



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Rosalynn Hughey

SUBJECT: SEE BELOW

DATE: May 7, 2018

Approved

Date

5-10-18

COUNCIL DISTRICT: 3, 4 & 6

SUBJECT: PROGRAMMATIC AGREEMENT BETWEEN THE FEDERAL TRANSIT ADMINISTRATION AND THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER WITH THE CITY OF SAN JOSE AS A CONCURRING PARTY REGARDING THE BART SILICON VALLEY - PHASE II EXTENSION PROJECT IN SANTA CLARA COUNTY

RECOMMENDATION

Adopt a resolution to authorize the City Manager to execute the Programmatic Agreement (PA) with the Federal Transit Administration (FTA), the California State Historic Preservation Officer (SHPO), the California Department of Transportation, and the Santa Clara Valley Transportation Authority (VTA) with the City of San José as a Concurring Party for the Bay Area Rapid Transit (BART) Silicon Valley Phase II Extension Project in Santa Clara County.

OUTCOME

If the City Council adopts the resolution, the City Manager can sign the PA for the City as a Concurring Party.

EXECUTIVE SUMMARY

For consultation under Section 106 of the National Historic Preservation Act, FTA has invited the City of San José and other key stakeholders to be concurring parties to a PA for the BART Silicon Valley Phase II Extension Project in Santa Clara County (Project). The PA provides a written understanding of the consultation process and protocols to the parties that participate in consultation on historic properties that could be potentially affected by the Project. The City may sign the PA, but is not required to do so.

BACKGROUND

The VTA's BART Silicon Valley Extension is a planned 16-mile, six-station extension of the existing 104-mile BART system into San José and Silicon Valley. BART Phase I, the Berryessa Extension, is a 10-mile, two-station extension south from the Warm Springs Station in Fremont, through Milpitas to the Berryessa/North San José Station. Phase I construction is nearing completion, and systems testing is underway.

BART Phase II is a six-mile extension from the Phase I terminus at the Berryessa/North San José Station to the City of Santa Clara, including a five-mile long subway tunnel under Downtown San José. Four stations are planned for Phase II: 28th Street (Alum Rock), Downtown San José, Diridon Station, and the City of Santa Clara.

Current Status of the BART Phase II Project

On April 5, 2018, the VTA Board certified the Final Subsequent Environmental Impact Report (EIR) for the Phase II Extension and approved VTA's BART Silicon Valley Phase II Extension Project (Phase II Project) that consists of the BART Extension with Transit-Oriented Joint Development. On April 26, 2018, the BART Board of Directors accepted the EIR, adopted the related Findings and Statement of Overriding Considerations, and approved the BART Silicon Valley Phase II Extension Project. The project is in the "Project Development" phase of the FTA New Starts grant program process, and is on schedule to receive an environmental Record of Decision by Spring 2018. The project would then move into the New Starts engineering phase with the goal of receiving a Full Funding Grant Agreement from the FTA in 2019. Preconstruction work, such as boring or utility relocations, could begin as early as 2019, with the goal to complete the project and open for revenue service in 2026.

ANALYSIS

Section 106 of the National Historic Preservation Act

Congress enacted the National Historic Preservation Act in 1966, mandating that Federal decision makers consider historic properties during project planning. Historic properties are any prehistoric or historic districts, sites, buildings, structures, or objects that are eligible for or already listed in the National Register of Historic Places (NRHP). Also included are any artifacts, records, and remains (surface or subsurface) that are related to and located within historic properties and any properties of traditional religious and cultural importance to Tribes. Cultural resources that are not eligible for the NRHP or listed in the NRHP may be considered as part of the National Environmental Policy Act review.

FTA has determined that the BART Silicon Valley – Phase II Extension Project constitutes an "undertaking" that requires compliance with Section 106 of the National Historic Preservation Act and its implementing regulations in 36 Code of Federal Regulations § 800.

Undertakings for the purposes of Section 106 compliance are defined in the 36 Code of Federal Regulations § 800 regulations as:

A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal Agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval.

Section 106 requires Federal agencies to take into account the “effects” of their undertakings on historic properties and provide the Federal Advisory Council on Historic Preservation (ACHP) with a reasonable opportunity to comment. An effect under Section 106 is an alteration to the characteristics of a historic property that would otherwise qualify it for eligibility or inclusion in the NRHP. A Federal agency must assess the effects of the proposed undertaking on historic properties prior to applying the criteria of “adverse effect.” Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative (see Attachment – Glossary of Relevant Terms).

In addition, Federal agencies are required to consult on the Section 106 process with SHPO, Tribal Historic Preservation Offices (THPO), and Indian (Native American) Tribes, and local agencies that are key stakeholders. Federal agencies may also invite other Consulting Parties with a legal or economic relation to the undertaking or affected properties or concern with the undertaking’s effects on historic properties.

“Consultation” is defined in Section 106 regulations as “the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them regarding matters arising in the Section 106 process.” The consultation process is used to identify and evaluate historic properties potentially affected by an undertaking, assess effects, and seek ways to avoid, minimize, or mitigate any adverse effects on those properties. Although public involvement is required in the Section 106 process, consulting parties are provided a more active role in these steps than the general public.

Programmatic Agreement (PA)

A PA is a flexible tool that allows agencies to tailor the Section 106 process to their program or series of undertakings. PAs may be appropriate for complex Federal undertakings where effects to historic properties cannot be fully determined in advance. The PA’s main purposes can include: specifying the alternatives or mitigation agreed to by the signatories; identifying who is responsible for carrying out the specified measures; and serving, along with its implementation, as evidence of the agency’s compliance with Section 106 of the NHPA. A PA is a legally binding document that commits an agency both by statute and by Federal regulation to carry out the undertaking in accordance with the terms of the agreement in satisfaction of its responsibilities under Section 106.

Consulting-party involvement in the development of the subject PA enables the FTA to identify major policy and historic preservation issues and focus consultation in relevant areas.

Consulting parties who may sign the PA fit into one of three types: 1) signatories who have the

sole authority to execute, amend, or terminate the agreement, including FTA and SHPO; 2) invited signatories, who upon signing, have the authority to amend and terminate the agreement, including VTA and the California Department of Transportation; and 3) concurring parties (who are part of Consulting Parties as defined under Federal law) who are invited to concur in an agreement, but who do not have the authority to amend or terminate the agreement, and have no responsibility or obligations to implement any of the terms and conditions under the PA, including Indian Tribes, the City of San José, the City of Santa Clara, the Peninsula Corridor Joint Powers Board, and the South Bay Historical Railroad Society, which operates the Edward Peterman Museum of Railroad History in the Santa Clara Depot.

To execute the subject PA, FTA and SHPO sign and date the agreement. Once signed, the agreement is executed. FTA can seek the signatures of any invited signatories and concurring parties, but such an agreement is already executed and in effect.

Just as with an invited signatory's signature, a concurring party signature is not required to execute the agreement; a concurring signature is essentially an endorsement of the agreement to be part of the outreach and consulting process. The refusal to sign by any party asked to concur in the agreement does not prevent the agreement from being executed and effective.

Whether any or all other consulting parties are invited to concur in an agreement is at the FTA's discretion. Extending the offer to sign an agreement as a concurring party may be an effective way of recognizing the assistance and support that a party has provided for the actions being evidenced in the agreement and encouraging their ongoing support. The individual who signs the agreement on behalf of any invited signatory or concurring party should be one with approval authority for any responsibilities or duties assumed under the agreement, or authority to represent the broad interest of their organization.

FTA has consulted with SHPO regarding the undertaking's potential to affect historic properties in the Area of Potential Effects (APE) of the BART Phase II Extension project and has prepared a PA pursuant to Federal law to ensure the completion of the identification and evaluation of potential historic properties and the resolution of adverse effects on historic properties within the APE. In consultation with SHPO, FTA has determined that several sites in the City of San José are historic properties, contain archaeological features, and are eligible for inclusion in the NRHP, or are already included in the NRHP. The City of San José has been invited to sign the PA as a concurring party.

Measures to Avoid Effects

Through consultation and dispute resolution protocols established in the PA, FTA intends to implement the following measures to avoid effects on these historic properties:

- 1. Consult with Parties in the PA, and continue to consult with individuals and groups identified by the NAHC regarding the proposed Undertaking and its effects on historic properties.**

2. **Implement the Archaeological Resources Treatment Plan (ARTP).** With VTA, ensure that identification, evaluation, assessment of adverse effects, and mitigation or treatment to resolve adverse effects to historic properties of archaeological sites as a result of construction activities is conducted pursuant to VTA's BART Silicon Valley—Phase II Extension Project Archaeological Resources Treatment Plan (ARTP) (Far Western 2018). The evaluation will apply the AIMS-R approach—Association, Integrity, Materials, Stratigraphy, Rarity—which establishes principles for evaluating historic-era archaeological deposits.
3. **Ensure that all historic preservation and archaeological work is performed by, or under the direct supervision of a person or persons who meet, at a minimum, the Secretary of the Interior's Professional Qualifications Standards in the relevant field of study (i.e., by Qualified Professionals; (QPs)).**

Archaeological monitoring of construction activities will be conducted by a QP, familiar with the procedures and conditions presented in the ARTP. VTA will prepare cultural resources inventory and evaluation report(s) for resources evaluated in the identification efforts and ensure that copies of draft inventory and evaluation reports are submitted concurrently to all Parties. Archaeological materials will be treated in accordance with the laboratory procedures described in the ARTP. Upon completion of the final project documents, archaeological materials deemed suitable pursuant to the ARTP will be curated at a facility that meets federally recognized standards.

VTA will retain the services of QP(s) that meet the professional qualifications in architectural history or historic architecture to review project designs and design changes adjacent to architectural historic properties and within the San José Downtown Commercial District Historic District. VTA will include the Cities of San José and Santa Clara in the selection of the QPs. The QP's review is intended to ensure the preservation of character-defining features of the historic properties and historic fabric of the historic district. If the design changes have the potential to affect historic properties, FTA will consult with all Parties to this PA to develop and evaluate measures that could avoid, minimize, or mitigate adverse effects on historic properties. If inadvertent effects to architectural historic properties occur during or after construction as a result of this Undertaking, the damage will be documented and addressed pursuant to 36 Code of Federal Regulations § 800.

4. **Determine if design changes proposed by VTA affect additional areas that would necessitate modifications of the APE.** If FTA determines that design changes affect additional areas, FTA will submit a modified APE to SHPO and to all Parties to this PA and will follow the review process and dispute resolution process in the PA.
5. **Make determinations of eligibility.** Determinations will be in accordance with the NRHP criteria for all potential historic properties within the APE that are consistent with the Secretary of the Interior's (SOI) Standards and Guidelines for Archeology and Historic Preservation as outlined in Chapter 6 – Implementation Plan, Thresholds of Eligibility of the ARTP.

Consultation as a Concurring Party

As a Concurring Party to this PA, the City would be consulted on implementation of these measures as described above. Further, the PA sets forth a comprehensive process to resolve any disputes among the parties to the PA with the FTA being the final decision maker as it relates to the requirements under Section 106 of the National Historical Preservation Act. There is no legal requirement for the City to sign the PA as a concurring party. If the City does not sign this PA, consultation would not be assured. Consultation and coordination with the City, with or without the City agreeing to be a Concurring Party under the PA, will impact City staff resources, particularly in the Planning Division of the Department of PBCE, thereby imposing direct and indirect costs to the City. Consultation and coordination among the Parties to the PA are likely to be more effective under this PA, which might result in lesser expenditure of staff resources and lesser impacts to the City's historic properties.

EVALUATION AND FOLLOW-UP

Future Construction Planning

As discussed in the staff memorandum to the City Council dated September 7, 2017, the BART Phase II extension will involve years of major construction. VTA, in collaboration with the City, will need to undertake development of an extensive Construction Outreach and Management Program that effectively plans and anticipates potential impacts, identifies effective mitigations, and provides timely and effective outreach, communication, and issue resolution. In addition, the City will require VTA, and its contractors, to comply with the San José Municipal Code provisions outlining the permit requirements for construction in the street right-of-way (Chapter 13.36) and Construction Impact Mitigation Plans for major construction projects in the street right of way (Section 13.36.200).

The City and VTA expect to enter into a mutually beneficial Master Cooperative Agreement that would include broad construction outreach and impact mitigation plans and measures. The comment letter further outlined examples of the types of plans and actions the City expects VTA to take, to plan for, mitigate, and manage BART construction.

In spring 2018, FTA is scheduled to issue a Record of Decision (ROD) and the project would then transition from New Starts Project Development (2-year period) to New Starts Project Engineering. As the BART Phase II project approaches New Starts Project Engineering, staff intends to bring for City Council consideration a Master Cooperative Agreement, and associated reimbursement agreements, to fund City design review, permitting, and construction oversight and inspection activities that the City will need to provide for the project. Prior to the commencement of any construction activities, including pre-construction utility relocation in 2019, staff will bring forward VTA's project construction and sequencing plan and the Construction Outreach and Management Program for City Council review in fall 2018.

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PUBLIC OUTREACH

For the past three and a half years, VTA has engaged the station area communities through the 28th Street (Alum Rock) and Downtown/Diridon BART Project Community Working Groups on a wide range of project topics, including construction approaches and mitigation strategies. VTA has discussed its intent at community meetings in San José to open field offices at each station location to perform community outreach and resolve issues that arise.

The City of San José has worked in close coordination with VTA as it conducted outreach on the BART Phase II extension. City staff participated in Community Working Groups for the 28th Street (Alum Rock) and Downtown/Diridon stations over the past three years. These covered a wide range of project topics, including tunneling, construction approaches, and mitigation strategies.

This memorandum will be posted on the City's Council Agenda Website for the May 22, 2018 Council Meeting.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office, the Departments of Transportation and Public Works, and the staff at VTA.

COMMISSION RECOMMENDATION/INPUT

No commission recommendation or input is associated with this action.

CEQA

Not a Project, File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no physical changes to the environment.

/s/

ROSALYNN HUGHEY, Director
Planning, Building and Code Enforcement

For questions please contact Jenny Nusbaum, Principal Planner, at 408-535-7872.

Attachment:

1. Glossary of Relevant Terms

ATTACHMENT A

DEFINITIONS AND TRANSLATIONS

The Advisory Council on Historic Preservation (ACHP) advises Federal agencies to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) and the procedures in the regulations implementing Section 106, "Protection of Historic Properties" (36 C.F.R. Part 800), with steps taken to meet the requirements of the National Environmental Policy Act (NEPA). The ACHP recommends that participants in the Section 106 process and NEPA practitioners familiarize themselves with the vocabulary of the two processes in order to better understand the relationship between the requirements and to realize opportunities to avoid unnecessary duplication of effort. The following is a selection of defined terms with highlighted comparisons and contrasts regarding their use in the NEPA and NHPA contexts.

TERM/PHRASE	NEPA	NHPA
Cultural Resources (NEPA)/ Historic Properties (Section 106)	Effects considered under NEPA include cultural and historic. [40 C.F.R. § 1508.8]	Any prehistoric or historic district, site, building structure, or object included in or eligible for inclusion in the National Register of Historic Places. [36 C.F.R. § 800.16.(f)(1)] Properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations may be determined to be eligible for inclusion in the National Register. [16 U.S.C. 470a(d)(6)(A)]
Federal Action (NEPA)/ Undertaking (Section 106)	Federal actions includes activities entirely or partially financed, assisted, conducted, regulated, or approved by Federal agencies. Federal actions include adopting policies such as, rules or regulations; adopting plans; adopting programs; or approving projects; ongoing activities; issuing permits; or financing projects completed by another entity. [40 C.F.R. § 1508.18]	A project, activities, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval. [36 C.F.R. § 800.16(y)]
Affected Environment (NEPA)/ Area of Potential Effects (Section 106)	The environment of the area(s) to be affected or created by the alternatives under consideration. [40 C.F.R. § 1502.15]	The geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. [36 C.F.R. § 800.16(d)]
Significance (NEPA)/ Significant (Section 106)	Used to describe the level of impact a proposed action may have. Context and intensity have to be evaluated when assessing significance. Context is described below; intensity refers to the severity of the impact, in whatever context(s) it occurs.	Use to describe the historic resource that has certain character defining features that make it historically significant and therefore eligible for listing in the National Register with the requisite integrity. See National Register of Historic Places eligibility criteria. [40 C.F.R. § 60.4]
Significant Impact (NEPA)/ Adverse effect (Section 106)	See Significance (NEPA) above.	Alteration to the characteristics of a historic property that qualify it for inclusion in the National Register of Historic Places in a manner that would diminish its integrity. [36 C.F.R. § 800.5(a)(1)]

TERM/PHRASE	NEPA	NHPA
Public Involvement (NEPA)/ Consultation (Section 106)	Agencies shall provide notice of NEPA-related public hearings or meetings and the availability of environmental documents. They shall solicit information and comments from the public, and make EISs and their supporting documentation available subject to the Freedom of Information Act. [40 C.F.R. § 1506.6]	The process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them. [36 C.F.R. § 800.16(f)] Agencies are required to consult with certain parties (see below) and give the public an opportunity to comment.
Stakeholders (NEPA)/ Consulting Parties (Section 106)	The term “stakeholder” is used throughout this handbook to refer to potentially impacted entities, including members of the public, who participate in some part of the NEPA process.	Parties that have consultative roles in the Section 106 process, including SHPOs; THPOs; Indian tribes; Native Hawaiian organizations; representatives of local governments; applicants for Federal assistance, permits, licenses, and other approvals; the ACHP; and other individuals and organizations with a demonstrated interest in the undertaking or the affected historic properties. [36 C.F.R. § 800.2(c)]
Cooperating Agency (NEPA)/ Consulting Party (Section 106)	Any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposed (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. A state or local agency of similar qualifications or, when the effects are on a reservation, an Indian tribe, may by agreement with the lead agency become a cooperating agency. [40 C.F.R. § 1508.5]	See Consulting Party (Section 106) above.
Context	“Context” is the geographic biophysical, and social context in which the effects will occur. The CEQ regulations [40 C.F.R. § 1508.27] mention society as a whole, the region, and affected interests as examples of context. Considering contexts does not mean giving greater attention to, for example, effects on society as a whole than to effects on a local area. The importance of a small-scale impact must be considered in the context of the local area and not dismissed because it lacks impacts on larger areas.	“Historic context” or “context” is background information gathered to evaluate the historic significance of a historic property.
Mitigation	Mitigation includes avoiding the impact altogether by not taking a certain action or parts of an action; minimizing impacts by limiting the degree or magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and compensating for the impact by replacing or providing substitute resources or environments. [40 C.F.R. § 1508.20]	A measure to resolve specific adverse effects to identified historic property or properties by offsetting such effects. A nexus is required between the mitigation measure(s) and the adverse effects to historic properties.

TERM/PHRASE	NEPA	NHPA
Type of Effects/ Impacts	Effects and impacts are synonymous terms under NEPA. The magnitude, duration, and timing of the effect to different aspects of the human environment are evaluated in the impact section of an EA or an EIS for their significance. Effects can be beneficial or adverse, and direct, indirect, or cumulative. [40 C.F.R. § 1508.8]	An “effect” means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register of Historic Places. [36 C.F.R. § 800.16(i)] Adverse effects are described above and may include direct, indirect, or cumulative effects.
Cumulative Effects	The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertaking such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. [40 C.F.R. § 1508.7] An individual action may not have much effect, but it may be part of a pattern of actions whose combined effects on a resource are significant.	Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative. [36 C.F.R. § 800.5(a)(1)] While the Section 106 regulations do not define “cumulative effects,” the CEQ regulation definition of “cumulative impact” is analogous and instructive.
Indirect Effects	Reasonably foreseeable impacts that occur later in time or are further removed in distance from the proposed action. [40 C.F.R. § 1508.8] These are often referred to as “downstream” impacts, or future impacts.	Indirect effects may change the character of the property’s use or physical features within the property’s setting that contribute to its historic significance; are often audible, atmospheric, and visual effects; and may relate to viewshed issues.
Direct Effects	An impact that occurs as a result of the proposal or alternative in the same place and at the same time as the action. Direct effects include actual changes to cultural or historic resources. [40 C.F.R. § 1508.8]	A direct effect to a historic property would include demolition of a historic building, major disturbance of an archaeological site, or any other actions that occur to the property itself.