

COUNCIL ACTION FORM

SUBJECT: INCLUSIVE CROSSWALK AT 5TH STREET AND DOUGLAS

BACKGROUND:

At the June 25, 2019 City Council meeting, Council directed staff to proceed with a project to install an inclusion crosswalk treatment at the 5th Street and Douglas Avenue intersection in Downtown Ames. It was the Council's intent to complete the installation prior to Pridefest taking place on Saturday, September 7th. Approximately one week following the June 26th Ames Tribune article on the inclusion crosswalk, local **Federal Highway Administration (FHWA) staff notified City staff that they were reviewing the proposed design for compliance with the Manual on Uniform Traffic Control Devices (MUTCD).**

It should be noted that City staff provided language from the current edition of the MUTCD (2009) in the staff report to City Council as to what the standards are for crosswalk markings. However, FHWA staff cited an internal memorandum from 2013 ("*Official Ruling 3(09)-24(l) – Application of Colored Pavement*") that provided an official ruling for FHWA on use of modern decorative crosswalk treatments. **In an email dated July 16, 2019, the FHWA determined that the proposed inclusion crosswalk design at 5th and Douglas was non-compliant and that if the City installed the treatment, FHWA would issue an official letter of non-compliance.**

At the July 23, 2019 meeting the City Council directed the City Attorney to report back on the impacts of receiving a determination of non-compliance from FHWA including any additional liability that may be incurred by the City if the decorative crosswalks were installed.

IMPACTS OF NON-COMPLIANCE:

The City Attorney had offered an opinion that a letter of non-compliance from the FHWA does not, in and of itself, increase the City's liability. The City Attorney's full opinion memo is attached.

PROJECT UPDATES:

As stated in the July 19, 2019 memo to City Council, staff solicited quotes for installing the design using more durable thermoplastic material, per Council direction. **Because it is the height of the construction season and the project has a relatively short deadline, the City only received one quote from Iowa Plains Signing, Inc. of Slater, Iowa in the amount of \$68,760.** This total is approximately \$56,000 greater than the amount originally quoted to the City Council.

If City Council would like to delay the installation, it is believed that rebidding the thermoplastic project over the winter and giving the contractor more time over the spring/summer of 2020 would result in bids closer to the \$12,000 - \$15,000 range that was originally quoted.

ALTERNATIVES:

1. Direct staff to install the decorative crosswalk bars with non-specialty paint using City staff labor prior to 2019 Pridefest. The estimated cost of this alternative is \$4,000.
2. Direct staff to install the decorative crosswalk bars with paint using City staff labor prior to 2019 Pridefest, but have it removed immediately following the one-day event.

If the street is closed while the markings are in place for Saturday, September 7th, it would likely avoid any non-compliance issues from FHWA. Since the markings will be removed after a short period of time, staff would use a lower quality paint that would reduce the estimated cost to \$3,000.

3. Direct staff to install the decorative thermoplastic crosswalk using the contractor quote of \$68,760 prior to 2019 Pridefest. However, staff is not certain the contractor could still complete the work by the date of the event.
4. Direct staff to rebid the thermoplastic installation over the winter of 2019/20 for contractor installation prior to Pridefest 2020.

It is anticipated that the cost of this option would be in a range of \$12,000 to \$15,000.

5. Direct staff to pursue an alternative off-street option such as painted sidewalks, flags, or banners in the Pridefest celebration area of 5th Street and Douglas Avenue prior to Pridefest 2019.

MANAGER'S RECOMMENDED ACTION:

While Public Works engineering staff cannot make a professional recommendation in support of the installation of the decorative inclusive crosswalks knowing it will lead to FHWA non-compliance, City Council may choose to weigh the impacts identified by the City Attorney and direct staff to move forward with the installation.

Should City Council desire to move ahead with the installation of the inclusive crosswalk, using paint with City staff labor seems the most time-efficient and cost-effective option. Therefore, the City Manager recommends that the City Council adopt Alternative No. 1, as described above. Funding for this project would come from the Road Use Tax Fund balance.



MEMO

Legal Department

To: Mayor Haila, Ames City Council

From: Mark O. Lambert, City Attorney

Date: August 6, 2019

Subject: City's liability re: inclusive crosswalks.

At the July 23, 2019 Ames City Council meeting, the Council directed the City Attorney to prepare a memo on the City's potential liability if the inclusive crosswalks were painted at the intersection of Douglas and 5th Street, and the Federal Highway Administration (FHWA) were to issue a "letter of non-compliance" regarding the crosswalk.

Sometimes, a city's potential liability is clear. Other times, it's basically an educated guess. There is always the potential for some liability – having zero liability may be a goal but is difficult, if not impossible, to attain.

In this situation, the FHWA contacted the City, after the Ames Tribune ran an article about the inclusive crosswalks, and indicated that its position was that such crosswalks are "non-compliant" with federal standards and if the City installed these crosswalks, the FHWA would issue an official "letter of non-compliance." The FHWA believed that the issuance of the non-compliance letter may create increased liability for the City should an incident take place, such as a vehicle/pedestrian collision.

First, it should be noted that I could find no direct case law, either in Iowa or elsewhere, on municipal liability for non-standard crosswalks in situations where the FHWA had issued a non-compliance letter.

Unique and creative crosswalks have been installed on streets in cities throughout the United States. (See: <https://www.smartcitiesdive.com/news/creative-crosswalks-street-art-meets-safety-enhancement/526474/>). As you can see by this article, some

claim that non-standard crosswalks actually *enhance* pedestrian safety by causing drivers to slow down. As creative crosswalks become more popular nationally, the strength of an argument that such crosswalks create confusion for drivers seems to decrease.

The argument would be that if the City installed a non-standard crosswalk, and a vehicle struck a pedestrian, a court might find the City liable for damages (the pedestrian's, the driver's or both) as the non-standard crosswalk caused confusion and therefore the driver didn't understand it was a crosswalk. The FHWA letter of non-compliance would most certainly be used as evidence of the City's liability in any litigation filed against the City. However, the FHWA letter would just be one piece of evidence; I do not believe it would be conclusive regarding the question of the City's liability.

Case law in Iowa indicates that pedestrians have the right of way in either marked or unmarked crosswalks. An unmarked crosswalk would constitute a path from the sidewalk on one side of the street to a sidewalk on the other side, at an intersection. Given this, it is hard to imagine that a non-standard crosswalk would constitute more liability for the City than a crosswalk the City hadn't marked at all.

Also, it is important to note that the standard crosswalk straight white lines would still be in place, and the colored rectangles would be within the standard straight crosswalk lines. This should be a clear indication to drivers that a crosswalk exists.

The *Code of Iowa* provides support for the City to have non-standard crosswalks. *Iowa Code* section 321.1(16) defines "crosswalk" as "that portion of a roadway ordinarily included within the prolongation or connection of the lateral lines of sidewalks at intersections, **or any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface.**" [Boldface and underline emphasis added.]

Given the flexibility in crosswalk design allowed by the Iowa Code, the fact that the pedestrian would still have the right of way, the fact that the straight crosswalk lines

would still be in place, and that there are arguments that creative crosswalks actually enhance pedestrian safety, my legal opinion is that the City has no greater risk of liability with the proposed inclusive crosswalk than a standard crosswalk. Although the FHWA letter would be a piece of evidence that a litigant could use against the City, it is incorrect to conclude that the issuance of the non-compliance letter, in and of itself, would increase the City's liability, given the other factors, above. The FHWA letter would be one piece of evidence and likely would not be conclusive on the question of the City's liability.

I discussed this issue with the City's Risk Manager, who shared a similar opinion.

-end-

Option 3: Bars v2.1

Douglas Ave

5th St



1 inch = 20 feet