regarding any Environmental Response measures, including any

settlement agreement, cleanup or abatement agreement, consent decree or other compromise proceeding involving Hazardous Material, and any such Environmental Response shall be subject to Grantor's approval, which shall not be unreasonably withheld.

**10.3 Hazardous Material Defined.** For purposes of this Agreement, "Hazardous Material" means any substance or material that, because of its quantity, concentration or physical or chemical characteristics, is at any time now or hereafter identified or regulated under any Laws as a "hazardous" or "toxic" or otherwise as posing a present or potential hazard to public health or the environment. Hazardous Material includes, without limitation, any material or substance defined as a "hazardous substance, pollutant or contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Sections 9601 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.) or pursuant to Section 25316 of the California Health and Safety Code; a "hazardous waste" listed pursuant to Section 25140 of the California Health and Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the Property or are naturally occurring substances on the Property, and any petroleum, including, without limitation, crude oil or any fraction thereof, natural gas or natural gas liquids.

**11. Reimbursement of Maintenance Costs.** After completion of the at-grade crossing road improvements referred to in Section 6, and continuing indefinitely thereafter so long as the Easement serves Grantee's Property, Grantee shall reimburse Grantor annually for (1) the actual costs incurred annually by Grantor in maintaining the Property and the at-grade crossing road improvements, plus an equal annual installment to an amortized replacement cost fund established by Grantor to pay the estimated replacement cost of the at-grade crossing road improvements at the end of their useful life, or (2) the sum of Ten Thousand Dollars (\$10,000) per year, as adjusted as hereafter provided, whichever of (1) or (2) is less. Said maximum sum



of Ten Thousand Dollars (\$10,000) per year shall be adjusted annually commencing with the first anniversary of the date of completion of the at-grade crossing road improvements and continuing on each anniversary of the completion date thereafter by (A) the percentage increase, if any, in the Consumer Price Index for the preceding twelve (12) months, or (B) three percent (3%) per year, whichever of (A) or (B) is less, calculated in the manner set forth in Section 4 hereof.

Upon completion of the safety improvements installed pursuant to Section 4 of this Agreement, Grantee shall also reimburse Grantor for the costs incurred by Grantor in maintaining the safety improvements, but Grantee's reimbursement obligation shall not exceed in the aggregate the sum of Ten Thousand Dollars (\$10,000) per year referred to above in this Section 11, as adjusted pursuant to the foregoing provision, for the costs incurred by Grantor in maintaining the at-grade crossing road improvements and the cost of maintaining the safety improvements. Grantor and/or its railroad operator shall have the sole right to control crossing signal operation at the Property, including decisions to close temporarily the crossing to public traffic for reasonable periods to accommodate rail or transit operations along the railroad right-of-way.

**12. Financial Assurance.** Grantee shall provide to Grantor pursuant to Section 1.1.5 hereof, as a condition to the effectiveness of the Easement, security reasonably satisfactory to Grantor securing the payment by Grantee of (a) the cost of the safety improvements provided for in Section 4, and (b) the amounts to be reimbursed by Grantee to Grantor pursuant to Section 11 hereof on account of the costs incurred by Grantor in maintaining the at-grade crossing improvements, including the amortized replacement cost fund. Such security shall be in the form of a bank letter of credit. SMART shall have sole discretion on whether to allow any other form of financial assurances in lieu of a bank letter of credit.

**13. Relocation.** Grantor hereby reserves the right to relocate the Easement if reasonably necessary for public transportation purposes, as determined by Grantor in its sole discretion, including, without limitation, to accommodate existing or proposed rail or freight operations. Grantor shall have the right, at Grantor's expense, to change, modify or remove any at-grade crossing road improvements or safety improvements in connection with any such relocation, provided that Grantor shall by construction or otherwise provide at Grantor's expense replacement improvements and facilities that are substantially equivalent to those existing at the time of such relocation and that are necessary to maintain access and utilities to Grantee's Property comparable to that afforded by the Easement granted herein. The location and type of such alternate access shall be determined in the reasonable discretion of Grantor. Grantee shall cooperate with Grantor by, including, but not limited to, executing any and all documents necessary for obtaining necessary governmental approvals and permits for such alternate access, but without expense to Grantee. Obtaining such approvals and permits shall be Grantor's sole responsibility and shall be at Grantor's sole expense.

**14. Grantee's Indemnification.** Grantee shall fully indemnify, defend and hold harmless Grantor and its officers, directors, employees, contractors and agents (collectively, "Grantor Indemnitees") from and against all liability, claim, causes of action, suits, sanctions, costs or expenses for injuries to or death of any person or damage to or loss of property ("Grantor Liabilities"), arising out of or resulting from (a) Grantee's breach or failure to perform any representation, covenant or other obligation under this Agreement (including without limit each and all of the provisions of Section 10 hereof), (b) any negligent act or omission or any intentional misconduct by Grantee, its agents, employees, contractors or subcontractors, licensees and invitees in the use of the Easement or the design, construction and/or maintenance of the at-grade Improvements, and/or (c) any use of the Easement by any third party. Grantee

shall also fully indemnify, defend, and hold harmless Grantor Indemnitees and each of them from and against any and all Grantor Liabilities that may be asserted by any contractor or subcontractor performing work in connection with the Project or the Improvements. Grantee's obligation to defend shall include the payment of all reasonable attorneys' fees and all other costs and expenses of suit incurred by Grantor Indemnitees, and if any judgment is rendered against any Grantor Indemnitee, Grantee shall, at its expense, promptly satisfy and discharge the same. This indemnity shall survive termination of this Agreement with respect to Grantor Liabilities arising prior to the termination of this Agreement.

As part of the approval of this Easement Agreement, Grantee agrees to defend, indemnify, hold harmless, and release the Grantor, its agents, officers, attorneys, and employees from any claim, action, or proceeding brought against any of them, the purpose of which is to attach, set aside, void, annul the approval of this Easement Agreement by Grantor, including, but not limited to, any action asserting that Grantor was required to and failed to prepare, adopt or approve any environmental document prior to approval by Grantor of this Easement Agreement. This indemnification obligation shall include, but not be limited to, damages, costs, expenses, attorneys fees of any person or entity, including Grantee, arising out of or in connection with the approval of this Easement Agreement, whether or not there is concurrent passive or active negligence on the part of Grantor, its agents, officers, attorneys, or employees.

**15. Insurance.**

**15.1 Commercial General Liability Insurance.** Grantee shall, at its own cost and expense, procure and maintain at all times during the term of this Easement Commercial General Liability Insurance, Form ISO CG000110 (1986 edition or later), amended to delete from Section IV, Paragraph 8c thereof the phrase "except in connection with construction or demolition operations within 50 feet of a railroad." The policy shall include as additional

insureds Grantor and its directors, officers, employees and agents while acting in such capacity, and their successors or assignees, as they now, or as they may hereafter be constituted, singly, jointly or severally (collectively, “Additional Insureds”).

The policy shall provide bodily injury and property damage coverage with a combined single limit of at least Two Million Dollars (\$2,000,000) each occurrence or claim and a general aggregate limit of at least Two Million Dollars (\$2,000,000). This insurance shall include, but shall not be limited to, premises and operations; contractual liability covering the indemnity provisions contained in this Agreement; personal injury; explosion, collapse, and underground property damage coverage, products and completed operations, and broad form property damage.

Prior to the Effective Date of this Easement, Grantee shall file a Certificate(s) of Insurance with the Project Director of Grantor evidencing coverage, and upon request, a certified duplicate original of the policy. Said Certificate(s) shall stipulate:

15.1.1 The insurance company(ies) issuing such policy(ies) shall give written notice to the Project Director of Grantor of any material alteration, or reduction in aggregate limits, if such limits apply, and provide at least thirty (30) days’ notice of cancellation.

15.1.2 The insurance policy(ies) is primary insurance and the insurance company(ies) providing such policy(ies) shall be liable thereunder for the full amount of any loss or claim for which Grantee is liable under this Section 15, up to and including the total limit of liability, without right of contribution from any of the insurance maintained or otherwise available to Grantor or any of the other Additional Insureds.

15.1.3 The policy shall also stipulate: Inclusion of the Additional Insureds referenced in Section 15.1.1 shall not in any way affect Grantor’s rights either as respects any claim, demand, suit or judgment made, brought or recovered against the Grantor.

Said policy shall protect the Additional Insureds in the same manner as though a separate policy had been issued to each, but nothing in said policy shall operate to increase the insurance company's liability as set forth in its policy beyond the amount or amounts shown or to which the insurance company would have been liable if only one interest had been named as an insured.

15.1.4 The insurance requirements established in this Section may be increased by Grantor from time to time in its reasonable discretion.

**15.2 Contractor Insurance Requirements.** Prior to the entry onto the Property, any contractor of Grantee shall be required to procure and maintain through completion of the improvements commercial general and auto liability insurance, workers' compensation and such other policies of insurance as are reasonably stipulated by Grantor in the Right of Entry to be signed by Grantee's contractor.

**16. Nature of Obligations; Remedies.** Each of Grantee's obligations under this Agreement, including, without limitation, those set forth in Sections 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 14 and 15 of this Agreement, shall be covenants running with the land that benefit Grantor's Property, burden the Grantee's Property, relate to the use of Grantee's Property and Grantor's Property, and shall be binding upon, and shall inure to the benefit of, the successive owners of the lands so bound and so benefited, respectively. In addition to any other remedies at law or in equity, upon any breach of any obligation established herein, Grantor shall be entitled to seek specific performance to require Grantee or successive owners to comply with the requirements of said obligation and to enjoin Grantee or any of Grantee's successive owners from the use of the Easement until the obligation has been satisfied, and/or to rescind or terminate the Easement. In the event that a court should find that Grantee's obligation does not constitute a covenant that runs with the land, the parties hereby recognize that it would be inequitable not to enforce said

obligation, and therefore, expressly agree that the obligation shall be enforceable as an equitable servitude, binding upon Grantee and its successors.

**17. Notices.** All notices, payments, requests, demands and other communications to be made or given under this Agreement shall be in writing and shall be deemed to have been duly given on the date of service if served personally or on the second day after mailing if mailed to the party to whom notice is to be given by first class mail, registered or certified, postage prepaid and properly addressed as follows:

To Grantor: Sonoma Marin Area Rail Transit District  
750 Lindero Street, Suite 200  
San Rafael, CA 94901  
Attention: Ms. Lilian Hames  
General Manager

With copies to: Gregory T. Dion, Esq.  
Deputy County Counsel  
County of Sonoma  
575 Administration Drive, Room 105A  
Santa Rosa, CA 95403

To Grantee: EAH, Inc.  
2169 East Francisco Blvd., Suite B  
San Rafael, CA 94901  
Attention: Mr. Alvin Bonnett  
Senior Vice President

and

Madera Bay LLC  
c/o Pollock Financial Group  
150 Portola Road  
Portola Valley, CA 94028  
Attention: Mr. James M. Pollock

With copies to: David L. Fletcher, Esq.  
2830 N. Swan Road, Suite 100  
Tucson, AZ 85712

and

Sean E. Morley, Esq.  
99 Almaden Blvd., Suite 720  
San Jose, CA 95109

18. **Governing Law.** This Agreement shall be interpreted, construed and enforced in accordance with the laws of the State of California as applied to contracts that are made and performed entirely in California.

19. **Attorneys' Fees.** In the event of any breach of this Agreement by any party, or in any action to determine either party's rights hereunder, the prevailing party shall be entitled to all costs incurred in bringing said action, including reasonable attorneys' fees, in addition to such other remedies to which it may be entitled at law or in equity.

20. **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto. This Agreement may not be assigned by Grantee without the prior approval of Grantor, which shall not be unreasonably withheld, conditioned or delayed.

21. **Amendments.** This Agreement may be amended only in a writing that is executed by all the parties hereto.

22. **Entire Agreement.** This Agreement constitutes the entire agreement of the parties with respect to its subject matter and supersedes any prior or contemporaneous oral or written understandings on the same subject. The parties intend this Agreement to be an integrated agreement.

23. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute a single agreement.

24. **Severability.** It is the intention of the Parties that should any term or provision of this Agreement be found to be void or unenforceable by a court of competent jurisdiction, such

term or provision shall be severed from this Agreement but shall not affect the validity of the remainder of this Agreement.

**25. Memorandum of Grant of Easement.** Upon the effectiveness of the Easement, but not before, the parties shall execute, acknowledge, and cause to be recorded in the Office of the County Recorder of the County of Marin, California a Memorandum of Grant of Easement in the form attached hereto as Exhibit “D” and incorporated by this reference.

**26. Authorization.** Upon execution of this Agreement, Grantee shall deliver to Grantor a fully executed copy of Grantee’s Operating Agreement or other organizational document, together with a written statement of Grantee’s members, in a form reasonably acceptable to Grantor, certifying that this Agreement has been duly approved by all appropriate organizational action of Grantee, constitutes a binding agreement of Grantee, enforceable in accordance with its terms, and that the individuals authorized to sign and deliver the Agreement on behalf of Grantee are fully authorized to do so.

**27. Noise Easement:** As a condition of the easement granted by Grantor to Grantee, Grantee agrees to grant to Grantor a noise easement over Grantee’s adjacent property, such that neither Grantee nor any successor property owner may object to Grantor’s rail operations adjacent to Grantee’s property.



IN WITNESS WHEREOF, the parties have entered into this Easement Agreement on the date first written above with the intent to be legally bound.

APPROVED AS TO FORM

\_\_\_\_\_  
Gregory T. Dion, Esq.  
Deputy County Counsel

“Grantor”  
SONOMA MARIN AREA RAIL TRANSIT  
DISTRICT

By: \_\_\_\_\_  
Its: General Manager

“Grantee”  
EAH, INC., a California non profit public  
benefit corporation

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

MADERA BAY, LLC,  
a California limited liability company

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

**LEGAL DESCRIPTION  
ROADWAY AND UTILITY EASEMENT**

All that certain real property situate in the Town of Corte Madera, County of Marin, State of California, described as follows:

Beginning at the northwest corner of Parcel One of deed. from Specialized Brokerage Services, Inc., a corporation, to Frank Perry Greene, Trustee, recorded August 12, 1981 as File Number 81035978 of Official Records, County of Marin, which lies on the easterly line of the parcel designated as "First Tract" in the deed from Thomas B. Valentine to San Francisco & San Rafael Railroad Company, recorded June 2, 1886 in Book 3 of Deeds at Page 399, Marin County Records; thence along the common boundary between said easterly line (3 Deeds 399) and the roadway and utility easement described as Parcel Four of said deed to Greene (OR 81035978) North 5°39'30" West, 40.00 feet; thence leaving said common boundary (3 Deeds 399 & OR 81035978) and continuing along said easterly line (3 Deeds 399) North 5°39'30" West. 0.15 feet; thence leaving said easterly line (3 Deeds 399) North 88°41'30" West, 151.12 feet, to the westerly line of said "First Tract" (3 Deeds 399), at the northeast corner of the roadway and utility easement, described as Parcel Three of said deed to Greene (OR 81035978), which lies on the easterly boundary of the parcel described in deed from Charles L. Robinson, and Ida Robinson, his wife, to I.J. Ely and Blanche H. Ely, his wife, recorded February 5, 1948 in Volume 578 of Official Records at Page 111, Marin County Records; thence along the common boundary between said "First Tract" (3 Deeds 399) and said Ely parcel (578 OR 111) South 5°39'30" East, 1.83 feet to the northwesterly line of the southwest branch of the Northwestern Pacific Railroad designated as "Tract 1" in the deed from Jennie A. Valentine, et al. to Northwestern Pacific Railroad Company, recorded November 2, 1908 in Book 119 of Deeds, at Page 38, Marin County Records; thence leaving said last described common boundary (3 Deeds 399 & 578 OR 111) along the common boundary between said "Tract 1" (119 Deeds 38) and said Ely parcel (578 OR 111) South 18°02'01" West, 18.99 feet to the southeast corner of said Ely parcel (578 OR 111), from which the northeasterly corner of that certain parcel of land acquired by the State of California for highway purposes and shown as "Parcel 1 – First" in the Notice of Pendency of Proceeding in Eminent Domain recorded January 13, 1956 in Volume 999 of Official Records at Page 35, Marin County Records, bears North 88°41'30" West, 743.042 feet; thence leaving said last described common boundary (119 Deeds 38 & 578 OR 111) and continuing along said northwesterly line of said "Tract 1" (119 Deeds 38) South 18°02'01" West, 20.88 feet; thence leaving said northwesterly line (119 Deeds 38) South 88°41'30" East, 166.03 feet; thence North 84°20'30" East, 1.22 feet to the point of beginning.

Containing 0.1458 acres more or less.

## **DESCRIPTION**

All that certain real property situate in the Town of Corte Madera, County of Marin, State of California, described as follows:

### PARCEL ONE:

BEGINNING at a point in the Easterly line of the Northwestern Pacific Railroad right of way, as described in Book 3 of Deeds, at Page 399, Marin County Records; said point being due East along the Easterly extension of the Southerly line of the property described in the Deed from Charles L. Robinson, et ux to I.J. Ely, et ux, recorded February 5, 1948 in Book 578 of Official Records at Page 111, Marin County Records; and. South 6°58' East 20.0 feet; running thence from said point of beginning along said right of way line, 6°58' East 400 feet; thence leaving said line and running North 83°02' East 150; thence North 6° 58' West 400 feet; thence 83°02' West 150 feet to the point of beginning.

TOGETHER with an easement for roadway and utilities over a strip of land 40 feet in width, lying Northerly of and adjacent to the Northerly line of the property above described.

### PARCEL TWO:

BEGINNING at a point in the Easterly line of the Northwestern Pacific Railroad right of way, as described in Book 119 of Deeds at Page 38, Marin County Records said point being due East along the Easterly extension of the Southerly line of the property described in the Deed from Charles L. Robinson, et ux, to I.J. Ely, et ux, recorded February 5, 1948 in Book 578 of Official Records, at Page 111, and South 6°58' East 420.0 feet; running thence from said point of beginning, North 83°02' East 150 feet; thence North 6°58' West 400 feet, North 83°02' East 350 feet, South 6°58' East 450 feet and South 83°02' West 500 feet to said Eastern line; thence North 6°58' West 50 feet to the point of beginning.

### PARCEL THREE:

AN EASEMENT for roadway and utility purposes over, along and under a strip of land with a uniform width of 20.0 feet, lying Northerly of and adjacent to the Southerly line of the property described in the Deed from Charles L. Robinson. et ux, to I.J. Ely, et ux, recorded February 5, 1948 in Book 578 of Official Records at Page 111, Marin County Records.

SAID EASEMENT to be appurtenant to Parcel One and Two and any subdivision thereof.

### PARCEL FOUR:

AN EASEMENT for roadway and utility purposes over a strip of land 40 feet in width, the Southern line of which is the Northern line of Parcel One, as described in the Deed from W.J. Heerdt, to I.J. Ely, et ux, recorded June 15, 1955 in Book 949 of Official Records at Page 77, Marin County Records.

SAID EASEMENT to be appurtenant to Parcel Two above described and any subdivision thereof.

**RECORDING REQUESTED BY AND  
WHEN RECORDED, RETURN TO:**

-----SPACE ABOVE THIS LINE FOR RECORDER’S USE ONLY-----

**MEMORANDUM OF GRANT OF EASEMENT**

THIS MEMORANDUM OF GRANT OF EASEMENT (this “Memorandum”) is made and entered into as of \_\_\_\_\_, by and between SONOMA MARIN AREA RAIL TRANSIT DISTRICT (“Grantor”) and EAH, INC., a California nonprofit public benefit corporation, and MADERA BAY, LLC, a California limited liability company (collectively “Grantee”).

**RECITALS:**

A. Grantor is the owner of a portion of the former Northwestern Pacific Railroad right-of-way within the Town of Corte Madera, County of Marin, State of California, more particularly described on Exhibit “A” which is attached hereto and incorporated herein by this reference (“Grantor’s Property”).

B. Grantee is the owner of the real property described on Exhibit “B” attached hereto and incorporated herein by reference (“Grantee’s Property”).

C. Grantor and Grantee have entered into that certain unrecorded Easement Agreement dated as of \_\_\_\_\_4 (the “Easement Agreement”)

pursuant to which Grantor has granted to Grantee a permanent non-exclusive at-grade roadway crossing and utility easement over Grantor's Property for access to and from Grantee's Property.

D. Grantor and Grantee desire to execute this Memorandum and cause the same to be recorded in the Official Records of Marin County, California, in order to provide third parties with notice of the grant of the easement and the Easement Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor and Grantee hereby acknowledge and agree as follows:

**AGREEMENTS:**

1. Pursuant to the Easement Agreement and this Memorandum, Grantor hereby grants to Grantee a permanent non-exclusive at-grade roadway crossing and utility easement ("Easement") over Grantor's Property described on Exhibit "A" attached hereto and incorporated by reference herein, for access to and from Grantee's Property described on Exhibit "B" attached hereto and incorporated by reference herein, and for the installation and maintenance of utilities facilities serving Grantee's Property, upon the terms and conditions set forth in the Easement Agreement. The Easement is appurtenant to Grantee's Property and any subdivision thereof.

2. Each of Grantee's obligations under the Easement Agreement, including, without limitation, the obligation of Grantee (1) to pay to Grantor the consideration for the grant of the Easement upon the satisfaction of the conditions to the effectiveness of the Easement, (2) to reimburse Grantor for the cost of safety improvements up to the limit specified in the Easement Agreement, (3) to obtain all necessary approvals for the at-grade crossing, (4) to obtain Grantor's approval of the designs for the at-grade crossing road improvements, (5) to perform Grantee's obligations with respect to any Hazardous Material, (6) to reimburse Grantor for costs incurred by Grantor in the maintenance of the at-grade crossing road improvements, up to the limit

specified in the Easement Agreement, and (7) to maintain insurance coverages and to indemnify Grantor as provided in the Easement Agreement, shall all be covenants running with the land that benefit Grantor's Property, burden Grantee's Property, relate to the use of Grantee's Property and Grantor's Property, and shall be binding upon, and shall inure to the benefit of, the successive owners of the lands so bound and so benefited, respectively. In addition to any other remedies at law or in equity, upon any breach by Grantee of any obligation established in the Easement Agreement, Grantor shall be entitled to seek specific performance to require Grantee or its successive owners to comply with the requirements of the Easement Agreement and to enjoin Grantee or any of Grantee's successive owners from the use of the Easement until Grantee's obligation has been satisfied, and/or to rescind or terminate the Easement. In the event that a court should find that any of Grantee's obligations do not constitute a covenant that runs with the land, the parties hereby recognize that it would be inequitable not to enforce said obligations, and therefore, the parties expressly agree that the obligations of Grantee set forth in the Easement Agreement shall be enforceable as equitable servitudes, binding upon Grantee and its successors.

3. The sole purpose of this Memorandum is to give notice of the grant of the Easement pursuant to the Easement Agreement and all of its terms, covenants, and conditions to the same extent as if the Easement Agreement were fully set forth herein. This Memorandum is subject to all of the terms, conditions, and provisions of the Easement Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Memorandum as of the date first set forth above.

“Grantor”

SONOMA MARIN AREA RAIL TRANSIT DISTRICT

By: \_\_\_\_\_  
Its: General Manager

“Grantee”

EAH, INC., a California non profit public  
benefit corporation

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

MADERA BAY, LLC,  
a California limited liability company

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

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_,  
Name and Title of Officer (e.g., "Jane Doe, Notary Public")  
personally appeared \_\_\_\_\_  
Name(s) of Singer(s)

- personally known to me
- proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Place Notary Seal Above

Signature of Notary Public

-----**OPTIONAL**-----

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**DESCRIPTION OF ATTACHED DOCUMENT**

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer**

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer – Title(s): \_\_\_\_\_
- Partner -  Limited  General
- Attorney In Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_

**Signer Is Representing:** \_\_\_\_\_

<b>RIGHT THUMBPRINT OF SIGNER</b>
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STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_,  
Name and Title of Officer (e.g., "Jane Doe, Notary Public")  
personally appeared \_\_\_\_\_  
Name(s) of Singer(s)

- personally known to me
- proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Place Notary Seal Above

Signature of Notary Public

-----**OPTIONAL**-----

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

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Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer**

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer – Title(s): \_\_\_\_\_
- Partner -  Limited  General
- Attorney In Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_

**Signer Is Representing:** \_\_\_\_\_

<p><b>RIGHT THUMBPRINT OF SIGNER</b></p> <p>Top of thumb here</p>
---

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_,  
Name and Title of Officer (e.g., "Jane Doe, Notary Public")  
personally appeared \_\_\_\_\_  
Name(s) of Singer(s)

- personally known to me
- proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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Signature of Notary Public

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Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer**

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer – Title(s): \_\_\_\_\_
- Partner -  Limited  General
- Attorney In Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_

**Signer Is Representing:** \_\_\_\_\_

<b>RIGHT THUMBPRINT OF SIGNER</b>
Top of thumb here



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## MEMORANDUM

**DATE:** February 14, 2008  
**TO:** SMART Board  
**FROM:** John Nemeth, Rail Planning Manager  
**RE: BOARD AGENDA ITEM: XIII**

### **Staff Report: Railroad Square Development Update**

#### **Issue Summary**

The project developer, New Railroad Square, LLC (NRRS) is seeking a partnership with the John Stewart Company, in order to ensure the availability of equity financing and to take advantage of other efficiencies. In addition, NRRS and the John Stewart Company have jointly requested some changes to the deal structure.

#### **Analysis**

In October, 2007 SMART reached a tentative agreement with NRRS on the terms for a potential development on SMART's property at Railroad Square. In the interim, NRRS has been working to secure mainly public funds to close the project's current financial gap. These include grants at the federal, state, regional and local levels. Recently, NRRS received funds from the state Cal Re-use program to conduct Phase I and Phase II environmental analysis on SMART's property. That work began recently.

NRRS has faced a challenge in securing sufficient private equity to build the project, given both nature of the project and the current state of the real estate and lending markets. Consequently, they are seeking to form a partnership with the John Stewart Company who could provide this equity. This arrangement would allow for a greater degree of planning collaboration with the adjacent Cannery properties, and other economies of scale.

The two developers have request changes to the current deal structure, possibly as a condition of the John Stewart Company's involvement. These requests will be considered in closed session.

#### **Staff Recommendation**

None. For information only

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