

BILL 4712

ORDINANCE 4712

AN ORDINANCE OF THE CITY OF WEST PLAINS, MISSOURI, (THE "CITY" OR "AGENCY") AUTHORIZING THE CITY ADMINISTRATOR TO EXECUTE AN AGREEMENT FOR CROSSING CLOSURE AND/OR ROADWAY IMPROVEMENTS (THE "AGREEMENT") WITH MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION, (THE "COMMISSION") AND BNSF RAILWAY COMPANY, A DELAWARE CORPORATION (THE "RAILROAD").

WHEREAS, City has received funding to construct a railroad overpass to be located within the boundaries of City, and

WHEREAS, for the successful completion of the railroad overpass project (the "Project") it will be necessary for City, Commission, and Railroad to cooperate in the construction of the Project, and

WHEREAS, City finds that City should enter into the Agreement in order to complete the Project, that the Project will promote public safety, and that the Project is in the public interest.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WEST PLAINS, MISSOURI, AS FOLLOWS:

Section 1: The City Administrator of City is authorized on behalf of City to execute the attached Agreement in substantially the same form as attached and such Agreement is incorporated as a part of this ordinance. Furthermore, the City Administrator of City is authorized to act as the representative of City in all aspects of dealing with Commission, Railroad, and all other parties in the execution and completion of the Agreement.

Section 2: This Ordinance shall be in full force and effect from and after the date of its final passage and approval.

PASSED AND APPROVED THIS 18 DAY OF July, 2022.

CITY OF WEST PLAINS, MISSOURI

By: Michael Topliff
Michael Topliff, Mayor

ATTEST:

Allison Skinner
Allison Skinner, City Clerk



June 9, 2022

To: Sam Anselm, City Administrator
Allison Skinner, City Clerk

From: Michael McMahon, Project/Grant Specialist

Re: MoDOT Agreement for Thornburgh Street Crossing Closure

Executive Summary

The purpose of this ordinance is to approve the agreement between MoDOT, BNSF and the City of West Plains for the closure of the rail crossing on Thornburgh Street.

Discussion

This agreement is for the closure of the Thornburgh Street rail crossing. This is part of the Independence Overpass project and was a known requirement at the time of application for funding. There are details that will be received from BNSF and updates will be made accordingly when that information is received.

This crossing will not be closed until after the U.S. Highway 160 Overpass has been completed.

*This agreement still needs to be reviewed by BNSF and it is possible that some of the clauses could change or perhaps have more specific details listed.

Fiscal Impact

There will be items installed to block off access to the rail crossing (outlined within the agreement) and the city will be responsible for some of the costs. This has not been fully outlined yet as it will be contingent on what BNSF requires specifically. The closure is part of the agreement to receive \$350,000 from BNSF toward the overpass project.

When the city receives the feedback from BNSF the fiscal impact will become clearer.

CCO Form: MO52
Approved: 04/04 (BDG)
Revised: 05/18 (MWH)
Modified: 02/22 (MWH)

Thornburgh St.
City of West Plains
Howell County
Crossing No. 667 836N
Job No. RRP 000S (627)

**MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION
AGREEMENT FOR CROSSING CLOSURE
AND/OR ROADWAY IMPROVEMENTS**

THIS AGREEMENT (this "Agreement") is entered into by the Missouri Highways and Transportation Commission (hereinafter, "Commission"), BNSF Railway Company (hereinafter, "Railroad"), and the City of West Plains, Howell County, Missouri (hereinafter, "Agency").

WITNESSETH:

WHEREAS, the closure of the existing grade crossing and vacation and transfer of any and all property rights across the Railroad right-of-way related thereto appears to be warranted in West Plains, Missouri, where Thornburgh St. intersects Railroad's Thayer North Subdivision at or near Railroad's Milepost 313.660 at a point more particularly known as DOT 667 836N (the "grade crossing").

NOW, THEREFORE, in consideration of the mutual covenants, promises and representations in this Agreement, the parties agree as follows:

(1) PURPOSE: The purpose of this Agreement is to provide for (i), the installation, maintenance, repair, and renewal of necessary safety improvements by Commission and Agency to accomplish the permanent abolishment and closure of the grade crossing to roadway traffic, and (ii) the vacation/surplus by Commission and Agency and transfer to the Railroad of any rights of the Commission and Agency related to the grade crossing (hereinafter, "Project").

(2) SCOPE OF OBLIGATIONS RELATED TO THE INITIAL CLOSURE WORK:

(A) In coordination with the Agency's and Commission's initial closure work described herein, the Railroad shall remove the existing crossing surface and crossbuck warning signs at the grade crossing; provided that the installation of permanent barricades described in Subsection (2)(B) have been fully completed (or temporary barricades providing substantially similar functionality are in place prior to the completion of the work described in Subsection (2)(B)) and after bridge A9252 carrying Missouri Route 17 (160) over the Railroad is open to traffic.

(B) The Agency shall vacate/surplus the Agency's property rights in and to the Railroad right-of-way. The Agency shall be responsible for the installation of a

permanent barricade consisting of Type A or D guardrail with Type IV object markers across the roadway approach to the grade crossing at the boundary of the Railroad's right-of-way (but not on the Railroad's property) on both sides of the crossing; obliterating the existing roadway approach on both sides of the crossing up to the track tie ends; removing the existing advance warning signs along each approach to the grade crossing.

(3) FUNDING AND APPORTIONMENT:

(A) The Railroad shall assume responsibility for one hundred percent (100%) of the costs of the work described in Subsection (2)(A) of this Agreement, using the Railroad's own funds.

(B) The Agency shall assume responsibility for one hundred percent (100%) of the costs of the work described in Subsection (2)(B) of this Agreement, using the Agency's own funds.

(4) COST OF PROJECT: The cost of the Project shall be the total monies expended by the Railroad, and Agency to complete the work and obligations described herein, together with the costs payable by the Railroad and by the Agency in the amounts described in Section (3) of this Agreement.

(5) ADDITIONAL REQUIREMENTS RELATED TO THE INITIAL CLOSURE WORK:

(A) The Railroad, upon receipt of notification from the Commission, shall furnish all labor and material and complete the work described in Subsection (2)(A) of this Agreement, in accordance with (i) the Ordered Due Date of the Commission's Administrative Order pursuant to Section 389.610, RSMo ("Administrative Order"), (ii) to the extent applicable, in accordance with that certain Master Agreement between the Railroad and the Commission, dated May 12, 1980 (the "Master Agreement"), and, (iii) to the extent applicable, in accordance with the rules and regulations contained in 23 CFR Part 140 Subpart I and 23 CFR Part 646 Subpart B issued by the Federal Highway Administration.

(B) The Agency shall complete its respective performance of the work described in Subsection (2)(B) of this Agreement, in accordance with the Ordered Due Date of the Administrative Order approving and authorizing the Project described in this Agreement.

(C) All traffic control devices installed by the Agency pursuant to this Agreement shall be installed in substantial compliance with the applicable provisions of the *Manual on Uniform Traffic Control Devices* (MUTCD) (2009 Edition), published by the Federal Highway Administration.

(6) FORCE ACCOUNT AND NON-FORCE ACCOUNT WORK: The Railroad will furnish all of the material and do all of the work to be performed by the Railroad with

its own forces, or such work may be done by a contractor paid under a contract let by the Railroad, and, if applicable, in compliance with provisions of 23 CFR Chapter I, Subchapter B, Part 140, Subpart I and Chapter 34 RSMo. Said Title 23 Code of Federal Requirements (23 CFR) and Chapter 34 RSMo is by reference made part of this Agreement, but only to the extent such provisions are applicable.

(7) MAINTENANCE AND OPERATION: After the completion of the initial closure work, the Agency shall maintain, repair and renew the respective permanent barricade installed in Subsection (2)(B), using the Agency's own funds.

(8) AGENCY OBLIGATION: The Agency in coordination with the Railroad hereby agrees to cooperate in the handling of traffic during construction.

(9) AMENDMENTS: Any change in this Agreement, whether by modification or supplementation, must be accomplished by a formal contract amendment signed and approved by the duly authorized representatives of the Railroad, the Commission, and the Agency.

(10) INDEMNIFICATION BY AGENCY:

(A) The Agency shall defend, indemnify and hold harmless the Commission, including its members and department employees, from any claim or liability whether based on a claim for damages to real or personal property or to a person for any matter relating to or arising out of the Agency's performance of its obligations under this Agreement.

(B) The Agency will require any contractor procured by the Agency to work under this Agreement:

1. To obtain a no cost permit from the Commission's district engineer prior to working on the Commission's right-of-way, which shall be signed by an authorized contractor representative (a permit from the Commission's district engineer will not be required for work outside of the Commission's right-of-way); and

2. To carry commercial general liability insurance and commercial automobile liability insurance from a company authorized to issue insurance in Missouri, and to name the Commission, and the Missouri Department of Transportation and its employees, as additional named insured's in amounts sufficient to cover the sovereign immunity limits for Missouri public entities (\$500,000 per claimant and \$3,000,000 per occurrence) as calculated by the Missouri Department of Insurance, Financial Institutions and Professional Registration, and published annually in the Missouri Register pursuant to Section 537.610, RSMo.

(C) In no event shall the language of this Agreement constitute or be construed as a waiver or limitation for either party's rights or defenses with regard to each party's applicable sovereign, governmental, or official immunities and protections as

provided by federal and state constitution or law.

(11) NON-EMPLOYMENT OF UNAUTHORIZED ALIENS: Pursuant to Section 285.530, RSMo, no business entity or employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Missouri. As a condition for the award of any contract or grant in excess of five thousand dollars by the State or by any political subdivision of the State to a business entity, or for any business entity receiving a state-administered or subsidized tax credit, tax abatement, or loan from the state, the business entity shall:

(A) By sworn affidavit and provision of documentation, affirm its enrollment and participation in a federal work authorization program with respect to the employees working in connection with the contracted services. E-Verify is an example of a federal work authorization program. The business entity must affirm its enrollment and participation in the E-Verify federal work authorization program with respect to the employees proposed to work in connection with the services requested herein by providing acceptable enrollment and participation documentation consisting of **completed** copy of the E-Verify Memorandum of Understanding. For business entities that are not already enrolled and participating in a federal work authorization program, E-Verify is available at http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm.

(B) By sworn affidavit, the Railroad affirms that it does not knowingly employ any person who is an unauthorized alien in connection with the contracted services. A copy of the affidavit referenced herein is provided within this document, attached as **Exhibit A**.

(12) WAIVER OF HEARING ON ISSUANCE OF ADMINISTRATIVE ORDERS: This Agreement is made subject to approval of the proposed Project by a final administrative order issued by the Missouri Highways and Transportation Commission, or by the Missouri Administrative Hearing Commission (hereinafter "AHC"), in accordance with Section 389.610, RSMo Supp. 2004. With reference to the issuance of that administrative order, the Railroad, the Agency and the Commission stipulate that the construction of the Project as described in this Agreement will promote public safety, and will not adversely affect public necessity. The Railroad and the Agency each consent that the Commission or the AHC, or both, may issue administrative orders approving and authorizing the construction of this Project in conformity with the provisions of this Agreement, and the Railroad and the Agency each waives its right to notice and an opportunity for hearing before the issuance of these administrative orders.

(13) NONDISCRIMINATION ASSURANCE: With regard to work under this Agreement, the Railroad and Agency agree as follows:

(A) Civil Rights Statutes: The Railroad and Agency shall comply with all state and federal statutes relating to nondiscrimination, including but not limited to Title VI and Title VII of the Civil Rights Act of 1964, as amended (42 USC 2000d and 2000e, *et seq.*), as well as any applicable titles of the Americans with Disabilities Act. In addition,

if the Railroad or Agency are providing services or operating programs on behalf of the Department or the Commission, it shall comply with all applicable provisions of Title II of the Americans with Disabilities Act.

(B) Administrative Rules: The Railroad and Agency shall comply with the administrative rules of the United States Department of Transportation relative to nondiscrimination in federally-assisted programs of the United States Department of Transportation (49 CFR Subtitle A, Part 21) which are herein incorporated by reference and made part of this Agreement.

(C) Nondiscrimination: The Railroad and Agency shall not discriminate on grounds of the race, color, religion, creed, sex, disability, national origin, age or ancestry of any individual in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The Railroad and Agency shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices.

(D) Solicitations for Subcontracts, Including Procurements of Material and Equipment: These assurances concerning nondiscrimination also apply to subcontractors and suppliers of the Railroad and Agency. These apply to all solicitations either by competitive bidding or negotiation made by the Railroad and Agency for work to be performed under a subcontract including procurement of materials or equipment. Each potential subcontractor or supplier shall be notified by the Railroad and Agency of the requirements of this Agreement relative to nondiscrimination on grounds of the race, color, religion, creed, sex, disability or national origin, age or ancestry of any individual.

(E) Information and Reports: The Railroad and Agency shall provide all information and reports required by this Agreement, or orders and instructions issued pursuant thereto, and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Commission or the United States Department of Transportation to be necessary to ascertain compliance with other contracts, orders and instructions. Where any information required of the Railroad or Agency is in the exclusive possession of another who fails or refuses to furnish this information, the Railroad or Agency shall so certify to the Commission or the United States Department of Transportation as appropriate and shall set forth what efforts it has made to obtain the information.

(F) Sanctions for Noncompliance: In the event the Railroad or Agency fails to comply with the nondiscrimination provisions of this Agreement, the Commission shall impose such contract sanctions as it or the United States Department of Transportation may determine to be appropriate, including but not limited to:

1. Withholding of payments under this Agreement until the Railroad and Agency complies; and/or
2. Cancellation, termination or suspension of this Agreement, in

whole or in part, or both.

(G) Incorporation of Provisions: The Railroad and Agency shall include the provisions of section (13) of this Agreement in every subcontract, including procurements of materials and leases of equipment, unless exempted by the statutes, executive order, administrative rules or instructions issued by the Commission or the United States Department of Transportation. The Railroad and Agency will take such action with respect to any subcontract or procurement as the Commission or the United States Department of Transportation may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided that in the event the Railroad and Agency becomes involved or is threatened with litigation with a subcontractor or supplier as a result of such direction, the Railroad and Agency may request the United States to enter into such litigation to protect the interests of the United States.

(14) COMMISSION REPRESENTATIVE: The Commission's Multimodal Operations Division Director is designated as the Commission's representative for the purpose of administering the provisions of this Agreement. The Commission's representative may designate by written notice other persons having the authority to act on behalf of the Commission in furtherance of the performance of this Agreement.

(15) ASSIGNMENT: The Railroad or Agency shall not assign, transfer, or delegate any interest in this Agreement without the prior written consent of the Commission.

(16) LAW OF MISSOURI TO GOVERN: This Agreement shall be construed according to the laws of the State of Missouri. The Railroad and Agency shall comply with all applicable local, state and federal laws and regulations relating to the performance of this Agreement.

(17) VENUE: It is agreed by the parties that any action at law, suit in equity, or other judicial proceeding to enforce or construe this Agreement, or regarding its alleged breach, shall be instituted only in the Circuit Court of Cole County, Missouri.

(18) CANCELLATION: The Commission may cancel this Agreement at any time for a material breach of contractual obligations by providing the Railroad and the Agency with written notice of cancellation after providing written notice thereof and a reasonable cure period thereafter. Should the Commission exercise its right to cancel this Agreement for such reasons, cancellation will become effective upon the date specified in the notice of cancellation sent to the Railroad and the Agency.

(19) AUDIT OF RECORDS: The Railroad must maintain all records relating to this Agreement, including but not limited to invoices, payrolls, etc. These records must be available at all reasonable times at no charge to the Commission and/or its designees or representatives during the period of this Agreement and any extension, and for three (3) years after the date of final payment made under this Agreement.

(20) RAILROAD NOTIFICATION: At least five (5) days prior to the commencement of any work described in Subsection (2)(A) of this Agreement to be performed by the Railroad, the Railroad shall notify the Commission and the Agency of the date it plans to commence said work.

(21) AUTHORITY TO EXECUTE: The signers of this Agreement warrant that they are acting officially and properly on behalf of their respective institutions and have been duly authorized, directed and empowered to execute this Agreement.

*Remainder of Page Intentionally Left Blank; Signatures and Execution Appear on
Following Page*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly appointed officials.

Executed by Agency on _____(DATE).

Executed by Railroad on _____(DATE).

Executed by Commission on _____(DATE).

MISSOURI HIGHWAYS AND
TRANSPORTATION COMMISSION

RAILROAD

By _____

Title _____

Title _____

ATTEST:

Agency

Commission Secretary

By Saul Hall

Title City Administrator

APPROVED AS TO FORM:

Senior Administrative Counsel

ATTEST:

By Aedison Skinner

Title City Clerk

Approved as to Form:

By _____

Title _____

Ordinance No. 4712

Exhibit A

Annual Worker Eligibility Verification Affidavit

[to be attached hereto]

