



Office of the City Manager

CONSENT CALENDAR  
October 29, 2024

To: Honorable Mayor and Members of the City Council

From: Paul Buddenhagen, City Manager

Submitted by: Terrance Davis, Director of Public Works

Subject: Agreement Regarding Allocation of Costs for Railroad Crossing Improvements for Berkeley Commons Between Berkeley Commons Owner, LLC, (“Developer”) a California limited liability company and the City of Berkeley (“City”).

RECOMMENDATION

Adopt a Resolution authorizing City Manager to execute an agreement (Attachment 1) and any amendments with Berkeley Commons (Developer) for payment for all the improvements to mitigate the impact of Berkeley Commons Development (Project) at the Addison Street and Bancroft Way at-grade railroad crossings.

FISCAL IMPACTS OF RECOMMENDATION

Developer is responsible for all actual costs and expenses for the Union Pacific Railroad (UPRR) parties performance of the safety improvement work at the two railroad crossings pertaining to their Project. One main purpose of this agreement is to document the process pursuant to which the Developer shall assume responsibility for all such railroad costs.

The agreement further confirms that the Developer and its contractor(s) are responsible for complying with all Union Pacific Railroad (UPRR) insurance and other requirements applicable to any work performed by Berkeley Commons Owner with respect to the Developer’s portion of Project safety improvements.

The Developer and City agree that the Developer shall be responsible for making all payments to the UPRR. There is no fiscal impact to the City as a result of this agreement.

CURRENT SITUATION AND ITS EFFECTS

Within Project area there are two railroad crossings; one at Addison and the other at Bancroft. The projected impacts of the Berkeley Commons development will require improvements to safely facilitate all road users through these intersections.

The City, Developer and UPRR have agreed on the Scope of Work for Developer's Work Associated with Railroad Crossings at Addison Street and at Bancroft Way are shown in Exhibits 1 & 2 respectively, attached.

### BACKGROUND

A developer is constructing the Berkeley Commons research and development campus, which includes two buildings with a combined gross floor area of 470,986 square feet and two parking structures providing a total of 943 spaces on an approximately 8.5-acre industrial site owned by the developer.

Pursuant to Use Permit #ZP2019-0215, the Project is subject to certain conditions of approval which requires the Developer to coordinate with the UPRR, the California Public Utilities commission (CPUC) and the City to improve the safety of all travelers at the Addison Street and Bancroft Way at-grade railroad crossing near the Project site.

### ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

There are no environmental impacts expected from the agreement between the Developer and the City.

### RATIONALE FOR RECOMMENDATION

The UPRR does not enter into agreements with private entities. Therefore, the City will enter into an agreement with the UPRR on behalf of the Developer with the Developer agreeing to pay all the associated UPRR costs.

### ALTERNATIVE ACTIONS CONSIDERED

Since Union Pacific does not enter into agreements with private entities the City will act as the go-between between the developer and Union Pacific in order for the safety improvements to be implemented. If the City does not step in UPRR will not approve the project, therefore no alternatives were feasible.

### CONTACT PERSON

Wahid Amiri, Deputy Public Works Director, (510) 981-6396

Hamid Mostowfi, Transportation Division Manager, Public Works, (510) 981-6403

### Attachments:

1. Resolution
2. Berkeley Commons Agreement re allocation of costs for railroad crossing
3. Exhibit 1
4. Exhibit 2
5. Insurance and Bonding Requirements
6. Surety Bond

RESOLUTION NO. ##,###-N.S.

AGREEMENT: REIMBURSEMENT AGREEMENT WITH BERKELEYCOMMONS, LLC  
FOR BERKELEYCOMMON'S CONSTRUCTION OF PUBLIC FACILITIES

WHEREAS, Berkeley Commons is engaged in the development of certain real property located at 600 Addison Street in City of Berkeley; and

WHEREAS, Development of the project under the use permits requires construction of safety improvements which consist of Union Pacific Railroad crossings safety improvements at Addison Street crossing and at Bancroft Street crossing, collectively "Public Facilities" in the project area that will serve Berkeley Commons as well as public; and

WHEREAS, Within the development project area there are two railroad crossings; one at Addison and the other at Bancroft; and

WHEREAS, The impacts of the Berkeley Commons development will require improvements to safely facilitate all road users through these intersections; and

WHEREAS, Since Union Pacific does not enter into agreements with private entities the city will act as the go-between between the developer and Union Pacific in order for the safety improvements to be implemented; and

WHEREAS, The Developer acknowledges responsibility and will pay for all actual costs and expenses for the UPRR parties performance of the safety improvement work pertaining to the Developer's portion of the safety improvements at the two railroad crossings; and

WHEREAS, City of Berkeley will submit invoices for implementation of "Public Facilities" by Union Pacific to Berkeley Commons for payment directly to Union Pacific; and

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that a reimbursement agreement and any amendments with Berkeley Commons for payment of implementation of safety improvements by Union Pacific at railroad crossings pertaining to the Developer's portion of the safety improvements at Addison and Bancroft Streets is accepted. A record signature copy of said agreement and any amendments to be on file in the Office of the City Clerk.

**AGREEMENT RE ALLOCATION OF COSTS FOR RAILROAD CROSSING  
IMPROVEMENTS FOR BERKELEY COMMONS**

This Agreement Regarding Allocation of Costs for Railroad Crossing Improvements for Berkeley Commons (“Agreement”) is by and between Berkeley Commons Owner, LLC, a California limited liability company (“Developer”), and the City of Berkeley (“City”), and is effective this \_\_\_ day of \_\_\_\_\_, 2024.

**RECITALS**

- A.** Developer is developing a research and development campus known as the Berkeley Commons project, containing two buildings totaling 470,986 square feet of gross floor area and two parking structures that can accommodate 943 parking spaces on an approximately 8.4-acre industrial site owned by Developer (“Project”).
- B.** Pursuant to Use Permit #ZP2019-0215, the Project is subject to certain conditions of approval (each a “Condition”), specifically Condition No. 27, which requires Developer to coordinate with the Union Pacific Railroad (“UPRR”), the California Public Utilities Commission (“CPUC”), and the City to improve the safety of all travelers at the Addison Street and Bancroft Way at-grade railroad crossings near the Project site (together the “Crossings”). Developer and the other parties have reached a consensus regarding the improvements which UPRR and Developer each will make to the Crossings as required by Condition No. 27 (“Project Railroad Improvements”).
- C.** SteelWave CDS, LLC (“SteelWave”), pursuant to Use Permit #ZP2021-0096 associated with an unrelated property identified as 747/787 Bancroft Way, proposes to implement certain additional improvements at the Bancroft Way at-grade railroad crossing (“SteelWave Improvements”), in coordination with UPRR, the CPUC, and the City, to improve the safety of all travelers at such railroad crossing with respect to SteelWave’s development project on such property.
- D.** City and UPRR intend to enter into one or more Construction and Maintenance Agreements (each a “C&M Agreement”) pursuant to which City will agree to reimburse UPRR and/or UPRR’s third party consultants and contractors (collectively, the “UPRR Parties”) for actual costs incurred by the UPRR Parties (“Railroad Costs”) for all work performed by the UPRR Parties to (i) construct or install UPRR’s portion of the Project Railroad Improvements, (ii) monitor or perform any engineering work regarding Developer’s work on constructing or installing Developer’s portion of the Project Railroad Improvements, and (ii) monitor or perform any engineering work regarding SteelWave’s work on constructing or installing the SteelWave Improvements (collectively “Railroad Work”). One main purpose of this Agreement is to document the process pursuant to which Developer shall assume responsibility for all such Railroad Costs, in recognition of the fact that such costs (excluding those associated with the SteelWave Improvements) are Developer’s responsibility under Condition No. 27.
- E.** This Agreement is further intended to confirm that Developer and its contractor are responsible for complying with all UPRR insurance and other requirements applicable to any work performed by Developer and/or its contractor with respect to the Developer’s portion of the

Project Railroad Improvements, consisting of all “Project work” performed under the C&M Agreement (excluding the SteelWave Improvements).

**AGREEMENT**

1. Under each C&M Agreement, City (as “Political Body”) is responsible for one hundred percent (100%) of all actual costs and expenses for the UPRR Parties’ performance of the Railroad Work. Developer acknowledges that the Estimate, as such term is defined in a C&M Agreement, is only an estimate of the expected Railroad Costs, as further detailed and explained in the C&M Agreement. Developer and City hereby agree that Developer shall be responsible for making all payments to the UPRR Parties which City is obligated to make under the C&M Agreement, other than those associated with the SteelWave Improvements, on and subject to the terms of this Agreement.

2. Prior to the execution of any C&M Agreement between the City and UPRR intended to be subject to this Agreement, Developer shall furnish to the City a Faithful Performance Bond as described in **Exhibit A**.

3. Within five (5) days after receipt of any bill (progressive, final, or otherwise) from the UPRR Parties with respect to any portion of the Railroad Work, City shall deliver a copy of such bill by email to Developer at the email address(es) set forth in **Section 12** below, and shall simultaneously send a copy of such bill to Developer by regular mail at the street address(es) set forth in said **Section 12**. Developer agrees to reimburse UPRR or other UPRR Party within twenty-five (25) days after receipt of the emailed copy of each bill from City.

4. Developer acknowledges and agrees that Developer shall be responsible for performing, or causing its contractor to perform, the Project work. Developer further agrees that any contractor retained by Developer to perform any portion of the Project work carried out on property owned by UPRR shall comply with the conditions on such work required under the C&M Agreement. Without limiting the specificity of the foregoing, Developer shall require any contractor performing work on property owned by UPRR to execute UPRR’s then-current form of Contractor’s Right of Entry Agreement (“CROE Agreement”) and comply with the requirements set forth therein.

5. Developer shall require any contractor entering onto UPRR property to maintain all insurance required by UPRR under the CROE Agreement, or to be covered by an Owner Controlled Insurance Program (“OCIP”) policy providing such coverage. City acknowledges and agrees that such insurance requirements satisfy and supersede any insurance requirements which City would otherwise impose on such contractor and its work, except that Developer shall require its contractor’s or OCIP insurance to be endorsed as follows:

(a) For the commercial general liability and automobile insurance, the City (including its elected officials, employees, and agents) shall be named as additional insured, and the policy shall be endorsed accordingly.

(b) The contractor’s or OCIP insurance shall be primary to any other insurance, self-insurance or joint self-insurance available to the City with respect to any claim

arising out of this Agreement. Any insurance, self-insurance or joint self-insurance maintained by the City shall be excess of the contractor's insurance and shall not contribute with it.

(c) The contractor's or OCIP insurance will not be cancelled, limited or allowed to expire until after thirty (30) days' written notice has been given to the City, except in the event of nonpayment for premium, in which case ten (10) days' advance notice shall be required. During the term of this Agreement, the contractor shall not materially alter any of the policies or reduce any of the levels of coverage afforded thereby.

6. The laws of the State of California shall govern this Agreement. The Parties agree that venue for any dispute shall be Alameda County, California.

7. The terms of this Agreement shall not be altered or otherwise modified except by a written amendment to this Agreement executed by City and Developer.

8. Developer is, and at all times shall remain, an independent contractor solely responsible for all acts of its employees, agents, contractors, or subcontractors, including any negligent acts or omissions. Developer is not City's agent, and shall have no authority to act on behalf of the City, or to bind the City to any obligation whatsoever, unless the City provides prior written authorization to Developer.

9. If any part of this Agreement or the application thereof is declared invalid for any reason, such invalidity shall not affect the other terms of this Agreement which can be given effect without the invalid provision or application, and to this end the provisions of this Agreement are declared to be severable.

10. Failure of City to insist on strict performance shall not constitute a waiver of any of the provisions of this Agreement or a waiver of any other default of Developer.

11. This Agreement shall be binding on and inure to the benefit of the heirs, executors, administrators, successors, and assigns of the Parties hereto.

12. The terms and conditions of this Agreement and any documents incorporated by reference represent the entire agreement between the parties with respect to the subject matter of this Agreement. This Agreement shall supersede any and all prior agreements, oral or written, regarding the subject matter between City and Developer. No other agreement, statement, or promise relating to the subject matter of this Agreement shall be valid or binding except by a written amendment to this Agreement.

13. All notices and other communications which are required or may be given under this Agreement or any Exhibits hereto shall be in writing and shall be deemed to have been duly given (i) when received if personally delivered; (ii) upon receipt if sent for next day delivery by recognized overnight delivery service (e.g., FedEx); (iii) upon receipt, if sent by certified or registered mail, return receipt requested; and (iv) upon receipt, if the communication consists of a bill sent by email as permitted by **Section 2** and the bill is also sent by regular mail as required by **Section 2**. In each case notice shall be sent to the respective Parties as follows:

**To City:** Hamid Mostowfi  
Transportation Division Manager  
City of Berkeley  
1947 Center St., 4<sup>th</sup> Floor  
Berkeley, CA 94704  
Email: hmostowfi@berkeleyca.gov

**To Developer:** Berkeley Commons Owner, LLC  
c/o Nick Menchel, Lane Partners, LLC  
644 Menlo Avenue, Suite 204  
Menlo Park, CA 94025  
Email: nick@lane-partners.com

**With copy to:** Todd A. Williams  
Fennemore Wendel  
1111 Broadway, 24th Floor  
Oakland, CA 94607  
Email: toddwilliams@fennemorelaw.com

**14.** This Agreement may be executed in one or more counterparts, each of which shall be considered an original, but all of which together shall constitute one and the same instrument. An emailed or PDF or photocopy signature on this Agreement shall have the same legal effect as an original signature.

IN WITNESS WHEREOF, City and Developer have executed this Agreement as of the date set forth above.

Approved as to form:

**CITY OF BERKELEY**

\_\_\_\_\_  
Deputy City Attorney

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

*[Signatures continued on following page]*

**DEVELOPER**

Berkeley Commons Owner, LLC, a California limited liability company

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

Name: \_\_\_\_\_

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

Approved as to form:

\_\_\_\_\_  
Todd A. Williams  
Fennemore Wendel  
Attorneys for Developer

**Exhibit A**  
**Insurance and Bonding Requirements**

- 1.1 Prior to the execution of any C&M Agreement between the City and UPRR, Developer shall furnish to City satisfactory proof that Developer or any contractor intended to perform any Project work has insurance in accordance with the requirements of Section 5 of this Agreement.
- 1.2 Nothing herein contained shall be construed as limiting in any way the extent to which Developer or any of its contractors or subcontractors may be held responsible for payment of damages resulting from their operations.
- 1.3 If Developer or any contractor fails to maintain any required insurance, City may take out such insurance, and Developer agrees to reimburse City for any and all costs of obtaining such insurance.
2. Prior to the execution of any C&M Agreement between the City and UPRR, Developer shall furnish a Faithful Performance Bond in an amount not less than 110% of the cumulative sum of the Estimate, as such term is defined in each C&M Agreement subject to this Agreement, executed on the City of Berkeley Standard Performance Bond agreement form (See **Exhibit B**). Notwithstanding anything to the contrary contained in said standard form, City agrees to instruct the surety to release the bond promptly upon the latest to occur of (i) completion of Project Railroad Improvements to the satisfaction of City, and (ii) payment by Developer of all actual or expected Railroad Costs other than costs associated with the SteelWave Improvements. City shall provide such instruction regardless of the status of the SteelWave Improvements and regardless of whether City and SteelWave may have entered into a separate agreement regarding such costs or improvements.

Exhibit B  
SURETY BOND

KNOW ALL MEN BY THESE PRESENTS,

That we, \_\_\_\_\_, as Principal, and \_\_\_\_\_, a Corporation organized and existing under the laws of the State of \_\_\_\_\_ and authorized to transact surety business in the State of California, as Surety, are held and firmly bound unto the City of Berkeley (hereinafter called Obligee), in the sum of two million Dollars (\$2,000,000.00), for the payment whereof well and truly to be made and we each of us bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION of the above obligation is such that:

Whereas, the above-named bounden Principal entered into an Agreement re Allocation of Costs for Railroad Crossing Improvements for Berkeley Commons (“Contract”) dated \_\_\_\_\_, 2024 with the said Obligee to do and perform the following work, to-wit:

To coordinate with the Union Pacific Railroad (“UPRR”), the California Public Utilities Commission (“CPUC”), and Obligee to improve the safety of all travelers at the Addison Street and Bancroft Way at-grade railroad crossings near the Principal’s Project site, and to make all payments to UPRR and any associated parties which Obligee becomes obligated to make under certain Construction & Maintenance Agreements between UPRR and Obligee;

which Contract is hereby referred to, incorporated by reference, and made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE. THE CONDITION OF THE ABOVE OBLIGATION IS SUCH,

That if the above bounden Principal shall well and truly keep, do, pay and perform, each and every, all and singular, all the matters, provisions, undertakings, covenants, terms, conditions, agreements and things in said Contract set forth and specified to be by the said Principal kept, done, paid and performed at the time and in the manner in said Contract specified, and shall pay over, make good and reimburse to the above-named Obligee, all loss and damages which said Obligee may sustain by reason of failure or default, or breach on the part of said Principal, then this obligation shall be void; otherwise to be and remain in full force and effect.

Whenever Principal shall be, and is declared by Obligee to be in default under the Contract, the Obligee having performed Obligee’s obligations thereunder, the Surety may promptly remedy the default, or shall promptly complete the Contract in accordance with its terms, provisions, undertakings, covenants, agreements, clauses, and conditions

Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the Contract falls due.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the Obligee named herein or the heirs, executors, administrators or successors of Obligee.

If any action or law or in equity is brought to enforce or interpret the provisions of this bond, the prevailing party shall be entitled to reasonable attorney's fees in addition to any other relief to which it may be entitled.

SIGNED AND SEALED THIS \_\_\_\_\_ day of \_\_\_\_\_, 2024

\_\_\_\_\_

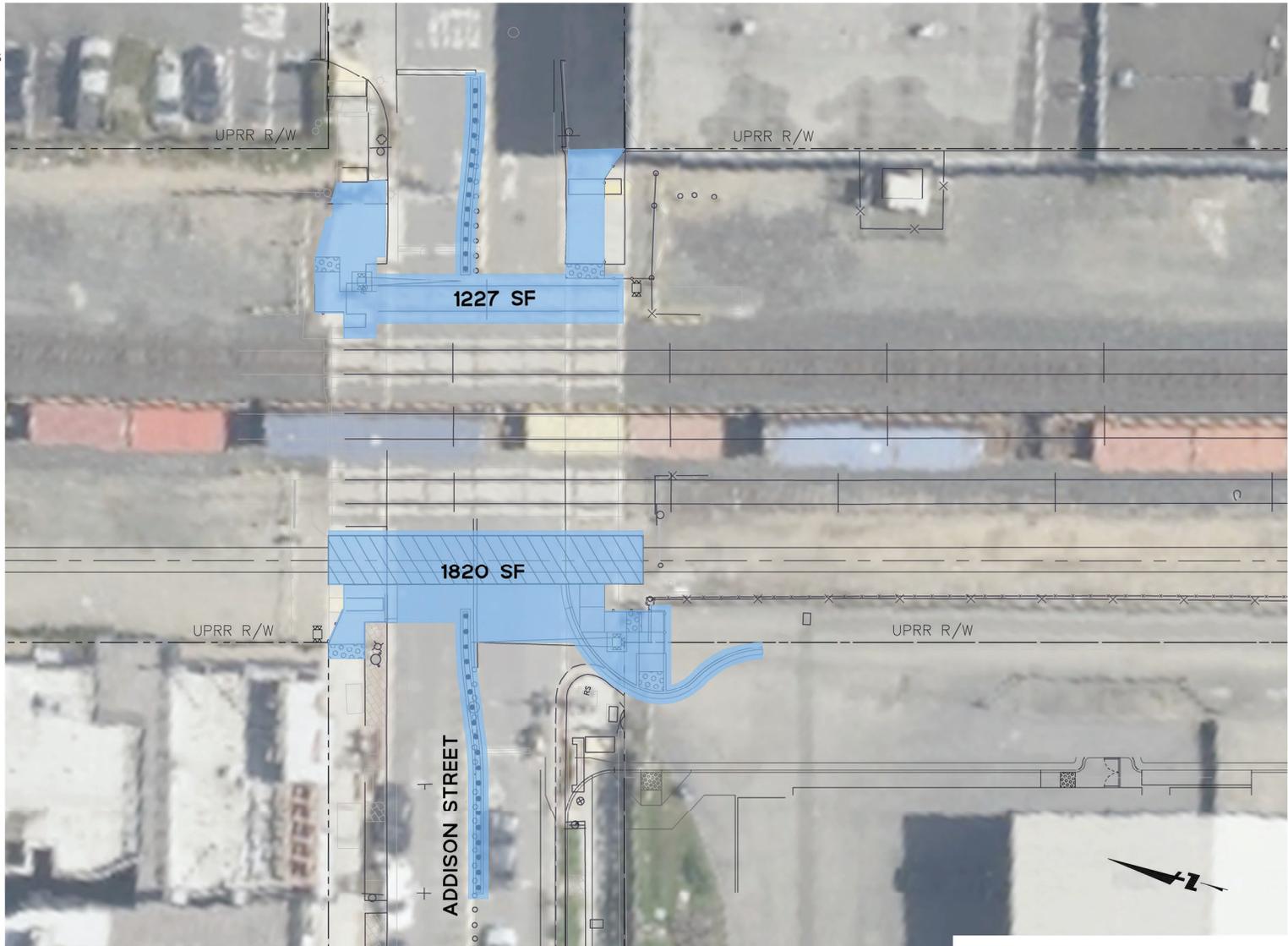
\_\_\_\_\_  
Principal

\_\_\_\_\_

\_\_\_\_\_  
Surety Attorney In Fact

LEGEND:

PROPOSED IMPROVEMENTS



**ADDISON STREET RAILROAD CROSSING IMPROVEMENTS**  
BERKELEY COMMONS RAILROAD IMPROVEMENTS

LEGEND:

PROPOSED IMPROVEMENTS



**BANCROFT STREET RAILROAD CROSSING IMPROVEMENTS**  
BERKELEY COMMONS RAILROAD IMPROVEMENTS

