

Memorandum

To: CHAIR AND COMMISSIONERS
CALIFORNIA TRANSPORTATION COMMISSION

CTC Meeting: December 14-15, 2011

Reference No.: 2.4a
Action Item

From: NORMA ORTEGA
Chief Financial Officer

Prepared by: Brent Green
Chief
Division of Right of Way
and Land Surveys

Subject: **RESOLUTION OF NECESSITY - APPEARANCE**

RECOMMENDATION:

The California Department of Transportation (Department) recommends the California Transportation Commission (Commission) adopt Resolution of Necessity (Resolution) C-20688 summarized on the following page. This Resolution is required for widening and reconstructing the 101 Freeway Wilfred Avenue interchange in Rohnert Park in Sonoma County.

ISSUE:

Prior to initiating Eminent Domain proceedings to acquire needed right of way for a programmed project, the Commission must first adopt a Resolution, stipulating specific findings identified under Section 1245.230 of the Code of Civil Procedure, which are:

1. The public interest and necessity require the proposed project.
2. The proposed project is planned and located in a manner that will be most compatible with the greatest public good and the least private injury.
3. This property is necessary for the proposed project.
4. An offer to acquire the property in compliance with Government Code Section 7267.2 has been made to the owner of record.

In this case, the property owner is contesting the Resolution and has requested a written appearance before the Commission to challenge the outstanding issues. At the request of the property owner, objections to the Resolution have been submitted in writing in lieu of a personal appearance before the Commission. The owner's objections are included as Attachment A. The Department's responses to the owner's objections are contained in Attachment B.

BACKGROUND:

Discussions have taken place with the owner, who has been offered the full amount of the Department's appraisal and, where applicable, advised of any relocation assistance benefits to which the owner may subsequently be entitled. Adoption of the Resolution will not interrupt the Department's efforts to secure an equitable settlement. In accordance with statutory requirements, the owner has been advised that the Department is requesting the Resolution at the Commission's

December 14-15, 2011 meeting. Adoption will assist the Department in the continuation of the orderly sequence of events required to meet construction schedules.

C-20688 – Carinalli Liquidating Trust

04-Son-101 - PM 15.3 - Parcel 60202-1 - EA 129659.

Right of Way Certification Date: July 30, 2008; Ready to List Date: August 15, 2008.

Freeway-widen and reconstruct interchange. Authorizes condemnation of land in fee for a State highway. Located in the city of Rohnert Park at 4600 Redwood Drive.

Assessor's Parcel Number 045-033-035.

Attachments:

Attachment A – Owner's Written Objections dated September 23, 2011

Attachment B - Department Response dated September 28, 2011

Attachment C - Fact Sheet

Exhibits A, B, C, D - Maps

LUCE FORWARD

ATTORNEYS AT LAW • FOUNDED 1873

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ANNE MORRISON EPPERLY, ATTORNEY
DIRECT DIAL NUMBER 415.356.4677
DIRECT FAX NUMBER 415.356.3871
EMAIL ADDRESS aepperly@luce.com

September 23, 2011

39202-00002

VIA E-MAIL (bimla.rhinehart@dot.ca.gov) & FEDERAL EXPRESS

Ms. Bimla Rhinehart, Executive Director
California Transportation Commission
1120 N Street, Room 2221 (MS-52)
Sacramento, CA 95814

VIA U.S. MAIL

Ms. Bimla Rhinehart, Executive Director
California Transportation Commission
P.O. Box 942873 (MS-52)
Sacramento, CA 94273-0001

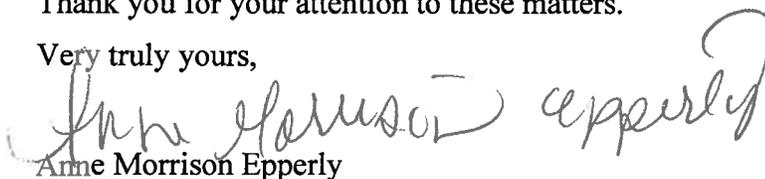
Re: Request for Written Approval
04-Son-101-PM 15.3
EA 129652
Project #0400000391-2
Parcel 60202
Carinalli Liquidating Trust, et al.

Dear Ms. Rhinehart:

Please take notice that Carinalli Liquidating Trust (“Owner”) hereby requests to appear by written appearance before the California Transportation Commission (“CTC”) at its meeting being held on October 26-27, 2011 in Sacramento, California so as to object the CTC’s proposed Resolution of Necessity (“Resolution”) to exercise the right of eminent domain to acquire that certain real property interest in the parcel described as Assessor’s Parcel Co. 60202 (“Parcel”). Owner’s written appearance and objection to the Resolution, which sets forth Owner’s statement of conditions which it feels are pertinent to the Parcel, is attached hereto as Exhibit A. Owner submits said written appearance and objection in lieu of a live appearance at the hearing and requests that its written appearance be made part of the official public record in these matters and brought to the attend of the CTC.

Thank you for your attention to these matters.

Very truly yours,



Anne Morrison Epperly

for

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

AME/jk
Enclosure

Attachment A

EXHIBIT A

WRITTEN APPEARANCE AND STATEMENT AT HEARING REGARDING PROPOSED
RESOLUTION OF NECESSITY BY THE CALIFORNIA TRANSPORTATION
COMMISSION TO EXERCISE THE RIGHT OF EMINENT DOMAIN TO ACQUIRE THAT
CERTAIN REAL PROPERTY INTEREST IN THE PARCEL DESCRIBED AS ASSESSOR'S
PARCEL NO. 60202

The undersigned legal counsel for the Carinalli Liquidating Trust ("Owner") hereby appears by written appearance at the hearing being held on October 26-27, 2011 by the California Transportation Commission at the Sacramento Convention Center located at 1300 J Street, Room 306 in Sacramento, California and on behalf of the Owner, and states the following:

1. The California Department of Transportation ("Caltrans") is not authorized to exercise the power of eminent domain for the purpose stated in its Proposed Resolution of Necessity ("Proposed Resolution") in that the Proposed Resolution, or any other document purporting to justify this action by the Caltrans, does not state facts sufficient to constitute a right to take land for the construction of that certain project number 0400000391-2 (the "Project").
2. The stated purpose is not a public use in that Caltrans has not stated within the Proposed Resolution, or within any other document or statement, facts sufficient to constitute or show a right to so construct the Project.
3. The public interest, convenience and necessity do not require the Project.
4. The Project as planned and located, is not planned and located in the manner that will be the most compatible with the greatest public good and the least private injury such that there is a reasonable probability that at some time in the near future, after the construction of the Project, it is highly likely that the Project will result in damage to the Owner's property.
5. The property sought to be acquired is not necessary for the Project for the reasons stated elsewhere and herein and for other good and sufficient reasons.
6. Compliance has not been made with Government Code Section 7267.2; an adequate written statement of the basis of the City's offer for the property has not been made and furnished to the undersigned; a reasonable offer in compliance with Code of Civil Procedure 1245.230 and Government Code Section 7267.2 has not been made.
7. There is no reasonable probability of use of the said real property for the said purpose within the applicable period of time.
8. Adoption of the Proposed Resolution will constitute a gross abuse of discretion within the meaning of California Code of Civil Procedure Section 1245.255 for the reasons stated elsewhere and herein, and for other good and sufficient reasons.
9. Caltrans has not complied with the Agreement for Possession and Use dated June 27, 2008 by and between the State of California, Department of Transportation and K 4

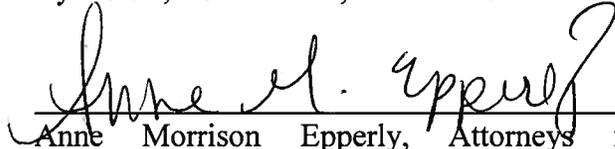
Corporation doing business as Sonoma Mortgage and Investment Company, Clement C. Carinalli and Ann Marie Carinalli, in that Caltrans has failed to negotiate in good faith with Owner to acquire an interest in the Parcel No. 60202 by direct purchase.

10. All other grounds provided or allowed by law.
11. Caltrans' offer of compensation to Owner failed to comply with the California Government Code and other requirements of law in that, among other things, it failed to include an explanation as to why business and goodwill damages are not relevant to the determination of the value of the property sought to be acquired, failed to include an explanation and analysis as to why the condemning agency failed to include severance damages incurred by the remaining property and failed to include an adequate explanation of the reasons why Caltrans offer is fair and reasonable and should be acceptable to Owner.

Dated: September 23, 2011

Carinalli Liquidating Trust

By LUCE, FORWARD, HAMILTON & SCRIPPS, LLP



Anne Morrison Epperly, Attorneys for Carinalli
Liquidating Trust

301283470.1

DEPARTMENT OF TRANSPORTATION
DISTRICT 4
P. O. BOX 23440
OAKLAND, CA 94623-0440
PHONE (510) 286-5400
FAX (510) 286-5482



*Flex your power!
Be energy efficient!*

September 28, 2011

Ms. Bimla Rhinehart
Executive Director
California Transportation Commission
1120 N Street, Room 2221 (MS 52)
Sacramento, CA 95814

Dear Ms. Rhinehart:

This is in response to the September 23, 2011 Written Appearance and Statement at Hearing filed by the Luce Forward law firm ("Luce firm") on behalf of the Bankruptcy Trustee for the Carinalli Liquidating Trust. Based on a September 23, 2011 telephone conversation with the Luce firm, the Department understands the Luce firm has prepared a written appearance only to preserve its client's rights and does not want the Department's Resolution of Necessity to be pulled from the Commission's agenda. Further, based on the parties' earlier communications, the Department accepted service on August 30, 2011 of the Luce firm's August 22 lawsuit with the understanding the Department will file its responsive pleading in Sonoma Superior Court on Friday, October 14, 2011.

The Department provides the following background information for mere clarification only – nothing in this response is intended nor should be construed as an exhaustive recitation of admissible evidence. Instead, the Department's intent in preparing this response is to mirror that of the Carinalli Liquidating Trust's – e.g., to preserve and protect both parties' rights, obligations, and duties, as well as to preserve and maintain all available rights and defenses under applicable laws, statutes and regulations. As such, the Department respectfully submits the following with the caveat that additional facts, besides those provided below, may become available as litigation proceeds.

The Department started the appraisal and acquisition process in January 2007 with Mr. Curtis Clemmer, the confirmed owner of record according to the County tax rolls. It was Mr. Clemmer who advised the Department that the three signboards situated within the proposed right of way were on a recorded easement owned by Clement and Ann Marie Carinalli. The Department gave notice to the Carinallis of its intent to appraise in May 2007. At the Department's first meeting with Mr. Carinalli in August 2007 to present its offer, Mr. Carinalli advised the Department that Mr. Clemmer had defaulted on his mortgage in late 2006 and that fee title now vested in Mr. Carinalli's business, presumably K-4 Corporation DBA Sonoma Mortgage and Trust Company. Based on this new title information, the Department amended its appraisal to value the fee area as a fee simple estate and the easement as a leased fee estate. A title search later determined that the

Attachment B

chain of title had not been clearly established, because Sonoma Mortgage and Trust had attempted to vest the property in its name when it was not legally capable of holding title under California law. Mr. Carinalli subsequently negotiated and executed a Possession and Use Agreement with the Department in June 2008 giving the Department physical possession of the identified right of way upon release from escrow of the Department's deposit of \$256,500.00 representing the Department's offer of just compensation and waiving his right to challenge the necessity of the taking in any future condemnation proceedings. Said release to / withdrawal by Mr. Carinalli of the \$256,500 from escrow was made on September 9, 2008 when title was cleared and the Memorandum for the Possession and Use Agreement was recorded with Sonoma County.

At the time of the execution of the Possession and Use Agreement, Mr. Carinalli advised the Department that he had re-negotiated his lease agreements with CBS Outdoor Inc., the owner of three signboards effective March 1, 2008. He requested the Department evaluate those leases and if appropriate, revise the Department's valuation of the easement. Although Mr. Carinalli's attorney had inserted language into the Possession and Use Agreement that called for the Department to commence condemnation proceedings if no settlement had been reached by December 31, 2008, it was understood that the condemnation action would be stayed until a decision on the new leases was determined. After a thorough investigation into the validity of the leases and their role in determining the value of the right of way, Mr. Carinalli was notified in May 2010 that the new leases could not be considered void of project influence since they were executed six months after both Mr. Carinalli and CBS Outdoor had received the Department's offer of compensation. It was after this notification that Mr. Carinalli advised the Department of his existing involuntary bankruptcy proceeding filed in November 2009. The Department indicated it would then go forward with condemnation, but Mr. Carinalli requested the Department wait until the pending bankruptcy repayment plan was approved (November 2010). The Department's requests for important information regarding the bankruptcy went unanswered by Mr. Carinalli until Counsel for the Bankruptcy Trustee contacted the Department in February 2011. The Department and the Trustee have attempted to find common ground to resolve the parties' differences, but have been unsuccessful. The decision to file for a resolution was done with the Trustee's knowledge and with the Department's understanding that the Trustee would pursue its lawsuit – a courtesy copy of which had been previously provided to the Department. The Department understands that any condemnation action beyond the issuance of the Resolution of Necessity is subject to the consent of the Federal Bankruptcy Court handling the Carinalli bankruptcy.

In its statement, the Trustee makes several claims as to why the Resolution has no merit. In response to these claims, the Department asserts that it is in compliance with California Code of Civil Procedure Section 1240.030 based on the following facts:

- The Department's right to acquire the identified right of way requirements is justified under Streets and Highway Code Article 3, section 104 and confirmed in the certificate of necessity for the Wilfred Avenue/Golf Course Drive Interchange Project (The "Project"). Said necessity is clearly supported by the Project's plans. This information was previously

provided to Mr. Carinalli and to CBS Outdoor, Inc., during the appraisal and acquisition process. Based on the extensive communications, it was and is reasonable that Mr. Carinalli and CBS Outdoor knew of the Project, the necessity of the Project and the proposed right of way and that the control of Mr. Carinalli's assets by the Federal Bankruptcy Trustee does not negate this nexus.

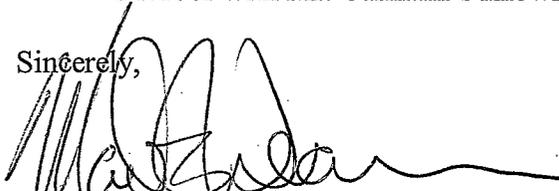
- The stated purpose for the Project has been clearly established as the Project addresses a critical need for major transportation improvements in Sonoma County along the corridor for State Route 101. This project is one of several identified in the Sonoma County Transportation Authority's and Metropolitan Transportation Commission's Route 101 Corridor Plan developed in conjunction with the Department of Transportation as part of the Federal and State Transportation Improvement Programs.
- Said public improvement project was developed with public input through publicly held meetings, including the City of Rohnert Park, Sonoma County, and private citizens taking into account the need to develop a project that was the most compatible with the public good and the least private injury.
- The Department's proposed right of requirement represents 151,510 square feet running along the easterly boundary of the 14 acre undeveloped parcel known as Assessor's Parcel Number 045-033-035 or State Parcel 60202. During the appraisal process, exhaustive research was completed to identify any possible or probable damage as a result of the Project. The highest and best use determination of rural residential was supported and justified by local zoning laws and through numerous discussions with local and county planners. Those same discussions verified that there would be no loss of utility or use to the remainder after the Project thus a determination was made that no severance damages exist. The Department does not believe, based on currently available information, that there is a right to loss of goodwill. As the owner of vacant/undeveloped land, Mr. Carinalli does not own a business on the property but leased a portion of his land to CBS Outdoor, Inc. It was CBS Outdoor who experienced the loss of goodwill when its business activity on the property: leased advertising space: was terminated by the commencement of the project. (It should be noted that under Sonoma County zoning regulations, the signboards were situated in a scenic corridor and could not be relocated outside of the right of way.) Department reached a negotiated settlement with CBS in October 2010.
- All presentations of the Department's valuations were made in compliance with a property owner's rights under 49 CFR 24.102(e). At the time of the first written offer, owners were entitled to receive the Department's valuation in the form of the Appraisal Summary

Ms. Bimla Rhinehart
September 28, 2011
Page 4

Statement. Since the property being appraised was vacant land, State law did not require the Department afford Mr. Carinalli the opportunity to read the Department's appraisal report and Mr. Carinalli did not elect to present the Department with an independent appraisal.

- The property in question was utilized in a timely manner. The Project was certified within six weeks after the Possession and Use Agreement was signed. Construction commenced on or about May 14, 2009 and the target completion is December 2011. The advertising signs were permitted to remain on site until the start of construction and the Department agreed to let Mr. Carinalli receive the signboard rent until the signs were removed by CBS Outdoor with Mr. Carinalli's knowledge.

Sincerely,



MARK L. WEAVER
Deputy District Director
Right of Way and Land Surveys

cc: Ms. Anne Morrison Epperly, Attorney, LUCE, FORWARD, HAMILTON & SCRIPPS LLP

Resolution of Necessity Appearance Fact Sheet

PROJECT DATA

4- SON-101 PM 15.3

Project No. 0400000391-2 (EA 129659)

Location:

US Route 101 in Sonoma County in and near the City of Rohnert Park

Limits:

Rohnert Park Expressway Overcrossing to Santa Rosa Ave. Overcrossing

Contract Limits:

N/A

Cost:

Right of Way: \$3,000,000.00; Construction \$27,800,000.00

Funding Source:

*State Transportation Improvement Program
Corridor Mobility Improvement Account
Measure M Sales Tax (Sonoma County)*

Number of Lanes:

Existing: Two northbound mixed flow lanes

Two southbound mixed flow lanes

Proposed:

Two northbound mixed flow lanes, one northbound high occupancy vehicle lane, Two southbound mixed flow lanes, one southbound high occupancy vehicle lane

Proposed Major Features:

Interchanges: New Wilfred Avenue/Golf Course Drive Interchange

Other:

Southbound collector-distributor road between Golf Course Drive/Wilfred Avenue and Santa Rosa Avenue; Southbound auxiliary lane between Rohnert Park Expressway and Golf Course Drive/Wilfred Avenue; Northbound auxiliary lane between Rohnert Park Expressway and Santa Rosa Avenue.

Traffic:

Existing (2001): 123,000 Annual Daily Traffic

Proposed (2030): 178,000 Annual Daily Traffic

PARCEL DATA

Property Owner:

Carinalli Liquidating Trust

Parcel Location:

4600 Redwood Drive, Rohnert Park

Present Use:

Vacant land

Area of Property:

14.08 acres

Area Required:

60202-1 151,510 square feet in fee

EXHIBIT A

COUNTY OF SONOMA

60202-1

EXHIBIT B EXHIBIT C EXHIBIT D

**TO
SANTA ROSA**

STATE HIGHWAY 101

**TO
SAN FRANCISCO**

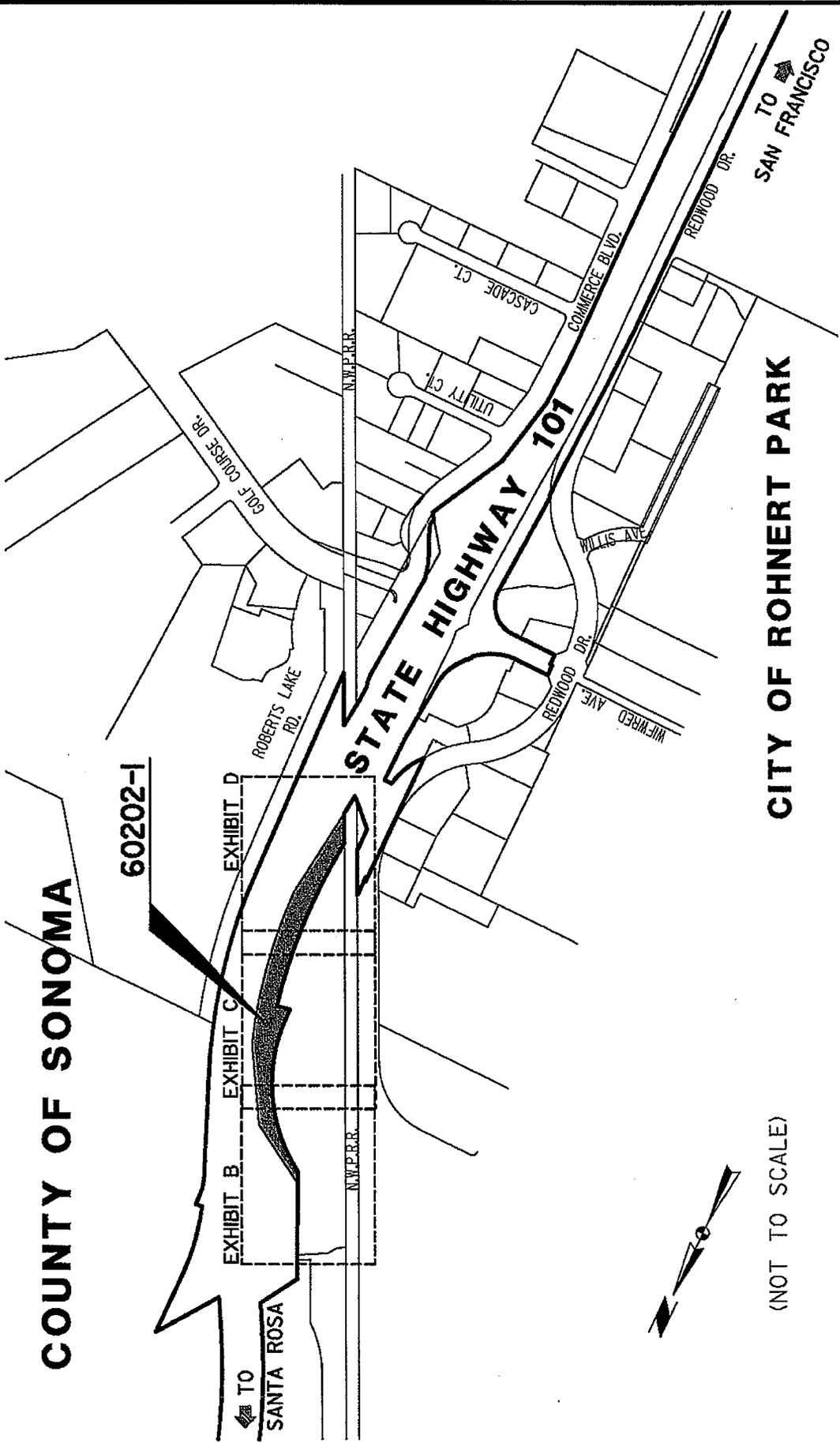
CITY OF ROHNERT PARK

(NOT TO SCALE)



A-10322,1,2,3

**RESOLUTION OF
NECESSITY MAP
04-SON-101-KP 24.7**

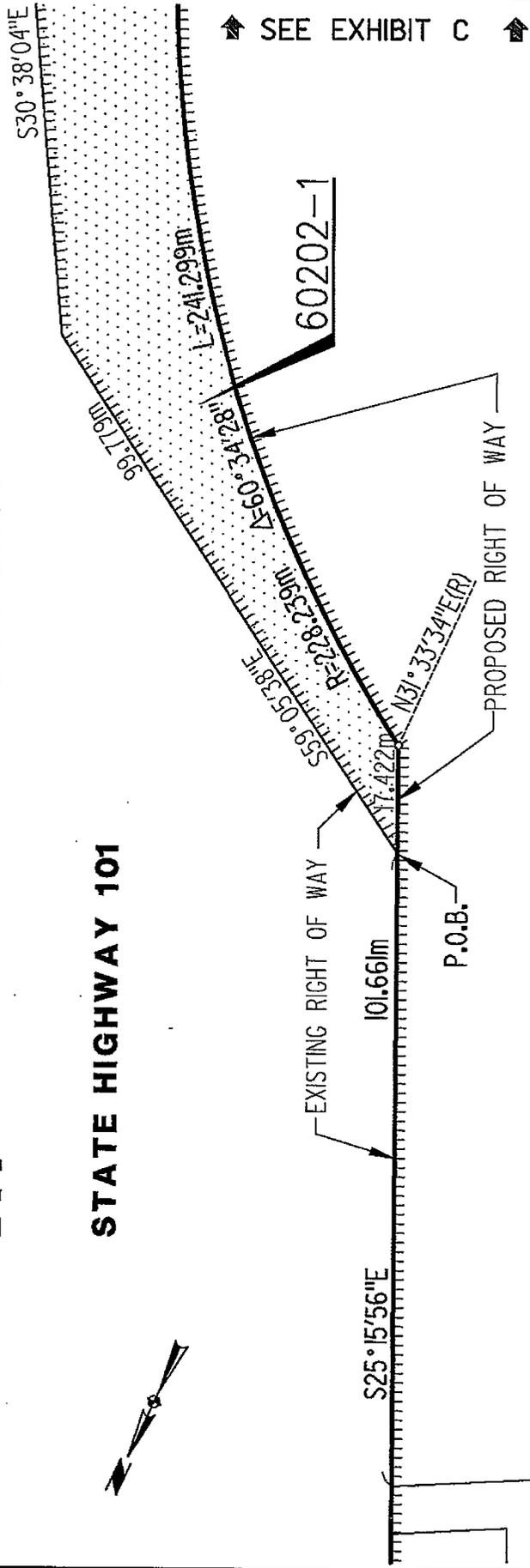


COORDINATES, BEARINGS AND DISTANCES SHOWN ARE ON THE CALIFORNIA COORDINATE SYSTEM OF 1983 ZONE 2. MULTIPLY DISTANCES SHOWN BY 1,000,00543 TO OBTAIN GROUND LEVEL DISTANCES.



COUNTY OF SONOMA
EXHIBIT B

STATE HIGHWAY 101



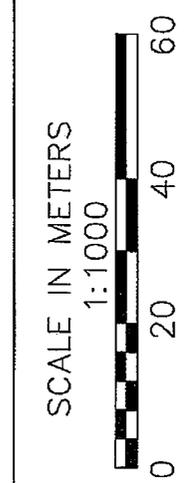
SEE EXHIBIT C

LEGEND

- ° DIMENSION POINT
- ||||| ACCESS PROHIBITED
- APN ASSESSOR'S PARCEL NUMBER
- (R) RADIAL BEARING
- P.O.B. POINT OF BEGINNING

APN 045-033-035
 (60202)
 CURTIS L. CLEMMER
 DOCUMENT NO. 2002062961
 RANCHO COTATI

N.W.P.R.R.



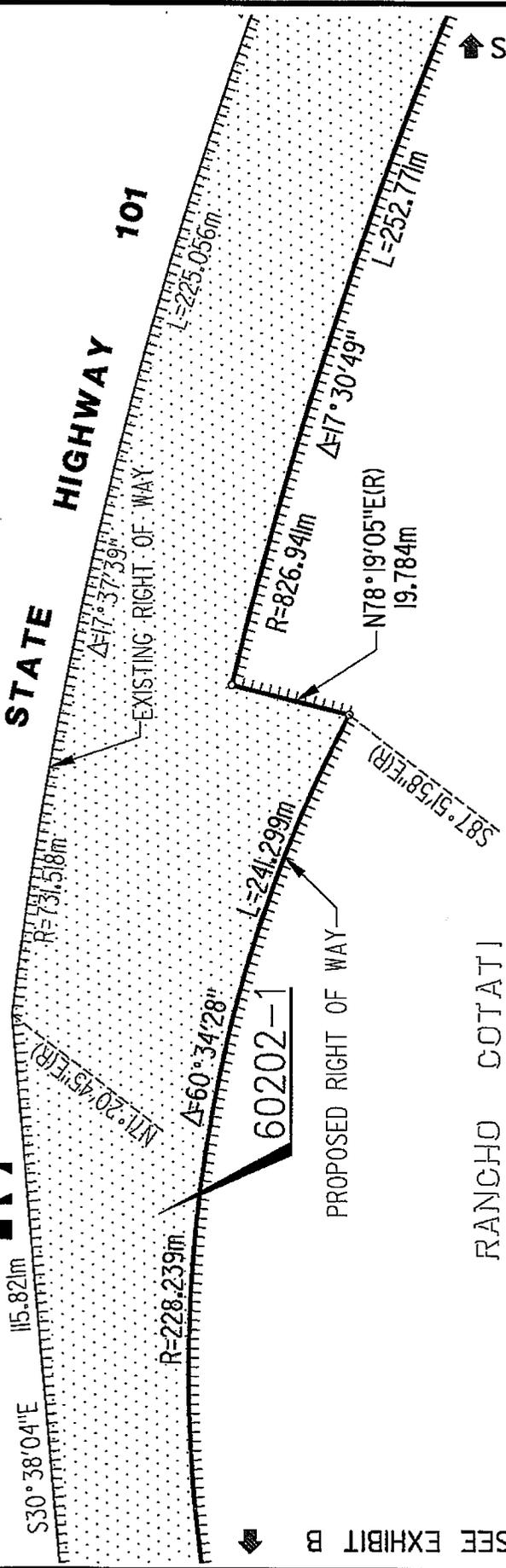
**RESOLUTION OF
NECESSITY MAP
04-SON-101-KP 24.7**

A-10322.1,2,3

COORDINATES, BEARINGS AND DISTANCES SHOWN ARE ON THE CALIFORNIA COORDINATE SYSTEM OF 1983 ZONE 2. MULTIPLY DISTANCES SHOWN BY 1.00000543 TO OBTAIN GROUND LEVEL DISTANCES.



COUNTY OF SONOMA EXHIBIT C



SEE EXHIBIT D

APN 045-033-035

60202

CURTIS L. CLEMMER
DOCUMENT NO. 200206296I

LEGEND

- DIMENSION POINT
- ||||| ACCESS PROHIBITED
- APN ASSESSOR'S PARCEL NUMBER
- (R) RADIAL BEARING

RANCHO COTATI

SEE EXHIBIT B



N.W.P.R.R.

A-10322.1,2,3

SCALE IN METERS

1:1000



RESOLUTION OF
NECESSITY MAP
04-SON-101-KP 24.7

COORDINATES, BEARINGS AND DISTANCES SHOWN
 ARE IN THE CALIFORNIA COORDINATE SYSTEM
 ZONE 2. MULTIPLY DISTANCES SHOWN BY
 1.0000543 TO OBTAIN GROUND LEVEL DISTANCES.



COUNTY OF SONOMA

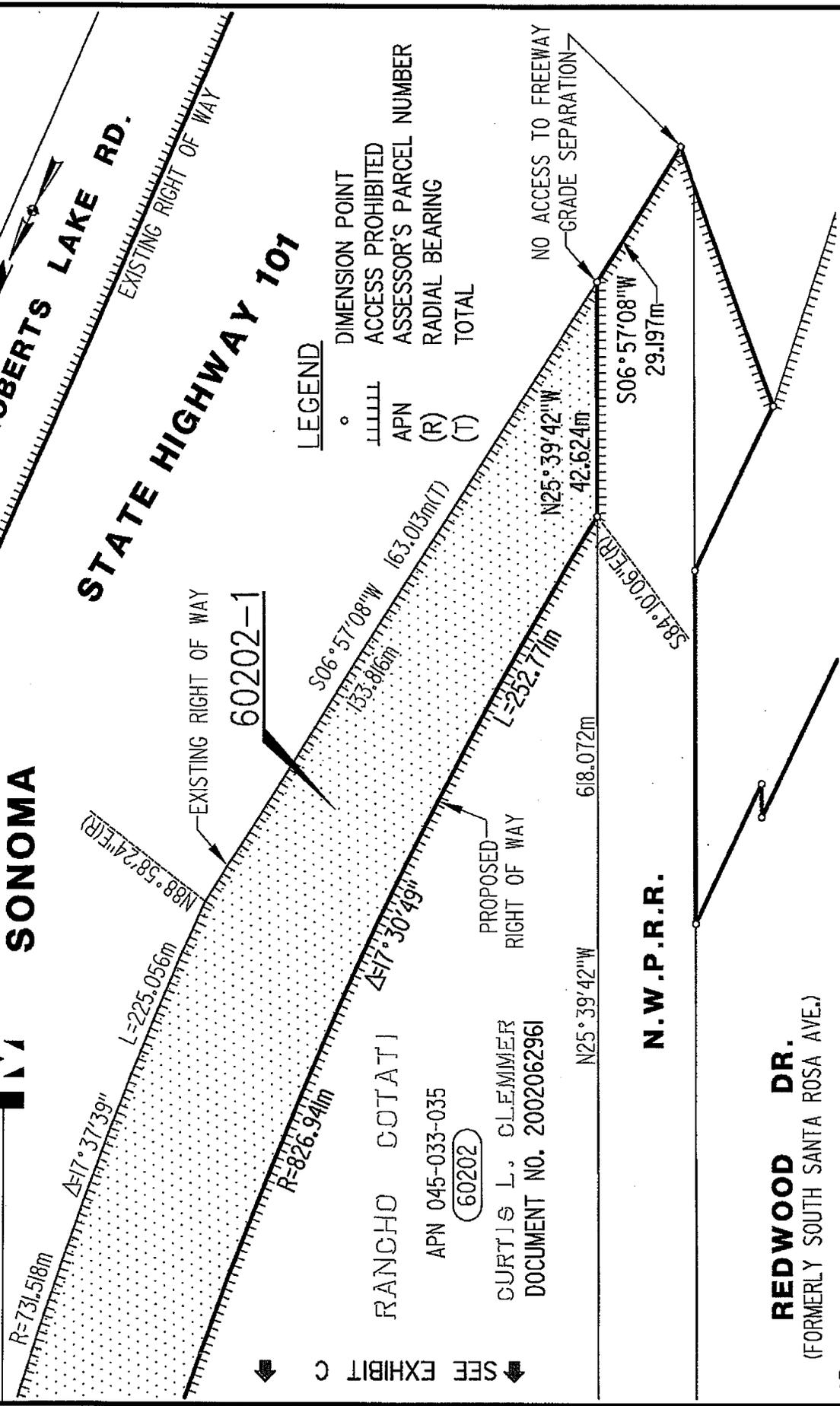
EXHIBIT D

ROBERTS LAKE RD.
 EXISTING RIGHT OF WAY

STATE HIGHWAY 101

LEGEND

- DIMENSION POINT
- ||||| ACCESS PROHIBITED
- APN ASSESSOR'S PARCEL NUMBER
- (R) RADIAL BEARING
- (T) TOTAL



SEE EXHIBIT C

RANCHO COTATI

APN 045-033-035

60202

CURTIS L. GLEMMER
 DOCUMENT NO. 2002062961

N.W.P.R.R.

REDWOOD DR.
 (FORMERLY SOUTH SANTA ROSA AVE.)

SCALE IN METERS
 1:1000



A-103221,2,3

CITY OF ROHNERT PARK

RESOLUTION OF NECESSITY MAP
04-SON-101-KP 24.7