

# CITY of NOVI CITY COUNCIL

Agenda Item E  
June 20, 2011

**SUBJECT:** Approval of a Preliminary Engineering Agreement with CSX Transportation, Inc. for the review of the portion of the Ten Mile Road Pathway project (CSX Railroad to Catherine Industrial Road) located within the CSX railroad right-of-way at an estimated cost of \$6,500.

**SUBMITTING DEPARTMENT:** Department of Public Services, Engineering Division *BTC*

**CITY MANAGER APPROVAL:** *RA* *W*

<b>EXPENDITURE REQUIRED</b>	<b>\$6,500 (Estimated)</b>
<b>AMOUNT BUDGETED</b>	<b>\$23,000 (Engineering)</b>
<b>LINE ITEM NUMBER</b>	<b>204-204.00-974.417</b>

## BACKGROUND INFORMATION:

This project will include a pathway segment along the north side of Ten Mile between Catherine Industrial Road and the CSX Railroad and includes the crossing of the railroad tracks. Once completed, a continuous non-motorized route will exist between Novi Road and Haggerty Road along the north side of Ten Mile, with the exception of one area approximately 230 feet long at the northeast corner of Meadowbrook and Ten Mile that is paved but not a constructed sidewalk. This pathway gap project was approved for the 2010-11 fiscal year in the Capital Improvement Program (CIP) based on the recommendations in the latest version of the Pathway & Sidewalk Prioritization Analysis and Process report by the Walkable Novi Committee. A location map has been included for reference.

The enclosed Preliminary Engineering Agreement is required by CSX as part of their engineering design review for any work within the railroad's right-of-way. The initial review has already been performed by CSX's engineering consultant, but the agreement is still outstanding. A review of the agreement was performed by Secret Wardle in November 2010 in which Secret requested some modifications to the agreement; however CSX has not responded to the several attempts made to contact them. The enclosed letter from Secret Wardle outlines the various concerns and potential risks, although low probability, regarding the proposed agreement. In order to keep the project on schedule and based on the lack of responsiveness by CSX to the City's requested modifications, staff recommends moving forward with the execution of the agreement and accepting the potential risks outlined in Beth Kudla's letter dated May 24, 2011.

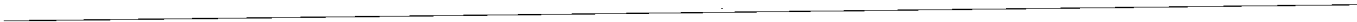
Following CSX's approval of the design, the City will then coordinate with CSX for the construction of the project. CSX will construct the portion of the path in the CSX right-of-way, which will be funded by this project.

Construction is scheduled to begin in summer 2011 and completion is anticipated by fall 2011, but is contingent on construction coordination with CSX and the acquisition of five permanent and four temporary easements that is currently in progress.

**RECOMMENDED ACTION:** Approval of a Preliminary Engineering Agreement with CSX Transportation, Inc. for the review of the portion of the Ten Mile Road Pathway project (CSX Railroad to Catherine Industrial Road) located within the CSX railroad right-of-way at an estimated cost of \$6,500.

	1	2	Y	N
Mayor Landry				
Mayor Pro Tem Gatt				
Council Member Fischer				
Council Member Margolis				

	1	2	Y	N
Council Member Mutch				
Council Member Staudt				
Council Member Wrobel				



**MAP INTERPRETATION NOTICE**

Map information depicted is not intended to replace or substitute for any official or primary source. This map was intended to meet National Map Accuracy Standards and use the most recent, accurate sources available to the people of the City of Novi. Boundary measurements and area calculations are approximate and should not be construed as survey measurements performed by a licensed Michigan Surveyor as defined in Michigan Public Act 132 of 1970 as amended. Please contact the City GIS Manager to confirm source and accuracy information related to this map.

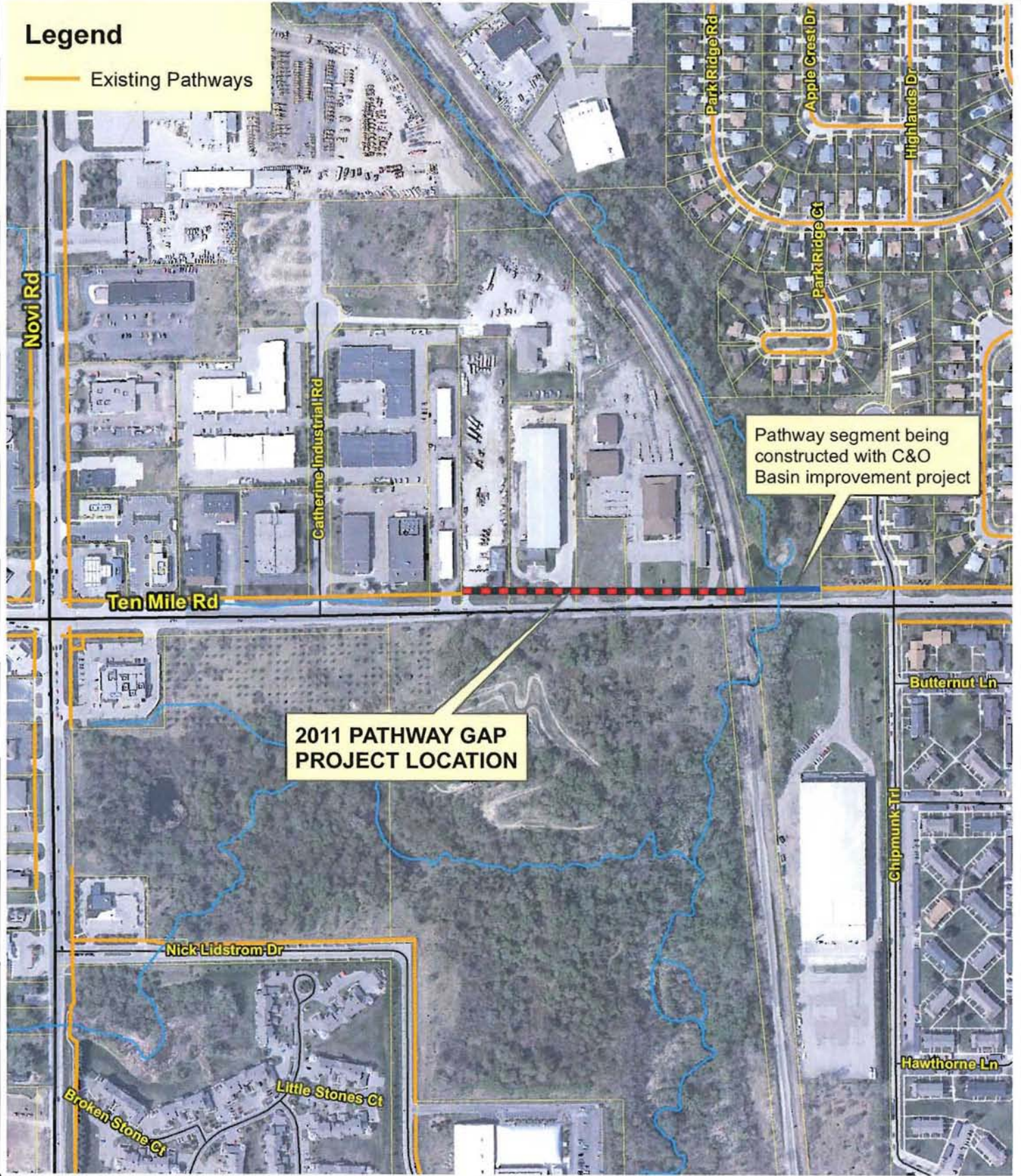
# City Of Novi



## 2011 PATHWAY GAP PROGRAM

### Legend

— Existing Pathways



Pathway segment being constructed with C&O Basin improvement project

2011 PATHWAY GAP PROJECT LOCATION

May 24, 2011

30903 Northwestern Highway  
P.O. Box 3040  
Farmington Hills, MI 48333-  
3040  
Tel: 248-851-9500  
Fax: 248-851-2158  
www.secretwardle.com

Elizabeth M. Kudla  
Direct: 248-539-2846  
bkudla@secretwardle.com

Mr. Ben Croy, Civil Engineer  
Engineering Division  
City of Novi  
26300 Delwal Drive  
Novi, Michigan 48375

**RE: Crossing Surface for Sidewalk -- 10 Mile Road  
CSXT Preliminary Engineering Agreement  
Our File No. 55124 NOV**

Dear Mr. Croy:

Despite follow-up efforts, including preparation of a short contract addendum, we have not received a response from CSX with respect to requested changes to the CSXT Preliminary Engineering Agreement to address the issues set forth in our November 18, 2010 review letter. The issues are summarized as follows:

1. The agreement does not include a billing dispute procedure and the City would be responsible for all actual costs exceeding the estimated \$6,500.00 review fee. A past due penalty will be added to charges not paid within 30 days. Any dispute over charges that is taken to court will be heard in a Court in Duval County Florida.
2. If CSX prepares plans they will only be guaranteed to meet CSX standards. CSX is not required to revise plans to meet local ordinance, state law, or other applicable standards.
3. CSX and its engineers should be considered independent contractors and the City should not be liable for the actions of CSX or its engineers.

The Preliminary Engineering Agreement appears to be a standard form agreement prepared by CSX to be executed in connection with any plan review or preparation that is necessary for any entity to construct improvements across the CSX railroad right-of-way. In this case, the City proposes to construct a walkway across the CSX railroad right-of-way on Ten Mile Road.

The Agreement, generally, provides for the City to pay the review and/or plan preparation fees of CSX's engineers to review or prepare plans for the proposed pathway to cross the railroad right-of-way. Though there is an initial estimate for review or preparation provided in the amount of \$6,500.00, the City may be responsible for any actual additional costs incurred beyond the \$6,500.00

Ben Croy, Civil Engineer

May 24, 2011

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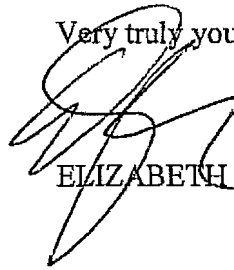
estimate. Because plan preparation is more labor intensive than plan review, and CSX has provided the City with specifications to incorporate into the City's plans, it is less likely that the CSX will exceed the estimated costs for review.

Additionally, because the City is preparing the overall plans for the pathway, the City can incorporate local ordinance, state law, and other applicable standards into the plan with respect to the CSX railroad right-of-way area.

Finally, there is a risk that the City would be accepting liability with respect to the CSX specifications that have been incorporated into the City's plans. Ultimately, if CSX constructs that portion of the pathway on its own property outside of the City's easement area, the likelihood of any City liability for the plan specifications would be decreased.

If upon consideration, the City is willing to accept the risks set forth above with respect to this agreement, we have no further objection to the City engineering into the Preliminary Engineering Agreement in its current format. If you have any questions regarding the above, please do not hesitate to call.

Very truly yours,



ELIZABETH M. KUDLA

EMK

Enclosure

cc: Maryanne Cornelius, City Clerk (w/Enclosure)  
Victor Cardenas, Assistant City Manager (w/Enclosure)  
Rob Hayes, Public Services Director (w/Enclosure)  
Thomas R. Schultz, Esquire (w/Enclosure)

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Project: Novi, Oakland, MI  
Crossing surface for sidewalk at 10 Mile Road.  
Chicago Division, Saginaw Subdivision  
DOT: 232 238 W; MP: CC 75.90  
OP No. TBD

## PRELIMINARY ENGINEERING AGREEMENT

This Preliminary Engineering Agreement (this "Agreement") is made as of \_\_\_\_\_, 20\_\_, by and between CSX TRANSPORTATION, INC., a Virginia corporation with its principal place of business in Jacksonville, Florida ("CSXT"), and the City of Novi, a body corporate and political subdivision of the State of Michigan ("Agency").

### EXPLANATORY STATEMENT

1. Agency wishes to facilitate the development of the proposed **crossing surface for sidewalk at 10 Mile Road, DOT 232 238 W, MP CC 75.90.** (the "Project").
2. Agency has requested that CSXT proceed with certain necessary engineering and/or design services for the Project to facilitate the parties' consideration of the Project.
3. Subject to the approval of CSXT, which approval may be withheld for any reason directly or indirectly related to safety or CSXT operations, property, or facilities, the Project is to be constructed, if at all, at no cost to CSXT, under a separate construction agreement to be executed by the parties at a future date.

NOW, THEREFORE, for and in consideration of the foregoing Explanatory Statement and other good and valuable consideration, the receipt and sufficiency of which are acknowledged by the parties, the parties agree as follows:

#### 1. Scope of Work

- 1.1. Generally. The work to be done by CSXT under this Agreement shall consist of: (i) the preparation or review and approval of preliminary and final engineering and design plans, specifications, drawings, agreements and other documents pertaining to the Project, (ii) the preparation of cost estimates for CSXT's work in connection with the Project, and (iii) the review of construction cost estimates, site surveys, assessments, studies, agreements and related construction documents submitted to CSXT by Agency for the Project (collectively, the "Engineering Work"). Engineering Work may also include office reviews, field reviews, attending hearings and meetings, and preparing correspondence, reports, and other documentation in connection with the Project. Nothing contained in this Agreement shall oblige CSXT to perform work which, in CSXT's opinion, is not relevant to CSXT's participation in the Project.
  - 1.2. Effect of CSXT Approval or Preparation of Documents. By its review, approval or preparation of plans, specifications, drawings or other documents pursuant to this Agreement (collectively, the "Plans"), CSXT signifies only that the Plans and the Project proposed to be constructed in accordance with the Plans satisfy CSXT's requirements. CSXT expressly disclaims all other representations and warranties in connection with the Plans, including, but not limited to, the integrity, suitability or fitness for the purposes of Agency or any other persons of such Plans or the Project constructed in accordance with the Plans.
2. Project Construction. Nothing contained in this Agreement shall be deemed to constitute CSXT's approval of or consent to the construction of the Project, which approval or consent may be withheld

for any reason directly or indirectly related to safety or CSXT operations, property, or facilities. The Project if constructed is to be constructed, if at all, under a separate construction agreement to be executed by the parties at a future date.

3. Reimbursement of CSXT Expenses.

3.1. Reimbursable Expenses. Agency shall reimburse CSXT for all costs and expenses incurred by CSXT in connection with the Engineering Work, including, without limitation: (i) all out of pocket expenses, (ii) travel and lodging expenses, (iii) telephone, facsimile, and mailing expenses, (iv) costs for equipment, tools, materials and supplies, (v) sums paid to consultants and subcontractors, and (vi) labor, together with labor overhead percentages established by CSXT pursuant to applicable law (collectively, the “**Reimbursable Expenses**”).

3.2. Estimate. CSXT has estimated the total Reimbursable Expenses for the Project to be approximately **\$6,500.00** (the “**Estimate**” as amended or revised). In the event CSXT anticipates that actual Reimbursable Expenses may exceed such Estimate, it shall provide Agency with the revised Estimate of total Reimbursable Expenses for Agency's approval and confirmation that sufficient funds have been appropriated to cover the total Reimbursable Expenses as reflected in the revised Estimate. CSXT may elect, by delivery of notice to Agency, to immediately cease all further Engineering Work, unless and until Agency provides such approval and confirmation.

3.3. Payment Terms.

3.3.1. Advance Payment in Full. Upon execution and delivery of this Agreement by Agency, Agency will deposit with CSXT a sum equal to the Reimbursable Expenses, as shown by the Estimate. Agency shall pay CSXT for Reimbursable Expenses in the amount set forth in CSXT Schedule PA attached hereto, a copy of which shall accompany the advance payment. If CSXT anticipates that it may incur Reimbursable Expenses in excess of the deposited amount, CSXT will request an additional deposit equal to the then remaining Reimbursable Expenses which CSXT estimates that it will incur. CSXT shall request such additional deposit by delivery of invoices to Agency. Agency shall make such additional deposit within thirty (30) days following delivery of such invoice to Agency.

3.3.2. Following completion of all Engineering Work, CSXT shall reconcile the total Reimbursable Expenses incurred by CSXT against the total payments received from Agency and shall submit to Agency a final invoice if required. Agency shall pay to CSXT the amount by which actual Reimbursable Expenses exceed total payments, as shown by the final invoice, within thirty (30) days following delivery to Agency of the final invoice. CSXT will provide a refund of any unused deposits if the deposit exceeds the incurred Reimbursable Expenses for the Project.

3.3.3. In the event that Agency fails to pay CSXT any sums due CSXT under this Agreement: (i) Agency shall pay CSXT interest at the lesser of 1.0% per month or the maximum rate of interest permitted by applicable law on the delinquent amount until paid in full; and (ii) CSXT may elect, by delivery of notice to Agency: (A) to immediately cease all further work on the Project, unless and until Agency pays the

entire delinquent sum, together with accrued interest; and/or (B) to terminate this Agreement.

- 3.4. Effect of Termination. Agency's obligation to pay CSXT Reimbursable Expenses in accordance with this Section shall survive termination of this Agreement for any reason.
4. Appropriations. Agency represents to CSXT that: (i) Agency has obtained appropriations sufficient to reimburse CSXT for the Reimbursable Expenses encompassed by the initial Estimate; (ii) Agency shall use its best efforts to obtain appropriations necessary to cover Reimbursable Expenses encompassed by subsequent Estimates approved by Agency; and (iii) Agency shall promptly notify CSXT in the event that Agency is unable to obtain such additional appropriations.
5. Termination.
- 5.1. By Agency. Agency may terminate this Agreement, for any reason, by delivery of notice to CSXT. Such termination shall become effective upon the expiration of fifteen (15) calendar days following delivery of notice to CSXT or such later date designated by the notice.
- 5.2. By CSXT. CSXT may terminate this Agreement (i) as provided pursuant to Section 3.3.3., or (ii) upon Agency's breach of any of the terms of, or its obligations under, this Agreement and such breach continues without cure for a period of ninety (90) days after written notification from CSXT to Agency of such breach.
- 5.3. Consequences of Termination. If the Agreement is terminated by either party pursuant to this Section or any other provision of this Agreement, the parties understand that it may be impractical to immediately stop the Engineering Work. Accordingly, both parties agree that, in such instance a party may continue to perform Engineering Work until it has reached a point where it may reasonably and/or safely suspend the Engineering Work. Agency shall reimburse CSXT pursuant to this Agreement for the Engineering Work performed, plus all costs reasonably incurred by CSXT to discontinue the Engineering Work and all other costs of CSXT incurred as a result of the Project up to the time of full suspension of the Engineering Work. Termination of this Agreement or Engineering Work on the Project, for any reason, shall not diminish or reduce Agency's obligation to pay CSXT for Reimbursable Expenses incurred in accordance with this Agreement. In the event of the termination of this Agreement or the Engineering Work for any reason, CSXT's only remaining obligation to Agency shall be to refund to Agency payments made to CSXT in excess of Reimbursable Expenses in accordance with Section 2.
6. Subcontracts. CSXT shall be permitted to engage outside consultants, counsel and subcontractors to perform all or any portion of the Engineering Work.
7. Notices. All notices, consents and approvals required or permitted by this Agreement shall be in writing and shall be deemed delivered (i) on the expiration of three (3) days following mailing by first class U.S. mail, (ii) on the next business day following mailing by a nationally recognized overnight carrier, or (iii) on the date of transmission, as evidenced by written confirmation of successful transmission, if by facsimile or other electronic transmission if sent on a business day (or if not sent on a business day, then on the next business day after the date sent), to the parties at the addresses set



Project: Novi, Oakland, MI  
Crossing surface for sidewalk at 10 Mile Road.  
Chicago Division, Saginaw Subdivision  
DOT: 232 238 W; MP: CC 75.90  
OP No. TBD

forth below, or such other addresses as either party may designate by delivery of prior notice to the other party:

If to CSXT: CSX Transportation, Inc.  
500 Water Street, J301  
Jacksonville, Florida 32202  
Attention: Hal Gibson

If to Agency: City of Novi  
26300 Delwai Drive  
Novi, MI 48375  
Attention: Brian Coburn

Entire Agreement. This Agreement embodies the entire understanding of the parties, may not be waived or modified except in a writing signed by authorized representatives of both parties, and supersedes all prior or contemporaneous written or oral understandings, agreements or negotiations regarding its subject matter. In the event of any inconsistency between this Agreement and the Exhibits, the more specific terms of the Exhibits shall be deemed controlling.

8. Waiver. If either party fails to enforce its respective rights under this Agreement, or fails to insist upon the performance of the other party's obligations hereunder, such failure shall not be construed as a permanent waiver of any rights or obligations in this Agreement.
9. Assignment. CSXT may assign this Agreement and all rights and obligations herein to a successor in interest, parent company, affiliate, or future affiliate. Upon assignment of this Agreement by CSXT and the assumption by CSXT's assignee of CSXT's obligations under this Agreement, CSXT shall have no further obligations under this Agreement. Agency shall not assign its rights or obligations under this Agreement without CSXT's prior written consent, which consent may be withheld for any reason.
10. Applicable Law. This Agreement shall be governed by the laws of the **State of Florida**, exclusive of its choice of law rules. The parties further agree that the venue of all legal and equitable proceedings related to disputes under this Agreement shall be situated in Duval County, Florida, and the parties agree to submit to the personal jurisdiction of any State or Federal court situated in Duval County, Florida.

Project: Novi, Oakland, MI  
Crossing surface for sidewalk at 10 Mile Road.  
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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in duplicate, each by its duly authorized officers, as of the date of this Agreement.

**City of Novi**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

**CSX TRANSPORTATION, INC.**

By: \_\_\_\_\_

Charles E. Gullakson  
Assistant Chief Engineer - Public Projects

**CSXT Schedule PA**  
(Advance Payment – Preliminary Engineering Agreement)

**PAYMENT SUBMISSION FORM**

**PROJECT INFORMATION**

**CSX OP No.:**            **TBD**  
**Description:**        **Crossing surface and sidewalk at 10 Mile Road.**

\*\*\*\*\*  
Payment is hereby provided in accordance with the terms of Section 3.3 Payment Terms of the Agreement dated \_\_\_\_\_, between Agency and CSXT.

\*\*\*\*\*  
A copy of this Payment Submission Form shall accompany all payments delivered by Agency to CSXT which shall be forwarded to the following address:

**CSX Transportation, Inc.**  
**P.O. Box 116651**  
**Atlanta, GA 30368-6651**

\*\*\*\*\*  
**Payment due within ten (10) days of Agency's receipt of fully executed agreement**

\*\*\*\*\*  
**(All information below to be completed by Agency providing Payment)**

<u>Payment Date</u>	<u>Payment Amount</u>	<u>Check No.</u>
_____	_____	_____

Date: \_\_\_\_\_

By: \_\_\_\_\_

**Please send copy of check to:**  
**CSX Transportation**  
**Hal Gibson Project**  
**Principal Engineer – Public Projects**  
**500 Water Street J-301**  
**Jacksonville, FL 32202**

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Email: \_\_\_\_\_