

FIRST AMENDMENT TO COOPERATIVE AGREEMENT BY AND BETWEEN THE COUNTY OF MARIN AND THE SONOMA-MARIN AREA RAIL TRANSIT DISTRICT FOR DEVELOPMENT, USE AND MAINTENANCE OF THE CAL PARK HILL TUNNEL REHABILITATION AND MULTI-USE PATHWAY

This First Amendment to the Cooperative Agreement by and between the County of Marin (hereinafter “**COUNTY**”) and the Sonoma-Marín Rail Transit District (hereinafter “**SMART**”) is made and entered into this _____ day of _____, 2010 (the “First Amendment”). Collectively, the COUNTY and SMART shall be referred to as the “Parties”.

RECITALS

WHEREAS, a portion of the SMART Right of Way, located between Railroad MP 14.7 to MP 15.9 (the “Property”) traverses the Cal Park Hill Tunnel and is being improved in three Phases (collectively, the “Project”).

WHEREAS, Phase 1 has been completed and related to the preparation of the preliminary engineering of the Project and was fully funded by the County.

WHEREAS, Phase 2 is complete and generally pertained to the development of final engineering design, preparation of construction documents, right-of-way acquisition, and environmental mitigations for the Project. Funding of Phase 2 was provided for in that certain Cost Sharing Agreement between the County of Marin and the Sonoma-Marín Area Rail Transit District for Improvements to the Cal Park Tunnel, effective September 27, 2005, as amended by that certain First Amendment to the Cost Sharing Agreement, dated March 21, 2007 (as amended, the “Cost Sharing Agreement”).

WHEREAS, Phase 3 of the Project is ongoing and generally pertains to the funding, construction, operation and maintenance of the Cal Park Hill Tunnel Rehabilitation and Multi-Use Pathway. Funding for Phase 3 of the Project was provided for in the Cooperative Agreement by and between the County of Marin and the Sonoma-Marín Area Rail Transit District for the Development, Use and Maintenance of the Cal Park Hill Tunnel Rehabilitation and Multi-Use Pathway, dated as of December 18, 2007 (the “Cooperative Agreement”).

WHEREAS, due to the various financial and timing constraints, Phase 3 of the Project was split into two sub-Phases A and B. Phase A pertains to the Tunnel Rehabilitation portion of the Project including the construction of the Multi-Use Pathway inside the tunnel, and Phase B pertains to the construction of the Multi-Use Pathway in areas outside of the Cal Park tunnel portion of the Project.

WHEREAS, the County has awarded a construction contract to construct sub-Phase A of the Project in accordance with the Cooperative Agreement, and the County has opened bids for the construction of sub-Phase B of the Project.

WHEREAS, the costs to fully construct sub-Phase A and sub-Phase B exceed the funds currently allocated for the completion of Phase 3 of the Project.

WHEREAS, the Parties desire to amend the Cooperative Agreement to modify the provisions relating to the acquisition and transfer of easements to SMART and to amend the financial plan to fund Phase 3 of the Project.

NOW, THEREFORE, in consideration of the foregoing recitals, the COUNTY and SMART do hereby agree as follows:

AGREEMENT

A. ACQUISITION AND TRANSFER OF EASEMENTS TO SMART

The following subsections are added to the end of **Section 4 (Acquisition and Transfer of Easements to SMART)** of the Cooperative Agreement:

- “d. The easement(s) described in Exhibit CA-4 (the “Original Easement”) may be substituted by a different easement (the “Substitute Easement”), upon the prior written consent of SMART. The Parties acknowledge that a Substitute Easement is currently contemplated, a portion of which is largely on the existing SMART easement, and the other portion is on property owned by Sywest Development that is adjacent to the Century Theater in Larkspur. The County agrees to facilitate modifications to the Substitute Easement, so that the ingress and egress is satisfactory to SMART and Sywest Development.
- e. Any reference to “easement” in the Cooperative Agreement or the Cost Sharing Agreement is deemed to refer to the Substitute Easement and the Original Easement, whichever is applicable.
- f. The County agrees to facilitate the modifications and construct improvements to the easement, so that the ingress and egress is satisfactory to SMART. Said improvements shall include, but not be limited to, the following: preparation of easement description, preparation of all documents necessary to secure title to the public access easement, obtaining title insurance, preparing Board letters for acceptance of the easement and recordation of the easement, prepare plans, specifications and estimates for the construction of the improvements, and provide project management and inspection services during the course of construction. Nothing in this Agreement or Amendment shall constitute or require the County to acquire or secure an easement through eminent domain proceedings.
- g. The Parties acknowledge that no construction work outside of the existing SMART easement can begin until title to the easement is obtained, and County agrees to act with all due diligence in obtaining such easement to complete the work in a timely fashion.

- h. SMART hereby authorizes the COUNTY to prepare plans, specifications and cost estimates for the easement and to construct the improvements on behalf of SMART.”

B. EXHIBIT CA-6 (FINANCIAL PLAN)

1. Exhibit CA-6 of the Cooperative Agreement is hereby deleted in its entirety and replaced with the Revised Exhibit CA-6 attached to this First Amendment.
2. The Parties acknowledge that this modification results in an increase to the overall cost of the Project, resulting in a net increase in financial participation from SMART of \$1,725,520, and a net increase in financial participation from the COUNTY of \$3,445,520.
3. As further set forth in the Revised Exhibit CA-6, SMART agrees to seek the allocation of these additional RM-2 funds for completion of sub-Phase B of the Project and appropriate such funds for the timely construction of sub-Phase B. The total amount of SMART RM-2 funds to be provided for the Project is \$13,405,520. Under no circumstances shall SMART be called upon to contribute funds other than RM2 for development of the Project.
4. As further set forth in the Revised Exhibit CA-6, the County agrees to allocate \$553,520 of Non-Motorized Transportation Pilot Program (NTPP) construction reserve funds for the completion of sub-Phase A and appropriate such funds for the timely completion of sub-Phase A. In addition, COUNTY will provide a total of \$5,092,000 from TAM RM2 funds to be allocated to complete the Project.

C. MISCELLANEOUS

1. Right of Way Agent. SMART authorizes COUNTY to act as its right of way agent for the sole purpose of facilitating modifications to the Substitute Easement that is based upon conceptual plans developed by SMART consultants. SMART agrees to provide timely review and approval of the easement documents and construction plans.
2. Retention of Records and Invoices. The County shall keep and maintain full and complete documentation and accounting records concerning the Project and shall make such documents and records available to SMART for inspection and copying during normal business hours. The County shall maintain such records and make them available for inspection for a period of five (5) years following completion of the Project.
3. Final Accounting. County shall provide an accounting for the Project for the Actual Cost of the Project to SMART no later than ninety (90) calendar days after County issues a Notice of Completion for the Project.

The accounting shall include a detailed statement of the portion of the actual engineering and construction costs that each Party has paid or must pay, including any resolution of construction-related claims.

- (a) *“Actual Cost.”* For purposes of this Section, “Actual Cost” shall mean any and all expenses incurred by County related to the design, construction, and finalization of the Project, including, but not limited to, engineering expenses, surveying, design and planning work, staff time, materials, payments to contractors, construction, inspections, expenses incurred in resolving construction or construction-related disputes, attorney fees for construction disputes or defects, or any other expense or cost whether monetary or in-kind related to the Project.
 - (b) *Overpayment.* If, based on the Actual Cost, the accounting reveals that any Party’s payments under this Cooperative Agreement exceed such Party’s proportional share of the Project, County shall refund the overpayment within thirty (30) calendar days of agreeing on the amount of the overpayment.
 - (c) *Underpayment.* If, based on the Actual Cost, the accounting reveals that the amount paid by any Party is less than that Party’s proportional share of the Project’s Actual Cost, County shall issue a written demand for payment to the Party. The Party shall then deposit the entire amount due with County within thirty (30) calendar days of the date on County’s demand for payment.
4. Joint Project Construction and Cooperation. County shall obtain all necessary permits to construct the Project in accordance with the plans and specifications approved by SMART. SMART and County shall cooperate while the Project is being constructed to ensure that the Project’s construction is satisfactory to SMART. County shall continue to furnish SMART monthly construction progress reports describing the work performed and completed during that reporting period with appropriate contract data such as issued contract change orders, cumulative costs of contract change orders, progress payments made (reported in dollars), and percentage progress achieved.
5. Change Orders. County will confer with SMART before implementing contract change orders that exceed an estimated cost of \$25,000 except when the safety of motorists and/or pedestrians or the protection of property require immediate issuance of that contract change order. County will not issue the Notice of Completion for the sub-Phase A or sub-Phase B projects without the prior written consent of SMART. SMART agrees to have staff attend weekly construction coordination meetings at the construction site. SMART and County agree that in the case of disagreements, immediate steps will be taken to resolve the issue

up to and including involving the General Manager and Director of Public Works.

6. Phasing of Work: County agrees to direct the Contractor to phase construction in the vicinity of the Larkspur Station as a last item of work. More specifically, from station SM710+00 southerly as shown on sheets C014 and C015 of the drawings for sub-Phase B: Cal Park Tunnel Multi-Use Pathway plans. The work in this area will be delayed for a period of 4 months from the issuance of the Notice to Proceed in order to allow SMART to determine the grades, alignment and layout of the station platforms. This will determine the modifications required to amend the existing plans for the Multi-Use Pathway. SMART and the County will work together to determine the necessary changes and adjustments to the contract documents, but both Parties agree that there is no additional cost associated with this change in work scheduling.
7. Except as otherwise provided herein, all terms and conditions of the Cooperative Agreement shall remain in full force and effect.
8. Resolution 2010-02 of the Board of Directors of SMART, relating to the preservation of all of SMART property for passenger rail service, which was adopted at a regularly scheduled meeting on January 20, 2010, is hereby incorporated by reference as if fully set forth herein.

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

COUNTY OF MARIN

By: _____
President, Board of Supervisors

APPROVED AS TO FORM:

By: _____
County Counsel

SONOMA MARIN AREA RAIL TRANSIT DISTRICT

By: _____
General Manager

APPROVED AS TO FORM:

By: _____
Legal Counsel

REVISED EXHIBIT CA-6

FINANCIAL PLAN