



## CITY OF CAPITOLA APPEAL INFORMATION

CITY OF CAPITOLA COMMUNITY DEVELOPMENT DEPARTMENT  
420 CAPITOLA AVENUE, CAPITOLA, CA 95010  
831-475-7300 WWW.CITYOFCAPITOLA.ORG

### Appeals Overview

The City of Capitola appeals process enables applicants and other affected parties to challenge a City decision by having the matter considered by a higher level decision making authority.

### Who May Appeal

Any Capitola resident may file a permit appeal. Non-residents may file an appeal if they can demonstrate that they have a significant interest in the matter.

### Appeal Deadlines

An appeals must be filed by 5:00 PM within 10 calendar days of a permit decision unless a longer appeal period is specified. Appeals filed after the deadline will not be accepted or considered. Postmarks are not accepted.

### Appeal Requirements

Individuals wishing to file an appeal must submit a completed appeal application and pay applicable fees. Applicants who file an appeal and have a developer deposit account will also be charged for staff time to process the appeal.

### Types of Appeals

1. **Administrative (Staff Determinations):** Appeals of administrative staff determinations are cases which do not involve a discretionary permit, such as a conditional use permit, design permit, or a subdivision map. Administrative appeals are considered by the City Council.
2. **Permit Decisions:** Appeals of permit decisions involve decisions issued by the Community Development Director or the Planning Commission. Director decisions are considered by the Planning Commission. The City Council considers appeals of Planning Commission decisions.
3. **Code Enforcement Actions:** Individuals cited with a code enforcement action may appeal the City's determination. Depending on the nature of the code enforcement action, the appeal may be considered by the Planning Commission or an appeal officer.
4. **Building Code Interpretations:** A property owner, applicant, or contractor may appeal an interpretation made by the Building Official to the Building Appeals Board.
5. **Coastal Appeals:** A decision by the City Council to approve a Coastal Development Permit may be appealed to the Coastal Commission if the project is located in the Coastal Appeal Zone.

### Appeal Fees

All appeal applications must be accompanied by a non-refundable appeal fee as established by the City's adopted Fee Schedule.

### Appeal Hearing

All appeals are considered at a public hearing before the applicable decision making body. Appellants should always attend the hearing to present their case to the decision makers.



## CITY OF CAPITOLA APPEAL APPLICATION FORM

TYPE OF APPEAL (check one)	APPEAL FEE
<input type="checkbox"/> Administrative - Staff Determination	See Fee Schedule
<input checked="" type="checkbox"/> Planning Commission Decision	See Fee Schedule
<input type="checkbox"/> Code Enforcement Action	See Fee Schedule
<input type="checkbox"/> Building Code Interpretation	See Fee Schedule
<input type="checkbox"/> Coastal Appeal	\$0

### APPELLANT INFORMATION

Name: Santa Cruz County Regional Transportation Commission

Address: 1101 Pacific Ave, Suite 250 City Santa Cruz Zip 95060

Phone: 831-460-3200

Email: info@sccrtc.org

### APPEAL INFORMATION

Project Address: 1410 Prospect Avenue

Property Owner: Alex Johnson

Application Number: 21-0376

### REASONS FOR APPEAL

Please note the reasons and grounds for your appeal. Attach additional pages as necessary.  
See attached additional pages.

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SIGNATURE

DATE 4/18/2022



Community Development Department  
City of Capitola  
420 Capitola Ave  
Capitola, CA 95010

April 18, 2022

**Subject: Appeal of Permit Application Number 21-0376**

The Santa Cruz Regional Transportation Commission (RTC) respectfully appeals the April 7, 2022 decision of the Capitola Planning Commission to grant a variance for Permit Number 21-0376.

Background Discussion:

The Applicant's proposal is to demolish an existing 1,606 square-foot, two-story, single-family residence at the property known as 1410 Prospect Avenue (APN: 034-046-19) and to construct a new 1,422 square-foot, two-story, single-family residence with a 796 square-foot basement. The proposal includes the relocation and remodel of an existing detached garage and a variance request allowing the project to not conform to the setbacks and maximum allowable floor area required by the City's Development Standards. The project is within in the R-1-GH (Single-Family Residential, Geologic Hazards) zoning district. The project is within the Coastal Zone and require a Coastal Development Permit.

According to the April 7, 2022 Agenda Report considered by the Capitola Planning Commission for Permit Number 21-0376, the City's Development Standards, R-1 regulations require a Rear Yard (1<sup>st</sup> Story) setback of seven feet and seven inches (7'-7") and a Rear Yard (1<sup>st</sup> Story) setback of seven feet and seven inches (7'-7"). The Agenda Report does not state the City's Development Standards, R-1 regulations setback requirements for basements; however, from discussions with City staff, it is understood that the standard practice of the City is to apply the 1<sup>st</sup> Story setback requirements to basements. It is also understood that the R-1 regulation for Rear Yard setbacks is based on 20% of parcel depth; due to the geometry of this parcel, the required Rear Yard setback may be variable due to the variable depth of the parcel.

The Applicant's Design Permit included a variance request to construct the proposed new single-family residence with a zero foot (0') 1<sup>st</sup> Story and basement setbacks. A Variance Application Form was submitted. On this Form, the Applicant lists the following as reasons supporting the Variance request:

- A. In response to "There are unique circumstances applicable to the subject property, including size, shape, topography, location, or surroundings, that do not generally apply to other properties in the vicinity or in the same zone as the subject property," the Applicant stated:



## SANTA CRUZ COUNTY REGIONAL TRANSPORTATION COMMISSION

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The subject parcel is 2,415 square feet and triangular in shape. It has a buildable envelope of 390 square feet.

- B. In response to “The strict application of the zoning code requirements would deprive the subject property of privileges enjoyed by other property in the vicinity or in the same zone as the subject property,” the Applicant stated:

The strict application of the zoning requirements would render the parcel virtually unbuildable

- C. In response to “The variance is necessary to preserve a substantial property right possessed by other property in the vicinity or in the same zone as the subject property,” the Applicant stated:

The requested variances will allow reconstruction of an historic property while reducing the existing encroachments without the requested variances the reconstruct could not be done.

- D. In response to “The variance will not be materially detrimental to the public health, safety, or welfare, or be injurious to the property or improvements in the vicinity or in the same zone as the subject property,” the Applicant stated:

The requested variances will not be harmful to the public health, safety, or be injurious to the properties in the near vicinity.

- E. In response to “The variance does not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity or in the same zone as the subject property,” the Applicant stated:

Variances to setbacks are numerous in this neighborhood and will not constitute granting of special privilege.

- F. In response to “The variance will not have adverse impacts on coastal resources,” the Applicant stated:

No coastal resources will be disturbed.

The RTC owns the right-of-way (ROW) for the Santa Cruz Branch Railroad Line (SCBRL) with existing freight railroad tracks located within the ROW. The RTC purchased the SCBRL ROW in accordance with the following purpose:

- preserve it as a transportation corridor;
- continue existing freight and recreational rail service;
- facilitate increased freight and recreational rail service;
- explore passenger rail service options;
- construct a bicycle and pedestrian trail alongside the track where feasible; and
- maximize its use as a transportation corridor.



In support of this purpose, the RTC entered into an administration, coordination, and license agreement (ACL) with St. Paul & Pacific Railroad, LLC (“Railway”) to conduct common carrier freight railroad operations (“Freight Service”) on and over the Freight Easement within the ROW. The property at 1410 Prospect Avenue abuts the northerly ROW line of the SCBRL. Through the terms of the ACL, both the Freight Easement and the remaining ROW are maintained. Full access to the entire SCBRL ROW is required to undertake maintenance operations and Freight Service.

The RTC seeks to maximize use of the SCBRL ROW as a transportation corridor including transportation infrastructure for Freight Service, passenger rail transportation service (including transit stations), and both paved and unpaved trails. The design for a paved section of trail within this portion of the SCBRL ROW is currently being prepared. In support of this design effort, the RTC has conducted a survey of the existing encroachments within this portion of the SCBRL ROW and is currently developing a strategy to address the existing encroachments in accordance with the attached *REVISED Policies for Leases, Licenses, Rights of Entry and Encroachments for the Santa Cruz Branch Line Right-of-Way*, approved by the RTC August 6, 2020. Encroachments that impact the uses, operations, inspections and maintenance of the SCBRL ROW; those that impact implementation of public projects within or in the vicinity of the SCBRL ROW; and those that impact liabilities to the RTC are prioritized as encroachments to be addressed.

The City of Capitola entered into a license agreement in 2004 (see attached) to maintain and repair the walking path within the SCBRL ROW at the top of the bluff adjacent to the 1410 Prospect Avenue property for use of pedestrians seeking recreational access to ocean beach. The license is to “construct, maintain, use, repair, renew and reconstruct the three (3) existing stairways and connecting walking path....”

Several encroachments at the top of bluff exist on this section of the bluffs between 1400 Prospect Avenue and 1560 Prospect Avenue (the addressing of these encroachments is being studied, as discussed above). These encroachments mainly comprise fences, landscaping, and decking. In a few instances, structures encroach into the SCBRL ROW. However, only one zero foot (0’) lot line setback is known to the RTC staff: that being 1400 Prospect Avenue. Existing encroachments impact the RTC’s use, operation, inspection and maintenance of the SCBRL ROW. Moreover, instabilities along this section of bluff have occurred in the past and were exacerbated and potentially caused by these encroachments. In a recent incident about 100 feet north of the 1410 Prospect Avenue property, a section of bluff failed adjacent to the City-maintained walking path, and restoration of this bluff required significant expense by the City and effort on behalf of both the RTC staff and City staff.

As discussed, the section of bluff in this area has had a history of previous slope failures. These failures are exacerbated and sometimes potentially caused by encroachments into the SCBRL ROW (which generally constrain the ability of the City and the RTC to inspect, maintain, and operate the SCBRL ROW). Construction of new structures adjacent to the bluffs may reduce overall bluff stability by construction vibrations and impacts, which can locally reduce soil





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cohesion and *will* change both surface subsurface drainage characteristics of the area. This is partly why the property is located within the Geologic Hazards overlay. Construction affects will be more apparent immediately during and after construction, when soils are first disturbed, but will persist years into the future as well. Any slope failure *toward* the railroad tracks will be the responsibility of the City and/or the RTC to repair.

Due to the operation of Freight Service on the SCBRL via the ACL, any entry into the SCBRL ROW requires special railway protective liability insurance and right-of-entry agreements from both the RTC and the Railway. Coordinating, executing and implementing these rights-of-entry are bespoke to each purpose and require significant coordination with RTC staff. Any zero foot (0') setback will necessitate the future need for multiple rights-of-entry with the RTC and the Railway, as any entry to the ROW for maintenance of the 1410 Prospect Avenue property at these locations will require a right-of-entry; in fact, the current design proposal includes a portion of the property isolated on each side by zero foot (0') setback portions of the structure ... this portion of the 1410 Prospect Avenue property will be inaccessible without a right-of-entry from the RTC and the Railway.

### Discussion of Design Permit Coordination:

RTC staff first became aware of the proposed development at 1410 Prospect Avenue at the end of January 2022. RTC staff on different occasions in late January and on February 1, respectively, spoke with City staff and the property owner regarding existing encroachments at this property and the potential plan for these encroachments. At that time and in a follow-up conversations with City staff and the property owner on February 7, 2022, the discussions centered around the existing fencing and landscaping adjacent to the City's path at the top of the bluff.

On February 8, 2022, RTC staff and City staff discussed the proposed project in more detail, at which time City staff recommended that RTC staff reach out to the Applicant to discuss the plans and any potential impacts to the SCBRL ROW. City staff provided RTC staff with a contact email for the designer, Derek VanAlstine, which RTC staff sent emails to on February 8, 2022 in an effort to further discussions about the project. RTC staff requested an opportunity to discuss the project and review the proposed plans prior to submission for a permit, in an effort to understand how the proposed development may "affect the railroad right-of-way."

No response was ever provided to the RTC in reply to these emails. The Applicant's representative in the Public Hearing acknowledged that they had not spoken to the RTC regarding the proposed development.

The RTC was first made aware of the City Planning Commission Public Hearing for the proposed development on April 12, 2022, when RTC staff were advised by a third party that the Planning Commission had approved the Design Permit and Variance. RTC staff who receive public notices did not receive a notice of the Public Hearing in advance of the hearing.



Appeal:

The RTC respectfully appeals the decision to grant the Applicant a Variance to have non-conforming zero foot (0') 1<sup>st</sup> Story and basement rear setbacks to the property line shared with the RTC. The RTC requests that the City of Capitola require the Applicant to comply with the rear property setbacks required by the City's Development Standards. The RTC secondly supports City staff's recommendation to condition that swinging doors, which when opened, not be constructed in such a way that they would extend over and into the SCBRL ROW; the development should in no way result in a situation that would necessitate entry into and/or encroachment into the SCBRL ROW without the RTC's and Railways prior and express written consent via a right-of-entry agreement or lease agreement.

The RTC does not appeal the variances for front or side property setbacks or for the Floor Area Ratio. With these other variances in tact, a sufficiently sized structure is able to be built and enjoyed by the property owner.

Approval of the Variance for rear setbacks would result in a situation that constrains the RTC's and the Railway's uses, operations, inspections and maintenance of the SCBRL ROW and Freight Easement. The Variance for rear setbacks would constrain the RTC's ability to preserve the SCBRL ROW as a transportation constrain, and it would also constrain its future uses for rail and active transportation uses. The RTC seeks to maximize usage of the SCBRL ROW corridor for a variety of active transportation and rail transportation, and it seeks to increase public access to coastal resources; the construction of new encroachments into or structures adjacent to the ROW limit the RTC's ability to deliver these advantages to the public. This injures the RTC's SCBRL ROW property and disturbs the public coastal access along the bluff top. Requiring the Applicant to comply with the rear property setbacks required by the City's Development Standards would preserve the RTC's ability to deliver its purpose for the SCBRL ROW and would preserve and enhance (by removal of existing encroachments) the existing public coastal access, which will be furthermore be enhanced by the trail project currently in design for the SCBRL ROW.

Approval of the Variance for rear setbacks would result in a situation in which the property owner would need to obtain a right-of-entry from the RTC and the Railway for access to the SCBRL ROW to undertake future maintenance of the structure, property and landscaping. In fact, a portion of the property (between the lightwell and the corner of the 1<sup>st</sup> story structure) would be inaccessible from the exterior without traversing over the SCBRL ROW, which would require rights-of-entry from the RTC and the Railway. Due to liability impacts, insurance requirements, maintenance concerns, railway safety concerns, and operational concerns, the RTC as a policy seeks to minimize and wherever practicable eliminate the need for other parties to need to obtain right-of-entries onto the SCBRL ROW.

Approval of the Variance for rear setbacks would result in a situation that could reduce stability of the bluff and exacerbate existing slope stability issues, which would result in a future increased maintenance liability for the City of Capitola (in relation to the City's walkway) and



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for the RTC and Railway. Approval of the Variance for rear setbacks would change surface and subsurface drainage characteristics in the area, which could exacerbate existing erosion problems in this area. Requiring the Applicant to comply with the rear property setbacks required by the City's Development Standards would limit and minimize the potential bluff instabilities caused by the project by keeping the disturbances farther away from the bluff top. The RTC also appeals condition #8, requesting that the condition be amended such that a geological report also be prepared and that the geotechnical report and geological report both numerically assess the outward slope stability impacts to the bluff (by "outward" meaning toward the railroad tracks) and that the project be revised to mitigate any impacts that in any way reduce the stability of the existing soils and/or bluff. The RTC requests that the City Planning Commission also amend conditions #8, #11 and #12 to require City staff to consult with RTC staff during City staff's review of such reports and plans required by said conditions.

RTC staff's review of existing rear yard setbacks along the top of this section of bluff contradicts City staff's analysis and Applicant's assertions that "Variances to setbacks are numerous in this neighborhood and will not constitute granting of special privilege." RTC staff's review indicate that the existing rear yard setback variances are potentially limited to 1400, 1410, 1420, 1430 and 1450 Prospect Avenue. Whilst the remaining properties are deeper, and thus further analysis is required, those properties have significantly larger rear yard structure setbacks that do not similarly constrain the RTC's and the Railway's uses, operations, inspections and maintenance of the SCBRL ROW and Freight Easement.

Sincerely,

Riley Gerbrandt, P.E.

Regional Transportation Commission

- Attachments:
1. City of Capitola License for Maintenance on Railroad Property
  2. RTC's *REVISED Policies for Leases, Licenses, Rights of Entry and Encroachments for the Santa Cruz Branch Line Right-of Way* (Approved August 6, 2020)



# REMS FileNet Cover Sheet

**AUD NBR: 238600**

**FLDR NBR: 0220951**

**CITY: CAPITOLA**

**STATE: CA**

**PARTY NAME: CAPITOLA, CITY OF**

**PURPOSE: LICENSE FOR MAINTENANCE**

**AGMT. DATE: 10/5/2004**

**MP STRT: 16.3**

**PRIM CRC7: CB115**

**BOX NBR: 0**

**BATCH: 0**

**LICENSE FOR MAINTENANCE OF STAIRWAYS  
ON RAILROAD PROPERTY**

**Duplicate Original  
Railroad Copy**

THIS AGREEMENT is made this 5<sup>TH</sup> day of OCTOBER, 2004, by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware Corporation ("UP" or Licenser) and the **CITY OF CAPITOLA**, whose address is 420 Capitola Avenue, Capitola, CA 95010 ("City" or "Licensee").

WHEREAS, certain stairways with a connecting walking path have previously been constructed on Licenser's property by parties unknown in order to facilitate recreational users accessing the adjacent ocean beach.

WHEREAS, City wishes to maintain and repair the stairways and walking path due to the frequent use of the same by pedestrians seeking such recreational access to ocean beach.

WHEREAS, City has also agreed to install and maintain additional fencing for access to that stairway closest to the southerly end of Licenser's bridge over Soquel Creek.

NOW THEREFORE, IT IS AGREED as follows:

**Section 1. RIGHTS GRANTED.**

A. Subject to the terms and conditions of this Agreement, UP hereby grants to Licensee, its successors and assigns, a license to construct, maintain, use, repair, renew and reconstruct the three (3) existing stairways and connecting walking path which are located at Licenser's right of way on UP's Santa Cruz Subdivision in the City of Capitola, County of Santa Cruz, State of California in the locations shown on the print dated June 11, 2004, marked **Schedule 1**, which is attached hereto and hereby made a part hereof (hereinafter the "Stairways", "Walking Path" or the "Licensed Area").

B. The rights granted herein are made subject to and subordinate to the prior and continuing right of UP, its successors and assigns, to use all of the tracks and property adjacent to and above the Stairways and Walking Path in the performance of its duty as a common carrier, and there is reserved unto UP, and its successors and assigns, the right to construct, reconstruct, maintain, repair, use and operate existing or future additional railroad tracks, track appurtenances, fiber optic or signal lines and facilities, pipe, and wire lines over, under and across the property, including without limitation, the Licensed Area.

C. The rights granted herein are given only insofar as UP may lawfully grant the same and UP makes no covenant or warranty of title, or for quiet possession or against encumbrances. No damages shall be recoverable from UP because of any dispossession of Licensee or because of failure of, or defect, in UP's title to the Property. The rights granted herein are also subject to any and all outstanding or existing licenses, leases, licenses, restrictions, conditions, covenants, claims of title and other rights (whether public or private and whether recorded or unrecorded) including, but not limited to, those for communication, pipeline and wire line facilities and also to any and all extensions and renewals thereof.

D. Licensee, by virtue of this license, shall not encroach upon, or occupy or use any other property of UP.

E. UP grants to Licensee only the right for the purposes aforesaid and Licensee shall not use or permit use of the Licensed Area for any other purpose.

F. If the right granted herein shall result in a substantial operational or safety problem for UP, then the parties shall negotiate in good faith to resolve such problem to the mutual satisfaction of the parties.

G. Fiber optic cable systems may be buried on UP's right-of-way. Protection of the fiber optic cable system is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Licensee, or its contractors, shall telephone UP during normal business hours (7:00 a.m. to 9:00 p.m., Central Time, Monday through Friday, except for holidays) at 1-800-336-9193 (also a 24-hour seven day number for emergency calls) to determine if fiber optic cable is buried anywhere on the right-of-way to be used by Licensee. If it is, Licensee, or its contractors, will telephone the telecommunications company(ies) involved, arrange for a cable locator, and make arrangements for relocation or other protection of the fiber optic cable prior to beginning any work on the right-of-way.

H. Licensee acknowledges that UP would not have granted this License without Licensee's agreement to comply with the covenants in this Section 1, and that a breach of any covenant constitutes a material breach of this Agreement.

## Section 2. CONTRACTOR'S RIGHT OF ENTRY AGREEMENT; FLAGGING.

A. The Licensee confirms that all work described herein, will be performed by a contractor or contractors hired by the Licensee. The Licensee agrees to require each of its contractors, (and their respective subcontractors), to execute UP's form of Contractor's Right of Entry Agreement that is marked **Schedule 3**, attached hereto and hereby made a part hereof, and to provide UP the insurance binders or certificates set forth in Exhibit A-1 of the Contractor's Right of Entry Agreement before commencing any work on any UP property.

B. The Licensee shall also require its contractors/subcontractors to perform their construction work in such a manner so as not to endanger or delay the movement of trains, engines or cars of UP, and so as not to injure or endanger UP's officers, agents, employees or damage their property. The Licensee shall also require its contractors/subcontractors to give precedence to the movement of trains, engines and cars of UP, over the movement of vehicles or equipment or construction activities of the Licensee's contractors/subcontractors.

C. If at any time during the construction or reconstruction of the Stairways, UP deems that flagging protection is necessary, such flagging shall be provided by UP at no cost to UP as set forth in the Contractor's Right of Entry Agreement described in Section 2A above.

## Section 3. LIABILITY.

A. To the extent permitted by law, Licensee shall save, protect, defend, indemnify and hold harmless UP, and its respective affiliates, and their respective officers, agents and employees, against and from any and all liability, loss, damages, claims, demands, costs and expenses, fines and penalties of whatsoever nature, including court costs and attorney's fees, arising from and growing out of any injury or death of persons whomsoever (including officers, agents and employees of UP or the Licensee and of any contractor as well as other persons) or loss of or damage to property whatsoever (including property of or in the custody of UP, the

Licensee or any contractor as well as other property), when such injury, death, loss or damage occurs or arises from Licensee's presence upon, or use of, or actions in the Licensed Area.

Section 4. MAINTENANCE OF STAIRWAYS.

Licensee, at its sole cost and expense and without any contribution whatsoever from Licensor, shall at all times during the term of this Agreement repair and maintain the Stairways in good and clean condition and repair, including without limitation, control of pest and vegetation. Licensee further agrees to rebuild the existing wooden stairway and to construct a fence along the pathway directing pedestrians to the steel stairway that leads to Wharf Road.

Section 5. INSURANCE.

Licensee is self-insured. Licensee may self insure for the coverages provided in **Schedule 2**, as customary under its respective risk management programs; provided its self-insurance retention is in keeping with its net worth and cash flows and is consistent with that of other Licensees of its size and operation.

Section 6. TERMINATION; WAIVER OF BREACH; TERM.

A. UP may terminate this Agreement by giving Licensee notice of termination if Licensee defaults under any obligation of Licensee under this license and, if after written notice is given by UP to Licensee specifying the default, Licensee fails either to immediately begin to cure the default, or to complete the cure expeditiously but in any event within thirty (30) days after the default notice is given. A waiver by UP of a breach of Licensee of any covenant or condition of this Agreement shall not impair the right of UP to avail itself of any subsequent breach thereof.

B. UP may also terminate this Agreement by giving written notice to Licensee if safety and operational needs of UP are materially affected or impaired by Licensee's use of the Property, and UP and Licensee cannot come to any mutual agreement or understanding as to how Licensee, at Licensee's sole cost and expense, will eliminate such material effect or impairment.

C. This Agreement and the license and permission herein granted shall be effective as of the date first herein written, and shall remain in full force and effect until terminated as herein provided.

Section 7. REMOVAL OF STAIRCASES UPON TERMINATION

Within ninety (90) days after termination of this Agreement the Licensee, at its sole cost and expense, shall remove the Staircases from the Property and restore the Property to its original condition, failing in which UP may perform such activities at the expense of Licensee.

**Section 8.     NOTICES.**

Any notices required or desired to be given under this Agreement shall be in writing and personally served, given by overnight express delivery, or given by mail. Telecopy notices shall be deemed valid only to the extent they are (a) actually received by the individual to whom addressed, and (b) followed by delivery of actual notice in the manner described above within three (3) business days thereafter. Any notice given by mail shall be sent, postage prepaid, by certified mail, return receipt requested, addressed to the party to receive at the following address or at such other address as the party may from time to time direct in writing:

UP:             Union Pacific Railroad Company  
                  ATTN: Gen. Mgr. Real Estate  
                  Real Estate Department  
                  1416 Dodge Street, WP001  
                  Omaha, Nebraska 68102  
                  Facsimile: (402) 997-3601/3602

Licensee:       City of Capitola  
                  ATTN: Public Works Director  
                  420 Capitola Vaenue  
                  Capitola, CA 95010  
                  Facsimile: (831) 479-8879

Express delivery notices shall be deemed to be given upon receipt. Postal notices shall be deemed to be given three (3) days after deposit with the United States Postal Service.

**Section 9.     SUCCESSORS AND ASSIGNS.**

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, but Licensee shall not assign this Agreement or any rights herein to any party without the prior written consent of UP.



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate as of the day and year first above written.

WITNESS:

*D.P. Thatcher*  
SR. MGR. REAL ESTATE  
UPRR

LICENSOR  
UNION PACIFIC RAILROAD COMPANY

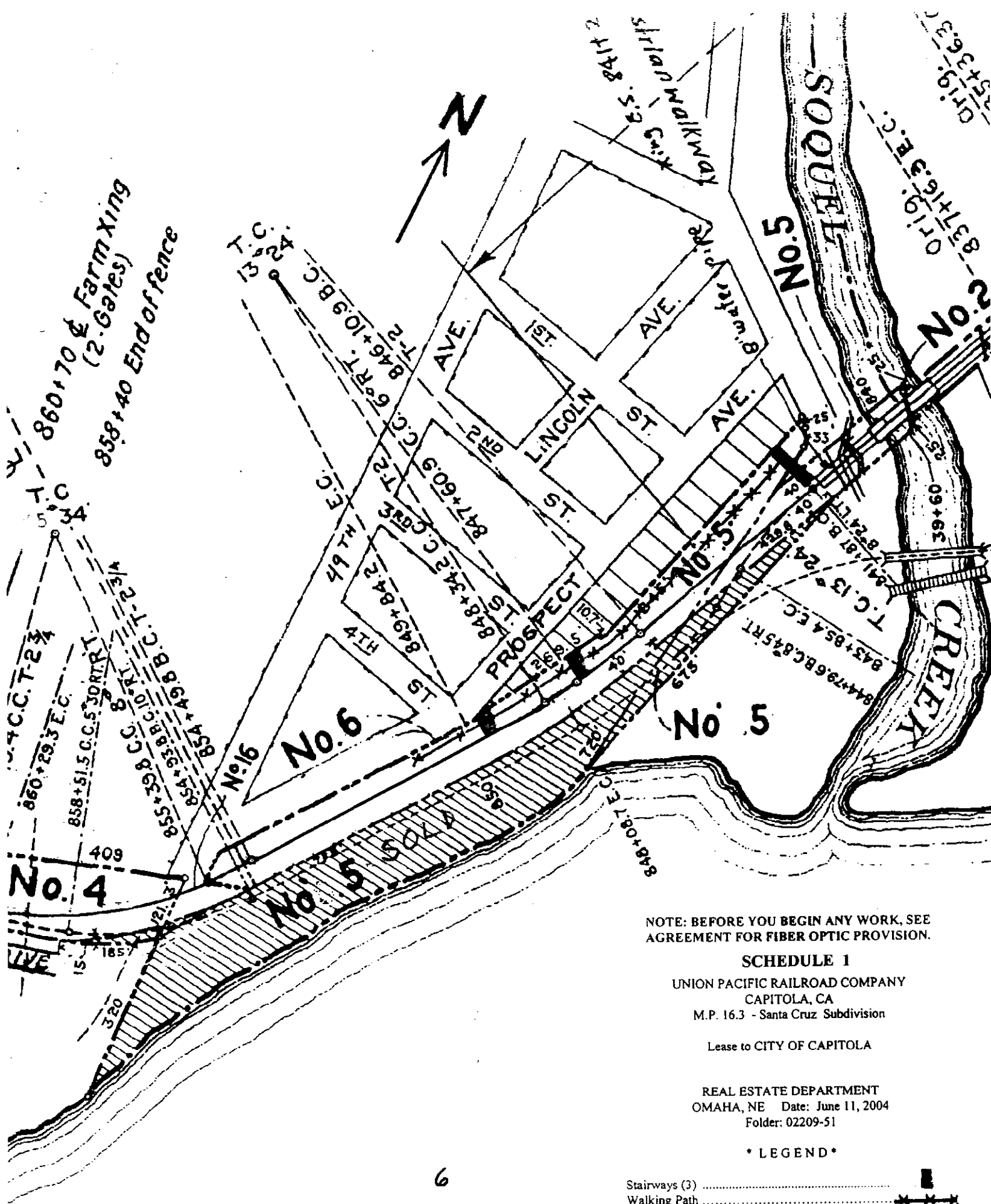
By: *[Signature]*  
Title: General Director-Real Estate

LICENSEE  
CITY OF CAPITOLA

WITNESS:

*Pamela Greeninger*  
Pamela Greeninger  
CITY CLERK 9/27/04

By: *[Signature]*  
Title: City manager



NOTE: BEFORE YOU BEGIN ANY WORK, SEE  
AGREEMENT FOR FIBER OPTIC PROVISION.

#### SCHEDULE 1

UNION PACIFIC RAILROAD COMPANY  
CAPITOLA, CA  
M.P. 16.3 - Santa Cruz Subdivision

Lease to CITY OF CAPITOLA

REAL ESTATE DEPARTMENT  
OMAHA, NE Date: June 11, 2004  
Folder: 02209-51

#### \* LEGEND \*

Stairways (3) .....  
Walking Path .....  
(RR)R/W Outlined .....

**SCHEDULE 2****UNION PACIFIC RAILROAD  
CONTRACT INSURANCE REQUIREMENTS**

Political Body and/or its Contractor shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

**A. Commercial General Liability** insurance. This insurance shall contain broad form contractual liability with a single limit of at least \$1,000,000 each occurrence or claim and an aggregate limit of at least 5,000,000. Coverage must be purchased on a post 1998 ISO or equivalent form, including but not limited to coverage for the following:

- Bodily injury including death and personal injury
- Property damage
- Fire legal liability
- Products and completed operations

The policy shall also contain the following endorsements **which shall be indicated on the certificate of insurance:**

- "For purposes of this insurance, Union Pacific Railroad payments related to the Federal Employers Liability Act or a Union Pacific Wage Continuation Program or similar programs are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law."
- The exclusions for railroads (except where the Job Site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed.
- Separate general aggregate for the project
- Coverage for Railroad's employees shall not be excluded
- Waiver of subrogation

**B. Business Automobile Coverage** insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence or claim, including but not limited to coverage for the following:

- Bodily injury and property damage
- Any and all motor vehicles including owned, hired and non-owned

The policy shall also contain the following endorsements **which shall be indicated on the certificate of insurance:**

- "For purposes of this insurance, Union Pacific Railroad payments related to the Federal Employers Liability Act or a Union Pacific Wage Continuation Program or similar programs are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law."
- Motor Carrier Act Endorsement- Hazardous materials clean up (MCS-90)

**C. Workers Compensation and Employers Liability** insurance including but not limited to:

- Political Body and/or its Contractor's statutory liability under the workers' compensation laws of the state(s) affected by this Agreement
- Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 disease policy limit, \$500,000 each employee

If Workers Compensation insurance will not cover the liability of Political Body and/or its Contractor in states that require participation in state workers' compensation fund, Political Body and/or its Contractor shall comply with the laws of such states. If Political Body and/or its Contractor is self-insured, evidence of state approval must be provided along with evidence of excess workers compensation coverage. Coverage shall include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable. The policy shall also contain the following endorsement **which shall be indicated on the certificate of insurance:**

- Alternate Employer Endorsement

**D. Umbrella or Excess Policies** In the event Political Body and/or its Contractor utilizes Umbrella or excess policies, these policies shall "follow form" and afford no less coverage than the primary policy.

**E. Railroad Protective Liability** insurance naming only the Railroad as the insured with a combined single limit of \$1,000,000 per occurrence with a \$5,000,000 aggregate. The policy shall be broad form coverage for "Physical Damage to Property" (ISO Form CG 00 35 07 98 or equivalent). A binder stating the policy is in place must be submitted to the Railroad until the original policy is forwarded to the Railroad.

## **Other Requirements**

**F.** Punitive damage exclusion must be deleted, **which deletion shall be indicated on the certificate of insurance.**

**G.** Political Body and/or its Contractor agrees to waive its right of recovery, and its insurers, through policy endorsement, agree to waive their right of subrogation against Railroad. Political Body and/or its Contractor further waives its right of recovery, and its insurers also waive their right of

subrogation against Railroad for loss of its owned or leased property or property under its care, custody and control. Political Body and/or its Contractor's insurance shall be primary with respect to any insurance carried by Railroad. All waivers of subrogation **shall be indicated on the certificate of insurance.**

**H.** All policy(ies) required above (excluding Workers Compensation) shall provide severability of interests and shall name Railroad as an additional insured. **Severability of interest and naming Railroad as additional insured shall be indicated on the certificate of insurance.**

**I.** Prior to commencing the Work, Political Body and/or its Contractor shall furnish to Railroad original certificate(s) of insurance evidencing the required coverage, endorsements, and amendments, and reference the contract audit/folder number if available. The certificate(s) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Railroad in writing of any cancellation or material alteration. **Upon request from Railroad, a certified duplicate original of any required policy shall be furnished.**

**J.** Any insurance policy shall be written by a reputable insurance company acceptable to Railroad or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.

**K.** Political Body and/or its Contractor **WARRANTS** that this Agreement has been thoroughly reviewed by Political Body and/or its Contractor's insurance agent(s)/broker(s), who have been instructed by Political Body and/or its Contractor to procure the insurance coverage required by this Agreement and acknowledges that Political Body and/or its Contractor insurance coverage will be primary.

**L.** If Political Body and/or its Contractor fails to procure and maintain insurance as required, Railroad may elect to do so at the cost of Political Body and/or its Contractor plus a 25% administration fee.

**M.** The fact that insurance is obtained by Political Body and/or its Contractor or Railroad on behalf of Political Body and/or its Contractor shall not be deemed to release or diminish the liability of Political Body and/or its Contractor, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad shall not be limited by the amount of the required insurance coverage.



**SCHEDULE 3**

**CONTRACTOR'S  
RIGHT OF ENTRY AGREEMENT**

**THIS AGREEMENT** is made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,  
by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation (the "Railroad"); and \_\_\_\_\_  
\_\_\_\_\_, a \_\_\_\_\_ corporation (the "Contractor").

**RECITALS:**

Contractor has been hired by \_\_\_\_\_ to perform work  
relating  
to

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(the "work"), with all or a portion of such work to be performed on property of Railroad in the vicinity of  
\_\_\_\_\_  
\_\_\_\_\_, [ which work is the subject of a contract dated \_\_\_\_\_  
between  
Railroad and \_\_\_\_\_ ].

Contractor has requested Railroad to permit it to perform the work on the portion of Railroad's property shown on  
the print dated \_\_\_\_\_, marked **Exhibit A**, attached hereto and hereby made a part hereof, and Railroad is  
agreeable thereto, subject to the following terms and conditions.

**AGREEMENT:**

**NOW, THEREFORE**, it is mutually agreed by and between the Railroad and Contractor, as follows:

**ARTICLE 1 - DEFINITION OF CONTRACTOR.**

For purposes of this agreement, all references in this agreement to the Contractor shall include the Contractor's  
contractors, subcontractors, officers, agents and employees, and others acting under its or their authority.

**ARTICLE 2 - RIGHT GRANTED; PURPOSE.**

The Railroad hereby grants to the Contractor the right, during the term hereinafter stated and upon and subject to  
each and all of the terms, provisions and conditions herein contained, to enter upon and have ingress to and egress from  
the property described in the Recitals for the purpose of performing any work described in the Recitals above. The right  
herein granted to Contractor is limited to those portions of Railroad's property specifically described herein, or as  
designated by the Railroad Representative named in Article 4.

**ARTICLE 3 - TERMS AND CONDITIONS CONTAINED IN EXHIBITS A, B, C AND D.**

The terms and conditions contained in **Exhibit A, Exhibit B, Exhibit C** and **Exhibit D**, attached hereto, are hereby made a part of this agreement.

**ARTICLE 4 - ALL EXPENSES TO BE BORNE BY CONTRACTOR; RAILROAD REPRESENTATIVE.**

A. The Contractor shall bear any and all costs and expenses associated with any work performed by the Contractor, or any costs or expenses incurred by the Railroad relating to this agreement.

B. The Contractor shall coordinate all of its work with the following Railroad representative or his or her duly authorized representative (the "Railroad Representative"):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

C. The Contractor, at its own expense, shall adequately police and supervise all work to be performed by the Contractor and shall ensure that such work is performed in a safe manner as set forth in Section 7 of **Exhibit B**. The responsibility of the Contractor for safe conduct and adequate policing and supervision of the Contractor's work shall not be lessened or otherwise affected by the Railroad's approval of plans and specifications involving the work, or by the Railroad's collaboration in performance of any work, or by the presence at the work site of the Railroad Representative, or by compliance by the Contractor with any requests or recommendations made by the Railroad Representative.

**ARTICLE 5 - TERM; TERMINATION.**

A. The grant of right herein made to Contractor shall commence on the date of this agreement, and continue until \_\_\_\_\_, unless sooner terminated as herein provided, or at such time as Contractor has completed its work on Railroad's property, whichever is earlier. Contractor agrees to notify the Railroad Representative in writing when it has completed its work on Railroad property.

B. This agreement may be terminated by either party on ten (10) days written notice to the other party.

**ARTICLE 6 - CERTIFICATE OF INSURANCE.**

A. Before commencing any work, Contractor will provide Railroad with the insurance binders, policies, certificates and/or endorsements set forth in **Exhibit C** of this agreement.

B. All insurance correspondence, binders, policies, certificates and/or endorsements shall be directed to:

Union Pacific Railroad Company

[Insert mailing address]

Attn: \_\_\_\_\_

**ARTICLE 7 - DISMISSAL OF CONTRACTOR/SUBCONTRACTOR EMPLOYEE.**

At the request of Railroad, Contractor shall remove from Railroad property any employee of Contractor or any subcontractor who fails to conform to the instructions of the Railroad Representative in connection with the work on Railroad's property, and any right of Contractor shall be suspended until such removal has occurred. Contractor shall indemnify Railroad against any claims arising from the removal of any such employee from Railroad property.

**ARTICLE 8 - ADMINISTRATIVE FEE.**

Contractor shall pay to Railroad \_\_\_\_\_ Dollars (\$\_\_\_\_\_) as reimbursement for clerical, administrative and handling expenses in connection with the processing of this agreement.

**ARTICLE 9 - CROSSINGS.**

No additional vehicular crossings (including temporary haul roads) or pedestrian crossings over Railroad's trackage shall be installed or used by Contractor without the prior written permission of Railroad.

**ARTICLE 10.- EXPLOSIVES.**

Explosives or other highly flammable substances shall not be stored on Railroad property without the prior written approval of the Railroad.

**IN WITNESS WHEREOF**, the parties hereto have duly executed this agreement in duplicate as of the date first herein written.

**UNION PACIFIC RAILROAD COMPANY**

By: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
(Name of Contractor)

By: \_\_\_\_\_  
Title: \_\_\_\_\_

**EXHIBIT B TO CONTRACTOR'S RIGHT OF ENTRY AGREEMENT****Section 1. NOTICE OF COMMENCEMENT OF WORK - FLAGGING.**

A. The Contractor agrees to notify the Railroad Representative at least ten (10) working days in advance of Contractor commencing its work and at least ten (10) working days in advance of proposed performance of any work by the Contractor in which any person or equipment will be within twenty-five (25) feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within twenty-five (25) feet of any track. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within twenty-five (25) feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad flagman is provided to watch for trains. Upon receipt of such ten (10)-day notice, the Railroad Representative will determine and inform the Contractor whether a flagman need be present and whether the Contractor need implement any special protective or safety measures. If flagging or other special protective or safety measures are performed by the Railroad, such services will be provided at Contractor's expense with the understanding that if the Railroad provides any flagging or other services, the Contractor shall not be relieved of any of its responsibilities or liabilities set forth herein. Contractor shall promptly pay to Railroad all charges connected with such services within thirty (30) days after presentation of a bill.

B. The rate of pay per hour for each man will be the prevailing hourly rate in effect for an eight hour day for the class of men used during regularly assigned hours and overtime in accordance with Labor Agreements and Schedules in effect at the time the work is performed. In addition to the cost of such labor, a composite charge for vacation, holiday, health and welfare, supplemental sickness, Railroad Retirement and unemployment compensation, supplemental pension, Employees Liability and Property Damage and Administration will be included, computed on actual payroll. The composite charge will be the prevailing composite charge in effect on the day of execution of this agreement. One and one-half times the current hourly rate is paid for overtime, Saturdays and Sundays; two and one-half times current hourly rate for holidays. Wage rates are subject to change, at any time, by law or by agreement between the Railroad and its employees, and may be retroactive as a result of negotiations or a ruling of an authorized Governmental Agency. Additional charges on labor are also subject to change. If the wage rate or additional charges are changed, the Contractor shall pay on the basis of the new rates and charges.

C. Reimbursement to the Railroad will be required covering the full eight hour day during which any flagman is furnished, unless he can be assigned to other Railroad work during a portion of such day, in which event reimbursement will not be required for the portion of the day during which the flagman is engaged in other Railroad work. Reimbursement will also be required for any day not actually worked by said flagman following his assignment to work on the project for which the Railroad is required to pay the flagman and which could not reasonably be avoided by the Railroad by assignment of such flagman to other work, even though the Contractor may not be working during such time. When it becomes necessary for the Railroad to bulletin and assign an employee to a flagging position in compliance with union collective bargaining agreements, the Contractor must provide the Railroad a minimum of five (5) days notice prior to the cessation of the need for a flagman. If five (5)-days notice of cessation is not given, the Contractor will still be required to pay flagging charges for the five (5)-day notice period required by union agreement to be given to the employee, even though flagging is not required for that period. An additional ten (10) days notice must then be given to the Railroad if flagging service are needed again after such five day cessation notice has been given Railroad.

**Section 2. LIMITATION AND SUBORDINATION OF RIGHTS GRANTED**

A. The foregoing grant of right is subject and subordinate to the prior and continuing right and obligation of the Railroad to use and maintain its entire property including the right and power of the Railroad to construct, maintain, repair, renew, use, operate, change, modify or relocate railroad tracks, roadways, signal, communication, fiber optics, or other wirelines, pipelines and other facilities upon, along or across any or all parts of its property, all or any of which may be freely done at any time or times by the Railroad without liability to the Contractor or to any other party for compensation or damages.

B. The foregoing grant is also subject to all outstanding superior rights (including those in favor of licensees and lessees of the Railroad's property, and others) and the right of the Railroad to renew and extend the same, and is made without covenant of title or for quiet enjoyment.

**Section 3. NO INTERFERENCE WITH OPERATIONS OF RAILROAD AND ITS TENANTS.**

A. The Contractor shall conduct its operations so as not to interfere with the continuous and uninterrupted use and operation of the railroad tracks and property of the Railroad, including without limitation, the operations of the Railroad's lessees, licensees or others, unless specifically authorized in advance by the Railroad Representative. Nothing shall be done or permitted to be done by the Contractor at any time that would in any manner impair the safety of such operations. When not in use, Contractor's machinery and materials shall be kept at least fifty (50) feet from the centerline of the Railroad's nearest track, and there shall be no vehicular crossings of Railroads tracks except at existing open public crossings.

B. Operations of the Railroad and work performed by the Railroad personnel and delays in the work to be performed by the Contractor caused by such railroad operations and work are expected by the Contractor, and Contractor agrees that the Railroad shall have no liability to Contractor, its subcontractors or any other person or entity for any such delays. The Contractor shall coordinate its activities with those of the Railroad and third parties so as to avoid interference with railroad operations. The safe operation of the Railroad takes precedence over any work to be performed by the Contractor.

**Section 4. LIENS.**

The Contractor shall pay in full all persons who perform labor or provide materials for the work to be performed by Contractor. The Contractor shall not create, permit or suffer any mechanic's or materialmen's liens of any kind or nature to be created or enforced against any property of the Railroad for any such work performed. The Contractor shall indemnify and hold harmless the Railroad from and against any and all liens, claims, demands, costs or expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished. If the Contractor fails to promptly cause any lien to be released of record, the Railroad may, at its election, discharge the lien or claim of lien at Contractor's expense.

**Section 5. PROTECTION OF FIBER OPTIC CABLE SYSTEMS.**

A. Fiber optic cable systems may be buried on the Railroad's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Contractor shall telephone the Railroad during normal business hours (7:00 a.m. to 9:00 p.m. Central Time, Monday through Friday, except holidays) at 1-800-336-9193 (also a 24-hour, 7-day number for emergency calls) to determine if fiber optic cable is buried anywhere on the Railroad's premises to be used by the Contractor. If it is, Contractor will telephone the telecommunications company(ies) involved, make arrangements for a cable locator and, if applicable, for relocation or other protection of the fiber optic cable. The Contractor shall not commence any work until all such protection or relocation (if applicable) has been accomplished.

B. In addition to other indemnity provisions in this Agreement, the Contractor shall indemnify, defend and hold the Railroad harmless from and against all costs, liability and expense whatsoever (including, without limitation, attorneys' fees, court costs and expenses) arising out of any act or omission of the Contractor, its contractor, agents and/or employees, that causes or contributes to (1) any damage to or destruction of any telecommunications system on Railroad's property, and/or (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on Railroad's property. Contractor shall not have or seek recourse against Railroad for any claim or cause of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunication company using Railroad's property or a customer or user of services of the fiber optic cable on Railroad's property.



**Section 6.     PERMITS - COMPLIANCE WITH LAWS.**

In the prosecution of the work covered by this agreement, the Contractor shall secure any and all necessary permits and shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work including, without limitation, all applicable Federal Railroad Administration regulations.

**Section 7.     SAFETY.**

A.     Safety of personnel, property, rail operations and the public is of paramount importance in the prosecution of the work performed by the Contractor. The Contractor shall be responsible for initiating, maintaining and supervising all safety, operations and programs in connection with the work. The Contractor shall at a minimum comply with the Railroad's safety standards listed in **Exhibit D**, hereto attached, to ensure uniformity with the safety standards followed by the Railroad's own forces. As a part of the Contractor's safety responsibilities, the Contractor shall notify the Railroad if the Contractor determines that any of the Railroad's safety standards are contrary to good safety practices. The Contractor shall furnish copies of **Exhibit D** to each of its employees before they enter on the job site.

B.     Without limitation of the provisions of paragraph A above, the Contractor shall keep the job site free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job.

C.     The Contractor shall have proper first aid supplies available on the job site so that prompt first aid services may be provided to any person injured on the job site. The Contractor shall promptly notify the Railroad of any U.S. Occupational Safety and Health Administration reportable injuries. The Contractor shall have a nondelegable duty to control its employees while they are on the job site or any other property of the Railroad, and to be certain they do not use, be under the influence of, or have in their possession any alcoholic beverage, drug or other substance that may inhibit the safe performance of any work.

D.     If and when requested by the Railroad, the Contractor shall deliver to the Railroad a copy of the Contractor's safety plan for conducting the work (the "Safety Plan"). Railroad shall have the right, but not the obligation, to require the Contractor to correct any deficiencies in the Safety Plan. The terms of this agreement shall control if there are any inconsistencies between this agreement and the Safety Plan.

**Section 8.     INDEMNITY.**

A.     To the extent not prohibited by applicable statute, the Contractor shall indemnify, defend and hold harmless the Railroad, its affiliates, and its and their officers, agents and employees ("Indemnified Parties") from and against any and all loss, damage, injury, liability, claim, demand, cost or expense (including, without limitation, attorney's, consultant's and expert's fees, and court costs), fine or penalty (collectively, "Loss") incurred by any person (including, without limitation, any Indemnified Party, the Contractor, or any employee of the Contractor or of any Indemnified Party) arising out of or in any manner connected with (i) any work performed by the Contractor, or (ii) any act or omission of the Contractor, its officers, agents or employees, or (iii) any breach of this agreement by the Contractor.

B.     The right to indemnity under this Section 8 shall accrue upon occurrence of the event giving rise to the Loss, and shall apply regardless of any negligence or strict liability of any Indemnified Party, except where the Loss is caused by the sole active negligence of an Indemnified Party as established by the final judgment of a court of competent jurisdiction. The sole active negligence of any Indemnified Party shall not bar the recovery of any other Indemnified Party.

C.     The Contractor expressly and specifically assumes potential liability under this Section 8 for claims or actions brought by the Contractor's own employees. The Contractor waives any immunity it may have under worker's compensation or industrial insurance acts to indemnify the Railroad under this Section 8. Contractor acknowledges that this waiver was mutually negotiated by the parties hereto.

D.     No court or jury findings in any employee's suit pursuant to any worker's compensation act or the Federal Employers' Liability Act against a party to this agreement may be relied upon or used by the Contractor in any attempt to assert liability against the Railroad.

E. The provisions of this Section 8 shall survive the completion of any work performed by the Contractor or the termination or expiration of this agreement. In no event shall this Section 8 or any other provision of this agreement be deemed to limit any liability the Contractor may have to any Indemnified Party by statute or under common law.

**Section 9. RESTORATION OF PROPERTY.**

In the event the Railroad authorizes the Contractor to take down any fence of the Railroad or in any manner move or disturb any of the other property of the Railroad in connection with the work to be performed by Contractor, then in that event the Contractor shall, as soon as possible and at Contractor's sole expense, restore such fence and other property to the same condition as the same were in before such fence was taken down or such other property was moved or disturbed. The Contractor shall remove all of Contractor's tools, equipment, rubbish and other materials from Railroad's property promptly upon completion of the work, restoring Railroad's property to the same state and condition as when Contractor entered thereon.

**Section 10. WAIVER OF DEFAULT.**

Waiver by the Railroad of any breach or default of any condition, covenant or agreement herein contained to be kept, observed and performed by the Contractor shall in no way impair the right of the Railroad to avail itself of any remedy for any subsequent breach or default.

**Section 11. MODIFICATION - ENTIRE AGREEMENT.**

No modification of this agreement shall be effective unless made in writing and signed by the Contractor and the Railroad. This agreement and the exhibits attached hereto and made a part hereof constitute the entire understanding between the Contractor and the Railroad and cancel and supersede any prior negotiations, understandings or agreements, whether written or oral, with respect to the work to be performed by the Contractor.

**Section 12. ASSIGNMENT - SUBCONTRACTING.**

The Contractor shall not assign or subcontract this agreement, or any interest therein, without the written consent of the Railroad. The Contractor shall be responsible for the acts and omissions of all subcontractors, and shall require all subcontractors to maintain the insurance coverage required to be maintained by the Contractor as provided in this agreement, and to indemnify the Contractor and the Railroad to the same extent as the Railroad is indemnified by the Contractor under this agreement.

**EXHIBIT C  
TO  
CONTRACTOR'S  
RIGHT OF ENTRY AGREEMENT**

**Union Pacific Railroad Company  
Insurance Provisions For  
Contractor's Right of Entry Agreement**

Contractor shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

**A. Commercial General Liability insurance.** This insurance shall contain broad form contractual liability with a single limit of at least \$5,000,000 each occurrence or claim and an aggregate limit of at least \$10,000,000. Coverage must be purchased on a post 1998 ISO or equivalent form, including but not limited to coverage for the following:

- Bodily injury including death and personal injury
- Property damage
- Fire legal liability (Not less than the replacement value of the portion of the premises occupied)
- Products and completed operations

The policy shall also contain the following endorsements **which shall be indicated on the certificate of insurance:**

- "For purposes of this insurance, Union Pacific Railroad payments related to the Federal Employers Liability Act or a Union Pacific Wage Continuation Program or similar programs are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law."
- The exclusions for railroads (except where the Job site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed.
- Coverage for Contractor's (and Railroad's) employees shall not be excluded
- Waiver of subrogation

**B. Business Automobile Coverage insurance.** This insurance shall contain a combined single limit of at least \$5,000,000 per occurrence or claim, including but not limited to coverage for the following:

- Bodily injury and property damage
- Any and all motor vehicles including owned, hired and non-owned

The policy shall also contain the following endorsements **which shall be indicated on the certificate of insurance:**

- "For purposes of this insurance, Union Pacific Railroad payments related to the Federal Employers Liability Act or a Union Pacific Wage Continuation Program or similar programs are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law."
- The exclusions for railroads (except where the Job site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed.
- Motor Carrier Act Endorsement- Hazardous materials clean up (MCS-90) if required by law.

**C. Workers Compensation and Employers Liability insurance** including but not limited to:

- Contractor's statutory liability under the workers' compensation laws of the state(s) affected by this Agreement

- Employers' Liability (Part B) with limits of at least  
\$500,000 each accident, \$500,000 disease policy limit  
\$500,000 each employee

If Workers Compensation insurance will not cover the liability of Contractor in states that require participation in state workers' compensation fund, Contractor shall comply with the laws of such states. If Contractor is self-insured, evidence of state approval must be provided along with evidence of excess workers compensation coverage. Coverage shall include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable.

The policy shall also contain the following endorsement **which shall be indicated on the certificate of insurance:**

- Alternate Employer Endorsement

- D. **Umbrella or Excess Policies** In the event Contractor utilizes Umbrella or excess policies, these policies shall "follow form" and afford no less coverage than the primary policy.
- E. **Railroad Protective Liability** insurance naming only the Railroad as the insured with a combined single limit of \$2,000,000 per occurrence with a \$6,000,000 aggregate. The policy shall be broad form coverage for "Physical Damage to Property" (ISO Form CG 00 35 07 98 or equivalent). A binder stating the policy is in place must be submitted to the Railroad until the original policy is forwarded to the Railroad.

#### **Other Requirements**

- F. Punitive damage exclusion must be deleted, **which deletion shall be indicated on the certificate of insurance.**
- G. Contractor agrees to waive its right of recovery, and its insurers, through policy endorsement, agree to waive their right of subrogation against Railroad. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against Railroad for loss of its owned or leased property or property under its care, custody and control. Contractor's insurance shall be primary with respect to any insurance carried by Railroad. All waivers of subrogation **shall be indicated on the certificate of insurance.**
- H. All policy(ies) required above (excluding Workers Compensation) shall provide severability of interests and shall name Railroad as an additional insured. **Severability of interest and naming Railroad as additional insured shall be indicated on the certificate of insurance.**
- I. Prior to commencing the Work, Contractor shall furnish to Railroad original certificate(s) of insurance evidencing the required coverage, endorsements, and amendments. The certificate(s) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Railroad in writing of any cancellation or material alteration. **Upon request from Railroad, a certified duplicate original of any required policy shall be furnished.**
- J. Any insurance policy shall be written by a reputable insurance company acceptable to Railroad or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.
- K. Contractor **WARRANTS** that this Agreement has been thoroughly reviewed by Contractor's insurance agent(s)/broker(s), who have been instructed by Contractor to procure the insurance coverage required by this Agreement and acknowledges that Contractor's insurance coverage will be primary.
- L. The fact that insurance is obtained by Contractor or Railroad on behalf of Contractor shall not be deemed to release or diminish the liability of Contractor, including, without limitation, liability under the indemnity provisions of

this Agreement. Damages recoverable by Railroad shall not be limited by the amount of the required insurance coverage.

**EXHIBIT D TO CONTRACTOR'S RIGHT OF ENTRY AGREEMENT****MINIMUM SAFETY REQUIREMENTS**

The term "employees" as used herein refer to all employees of the Contractor as well as all employees of any subcontractor or agent of the Contractor.

**I. Clothing**

- A. All employees of the Contractor will be suitably dressed to perform their duties safely and in a manner that will not interfere with their vision, hearing, or free use of their hands or feet.

Specifically, the Contractor's employees must wear:

- (i) Waist-length shirts with sleeves.
  - (ii) Trousers that cover the entire leg. If flare-legged trousers are worn, the trouser bottoms must be tied to prevent catching.
  - (iii) Footwear that covers their ankles and has a defined heel. Employees working on bridges are required to wear safety-toed footwear that conforms to the American National Standards Institute (ANSI) and FRA footwear requirements.
- B. Employees shall not wear boots (other than work boots), sandals, canvas-type shoes, or other shoes that have thin soles or heels that are higher than normal.
- C. Employees must not wear loose or ragged clothing, neckties, finger rings, or other loose jewelry while operating or working on machinery.

**II. Personal Protective Equipment**

The Contractor shall require its employees to wear personal protective equipment as specified by Railroad rules, regulations, or recommended or requested by the Railroad Representative.

- (i) Hard hat that meets the American National Standard (ANSI) Z89.1 – latest revision. Hard hats should be affixed with the contractor's or subcontractor's company logo or name.
- (ii) Eye protection that meets American National Standard (ANSI) for occupational and educational eye and face protection, Z87.1 – latest revision. Additional eye protection must be provided to meet specific job situations such as welding, grinding, etc.
- (iii) Hearing protection, which affords enough attenuation to give protection from noise levels that will be occurring on the job site. Hearing protection, in the form of plugs or muffs, must be worn when employees are within:
  - 100 feet of a locomotive or roadway/work equipment
  - 15 feet of power operated tools
  - 150 feet of jet blowers or pile drivers
  - 150 feet of retarders in use (when within 10 feet, employees must wear dual ear protection – plugs and muffs)
  -
- (iv) Other types of personal protective equipment, such as respirators, fall protection equipment, and face shields, must be worn as recommended or requested by the Railroad Representative.

### **III. On Track Safety**

The Contractor is responsible for compliance with the Federal Railroad Administration's Roadway Worker Protection regulations – 49CFR214, Subpart C and Railroad's On-Track Safety rules. Under 49CFR214, Subpart C, railroad contractors are responsible for the training of their employees on such regulations. In addition to the instructions contained in Roadway Worker Protection regulations, all employees must:

- (i) Maintain a distance of twenty-five (25) feet to any track unless the Railroad Representative is present to authorize movements.
- (ii) Wear an orange, reflectorized workwear approved by the Railroad Representative.
- (iii) Participate in a job briefing that will specify the type of On-Track Safety for the type of work being performed. Contractors must take special note of limits of track authority, which tracks may or may not be fouled, and clearing the track. The Contractors will also receive special instructions relating to the work zone around machines and minimum distances between machines while working or traveling.

### **IV. Equipment**

- A. It is the responsibility of the Contractor to ensure that all equipment is in a safe condition to operate. If, in the opinion of the Railroad Representative, any of the Contractor's equipment is unsafe for use, the Contractor shall remove such equipment from the Railroad's property. In addition, the Contractor must ensure that the operators of all equipment are properly trained and competent in the safe operation of the equipment. In addition, operators must be:
  - Familiar and comply with Railroad's rules on lockout/tagout of equipment.
  - Trained in and comply with the applicable operating rules if operating any hy-rail equipment on-track.
  - Trained in and comply with the applicable air brake rules if operating any equipment that moves rail cars or any other railbound equipment.
- B. All self-propelled equipment must be equipped with a first-aid kit, fire extinguisher, and audible back-up warning device.
- C. Unless otherwise authorized by the Railroad Representative, all equipment must be parked a minimum of twenty-five (25) feet from any track. Before leaving any equipment unattended, the operator must stop the engine and properly secure the equipment against movement.
- D. Cranes must be equipped with three orange cones that will be used to mark the working area of the crane and the minimum clearances to overhead powerlines.

### **V. General Safety Requirements**

- A. The Contractor shall ensure that all waste is properly disposed of in accordance with applicable federal and state regulations.
- B. The Contractor shall ensure that all employees participate in and comply with a job briefing conducted by the Railroad Representative, if applicable. During this briefing, the Railroad Representative will specify safe work procedures, (including On-Track Safety) and the potential hazards of the job. If any employee has any questions or concerns about the work, the employee must voice them during the job briefing. Additional job briefings will be conducted during the work as conditions, work procedures, or personnel change.
- C. All track work performed by the Contractor meets the minimum safety requirements established by the Federal Railroad Administration's Track Safety Standards 49CFR213.
- D. All employees comply with the following safety procedures when working around any railroad track:

- (i) Always be on the alert for moving equipment. Employees must always expect movement on any track, at any time, in either direction.
- (ii) Do not step or walk on the top of the rail, frog, switches, guard rails, or other track components.
- (iii) In passing around the ends of standing cars, engines, roadway machines or work equipment, leave at least 20 feet between yourself and the end of the equipment. Do not go between pieces of equipment if the opening is less than one car length (50 feet).
- (iv) Avoid walking or standing on a track unless so authorized by the employee in charge.
- (v) Before stepping over or crossing tracks, look in both directions first.
- (vi) Do not sit on, lie under, or cross between cars except as required in the performance of your duties and only when track and equipment have been protected against movement.

E. All employees must comply with all federal and state regulations concerning workplace safety.



**REVISED Policies for Leases, Licenses, Rights of Entry and  
Encroachments for the Santa Cruz Branch Line Right-of-Way  
*Approved August 6, 2020***

**Background**

Purpose for Purchase of Branch Line

The Regional Transportation Commission (RTC) purchased the Santa Cruz Branch Rail Line (Branch Line) right-of-way (ROW) to:

- preserve it as a transportation corridor;
- continue existing freight and recreational rail service;
- facilitate increased freight and recreational rail service;
- explore passenger rail service options;
- construct a bicycle and pedestrian trail alongside the track where feasible; and
- maximize its use as a transportation corridor.

Funding for Purchase of Branch Line

The purchase of the Branch Line right-of-way was facilitated by funding from Proposition 116 of 1990, which provided Santa Cruz County with \$11 million to use for "rail projects within Santa Cruz County which facilitate recreational, commuter, intercity and intercounty travel." The California Transportation Commission (CTC) developed policies and requirements for projects funded with Proposition 116 funds. The CTC imposed certain conditions on its approval of Proposition 116 funds for purchase of the Branch Line right-of-way. The Proposition 116 funds were provided through a master funding agreement and a program supplement agreement with the State of California and administered by Caltrans.

Rail Service Operations for Branch Line

When the RTC purchased the Branch Line ROW, Union Pacific retained an easement for freight operations. That easement was transferred to the shortline freight and recreational rail operator selected by the RTC for the Branch Line. Over time, as the RTC selects new or replacement rail operators that easement is expected to be transferred to that operator. The Surface Transportation Board (STB) designates the RTC selected rail operator as the common carrier for freight service on the Branch Line, as long as the operator meets the requirements of the STB. The RTC enters into an administration, coordination and license (AC&L) agreement with the selected rail operator. That agreement outlines the responsibilities of the operator and provides the operator with a license to operate recreational passenger rail service on the Branch Line. There are a

number of operating agreements for the rail line including crossing agreements and a trackage rights agreement with Santa Cruz Big Trees and Pacific Railway. Rail operations on the Branch Line are governed and inspected by the Federal Railroad Administration (FRA) and the California Public Utilities Commission (CPUC) to help ensure safety.

#### RTC Planning Documents Affecting Branch Line

The RTC adopts every 4 or 5 years a regional transportation plan with projects on the Branch Line. The RTC also completed a master plan and environmental document for the Monterey Bay Sanctuary Scenic Trail Network (MBSST), which includes as its spine a trail on the Branch Line right-of-way alongside the operating track, which is referred to as the Coastal Rail Trail. In addition, the RTC has completed a passenger rail service feasibility study for the rail line, a Unified Corridor Investment Study that includes the Branch Line ROW, and is in the process of completing a Transit Corridor Alternatives Analysis for the Branch Line ROW. The RTC may undertake other studies which may affect the Branch Line ROW.

#### **Policies for Leases, Licenses, Encroachments and Rights of Entry on the Rail Line ROW**

The RTC currently manages several long-term leases of the Branch Line for various uses including parking, storage, and related uses. A lease analysis completed in 2009 concluded that most of the existing leases that were assumed by the RTC at the time of the purchase are significantly below market rate and in need of an update. The RTC periodically receives requests for updates to existing leases and additional long-term leases on the Branch Line. The Branch Line also includes licenses for pipelines, crossings, etc. In addition, the RTC regularly receives requests for temporary use of the Branch Line, primarily for construction staging, utility crossings, and road construction projects that impact or cross the Branch Line. The RTC manages these requests by granting temporary rights of entry for use of its property consistent with authorization given to the Executive Director by the RTC Board under these policies. Finally, the RTC is working with entities who are implementing capital projects within the Branch Line property, including the various segments of the MBSST.

The following policies shall apply to all leases, licenses, encroachments and rights of entry managed and/or issued by the RTC:

1. Leases, licenses, rights of entry and encroachments on the Santa Cruz Branch Rail Line right-of-way shall be consistent with:
  - a. The RTC's purpose for purchasing the right-of-way;
  - b. Funding requirements of Proposition 116, the California Transportation Commission, and agreements with the State;

- c. Rail service operations and safety requirements of the STB, the FRA, the CPUC, agreements with the shortline rail operator, licenses and other agreements and arrangements affecting railroad operations;
  - d. Standards of the American Railway Engineering and Maintenance of Way Association (AREMA)
  - e. The RTC's Regional Transportation Plan for Santa Cruz County;
  - f. The RTC master plan for the MBSST;
  - g. Measure D and Measure D policies outlined in the Measure D Strategic Implementation Plan (SIP) for improvements funded by Measure D;
  - h. RTC policies for capital projects implemented by others within the Branch Line right-of-way and any associated agreements for implementation and maintenance of such projects;
  - i. Plans developed by the RTC for high capacity transit service or other uses on the Branch Line; and
  - j. All applicable federal, state and local laws and regulations.
2. To ensure that there is no gift of public funds, new and updated leases shall be at market rate defined as:

The most probable rent that a property should bring in a competitive and open market reflecting all conditions and restrictions of the specified lease agreement including term, rental adjustment and revaluation, permitted uses, use restrictions, and expense obligations; the lessee and lessor each acting prudently and knowledgeably, and assuming consummation of a lease contract as of a specified date and the passing of the leasehold from lessor to lessee under conditions whereby:

- a. Lessee and lessor are typically motivated;
  - b. Both parties are well informed or well advised, and acting in what they consider their best interests, which can be aided by the production of a market rental rate survey or formal appraisal utilized during negotiations;
  - c. A reasonable time is allowed for exposure in the open market;
  - d. The rent payment is made in terms of cash in U.S. dollars, and is expressed as an amount per time period consistent with the payment schedule of the lease contract; and
  - e. The rental amount represents the normal consideration for the property leased unaffected by special fees or concessions granted by anyone associated with the transaction.
3. The RTC shall use closed sessions consistent with the Brown Act to direct its lease negotiators regarding updated and new leases.
4. Leases (new and updated), licenses and rights of entry for a one-time or an annual amount exceeding the Executive Director's procurement authority for a single transaction, as established in the RTC's Administrative and Fiscal

policies, shall be presented to the RTC for consideration in public session and the Executive Director is authorized to approve others.

5. There shall be a public review period of lease terms and conditions of at least 21 days prior to approval of a lease or lease update to give all responsible persons the opportunity to make credible and responsible offers with better lease terms and conditions to the RTC.
6. Leases shall include terms for escalation of rental rates consistent with market conditions.
7. Every five years, the RTC shall review existing leases to ensure that the rent is at market rates and for any leases found to be below market rates, the RTC shall work to update them to market rates based on a market rental rate survey, formal appraisal or other appropriate information.
8. Leases shall include a termination clause to ensure that leases will not unduly impact the development of transportation projects on the Branch Line right-of-way. Licenses and rights of entry that could potentially impact planned transportation projects on the Branch Line right-of-way due to length of term, purpose, etc. shall also include a termination clause.
9. Licenses and rights of entry shall include fees to the RTC and the rail service operator as applicable to reimburse the RTC and rail service operator for their cost to provide such right of entry in addition to a determined or negotiated market rate for the right of use provided by the license or right of entry.
10. Any lease, license, or right of entry that also crosses or otherwise impacts the rail service operator's easement or operations shall require review and acknowledgement by the rail operator.
11. If the license or right of entry will provide a service to the RTC benefiting its ownership, management, maintenance, improvement or operation of the Branch Line right-of-way, fees may be reduced or waived by the RTC.
12. Leases and rights of entry shall include appropriate indemnification to the RTC and the rail service operator as applicable.
13. Rights of entry shall include appropriate insurance requirements to protect the interests of the RTC and the rail service operator as applicable.
14. Leases, licenses, and rights of entry shall include prohibition against any alteration of RTC property except as approved by the corresponding lease, license, or right of entry.

15. Rights of entry and licenses shall include a requirement for notification of the rail service operator prior to entering the property as authorized.
16. Revenues from leases, licenses and rights of entry shall be used to cover costs of the RTC to negotiate, produce and implement such leases, licenses and rights of entry and for costs associated with the RTC's responsibility to manage, maintain, operate and improve the Branch Line as established in the funding agreements with the State.
17. Any encroachments onto the Branch Line shall be resolved by removal of the encroachment or conversion of the encroachment to a long-term lease, license or right of entry.
18. As resources allow and needs arise, the RTC will work to identify and address encroachments on the Branch Line ROW. Encroachments may also be brought to the attention of the RTC or discovered inadvertently.
19. Identification and addressing of encroachments shall prioritize encroachments which:
  - a. Impact the uses, operations, inspections and maintenance of the Branch Line ROW;
  - b. Impact the implementation of projects by the RTC or RTC partner agencies on or in the vicinity of the Branch Line ROW; and/or
  - c. Impact liabilities to the RTC.
20. Encroachments that are not the subject of an approved lease, license or right of entry in accordance with this Policy are not permitted, and are subject to removal in accordance with applicable law. Depending on the nature of the encroachment, and at the sole discretion of the RTC, options may include:
  - a. Immediate removal;
  - b. Removal within a specified period of time;
  - c. Possible modifications to the encroachment; and/or
  - d. Development of a lease, license, or right of entry at Fair Market Value.
21. For areas that should be fenced as determined by RTC:
  - a. RTC will gather relevant, available information to confirm the location of the applicable RTC property boundaries.
  - b. RTC will notify neighboring property owners in advance of the decision to install fences, barricades, and other barriers in the specified area.

c. RTC will cause the fences, barricades, and other barriers to be installed in the specific locations at the times specified in the notice to the property owners.