

APPENDIX F: DRAFT MEMORANDUM OF AGREEMENT

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Memorandum of Agreement
among the
Federal Transit Administration,
The Santa Clara Valley Transportation Authority,
The California State Historic Preservation Officer, and
The Advisory Council on Historic Preservation
for the
Silicon Valley Rapid Transit Corridor Project
BART Extension to Milpitas, San Jose and Santa Clara
in Alameda and Santa Clara counties, California

WHEREAS, the Federal Transit Administration (FTA) and Santa Clara Valley Transportation Authority (VTA) propose to construct a 16.3-mile extension of the Bay Area Rapid Transit (BART) rail system from just south of the future BART Warm Springs Station in Fremont to the Cities of Milpitas, San Jose and Santa Clara, including seven stations, plus one future station, along the alignment and a maintenance and vehicle storage yard in San Jose/Santa Clara (Undertaking); and

WHEREAS, the alternatives being considered for the Undertaking include the “New Starts” Baseline Alternative and a Minimum Operating Segment of the Undertaking; and

WHEREAS, FTA is the lead federal agency for this Undertaking, and the local lead agency is VTA; and

WHEREAS, FTA and VTA have consulted with the California State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR Part 800, regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f); and

WHEREAS, FTA and VTA have established the Archaeological Area of Potential Effects (APE) and Historic Architectural APE for the Undertaking in consultation with the SHPO; and

WHEREAS, FTA and VTA, in consultation with the SHPO, have elected to comply with Section 106 of the National Historic Preservation Act (NHP) for the Undertaking through execution and implementation of this Memorandum of Agreement (MOA) pursuant to 36 CFR 800.6(b) (1) and (c), so that the process of identifying archaeological properties eligible for inclusion in the National Register of Historic Places (NRHP) that may be affected by the Undertaking, determining the nature and scope of any such effects, and resolving any adverse effects of the Undertaking on the properties may proceed in the phased manner authorized by 36 CFR 800.4(b)(2); and

WHEREAS, properties eligible for inclusion in the NRHP are referred to in this MOA as “historic properties”; and

WHEREAS, this Undertaking may adversely affect built-environment historic properties listed or eligible for listing on the NRHP, including components of the Santa Clara Station (in Santa Clara), and the San Jose Downtown Commercial Historic District (in San Jose), and

WHEREAS, FTA and VTA have consulted the Native American Heritage Commission and interested Native American groups and individuals about the Undertaking and will ensure that

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these groups and individuals continue to be consulted and are provided with the opportunity to participate in the implementation of this MOA and of the Undertaking;

WHEREAS, FTA and VTA have consulted with 25 local government offices, historical organizations, and individuals interested in historic preservation in Alameda and Santa Clara counties about the Undertaking and its effects on historic properties, and have taken all comments received from these parties into account; and

WHEREAS, pursuant to 36 CFR 800.6(c)(3) the FTA and VTA have invited the South Bay Historical Railroad Society (SBRHS) and the Peninsula Corridor Joint Powers Board (JPB) to concur in this MOA; and

NOW, THEREFORE, FTA, VTA, the SHPO, and the Council agree that the Undertaking will be implemented in accordance with the following stipulations in order to take into account the effect of the Undertaking on any known or prospective historic properties that may be located within the Undertaking's Areas of Potential Effects (APE), and that these stipulations shall govern the Undertaking and all of its parts until this MOA expires or is terminated.

STIPULATIONS

I. Applicability of Stipulations

FTA will ensure that VTA implements the following stipulations.

The following stipulations apply only to the Undertaking and the Minimum Operating Segment, if implemented.

II. Standards

A. Professional Standards. All activities regarding history, historic preservation, historical archaeology and prehistoric archaeology that are carried out pursuant to this MOA will be carried out by or under the direct supervision of persons meeting, at a minimum, the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44738-9) in these disciplines.

B. Historic Preservation Standards. Historic Preservation activities carried out pursuant to this MOA shall meet the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716-44740) as well as standards and guidelines for historic preservation activities established by the SHPO. FTA shall ensure that all reports prepared by the VTA pursuant to this MOA will be provided to the other signatories and shall ensure that all such reports meet published standards of the SHPO, specifically, Preservation Planning Bulletin Number 4(a), "Archaeological Resources Management Reports (ARMR): Recommended Contents and Format" (December 1989).

C. Curation and Curation Standards. FTA and VTA shall ensure that, to the extent permitted under §§5097.98 and 5097.991 of the California Public Resources Code, the materials and records resulting from the historic preservation work stipulated in this MOA are curated in accordance with 36 CFR Part 79.

III. Archaeological Historic Properties

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A. Cultural Resources Treatment Plan. A comprehensive Cultural Resources Treatment Plan (CRTP) shall be developed by VTA. The CRTP shall describe the specific field methodologies to be utilized, including procedures to be followed if prehistoric and historic archaeological resources are encountered. The CRTP shall meet the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716-44740), take into account the Council's publication, *Treatment of Archaeological Properties: A Handbook* (Advisory Council on Historic Preservation 1980) as well as standards and guidelines established by the SHPO.

Upon completion in draft form, VTA will submit the Draft CRTP to all other signatories to this MOA for a 15 working day review period. VTA will incorporate any comments received during this review period into the final CRTP. If any party fails to submit their comments within fifteen working days, VTA shall assume that party's concurrence with the Draft CRTP.

The CRTP shall be appended to this MOA

B. Identifying Archaeological Historic Properties. VTA shall ensure that cultural resources discovered within the Archaeological APE are identified and evaluated pursuant to the CRTP.

C. Evaluating Archaeological Historic Properties. Evaluations performed hereunder shall conform to the procedural requirements of 36 CFR § 800.4(c)(1-2). Failure of any party consulted pursuant to 36 CFR § 800.4(c)(1-2) to respond within 21 days after receipt of a VTA request for comments on determinations of NRHP eligibility may be considered by VTA to constitute concurrence with VTA's proposed determination. The signatories agree that only cultural resources determined eligible for inclusion in the NRHP will be subject to further consideration under the terms of this MOA.

D. Determining and Treating Effects

1. VTA will make every reasonable effort to ensure that potential effects of any Undertaking activity on identified historic properties are avoided. Where such avoidance will be ensured, VTA may proceed with the Undertaking activity in accordance with any conditions or restrictions that may be needed to ensure avoidance. However, VTA shall not authorize construction to proceed hereunder unless and until any objections raised pursuant to the terms of this MOA have been resolved.

2. If VTA, in consultation with FTA, determines that effects of any Undertaking activity on historic properties cannot be avoided, and that such effects will be adverse, then the adverse effects will be resolved in part by implementing and completing the data recovery program prescribed by and set forth in the CRTP, or in any successor CRTP that is developed through consultation among the signatories following execution of this MOA. VTA may proceed with the Undertaking activity after the adverse effect of the Undertaking activity on the historic property has been resolved to the satisfaction of the FTA by completion of the fieldwork phase of CRTP implementation. However, VTA shall not authorize construction to proceed hereunder unless and until any objections raised pursuant to the terms of this MOA have been resolved.

E. Amending the CRTP

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1. Within 30 days following execution of this MOA, the signatories shall consult to review and amend the CRTP to their mutual satisfaction. The amended CRTP shall be implemented by VTA as required by the terms of this MOA.
2. Any signatory may, in writing, propose to the other signatories that the CRTP be further amended. Thereupon, the signatories will proceed to address the amendment proposal.
3. Amendment of the CRTP, as stipulated hereunder, will not require amendment of this MOA.

F. Reporting Requirements

1. VTA will submit on a semi-annual basis to the signatories, a written report documenting the activities carried out pursuant to this stipulation. These reports will be submitted until the fieldwork phases of this stipulation have been completed.
2. Within three months after VTA has determined that all fieldwork required by this stipulation have been completed, VTA will submit to the signatories and to Native American consulting parties a written summary report that comprehensively presents the results of all inventory, evaluation, and treatment actions carried out pursuant to this stipulation.
3. Within six months after VTA has determined that all fieldwork required by this stipulation have been completed, VTA will ensure preparation, and concurrent distribution to the other signatories and to Native American consulting parties for review and comment, of a written draft technical report that documents the results of implementing the CRTP. The reviewing parties will be afforded 30 days following receipt of the draft technical report to submit any written comments to VTA. Failure of these parties to respond within this time frame shall not preclude VTA from authorizing revisions to the draft technical report as VTA may deem appropriate. VTA will provide the reviewing parties with written documentation indicating whether and how the draft technical report will be modified in accordance with any reviewing party comments. Unless the reviewing parties object to this documentation in writing to VTA within 30 days following receipt, VTA may modify the draft technical report as VTA may deem appropriate. Thereafter, VTA may issue the technical report in final form and distribute this document as appropriate.
4. Copies of the final technical report documenting the results of CRTP implementation will be distributed by VTA to the other signatories, to Native American consulting parties, and to the appropriate California Historic Resources Information Survey (CHRIS) Regional Information Center, as appropriate.

G. Native American Consultation and Treatment of Native American Remains and Artifacts.

1. VTA will ensure that Native Americans are consulted during, and will be invited to participate in, the implementation of the terms of this MOA and in implementation of the Undertaking. The Native American consultation and participation herein prescribed shall be implemented by VTA in accordance with applicable sections of the CRTP and any successor CRTP.
2. The parties to this MOA agree that Native American burials and related items discovered during the implementation of the MOA and the Undertaking will be treated in accordance with

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the requirements of § 7050.5(b) of the California Health and Safety Code. If, pursuant to § 7050.5(c) of the California Health and Safety Code, the county coroner/medical examiner determines that the human remains are or may be of Native American origin, then the discovery shall be treated in accordance with the provisions of §§ 5097.98 (a) - (d) of the California Public Resources Code.

3. VTA will ensure that the expressed wishes of Native Americans are taken into consideration when decisions are made relating to the disposition of other Native American archaeological materials and records.

H. Confidentiality. The signatories to this MOA acknowledge that historic properties covered by this MOA are subject to the provisions of § 304 of the National Historic Preservation Act of 1996 and § 6254.10 of the California Government Code (Public Records Act), relating to the disclosure of archeological site information and having so acknowledged, will ensure that all actions and documentation prescribed by this MOA are consistent with §304 of the National Historic Preservation Act of 1996 and § 6254.10 of the California Government Code.

IV. Architectural Historic Properties

A. Protective Measures. VTA, in consultation with the owners of historic properties immediately adjoining the construction site, will develop and implement measures to protect the contributing elements of the Santa Clara Station property and the San Jose Downtown Commercial Historic District from damage by any aspect of the Undertaking. Such measures will include, but are not necessarily limited to those identified in Appendix A to this Agreement (Appendix A to be developed).

B. Repair of Inadvertent Damage. VTA will ensure that any damage to contributing elements of the Santa Clara Station property and the San Jose Downtown Commercial Historic District resulting from the Undertaking will be repaired in accordance with the Secretary of the Interior's Standards for Rehabilitation and Illustrated Guidelines for Rehabilitating Historic Buildings (U.S. Department of the Interior, National Park Service, 1992) and California Historical Building Code (CHBC). The condition of the contributing properties will be photographed prior to the start of the Undertaking to establish the baseline condition for assessing damage. To record these existing conditions, VTA will consult with property owners about the appropriate level of photographic documentation of building interiors and exteriors. A copy of this photographic documentation will be provided to the property owners, and will be retained on file by VTA. If repair of inadvertent damage is necessary, VTA will submit plans to the SHPO for review and comment to ensure conformance with the Secretary of the Interior's Standards for Rehabilitation.

C. Project Design. VTA will ensure that the design and implementation of project elements in and adjacent to the Santa Clara Station property and the San Jose Downtown Commercial Historic District will be consistent with the Secretary of the Interior's Standards for Rehabilitation and Illustrated Guidelines for Rehabilitating Historic Buildings (U.S. Department of the Interior, National Park Service, 1992) and California Historical Building Code (CHBC). The project elements include, but are not necessarily limited to, new construction introduced on and adjacent to the station and district, e.g. pedestrian linkage, signage, landscaping, and/or streetscape improvements options.

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D. HABS/HAER Documentation. Prior to the start of any work covered by this MOA, VTA will ensure that the components of the Santa Clara Station property and the San Jose Downtown Commercial Historic District that will be adversely affected by implementation of the Undertaking have been recorded in accordance with Historic American Buildings Survey /Historic American Engineering Record (HABS/HAER) standards. These components are:

- Santa Clara Station Depot
- Santa Clara Tower
- 28 East Santa Clara Street, San Jose

VTA shall contact the HABS/HAER branch of the National Park Service (NPS) at 1111 Jackson Street, Suite 700, Oakland, CA 94607 to obtain guidance regarding the production of the HABS/HAER documentation. VTA will consult with NPS regarding recordation level and specifications for completing additional documentation, if necessary. All documentation will be submitted to NPS and SHPO, with xerographic copies to the SBHRS, City of Santa Clara, City of San Jose, History San Jose, and other parties, as appropriate. VTA will ensure that these HABS/HAER records are accepted by NPS prior to carrying out any other treatment.

VTA will make the content of these HABS/HAER documents available for other mitigation measures, such as the interpretive mitigation below.

E. Documentary Videography. If contributing elements of the Santa Clara Station property and the San Jose Downtown Commercial Historic District will be demolished by the Undertaking, after recordation and at least 30 days prior to demolition, VTA will produce video documentation of the Santa Clara Station property and the San Jose Downtown Commercial Historic District. This video documentation will include footage of the exterior and interior of all contributing elements of the Santa Clara Station property and footage of the exterior of all contributing elements of the district and interior footage of the adversely affected contributing elements of the San Jose Downtown Commercial Historic District. Copies of the video documentation will be provided to SBHRS, City of Santa Clara and City of San Jose and other parties, as appropriate.

F. Salvage. If contributing elements of the Santa Clara Station property and the San Jose Downtown Commercial Historic District will be demolished by the Undertaking, after recordation and at least 30 days prior to demolition, VTA and appropriate museums and/or historical societies will have the opportunity to salvage architectural elements for re-use or curation. Items selected will be removed in a manner that minimizes damage.

Portable Interpretive Exhibit. VTA will consult with SBHRS, History San Jose, and other local history organizations, as appropriate, about their interest in the interpretive exhibits. If there is interest, VTA will consult with the design and engineering team for the Undertaking to ensure that portable interpretive exhibits are created that present the history of the Santa Clara Station property and of the San Jose Downtown Commercial Historic District. The interpretive exhibits may include, but are not necessarily limited to, portable interpretive displays that discuss the changes to the station and district over time, murals or other depiction of the properties, or other interpretive materials.

VTA will produce and install the exhibits if consultation results in agreement between VTA and the appropriate organization concerning the nature and extent of the exhibits before *<insert date>*.

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G. Reevaluation of the Santa Clara Station property. Within 180 days after FTA determines that the Undertaking has been completed, FTA, in consultation with SHPO, will re-evaluate the Santa Clara Station property, a property listed on the NRHP, and a historic district recognized by the City of Santa Clara. This re-evaluation will determine whether the National Register nomination should be amended, or whether the property no longer qualifies for listing and should be removed from the National Register. As appropriate, FTA will prepare and submit to the SHPO either an amended nomination or petition for removal, to be processed according to the procedures set forth in 36 CFR Part 60(60.14 and 60.15).

H. Reevaluation of the San Jose Downtown Commercial Historic District. Within 180 days after FTA determines that the Undertaking has been completed, FTA, in consultation with SHPO, will re-evaluate the San Jose Downtown Commercial Historic District, a property listed on the NRHP, and determine whether the National Register nomination should be amended or whether the district no longer qualifies for listing and should be removed from the National Register. As appropriate, FTA will prepare and submit to the SHPO either an amended nomination or petition for removal, to be processed according to the procedures set forth in 36 CFR Part 60(60.14 and 60.15).

J. Annual Report. VTA will prepare an annual report describing the status of its efforts to comply with the mitigation measures set forth in this stipulation. The annual report will be prepared following the end of the each fiscal year (July 1 to June 30) and will be distributed by VTA to all of the signatories to this MOA by July 30 of each year, until VTA determines that the applicable mitigation measures set forth in this stipulation have been completed.

V. Amendments, Termination and New Agreement

A. Amendments. If any signatory to this Agreement determines that an amendment to its terms should be made, the signatory will immediately consult with the other signatories to this MOA pursuant to 36 CFR 800.6 (c)(7). The parties to this MOA will consult for no more than 30 days to consider such amendment. This MOA may be amended only upon written concurrence of all signatory parties.

B. Termination. If the signatory parties to this MOA do not reach consensus on amendment(s) as provided for in this stipulation, VTA, FTA, the Council, or the SHPO may terminate it. The party terminating the MOA will in writing provide all other signatories with an explanation of the reasons for termination. If the MOA is not amended or terminated, the MOA will remain in effect as originally executed, and FTA will notify the other signatories that the attempt to reach consensus on amendment(s) was unsuccessful.

C. Action Following Termination. If this MOA is terminated by FTA, the Council, or the SHPO for any reason, and FTA determines that the Undertaking will proceed, FTA will execute a new MOA with the signatories under 36 CFR 800.6, or request the comments of the Council pursuant to 36 CFR 800.7(a).

VI. Dispute Resolution

Should any signatory to this MOA object to the manner in which the terms of this MOA are implemented, or to any documentation prepared in accordance with and subject to the terms of this MOA, FTA will consult further with the objecting party to resolve the objection. If FTA determines within fourteen (14) days of receipt that such objection cannot be resolved, FTA will

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forward all documentation relevant to the dispute to the Council, including FTA's proposed response to the objection. Within thirty (30) days after receipt of all pertinent documentation, the Council will:

- Advise FTA that it concurs in FTA's proposed response, whereupon FTA will respond to the objection accordingly; or
- Provide FTA with recommendations which FTA will take into account in reaching a final decision regarding the dispute.

Any Council comment provided in response to FTA's request will be taken into account by FTA with reference only to the subject of the dispute. The signatories' responsibilities to carry out all actions under this MOA that are not the subject of the dispute will remain unchanged. FTA may authorize VTA to implement that portion of the MOA which is subject to dispute after receiving and taking into account, any Council comments issued in accordance with this stipulation. FTA's decision regarding resolution of the dispute will be final.

If the Council fails to comment within the time period specified in this stipulation, FTA may authorize VTA to implement that portion of the MOA which is subject to dispute in accordance with FTA's proposed response to the objection as submitted to the Council, and after taking into account any SHPO or Council comments. FTA's decision regarding resolution of the dispute will be final.

VII. Public Objections

If any member of the public objects to the manner in which the provisions of this MOA are implemented, FTA shall immediately notify the other parties in writing of the objection and take the objection into account. FTA shall consult with the objecting party and, if the objecting party so requests, with any or all of the other signatories, for no more than thirty (30) calendar days. Within fourteen (14) calendar days following closure of the consultation period, FTA will render a decision regarding the objection and notify all parties of this decision in writing. In reaching a decision, FTA will take comments from all parties into account. No provision of this stipulation will preclude FTA from continuing to implement any provision of the MOA that is subject to public objection.

VIII. Duration

A. Reconsideration. If FTA determines that construction of the Undertaking has not been initiated within ten years following execution of this MOA, the signatories shall consult to reconsider its terms. Reconsideration may include continuation of the MOA as originally executed, amendment, or termination.

B. Terms Fulfilled. This MOA will be in effect through FTA's implementation of the Undertaking, and will terminate and have no further force or effect when FTA, in consultation with the other signatories, determines that the terms of this MOA have been fulfilled in a satisfactory manner. FTA will provide that other signatories with written notice of its determination and of termination of this MOA.

Execution and implementation of this MOA is evidence that FTA has afforded the Council a reasonable opportunity to comment of the Undertaking and the effect of the Undertaking on

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historic properties, and have themselves taken into account the effect of the Undertaking on historic properties.

Signatory Parties:

Federal Transit Administration

By: _____ Date: _____
Title:

California State Historic Preservation Officer

By: _____ Date: _____
Title:

Advisory Council on Historic Preservation

By: _____ Date: _____
Title:

Santa Clara Valley Transportation Authority

By: _____ Date: _____
Title:

Invited Concurring Parties:

City of San Jose (if applicable)

By: _____ Date: _____
Title:

City of Santa Clara (if applicable)

By: _____ Date: _____
Title:

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Invited Consulting/Concurring Parties:

South Bay Historical Railroad Society (if applicable)

By: _____ Date: _____
Title:

Peninsula Corridor Joint Powers Board (if applicable)

By: _____ Date: _____
Title:

California Department of Transportation, District 04 (if applicable)

By: _____ Date: _____
Title: