

**TOWN OF
APPLE VALLEY, CALIFORNIA**

AGENDA MATTER

Subject Item:

APPROVE AND AUTHORIZE A MEMORANDUM OF UNDERSTANDING WITH SAN BERNARDINO COUNTY DEPARTMENT OF PUBLIC WORKS, SANBAG, AND THE CITY OF VICTORVILLE FOR THE LA MESA/ NISQUALLI INTERCHANGE AND THE YUCCA LOMA/ YATES ROAD/ GREEN TREE BLVD CORRIDOR PROJECT.

Summary Statement:

The construction of the new La Mesa/ Nisqualli Interchange on Interstate 15 is a critical component of the new Yucca Loma Bridge/ Yates Road/ Green Tree Blvd. Corridor Project. The proposed Memorandum of Understanding (MOU) is a funding participation agreement between the County of San Bernardino Public Works Department, SANBAG, the City of Victorville and the Town of Apple Valley. The MOU outlines the fair-share funding obligation of each agency for the new La Mesa/ Nisqualli Interchange, and the manner by which each agency will participate. Apple Valley's fair-share Nexus Study obligation toward the new La Mesa/ Nisqualli Interchange shall be applied toward the completion of the Green Tree Blvd., extension in Victorville, and the ultimate connection of the Yucca Loma Bridge/ Yates Road segments to Hesperia Road.

Recommended Action:

That the Town Council approve and authorize a Memorandum of Understanding between San Bernardino County Department of Public Works, SANBAG, and the City of Victorville, subject to approval as to form by the Town Attorney and as to content by the Town Manager, and authorize the Mayor to execute said MOU.

Proposed by: Brad Miller, Engineering Division

Item Number _____

T. M. Approval: _____

Budgeted Item **Yes** **No** **N/A**

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE TOWN OF APPLE VALLEY

AND

COUNTY OF SAN BERNARDINO – PUBLIC WORKS

AND

THE CITY OF VICTORVILLE

AND

SAN BERNARDINO ASSOCIATED GOVERNMENTS

This Memorandum of Understanding (“MOU”) is entered on the ___ of _____, 2011, by and between the County of San Bernardino (hereinafter referred to as “COUNTY”), Town of Apple Valley (hereinafter referred to as “TOWN”), City of Victorville (hereinafter referred to as “CITY”), and San Bernardino Associated Governments (hereinafter referred to as “SANBAG”).

RECITALS

WHEREAS, COUNTY, TOWN, CITY, and SANBAG (also referred to as “the Parties”), desire to construct improvements along Yucca Loma Road from Apple Valley Road to the Mojave River, the bridge over the Mojave River, Yates Road from the Mojave River to Ridgecrest Road, and from Ridgecrest Road along the proposed Green Tree alignment with a terminus at the intersection of Green Tree Boulevard and Hesperia Road, including the bridge over the Burlington Northern and Santa Fe (“BNSF”) railway (hereinafter referred to as the “YUCCA LOMA CORRIDOR”); and

WHEREAS, COUNTY, TOWN, and CITY have previously approved a funding agreement for the preliminary design and environmental review phase of the YUCCA LOMA CORRIDOR and a separate agreement will be executed for final design; and

WHEREAS, TOWN has completed its environmental review of the YUCCA LOMA CORRIDOR, and approved the negative declaration and the YUCCA LOMA CORRIDOR on December 14, 2010; and

WHEREAS, COUNTY, TOWN, CITY, and SANBAG now desire to proceed with final design and construction of a portion of the YUCCA LOMA CORRIDOR, that includes grading and right-of-way acquisition for four lanes and construction of a two lane road along Yucca Loma Road, from Apple Valley Road to the Mojave River, Yates Road, from the Mojave River to Ridgecrest Road, and Green Tree Boulevard along the proposed Green Tree alignment from Ridgecrest Road with a terminus at the intersection of Green Tree Boulevard and Hesperia Road, a four lane bridge over the Mojave River and a four lane bridge over the BNSF railway as the initial phase of the PROJECT (hereinafter referred to as “the PROJECT”); and

WHEREAS, the remaining portion of the PROJECT will be included in a separate phase, at a later date or by conditioning future development; and

WHEREAS, the COUNTY and TOWN have development contributions required by the SANBAG NEXUS STUDY for the construction phase of the La Mesa/Nisqualli Interchange which includes the construction of a new interchange on I-15, between the Bear Valley Road and Palmdale Road interchanges, including a bridge with three through lanes in each direction with double left turn lanes, northbound ramps connecting with Nisqualli Road, and southbound ramps connecting with Armargosa Road; and

WHEREAS, COUNTY, TOWN, CITY, and SANBAG now desire to enter into this MOU to express the Parties' commitment to moving forward, as well as agree to general terms and conditions and an overall delivery strategy for the PROJECT; and

WHEREAS, the YUCCA LOMA CORRIDOR has been included in the SANBAG Nexus Study (hereinafter referred to as "NEXUS STUDY") and Victor Valley Measure I Major Local Highways Plan.

NOW, THEREFORE, COUNTY, TOWN, CITY, and SANBAG agree to the following:

1. The Parties agree to the following delivery strategy for the PROJECT:
 - a. TOWN will continue to act as the lead agency on the Plans, Specifications, and Estimate (PS&E) and environmental review for the PROJECT pursuant to the cooperative agreement entered into by and between TOWN, CITY, and COUNTY on or about December 11, 2007 (County Contract No. 07-1076).
 - b. TOWN, CITY, COUNTY, and SANBAG agree that they intend to enter into future agreements, by separate agreement or by an amendment to this MOU, for right-of-way and construction phases of the PROJECT. The Parties agree to negotiate in good faith the terms of future agreements for right-of-way and construction of the PROJECT. The failure of the Parties to reach mutually acceptable terms of a future agreement for right-of-way and construction of the PROJECT shall not be deemed a breach of this MOU.
2. The Parties agree to the following funding strategy for the PROJECT.
 - a. The TOWN commits to fund its development contribution share of the La Mesa/Nisqualli Interchange required by the SANBAG NEXUS STUDY, based on the actual construction cost of the La Mesa/ Nisqualli Interchange, toward the completion of the Green Tree Blvd. segment of the PROJECT. The dollar amount of said contribution shall be adjusted per the policies of the Measure I 2010-2040 Strategic Plan from the year of the award on the construction contract for the La Mesa / Nisqualli Interchange to the year of the award of a construction contract for the Green Tree Blvd. segment of the PROJECT.
 - b. The COUNTY commits to fund its development contribution share of the La Mesa/Nisqualli Interchange required by the SANBAG NEXUS STUDY, based on the actual construction cost of the La Mesa/ Nisqualli Interchange, toward the completion of the Green Tree Blvd. segment of the PROJECT. The dollar amount of said contribution shall be adjusted per the policies of the Measure I 2010-2040 Strategic Plan from the year of the award on the construction contract for the La Mesa / Nisqualli Interchange to the year of the award of a construction contract for the Green Tree Blvd. segment of the PROJECT.
 - c. The CITY commits, in accordance with the approved cooperative agreement with SANBAG, to fund the entire TOWN and COUNTY Nexus Study development contribution share of the La Mesa / Nisqualli Interchange actual construction cost in exchange for the TOWN and COUNTY contributing the SANBAG

Nexus Study development contribution share of the actual construction cost toward the Green Tree Blvd. segment of the PROJECT.

d. All Parties agree to enter into project funding agreements that would address fully funding both projects. Subject to these future funding agreements approved by all parties, CITY, TOWN, and COUNTY agree to fully fund their NEXUS STUDY fair-share development contributions at the point when those contributions are applicable, and in accordance with the SANBAG Nexus Study, and SANBAG agrees to fully fund their public share contributions, for the PROJECT and the La Mesa/Nisqualli Interchange Project. In the event that this MOU is terminated, whether with or without cause, it shall not affect the previously calculated NEXUS STUDY fair-share development contributions for the PROJECT and the La/Mesa Nisqualli Interchange Project. CITY, TOWN, and COUNTY may advance part and/or all of the other Parties' development contribution to deliver either the PROJECT or the La/Mesa Nisqualli Interchange Project. Upon completion of both the PROJECT and the La/Mesa Nisqualli Interchange Project, all development contributions will be adjusted to comply with the NEXUS STUDY fair-share development contributions based upon actual expenditures.

3. This MOU may be amended only by a written agreement signed by authorized representatives of the Parties.

4. TOWN, CITY, COUNTY, and SANBAG may each individually terminate this MOU if any one of the following conditions exist:

a. Construction of the PROJECT, (or any of the PROJECT phases), fails to commence within thirty-six (36) months of the effective date of this MOU; and/or

b. Funding for the PROJECT is not secured by all of the Parties; and/or

c. The Parties cannot reach an agreement concerning the right-of-way and construction elements of the PROJECT; and/or

d. Any party to this MOU fails to comply with the terms and conditions of this MOU (hereinafter referred to as "a breach"), after being provided written notice of the breach by another party to this MOU and ninety (90) days to cure the breach.

5. Any party terminating the MOU pursuant to Paragraph 4, above, shall provide the other parties written notice of its intent to terminate sixty (60) days in advance of the termination date. In the event TOWN, CITY, COUNTY, or SANBAG exercises its right to terminate this MOU, the entire MOU terminates. All agencies shall be responsible for their share of the project cost incurred within each agency's respective jurisdiction before the termination.

6. Unless this MOU is terminated by the Parties pursuant to Paragraph 4, herein, this MOU shall terminate upon completion of the PROJECT and payment of final billing by the Parties for their share of the PROJECT costs. The Parties' indemnification obligations contained herein shall survive the termination of this MOU.

7. TOWN agrees to indemnify, defend (with counsel approved by COUNTY) and hold harmless COUNTY and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.

8. TOWN agrees to indemnify, defend (with counsel approved by SANBAG) and hold harmless SANBAG and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
9. TOWN agrees to indemnify, defend (with counsel approved by CITY) and hold harmless CITY and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
10. CITY agrees to indemnify, defend (with counsel approved by COUNTY) and hold harmless COUNTY and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
11. CITY agrees to indemnify, defend (with counsel approved by TOWN) and hold harmless TOWN and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
12. CITY agrees to indemnify, defend (with counsel approved by SANBAG) and hold harmless SANBAG and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
13. SANBAG agrees to indemnify, defend (with counsel approved by COUNTY) and hold harmless COUNTY and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
14. SANBAG agrees to indemnify, defend (with counsel approved by TOWN) and hold harmless TOWN and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
15. SANBAG agrees to indemnify, defend (with counsel approved by CITY) and hold harmless CITY and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
16. COUNTY agrees to indemnify, defend (with counsel approved by TOWN) and hold harmless TOWN and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
17. COUNTY agrees to indemnify, defend (with counsel approved by SANBAG) and hold harmless SANBAG and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
18. COUNTY agrees to indemnify, defend (with counsel approved by CITY) and hold harmless CITY and its officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of its obligations under this MOU.
19. In the event TOWN and/or CITY and/or SANBAG and/or COUNTY are found to be comparatively at fault for any claim, action, loss, or damage which results from their respective obligations under the Agreement, the TOWN, CITY, SANBAG, and/or COUNTY shall indemnify the other to the extent of its

comparative fault. Furthermore, if TOWN and/or CITY and/or SANBAG and/or COUNTY attempts to seek recovery from the other for Workers' Compensation benefits paid to an employee, TOWN, CITY, SANBAG, and COUNTY agree that any alleged negligence of the employee shall not be construed against the employer of that employee.

20. In the event of litigation arising from this MOU, each Party to the agreement shall bear its own costs, including attorney(s) fees. This Paragraph shall not apply to the costs or attorney(s) fees relative to paragraphs 7 through 19, which relate to the Parties' indemnification obligations.

21. TOWN, CITY, SANBAG and COUNTY are wholly or partially self-insured public entities for purposes of Professional Liability, Automobile Liability, General Liability, and Workers' Compensation and warrant that through their programs of self-insurance, they have adequate coverage or resources to protect against liabilities arising out of their respective performance of the terms, conditions or obligations of this MOU.

22. Except for the cooperative agreement entered into by and between TOWN, CITY, and COUNTY on or about December 11, 2007, for the preparation of PROJECT design and environmental documents (County Contract No. 07-1076) and the cooperative agreement entered into by and between TOWN and COUNTY on or about May 3, 2011, for roadway improvements along Yucca Loma Road and Yates Road and appraisal and acquisition of road right-of-way (County Contract No. 11-238), this MOU contains the entire agreement of the Parties with respect to subject matter hereof, and supersedes all prior negotiations, understandings or agreements. No supplement, modification, or amendment of this MOU shall be binding unless executed in writing and signed by all Parties.

23. This MOU shall be governed by the laws of the State of California. Any action or proceeding between the Parties concerning the interpretation or enforcement of this MOU, or which arises out of or is in any way connected with this MOU or the PROJECT, shall be instituted and tried in the appropriate state court located in the County of San Bernardino, California.

24. Time is of the essence for each and every provision of this MOU.

25. Since the Parties or their agents have participated fully in the preparation of this MOU, the language of this MOU shall be construed simply, according to its fair meaning, and not strictly for any or against any Party. Any term referencing time, days or period for performance shall be deemed work days. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this MOU.

26. No waiver of any default shall constitute a waiver of any other default or breach, whether of the same or other covenant or condition. No waiver, benefit, privilege, or service voluntarily given or performed by a Party shall give the other Party any contractual rights by custom, estoppel, or otherwise.

27. If a court of competent jurisdiction declares any portion of this MOU invalid, illegal, or otherwise unenforceable, the remaining provisions shall continue in full force and effect, unless the purpose of this MOU is frustrated.

28. This MOU may be signed in counterparts, each of which shall constitute an original.

29. This MOU shall take effect on the date it is signed by all Parties.

30. If this MOU is funded in whole or in part with funds provided by the American Recovery and Reinvestment Act of 2009, TOWN and its contractors shall comply with the following provisions:

Use of ARRA Funds and Requirements - This Contract may be funded in whole or in part with funds provided by the American Recovery and Reinvestment Act of 2009 ("ARRA"), signed into law on February 17, 2009. Section 1605 of ARRA prohibits the use of recovery funds for a project for the construction, alteration, maintenance or repair of a public building or public work (both as defined in 2 CFR 176.140) unless all of the iron, steel and manufactured goods (as defined in 2 CFR 176.140) used in the project are produced in the United States. A waiver is available under three limited circumstances: (I) Iron, steel or relevant manufactured goods are not produced in the United States in sufficient and reasonable quantities and of a satisfactory quality; (ii) Inclusion of iron, steel or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent; or (iii) Applying the domestic preference would be inconsistent with the public interest. This is referred to as the "Buy American" requirement. Request for a waiver must be made to COUNTY for an appropriate determination.

Section 1606 of ARRA requires that laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to ARRA shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. 31). This is referred to as the "wage rate" requirement.

The above described provisions constitute notice under ARRA of the Buy American and wage rate requirements. TOWN and its contractors must contact the COUNTY contact if they have any questions regarding the applicability or implementation of the ARRA Buy American and wage rate requirements. TOWN and its contractors will also be required to provide detailed information regarding compliance with the Buy American requirements, expenditure of funds and wages paid to employees so that COUNTY may fulfill any reporting requirements it has under ARRA. The information may be required as frequently as monthly or quarterly. TOWN and its contractors agree to fully cooperate in providing information or documents as requested by COUNTY pursuant to this provision. Failure to do so will be deemed a default and may result in the withholding of payments and termination of this Contract.

TOWN and its contractors may also be required to register in the Central Contractor Registration (CCR) database at <http://www.ccr.gov> and may be required to have their subcontractors also register in the same database. TOWN and its contractors must contact COUNTY with any questions regarding registration requirements.

Schedule of Expenditure of Federal Awards - In addition to the requirements described in "Use of ARRA Funds and Requirements," proper accounting and reporting of ARRA expenditures in single audits is required. TOWN and its contractors agree to separately identify the expenditures for each grant award funded under ARRA on

the Schedule of Expenditures of Federal Awards (SEFA) and the Data Collection Form (SF-SAC) required by the Office of Management and Budget Circular A-133, "Audits of States, Local Governments, and Nonprofit Organizations." This identification on the SEFA and SF-SAC shall include the Federal award number, the Catalog of Federal Domestic Assistance (CFDA) number, and amount such that separate accountability and disclosure is provided for ARRA funds by Federal award number consistent with the recipient reports required by ARRA Section 1512 (c).

In addition, TOWN and its contractors agree to separately identify to each subcontractor and document at the time of sub-contract and at the time of disbursement of funds, the Federal award number, any special CFDA number assigned for ARRA purposes, and amount of ARRA funds.

TOWN and its contractors may be required to provide detailed information regarding expenditures so that COUNTY may fulfill any reporting requirements under ARRA described in this section. The information may be required as frequently as monthly or quarterly. TOWN and its contractors agree to fully cooperate in providing information or documents as requested by COUNTY pursuant to this provision. Failure to do so will be deemed a default and may result in the withholding of payments and termination of this Contract.

Whistleblower Protection

TOWN and its contractors agree that both they and their subcontractors shall comply with Section 1553 of the ARRA, which prohibits all non-Federal contractors, including the State, and all contractors of the State, from discharging, demoting or otherwise discriminating against an employee for disclosures by the employee that the employee reasonably believes are evidence of: (1) gross mismanagement of a contract relating to ARRA funds; (2) a gross waste of ARRA funds; (3) a substantial and specific danger to public health or safety related to the implementation or use of ARRA funds; (4) an abuse of authority related to the implementation or use of recovery funds; or (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to ARRA funds.

TOWN and its contractors agree that they and their subcontractors shall post notice of the rights and remedies available to employees under Section 1553 of Division A, Title XV of the ARRA.

SIGNATURES ON THE FOLLOWING PAGES:

CHAIRMAN OF THE BOARD

(Print or Type)

Laura H. Welch

Clerk of the Board of Supervisors
of the County of San Bernardino.

By _____

Deputy

Dated: _____

Address _____

SAN BERNARDINO COUNTY

TRANSPORTATION AUTHORITY

▶ _____

Name _____

(Print or type name of person signing contract)
contract)

Title _____

Dated: _____

Address _____

Council Meeting Date: 07/12/11

CITY OF VICTORVILLE

By ▶ _____

(Authorized signature - sign in blue ink)

Name _____

(Print or type name of person signing

Title _____

Dated: _____

Address _____

Approved as to Legal Form	Reviewed by Contract Compliance	Presented to BOS for Signature
▶	▶	▶
_____ County Counsel	_____ Date	_____ Department Head
Date	_____ Date	Date
_____	_____	_____

APPROVED AS TO FORM AND

PROCEDURE:

By: _____

Penny Alexander-Kelley

SANBAG Counsel

Date: _____

APPROVED AS TO FORM AND

PROCEDURE:

By: _____

Town Attorney

Date: _____

APPROVED AS TO FORM AND

PROCEDURE:

By: _____

City Attorney

Date: