

## Board of Directors Meeting: February 21, 2024 – Public Comments

Date	Name	2. Approval of January 17, 2024 Board Meeting Minutes
		None
Date	Name	5. Public Comment on Non-Agenda Items
		None
Date	Name	6. Consent a. Accept Monthly Ridership Report – December 2023 b. Approve Monthly Financial Report – November 2023 c. Authorize the General Manager to Execute Amendment No. 2 to Contract No. OP-SV-20-007 with Nick Barbieri Trucking, LLC DBA Redwood Coast Fuels - North Bay Petroleum for Ongoing Fuel Delivery Services for \$1,800,000 for a total not-to-exceed contract amount of \$5,965,000
		None
Date	Name	7. Update on the San Rafael Transit Center Relocation Project – <i>Presented by Chief Engineer, Bill Gamlen</i>
		None
Date	Name	8. Adopt a Resolution to Amending Resolution No. 2023-23, the Fiscal Year 2024 Adopted Budget, reducing the spending authority by \$14,164,629 from \$134,913,965 to \$120,749,336- <i>Presented by Chief Financial Officer, Heather McKillop</i>
		None
Date	Name	9. CLOSED SESSION: Conference with Legal Counsel regarding existing litigation pursuant to California Government Code Section 54956.9(a); Number of cases: (3) 1) James Duncan v. Sonoma-Marin Area Rail Transit; City of Santa Rosa, Real Party in Interest; County of Sonoma, Real Party in Interest; Sonoma County Superior Court Case No. SCV-266092; First Dist. Court of Appeal Case No. A165783 2) James Duncan v. SMART; CPUC No. C.21-06-011 3) Application of City of Santa Rosa for a Crossing at Jennings Avenue; CPUC No. A.15-05-014
2/20/24	James Duncan	Attached

To: Chair and SMART Board Directors,  
From: James L Duncan  
Re: Closed Session Item 9, SMART Board Meeting, February 21, 2024.  
Date: February 20, 2024

Duncan v. SMART, Sonoma County Superior Court case SCV-266092, is now final which means that the legal outcome is binding on the parties involved. One of the outcomes is that SMART did not form a binding contract with the City of Santa Rosa to have SMART's contractors build the improvements at the pedestrian and bicycle at-grade crossing at Jennings Avenue which had been approved by the California Public Utilities Commission in Application A.15-05-014. Although beyond further challenge in the state courts this outcome is incorrect legally and ethically.

Once the Jennings Crossing was initially approved, Santa Rosa promptly requested SMART to provide a bid to have its contractors build it with Santa Rosa paying all costs. Building the crossing before the beginning of regular train service was intended to reduce Santa Rosa's construction costs and also would minimize future disruption to the rail corridor.

The staff of SMART, Santa Rosa, and SMART's contractors worked together and by February 2017 the scope of the work and its costs had been determined, the existing contract between SMART and its contractor had been amended to include the Jennings Crossing, and the Santa Rosa City Council had allocated funding and authorized the City Manager to enter into a Reimbursement Agreement for the work. All that remained to be done before SMART's contractors could begin was to process the Reimbursement Agreement which could have been done promptly but was not.

It was not until June 2017, that SMART sent Santa Rosa the Reimbursement Agreement for signature. SMART's Chief Engineer stated in an e-mail that the Reimbursement Agreement "had to go to the Board" so Santa Rosa hand-delivered to SMART the signed Reimbursement Agreement for the next scheduled Board Meeting. But SMART's General Manager held up the Reimbursement Agreement so that it did not "go to the Board" rather he insisted that Santa Rosa must first also enter into an unrelated separate Quiet Zone Maintenance Agreement with SMART.

Ultimately, as SMART's attorneys told the court, the "reimbursement agreement did not go to the SMART Board, the Board was not asked to authorize the agreement nor did the Board authorize Mansourian to sign it." The legal principle that applies when a party sets a condition to a contract but prevents or makes impossible the performance or happening of that condition - is the condition is excused and the contract is binding and enforceable. This principle is known as the "prevention doctrine" or "doctrine of prevention" and is followed by federal and state courts including California - one can look the principle up online on numerous legal websites.

The prevention doctrine was cited in both the local court and the Court of Appeal but the Court of Appeal, in holding that was no contract for the Jennings Crossing, stated the court would not even consider the applicability of the prevention doctrine to the case. SMART may have

prevailed on this issue but there is another more important court that SMART's Board should be concerned about - the court of public opinion.

Although a supermajority of voters approved Measure Q, SMART's sales tax measure, the subsequent measure to extend the sales tax was rejected by the voters. Both the Marin and Sonoma Bicycle Coalitions, strong supporters of Measure Q, took no position on that failed measure. The Marin Grand Jury recently issued a critical report on SMART titled "SMART at a Crossroads - Here Today, Gone Tomorrow?" A recent comment by Mike Arnold critiques SMART's extremely low farebox recovery as a measure of SMART's effectiveness. So a negative public opinion on the value of SMART compared with other competing social needs already exists. Further, if the Jennings Crossing remains closed there may be a negative public opinion that SMART has brought about its unjustified closure and accordingly may vote no on any future sales tax funding for SMART.

SCV-266092 also asked the court for an award of damages payable to Santa Rosa based upon SMART's actions which were not related to the Reimbursement Agreement. SMART's failure to honor what had seemed a commitment to have its contractors build the crossing and the aftermath of the disastrous Tubbs Fire caused Santa Rosa to have to file for an initial extension of the CPUC's approval in 2019.

SMART's Chief Engineer became a party in A.15-05-014 then and formally expressed opposition to the extension based upon grounds which the Commission had previously rejected. In extending the approval, the Commission directed SMART to "comply with D.16-09-002 and cooperate in good faith with the City to reach an agreement regarding the construction of the approved crossing".

The request for damages was based upon SMART's actions after that initial extension and SMART's continuing actions in opposition to the approved crossing. The CPUC has rejected all of SMART's contentions in A.15-05-014. SCV-266092 alleged that SMART was in violation of Public Utilities Code section 702 in conjunction with other sections of the Public Utilities Code.

The Court of Appeal did not consider or discuss these statutes but held that SMART could not be liable for damages because the CPUC decision approving the crossing did not direct SMART to do anything. The CPUC specifically rejected this exact argument in the related CPUC proceeding C.21-06-011 because section 702 mandates that public utilities obey and comply with CPUC decisions. The Court of Appeal may have held that SMART cannot be liable for damages on the basis noted above but, again, in the court of public opinion the voters may have a negative view of SMART's actions and vote accordingly.

CPUC proceeding, Duncan v. SMART, C.21-06-011 is still pending. The Court of Appeal's holding on the Reimbursement Agreement and SMART's liability for damages are not relevant to C.21-06-011. Those issues have never been before the Commission which cannot award damages and normally does not adjudicate construction contracts.

SCV-266092 asked the court to enforce the CPUC Decision approving the Jennings Crossing and also to declare that the Quiet Zone Maintenance Agreement between SMART and the

County of Sonoma is void at inception which means that the agreement was not and has never been valid. The Court of Appeal, however, has held that these issues in SCV-266092 are under the jurisdiction of the CPUC and must be determined there.

C.21-06-011 asks the Commission to find that SMART is in violation of Public Utilities Code section 702 in conjunction with other sections of the Public Utilities Code as well as provisions of the California Constitution and to impose penalties on SMART. Because the Court of Appeal did not consider these statutes at all there is no impediment to the Commission doing so. Accordingly, the issue of enforcement of SMART's compliance with the Commission's Jennings Crossing Decisions and associated state law should be resolved in C.21-06-011.

The Quiet Zone Maintenance Agreement between SMART and the County of Sonoma was not and is not currently included in C.21-06-011. The Scoping Memo in C.21-06-011 would have to be revised to include that agreement. The CPUC Administrative Law Judge in C.21-06-011 has indicated that the Scoping Memo will not be revised at this late date. This issue should be determined in a subsequent proceeding and should also include the similar Quiet Zone Agreement between SMART and the City of San Rafael.

Both the Quiet Zone Agreement between SMART and the County of Sonoma and the City of San Rafael do not disclose SMART's duty under CEQA and the specific provisions of Mitigation N-5 in its EIR to mitigate the significant environmental impact of its train horn noise with Quiet Zones. Further, SMART's Quiet Zone Agreement does not disclose that Measure Q, which levies a sales tax to fund SMART, specifically dedicates that sales tax revenue to funding the environmental compliance and mitigation measures identified in SMART's Final Environmental Impact Reports. Specific mitigation measures include ... implementation of Quiet Zones. Accordingly, these agreements should be found to be void.

The ongoing CPUC proceeding A.15-05-014 is the original application by Santa Rosa for approval of the Jennings Crossing and is now before the CPUC for its third extension all of which have been made necessary by the actions of SMART. As the Board should be aware, the ALJ has set March 1, 2024 as the date that Santa Rosa must file an update regarding any agreement with SMART for the construction of the Jennings Crossing. Neither SMART's EIR, Measure Q, nor the CPUC's Decisions authorize SMART to bring about the closure of the Jennings Crossing and if it remains closed - the court of public opinion may hold SMART responsible for that.

I hope that these comments will inspire the Board to change course and act to redeem SMART in the court of public opinion.

James L. Duncan  
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