

RESOLUTION NO. 2011-23

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK
AUTHORIZING AND APPROVING AN EASEMENT AGREEMENT WITH
SONOMA MARIN AREA RAIL TRANSIT (SMART),
RAILROAD AT SOUTHWEST BOULEVARD
FOR EASTSIDE TRUNK SEWER PHASE II, PROJECT No. 2007-02**

WHEREAS, Sonoma Marin Area Rail Transit District (SMART) is the owner of certain real property serving as a railroad right of way within the City of Rohnert Park; and

WHEREAS, the City proposes to install, construct and maintain the Eastside Trunk Sewer Phase II, Project No. 2007-02 crossing the railroad right of way; and

WHEREAS, city staff and SMART staff have negotiated in good faith an easement agreement for the purposes of addressing mutually agreeable covenants, terms, conditions and restrictions.

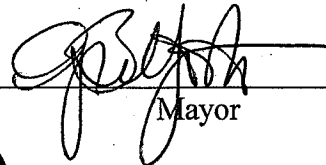
NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Rohnert Park that it does hereby authorize and approve an easement agreement, attached hereto and incorporated herein as Exhibit A, by and between SMART, a public agency created under California law, and the City of Rohnert Park, a California municipal corporation, for good and valuable consideration and in consideration of the mutual covenants, terms, conditions and restrictions contained therein.

BE IT FURTHER RESOLVED that the Mayor is hereby authorized and directed to execute this agreement in substantially similar form to the attached agreement for and on behalf of the City of Rohnert Park.

BE IT FURTHER RESOLVED that the City Clerk is hereby directed to complete a Certificate of Acceptance on behalf of the City of Rohnert Park and record the Easement Agreement with the County Recorder.

DULY AND REGULARLY ADOPTED this 22nd day of March, 2011.

CITY OF ROHNERT PARK



Mayor

ATTEST:



City Clerk



AHANOTU: <u>AYE</u>	CALLINAN: <u>AYE</u>	MACKENZIE: <u>AYE</u>	STAFFORD: <u>AYE</u>	BELFORTE: <u>AYE</u>
AYES: (5)	NOES: (0)	ABSENT: (0)	ABSTAIN: (0)	

RECORDING REQUESTED BY:
CITY OF ROHNERT PARK

WHEN RECORDED RETURN TO:
City of Rohnert Park
City Clerk
130 Avram Ave.
Rohnert Park, CA 94928

(Exempt from recording fee per Govt. Code § 27383)

APN: 143-061-068

EASEMENT AGREEMENT

This Easement Agreement ("Agreement") is made by and between the Sonoma Marin Area Rail Transit District, a Public Agency created under California law ("SMART"), and the City of Rohnert Park, a California municipal corporation ("CITY").

RECITALS

WHEREAS, SMART is the owner of certain real property (hereinafter referred to as the "SMART Property") serving as a railroad right-of-way in the County of Sonoma, that crosses through the City of Rohnert Park, California, identified as APN: 143-061-068, and more particularly described as follows:

All that certain real property situated in the County of Sonoma, State of California, being a portion of the lands of Sonoma-Marin Area Transit District, a public agency under California law, located and doing business in care of the Sonoma County Transportation Authority, as described by deed recorded under document number 2004-028629 recorded March 2, 2004, Sonoma County Records.

WHEREAS, with funding from a 1/4-cent sales tax measure approved by voters in 2008, SMART is authorized to design, construct, implement, operate, finance, maintain and manage a passenger rail system and a bicycle/pedestrian pathway from Cloverdale, California to Larkspur, California, a system with projected ridership of about 1.4 million passengers per year, the implementation of which entails extensive capital improvements, such as the construction of train passing sidings, trestle bridge replacements, drainage improvements, a rail maintenance facility, and 54 miles of Class I pathway and 17 miles of Class II pathway improvements ("SMART Project");

WHEREAS, CITY, as part of an approximately \$30 million capital improvement project to provide additional wastewater capacity for existing and future development in CITY, wishes to obtain a permanent easement consisting of a strip approximately 10 feet wide over a portion of the SMART Property where it crosses Southwest Boulevard near the intersection of Seed Farm Drive for the purposes of installing, constructing, and maintaining a sewer trunk line, which when encased will be approximately 42 inches in diameter and will be located approximately 15

feet below ground level ("Project").

NOW, THEREFORE, for good and valuable consideration and in consideration of the mutual covenants, terms, conditions and restrictions contained herein, SMART and CITY covenant and agree as follows:

A G R E E M E N T

1. Grant of Non-Exclusive Easement. SMART hereby grants to CITY a non-exclusive easement ("Easement") over a portion of the SMART Property as more particularly described in Exhibit "A" (Legal Description of Easement Area) and depicted in Exhibit "B" (Depiction of Easement Area). The Easement is of the nature, character and extent, and subject to the conditions, set forth in this Agreement.

2. Description of Easement over SMART Property. The Easement is a perpetual easement and right-of-way for the purpose of laying down, constructing, reconstructing, removing, replacing, repairing, maintaining, operating and using the Project, in accordance with improvement plans entitled: "CITY OF ROHNERT PARK EAST SIDE SEWER TRUNK PROJECT" in, under, along, and across the Easement Area, and the right at all times to enter in, over and upon the Easement Area for all purposes connected with the laying down, constructing, reconstructing, removing, replacing, repairing, maintaining, operating and using the Project; provided, however, that such use does not damage or interfere with the SMART Project or SMART's use of the SMART Property or the improvements existing thereon at any time for freight or passenger transit purposes and any purposes reasonably related thereto. Under this non-exclusive Easement, SMART reserves the right to install, construct, operate, and maintain both its existing improvements and any future improvements, whether or not owned or operated by SMART, on the SMART Property provided that such improvements do not materially interfere with CITY'S rights to use the Easement Area in accordance with this Agreement. The grant of easement herein is subject and subordinate to the rights of SMART and its successors and assigns to use the SMART Property in the performance of its governmental and proprietary functions. CITY acknowledges that this Easement is granted and given subject to all easements, covenants, conditions, encumbrances, deeds of trust, dedications, offers of dedication, restrictions, reservations and rights-of-ways of record or apparent from an examination of the Easement Area as of the date of recordation hereof.

3. Term. The Easement will continue in perpetuity so long as CITY is in compliance with the terms and conditions of this Agreement.

4. Maintenance of Easement. CITY agrees to maintain at all times all components of the Project within the Easement Area in good condition and repair at CITY's sole cost and expense. Any reconstruction or maintenance activities performed by CITY related to the Project and Easement may not interfere with SMART's continued use of the SMART Property or the Easement Area for any purpose.

5. Right of Entry Permit. CITY agrees to obtain from SMART a Right-of-Entry Permit to enter upon Easement Area for the performance of any routine work. CITY may designate a contractor to perform such work, in which case that contractor must obtain a Right-of-Entry Permit from SMART to enter upon Easement Area. SMART may not unreasonably

deny any Right-of-Entry Permit contemplated hereunder. CITY must give notice to SMART prior to commencement of any work, as required by the Right-of-Entry Permit. In the event of an actual or threatened emergency that may constitute a threat to the public health, safety or welfare arising from the operation of the Project that is detected by SMART, SMART's notice to CITY under Section 10 below will constitute authorization for CITY to enter into the Easement Area and perform any needed emergency work or repairs, and if such actual or threatened emergency is first detected by CITY, then CITY will not be required to obtain a Right-of-Entry Permit, but must, at minimum, provide telephonic notice of such emergency situation to SMART prior to performing any emergency work or repairs to the Project.

6. Fiber Optic Systems. CITY acknowledges that under this non-exclusive Easement SMART (or anyone acting with the permission of SMART) may construct, reconstruct, maintain, and operate fiber optic and other telecommunications systems ("Systems") in, upon, along, across, and beneath Easement Area and SMART rights-of-ways, including the Easement Area under which the Project is to be located, provided that any such grant of access, easement or license to such Systems does not interfere with CITY's rights to use the Easement Area in accordance with this Agreement.

In the event that SMART subsequent to the date of this Agreement proceeds with the installation of a System in furtherance of the SMART Project or its general operations and can affirmatively demonstrate (1) that the installation of such System cannot with reasonable commercial efforts be designed in a manner that avoids CITY's Project and use of the Easement Area and (2) that as a direct result of CITY's Project changes must be made to the design and installation of the System within the Easement Area and an area limited to five feet on either side of the Easement Area that result in increased design and installation costs to SMART in excess of \$1000, then CITY agrees to reimburse SMART for all reasonable additional design and installation expenses which would not have been incurred except by reason of CITY's use of Easement Area under this Agreement..

In addition to other provisions of this Agreement requiring CITY to give notice prior to commencing work, CITY must telephone Qwest Communications, Inc. at (800) 283-4237 (a 24-hour number) to determine whether a System is buried anywhere in the Easement Area. If there is, CITY will telephone the owner of the System designated by SMART, arrange for a cable locator, and make arrangements for relocation or other protection for the System prior to beginning any work in the Easement Area.

7. Project Markers. Project markers in a form and size satisfactory to SMART, identifying the facility and its owner, must be installed and maintained by and at the expense of CITY in the vicinity of the Easement Area and upon SMART property as SMART may reasonably approve. Such markers must be relocated or removed upon reasonable request of SMART without expense to SMART. The absence of markers does not constitute a warranty by SMART that there are no subsurface installations.

8. Waste or Nuisance; SMART's Rights in Property. CITY may not commit, suffer or permit the commission by its agents, employees, contractors or invitees of: (a) any waste or nuisance on the Easement Area; (b) any action, inaction or use of the Easement Area which interferes or conflicts with the use of the Easement Area by SMART or any authorized person in accordance with this Agreement; or (c) any action or inaction on the Easement Area in violation

of any law or ordinance. Except as otherwise provided in this Agreement, CITY may not undertake or permit any activity or use on the Easement Area that is not expressly permitted by this Agreement.

9. Indemnity. CITY agrees to defend, indemnify, hold harmless, and release SMART, its officers, agents, and employees, from and against any and all actions, claims, damages, liabilities, or expenses (collectively, "Claims") that may be asserted by any person or entity, including CITY, relating to or arising out of the Project or CITY's use of the Easement granted herein, provided, however, that this indemnity does not extend to that portion of any such Claim caused by SMART's sole negligence or willful misconduct. Without limiting the foregoing indemnity, CITY further agrees to defend and indemnify SMART for any damage to SMART's Property and any of SMART's chattels and improvements thereon as a result of the construction, operation, maintenance or repair of the Project. Further, should the Project in any way disrupt rail service, including both freight and passenger rail service, such that service may not be provided for any period of time, CITY agrees to defend and indemnify SMART for any Claims that may result from such disruption to the extent such Claims are caused by or directly attributable to the Project.

10. Relocation for Grade Separation. In the event that SMART is required to establish a grade separation at the intersection of Southwest Boulevard and the SMART right-of-way, and the grade separation requires relocation of the Project, CITY shall relocate the Project to accommodate the required grade separation at its sole cost and expense.

11. Enforcement. If, through inspection or otherwise, SMART determines that CITY is in violation of the provisions of this Agreement or that a violation is threatened, SMART shall give written notice to CITY of such violation and demand corrective action sufficient to cure the violation. If CITY fails to cure the violation within 14 days after receipt of notice thereof from SMART, or under circumstances where the violation cannot reasonably be cured within a 14 day period, CITY fails to begin curing such violation within the 14-day period, or CITY fails to continue diligently to cure such violation until finally cured, SMART may bring an action to enforce the provisions of this Agreement, enjoin the violation, recover damages and enforcement costs for the violation, and require restoration of the Easement Area to the condition that existed prior to the violation. If SMART reasonably determines that circumstances require immediate action to prevent or mitigate a material violation or threatened material violation of the provisions of this Agreement, SMART must immediately provide CITY with notice of such actual or threatened violation. In the event that CITY fails to promptly respond to such notice or initiate a cure within a reasonable period of time, not to exceed 48-hours or such shorter period as may be appropriate under the applicable emergency circumstances, then SMART may pursue its remedies and CITY agrees to indemnify SMART for all costs incurred in connection with such action in accordance with Section 9 of this Agreement.

12. Compensation for Easement. As consideration for the Easement granted herein, CITY agrees to pay SMART the sum of One-Thousand Dollars (\$1,000.00). Said sum is in settlement of all matters relating to CITY's acquisition of the Easement conveyed herein, including, but not limited to, any and all claims by SMART for relocation benefits, loss of goodwill, and any severance or other damages. CITY agrees to pay all applicable escrow, closing, and document recording fees incurred. CITY shall also reimburse SMART for any staff and attorney time to review and prepare documents associated with this Agreement. Upon

receipt of this Easement Agreement, duly executed and acknowledged, CITY shall execute an acceptance of the Easement Agreement and cause the Easement Agreement to be recorded with the Sonoma County Recorder.

13. Enforcement Discretion. Enforcement of the provisions of this Agreement shall be at the discretion of the parties, and any forbearance by a party to exercise its rights under this Agreement in the event of any breach of any provision of this Agreement by the other party shall not be deemed or construed to be a waiver by the party of such provision or of any subsequent breach of the same or any other provision of this Agreement or of any of the party's rights under this Agreement. No delay or omission by a party in the exercise of any right or remedy upon any breach by the other party shall impair such right or remedy or be construed as a waiver.

14. Access and Control. Except as otherwise expressly provided in this Agreement, SMART retains the exclusive right of access to and control over the Easement Area. Nothing contained in this Agreement shall be construed as precluding SMART's right to grant access to third parties in and across the Easement Area, except that any such grant of access shall not interfere or conflict with CITY's rights to use the Easement Area in accordance with the terms of this Agreement.

15. Successors. This Agreement shall be binding on and shall inure to the benefit of the parties hereto and their respective successors, heirs, assigns and transferees.

16. Amendment. If circumstances arise under which an amendment or modification of this Agreement would be appropriate, such amendment shall become effective only upon mutual consent of the parties. Any such amendment shall be in writing and recorded in the Office of the Sonoma County Recorder.

17. Notices. Any notice, demand, request, approval, or other communication that either party desires or is required to be given under this Agreement shall be in writing and may be given by personal delivery or by mail. Notices, demands, requests, approvals, or other communications sent by mail should be addressed as follows:

SMART: Sonoma-Marín Area Rail Transit
 Attn: Property Manager
 750 Lindaro St., Suite 200
 San Rafael, CA 94901

CITY: City of Rohnert Park
P.O. Box 1489
Rohnert Park, CA 94928
Attn: City Manager

and when so addressed, shall be deemed given upon deposit in the United States Mail, registered or certified, return receipt requested, postage prepaid. In all other instances, notices, demands, requests, approvals, or other communications shall be deemed given at the time of actual delivery. Changes may be made in the names and addresses of the persons to whom notices, demands, requests, approvals, or other communications are to be given by giving notice pursuant to this section.

18. Applicable Law and Forum. Interpretation and performance of this Agreement shall be governed by California law and any action to enforce the provisions of this Agreement or the breach thereof shall be brought and tried in the County of Sonoma.

19. No Third Party Beneficiaries. Nothing contained in this Agreement shall be construed to create and the parties do not intend to create any rights in third parties.

20. Integration. This Agreement is the final and complete expression of the agreement between the parties and any and all prior or contemporaneous agreements written or oral are merged into this instrument.

21. Captions. The captions in this Agreement have been included solely for convenience of reference. They are not a part of this Agreement and shall have no effect upon its construction or interpretation.

22. Survival of Agreement. This Agreement, including all representations, warranties, covenants, agreements, releases and other obligations contained herein, shall survive the closing of this transaction and recordation of any deed or other document related hereto.

23. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall continue in full force without being impaired or invalidated in any way.

24. Authority And Execution. Each person executing this Agreement on behalf of a party represents and warrants that such person is duly and validly authorized to do so on behalf of the entity it purports to bind and if such party is a partnership, corporation or trustee, that such partnership, corporation, or trustee has full right and authority to enter into this Agreement and perform all of its obligations hereunder.

24. Attorneys Fees. In the event either party pursues any right to enforce the provisions of this Agreement, the prevailing party shall have the right to collect all costs and expenses, including attorneys' fees, incurred by the prevailing party in enforcing the obligations of the other party under this Agreement, as fixed by the court.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed.

By SMART this _____ day of _____.

By CITY this _____ day of _____.

SONOMA-MARIN AREA RAIL TRANSIT DISTRICT:

Attest:

By: _____
Chair, Board of Directors

By: _____
Clerk, Board of Directors

Reviewed as to Substance:

By: _____
General Manager

Date: _____

Approved as to Form:

By: _____
Deputy County Counsel

Date: _____

CITY:

By: _____
Gina Belforte, Mayor

Attest:

By: _____
Judy Hauff, City Clerk

(signature blocks continued on next page)

Approved as to Form:

By: _____
City Attorney

Date: _____

By: _____
Right-of-Way Section Manager

Date: _____

EXHIBIT A

Legal Description of Easement Area

EXHIBIT A

All that certain real property situate in the County of Sonoma, State of California, being a portion of the lands of Sonoma-Marin Area Transit District, a public agency under California Law, located and doing business in care of the Sonoma County Transportation Authority, as described by deed recorded under document number 2004-028629 recorded March 2, 2004, Sonoma County Records, being more particularly described as follows:

PERMANENT EASEMENT

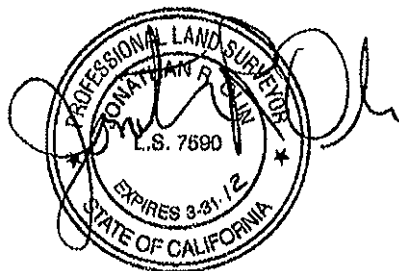
A strip of land 10 feet wide, the centerline of which is described as follows:

COMMENCING at the southwesterly corner of Lot "D" as shown on that certain Map entitled "Colegio Vista Unit 3" recorded May 3, 1973 in Book 184 of Maps, at Pages 47 through 49, Sonoma County Records, from which point the northwesterly corner of said Lot "D" bears North 25°39'40" West as shown on said Map; thence along the southeasterly prolongation of the westerly line of said Lot "D" also being the easterly line of said lands of Sonoma-Marin Area Transit District, South 25°39'40" East, 19.56 feet to the TRUE POINT OF BEGINNING; thence leaving said line, South 65°32'27" West, 60.01 feet to the westerly line of said lands of Sonoma-Marin Area Transit District and the terminus of said centerline.

Containing 600 square feet, more or less.

The sidelines of said strip shall be shortened or lengthened to terminate at the westerly and easterly lines of the said lands of Sonoma-Marin Area Transit District.

Basis Of Bearings: The westerly line of said Lot "D" taken as North 25°39'40" West as shown on said Map.

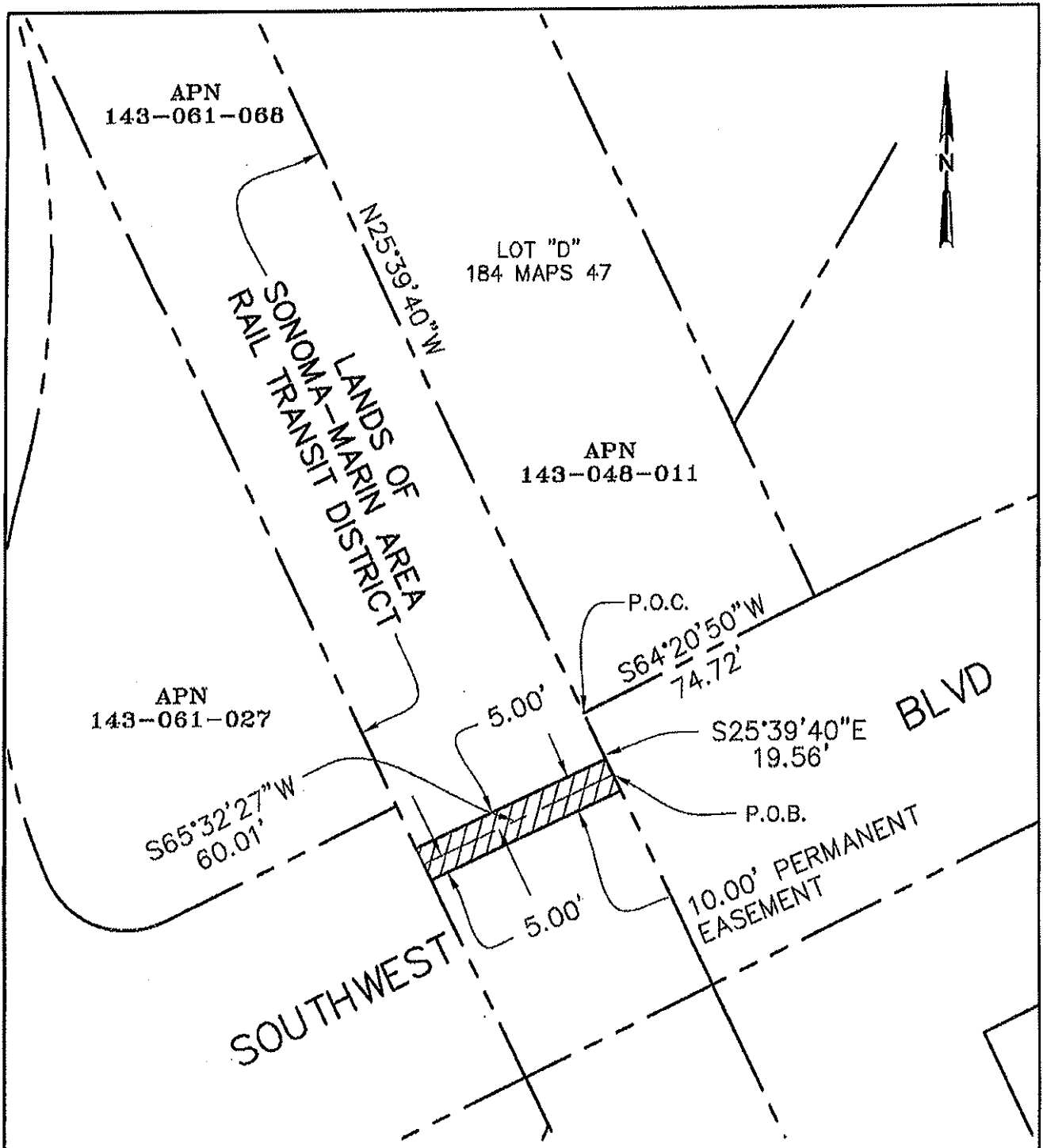


1/27/11

Jonathan R. Olin LS 7590
Expires 3/31/12
End of Description

EXHIBIT B

Depiction of Easement Area



LEGEND

P.O.C.=POINT OF COMMENCEMENT
 T.P.O.B.=TRUE POINT OF BEGINNING

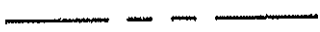


-  PARCEL LINE
-  CENTER LINE
-  PERMANENT EASEMENT AREA

EXHIBIT "B"

LANDS OF S.M.A.R.T.
 PERMANENT EASEMENT
 IN FAVOR OF
 THE CITY OF ROHNERT PARK



AREA
EASEMENT AREA 600 SF

Scale: 1"=40'	Date: 1/27/11
DWN. AEB CHK. JRD	APN 143-061-068
	SHEET NO. 1 OF 1