

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY
AND RECORD OF ACTION**

March 29, 2022

FROM

TERRY W. THOMPSON, Director, Real Estate Services Department

SUBJECT

Grant of Temporary Construction Easement to the San Bernardino County Transportation Authority and Approval of Public Highway Overpass Agreement with the Union Pacific Railroad Company and Assignment and Assumption Agreement with the San Bernardino County Transportation Authority for the Cedar Avenue at Interstate 10 Improvement Project

RECOMMENDATION(S)

1. Find that granting a Temporary Construction Easement containing approximately 24,573 square feet over a portion of County-owned property (Assessor Parcel Numbers 0252-161-10 and 0252-161-09) located at 18313 Valley Boulevard in unincorporated Bloomington, to the San Bernardino County Transportation Authority at no cost, in accordance with section 25526.6 of the California Government Code, for the Cedar Avenue at Interstate 10 Improvement Project is exempt surplus land as defined in Government Code section 54221(f)(1)(D) and the conveyance is in the public interest and will not substantially conflict or interfere with the use of the property by the County.
2. Authorize the Chairman of the Board of Supervisors to execute the Temporary Construction Easement described in Recommendation No. 1.
3. Approve the Public Highway Overpass **Agreement No. 22-217** with the Union Pacific Railroad Company for the acquisition of aerial, slope, and temporary construction easements and for the construction, use, maintenance, and repair of the grade separated overpass.
4. Approve the Assignment and Assumption **Agreement No. 22-218** between the San Bernardino County Transportation Authority and San Bernardino County to assign the right to perform the construction described in the Public Highway Overpass Agreement to the San Bernardino County Transportation Authority.
5. Adopt **Resolution No. 2022-54** making findings of fact as a responsible agency pursuant to the California Environmental Quality Act in connection with the approval of Recommendation Nos. 1 through 4 associated with the Cedar Avenue at Interstate 10 Improvement Project California Environmental Quality Act/National Environmental Policy Act - Final Initial Study with Mitigated Negative Declaration/Environmental Assessment with Finding of No Significant Impact prepared by Caltrans.

(Presenter: Terry W. Thompson, Director, 387-5000)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Operate in a Fiscally-Responsible and Business-Like Manner.

Ensure Development of a Well-Planned, Balanced, and Sustainable County.

Pursue County Goals and Objectives by Working with Other Agencies and Stakeholders.

**Grant of Temporary Construction Easement to the San Bernardino County Transportation Authority and Approval of Public Highway Overpass Agreement with the Union Pacific Railroad Company and Assignment and Assumption Agreement with the San Bernardino County Transportation Authority for the Cedar Avenue at Interstate 10 Improvement Project
March 29, 2022**

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The design of the Cedar Avenue at Interstate 10 Improvement Project (Project) is financed by Federal Surface Transportation Program Local (STPL) funds. San Bernardino County (County) has assigned \$4,000,000 in STPL funds to the California Department of Transportation (Caltrans) to design the Project. Federal Toll Credits in the amount of \$458,800 will be applied towards the \$4,000,000 of STPL funds in place of a local match. The Federal Toll Credits program allows the State to use toll revenues to meet non-federal state matching requirements and waives the County's requirement to participate with a local match. Therefore, no County local funds will be needed for this phase of the Project.

A Temporary Construction Easement (TCE) will be conveyed to the San Bernardino County Transportation Authority (SBCTA) at no cost, pursuant to Government Code section 25526.6, as a Project contribution and is in the public interest.

There is no cost for the County associated with the Public Highway Overpass Agreement (Overpass Agreement), as all project costs arising from it will be borne by SBCTA. The Overpass Agreement contains the obligations and rights conveyed to the County, including the property interests for the portion of the Project impacting the Union Pacific Railroad (UPRR) right-of-way. The compensation for the property interests will be paid for by SBCTA from its Project budget.

BACKGROUND INFORMATION

The recommended actions will grant a TCE containing approximately 24,573 square feet over a portion of County-owned property (Assessor Parcel Numbers (APNs) 0252-161-10 and 0252-161-09, located at 18313 Valley Boulevard in unincorporated Bloomington), approve the Overpass Agreement with the UPRR, approve an Assignment and Assumption Agreement with SBCTA, approve the overall Cedar Avenue at Interstate 10 Improvement Project (Project) and California Environmental Quality Act (CEQA)/National Environmental Policy Act (NEPA) Final Initial Study/Environmental Assessment with Finding of No Significant Impact (IS-MND/EA-FONSI).

The Project is a joint effort among the County, Caltrans, SBCTA, the City of Fontana, and the City of Rialto. SBCTA is the lead agency for the Right-of-Way and Construction phases, with the County's Real Estate Service Department (RESA) assisting with right-of-way acquisition services. Caltrans provides project design services and is the lead agency for environmental compliance. The proposed Project improvements will impact the interchange at Cedar Avenue and I-10, between Slover Avenue and Bloomington Avenue, and will consist of widening Cedar Avenue from Bloomington Avenue to Orange Street, adding turn lanes, widening the interstate overcrossing, replacing the UPRR/Cedar Avenue bridge, and modifying existing ramps.

On June 4, 2013 (Item No. 42), the Board of Supervisors (Board) entered into a Memorandum of Understanding (MOU) with SBCTA, which outlines the Project requirements and funding obligations of the parties. Caltrans was the lead agency and reviewed the Project under the CEQA and the NEPA. On June 28, 2013, Caltrans approved the following documents for the Project: 1) a mitigated negative declaration under CEQA; and 2) a Finding of No Significant Impact under NEPA.

**Grant of Temporary Construction Easement to the San Bernardino County Transportation Authority and Approval of Public Highway Overpass Agreement with the Union Pacific Railroad Company and Assignment and Assumption Agreement with the San Bernardino County Transportation Authority for the Cedar Avenue at Interstate 10 Improvement Project
March 29, 2022**

On July 8, 2014 (Item No. 44), the Board approved Cooperative Agreement No. 14-603 with Caltrans and authorizing Caltrans to provide design work for the Project.

On January 23, 2018 (Item No. 39), the Board approved Cooperative Agreement No. 18-32 with SBCTA for the Project Approval and Environmental Document phases, Plans, Specifications and Estimate, and Project Management services for the Project. This item also stated that the County and SBCTA anticipated returning to their respective boards with an amendment to Cooperative Agreement No. 18-32 for the purpose of releasing the County as lead agency, and assigning SBCTA as lead agency for the Design, Right-of-Way and Construction phases.

On December 4, 2018 (Item No. 55), the Board entered into Cooperative Agreement No. 18-865 with SBCTA for the Right-of-Way and Construction phases of the Project. SBCTA serves as the lead agency for these two phases of the Project, and RESD assists SBCTA with the Right-of-Way services as needed for the Project.

On December 18, 2018 (Item No. 49), the Board approved Amendment No. 1 to Cooperative Agreement No. 18-32, revising the County and SBCTA roles for the utility potholing and coordination work.

On September 24, 2019 (Item No. 34), the Board approved Amendment No. 1 to Cooperative Agreement No. 14-603 with Caltrans increasing the estimated Project design cost by \$2,300,000, from \$4,000,000 to \$6,300,000.

On September 15, 2020 (Item Nos. 48 and 50), the Board approved Amendment No. 2 to Cooperative Agreement No. 18-32 with SBCTA and Amendment No. 2 to Cooperative Agreement No. 14-603 with Caltrans, relative to the Project's design cost increase of \$1,252,000.

Regarding right-of-way acquisition, the Project requires a TCE over a portion of County-owned property formerly known as Ayala Park. On December 10, 2019 (Item No. 53), the Board approved the sale of Ayala Park (APNs 0252-161-09 and 0252-161-10) from the Bloomington Recreation and Park District to the County for the Ayala Park Relocation Project. The conveyance was recorded on September 24, 2021. The TCE for this Project will cover 24,573 square feet of the now County-owned parcels and will last 42 months beginning upon execution. The TCE will be conveyed at no cost as a Project contribution by the County for the benefit of the residents of, and travelers through, the Bloomington community.

The Project also requires a 21,827 square foot Aerial Easement, a 3,844 square foot Slope Easement, and two TCEs totaling 21,724 square feet over UPRR property located at the Cedar Avenue overcrossing. The Overpass Agreement, as required by UPRR, contains certain obligations and rights conveyed to the County and its assignees, including the right to construct the Project and the property interests described above. The compensation for the property interests will be paid for by SBCTA from its Project budget.

The Overpass Agreement is UPRR's standard contract, and which contains terms that differ from the County's standard contract language and omits certain County standard contract terms. The non-standard and missing terms include the following:

**Grant of Temporary Construction Easement to the San Bernardino
County Transportation Authority and Approval of Public Highway
Overpass Agreement with the Union Pacific Railroad Company and
Assignment and Assumption Agreement with the San Bernardino
County Transportation Authority for the Cedar Avenue at Interstate 10
Improvement Project
March 29, 2022**

1. Indemnification by the County prior to entry on UPRR property. The Overpass Agreement requires, prior to entry on UPRR property, that the County agree to release, defend and indemnify the UPRR from and against any loss, damage, injury, liability, claim, cost or expense incurred by any person including, without limitation, the County's employees, or damage to any property or equipment that arises from the presence or activities of the County's employees or representatives on UPRR's property, except to the extent that any loss is caused by the sole direct negligence of UPRR. In addition, any contractor utilized by County and performing work on UPRR property must agree to a unilateral indemnity in favor of UPRR pursuant to Overpass Agreement Exhibit E, "Contractor's Right of Entry Agreement."
 - The County standard contract terms do not include any indemnification or defense owed by the County.
 - Potential Impact: By agreeing to indemnify, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against UPRR without such limitations and the County would be responsible to defend and reimburse UPRR for costs, expenses, and damages, which could exceed the total contract amount.
2. Indemnification by the County related to non-compliance with applicable laws. The Overpass Agreement requires the County to reimburse and indemnify UPRR for any fine, penalty, cost, or charge, including without limitation attorney's fees, court costs, expenses, and the cost, charge, or expense to UPRR to defend any such action, incurred because of any failure by the County to comply with any such federal, state, or local laws, regulations, and enactments affecting the work.
 - The County standard contract terms do not include any indemnification or defense owed by the County.
 - Potential Impact: By agreeing to indemnify, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against UPRR without such limitations and the County would be responsible to reimburse UPRR for costs, expenses, and damages, which could exceed the total contract amount.
3. Indemnification by UPRR omitted. The Overpass Agreement does not require UPRR to indemnify the County.
 - The County standard contract indemnity provision requires a contractual obligation to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors, or omissions of any person.
 - Potential Impact: UPRR is not required to defend, indemnify, or hold the County harmless from any claims, including indemnification for claims arising from their negligent or intentional acts. If the County is sued for any claim arising out of, or related to, the Overpass Agreement, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.

**Grant of Temporary Construction Easement to the San Bernardino
County Transportation Authority and Approval of Public Highway
Overpass Agreement with the Union Pacific Railroad Company and
Assignment and Assumption Agreement with the San Bernardino
County Transportation Authority for the Cedar Avenue at Interstate 10
Improvement Project
March 29, 2022**

4. Shifting of costs for work to be performed by UPRR. The Overpass Agreement requires certain work to be performed by UPRR at the County's cost and expense. Such costs are estimated to be \$555,000 and include UPRR oversight, coordination of access on UPRR property, and inspection of work performed under the Overpass Agreement.
 - The County standard contract prohibits limitation of a party's liability and shifting of costs and expenses to County in performance of the contract.
 - Potential Impact: Claims for work performed and additional costs and expenses could exceed the estimated contract amount leaving the County financially liable for additional and excess costs. However, such costs for UPRR work will be paid by SBCTA.
5. Venue and Governing Law. The Overpass Agreement is silent on venue and governing law.
 - The County standard contract requires venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District, and California governing law.
 - Potential Impact: An action may be brought in a jurisdiction other than in the Superior Court of California, San Bernardino County, San Bernardino District. Having a venue in another jurisdiction may result in additional expenses that exceed the amount of the contract. Remaining silent on governing law results in uncertainty over which state's law will govern the interpretation of the Overpass Agreement and may lead to ambiguity in interpretation of the contract terms. UPRR is a Delaware corporation, based in Omaha, Nebraska. The Overpass Agreement could be interpreted under any state law depending on where the claim is brought, including Delaware, Nebraska, or California. Any questions, issues or claims arising under the Overpass Agreement could require the County to hire outside counsel competent to advise on the applicable state laws, which may result in fees and expense.
6. Termination for Convenience. There is no termination for convenience.
 - The County standard contract gives the County the right to terminate the contract, for any reason, with a 30-day written notice of termination without any obligation other than to pay amounts for services rendered and expenses reasonably incurred prior to the effective date of termination.
 - Potential Impact: The County can only terminate the contract during the term of an uncured breach. Any attempted termination by the County without cause would result in potential payment liability which could result in payment liability where no funds are available due to the lack of allocation or loss of funding.
7. Insurance. The Overpass Agreement does not require UPRR to meet the County's insurance standards as required pursuant to County Policy 11-07.
 - The County Policy requires agreements with the County to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the County standard contract.
 - Potential Impact: The Overpass Agreement does not include the County standard insurance requirements. This means that the County has no assurance

**Grant of Temporary Construction Easement to the San Bernardino County Transportation Authority and Approval of Public Highway Overpass Agreement with the Union Pacific Railroad Company and Assignment and Assumption Agreement with the San Bernardino County Transportation Authority for the Cedar Avenue at Interstate 10 Improvement Project
March 29, 2022**

that UPRR will be financially responsible for claims that may arise from the County's use of the property which could result in expenses to the County.

The Overpass Agreement allows the County to assign its rights to construct the Project to SBCTA. The Assignment and Assumption Agreement between the County and SBCTA assigns to SBCTA all the rights and obligations necessary for SBCTA to act as the lead agency on the construction phase for the overpass structure, which includes the County's obligations to perform construction work pursuant to the Overpass Agreement, the costs for the permanent, construction, and maintenance easement rights to construct and maintain the overpass structure, and all other costs imposed by UPRR for engineering review, railroad flagging, and construction oversight. Upon completion of the construction phase, the County will be responsible for the ownership and maintenance of the overpass structure and shall retain all obligations as set forth in the Overpass Agreement.

On June 30, 2021, as part of necessary right-of-way acquisition for the Project, the County accepted an approximately 1.4-acre parcel of land (APN 0252-161-36). SBCTA identified a portion of this parcel as necessary for the Project and requested a TCE over it, but the property owner required the sale of the entire parcel, to which SBCTA agreed. SBCTA entered into a Right-of-Way Contract with the seller and paid \$711,439 to acquire the parcel. Pursuant to Section III.B. of Cooperative Agreement No. 18-865, approved by the Board on December 4, 2018 (Item No. 55), SBCTA may acquire property in the name of the County. Cooperative Agreement No. 18-865 also requires the County to accept all Project acquired right-of-way located within County's jurisdictional boundaries not later than 30 days after SBCTA requests the County to accept such acquired right-of-way. The parcel was therefore conveyed directly to the County and accepted by the Director of RESD for recordation pursuant to Resolution 2012-44, adopted on March 27, 2012 (Item No. 75), authorizing the Chief Executive's Officer's designees to accept certain real property. SBCTA and the County will coordinate for the disposition of this parcel upon completion of the Project's construction.

Caltrans, as Lead Agency, performed a combined CEQA/NEPA consisting of a Final IS-MND/EA-FONSI approved on June 28, 2013 (SCH# 2012071091). The Project was determined to have no significant effect on the environment with mitigation measures implemented. The Notice of Determination was received by the Office of Planning and Research on October 10, 2013, and no further CEQA compliance is required.

The conveyance of the TCE to SBCTA was reviewed pursuant to the Surplus Land Act, and the TCE was determined to be "exempt surplus land" as defined in Government Code section 54221(f)(1)(D), because it is being conveyed by the County to SBCTA for agency use associated with the construction phase of the Project.

Pursuant to Section 15096 of the California Environmental Quality Act (CEQA) Guidelines, the County, through its Department of Public Works (Public Works), in its capacity as a responsible agency, considered the Final IS-MND/EA-FONSI, together with the mitigation measures that were prepared by Caltrans. Public Works staff independently finds that the MND and mitigation measures adequately analyze the potential environmental impacts of the Project and that no significant adverse impacts will occur as a result of the actions described in the Board item. No further CEQA analysis or action is required.

**Grant of Temporary Construction Easement to the San Bernardino
County Transportation Authority and Approval of Public Highway
Overpass Agreement with the Union Pacific Railroad Company and
Assignment and Assumption Agreement with the San Bernardino
County Transportation Authority for the Cedar Avenue at Interstate 10
Improvement Project
March 29, 2022**

PROCUREMENT

The County may convey the TCE to SBCTA pursuant to County Policy 12-17, and Government Code sections 25526.6 and 54221(f)(1)(D).

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Scott Runyan, Supervising Deputy County Counsel, and Aaron Gest, Deputy County Counsel, 387-5455) on March 22, 2022; Department of Public Works Transportation Design (Chris Nguyen, Interim Engineering Manager, 387-7939) on March 7, 2022; Finance (Carl Lofton, Administrative Analyst, 387-5404) on March 10, 2022; and County Finance and Administration (Diana Atkeson, Deputy Executive Officer, 387-4376) on March 13, 2022.

(KD: 665-0430)


**Grant of Temporary Construction Easement to the San Bernardino
County Transportation Authority and Approval of Public Highway
Overpass Agreement with the Union Pacific Railroad Company and
Assignment and Assumption Agreement with the San Bernardino
County Transportation Authority for the Cedar Avenue at Interstate 10
Improvement Project
March 29, 2022**

Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Dawn Rowe
Ayes: Col. Paul Cook (Ret.), Janice Rutherford, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 29, 2022



cc: W/RESOLUTION
RESO- Thompson w/agree w/Easement for sign
Contractor- C/O RESO w/agree
File- w/agree w/Easement
LA 03/30/2022