

**CITY OF ALBANY  
CITY COUNCIL AGENDA  
STAFF REPORT**

Agenda date: July 6, 2009  
Reviewed by: BP

**Subject:** BART Agreements regarding Ohlone Greenway Earthquake Safety Project

**Report by:** Ann Chaney, Community Development Director

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**STAFF RECOMMENDATION**

That the City Council authorize the City Administrator to enter into the following Agreements with BART, as recommended by staff. In the event that there are any significant changes, staff will return to Council for authorization.

- Acquisition Agreement (includes Summary of Acquisition Agreement)
- Right of Entry (Exhibit “A”)
- Letter Agreement for Final Design and Construction

Note: The cities of Albany and El Cerrito are currently negotiating with BART on Agreement language that is primarily of a legal nature. As mentioned above, any significant changes will be brought back to the Council for consideration.

**BACKGROUND**

BART plans to seismically retrofit the columns under the BART tracks (Ohlone Greenway) in Spring 2010 that will require excavation around the columns. The project will affect the cities of Albany, Berkeley, El Cerrito and Richmond. Because enhancements to the Ohlone Greenway were identified in Albany’s Park and Open Space Master Plan, the City talked with BART about putting back landscaping and amenities more to the liking of the community. BART agreed to this idea, and in 2007, the City hired Gates and Associates to assist in developing a plan for the Greenway. In July 2008, the City Council adopted the Gates’ 35% plan, as modified by the Tree Task Force plan and reviewed by the Parks & Recreation Commission. In order to develop construction drawings and a cost estimate, this plan was forwarded to BART and its engineers (BKF Engineering). During the latter half of 2008, numerous meetings were held with BART staff, the engineers, and Gates and Associates, to help ensure that the details of the plan reflect the City’s wishes, and that any costs to the City, if any, be minimal.

In late 2008, BART and City staffs reviewed a detailed cost estimate for the Albany portion, which included repair and replacement costs directly attributable to the earthquake safety project, and costs attributable to Albany’s plan termed as “betterments”. What was unknown at the time was the amount BART would have to pay the City for use of Albany’s portion of the Greenway. In general, BART owns the land west of the east side of the bicycle path, and Albany owns the land east of the bicycle path. Given some

revisions which lowered the cost estimate, and given BART's recent independent appraisal for temporary use of the City-owned Greenway which totaled \$378,673, the difference was insignificant and BART agreed there would be no additional cost to the City for carrying out the City's plan. The original cost estimate for City "betterments" was \$616,000. The City will be responsible for an estimated \$49,000 cost to complete the Ohlone Greenway lighting project by converting temporary power to permanent power.

Key Features of the Ohlone Greenway project, when finished, include:

- 12 foot wide bicycle/pedestrian path with two 2-foot shoulder of decomposed granite on either side of the path
- Retention of pedestrian path (to be repaired where damaged)
- Tree replacement with species and location per Albany's plan
- 15 gallon replacement trees for existing trees 12" or less DBH; 24" box replacement trees for existing trees greater than 12" DBH
  - Low native understory planting areas
  - Low evergreen shrubs and ground cover plantings
  - Use of sod and mix of hydroseeded native grasses and wildflowers per plan
  - Area for future demonstration gardens
  - Removal of par course apparatus
- Salvaging existing street furnishings; replacing if damaged

Key Factors prior to and during Construction include:

- Providing the City a schedule with the locations of work for city review and approval
- City holidays and events have been identified for the contractor in order to avoid areas such as Solano Avenue during those times
- No direct contribution from the city is required for expansion of the greenway in that the "betterment" is offset by right of entry consideration (temporary construction easements)
- City identified trees to be removed (e.g., dead) or protected, and will prune affected trees
- Contractor and City will have a joint field walk to confirm the trees to be protected
- Protected trees to remain will be fenced off
- BART will install "purple" irrigation pipe in anticipation of future lines carrying recycled water via EBMUD
- BART will require its contractor to comply with Albany's permit requirements (Albany's permit requirements include no use of chemical pesticides)
- BART worked with the City on the detour plan during construction for vehicular, pedestrian and bicycle access
- BART will have a community relations group handle questions, outreach and complaints

Because BART will be working within the City's public right-of-way, Public Works prepared Encroachment Permit conditions. For example, staff has prepared a special condition to preclude the BART contractor from working on either end of the block bounded by Solano and Marin Avenue at the same time. If this situation occurred, it

would likely create simultaneous traffic delays on both of these arterial streets. Therefore, the City is requiring that the Greenway be divided into three segments, and that construction cannot occur in two adjacent segments at the same time. These segments are from Berkeley to a pier just north of Marin Avenue; from that point to Portland Avenue; and from Portland Avenue to El Cerrito. In addition, BART officials state that the Ohlone path will be opened upon completion, while landscape work may be continuing on either side of the path. The City Engineer, Public Works Manager and City Arborist/Urban Forester have been instrumental in reviewing the BART/BKF plans and preparing the Encroachment Permit conditions.

## **DISCUSSION**

The purpose of this staff report is to summarize the key elements of the Agreements between BART and Albany that are needed to enable BART to call for bids, hire a contractor, and construct the project. These include:

- Acquisition Agreement (includes Summary of Acquisition Agreement)
- Exhibit A – Right of Entry Agreement
- Letter Agreement for Final Design and Construction

Albany staff coordinated with the neighboring cities of El Cerrito and Berkeley on these agreements. Except for the scope and Right of Entry value, the Albany and El Cerrito agreements are virtually identical.

As of the writing of this report, the Albany and El Cerrito staffs have reached agreement with the BART staff on the Letter Agreement, and Right of Entry Agreement, but not the Acquisition Agreement. The outstanding issues in this latter agreement are primarily legal in nature (e.g., indemnification). A meeting is being scheduled with the relevant attorneys with the intent of resolving the remaining outstanding issues. Therefore, it is recommended that the City Administrator be authorized to enter into the Agreements, as recommended by staff. In the event there are significant changes, staff will return to the Council for authorization.

### Acquisition Agreement and Right of Entry

Staff worked with BART to determine those amenities and landscape features that BART will replace without cost to the City. It is clear that BART cannot improve the entire Greenway precisely as the City would like, and areas outside the Agreement will be subject to future planning conducted by the City. However, a number of major improvements will be seen as a result of the Earthquake Safety Project (see list above).

In order for BART to use City property along the Ohlone Greenway for construction purposes, BART is required to purchase temporary construction easements. An Acquisition Agreement (attached) will be used for this purpose. In return, the City will grant a Right of Entry (attached). For appraisal purposes, the Right of Entry is for a 42-month period, anticipated between December 2009 and June 2013, and is divided into separate parcels. Possession and use of each parcel (again for appraisal purposes) is

anticipated to be an average of seven (7) months within this 42-month period. It also requires BART to submit a project timeline for the City's approval that addresses the construction sequence of each city block, with the intent of having the least impact to the public. As noted above, the value of Albany's Right of Entry is \$378,673, based on a recent appraisal by BART. In lieu of payment of the Right of Entry value, BART will construct improvements in accordance with the concept plan approved by City Council, which is beyond the equivalent value of BART's required restoration.

Key features of the Acquisition Agreement include:

Article 3 - provides for the City assuming ownership and maintenance responsibility of the improvements upon the City's acceptance of the phased landscape revisions (except for items covered under the plant establishment period)

Article 4 – addresses what happens in the event of a breach by either the City or BART

Article 5 – contains a section regarding the environmental condition of the property

Article 6 – addresses Covenants and Indemnity

Article 7 – Insurance section (is included in both the Acquisition Agreement and Letter Agreement)

Article 8 – addresses such items as attorney's fees and noticing

#### Letter of Agreement

The Letter of Agreement defines how BART and the City will interface during the final design and construction of the Earthquake Safety Program. The Letter Agreement details the additional responsibilities of BART and the City for final design review and construction activities, reimbursement by BART to the City for plan review and inspection services, repair of local streets damaged by construction traffic, and other miscellaneous provisions.

The Letter of Agreement also specifies that BART or its contractors will subsequently apply to the City for all required encroachment permits for construction of the Earthquake Safety Program. BART will also provide a community relations liaison who will serve as the information point of contact regarding the status of the Program.

BART is scheduled to begin its 3 1/2-year retrofit around 2010. BART and the City will maintain close communication in regard to scheduling and determining the most efficient way for BART to complete the work with the least possible amount of disruption to users of the Ohlone Greenway. The City's Arborist is also prepared to work closely with BART and its contractor regarding the protection of trees to remain and the planting and care of proposed new trees.

#### **SUSTAINABILITY IMPACT**

Both the BART earthquake safety program and the improvements to be derived from the project (e.g. widened bicycle/pedestrian path) will enhance public safety and the environment by improving alternative modes of transportation that lead to a reduction in carbon emissions.

## **FINANCIAL IMPACT**

The appraised value of the Right of Entry is \$378,673. In lieu of payment by check or cash to the City by BART for this Right of Entry, BART will build the improvements approved by the City that are beyond the equivalent value of BART's required restoration. The City has, and will continue to incur direct costs associated with the review of plans by the City Engineer. Through Letter Agreement BART will reimburse the City for actual costs for time and materials to perform plan review and inspection, which should offset much, if not all of these costs.

During construction, the City will realize minor cost savings on maintenance of the Greenway. After construction, the new facilities will include a new pathway surface that will require less maintenance and additional irrigation and plant stock that will require more maintenance. However, the landscape was designed to keep maintenance costs to a minimum, and the eventual extension of recycled water will further reduce costs. Furthermore, BART will be responsible for a one-year plant establishment period that will further reduce long-term maintenance needs. On balance, City staff does not anticipate any significant change in maintenance costs along the Greenway due to the improvements being built for the City by BART.

### Attachments

Acquisition Agreement (includes Summary of Acquisition Agreement)

Right of Entry Agreement (Exhibit "A")

Letter Agreement for Final Design and Construction

Maps/plans will be available at the July 20, 2009 City Council meeting