

Attachment 1

DRAFT
JANUARY 21, 2011

INTERLOCAL AGREEMENT BETWEEN PORT OF SEATTLE AND CITY OF AUBURN FOR M STREET SE GRADE SEPARATION

This Interlocal Agreement (“Agreement”) is made and entered into by the City of Auburn, a municipal corporation of the State of Washington, hereinafter called the “City”, and the Port of Seattle, a municipal corporation of the State of Washington, hereinafter called the “Port”. As used in this Agreement, “Project” means the construction of those elements associated with the grade separation of M Street SE from the Burlington Northern Santa Fe Railway (BNSF) Stampede Pass rail line that benefit the movement of freight and goods as further described in Section 1.2. The Port and the City are also referred to in this Agreement collectively as “the Parties”, and individually as a “Party”.

RECITALS

WHEREAS, the assurance of continuing freight movement throughout Puget Sound is an issue of critical strategic importance to the City and to the Port.

WHEREAS, the Port, the State of Washington (State), King County (County), the Port of Tacoma, the City, and other local jurisdictions have developed and signed the 2002 Freight Action Strategy Memorandum of Understanding for Phases I and II of the FAST Corridor (“FAST MOU”) which collectively commits approximately Two Hundred and Sixty Three Million Dollars (\$263,000,000.00) for grade separation and other road and rail improvements listed as FAST Corridor Phase II projects (See Exhibit A for a copy of the agreement and the Resolution adopting the agreement);

WHEREAS, the Project is listed on Attachment B to the 2002 FAST MOU (included in Exhibit A of this document) among the FAST Corridor Phase II projects for immediate implementation;

WHEREAS, the Project, a grade separation of M Street SE in Auburn from the BNSF Stampede Pass rail line, will provide substantial benefits to the Port in the following ways. It will:

- Support longer and more frequent trains on the Stampede Pass rail line;
- Reduce delays on M Street SE to trucks carrying freight deliveries;
- Reduce conflicts between rail and vehicle traffic modes;
- Enhance overall freight mobility; and
- Improve safety and traffic flow for all travel modes.

WHEREAS, the Port, as part of the FAST MOU, agreed to contribute Seven Hundred and Seventy One Thousand Four Hundred Dollars (\$771,400) towards the construction of the Project;

NOW, THEREFORE, the Parties agree as follows:

1. SCOPE OF WORK

1.1. Project Title: M Street SE Grade Separation

1.2. Description: The Project is one of the package of 10 "FAST Corridor Phase II" rail separation and Port access projects. The project will lower M Street SE below the BNSF Stampede Pass rail line to eliminate an at-grade crossing, construct rail improvements, bridges, walls, relocate utility and stormwater facilities to accommodate the underpass, widen M Street SE at the crossing to five lanes with sidewalks and bicycle lanes, and replace the traffic signal at the intersection of 4th Street SE and M Street. Elements of mutual benefit to the Parties are further illustrated in Exhibit B.

1.3. Schedule: Pending availability of funding, the Project will be advertised in late 2011, with construction starting in early 2012. Construction completion is scheduled for the 2nd Quarter of 2013, at which time the grade separation will be fully operational.

2. TERMS AND CONDITIONS

2.1. Lead Agency: The City shall be the lead agency for ensuring Project compliance with the State Environmental Policy Act (SEPA) and National Environmental Policy Act (NEPA), and shall be responsible for obtaining all necessary permits and/or agreements. As lead agency, the City shall be responsible for accomplishing all aspects of the Project scope.

2.2. Contact Persons: The Parties to this Agreement shall designate person(s) to act as liaison for the Project. The contact persons shall meet on a mutually agreed upon, scheduled basis at a frequency appropriate to the phase and status of the Project.

2.3. Schedule/Scope: The scope and schedule for the Project shall be mutually agreed upon by the City and Port. All scope and schedule changes shall be coordinated by the City using a formal documentation process. Construction change orders that do not change Project functionality and benefits to the Port, or the overall scope or general schedule of the project will not require coordination or documentation with the Port. Any changes to the functionality of the Project and benefits to the Port, as listed above under Section 1.2, and further illustrated by the description of project benefits, the project drawing, and stamped channelization plan provided in Exhibit B, shall require approval by the Port.

2.4. Progress Report: The City shall provide the Port with a copy of the approved baseline Critical Path Method (CPM) schedule, contract bid items or summary of values, and project cash flow forecast of the construction progress payments. At the time application for payment is made, the City shall provide to the Port a progress report. The progress report will include a narrative describing the project progress since the last report, an updated CPM construction schedule showing the current progress and percent complete of the major work elements, and a construction payment schedule. The construction payment schedule will include a listing of the contract bid items or a schedule of values and a tabulation of the construction progress payments made on the respective contract bid items. The construction progress tabulation will include the contract bid item amounts, amounts previously paid on the contract per bid item, the current contract bid item payment request, and the total amounts paid on the bid items.

2.5. Agency Coordination: The City anticipates that interagency agreements may be required with the Port of Tacoma and BNSF. The Port agrees to support the City to the extent practical in the City's pursuit of such interagency agreements and/or permits.

2.7 Design Changes: The City shall not order or approve any design changes that negatively affect rail movements or vehicular traffic level of service, or otherwise reduce the benefits of the Project to the Port as listed in Section 1.2, and further illustrated in Exhibit B, without first obtaining the Port's written approval for these design changes. The City shall inform the Port of any design change that could reduce the Port's anticipated benefit. The City shall provide the Port with copies of the proposed design change for the Port's review, comment and approval. The Port shall provide the City with comments within two weeks of its receipt of the proposed design changes. If the Port offers comments or exceptions to the proposed plans, the Port further agrees to participate in meetings scheduled by the City to resolve the Port comments and exceptions in order to maintain the benefits to the Port as listed in Section 1.2, and further illustrated in Exhibit B.

2.8 Ownership and Maintenance: Except for those project improvements owned by BNSF or other private parties, the City shall own all Project improvements and shall be responsible for the reasonable maintenance of the Project.

3 COST REIMBURSEMENT AND FUNDING

The Port agrees to contribute Seven Hundred and Seventy One Thousand and Four Hundred Dollars (\$771,400) toward the construction of the Project under the following conditions:

1. All environmental review and permitting has been successfully completed, documented and not subject to any appeal or legal challenge;
2. The Port and City continue to work together to ensure that the Project developments during construction meet the needs of both parties including, but not limited to, construction staging and local freight circulation;
3. The Port is satisfied that the Project, as constructed, provides the benefits to the Port identified in the preamble of this Agreement and;
4. The Port Commission authorizes the execution of this Agreement and the payment of Seven Hundred and Seventy One Thousand Four Hundred Dollars (\$771,400) for the Project costs.

If the Port Commission authorizes a contribution of \$771,400 toward construction of the Project, the Port shall make two payments as follows:

The first payment of \$385,700 after the City has made aggregate of progress payments totaling at least 50% of the overall construction cost for completed construction. The second payment of \$385,700 upon receipt of the final progress report and a letter from the City Project Manager certifying the Project is substantially complete, supported by a progress report.

The City shall certify the project has reached Substantial Completion by sending the Port a copy of the letter from the City's Engineer to the Contractor establishing the Substantial Completion date, as required by the City of Auburn 2010 Standard Specifications. (See Exhibit C) Upon receipt of the letter, the Port reserves the right to request an inspection of the Project, to confirm the project improvements, as defined in Section 1, Scope of Work, and Exhibit B, are in place and fully operational. To allow the City to proceed with the construction contract approval process in a timely manner, if the Port has not conducted said inspection and provided the City with any comments within seven (7) days of the established substantial completion date, the Port does waive the right to request and perform said inspection.

4 AMENDMENT

Either Party may request changes to the provisions contained in this Agreement. Any change to this Agreement must be mutually agreed to by both Parties, in writing and executed with the same formalities as the original Agreement.

5 NOTIFICATION

Any notice required or permitted to be given pursuant to this Agreement shall be in writing, and shall be sent postage prepaid by U.S. Mail, return receipt requested, to the following addresses unless otherwise indicated by the Parties to this Agreement:

To the CITY: Jacob Sweeting, Project Engineer
City of Auburn
Public Works Department
25 West Main Street
Auburn, WA 98001

To the PORT: Christine Wolf, Transportation Program Planner
Seaport Leasing and Asset Management
Port of Seattle
2711 Alaskan Way
Seattle, WA 98121

6 RECORDS RETENTION AND AUDIT

During the progress of the work on the Project and for a period not less than three (3) years from the date of final payment by the Port to the City, the records and accounts pertaining to the Project and accounting thereof are to be kept available for inspection and audit by the Port and the City shall provide the Port with copies of all records, accounts, documents, or other data pertaining to the Project upon the Port’s request. If any litigation, claim, or audit is commenced, the records and accounts along with supporting documentation shall be retained until all litigation, claims, or audit finding has been resolved, even though such litigation, claim, or audit continues past the typical three year retention period. This provision is not intended to alter or amend records retention requirements established by applicable state and federal laws.

7 DISPUTES

The designated representatives herein under section 5.0, NOTIFICATION, shall use their best efforts to resolve disputes between the Parties. If the designated representatives are unable to resolve a dispute, then the responsible department or division directors for each Party shall review the matter and attempt to resolve it. If the department or division directors are unable to resolve the dispute, the matter shall be reviewed by the public works director or chief executive officer of each Party or his or her designee. The Parties agree to exhaust each of these procedural steps before seeking to resolve disputes in a court of law or any other forum.

8 EFFECTIVENESS AND DURATION

This Agreement is effective upon the date of execution by both Parties and will remain in effect until Completion of the Project, unless otherwise stated herein or unless amended or terminated.

9 TERMINATION

Either Party may terminate this Agreement at any time upon thirty (30) days written notice to the other Party. If either Party decides to terminate this Agreement, the Port shall reimburse the City for all costs payable under this Agreement and all non-cancelable obligations that the City incurred prior to receiving the Port’s notice of its intent to terminate this Agreement. For the purposes of this Agreement, “non-cancelable obligations” are defined as those costs that the City is obligated to pay as of the day that either Party provides notice that it is terminating this Agreement, including the Port’s percentage of the total cost

of any phase of the Project that the City has commenced prior to the Port's notice of termination, whether or not such phase has reached Completion.

10 INDEMNIFICATION AND HOLD HARMLESS

10.1 To the maximum extent permitted by law, the City shall protect, defend, indemnify, and hold harmless the Port, its officers, officials, employees, and agents from any and all costs, claims, demands, suits, actions, judgment, and/or awards of damages, including but not limited to reasonable attorney's fees, to the extent arising out of, or in any way resulting from, the City's own negligent acts or omissions.

10.2 The City agrees that its obligations under this section extend to any claim, demand and/or cause of action brought by, or on behalf of, any of its employees or agents. For this purpose, the City hereby waives, with respect to the Port only, any immunity that would otherwise be available against such claims under the Industrial Insurance provision of Title 51 RCW to the extent necessary to provide indemnification as required under this Agreement.

10.3 The indemnification, hold harmless, and/or waiver obligation described in this Agreement in paragraphs 10.1 and 10.2 shall survive the termination of this Agreement.

11 VENUE

This Agreement shall be deemed to be made in the County of King, State of Washington, and the legal rights and obligations of the City and Port shall be determined in accordance with the laws of the State of Washington. All legal actions in connection with this Agreement shall be brought in the County of King, State of Washington.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement which shall be effective upon the date of recording.

Interlocal Agreement between Port of Seattle and City of Auburn for the M Street SE Grade Separation Project

PORT OF SEATTLE

CITY OF AUBURN

Tay Yoshitani, Chief Executive Officer

Peter B. Lewis, Mayor

Date: _____

Date: _____

APPROVED AS TO FORM:



Port Attorney

City Attorney

Date: _____

Date: _____

ATTEST:

City Clerk

Date: _____

OK

Attachment 1

**Exhibit A – Port of Seattle Commission Resolution No. 3500,
authorizing the 2002 FAST MOU**

DRAFT

Exhibit B—Elements of Mutual Benefit

Overview

Project Description

This project will improve the final 1,700 foot segment of the M Street Corridor, which is a regionally significant principal arterial connection between Washington State Routes 167 and 164 (Auburn Way South) through Auburn, King County Washington. The M Street Corridor connects regional and manufacturing growth centers, serves local and regional destinations, and provides an essential freight mobility link.

This project is located on M Street SE between 3rd and 8th Streets SE in the vicinity of the Washington State Route 18 overpass and the at-grade BNSF Stampede Rail crossing in Auburn. The project includes lowering M Street SE below the existing BNSF railroad, constructing a new railroad bridge, widening the roadway from 2 to 5 lanes, and adding bicycle lanes and sidewalks.



M Street SE – Existing Conditions

Project Need

This project was identified in the 1997 *Auburn Stampede Rail Traffic Impact Study* as necessary to mitigate the impacts from BNSF expanding operations on the Stampede Pass rail line. The study identified that up to 22 daily trains may operate in the future on the Stampede Pass line and create perpetual gridlock throughout the City and on nearby State highways. M Street SE has also been identified as a Freight Action Strategy (FAST) corridor project. FAST is a multi-agency coalition dedicated to improving freight mobility throughout the Puget Sound Region and mitigating the impacts of freight movements on local communities.

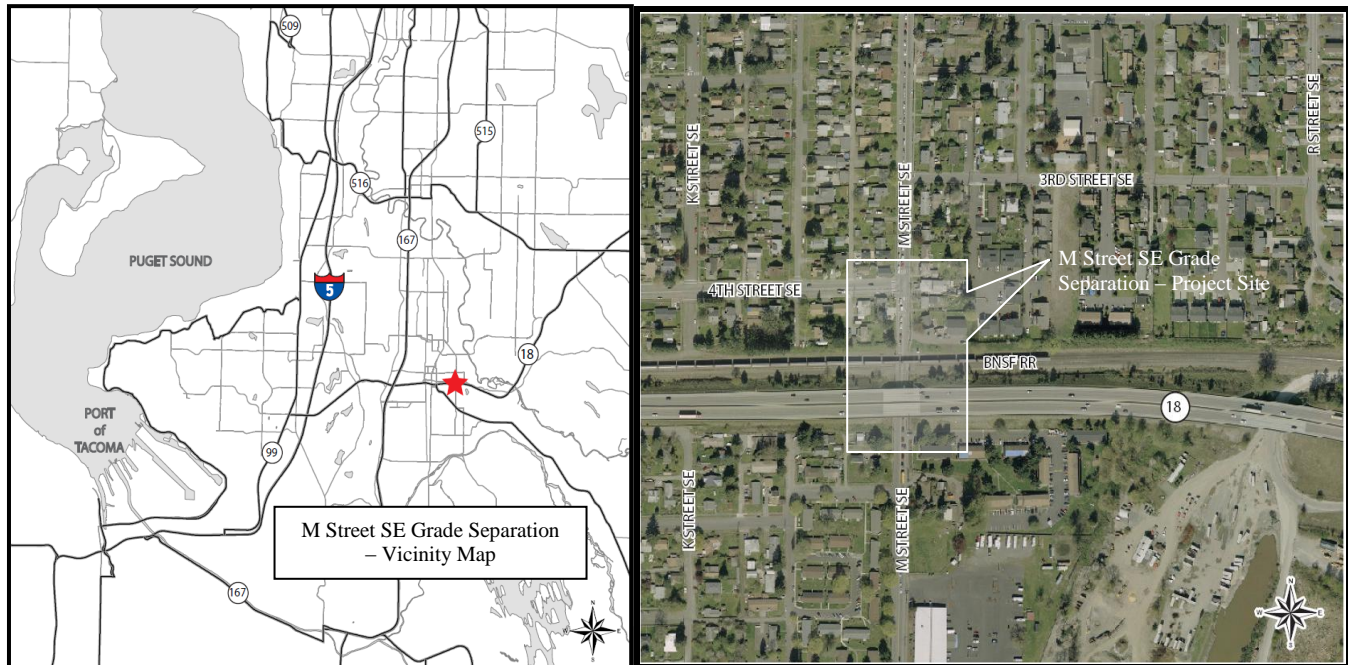


M Street SE – Proposed

Project Benefits

Completing the M Street SE Grade separation will not only improve freight mobility for train and truck traffic, it will also eliminate the significant traffic back-ups that overtax the City's arterial street system. These backups impact emergency vehicle access, the 53 daily school bus crossings, residential and business driveways, and local neighborhood streets. The project will also provide secondary benefits that include improved travel times; reduction of cut-through traffic on neighborhood streets; air quality along the corridor; and beautification of one of Auburn's key gateways.

By separating this existing at-grade/street-rail crossing from the railroad safety will be substantially improved. Replacement of the at-grade crossing eliminates the possibility of fatalities and injuries that often result from collisions between trains, vehicles, and pedestrians. It also eliminates blocking delays that cause traffic congestion/delays, reduces the intrusive noise from train horns and automatic warning devices, and will improve emergency response times.



Status Update

Design is 80% complete and is expected to be complete by next spring (2011). ROW Acquisition is 30% complete and is expected to be complete by next spring (2011). Property management of acquired homes will include demolition as needed for safety and security. All design and ROW funding is secured.

The entire construction is anticipated to last between 18 and 27 months (depending on train volumes). Train volumes impact the construction costs and schedule significantly as many key work elements must be limited or stopped when trains cross. Constructing the project while train volumes are down, due to the recent economic downturn, could result in a shorter construction duration and significantly lowered construction costs. Assuming funding is secured, construction is scheduled to start late next year (November 2011).

City of Auburn Contacts

Jacob Sweeting, Project Manager, City of Auburn 253.804.5059 – jsweeting@auburnwa.gov

Carolyn Robertson, Government Relations Manager 253.931.3096 – crobertson@auburnwa.gov

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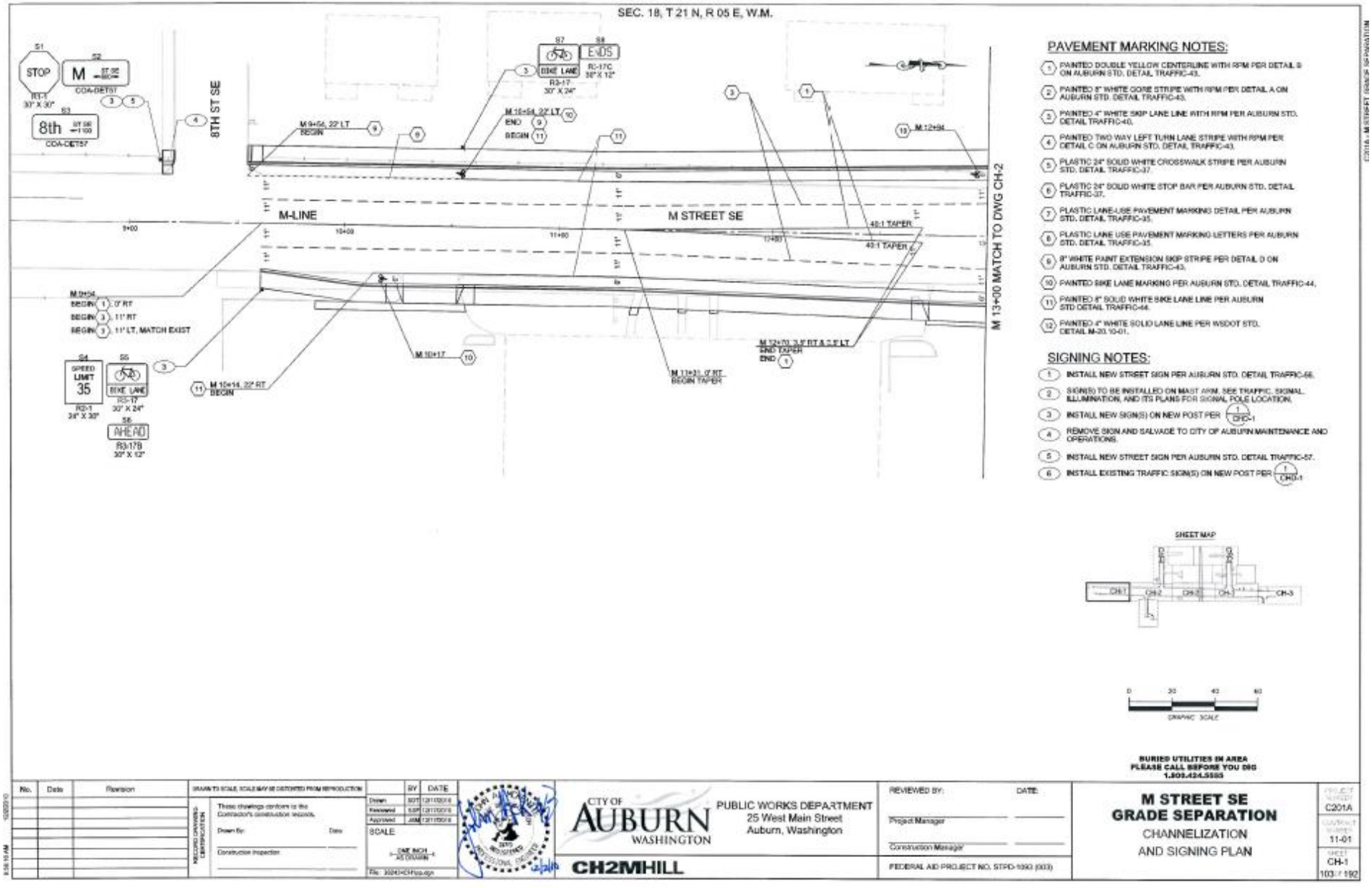


Exhibit B-3

**Exhibit C - Definition of “Substantial Completion”
Per the 2010 City of Auburn Standard Specifications**

1-05.11(1) SUBSTANTIAL COMPLETION DATE

When the Contractor considers the work to be substantially complete, the Contractor shall so notify the Engineer and request the Engineer establish the Substantial Completion Date. The Contractor’s request shall list the specific items of work that remain to be completed in order to reach physical completion. The Engineer will schedule an inspection of the work with the Contractor to determine the status of completion. The Engineer may also establish the Substantial Completion Date unilaterally.

If, after this inspection, the Engineer concurs with the Contractor that the work is substantially complete and ready for its intended use, the Engineer, by written notice to the Contractor, will set the Substantial Completion Date. If, after this inspection the Engineer does not consider the work substantially complete and ready for its intended use, the Engineer will, by written notice, so notify the Contractor giving the reasons therefore.

Upon receipt of written notice concurring in or denying substantial completion, whichever is applicable, the Contractor shall pursue vigorously, diligently and without unauthorized interruption, the work necessary to reach Substantial and Physical Completion. The Contractor shall provide the Engineer with a revised schedule indicating when the Contractor expects to reach substantial and physical completion of the work.

The above process shall be repeated until the Engineer establishes the Substantial Completion Date and the Contractor considers the work physically complete and ready for final inspection.