

ORDINANCE NO. 20050526-007

AN ORDINANCE ADOPTING AN INTERLOCAL AGREEMENT WITH THE CAPITAL METROPOLITAN TRANSPORTATION AUTHORITY AND WAIVING THE PROVISIONS OF CHAPTER 13-4 OF THE CITY CODE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The Interlocal Agreement between the City and the Capital Metropolitan Transportation Authority included in Attachment A to this ordinance is approved.

PART 2. To the extent there is a conflict with Chapter 13-4 of the City Code, the terms of the interlocal agreement prevail and the terms of the conflicting Code sections are waived.

PART 3. This ordinance takes effect on June 6, 2005.

PASSED AND APPROVED

_____ May 26 _____, 2005

§
§
§

Will Wynn
Mayor

APPROVED:

David Allan Smith
City Attorney

ATTEST:

Shirley A. Brown
City Clerk

ATTACHMENT A

INTERLOCAL AGREEMENT REGARDING QUIET ZONES

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS) **KNOW ALL BY THESE PRESENTS:**

THIS AGREEMENT (Agreement) is made by and between the **CITY OF AUSTIN**, a Texas home rule municipality (City) and Capital Metropolitan Transportation Authority; a transportation authority located in Travis County and Williamson County, Texas, and organized under the provisions of Chapter 451 of the Texas Transportation Code (Capital Metro); collectively referred to as the Parties in this Agreement.

**I.
RECITALS**

1.01 Capital Metro is the owner of railroad right-of-way within the city limits of the City and has requested that the City create zones (Quiet Zones) along certain portions of the railroad right-of-way, that include public crossings over the railroad rights-of-way (Crossings), relieving rail carriers operating on those lines from the obligation to blow whistles, sound horns or use other warning devices within the proposed Quiet Zones under the Austin City Code (City Code). The location of the proposed Quiet Zones and the individual Crossings located within the Quiet Zones is described in Exhibit A attached to this Agreement.

1.02 Capital Metro has installed Safety Measures within the designated proposed Quiet Zones as a substitute for blowing whistles, sounding horns or using other warning devices by the railway carriers operating within the Quiet Zones. Descriptions of the Safety Measures at each crossing within the Quiet Zones are attached as Exhibit B to this Agreement.

1.03 Capital Metro has agreed to assume responsibilities and to perform certain duties concerning these Quiet Zones.

1.04 Because of the Safety Measures implemented by Capital Metro and the assumption by Capital Metro of the responsibilities and duties concerning the Quiet Zones, the Parties desire to create Quiet Zones. The City desires to waive any conflict between this Agreement and the City Code by separate action.

1.05 The City and Capital Metro desire to set forth in writing the agreed terms for the operation, maintenance and control of the Safety Measures within the Quiet Zones, the obligations of the railway carriers operating within the Quiet Zones, and the responsibility of Capital Metro for the operations of railway carriers operating within the Quiet Zones.

1.06 The Parties recognize and acknowledge that the Federal Railroad Administration is considering the adoption of rules and regulations under the authority of 49 U.S.C. § 20153, which may impose additional duties and responsibilities on the Parties not contemplated by this Agreement. The Parties also recognize and acknowledge that the imposition of these additional duties may affect the continuation of the Quiet Zones contemplated by this Agreement. The Parties also recognize and acknowledge that certain provisions of state law and regulations may also apply to this Agreement.

1.07 On May 26, 2005, the Austin City Council adopted an ordinance authorizing execution of this Agreement and waiving any conflict between this Agreement and Chapter 13-4 of the City Code. On April 5, 2005, Capital Metro's Board of Directors, by resolution, a copy of which is attached to this Agreement as Exhibit C, authorized the execution of this Agreement with the City to effectuate the creation, operation, and maintenance of the Quiet Zones desired by Capital Metro.

1.08 There are no state-owned public rights of way within the proposed Quiet Zones.

1.09 Capital Metro, as evidenced by the execution of this Agreement, is authorized to negotiate and execute this Agreement with the City for the operation, maintenance and enforcement of the Quiet Zones.

NOW, THEREFORE, in consideration of the foregoing premises, the mutual covenants set forth herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the City and Capital Metro agree as follows:

II. OBLIGATIONS OF CAPITAL METRO

2.01 Applicability of the City Code and Preemption by State or Federal Law. The requirements of the City Code regarding rail carrier operations shall apply to the Quiet Zones identified in Exhibit A. The Parties recognize and agree that:

- (a) State law and regulations, together with federal law and regulations, may preempt the provisions of the City Code and this Agreement.
- (b) Capital Metro may be required to modify the Safety Measures identified in Exhibit B, or its maintenance and operation of the Safety Measures, to comply with state and federal requirements. Capital Metro shall assume all responsibility for any such modifications and for compliance with all applicable federal and state law requirements.
- (c) This Agreement may be required to be modified to reflect the continued and developing requirements of state and federal law and regulations concerning Quiet Zones. The Parties agree to use their best efforts to enter into any further agreements necessitated by the implementation of changes under state and federal law. If the Parties are unable to reach an agreement concerning modifications to this Agreement necessitated by changes in state or federal law and regulations within 90 days of the changes, the City shall have the right, upon Notice to Capital Metro, to terminate its authorization of the Quiet Zones and shall have the right to terminate this Agreement. Capital Metro, upon receipt of Notice by the City under this subparagraph, shall terminate the Quiet Zones pending the completion and execution of any further agreements necessitated by changes in state or federal law in accordance with the terms of subparagraph 2.07 of this Agreement.

2.02 Ownership, Operation and Maintenance of Quiet Zone Safety Measures. The installation, ownership, operation, maintenance, and control of the Safety Measures installed in the Quiet Zones shall be the sole responsibility of Capital Metro at all times.

2.03 Responsibility for Injuries, Loss of Life or Damage to Property. Capital Metro shall be responsible for:

- (a) The safety of its own employees and authorized agents;
- (b) Any loss or damage to property of the City or for injury to or the loss of life of any City employees;
- (c) Any loss or damage to the property of third persons or for injury to or loss of life of third persons.

directly caused by Capital Metro, or its employees, authorized agents, resulting from the construction, installation, control, operation, or maintenance of the Safety Measures in the Quiet Zones.

2.04 Responsibility in the Event of the Inoperability or Failure of the Safety Measures. Immediately upon learning that any Safety Measures in the Quiet Zones are inoperable or malfunctioning, Capital Metro shall notify the City by contacting the Director of Public Works or its successor department (City Designee).

- (a) Capital Metro shall immediately advise all rail carriers operating on the railroad rights-of-way in which the Quiet Zones are located of the malfunction or inoperability of the Safety Measures. Capital Metro shall require the rail carriers to blow whistles, sound horns, or use other warning devices in the Crossings as required by City Code, state, or federal law as though the Crossings were not located within a designated Quiet Zone until such time as the inoperable or malfunctioning Safety Measures are restored to a fully functional status.
- (b) Capital Metro shall provide the City Designee with proof of notification in a form acceptable to the City Designee of the notice to rail carriers required by this subparagraph within twenty-four hours of the delivery of that notice to the rail carriers. Capital Metro shall advise the City Designee of the status of the repairs to the Safety Measures on an as-needed basis and shall advise the City Designee upon the restoration of the Safety Measures to a fully functional status.

2.05 Rail Carriers Operating within the Quiet Zones. A list of the rail carriers together with their business addresses, business telephone numbers, and emergency telephone numbers for the chief operating officer for each rail carrier operating on the railroad rights-of-way in which the Quiet Zones are located, is attached as Exhibit D. Within fifteen days of the consummation of any agreement by Capital Metro permitting any additional rail carrier to operate on the rail system in which the Quiet Zones are located, Capital Metro shall provide the City with a copy, if any, of Capital Metro's agreement with the additional rail carrier, together with the name, business address, business telephone number, and emergency telephone number of the chief operating officer for the additional rail carrier.

2.06 Coordination of Activities. Capital Metro agrees to communicate to the City all information reasonably necessary for the proper administration of the Quiet Zones and for the accomplishment of this Agreement.

2.07 Procedure for Termination of the Quiet Zones. Capital Metro agrees to follow all procedures specified by the City Code or any directives by the City under applicable state or federal law or regulation for the termination of the Quiet Zones as may be required by the City Code, state or federal law. If Capital Metro disagrees with the termination of the Quiet Zones, Capital Metro agrees to abide by the termination determination pending the review of the decision or directive to terminate under the terms of the default provisions of this Agreement, or state, or federal law.

III. GENERAL PROVISIONS

3.01. Authority. This Agreement is made pursuant to the authority conferred upon the Parties by Chapter 791, Texas Government Code.

3.02. Default Process. If one Party believes that the other Party is in default of any provision of this Agreement, the non-defaulting Party shall give written Notice to the other Party, specifying the event of default and extending the defaulting Party thirty calendar days to cure the default except as otherwise provided by this Agreement.

- (a) This thirty-day period for Notice and opportunity to cure must pass before the non-defaulting Party may initiate any remedies available to the non-defaulting Party due to an alleged default. The non-defaulting Party must mitigate any direct or consequential damages arising from any default to the extent reasonably possible under the circumstances.
- (b) The Parties agree that they will use good faith and reasonable efforts to resolve any dispute by agreement. If no agreement is reached, the Parties agree to engage in nonbinding arbitration, mediation or other alternative dispute resolution methods as recommended by the laws of the State of Texas, before initiating any lawsuit to enforce their respective rights under this Agreement.
- (c) If the default is not cured during the thirty-day period, the non-defaulting Party may pursue all remedies, at law or in equity, that it deems appropriate to redress such default. Nothing in this Agreement will be construed to limit any Party's right to recover damages or seek other appropriate curative remedies if a non-defaulting Party files a breach of contract action relating to this Agreement. Nothing in this Agreement shall be construed as a waiver of a Party's right to seek emergency relief in the event of an emergency or a waiver of the rights of a Party existing under the laws of the State of Texas.

- (d) If Capital Metro fails to operate, maintain, or control the Safety Measures installed within any of the Quiet Zones in accordance with City, state or federal requirements, the City shall have the right to require Capital Metro to deactivate the affected Quiet Zone(s). If Capital Metro fails or refuses a directive of the City to deactivate a Quiet Zone and to require rail carriers operating on the railroad right-of-way to blow whistles, sound horns, or use other warning devices at the Crossings within the Quiet Zones as though the Quiet Zones did not exist, the City shall have the right to seek emergency and equitable relief in a court of competent jurisdiction for such failure or refusal.

3.03 Severability. If any word, phrase, clause, sentence, paragraph, section or other portion of this Agreement is held to be invalid for any reason by a court or agency of competent jurisdiction, the remainder of this Agreement shall not be affected and this Agreement shall be construed as if such invalid portion had never been contained herein and the provisions of this Agreement are expressly deemed severable for this purpose.

3.04 Force Majeure. If, by reason of Force Majeure, any Party shall be rendered wholly or partially unable to carry out its obligations under this Agreement after its effective date, then such Party shall give written Notice of the particulars of such Force Majeure to the other Party within a reasonable time after the occurrences thereof.

- (a) The obligations of the Party giving such Notice, to the extent affected by such Force Majeure, shall be suspended during the continuance of the inability claimed and for no longer period, and any such Party shall in good faith exercise its best efforts to remove and overcome such inability.
- (b) This subparagraph 3.04 regarding Force Majeure does not apply to those conditions addressed by subparagraph 2.04 of this Agreement. Force Majeure will not relieve Capital Metro of its responsibilities under subparagraph 2.04 of this Agreement governing the inoperability or malfunctioning of the Safety Measures in the Quiet Zones. Force Majeure will not relieve Capital Metro of its obligations or responsibilities as provided in subparagraph 2.04. If a Force Majeure event renders the Safety Measures inoperable for any reason, Capital Metro shall proceed as provided in subparagraph 2.04.
- (c) The term “**Force Majeure**”, as used in this Agreement, means and refers to acts of God; strikes, lockouts or other disturbances; acts of public enemies; orders of any kind of the government of the United States, the State of Texas, or any other civil or military authority; insurrections; riots; epidemics; earthquakes; lightning; fires; hurricanes; storms; floods; washouts; or other natural disasters; arrests; restraint of government and people; civil disturbances; explosions; breakage or accidents to machinery, pipelines or canals; or other causes not reasonably within the control of the Party claiming such inability.

3.05 Cooperation. The Parties agree to cooperate at all times in good faith to effectuate the purposes and intent of this Agreement.

3.06 Entire Agreement. This Agreement contains the entire agreement of the Parties and supersedes all prior or contemporaneous understandings or representations, whether oral or written, respecting the subject matter of this Agreement. No other agreement, statement or promise relating to the subject matter of this Agreement that is not contained in this Agreement is valid or binding.

3.07 Amendments. Any amendment hereof must be in writing and signed by the authorized representative of each Party hereto.

3.08 No Amendment of Other Agreements. Unless otherwise expressly stipulated herein, this Agreement is separate from and shall not constitute an amendment or modification of any other agreement between the Parties.

3.09 No Third Party Beneficiaries. This Agreement shall inure only to the benefit of the Parties hereto and third persons not privy hereto shall not, in any form or manner, be considered a third party beneficiary of this Agreement.

3.10 No Partnership or Joint Venture; Independent Contractors. This Agreement shall not be construed in any form or manner to establish a partnership, joint venture, joint enterprise, or agency, express or implied, nor any employer-employee or borrowed servant relationship by and among the Parties. The City and Capital Metro have the status of independent contractors hereunder and each will be solely responsible for the proper direction of its employees and servants, and agents. The employees, agents and servants, and employees of the each of the Parties will not be considered employees, borrowed servants or agents of the other Parties for any reason.

3.11 Assignment. The rights and obligations of Capital Metro arising under this Agreement shall not be assigned without the prior written consent of the City, which consent shall not be unreasonably withheld.

3.12 Applicable Law. This agreement shall be construed under and in accordance with Texas and applicable federal law.

3.13 Venue. Venue for any action arising hereunder shall be in Travis County, Texas.

3.14 Notices. Except as provided by this Agreement, Notices to either Party shall be in writing, and may be either hand-delivered or sent by certified mail, postage paid, return receipt requested. If sent to the Parties at the addresses designated below, Notice shall be deemed effective upon receipt, in the case of hand-delivery, and three days after deposit in the U.S. Mail, in the case of mailing. The addresses for the Parties for Notices under this Agreement shall be:

Capital Metro:

Rail Manager
Capital Metropolitan
Transportation Authority
2910 E. 5th Street
Austin, Texas 78702

CITY OF AUSTIN:

Public Works
City of Austin
P.O. Box 1088
Austin, Texas 78767
Attn: Director

3.15 Effective Date. This Agreement shall be effective from and after the date of due execution hereof by all Parties. Unless sooner terminated in accordance with the procedures set forth above, this Agreement shall terminate 25 years from the effective date.

3.16 Headings. All headings and captions used in this Agreement are intended solely for convenience and shall not enlarge, limit, or otherwise affect that which is set forth in any one of the paragraphs or sections in this Agreement.

3.17 Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which will be deemed an original, but all of which will constitute one and the same instrument. Each Party represents and warrants that it has the full right, power, and authority to execute this Agreement.

3.18 Interpretation. The Parties acknowledge that this Agreement is voluntary and consensual on the part of each Party. Each Party has fully participated in the negotiation, formulation, drafting, and approval of this Agreement. If there is any ambiguity, the provisions of this Agreement are not to be construed for or against any particular Party by reason of authorship.

3.19 Exhibits. The Exhibits reference and attached to this Agreement are incorporated into this Agreement by reference for all purposes.

IN WITNESS WHEREOF, each Party has executed this Agreement as of the dates set forth below.

CITY:

APPROVED AS TO FORM:

Martha V. Terry
Assistant City Attorney

CITY OF AUSTIN:

By: _____
Jose E. Canales
Deputy City Manager

Date: _____

CAPITAL METRO:

APPROVED AS TO FORM:

Sallie Crosby
Attorney for Capital Metro

CAPITAL METRO:

By: _____
Fred M. Gilliam
President and Chief Executive Officer

Date: _____

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

THIS INSTRUMENT was acknowledged before me on this ___ day of _____, 2005, by Jose E. Canales, Deputy City Manager of the City of Austin, a Texas municipal corporation, on behalf of said municipal corporation.

(SEAL)

Notary Public, State of Texas

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

THIS INSTRUMENT was acknowledged before me on this ___ day of _____, 2005, by Fred M Gilliam, President and Chief Operating Officer, of the Capital Metropolitan Transportation Authority of the State of Texas on behalf of said Authority.

(SEAL)

Notary Public, State of Texas

EXHIBIT "A"

<u>DOT #</u>	<u>LOCATION</u>	<u>MILEPOST</u>
924 564M	Avery Ranch Blvd.	77.95
765 812U	Ohlen Road	64.20
765 811M	Wooten Pedestrian Xing	63.72
765 810F	Anderson Lane	63.49
765 809L	Morrow Street	63.21
765 808E	Lamar Blvd.	62.45

EXHIBIT "B"

<u>DOT #</u>	<u>LOCATION</u>	<u>MILEPOST</u>	<u>ASM'S</u>
924 564M	Avery Ranch Blvd.	77.95	Constant Warning Time Devices; Medians extending at least 100 feet from gate arm bounded by non-traversable curbs; gate arm extended full length to median; no horn signage.
765 812U	Ohlen Road	64.20	Constant Warning Time Devices; Quad gates; Pavement detection loops; no horn signage.
765 811M	Wooten Pedestrian Xing	63.72	Constant Warning Time Devices; gate arm extended full length across sidewalk; 6' chainlink fence extended 300' either side of the crossing to channel pedestrian traffic to the crossing.
765 810F	Anderson Lane	63.49	Constant Warning Time Devices; Wayside Horn; no horn signage.
765 809L	Morrow Street	63.21	Constant Warning Time Devices; Quad gates; Pavement detection loops; no horn signage.
765 808E	Lamar Blvd.	62.45	Constant Warning Time Devices; Quad gates; Pavement detection loops; no horn signage.

CAPITAL METROPOLITAN TRANSPORTATION AUTHORITY
2910 East Fifth Street, Austin, Texas 78702 | TEL 512.389.7400 | FAX 512.369.6596 | www.capmetro.org

EXHIBIT "C"



RESOLUTION

OF THE

CAPITAL METROPOLITAN TRANSPORTATION AUTHORITY

BOARD OF DIRECTORS

STATE OF TEXAS

RESOLUTION NO.: CMTA-2005-0425-034

COUNTY OF TRAVIS

WHEREAS, the Board of Directors recognizes the need to improve Capital Metro's rail asset to assure the safe movement of freight and passengers; and

WHEREAS, the Board of Directors recognizes the need for a cooperative effort between the City of Austin, Capital Metro and neighborhoods to improve the quality of life in Austin.

THEREFORE, BE IT RESOLVED by the Capital Metropolitan Transportation Authority Board of Directors that the President/CEO, or his designee, is authorized to finalize and execute enter into an Interlocal Agreement with the City of Austin regarding the creation of quiet zones within the limits of the City of Austin.

It was moved by Harless seconded by Trevino to approve the above resolution. The motion carried a vote of 6 ayes (Trevino, Gomez, Cowman, Harless, Thomas and Walker) 1 nay (Slusher).

Gina Estrada
Executive Assistant/Board Liaison

Date: April 25, 2005

EXHIBIT "D"

Austin Area Terminal Railroad (AATR) provides direction for all operation, maintenance and train movement for each rail carrier operating on the railroad rights-of-way in which the Quiet Zones, including the Steam Train. The business address, business telephone number, and emergency telephone numbers for the chief operating officer AATR are as follows:

Austin Area Terminal Railroad (AATR)

231 East Main St
Suite 130
Round Rock, TX 78664
Office no. (512) 733-5909
AATR Emergency No. 1 (888) 525-7055 or (512) 923-8552

General Manager: Jerry McAden
Office 512-733-5909
Cell 51-923-8555

Other Numbers:

Austin Steam Train Association (ASTA)

General Manager: Ron Larson
Office (512) 477-8468
Cell (512) 423-6997

Capital Metropolitan Transportation Authority (AMTA)

Rail Manager: Bill LeJeune
2910 E 5th Street
Austin, Tx 78702
512-369-6281
Cell 512-415-5560 (24/7)